

The Role of the Indonesian Constitutional Court in Developing Inclusive Legal System Through a Judicial Review in the Economic Sector

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ABSTRACT

The low quality of regulations, particularly in the economic sector, is one of the inhibiting factors in Indonesia's economic development. A large number of judicial judgments at the Constitutional Court is a phenomenon that shows that there are problems with regulations in the financial sector that prioritize positivism laws which are anti-thesis of inclusive rule. This study aims to determine the effect of judicial review on the development of Indonesia's economic, legal system and acknowledge the constitutionality considerations in the Constitutional Court Decisions related to the inclusive legal system in achieving economic development in the broader economic perspective. This research is normative legal research that uses legal materials in statutory regulations and includes decisions of the Constitutional Court. The result of this research is that The judicial review mechanism has consequences of declaring the constitutionality of law norm related economy aspect that contradicts the 1945 constitution. Thus, since the decision of the Court has final and binding, all Indonesian citizens must comply with and carry out the decision, particularly for the legislators to refer to the Constitutional Court's decision in making laws and regulations in Indonesia. Then, in assessing the constitutionality of a norm, the Constitutional Court bases its decision on Pancasila and the 1945 Constitution, the sources and fundamental pillars of an inclusive legal system. Eventually, the contribution of The Court, directly and indirectly, developing the inclusive legal system through the judicial review of law norm related economic, has been accomplished.

Keywords: *Judicial Review, Constitutional Court, Inclusive Legal system, Economic Development.*

1. INTRODUCTION

At present, the positivistic paradigm no longer has a significant effect as new paradigms emerge in dealing with Indonesian legal development problems, especially economic law development. According to Lili Rasyidi, Development is a change that can mean progress or decline and mean both at once. Furthermore, development brings at the same time about positive progress changes and has negative impacts such as shifting human values into material values. In the concept of development theory of Mochtar Kusumaatmadja, it is stated that the problem of legal Development in Indonesia is experiencing a dilemma. The dilemma about the dynamics of law in adjusting the need for legal unity to achieve legal certainty with the rapid development of society due to the entry of new values originating from the heterogeneity of structures, legal traditions, and community life. [1] However, it should be understood that, after all, humans and law are 2 (two) important

elements that have a significant role in determining the success of a country's development.

According to Adi Sulistyono, the Indonesian National Long-Term Development Plan for 2005-2025 emphasizes the direction of economic law development. Economic law here means the entirety of statutory regulations, customary law, court decisions related to financial activities such as legal entities for economic actors, transactions for economic actors, places for transactions by economic actors to government intervention in supporting economic activities as well as methods for resolving disputes of economic actors. The development of economic law has a close relationship with the economic system, namely the economic system determines the quality of future economic law development. Principally, The Indonesian economic system is a Pancasila economic system; therefore, the development of economic law should be based on Pancasila. [2] For this reason, the law exists as a link for

those who need justice as the fifth value of Pancasila, namely social justice. According to Sudjito, Pancasila as a value system which is the way of life of the nation/*Weltanschauung*, will be effective if all components of the nation, namely citizens, believe in the truth of the values of Pancasila. Moreover, legal science with the Pancasila paradigm is a science that is classified as a typical Indonesian legal science but is objective and universal. This science of law contains the total values of the One Godhead and other values within the framework of the value of One Godhead. [3] For this reason, a value system rooted in Pancasila and based on the only Godhead can become a bridge for inclusive legal values to become the foundation for the development of economic law in Indonesia. It is because, predominantly, the values in the inclusive legal system are not much different from the values of Pancasila itself. Inclusive law recognizes elements outside the object of law, such as religion, morals, and habits (living law); therefore, it can be used to achieve and optimize the goal of the law, namely social justice in economic development.

The Inclusive Legal System is a legal system that is less popular in use because it is more often used at the economic, political, and social levels. [4] An inclusive legal system offers a new paradigm in responding to the socio-economic phenomena of society in the field of legal development. The low quality of regulations, especially in the economic sector, is one of the inhibiting factors in Indonesia's economic development. A large number of judicial judgments at the Constitutional Court is a phenomenon that shows that there are problems with regulations in the financial sector that prioritize positivism laws which are anti-thesis of inclusive rule. Furthermore, the friction of the implementation of laws and regulations that are not in line with written rules that prioritize the principles of market mechanisms and negate the constitutional rights of the community's economy makes a reason for conducting a judicial review to the Constitutional Court.

Along with the alter in the era after the reformation, several fundamental changes occurred, including the amendment of the 1945 Constitution, the formation of the Constitutional Court, and modifications of the state economic policies mechanism. Suppose all of these economic policies in the form of statutory conflict with the 1945 Constitution. In that case, if they are found to be contradictory, they can be declared not binding on the public, or the Constitutional Court may cancel their validity. Regardless, the constitution practically should be described through the laws, including a law in economic. The Court's contribution significantly explores and implements the values of inclusiveness through its decisions in the economic field. For example, Constitutional Court Decision Number 002/PUU-I/2003 concerning the Oil and Gas Law. In its decision, the Court considered that the government could intervene in determining the price of fuel oil, including costs based on market mechanisms. The government should consider the interests of certain groups of society and the

procedure for fair and fair business competition. There is attention to protect the marginal community who might not afford to buy at a high price.

In the Constitutional Court Decision Number 3/PUU-VIII/2010 concerning the Review of Law Number 27 of 2007 concerning the Management of Coastal Areas and Small Islands, the Court explained the importance of the state to consider the individual rights, collective rights of customary law communities (tenure rights), indigenous peoples and the constitutional rights of the community in carrying out policies for regulating, managing and supervising natural resources in Indonesia. In addition, in coastal waters and small islands, local wisdom (noble values) still applies in society. Thus, the Court believes that regarding the management of coastal areas and small islands as economic resources for the interests of the people and nation of Indonesia and as part of the implementation of the national economy, it is necessary to base it on the constitution. One of the constitutional mandates is economic democracy based on the principle of togetherness as known in an inclusive legal system. In an inclusive legal system, there is an equilibrium to the marginalized and applying the principle of balance. Every individual has the right to freedom to fulfill their needs. Still, on the other hand, there is a need for the protection of the community from an individual's exercise of their freedom. Therefore, the Court believes that the management of natural resources should not use only the principle of economic efficiency that benefits a few small groups of capital owners but needs to pay attention to the community's welfare in a just manner.

Another decision is Decision Number 13/PUU-VI/2008 concerning the review of Law Number 16 of 2008 concerning Amendments to Law Number 45 of 2007 concerning State Revenue and Expenditure Budget for Fiscal Year 2008. The petitioners filed a constitutionality issue of the 2008 Revised State Budget Law contrary to the 1945 Constitution because it includes a budget for education that is less than 20% of the state budget of revenues and expenditures. The Court believes that by referring to several previous Court decisions related to the same object of testing, it considers an intentional act by the legislators to violate the 1945 Constitution by not complying with the previous Constitutional Court's decision. Therefore, the Court stated that all provisions of the 2008 Revised State Budget Law concerning the education budget were contrary to the 1945 Constitution, referring to constitutionalism principle in a state of law. The Court's authority to annul a law related to the state budget is one of its privileges and shows the importance of the Constitutional Court's role in assessing a policy for managing the state financial budget. According to Jimly Asshidiqie, the constitutionality of economic policy or using the economic constitution as the highest reference in economic policy development has become common in various countries regardless of the country's ideology. [5]

Research related to an inclusive legal system that links to the role of the Indonesian Constitutional Court itself is still scarce. For instance, Darwin Botutihe (2019) research, which writes about legal development with an inclusive legal theory approach in the Pancasila Law State, focuses on the criteria for the formation of law in Indonesia, which is the basic assumption of inclusive legal theory. [6] Then the writing of Asriadi Zainuddin (2018) related to the Existence of Inclusive Legal Theory in the National Law System, which examines the relationship between inclusive legal theory and the formation of national law based on Pancasila. [7] Firdaus Rumbia (2012), in the title Legal Development in the Field Economics, is Part of the Implementation of Pancasila Values and the Development of the National Legal Framework, found how weak legislation in the economic sector was by examining the Constitutional Court Decision regarding the economy in 2002-2009 and proposing the need for a remarkable institution to reform laws in the economic field. [8]

Therefore, this research aims to determine the impact of judicial review on the development of Indonesia's economic, legal system and acknowledge the constitutionality considerations in the Constitutional Court Decisions related to the inclusive legal system in achieving economic development in the broader economic perspective.

2. RESEARCH METHOD

This research is normative legal research, namely legal research conducted by examining library materials (secondary data), including vertical and horizontal synchronization, namely examining the compatibility of law (laws and regulations) so that they do not conflict based on the hierarchy of legislation. [9] It uses secondary data by applying legal materials obtained from literature studies of primary legal materials, secondary legal materials, and tertiary materials. The primary legal materials are, namely, the 1945 Constitution, Pancasila, the Constitutional Court decisions, and regulations related to economic. The secondary legal materials include books, journals, and legal proceedings about inclusive system theory and economic law system research results.

Because this research is normative, the approaches used are the statutory approach and the analytical approach. The conceptual approach uses to find out the concept of an inclusive legal system and its relation to the Constitutional Court's role in developing the inclusive legal system itself. Meanwhile, the analytical approach analyses the meaning and terms of an inclusive legal system concept and applies it to legal practice and judge decisions related economic sector.

3. FINDINGS AND DISCUSSION

There are two issues that should be answered in this research. The first, how the judicial review should be

compound the development of an inclusive legal system. The second, on how the decision of the Constitutional Court could bring the impact toward the inclusive legal system in economic aspect.

3.1. The Magnitude of Judicial Review on the Development of the Inclusive Legal System in Indonesia

3.1.1. The Concept of Inclusive Legal System

Based on Mahzab Tamsis perspective, Inclusive Legal Theory is a system consisting of a system of norms, institutions, cultural, religious values, and facts as human guidance in society and a state to make humans more civilized by respecting the dignity and encouraging legislators to form excellent and right laws (legislative justice). Eventually, it can achieve legal justice and social order and live in peace. In understanding a theory or an inclusive legal system, there will always be pros and cons to inclusiveness by the notion of exclusivity about its truth. [10] Therefore, Sudjito suggests uniting these various thoughts to achieve the state's goal shall stand on Pancasila as the *Philosophische Grondslag* and the Opening of the 1945 Constitution as *Staatsfundamentalnorm* (The fundamental State principles). Because the nature and position of both are permanent and substantial and inherent in the survival of the state and the orderly hierarchy of Indonesian law, they are at the highest legal position and become a source of direction for articles in the constitution and other statutory regulations under it. Furthermore, both have beneficial to replace, to solve the deviation in various legal issues in Indonesia, such as development economic law.

The formation of law in Indonesia, which is based on Pancasila, contains at least five primary criteria from inclusive legal theory in the construction of laws and regulations in Indonesia. These criteria include acceptance of non-linear laws such as customary law, politics, and religion; recognition of the tradition of freedom; placement of non-autonomy national law in international relations; Recognition of the existence of God Almighty in religious concepts, and acknowledgment toward Affirmative Action Nation for Marginalized Communities ideology. Therefore, the inclusive law theory of the Tamsis school is a manifestation of the values of Pancasila and the 1945 Constitution in legal development in Indonesia. [11] It concluded that the 1945 Constitution and Pancasila are the finest feature reflecting the merits of an inclusive legal system. Although it is not commonly acknowledged by many scholars of law yet, it is implicitly comprised in the Court decision.

An example of a country that adopts an inclusive legal system is Australia. Australia, a multicultural country like Indonesia, believes that there is a need to protect people who might be disadvantaged by court processes and procedures within the existing legal framework. In

addition, the development of accommodative and inclusive approaches is the right solution in responding to and responding to the needs and diversity of Australian society. The Australian High Court Judge provided requirements for the rule of law in the enforcement of an inclusive legal system, including, first, it must be and be seen to be impartial and independent. Second, it must be competent and knowledgeable of the law and its purpose, including accepting and observing limitations on judicial power and, within those limits, "developing the law to answer the needs of society from time to time." Third, it must have "the confidence of the people." Fourth, it must be "reasonably accessible to those who have a genuine need for its remedies." [12] Therefore, the development of the inclusive legal system is proven to bring benefits not only for society but also for the state in general.

3.1.2. *The Judicial Review Role*

The judicial review mechanism is an alternative way of applying inclusive values, namely values that grow and develop in society into an Indonesian legal system through a Constitutional Court Decision. Besides the articles of the 1945 Constitution, the Court also refers to the Preamble of the 1945 Constitution. In addition, however, it contains ideas, the constitutional ideals of the nation and state of the Republic of Indonesia, and the principles and values that live in society about what should be realized in the implementation of national economic development. [13] For this reason, the role of judicial review is a fundamental idea in promoting the development of an inclusive legal system, especially in the economic sector. The distinctive nature of the Constitutional Court decisions, which are *erga omnes*, namely binding on all citizens, makes the Constitutional Court decisions obliged to be obeyed by all without exception.

Jimly Asshiddiqie stated that the judicial review became a concrete way to actualize the value of Pancasila and the 1945 Constitution. Basically, the 1945 Constitution is a very religious and Godly constitution. In essence, the 1945 Constitution as the highest consensus law is used to administer the power of the state (social constitution), the business world (economic constitution), and community activities, and the dynamics of the market economy. For this reason, the role of legal supervision through judicial review needs to be carried out by the Constitutional Court. [14] Eventually, the inclusive legal system was indirectly absorbed through the Court decision.

The Constitutional Court's contribution to the economic constitutional rights of the Indonesian people is very crucial. It is because basically, the Constitutional Court is considered capable of being a state agent capable of transforming constitutional promises to protect the poor among the poorest, ensuring affordable access to education for all citizens; job guarantee; a decent life; residence; health; and social security, from text to practical level as guaranteed in Articles 28C (1), 28D (2),

28H (1) of the 1945 Constitution. Moreover, the Constitutional Court emphasized the importance of state efforts in realizing the state's goals as mandated in the constitution, namely the prosperity of the people and promoting the common good. The Constitutional Court broke through the limits of authority as a negative legislator by ordering the government to form government regulations to protect the constitutional rights of citizens by embracing economic liberalization without leaving the historical value of Indonesia's economic order as outlined in Article 33 of the 1945 Constitution. [15] However, the development of the economy needed the supporting factor, as an institution or a norm system, to reach the goal, that is, the welfare state. Thus, since the key is the economic system and the policy economy should base on the Pancasila and The 1945 Constitution, The Constitutional Court's existence is needed to guarantee the implementation through judicial review.

All economic constitutions in the world regulate at least 3 (three) main issues, namely:

1. Control and ownership of natural resource wealth.
2. The conception of individual property rights.
3. The role of the state and state enterprises in business activities.

Even in some countries, the constitution regulates economic policy in a broader or more detailed manner. For example, in the United States, the constitution plays a vital role in shaping and developing the economic system in society and state life in general. Therefore, the notion of an economic constitution in the United States has developed for a long time though the American constitution is not technically referred to as an economic constitution. [16] Thus, the constitution plays a significant role in the economic aspect.

3.2. *The Constitutionality Considerations of Constitutional Court Decisions*

Basically, legal considerations in the Constitutional Court decisions related to the economy based on the 1945 Constitution provide views and understanding of the community's role in the Constitutional Court's role in economic development. The Court's opinion in the decisions is the Constitutional Court's interpretation of the constitutionality issue in this case related to the values that develop in society which are part of the inclusive legal system itself. The Constitutional Court decisions in the economic aspect aimed to solve the economic constitutional right society problem issue. Principally, the constitutional, economic right of society has contained an inclusive system value implicitly. Moreover, the Court believed that the value has come through its decisions, though the inclusive system value is not mentioned explicitly.

The inclusive legal theory is very relevant to Indonesia because it conforms with the national legal system based on Pancasila. Pancasila, which was born from the Indonesian people's original ideas and outlook of life, manifests the implementation of the ideal of inclusive law. In the legal considerations of the Constitutional

Court Decision Number 28/PUU-XV/2013 on the review of the Cooperative Law, the Court view that Indonesia as a society that ties itself into a nation and state that aspires to have an economic system that is in line with the values that grow and develop within the public. It is the reason behind the formulation of Article 33, paragraph (1) of the 1945 Constitution, namely that the economy is structured as a joint effort based on the kinship principle. Therefore, the Court believes that the economic system in Indonesia must not grow and develop according to market mechanisms that run based on supply and demand because it can create a materialistic society. Moreover, the Court views that the state should avoid the inequality and injustice economy due to differences between individuals in a joint effort by applying the principle of kinship, which includes helping or cooperation by Pancasila values. In the end, the application of this principle can advance public welfare by realizing social justice for all Indonesian people, as stated in the Preamble to the 1945 Constitution.

The Constitutional Court Decision Number 138/PUU-XIII/2015 concerning the Review of Law Number 39 of 2014 concerning Plantations. In its decision, the Constitutional Court considered the objectives and principles contained in the Plantation Law. The formation of the Plantation Law was based on the provisions of the 1945 Constitution, namely that the earth, water, and natural resources contained therein are to be used to the maximum extent possible for the welfare of the people. This Plantation Law has excellent potential for national economic development based on the principle of the benefit of the people, the local wisdom, environmental preservation, etc. These principles are also part of the values contained in an inclusive legal system. In addition, the Court stated that plantation activities regulated in several articles of the Plantation Law do not apply to customary law communities and individuals as small farmers because it can criminalize them.

The third example, which is one of the unprecedented constitutional court decisions ever, is the Constitutional Court Decision Number 85/PUU-XV/2013 on the review of the Water Resources Law. The Petitioners submitted several articles because the provisions in these articles were considered to provide a loophole for the privatization of water. Moreover, it also creates the potential loss of state responsibility in providing drinking water for the people; and it could encourage potential conflicts of the fulfillment of the right to water, and it would need further regulation in Indonesia.

In its legal considerations, the Court explained the relationship between Article 33, paragraph (3) of the 1945 Constitution and the provisions of the fifth principle of Pancasila (Social justice for all Indonesian people). The Court stated that the fifth principle of Pancasila is manifested in the 1945 Constitution as the basis for organizing the state in the economic field. Economic democracy is believed as the best form to achieve the prosperity of the Indonesian people as much as possible. Thus, in this decision, the Court interprets the primary

meaning of social justice as a just and prosperous society. Furthermore, economic democracy, in the perspective of social justice, is a democratic concept in which the national economy is structured as a joint effort on the principle of kinship. It means that the state's goal is an instrument of the people in realizing social justice in economic democracy in Indonesia. In other words, a state is a tool in the demonstration of Pancasila's economic democracy. In addition, the Court assessed that the increase in water demand in the community resulted in the economic value of water getting higher than its social value and function, thus triggering frictions in the interests of various parties related to water resources. Therefore, to prevent the conflicts and maintain the preservation and sustainability of water availability for the nation's benefit, the Court believes that there is a need for strict restrictions on water exploitation. These restrictions include:

1. The state must control every water exploitation, and its designation is for the benefit of the people.
2. The state is responsible for fulfilling the right to water for the people.
3. Paying attention to environmental sustainability as part of human rights.
4. The state is fully accountable for the supervision and control of water management in Indonesia.
5. The state should prioritize state-owned or regional-owned enterprises as management bodies for water supply for the people.

After considering the Petitioners' petition, the Court sees that it turns out that the articles proposed by the Petitioners are the articles that form the heart or the principal basis of this law so that the Court considers that the Natural Resources Law as a whole contradicts the 1945 Constitution. This decision is phenomenal because the Court stated that the Act in its entirety could not be applied so that it temporarily reinstated Law Number 11 of 1974 concerning Irrigation to prevent a legal vacuum. In this decision, the Court firmly stated that the best economic system under the Indonesian state is an economic democracy based on Pancasila and the 1945 Constitution because it can guarantee the realization of the state's goal, namely the welfare of all Indonesian people without exception.

Those examples of the Court decision show that in consideration of the decision, the justice is implicitly put some value of inclusive theory. It also indicates that there is an intersection value between the inclusive approach, Pancasila, and the 1945 Constitution, such as acknowledgment to the marginal society.

In several decisions, the Court has explicitly or implicitly assessed the constitutionality of a law related to the economy. For example, one of the articles in the 1945 Constitution, often used as a touchstone or basis in legal considerations, is Article 33. Article 33 of the 1945 Constitution, particularly the first 3 (three) paragraphs, implies an economic ideology or economic democracy adopted by the nation's founding fathers to improve the

general welfare as aspired to in the fourth paragraph of the opening of the 1945 Constitution. In addition, Article 33 of the 1945 Constitution regulates the economy in a self-affirmation of the constitutional position in the economic field, which must be placed in the highest position in the national economic policy system. [17]

4. CONCLUSION

Based on the discussion above, it is evident that there is a relationship between inclusive legal system development and the judicial review in Constitutional Court, that is, judicial review as an effective mechanism to magnify the inclusive legal system in Indonesia. In assessing the constitutionality of a norm, the Constitutional Court bases its decision on Pancasila and the 1945 Constitution, the sources and fundamental pillars of an inclusive legal system in achieving economic development in Indonesia. Fundamentally, Constitutional Court decisions can be a means of changing society, namely by changing the mindset of society to create a prosperous society. Thus, the Court becomes an instrument in protecting citizens from violations of their constitutional rights, especially rights related to the economic field, such as the right to live in prosperity.

In the judicial reviews of laws related to the economy, the constitutional court decision should have been one of the sources of lawmaking, especially in determined how the lawmaker should implement constitutional principles operationally with laws and bylaws. Thus, it is necessary that in its decisions, the Constitutional Court should provide clear guidelines on how to enforce laws related to the economy required by the constitution and how the lawmaker should interpret the economic principles of the constitution in the process of lawmaking. Moreover, operationally, the constitutional principles shall require further specific elaboration to avoid misinterpretations. Thus it is necessary for the Court to apply judicial activism whenever deciding on the constitutionality of laws and see beyond the normative aspect of rules for the benefit of the people.

The drafters of laws and regulations need to examine the constitutional Court's decisions as a whole, especially at the operational level, such as policymakers, to refer to the constitutional guidelines that the Constitutional Court has stated in its decisions.

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