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Affirming the Democratic Economic System After the Amendment of Article 33 of the Indonesian Constitution: A Critical Legal Studies Perspective

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ABSTRACT

This paper, which uses an interdisciplinary, historical, and literary approach, aims to answer the questions of how the process of discussing changes to Article 33 of the Indonesian constitution led to the formulation of the article as it is known today. Second, how did the amendment of Article 33 of the Indonesian Constitution pave the way for the emergence of neoliberal legal products in Indonesia? Third, how is the democratic economic system (*sistem ekonomi kerakyatan*), as an economic system with a strong historical and constitutional foundation in Indonesia, affirmed by the deviationist doctrine from the perspective of critical legal studies (CLS)? This paper discusses the debates that took place in the agenda to amend Article 33 of the Indonesian constitution as the background of today's anomie. From a CLS perspective, the inclusion of the concept of efficiency in Article 33 of the Indonesian constitution after the amendment shows the infiltration of neoliberalism into Indonesia's basic law, riding on the political and legal reform agenda after the collapse of the authoritarian regime. To counter the excesses of neoliberalism, a legal scholar in the CLS perspective can engage in radical legal practice centred on the deviationist doctrine by, among other things, tracing legal principles back to their roots. Based on the deviationist doctrine, the formulation of Article 33 of the 1945 Constitution is a credo of political economy as well as the original legal policy of a sovereign, anti-colonialist, anti-imperialist, anti-capitalist independent state, and therefore cannot be arbitrarily changed and/or abolished.

Keywords: critical legal studies; democratic economic system; the amendment of the Indonesian constitution

INTRODUCTION

The Republic of Indonesia's state objectives, proclaimed on August 17th, 1945, are set forth in the Preamble, Body, and Explanation of the 1945 Constitution of the Republic of Indonesia (*UUD 1945*). In the first Indonesian constitution, Article 33 outlines state objectives related to the economic field. The main idea presented is the establishment of a democratic economic system in Indonesia. Article 33 of the 1945 Constitution stipulates that

> "Article 33 sets out the basis of a democratic economy where production is by all, for all, under the direction or ownership of members of the community. The prosperity of the community is the priority, not the prosperity of individuals. That is why the economy is organised as a joint effort based on the principle of kinship. A cooperative is the way to build a business. The economy is based on a democratic economy, prosperity for all! Therefore, those branches of production which are important for the state and which control the lives of many people must be controlled by the state. Otherwise the reins of production will fall into the hands of powerful individuals and the masses will be oppressed. Only enterprises that do not control the people's livelihoods can be in the hands of individuals. The earth, water and the natural resources

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contained in the earth are the mainstays of the people's prosperity. Therefore, they must be controlled by the state and used for the greatest prosperity of the people."

However, the historical record shows that efforts to implement a democratic economic system in accordance with the will of the constitution have not been easy. Each regime took a different approach to interpreting and implementing Article 33 of the 1945 Constitution. In the Guided Democracy regime (President Sukarno), the method used was to nationalise Dutch companies that had existed since the colonial era, launch agrarian reform and implement Indonesian socialism, which was referred to as the Guided Economy. However, the unstable government after the handover of sovereignty, the break-up of the Sukarno-Hatta duo, the involvement of the army in political and economic life, and strong foreign pressure in the form of political subversion by armed force or sabotage and economic boycotts, meant that these efforts did not achieve the expected results.[1]

When the regime of President Soeharto (New Order) came to power, the norm of Article 33 of the 1945 Constitution was not consistently and consequently implemented and was distorted through various kinds of legal transplants in laws and regulations under the constitution. The legal transplants attempted to incorporate elements of a liberal capitalist economic system that prioritised individual interests over the values of communalism-collectivism and was only market-oriented.[2]

When the New Order regime collapsed, the *Reformasi* movement gained momentum to amend the 1945 Constitution in order to prevent the authoritarian rule that the 1945 Constitution's norms made possible. Ironically, in addition to changing political and legal norms, the *Reformasi* movement also sought to change economic norms that were not problematic *per se*, but only in their interpretation and implementation. The wording of Article 33 paragraphs (1) to (3) was retained, but the People's Consultative Assembly (*Majelis Permusyawaratan Rakyat*, MPR) approved the addition of two paragraphs, paragraphs (4) and (5), and deleted the Explanation to Article 33.

In response, Maria Farida Indrati Soeprapto criticised that the MPR members' agreement to abolish the Explanation of the 1945 Constitution was not appropriate because the Preamble and the Explanation of the 1945 Constitution cannot be separated and both form a complementary unit. The agreement to abolish the Explanation of the 1945 Constitution by inserting normative matters into the Articles, Soeprapto said, could result in the disappearance of the meaning of the Preamble of the 1945 Constitution, namely Pancasila, both as a legal ideal (*Rechtsidee*) and as a fundamental state norm (*Staatsfundamentalnorm*). The next effect is the denial of Pancasila as a philosophy and basic guidelines in society, nation, and state.[3]

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[1] Amiruddin, "Ekonomi Terpimpin 1957-1965: Mencari Jalan Baru Pembangunan Ekonomi Indonesia" (Skripsi Fakultas Sastra Universitas Indonesia, Depok, Universitas Indonesia, 1996), pp. 123-30.

[2] R. William Liddle, "The Relative Autonomy of the Third World Politician: Soeharto and Indonesian Economic Development in Comparative Perspective," *International Studies Quarterly* 35, no. 4 (Desember 1991): 405, https://doi.org/10.2307/2600948; Yasuyuki Matsumoto, *Financial Fragility and Instability in Indonesia* (London: Routledge, 2007), p. 11, https://doi.org/10.4324/9780203966686.

[3] Maria Farida Indrati Soeprapto, "Eksistensi Penjelasan UUD 1945 Pasca Amandemen Undang-Undang Dasar 1945," *Mimbar Hukum* 2, no. 49 (2005).

As part of the constitutional reform project that lasted from 1999 to 2002, Article 33 of the 1945 Constitution was amended as follows.

> "Paragraph (1) The economy shall be organized as a joint endeavor based on the principle of kinship. Paragraph (2) Branches of production that are important for the state and that control the lives of many people shall be controlled by the state. Paragraph (3) The land, water, and natural resources contained therein shall be controlled by the state and utilized for the greatest prosperity of the people. Paragraph (4) The national economy shall be organised on the basis of a democratic economy with the principles of togetherness, *equitable efficiency*, sustainability, environmentality, independence, and by maintaining a balance of development and national economic unity. Paragraph (5) Further provisions concerning the implementation of this article shall be regulated by law."[4]

The formulation of the word "efficiency" (*efisiensi*) in Article 33 (4) of the 1945 Constitution after the amendment can be seen as a continuation of the liberal-capitalist legal transplantation project into the Indonesian legal system. The infiltration of the word "efficiency", which is a keyword of the liberal capitalist economic system, has disrupted the established constitutional order that was built to realise a sovereign independent state, anti-colonialism, anti-imperialism, and anti-capitalism. According to Andi Luhur Prianto, the principle of efficiency is one of the elements of neoliberalism-a contemporary variant of liberal capitalism-which, like the concept of good governance, has the ultimate goal of maintaining the free market.[5]

The post-amendment Indonesian constitution does not formulate the word "efficiency" as a separate word, but combines it with the word "equity" to create a new, ambiguous phrase: "equitable efficiency" (*efisiensi berkeadilan*). It is unclear what is meant by "equitable efficiency", as the post-1945 amendment constitution consists only of a Preamble and a Body with no Explanation. Therefore, the meaning of "equity" (*keadilan*) referred to in the phrase "equitable efficiency" is subject to multiple interpretations and could be understood as equity within the framework of a liberal capitalist economic system. However, Nongtji argues that the concept of equitable efficiency implies an attempt to balance economic principles that prioritise not only *growth* (the essence of efficiency) but also *equality* (the essence of equity).[6]

After the amendment of the Indonesian constitution, in particular the amendment of Article 33, the Indonesian economic system has increasingly tended to serve the interests of the market and the contemporary variant of liberal capitalism, namely neoliberalism. Neoliberalism is often understood as an ideology of the market and private interests as opposed to state intervention. Neoliberalism is also fundamentally understood as a manifestation of the rise in power and income

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[4] Italics added by the authors.

[5] Andi Luhur Prianto, "Good Governance dan Formasi Kebijakan Publik Neo-Liberal," *Otoritas: Jurnal Ilmu Pemerintahan* 1, no. 1 (14 April 2011): p. 6, https://doi.org/10.26618/ojip.v1i1.11.

[6] Bustamin Nongtji, "Konsep Efisiensi Berkeadilan Dalam Demokrasi Ekonomi Menurut Pasal 33 Ayat (4) UUD NRI 1945 Dalam Perspektif Perlindungan Bagi Usaha Kecil," *Masalah-Masalah Hukum* 42, no. 2 (23 April 2013), https://doi.org/10.14710/mmh.42.2.2013.251-260. Italics added by the authors.

of the upper fraction of the ruling class, i.e. the richest people.[7] If the New Order regime served market interests by issuing laws and regulations under the constitution that contradicted the constitution, the *Reformasi* regime amended the constitution to pave the way for issuing more and more laws and regulations under the constitution that massively served market interests.[8]

Market interests, capitalism, and neoliberalism are concepts that have been criticised by the critical legal studies (CLS) movement. This school of thought was initiated in 1977 by Roberto Mangabeira Unger and his colleagues such as Duncan Kennedy, David Trubek, Mark Tushnet, Mark Kelman, Karl Klare, Morton Horowitz, and Peter Gabel.[9] Through his writings, including an article entitled "The Critical Legal Studies Movement" published in the *Harvard Law Review* (1983) and developed into a book of the same title in 1986, Unger outlined four main theses of the CLS movement, namely (1) a critique of conventional social science, (2) a critique of contemporary structural theory, (3) a critique of formalism and objectivism, and (4) the doctrine of deviationism.

This paper seeks to answer the following questions: first, how did the process of discussing the amendment of Article 33 of the Indonesian constitution lead to the formulation of the article as it is known today? Second, how did the amendment of Article 33 of the Indonesian constitution pave the way for the emergence of neoliberal legal products in Indonesia? Third, how is the democratic economic system, as an economic system with a strong historical and constitutional foundation in Indonesia, affirmed by the deviationist doctrine in the CLS perspective?

METHODS

This paper uses an interdisciplinary approach,[10] understanding that it is not enough to answer legal problems by referring only to principles, theories, thoughts, and legal doctrines, but also to consider the economic, political, social and cultural contexts that surround them. This paper also takes a historical approach, because the study of law cannot be done without mentioning history. Historical legal studies are concerned not only with how legal principles, theories, thoughts, and doctrines are understood as mere legal material, but also with what social effects arise from these legal principles, theories, thoughts, and doctrines.[11]

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[7] Alfredo Saad-Filho dan Deborah Johnston, ed., *Neoliberalism: A Critical Reader* (London: Pluto Press, 2015), p. 9, https://doi.org/10.2307/j.ctt18fs4hp.

[8] Syahriza Alkohir Anggoro, "Rule of Law, Neoliberalisme dan Proyek Reformasi Hukum World Bank: Perspektif Critical Legal Studies," *Jurnal Hukum & Pembangunan* 50, no. 1 (13 Juli 2020): 278, https://doi.org/10.21143/jhp.vol50.no1.2502.

[9] Corinne Blalock, "Neoliberalism and the Crisis of Legal Theory," *Law and Contemporary Problems* 77, no. 4 (2014), https://www.jstor.org/stable/24244648.

[10] Satjipto Rahardjo, *Ilmu Hukum*, 6 ed. (Bandung: Citra Aditya Bakti, 2006), p. 330.

[11] Satjipto Rahardjo, *Membangun dan Merombak Hukum Indonesia: Suatu Pendekatan Lintas Disiplin* (Yogyakarta: Genta Publishing, 2009), p. 64.

This research is a literature study based on secondary data.[12] The secondary data collected in this research consists of primary legal materials, namely laws and regulations, and secondary legal materials, namely legal materials from books and journal articles.

DISCUSSION

Historical Background to the Amendment of Article 33 of the Indonesian Constitution

The discussion on the amendment of the 1945 Constitution, which contains the formulation of articles on the national economy and social welfare, especially Article 33, has not been a priority in the Indonesian constitutional amendment agenda from the beginning. There are three things that are prioritised in Indonesia's constitutional amendment agenda, namely (1) the regulation of the state government and the term of office of the president, (2) the empowerment of the legislature, and (3) the form of the state.[13] Discussions on the national economy and social welfare were also not included in the meetings of the Ad Hoc Committee (*Panitia Ad Hoc*, PAH) III of the MPR Working Committee (*Badan Pekerja*, BP), so they were not discussed at the 1999 MPR General Assembly, which approved the First Amendment to the 1945 Constitution.[14]

It was not until the second amendment of the 1945 constitution that Article 33 was seriously considered. The Indonesian Democratic Party of Struggle faction (*Fraksi Partai Demokrasi Indonesia Perjuangan*, F-PDIP), through its spokesman Pataniari Siahaan, was the first to propose a draft amendment to Article 33, which read in part: "Paragraph (1) The economy shall be developed in a sustainable manner based on the cooperation of all the people on the basis of justice, harmony, and utility, or *efficiency*. Paragraph (2) Those branches of production which are important to the state and whose output is a necessity for all the people shall be controlled by the state and organised on the basis of the principles of equity and *efficiency*."[15] The F-PDIP formulation was also the first to propose the inclusion of the word "efficiency" in Article 33 of the 1945 Constitution.

Historically, the concept of efficiency originated from the reorganization of government administration at the end of President Sukarno's reign (Guided Democracy), which continued during General Soeharto's New Order.[16] The concept of efficiency was a topic of increasing discussion leading up to the fall of President Sukarno's regime. This was highlighted by a symposium entitled "Revival of the Spirit of '66: Exploring the New Tracee", organised by a group of economic thinkers from Universitas Indonesia. The symposium concluded that the economic downturn during President Sukarno's rule was due to the government's neglect of rational economic principles, as it prioritised political interests. The economic management relied heavily on slogans and platitudes without

[12] Sharon Hanson, ed., *Legal Method* (London: Routledge-Cavendish, 1999), p. 141, https://doi.org/10.4324/9781843140610.

[13] Tim Penyusun Naskah Komprehensif Proses dan Hasil Perubahan UUD 1945, *Naskah Komprehensif Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945: Latar Belakang, Proses, dan Hasil Pembahasan, 1999–2002 [Buku VII: Keuangan, Perekonomian Nasional, dan Kesejahteraan Sosial]* (Jakarta: Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi, 2010), p. 491.

[14] Tim Penyusun Naskah Komprehensif Proses dan Hasil Perubahan UUD 1945, p. 492.

[15] Tim Penyusun Naskah Komprehensif Proses dan Hasil Perubahan UUD 1945, p. 496. Italics added by the authors.

[16] Farabi Fakih, *Authoritarian Modernization in Indonesia's Early Independence Period: The Foundation of the New Order State (1950-1965)* (BRILL, 2020), pp. 134–36, https://doi.org/10.1163/9789004437722.

objective measures. The principles of balance, efficiency, and the need for investment for economic growth were ignored.[17]

The proposal to include the word "efficiency" in Article 33 of the 1945 Constitution was also submitted by the Star Moon Party faction (*Fraksi Partai Bulan Bintang*, F-PBB) through its spokesman Hamdan Zoelva,[18] the National Awakening faction (*Fraksi Kebangkitan Bangsa*, F-KB) through its spokesman Abdul Khaliq Ahmad,[19] the Reformation faction (*Fraksi Reformasi*) through its spokesman Fuad Bawazier,[20] and the Group Representatives faction (*Fraksi Utusan Golongan*, F-UG) through its spokesman Valina S. Subekti.[21]

In addition to efforts to introduce the word "efficiency" into Article 33 of the 1945 Constitution, there are also efforts to propose the formulation of "a market-friendly economic system within a market-friendly social safety net" and "a social market economic system", as conveyed by the Democratic Party of *Kasih Bangsa* faction (*Fraksi Partai Demokrasi Kasih Bangsa*, F-PDKB) through its spokesman Gregorius Seto Harianto. The proposed amendments to Article 33 of the F-PDKB are as follows: "Paragraph (1) The economy shall be organised in a social market economy system which is a common enterprise based on the principle of kinship. Paragraph (3) Cooperatives and other people's economic enterprises shall be developed in a fair, equal and market-friendly manner."[22] There was also a proposal from the *Golkar* Party faction (*Fraksi Partai Golkar*, F-PG) to change the principle of "kinship" to "equality and justice".[23] There is also a proposal to include the phrase "fair market economy" from the F-KB. The proposed amendments to Article 33 of the F-KB are as follows: "The national economy shall be built on the joint efforts of all the people on the basis of a fair, independent, and sustainable market economy for the prosperity of the people in accordance with the provisions of the law."[24]

The results of the discussion of changes to Article 33 of the 1945 Constitution in the Second and Third Amendments to the 1945 Constitution, which were then finalised by BP MPR, are as follows.

> "Paragraph (1) The economy shall be structured and developed as a collective effort of all the people on a sustainable basis based on the principles of equity, efficiency, and economic democracy to realise prosperity, welfare, and social justice for all the people. Paragraph (2) The branches of production which are important to the state and which determine the livelihood of many people shall be controlled and/or regulated by the state on the basis of the principles of equity and efficiency as regulated by law. Paragraph (3) The land, water and airspace, and

[17] Swasono, "Demokrasi Ekonomi: Komitmen dan Pembangunan Indonesia," p. 10.
[18] Tim Penyusun Naskah Komprehensif Proses dan Hasil Perubahan UUD 1945, *Naskah Komprehensif Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945: Latar Belakang, Proses, dan Hasil Pembahasan, 1999–2002 [Buku VII: Keuangan, Perekonomian Nasional, dan Kesejahteraan Sosial]*, p. 510, p. 523.
[19] Tim Penyusun Naskah Komprehensif Proses dan Hasil Perubahan UUD 1945, p. 514.
[20] Tim Penyusun Naskah Komprehensif Proses dan Hasil Perubahan UUD 1945, p. 516.
[21] Tim Penyusun Naskah Komprehensif Proses dan Hasil Perubahan UUD 1945, p. 519.
[22] Tim Penyusun Naskah Komprehensif Proses dan Hasil Perubahan UUD 1945, p. 506.
[23] Tim Penyusun Naskah Komprehensif Proses dan Hasil Perubahan UUD 1945, p. 497.
[24] Tim Penyusun Naskah Komprehensif Proses dan Hasil Perubahan UUD 1945, p. 512, 513.

> the natural resources contained therein shall be controlled and/or regulated by the state and shall be used to the greatest extent possible for the well-being of the people, which shall be regulated by law. Paragraph (4) Economic agents shall be cooperatives, state-owned enterprises, and private enterprises, including individual enterprises. Paragraph (5) The preparation and development of the national economy shall always preserve and improve the environmental system, take into account and respect customary rights, and ensure a balance of progress throughout the country."[25]

The results of the discussion were criticised by Sandra Moniaga, who represents non-governmental organisations that are members of the NGO Coalition for a New Constitution. Sandra Moniaga said,

> "[M]PR has shown itself to be insufficiently critical and sensitive in its formulation and evaluation, ignoring the reality of the failures of the national economic system that has been built up over the last thirty years...[26]
>
> "In fact, instead of criticising the neoliberal economic policies of the New Order, Article 33 was replaced with a more populist one. So there are words like efficiency, there are words like economic democracy, for example. This, in our view, shows the insensitivity, or perhaps lack of understanding, of MPR members of the rhetoric of neoliberal economics."[27]

Another interesting point in the discussion on the amendment of Article 33 of the 1945 Constitution was the split of the Economic Expert Team, which was part of the Expert Team of PAH I BP MPR. The Expert Team of PAH I BP MPR was formed to deepen and examine more comprehensively the draft amendments to the 1945 Constitution formulated by BP MPR. The team was chaired by Ismail Suny, with Maria S.W. Sumardjono as vice-chairman, Nasaruddin Umar as secretary and 30 members divided into five fields, namely political, legal, economic, religious-social-cultural and educational.[28] The Economic Expert Team was chaired by Mubyarto, with Sri Mulyani Indrawati as secretary, and included Dawam Rahardjo, Sjahrir, Bambang Sudibyo, Didik J. Rachbini, and Sri Adiningsih.

There are two groups with different opinions on whether Article 33 of the 1945 Constitution should be amended. Mubyarto and Dawam Rahardjo are the group that does not agree with the changes because, according to these two economists, Article 33 is still good enough as a basis for managing the Indonesian economy now and in the future. Mubyarto and Dawam Rahardjo argue that Article 33 of the 1945 Constitution does not need to be amended and is still very relevant to the spirit of the people's economy, which has been the milestone of Indonesia's national economy.[29] Any shortcomings are considered to be a matter of regulation and implementation.[30]

On the other hand, other members of the Economic Expert Team fully support the amendment of Article 33 of the 1945 Constitution. According to this team, Article 33 needs to be amended to fit

[25] Tim Penyusun Naskah Komprehensif Proses dan Hasil Perubahan UUD 1945, p. 528. Italics added by the authors.
[26] Tim Penyusun Naskah Komprehensif Proses dan Hasil Perubahan UUD 1945, p. 631.
[27] Tim Penyusun Naskah Komprehensif Proses dan Hasil Perubahan UUD 1945, p. 632. Italics added by the authors.
[28] Tim Penyusun Naskah Komprehensif Proses dan Hasil Perubahan UUD 1945, p. 780.
[29] Tim Penyusun Naskah Komprehensif Proses dan Hasil Perubahan UUD 1945, p. 588.
[30] Tim Penyusun Naskah Komprehensif Proses dan Hasil Perubahan UUD 1945, p. 537.

the context of global economic developments, in particular to be more responsive to the market. According to Bambang Sudibyo, the essence of the ideas contained in Article 33 should be retained, but "in a more down-to-earth, non-interpretable and workable formulation".[31] Sjahrir added that the wording of the market should be included in the amendment to Article 33 and, according to Sjahrir, "we should not be ashamed to include the term market in the 1945 Constitution because the market really exists".[32]

> Mubyarto, who later resigned from the Expert Team of the PAH I BP MPR, disagreed.[33] He said,
> "[M]arket mechanisms allocate economic resources, but they have both advantages and disadvantages. They can be successful, but they can also fail to produce the desired society…[34]
> "[T]he depletion of natural resources is not due to inadequate provisions in Article 33 or any fault of the article itself. Rather, it is because the principles of economic democracy have been violated or not properly implemented. The Economic Expert Team members have been engaged in changes, discussions, and heated debates, particularly on whether to amend Article 33. It is suggested that failure to amend Article 33 will hinder the resolution of the economic crisis, allow *KKN* to persist, impede economic democracy, reduce national economic efficiency, and make Indonesia vulnerable to the effects of globalization. However, this suggestion is not entirely accurate...[35]
> "[T]he economic articles in the 1945 Constitution do not require amendment since the policies and programmes for economic development have already been reformed. Amendments to the 1945 Constitution are only necessary in the fields of law and constitutional politics. In other areas, including the economic sector, the focus should be on enacting new laws."[36]

The Emergence of Neoliberal Legal Products After the Amendment of Article 33

The debates surrounding the amendment to Article 33 of the 1945 Constitution and the split of the Economic Expert Team, which represents science in the forum of power politics, demonstrate that Article 33 of the post-amendment Indonesian constitution has been problematic since its inception. Further research is needed to uncover any direct involvement of foreign interests in the discussion of changes to Article 33 of the 1945 Constitution. However, R.M.A.B. Kusuma is one of the few scholars who has raised this issue. Kusuma said,

> "[T]he revision of the 1945 constitution came about when the MPR, led by Amien Rais, sought input from the National Democratic Institute (NDI), whose people were given facilities to hang out in the MPR. The influence of the NDI was so great that there were members of the MPR

[31] Tim Penyusun Naskah Komprehensif Proses dan Hasil Perubahan UUD 1945, p. 546.
[32] Tim Penyusun Naskah Komprehensif Proses dan Hasil Perubahan UUD 1945, p. 554.
[33] Tim Penyusun Naskah Komprehensif Proses dan Hasil Perubahan UUD 1945, p. 591.
[34] Tim Penyusun Naskah Komprehensif Proses dan Hasil Perubahan UUD 1945, p. 543.
[35] Tim Penyusun Naskah Komprehensif Proses dan Hasil Perubahan UUD 1945, p. 588.
[36] Tim Penyusun Naskah Komprehensif Proses dan Hasil Perubahan UUD 1945, p. 590.

who 'shamelessly' declared that they wanted to emulate the constitution and system of government of the United States."[37]

Reading the debates that took place during the discussion on the amendment of Article 33 of the 1945 Constitution, one can conclude that the majority of those who wanted to amend the Indonesian constitution were almost unanimous in their view that Indonesia's economic constitution must be adaptable and responsive to global dynamics and market interests. In short, the economic policy orientation of the post-reform government regime must fully support neoliberalism.

The proposed amendments to Article 33 of the 1945 Constitution included concepts such as "efficiency", "market-friendly economic system within a market-friendly social safety net", "social market economic system", and "fair market economy", all of which reflect elements of neoliberalism. Ultimately, only the concept of efficiency was successfully incorporated into the amended Article 33. Thus, the proposal to abolish the concept of efficiency on the grounds that it contradicted the concept of equality was unanimously rejected. The proposal was made by M. Hatta Mustafa of the F-UG, Asnawi Latief of the United Daulat Ummah faction (*Fraksi Persatuan Daulat Ummah*, F-PDU), Ali Hardi Kiaidemak of the United Development Party faction (*Fraksi Partai Persatuan Pembangunan*, F-PPP), Ida Fauziah of the F-KB, and Ramson Siagian of the F-PDIP in the final debate before the final approval of the 1945 Constitution.[38]

From the CLS perspective, the inclusion of the concept of efficiency in Article 33 of the 1945 Constitution after the amendment shows that the final result of the process of formulating the supreme or basic law in the form of a constitution is not sacred and cannot be questioned. The CLS movement believes that law is politics.[39] As politics, law is always affected by other things, both internal and external.[40] Neoliberalism is an external influence, while the views and attitudes of the constitutional framers are internal to the process of amending Article 33 of the 1945 Constitution.

As well as rejecting legal liberalism[41] and formalism,[42] the CLS movement also rejects legal objectivism. Legal objectivism is the belief that legal products, namely constitutions, statutes, and certain legal doctrines, always embody and maintain a defensible scheme of human associations. This suggests an intelligible, if always imperfect, moral order in which the imperatives of social life, such as economic efficiency, have normative force in accordance with the enduring human will. In the objectivist view, laws always emerge from power struggles or the practical pressures of legitimate authority.[43] The CLS movement does not believe in this kind of view.

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[37] Kusuma, *Sistem Pemerintahan "Pendiri Negara" versus Sistem Presidensiel "Orde Reformasi,"* xv.

[38] Tim Penyusun Naskah Komprehensif Proses dan Hasil Perubahan UUD 1945, *Naskah Komprehensif Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945: Latar Belakang, Proses, dan Hasil Pembahasan, 1999-2002 [Buku VII: Keuangan, Perekonomian Nasional, dan Kesejahteraan Sosial]*, p. 652, 657, 661-662, 672–673, 709-710.

[39] Mark Tushnet, "Critical Legal Studies: A Political History," *The Yale Law Journal* 100, no. 5 (Maret 1991): p. 1517, https://doi.org/10.2307/796697; Roberto Mangabeira Unger, "The Critical Legal Studies Movement," *Harvard Law Review* 96, no. 3 (Januari 1983): p. 563, https://doi.org/10.2307/1341032.

[40] Tushnet, "Critical Legal Studies," p. 1518.

[41] Hugh Collins, "Roberto Unger and the Critical Legal Studies Movement," *Journal of Law and Society* 14, no. 4 (1987): p. 401, https://doi.org/10.2307/1410255.

[42] Collins, p. 396.

[43] Roberto Mangabeira Unger, *The Critical Legal Studies Movement* (Cambridge, Mass.: Harvard University Press, 1986), p. 2.

Starting from the two central tenets of the CLS movement, that law is politics and that legal objectivism must be rejected, it is possible to criticise the rise of neoliberalism after the amendment of Article 33 of the 1945 Constitution. After the amendments to the Indonesian constitution, there has been an abundance of legal products produced by the legislature, far beyond the previous periods. This is because the position and role of the legislature, especially the House of Representatives (*Dewan Perwakilan Rakyat*, DPR), has become stronger. However, this state of affairs contradicts one of the five basic agreements of the MPR in amending the Indonesian constitution, which is to emphasise the presidential system of government. In reality, the system of government established after the amendment of the Indonesian constitution tends towards a parliamentary system of government, as evidenced by the many powers of the President that must be exercised together or with the consideration of the DPR,[44] including in the making of laws and regulations.

The legal products enacted after the amendment of the Indonesian constitution generally have a number of pro-market and neoliberal features in the form of the transfer of resource management from the state to the private sector ("privatisation"), the reduction of state authority and, broadly speaking, an agenda to integrate state affairs and/or certain public services into the global/international order. The latter is clearly evident in areas of state affairs that are in direct contact with the global order, such as state finances. After the amendment of the Indonesian constitution, there were efforts to establish a national law that could replace the centuries-old colonial law such as the *Indische Comptabiliteitswet* (ICW, *Staatsblad* 1864 No. 106), which was not unprecedented in previous periods, but was never finalised.

Finally, Law No. 17/2003 on State Finance and Law No. 1/2004 on State Treasury contain norms that, among other things, the management and accountability of state finances must be based on one standard, namely the Government Accounting Standards (*Standar Akuntansi Pemerintahan*, SAP).[45] In turn, SAP has been developed by adopting, absorbing and replicating a number of "regulations" (soft law, private international law instruments) created by non-state private actors and actors outside the Indonesian legal framework in order to promote the free market order and global capitalism. These transnational actors include the International Federation of Accountants (IFAC), the International Public Sector Accounting Standards Board (IPSASB), the International Accounting Standards Committee (IASC), the International Accounting Standards Board (IASB), the International Monetary Fund (IMF), the Indonesian Institute of Accountants (IAI), the Financial Accounting Standards Board (FASB), the US Governmental Accounting Standards Board (GASB), and the US Federal Accounting Standards Advisory Board (FASAB).[46]

In addition, at the level of laws, legal products began to germinate as further elaborations of other norms of the 1945 Constitution, some of which were very controversial because they provoked

[44] Soeprapto, "Eksistensi Penjelasan UUD 1945 Pasca Amandemen Undang-Undang Dasar 1945," p. 131.
[45] Pasal 32 ayat (1) Undang-Undang Nomor 17 Tahun 2003 tentang Keuangan Negara dan penjelasan Undang-Undang Nomor 1 Tahun 2004 tentang Perbendaharaan Negara.
[46] Lampiran III angka 15 Peraturan Pemerintah Nomor 71 Tahun 2010 tentang Standar Akuntansi Pemerintahan.

various public rejections, including but not limited to rejections pursued through law review applications to the Constitutional Court (*Mahkamah Konstitusi*, MK). These laws include Law No. 36/1999 on Telecommunications, which expanded the involvement of private actors in the telecommunications sector; Law No. 29/2000 on Plant Variety Protection, which paved the way for the commodification of agricultural varieties; and Law No. 31/2004 on Fisheries, which opened up opportunities for the commodification of fishing areas.[47]

The next legal products are Law No. 22/2001 on Oil and Gas,[48] Law No. 19/2003 on State-Owned Enterprises which was judicialised through Constitutional Court Decision No. 58/PUU-VI/2008 and Constitutional Court Decision No. 61/PUU-XVIII/2020, Law No. 20/2003 on National Education System which was judicialised through Constitutional Court Decision No. 5/PUU-X/2012, Law No. 30/2007 on Energy,[49] and Law No. 21/2011 on Financial Services Authority which was judicialised through Constitutional Court Decision No. 25/PUU-XII/2014. Some legal products also emerged as imperatives or prerequisites from international financial institutions, such as Law No. 7/2004 on Water Resources, which was completely annulled by the Constitutional Court through Constitutional Court Decision No. 85/PUU-XII/2013. This law is considered to have changed the paradigm of the management of public utilities, subjecting them to market mechanisms.[50]

On the other hand, the Constitutional Court has struck down neoliberal laws, ironically referring to the concept of equitable efficiency in Article 33 of the post-amendment 1945 Constitution. For example, in the review of Law No. 20/2002 on Electricity, which embodied the concept of equitable efficiency in the form of the unbundling of the electricity sector. In Constitutional Court Decisions No. 001/PUU-I/2003, No. 021/PUU-I/2003, and No. 022/PUU-I/2003, the Court argued that equitable efficiency at the microeconomic and macroeconomic levels should be based on the effectiveness of governance for the social welfare and prosperity of the people, and not on the efficiency of the interests of a handful of capital owners or the philosophy of free competition ("free-fight liberalism").[51] These conditions are the direct and indirect result of amendments to the Indonesian constitution, in particular Article 33 of the 1945 Constitution.

Affirming the Democratic Economic System: An Application of the Deviationist Doctrine

Amendments to Article 33 of the 1945 Constitution created what Agus Brotosusilo called anomie (a state without norms, chaos) or dualism in the Indonesian economic system-leading to legal uncertainty.[52] This is due to the philosophical contradiction contained in Article 33 after the amendment of the Indonesian constitution, which juxtaposes elements of a liberal capitalist economy

[47] Indriaswari Dyah Saptaningrum, "Jejak Neoliberalisme dalam Perkembangan Hukum Indonesia," *Jurnal Hukum Jentera* Edisi Khusus (2008).
[48] Simon Butt dan Fritz Edward Siregar, "Analisis Kritik terhadap Putusan Mahkamah Konstitusi Nomor 36/PUU-X/2012," *Mimbar Hukum* 25, no. 1 (3 April 2013), https://doi.org/10.22146/jmh.16098.
[49] Saptaningrum, "Jejak Neoliberalisme dalam Perkembangan Hukum Indonesia," p. 79.
[50] Adhi Anugroho, Ratih Lestarini, dan Tri Hayati, "Analisis Yuridis terhadap Asas Efisiensi Berkeadilan Berdasarkan Pasal 33 ayat (4) UUD 1945 dalam Peraturan Perundang-undangan di Bidang Ketenagalistrikan," *Jurnal Hukum & Pembangunan* 47, no. 2 (2 Juli 2017): p. 79, https://doi.org/10.21143/jhp.vol47.no2.1451.
[51] Anugroho, Lestarini, dan Hayati, "Analisis Yuridis terhadap Asas Efisiensi Berkeadilan Berdasarkan Pasal 33 ayat (4) UUD 1945 dalam Peraturan Perundang-undangan di Bidang Ketenagalistrikan."
[52] Agus Brotosusilo, "The Economic Analysis of Law" (Jakarta, 1996).

(the principle of efficiency) with elements of a democratic economy (the principle of kinship and togetherness).

According to Elli Ruslina, the dualism of the Indonesian economic system is rooted in the process of economic transformation during the formation of the Indonesian nation-state after independence. The nation's founding fathers, Ruslina argues, were wise in formulating the 1945 Constitution by allowing colonial regulations to come into force under Article II of the Transitional Regulations. The first economic system, which is national in nature, is necessarily and permanently based on kinship and togetherness, while the second economic system, which is a continuation of the colonial regulations, is temporarily based on individualism.[53]

Ruslina is quite astute because she has managed to draw out the common thread of the inherent dilemmas in the legal and economic fields of post-colonial countries like Indonesia. In the legal field, it is widely known that the Indonesian legal system and its institutions are actually a colonial legacy with slight modifications through what M.A. Jaspan calls "confusing legal syncretism".[54] But Isra and Tagnan argue that it is precisely this syncretism that can prevent the newly created state from disintegrating into "a thousand small states".[55]

In both the legal and economic fields, the national government's efforts to create a national legal (system) that is in accordance with the nation's personality,[56] the ideology of Pancasila, a socialist society, and a just and prosperous national life[57] are not easy because the efforts made tend to revolve around expressing needs and basic principles. Meanwhile, the translation of the principles of social justice, deliberation and general welfare into a set of practical and applicable laws and regulations has not been carried out carefully and in detail.[58]

The amendments to Article 33 of the 1945 Constitution, which introduced the principle of efficiency in the management of the national economy, which was accompanied by the non-recognition of the existence of the Explanation to the 1945 Constitution based on Article II of the Additional Regulations to the 1945 Constitution after the amendment ("with the provision of amendments to this Constitution, the Constitution of the Republic of Indonesia of 1945 consists of the Preamble and Articles"), causes legal syncretism and dualism to no longer be at the balance point. The amendments to Article 33 of the 1945 Constitution have thus broken the unity of meaning of

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[53] Elli Ruslina, "Makna Pasal 33 Undang-Undang Dasar 1945 dalam Pembangunan Hukum Ekonomi Indonesia," *Jurnal Konstitusi* 9, no. 1 (20 Mei 2016), https://doi.org/10.31078/jk913.

[54] M. A. Jaspan, "In Quest of New Law: The Perplexity of Legal Syncretism in Indonesia," *Comparative Studies in Society and History* 7, no. 3 (April 1965), https://doi.org/10.1017/S0010417500003674.

[55] Saldi Isra dan Hilaire Tegnan, "Legal Syncretism or the Theory of Unity in Diversity as an Alternative to Legal Pluralism in Indonesia," *International Journal of Law and Management* 63, no. 6 (11 November 2021): p. 562, https://doi.org/10.1108/IJLMA-04-2018-0082.

[56] Soetandyo Wignjosoebroto, *Dari hukum Kolonial ke Hukum Nasional: Suatu Kajian tentang Dinamika Sosial-Politik dalam Perkembangan Hukum Selama Satu Setengah Abad di Indonesia, 1840-1990* (Jakarta: RajaGrafindo Persada, 1995), p. 209.

[57] Daniel S. Lev, "The Lady and the Banyan Tree: Civil-Law Change in Indonesia," *The American Journal of Comparative Law* 14, no. 2 (1965): p. 293, https://doi.org/10.2307/838638.

[58] Jaspan, "In Quest of New Law," p. 265.

Article 33 from its explanation and allowed the main idea of Article 33 to be freely interpreted or deviated from its "methodical construction"—as can be seen from the opinions expressed by some members of the Economic Expert Team regarding the principle of kinship and other main ideas of Article 33 of the 1945 Constitution.[59]

Therefore, even though the concept of efficiency has been embedded in the Indonesian constitution after the amendment, in order to combat the direct or indirect excesses of neoliberalism, a legal scholar can use the CLS perspective as a prescriptive solution. As Unger points out, a legal scholar can practice a deviationist doctrine that operates in three models. First, the vertical deviationist doctrine, that is, tracing legal principles back to their roots in order to identify the empirical and normative beliefs that underlie those legal principles. Second, the horizontal deviationist doctrine, that is, the application of legal principles recognised as appropriate in one area of social life to other areas. Third, interpretivism, which presents an interpretation of legal doctrine that systematically places greater emphasis on general principles.[60]

Based on the deviationist doctrine, the formulation of Article 33 of the 1945 Constitution is a credo of political-economic thought as well as the original legal policy of a sovereign independent country, anti-colonialism, anti-imperialism and anti-capitalism. As a political economy, Article 33 of the 1945 Constitution contains historical elements that cannot be arbitrarily changed and/or deleted. Article 33 of the 1945 Constitution is the vision, ideals, hopes and goals for the formation of the Indonesian nation and state in the fields of economy and social welfare. So it is very inaccurate for a member of the Economic Expert Team, Sjahrir, to say that the content of Article 33 of the 1945 Constitution is old-fashioned, confusing and outdated. As well analysed by Zon, Iskandar and Zuhdi,

> "[S]jahrir argued that the term 'kinship' in Article 33 of the 1945 Constitution is ambiguous and open to multiple interpretations. The term may be confusing for those who are not familiar with Hatta's works. Additionally, Sjahrir's lawsuit overlooked the issue of separating the Constitution from the ideas of other Republic founders. 'Kinship' is a concept that originated from the Taman Siswa College. Both Hatta and Soekarno employed this concept with the meaning proposed by Taman Siswa. Before dismissing the term 'kinship' as 'dubious', it is necessary to consider Taman Siswa's explanations of the concept."[61]

Sjahrir's views continue the thoughts of Widjojo Nitisastro, the economic architect of the New Order regime. Nitisastro previously criticised the economic management of the Guided Democracy regime. Nitisastro argues that the Guided Democracy regime has mismanaged the national economy[62] due to its lack of rationality and disregard for economic principles. These principles include maintaining a balance between expenditure and revenue, exports and imports, the flow of goods and money, providing employment opportunities, accommodating growth in the working-age population,

[59] Fadli Zon, Muhammad Iskandar, dan Susanto Zuhdi, "Tinjauan Sejarah Hukum Pasal 33 UUD 1945 Sebagai Ideologi Ekonomi," *Negara Hukum* 7, no. 1 (27 Desember 2017): 112, https://doi.org/10.22212/jnh.v7i1.925.
[60] Collins, "Roberto Unger and the Critical Legal Studies Movement," 404-7.
[61] Zon, Iskandar, dan Zuhdi, "Tinjauan Sejarah Hukum Pasal 33 UUD 1945 Sebagai Ideologi Ekonomi," p. 113.
[62] Widjojo Nitisastro, *Pengalaman Pembangunan Indonesia: Kumpulan Tulisan dan Uraian Widjojo Nitisastro* (Jakarta: Penerbit Buku Kompas, 2010), pp. 31-41.

using economic resources efficiently, ensuring fairness in the distribution of burdens and fortune, and investing in economic growth.[63]

Nitisastro's thoughts, followed by his colleagues and juniors at the Faculty of Economics, Universitas Indonesia, were later adopted as the economic policy of the New Order regime. This policy was characterised by the issuance of laws and regulations that aimed to increase foreign investment and aid, as well as integrate Indonesia with the global economy and capitalism. This approach contradicted the views of many of Indonesia's early leaders regarding the role of foreign capital and the private sector.[64] For example, soon after the publication of Law No. 1/1967 on Foreign Investment, Hatta wrote an article in which he stated, among other things,

> "Aid that is based on political requirements cannot be considered development aid because it binds the recipient country to a particular policy. Many less developed countries, which had only just gained independence from colonialism after the Second World War, view such aid as the first step towards the implementation of neo-colonialism and economic colonialism. Development aid must be free of political conditions and foreign interference in the internal affairs of the recipient country. Aid that is simply given to a less developed country simply to relieve that country of various financial difficulties is not development aid. This aid is philanthropic in nature and does not educate people to try and save money. This kind of aid may even encourage the government of the recipient country to become wasteful and irresponsible."[65]

However, Hatta's views were not always welcomed by the economic policymakers of the New Order regime. One small incident that illustrates the general attitude and impression of the New Order regime towards Hatta's political economic thought occurred in 1975 when Universitas Indonesia wanted to award Hatta an honorary doctorate (*honoris causa*). The then Dean of the Faculty of Economics at Universitas Indonesia, who also happened to be Indonesia's Minister of Finance, rejected the plan. In the end, the task was taken over by the Dean of the Faculty of Law at Universitas Indonesia.[66] Thus Hatta, one of the Republic's few early economists, a diligent, brilliant, and highly productive economic thinker, was denied economic expertise by later generations of economists.

The views of Nitisastro and his friends, widely known as the "Berkeley Mafia", are clearly ahistorical and anachronistic because they attempt to divorce national economic policy from its context, namely an economic policy that is anti-colonialist, anti-imperialist and anti-capitalist. Apart from the authoritarianism of the last period of President Sukarno's administration, which was triggered by Vice-President Hatta's resignation from the national leadership, managing the economy

[63] Nitisastro, pp. 48-49.
[64] Kian Wie Thee, *Pelaku Berkisah: Ekonomi Indonesia 1950-an sampai 1990-an* (Jakarta: Penerbit Buku Kompas, 2005), lxii.
[65] Mohammad Hatta, *Masalah Bantuan Perkembangan Ekonomi bagi Indonesia* (Jakarta: Djambatan, 1968), p. 2.
[66] Sri-Edi Swasono, *Keindonesiaan: Demokrasi Ekonomi, Keberdaulatan, dan Kemandirian* (Yogyakarta: UST-Press, 2015), p. 176.

at that time was not an easy task because it took place during a period of vulnerable and unstable political transition.[67] Before it had a chance to prove its success, the Guided Economy programme-fully supported by Hatta, including the writing of a special book detailing the Guided Economy concept[68]-was disrupted by US interference in the late 1950s through a series of military sabotages outside Java, culminating in the removal of President Sukarno's prestige through a "crawling coup" by the US-backed army under the pretext of a communist purge.[69]

Based on the deviationist doctrine, the conflict between Hatta's thought and the "Berkeley Mafia" is actually a continuation of the paradigmatic debate between the German Historical School and the Austrian School on the methodology of economics. The German Historical School rejected the Austrian School's attempt to refine economics, a physics-style approach to economics, through complex, abstract, and overly theoretical mathematical modelling. For the German Historical School, led by Gustav von Schmoller, the task of the social sciences, including economics, was to seek truth and information about society on the basis of historical experience. The German Historical School rejected the materialist-determinist approach of the Austrian School, led by Carl Menger, which held that human action could be explained as some kind of physical or chemical reaction.[70]

The opposition between the two schools, said Zon, quoting Zimmerman, was a form of resistance by the Germans, who lived in an agrarian economy, to British economics, which was born and developed in an industrial society. According to Zimmerman, behind the theoretical "sophistication" of the Austrian School there was a bias towards free market interests that were only relevant to industrialised countries such as Britain and the United States. This thinking was clearly incompatible with the national interests of Germany, where people still lived in an agrarian environment.[71]

In his essays, which were analysed in detail by Zon, Hatta took a position in line with the German Historical School. According to Hatta, problems related to the national economy, especially those related to agricultural affairs, would be more appropriately analysed based on the work of scholars using a historical approach such as Schmoller, Karl Bücher, Werner Sombart, Karl Marx, and Max Weber. Indonesia's economic problems, Hatta said, were historical and sociological rather than monetary.[72]

CLOSING

The debates that took place during the discussion on the amendment of Article 33 of the 1945 Constitution show that Article 33 of the Indonesian constitution has been problematic since its inception. Looking at the discussion on the agenda to amend Article 33 of the 1945 Constitution, it

[67] Amiruddin, "Ekonomi Terpimpin 1957-1965: Mencari Jalan Baru Pembangunan Ekonomi Indonesia," 116; Zon, "Pemikiran Ekonomi Kerakyatan Mohammad Hatta (1926-1959)," pp. 137-38.
[68] Zon, "Pemikiran Ekonomi Kerakyatan Mohammad Hatta (1926–1959)," p.139.
[69] Vincent Bevins, *The Jakarta method: Washington's anticommunist crusade & the mass murder program that shaped our world* (New York, NY: Public Affairs, 2021).
[70] Zon, "Pemikiran Ekonomi Kerakyatan Mohammad Hatta (1926-1959)," pp. 96-97.
[71] Zon, p. 97.
[72] Zon, p. 98.

can be concluded that the majority of the constitutional framers believed that Indonesia should be adaptable and responsive to global dynamics and market interests and support neoliberalism. From a CLS perspective, the inclusion of the concept of efficiency in Article 33 of the Indonesian constitution after the amendment shows the infiltration of neoliberalism into Indonesia's basic law, riding on the political and legal reform agenda after the collapse of the authoritarian regime. The CLS movement sees law as politics. As politics, law is always influenced by other things, both internally and externally.

Although the concept of efficiency has been embedded in the Indonesian constitution after the amendment, in order to counter the direct or indirect excesses of neoliberalism, a legal scholar can exercise radical legal practice in the CLS perspective, centred on the deviationist doctrine. This doctrine enshrines the idea of tracing legal principles back to their roots, applying legal principles that are appropriate in one area of social life to other areas, and interpreting legal principles that systematically emphasise general principles. Based on the deviationist doctrine, the formulation of Article 33 of the 1945 Constitution is a credo of political economy as well as the original legal policy of a sovereign independent state, anti-colonialism, anti-imperialism and anti-capitalism. As a political economy, Article 33 of the 1945 Constitution contains historical factors that cannot be arbitrarily changed and/or removed.

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