PalArch's Journal of Archaeology of Egypt / Egyptology

THE DIALECTICS OF FREEDOM OF CONTRACT DOCTRINE WITH WELFARE-STATE CONCEPT IN PROVIDING LEGAL PROTECTION TO CONSUMERS

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Abdul Halim Barkatullah: The Dialectics of Freedom of Contract Doctrine with Welfare-State Concept in Providing Legal Protection to Consumers -- Palarch's Journal of Archaeology of Egypt/Egyptology 17(6), ISSN 1567-214x

ABSTRACT
The principle of welfare state is a reaction to the failure of the liberal state in realizing its people's welfare. The principles of liberal state believe that the functions of state should be limited to the minimum level, so that the government has no power and authority to do as it please. The doctrine of freedom of contract, based on the principle of liberal state, has negative effects on consumers' interests. When a nation develops into a welfare nation, there is great demand for government intervention through law and regulations that protect people. In this period of development, the nation begins to pay attention to consumers' needs and interests. In the notion of welfare state, the nation is required to extend its responsibilities to cover socio-economic matters of the general public. This development gives authorization or legality for "interventionist nations" to intervene in various social and economic matters to ensure the social welfare of the people. In other words, the consumers' rights in Indonesian legal system are the result of dialectics between freedom of contract doctrine with the concept of welfare state.

INTRODUCTION

In the 19th century, there was a notion that believed that the functions of a state should be limited to a level where the state could not abuse its authority and power by doing as it wishes. It is even said that "The least government is the best government" (Buiardjo, 2012). This notion is the main characteristic of what is known as "night watchman state" (*nachwachterstaat*), which was considered as an ideal form of a nation in the 19th century. The principle of '*laizzes faire*' that stipulates that a nation should allow or free its people to attend to their economic matters by themselves, so that the economic condition of the nation can be improved and healthy.

However, in its development, the symptoms of capitalism emerged in the economic field as the 'night watchman state' was implemented. It gradually caused imbalance and inequality in the distribution of resources and wealth. Consequently, this resulted in poverty, which kept getting worse and hard to solve by the minimally functioned state(Asshiddiqie, 2014).

Since the beginning of the twentieth century, a new concept of nation emerged to replace the '*nachwachterstaat*'; i.e. the 'Welfare State'. In the concept of welfare state, the nation is required to extend its influence and responsibilities to cover the socio-economic matters of its people (Asshidiqie, 2014). During this period, nations began to pay special attention to the condition of labors, consumers, small and medium enterprises, and environment (Samsul, 2004). Consumer protection is an inseparable consequence of the advancement in technology and industry in modern society (Samsul, 2004), which is different from the practices in traditional society (Buiardjo, 2012).

In the practice of governance in today's world, most nations commonly implement the concept of welfare state. The state is required to expand its responsibilities to cover socio-economic matters of the people. This development provides legality for 'interventionist nations' in the twentieth century. A nation needs, and is even obligated, to intervene in various social and economic matters to ensure that social welfare of the public is realized (Asshiddiqie, 2014).

The tradition of state's intervention, which is the characteristic of welfare state, has undergone changes. The issues in economy have developed in such a way that it brings about an expectation, as well as worry, about the emergence of new era in which the roles and involvement of the nation in various aspects of socio-economic life are gradually lessen(Samsul, 2004).

Nowadays, the notion that argues that a nation has constitutional role and responsibility to protect its citizen is being tested (Fakih, 2004). Many nations; whether they realize it or not, deliberately or spontaneously; are involved in a transformation process that changes the world into one dominated by capitalism and neo-liberalism. This is the test that the concept of welfare state should undergo to prove that it is able to ensure public welfare.

When a nation becomes a welfare state, there is strong demand for government intervention through laws and regulations that protect people(Fishmen, 1996).During this period, nations began to pay special attention to the condition of labors, consumers, small and medium enterprises, and environment.

The economic theory on the relationship between consumers and producers has implications on the theory of law developed in the age of individual liberty and liberalism domination (Samsul, 2004). Freedom of contract argues that the parties involved are the ones that should determine the content of a contract. Meanwhile the notion of contract relationship states that only the concerned parties have rights and responsibilities in the contract. The doctrines of freedom of contract and contract relationship greatly influence the development of consumer protection law and regulations. This is the foundation of the present study, which will discuss the dialectics of freedom of contract doctrine with the concept of welfare state in providing legal protection for consumers.

RESEARCH METHODOLOGY

The study on dialectics between the doctrine of freedom of contract and welfare state concept in providing legal protection for consumers is a normative legal study (Soekanto and Mamudji, 2004), i.e. an investigation that refers to existing regulations. This study is also a doctrinal research (Sunggono, 2007) because the researcher aims to discover the principles related to the topic being investigated.

To answer the research questions, the researcher gathers legal data through documents study (literature study), including primary legal data, secondary legal data, and tertiary legal data. It is performed by making inventory and identifying regulations, international conventions, legal documents, legal notes, academic writings, and literature in legal discipline consisting of books, articles, journals, and researchers related to the study.

The gathered data are then processed. Data is analyzed using qualitative method, using interpretation technique. Legal data are interpreted and described based on existing norms and theories of law; so that deviation of decision or conclusion can be avoided. Conclusion is drawn using inductive reasoning; i.e. a systematic reasoning from specifics to generals; and deductive reasoning; i.e. a systematic reasoning from generals to specifics.

FINDINGS AND DISCUSSION

THE EFFECT OF SOCIALISM ON THE NOTION OF LIBERAL STATE THAT BRINGS ABOUT THE CONCEPT OF WELFARE STATE

Welfare state is a political system in which the state has responsibilities to ensure its citizens' welfare by providing life quality minimum standard assurance and protect its citizens from the danger or risk of poverty, illness, and social destitution.

The term welfare state was first used by Alfred Zimmern at the end of 1930s to differentiate the policies of democratic states and war states of European dictators. The elements of welfare state system was first developed in Eastern Europe since the end of the 19th century. Germany began in 1883 by issuing and implementing regulations on state-subsidized accident and healthcare insurances, pioneered by *Chancellor* Otto von Bismark. New Zealand introduced pension system in 1898. Austria-Hungary began to implement national health insurance system by the end of 19th century, followed by Norwegia in 1909; Sweden in 1910; Italy, the United Kingdom, and Russia in 1911. The United States then followed by legalizing the Social Security Act of 1935. In its development, a comprehensive welfare state covers all elements of social welfare of its citizens (Yanuar, 2007).

The term welfare state (Suhartono, 2004) in English is similar with the terms *welvaartsstaat* (Asshiddiqie, J. 2014) or*verzorgingsstaat* (Hadjon,1997). in Dutch, also known as sociale *rechtsstaat* (Meuwissen, 1975). Concerning this, de Haan stated that: "*De moderne staat in nit alleen rechsstaat in de negentiende eeuwse zin, maar ook verzorgingsstaat – of zo men wil – sociale rechtsstaat*"(de Haan, Drupssteen, Fernhout, 1986).(A modern nation is not only a legal state in the 19th century sense, but also a welfare state—or if you like—social state).

Legal welfare state is a combination of legal state and welfare state concepts (de Haan, Drupssteen, Fernhout, 1986). According to Burkens, legal state is a nation that puts laws and regulations as the foundation of its power and that implements the power and authority based on those laws and regulations. Meanwhile, welfare state, according to Manan (1996) is a nation in which the government serves not only as the keeper of peace and order of society but also as the primary party responsible to realize social fairness, social welfare, and public prosperity. Welfare state is a nation that aims to realize social equality and fairness for all people and to give opportunities for the people to be independent (Manan, 1996).

The communist nations use the term socialist legality (Azhary, 2005). The concept of socialist legality is different from *rechtstaat* and 'rule of law'. Its main characteristic is based on communism, which uses law as a tool to realize socialism and ignore

individual rights. Individual rights fuse in the goals of socialism that puts collective needs above individual needs.

During the classic age in Europe, the thoughts on legal state emerged as a reaction to the concept of police state (*polizei staat*), and the parties reacting to police state were the rich and intelligent people known as the liberal bourgeois. Hence, the legal state concept that they created is called liberal legal state(Azhary, 2005).The function of the state in liberal legal state is only to maintain rules and order (*secherheit polizei*) and, therefore, the concept of the state is also called the night watchmen state (*nachtwakerstaat* or *nachtwachterstaat*), while the economic or welfare function (*wohlfart polizei*) is trusted to be administered by the bourgeois group, based on the principle of free competition(Azhary, 2005).

Legal state at that time is also called *klassiek liberale en democratische rechtsstaat*, commonly shortened into*democratische rechtsstaat*. Its liberal nature is based on the notion of state from John Locke, Montesquieu, and Immanuel Kant, while its democratic nature is based on the work of J.J. Rousseau on social contract (Hadjon, 1997). The liberal principle is based on liberty (*vrijheid*) and the democratic principle is based on equality (*gelijkheid*). Liberty, according to Immanuel Kant, is "the free self-assertion of each limited only by the like liberty of all". As such, liberty is a condition that allows for the implementation of free will and is only limited by others' free will. From this point, another principle is born; that is "freedom from arbitrary and unreasonable exercise of the power and authority" (Pound, 1987). The concept of equality includes the abstract-formal equality; and from this, the principle of one man-one vote is developed (Hadjon, 1997).

In its development, *rechtsstaat* concept is also perfected by discussing about legal state, Scholten differentiates the levels of legal state's elements into 'principle' and 'aspect (Scholten, 1989). The important elements are called 'principle' and the implementation or realization of the principles is called 'aspect'.[1]According to Scholten, there are two principles of legal state: (1) the recognition of citizens' rights for the state; consisted of two aspects, individual rights that are beyond the authority of the state and the limitation on those rights through legal regulations; (2) distribution of power. Scholten, following the argument of Montesquieu, outlines three powers (authorities) of the state which have to be separated from one another: the power to formulate and issue regulations, the power to implement laws and regulation, and the power to judge (Scholten, 1989).

The principle of 'the rule of law' implemented in the Anglo-Saxon legal system is essentially similar with what in Continental Europe legal system is known as *rechtsstaat*, *concept of legality*, or *etat de droit*; all means "the law which governs and no men." (Brewer, 1989) However, there is a difference in historical background of the two legal systems.

The *rechtsstaat* concept was born from the struggle against absolutism. It is revolutionary in nature, while the concept of 'rule of law' is evolutionary. The *rechtsstaat* concept is based on the continental legal system called 'civil law' while the concept of rule of law is based on the Anglo-Saxon legal system called 'common law'. Civil law is administrative while common law is judicial (Pound, 1987; Hadjon, 1997).

In the rule of law, constitutional law is not the source; it is the consequence of individual rights formulated and asserted by the legal court. The constitution in Anglo Saxon nations, such as the United Kingdom, is not written in one single document; it comprises of documents, charters, petitions, court orders, custom, traditions, and conventions (Moore, 1997). In Anglo Saxon nations, human rights and individual free will are limited by customs and legal court orders, while the constitution is only a generalization of the existing practices or customs (Azhary, 2005).

Ssocialist legality principle exists and is developed in communist nations, and was first developed in USSR during the New Economic Policy era (1921-1928). In USSR constitution, there are several clauses that regulate about human rights, both the political and the socio-cultural rights, such as: equality in the eyes of the law, warranty of freedom of speech, freedom of assembly, freedom to demonstrate, and freedom of religion, including freedom from anti-religion propaganda (Atmosudirdjo*et'al*, 2006).

Citizens in socialist legality states have to obey the constitution and regulations because the constitution and regulations are fair and true. The constitution must be true because a socialist state exists for the greater good of everyone, not just a group of people. Marxist nations have been struggling against law, because they believe that law in non-socialist states is only used to defend and serve an inappropriate and incorrect social structure.

The economic structure of the people, and the economic condition of people of power, determine the social awareness, will, and interest expressed in the law. The law is only works in correlation with the structure it serves to form and uphold the legal rules and regulations it contains. Therefore, the term socialist, put before the term legality, is an important justification implying that the principle of legality only works in a structure of economy and if it regulates the interest of the economic structure. In socialist legal states, law only has value because it serves the interest of the socialist nation. Law is important and highly necessary as a superstructure, and its authority can only be based on healthy structure of economy in which production is exploited for the benefit of everyone. The term socialist in socialist legal state is a reminder of Marxism (Azhary, 2005).

The development of socialism and liberalism brings about a concept of welfare state, which is variance of legal state, developed from the implementation of past legal state concepts (particularly *rechtsstaat* and *the rule of law*). However, welfare state develops its own basic principles which are different from the basic principles of *rechtsstaat* and the rule of law.

Hadjon (2005) differentiated *rechtsstaat* and rule of law based on their backgrounds and fundamental legal systems. *Rechtstaat* is born from a struggle against absolutism so that it is revolutionary in nature; it is based on the European continental legal system called common law. Meanwhile, rule of law develops evolutionary and is based on common law legal system. However, in the present development, the differences no longer matter because both concepts essentially aim toward a single goal; the acknowledgement and protection of human rights.

Although there are differences in the background of *rechtsstaat* and rule of law, it cannot be denied that the term 'legal state' in the 1945 Constitution of Indonesia is inseparable from the influence of both concepts (Rani, 2002).

In a broader spectrum, the form of welfare state is congruent with the functions of a nation and government, which is to apply law and regulations as the mean to prosper

the society. Law is not only to be implemented and upheld; it is also an important instrument that drives the government, providing guides and directions for the development of other sectors (politics, economy, social, and culture).

The concepts of legal state have principles that are closely related with the concepts of welfare state; in which certain items stressed on human rights, the legality of government institution and apparatus, and the implementation of law; as well as the implementation of government based on law and regulations.

There are differences in opinion concerning when welfare state is born. Some believe that Welfare State concept was born in Germany, on 15 February 1881, when Kaizer Wilhelm I proposed an idea to *Reichstag*; arguing that social security can be used to protect German workers from loss of earning due to work-related accident or old age. Another opinion states that it was Otto von Bismack, the leader of Germany unification, who first came out with the idea of welfare state in Germany. He implemented welfare state in order to, among others, form alliance between the Junkers and the workers in facing liberal authorities (Freeman, 1998). After its development in Germany, Welfare State concept came to England between 1908-1911 and to the United States in mid-1930s. Since then, welfare state has been identified as one of the characteristics of modern civilization and welfare provision becomes one of the important responsibilities of government (Freeman, 1998).

Welfare State is considered a solution for various problems that societies faced by the end of World War II. It is described as a middle-way between *laissez-faire* on one extreme and collectivist's economic policies on the other; a way that promised to solve the ideological conflict that had threatened pre-World War II democratic society(Moon, 1998).Meanwhile, Freeman (1998)argues that Welfare State is an antithesis of the true liberalism objectives; it is different from the concept of liberalism that does not wish the state to be the architect of social structure.

Welfare state is born as a reaction to the failure of liberal legal state to ensure its people's welfare. Liberal legal state believes that the functions of a state should be limited to minimum level, so that the state cannot abuse its authority and power to do as it please. It is even said that "The least government is the best government." (Budiardjo, 2012). This principle is the primary character of what is known as night watchmen state (*nachwachterstaat*).

In the classical or liberal legal states, the most important thing is the protection and warranty for human rights, in political and socio-economic aspects; including the acknowledgement and protection of individual freedom, ownership of property, and freedom of competing and freedom of contract (La Sueur and Herber, 1995).

The limitation upon the functions of night watchmen state develops beyond political aspect to include economy; in which a principle of *laissez-faire* (that a state should allow and free its people to handle their own matters of economy so that the economy of the state can be healthy) is born (Asshiddiqie, 2014). However, in its development, the symptoms of capitalism emerged in the economic field as the 'night watchman state' was implemented. It gradually caused imbalance and inequality in the distribution of resources and wealth.

Freedom to compete creates groups of citizens in which the interaction between the people who own resources or capital (capitalists) and the people who do not own resources or capital (labors) is unfair and unbalanced. The capitalist society grows stronger and the labor, which consists of most of the public, grows weaker. It means

that the classic legal state, that promotes freedom and equality, turns out to be unable to create equity and prosperity for all citizens.

In the context of Indonesia, welfare state is a concrete thinking of the real values of legal state concept. Both concepts of welfare state and Indonesian legal state have positive correlation on the values of progressive law, public economy, national culture, democracy of *Pancasila*, and active and free politics that promotes independency more than mere peace. This concept has been around since the Proclamation of Independence on 17 August 1945, and is embedded in the fourth paragraph of the Preamble of 1945 Constitution ". . . [which shall] protect all the people of Indonesia and all the independence and the land that have been struggled for, and to improve public welfare, to educate the life of the nation, and to participate in the establishment of world order based on perpetual peace and social justice."

THE DIALECTICS OF WELFARE STATE CONCEPT ON THE FREEDOM OF CONTRACT PRINCIPLE IN PROVIDING LEGAL PROTECTION FOR CONSUMERS IN INDONESIA

THE FREEDOM OF CONTRACT PRINCIPLE IN HISTORICAL VIEW

The principle of freedom of contract emerged in Europe in middle age, around the same time as the emergence of the classic economic theory of *laissez-faire* which was a reaction towards mercantile system. Adam Smith, in his book "An Inquiry into the Nature and Causes of the Wealth of Nations," states that mercantile system does not promote the economic development of a nation; it hinders the economic growth and development, instead (Keraf, 2006). He clearly states that: "[system] that attempts, either with great force, to withdraw a big amount of public capital to be invested in certain industries, more than what is naturally possible; or with extraordinary limitation, to forcefully move certain stocks of certain industry which is intended to be used in the industry; is essentially contrary with the true objectives that it wishes to achieve. The system obstructs, rather than promotes, public growth and development towards real prosperity and wealth; and decreases, instead of improving, the real value of annual yields of land and labors." (Keraf, 2006).

The system is also considered unfair because in its effort to promote economic growth, it gives special rights for certain groups, instead of allowing economic freedom of all actors of the economy.

The culmination of freedom of contract development is achieved after the French Revolution. The development should be viewed in the context of social conditions and development of commerce and economic trading, which had been more prominent in social structure since the beginning of the 18th century. The economists begin to learn that one of the prerequisites of social order is individual freedom; i.e. the freedom of every individual to struggle for his welfare and to manage his affairs and relationships as he sees fit.

The effects of individualism and liberal doctrine on freedom of contract principle is based on two principles: that people are allowed to form contractual engagement; and that each contractual relationship made in liberty is fair and proper, and therefore needs legal sanctions(Keraf, 2006).

The concept proposed by Adam Smith argues that a legal constitution or regulation is not supposed to be used to interfere infreedom of contract because the freedom is important for the continuation of commerce and industry. Hence, Adam Smith strongly opposes laws and regulations that regulate contractual agreements, because

such intervention may affect the offer of one of the most important tools of production, i.e. the labors.

Another concept comes from Bentham, a supporter of Utilitarianism. According to Bentham, the criteria to measure the freedom of contract is that everyone can act in liberty, without being hindered just because they have bargaining position, to earn a living(Sjahdeini, 2003).Also, any party in an agreement cannot be hindered from his freedom/liberty to act to satisfy the agreement, as long as the other party agrees that the clauses in the agreement are acceptable. He further states that no one knows what is good for an individual, except that individual himself. Limitation towards freedom of contract is, therefore, a limitation of freedom or liberty. The government should never intervene in matters that it does not understand. Friedman states that nowadays, freedom of contract is still considered an essential aspect of individual freedom, but it no longer has absolute value as in the last century (Friedman, 1987).

Public affair requires freedom of contract. It even determines how and to what extent the freedom should be limited. The limitation is not universal or perpetual; it depends on the social context. It has to be put in the contexts of social relationships and equilibrium, evolution of economy, and the changes of social views. Freedom of contract can be seen from two perspectives, the material and the formal views (Feenstra and Ahsmann, 1998).

Freedom of contract in material perspective means that we agree to every content or substance that we desire, and that we are not bound to certain types of agreement. Limitations on agreement are applied only to the form of general stipulations, which stipulates that the content of agreement should conform to certain legal regulations; such as the case in labor agreement and agreement of rent. Freedom of contract in material sense is known as open system of agreements.

Freedom of contract in formal sense means that an agreement can be carried out in a desired way. On the principle, there is no requirement concerning the form of the agreement. Consensus of expectation of agreement between the parties is sufficient. Freedom of contract in formal sense is also called consensus principle.

Regarding the principle of 'consensus' in formal freedom, it is generally viewed as a 'present' from the middle age Canonic (the implementers of Canon law, or Church law). In a codex of canon law from the 13th century, i.e. the decrees of Pope Gregorius IX in 1234, it is found that "agreements, no matter how incomplete they are, should be fulfilled" (*pacta quantum cum que nuda servanda sund*). Court's acknowledgement of the doctrine of freedom of contract has negative effects on consumers' interests. Firstly, the producers use their powers to put in effect legal contracts consisted of stipulations that benefit the producers. Secondly, producers avoid responsibilities towards third parties that have no legal relationship (contract) with the producers based on the doctrine of *privity of contract*. Thirdly, the implementation of *caveat emptor* principle, which asserts that consumers should be wary and careful in doing transaction with producers, causes the court or legislative bodies to decline being involved in, or intervening, the market (Hamilton, "Not Known").

THE DIALECTICS OF WELFARE STATE CONCEPT AFFECTS THE LIMITATION ON THE FREEDOM OF CONTRACT PRINCIPLE

In the 20th century, the position of a state or government, which previously serves as merely the keeper of public order and security, changes. The changes occur because of the changes in the implemented concept of state, from *nacthwakersstaat* (night watchmen state) to the concept of *welvaarstaat* (welfare state) or *verzorgingsstaat*,

which is also known as *sociale rechtsstaat* (social legal state) (Hadjon, 1997). In social legal state (*sociale rechtstaat*), the state or government performs not only their responsibilities, tasks, and authorities to keep social order and security, but also broader extent of responsibilities, i.e. to realize social welfare and equality for all citizens (Rani 2002).

In the concept of Welfare State, the government is obligated to prepare big amount of regulations related to people's welfare. The regulations or governance include providing alms and grants for those who are unable to work, and assurance or warranty that proper living needs (such as food, healthcare, and education) will be satisfied. The responsibilities and obligations put on the state, regarding public welfare, aims to satisfy the material needs of the people. This is the basic principle of modern welfare state (Evers, etal, 1987).

The concept of welfare state or modern legal state requires that all actions of the state (government) are based on law or regulation. In addition, the state is also given responsibilities and obligation to make the people prosper. In its development, the concept of welfare state is further categorized into differentiated welfare state and integrated welfare state. The former is commonly referred to as welfare state, while the latter is known as corporatist welfare state; which is a development of the former (Mishra, 1994).

In differentiated welfare state, dominated by nations with free-market system of economy and plural system of politics, various interest groups compete with one another to affect political decisions. The efforts of social welfare are separated from economic affairs. Social welfare is an autonomous field handled by the state. In corporatist welfare state, the government works together with business community and labor union to regulate economy and integrate social welfare in comprehensive economy and social policies. Social welfare policy is based on class cooperation or collective agreement, not on competition and conflict. Corporatist state is characterized by the integration of social welfare efforts to economic affairs (Mishra, 1994).

According to Manan (1994) various concepts of modern legal state essentially consist of three main concepts; legal concept, political concept, and socio-economic concept. In legal concept, the government (in broad sense) should be based on the system of constitution, and should aim towards the realization of the principle of equal status in law. These two elements should be able to ensure the implementation of law order, the upholding of law, and the realization of objectives of the law. Attamimi define law order as a holistic unit of objective law; outwardly, it does not depend on other law; inwardly, it determines all development of regulation/law in the unit of law order (Attamimi, 1992). Logemann states that, like social order which is a whole interrelated unit, positive law is also a law order, developed by abstracting a whole relationship of norms (Logemann, 1948). In positive law, there is no opposing norm (Logemann, 1948). Another concept of law in legal state is the assurance that the law is upheld and its objectives are met. To uphold the law, there are three elements that need to be considered: fairness, utility/benefit, and legal assurance (Mertokusumo and Pitlo, 1993).

In the concept of socio-economy, the state is obligated to realize social welfare for all people, in terms of both social and economic welfare. The characteristics of welfare state or social legal state include that the state aims to make its people live in prosperity and that the state is required to provide the best services as wide as possible

to the people. Concerning this, Jeremy Bentham states that the law and regulations formulated by the authorities should aim to realize the greatest happiness of the greatest number (Ali, 2002).

The concept of freedom (liberty) and equality in classic legal state is formal-juridical in nature; while in social legal state, the concept is interpreted based on the reality of social life; that there is no absolute equality between individuals in the society. Social, economic, and cultural rights are given priorities of attention. In classic legal state, rights are interpreted as "the right to do", while in social legal state, they are based on "the rights to receive." (Hadjon, 2014).

The pioneers of *laissez-faire* economy, such as Adam Smith, believe that law and regulations should not be used to interfere with the freedom of contract, because freedom of contract is essential for the continuation of commerce and industry (Khairandy, 2003). Court's acknowledgement of the doctrine of freedom of contract has negative effects on consumers' interests. Firstly, the producers use their powers to put in effect legal contracts consisted of stipulations that benefit the producers. Secondly, producers avoid responsibilities towards third parties that have no legal relationship (contract) with the producers based on the doctrine of *privity of contract*. Thirdly, the implementation of *caveat emptor* principle, which asserts that consumers should be wary and careful in doing transaction with producers, causes the court or legislative bodies to decline being involved in, or intervening, the market.

The next problem is related with consumers' ignorance regarding the advancement of technology and the greater variation of products in the market. In the case that the consumer, including a commercial organization, possesses insufficient knowledge, it can be said that personal contract and public welfare are not congruent or in agreement. Therefore, the state needs to formulate and implement legal regulations to protect the consumers' interests. Atiyah worries that there is a possibility that the regulation is too far, that the cost of implementing the regulation will have to be shared by all consumers even though its benefits are only enjoyed by a small number of consumers.

The existence and implementation of freedom of contract principle in Indonesia are regulated in the Book of Civil Law (KUHPerdata). The Book of Civil Law (KUHPerdata) is equivalent in status with Constitution, in Indonesian legal system. The implementation of limitation against freedom of contract through government's intervention cannot be done by regulations that are lower in status than the Constitution. Therefore, only the Constitution or Constitution-Substituting Governmental Decree that have the power to limit the freedom of contract. Moral and social order causes are forms of limitation against freedom of contract. Freedom of contract itself is a value that, in essence, equivalent in weight with the positive interests in Constitution, so that any judge has to evaluate the validity of such agreement by considering the interest of both parties based on the current situation and condition.

THE EFFECT OF WELFARE STATE PRINCIPLE ON LEGAL PROTECTION OF CONSUMERS IN INDONESIA

The 1945 Constitution is a political constitution as well as an economic constitution. One of its most important character as an economic constitution is that the 1945 Constitution contains the idea of welfare state (Asshiddiqie, 2014). Hartono (1986) refers to this as legal state in material sense; it is a legal state that can bring fairness and equality based on the principles of *Pancasila*.

The characteristics of welfare state are also reflected in the Body of the 1945 Constitution of Indonesia; particularly in Articles 33 and 34 (Chapter XIV) concerning National Economy and Social Welfare. Article 33 of the Constitution states that:

- The economy shall be organized as a common endeavor based upon the principles of the family system.
- Sectors of production which are important for the country and affect the life of the people shall be under the powers of the State.
- The land, the waters, and the natural resources within shall be under the powers of the State and shall be used to the greatest benefit of the people.
- The organization of national economy shall be conducted on the basis of economic democracy upholding the principles of togetherness, efficiency within justice, continuity, environmental perspective, self-sufficiency, and keeping a balance in the progress and unity of the national economy.
- Further provisions relating to the implementation of this article shall be regulated by law.

Article 33 of the 1945 Constitution was formulated by Mohammad Hatta as the basis of economic policy for further economic development (Swasono, 1995). It was formulated with considerations regarding the changes in Europe (particularly the Netherland), in which liberal capitalism gradually diminished and neo-mercantilism got stronger. Considering these changes, Mohammad Hatta argued that the global economy in the third world countries at that time tended to develop further away from individualism and closer to collectivism based on social welfare (Swasono, 1995). According to Mohammad Hattaas cited Swasono (1995). further added that: "Indeed, collectivism suits the aspiration of Indonesia. We, Indonesian people—as other Asian people—have based our life upon a principle of collectivism, known as cooperation (*gotong-royong*) principle."

Concerning the system of economy implementation that favors the people, Friedmann (1987)outlines four functions of the state in economy: (1) as provider of public welfare; (2) as regulator; (3) as entrepreneur or operating certain sectors through state owned corporations, and; (4) as umpire to formulate fair standards of performance in economy.

Article 34 of the 1945 Constitution of Indonesia describes the social responsibilities of the government to take care of and satisfy the consumption needs of poor people. Meanwhile, Article 33 stipulates the responsibilities of the state and the rich to realize social welfare through the principles of family system, business enterprises, and economic resources.

In Articles 33 and 34 of the 1945 Constitution, there are stipulations concerning sources of social welfare and prosperity (the objects), entrepreneurs or businessmen (the subjects), forms of endeavors, the utilization of business objects (the production process), and the final objective of the endeavors, i.e. to achieve public prosperity in order to improve social welfare(Friedmann, 1987).

The consideration of consumer protection is one of the forms of welfare state. The importance of legal protection for consumers is due to their weak bargaining position. Legal protection for consumers requires the state to take the side of the weaker bargaining position (Barkatullah, 2009). The role of the state in this situation covers national and international aspects. It means that there is a demand for legal certainty

and assurance while performing transaction in national law, through the formulation of regulations in consumer protection; and in international law, through international agreements or law harmonization (Barkatullah, 2009).

Consumers' rights are so important that some experts believe that consumers' rights are the "fourth generation of human rights," which is the key words in the conception of human rights for future development (Asshidiqie, 2000). State intervention is needed to provide consumers protection in any contract. It is because consumers carry greater risks than businessmen; in other words, consumers' rights are more vulnerable (Makarim, 2003). Due to their weak bargaining position, consumers' rights are prone to violation, disguised in freedom of contract principle(Makarim, 2003).

Legal protection for consumers is a big problem, considering that global competition is rapidly developing. Legal protection is needed in competition and in the market in which various products and services put consumers in weak bargaining position. Legal protection for consumers is formulated in the form of regulations and law implemented by the state (Barkatullah, 2010).

Considering consumers' position, they need to be protected by law since one of the nature and objectives of law is to protect the people. Protection for the people should be realized in the form of legal certainty, which is a right of consumers'. Consumer protection is important because consumers have universal as well as specific rights.

CONCLUSION

Economic theories on the relationship between consumers and producers have implications on the theory of law developed in the age of individual liberty and liberalism domination. Freedom of contract argues that the parties involved are the ones that should determine the content of a contract. Meanwhile the notion of contract relationship states that only the concerned parties have rights and responsibilities in the contract. The doctrines of freedom of contract and contract relationship greatly influence the development of consumer protection law.

Court's acknowledgement of the doctrine of freedom of contract has negative effects on consumers' interests. Firstly, the producers use their powers to put in effect legal contracts consisted of stipulations that benefit the producers. Secondly, producers avoid responsibilities towards third parties that have no legal relationship (contract) with the producers based on the doctrine of *privity of contract*. Thirdly, the implementation of *caveat emptor* principle, which asserts that consumers should be wary and careful in doing transaction with producers, causes the court or legislative bodies to decline being involved in, or intervening, the market.

When a nation develops into a welfare state, there is strong demand for government intervention through laws and regulations that protect people. During this period, nations began to pay special attention to the condition of labors, consumers, small and medium enterprises, and environment. In the concept of welfare state, the nation is required to expand its responsibilities to cover socio-economic matters of the people. This development provides legality for 'interventionist nations' in the twentieth century. A nation needs, and is even obligated, to intervene in various social and economic matters to ensure that social welfare and prosperity of the people is realized. The importance of state's intervention is based on the rapid development of law due to the advancement of technology in this age; which allows for the distribution and dissemination of thoughts to the whole world in the form of consumer movement.

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