

The Principle of Competition Balance In Indonesia's Nationalism Framework

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Abstract

The importance of the role of competition in economic development in order to realize the welfare of the people, then the government should give serious attention to the rules of law, in particular competition law and competition law enforcement issues such business. Based on this background, it can be formulated in this dissertation How embodiment of the principle of balance in the prohibition of monopolistic practices and unfair business competition? How will the principle of balance in the prohibition of monopolistic practices and unfair business competition in the future? So that rules made in the field of competition law and government policies must not distort the market negatively, especially those that can lead to a variety of monopolistic practices and unfair business competition.

Furthermore, the formulation of norms in terms of competition law let really a balance of interests, a good balance between the interests of businesses and public interests or public interests among business people, as well as the balance between private and public interests. In this relationship, the government has issued Law No. 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition. The principle of setting Balance Interest In The preamble and article of Law No. 5 of 1999 so that the principle of balance in the prohibition of monopolistic practices and unfair business competition can reflect equitable proportional to perform the role of the economic and control of resources and economic activities so that the principles of economic democracy is achieved. Standardization of treatment and facilities for small businesses and cooperatives in the face of competition with economic agents or employers in the form of: classifying certain business activities that cater for small businesses and cooperatives, and business fields that can not be penetrated by the larger one, or by specifying the standard value of the business or project that is only allowed to enter small businesses and cooperatives, and should not be entered by large employers. Determination is intended that the standardization of business competition can be run properly, honestly and efficiently, that the principle of economic democracy.

Keywords: Principle of Balance, Competition, Economic Democracy

1. Introduction

The public is often raised questions about whether the healthy competition is in accordance with the national identity that philosophize economy kinship or not? Some even thought that the values of competition as stipulated in Act No. 5 of 1999 on Prohibition of Monopolistic Practices and Unfair Business Competition (Competition Act) and The Commission for the Supervision of Business Competition as an institutional supervisor is entrusted by the IMF, the exploitative neoliberal organization, deify competition, anti-subsidy and anti-national interests.

Thus that kind of pattern of thinking is not wrong when it comes to the time of enactment of the Act and the Commission for the Supervision of Business Competition in 1999 which also coincided with the early effective years of IMF's Letter of Intent (LoI). However if we have to examine further, it appears that the desire to have the instruments and policies which sympathize with healthy competition and anti conglomeration of business structure only launched 10 years earlier by the people through the People's Consultative Assembly of the Republic of Indonesia as in the Directions of Economic Policy of The Guidelines of State Policy 1988 which calls for: (1) development of a democratic economic system that based on the fair market's mechanism with the principles of fair competition; (2) avoiding a monopolistic market structure; (3) optimizing the role of government in correcting imperfections in the market by eliminating all barriers that interfere with market's mechanism. This determination was further reinforced by the People's Consultative Assembly of the Republic of Indonesia's Provision 1998 which raised concern: "the implementation of a national economy which is not really refer to the mandate of Article 33 of the 1945 Constitution of the Republic of Indonesia and tend to show a very monopolistic patterns". This constitutional document suggests that the competition and The Commission for the

Supervision of Business Competition is actually the culmination of Indonesian people's desire who are not satisfied with the business pattern and economic structure in the past. The House of Representatives of the Republic of Indonesia responded by making the Competition Act as the first initiative law in the history of its legislation. Thus, the commitment with the IMF was only stimulant which accelerates the realization of that desire.

If nationalism is defined as a determination to protect the national interest in terms of the small businesses and cooperatives interests, then this Act is already completed the determination explained before. We can take a look at Article 50 which excludes Act on small businesses and cooperatives. Please do note that this Act does not exclude the behavior of businesses, but rather to exclude the subject which are small businesses and cooperatives. This can be interpreted as the state's commitment through the Act, as stated in Article 3 about purpose i.e to create a conducive business climate through the fair competition setting so as to guarantee the certainty of similar business chance for the large enterprise, entrepreneurs of medium and small businesses. With these exceptions, the Act respecting the conditions and efforts to "struggle for live" of small businesses and cooperatives that dominate the figure of our national businesses.

Competition Act is a synthesis of two diametrical points i.e free fight liberalism that embrace free competition without limits and statism that promote ownership and control of the state in the economy. Competition Act is a bridge that ensures competition in the corridor arrangement (vide Article 3 of the Act). This is then known as competition policy (competition policy), in which includes the enforcement and regulation or government policy. If The Commission for the Supervision of Business Competition considers that a sector is too strategic to be released on the competition, with a reason that the technology or product characteristics having high concentration due to lack of investment, The Commission for the Supervision of Business Competition would advise the government to regulate it. If a product needs to be subsidized due to the low purchasing demand by the people, The Commission for the Supervision of Business Competition then asked the government to give them the subsidy.

The Commission for the Supervision of Business Competition's position in the process of liquid fuels's subsidy could be an example in this context. As we know, the Act Number 22 Year 2001 on Oil and Gas which amended the Constitutional Constitutional Court of Indonesia has ordered the government regarding the price regulation which is not confined to the subsidized liquid fuels. The Commission for the Supervision of Business Competition's position supports the subsidies and requested the government to set a limit for the price of non-subsidized liquid fuels, so the competition landscape is subsidized fuel would be available, while non-subsidized liquid fuels's price is also affordable. Business actor competes for the market (a tender to become the distributor of subsidized liquid fuels) and in the market (competing head to head) in the range below the upper limit for the price of non-subsidized liquid fuels. In other words, The Commission for the Supervision of Business Competition is not anti-subsidy. However, The Commission for the Supervision of Business Competition has a hard position when subsidy is used as a weapon to blackmail people with subsidized goods reduction mode. The goal is to control people to buy non-subsidized goods which the volume has reduced and the price is increased before. It is clear that if the nationalism is defined as the spirit to maintain subsidies to help people with low purchasing power, The Commission for the Supervision of Business Competition then became one of the supporters.

Furthermore, if nationalism is defined as state-owned enterprises's (SOEs) control over strategic sectors and a limit on foreign ownership in certain businesses, then The Commission for the Supervision of Business Competition will not sue. In fact, Article 51 of Act justifies SOEs to dominate strategic sectors as a natural monopoly that is respected, as long as it does not abuse its power on it. Similar things have been done when the Act or the government released the upper limit or even closed on foreign ownership, then The Commission for the Supervision of Business Competition will always respect it as long as the it regulates consistently. If this is the case, The Commission for the Supervision of Business Competition will ensure fair competition between domestic businesses without discrimination.

As a result, healthy competition is the identity of Indonesia. It includes a stimulant to compete towards the business structure that is not monopolistic. Ideally, healthy competition is intended to increase consumer and producer welfare by reducing the deadweight loss (economic inefficiency factor). Would not it be better for the people if the price of text message drop and become cheaper? Isn't it great when our small business actors are able compete and have a chance to win the tender because the process is now more transparent? Would it even better if the business license of telecommunications frequencies have now been auctioned, and thus more predictable than how it's used to be when it was very dependent on relations and connections?

In the author's perspective, nationalism is when the prosperity of the people is increased due to reduction of consumer loss because of policy enforcement and fair competition. Thus, a healthy competition that is capable of prospering the people is also considered as a nationalist and heroic struggle. If so, do we still consider a healthy competition as neo-liberalime that deserves to be hated?

2. Research Method

Based on the title and formulation of the problem, the study included in the category of normative legal research. Legal research methods of this type are commonly referred to as a doctrinal legal research or research library. Named doctrinal legal research because the research only refers to the written regulations that are closely related research at the library since it would require legal material that is secondary to the library. In a normative legal research studied law written on various aspects such as aspects of theory, philosophy, comparative, structure / composition, consistency, general description and explanation on each chapter, the formalities and the binding force of a law and the language used is the language of the law.

3. Result and Discussion

3.1. Terminology of Principle of Balance

In the General Dictionary of the Indonesian Language¹ (Ind: Kamus Umum Bahasa Indonesia), principle is defined as something that is the subject of a basic truth or pedestal think (to contend). Whereas in the framework of the law norm, the principle can be interpreted as something to be true which is used as the principal or the basis of preparation of legal norms, both written and unwritten law norms. The principle itself is not always defined in terms of an ordinance, but its existence has always recognized and relied upon the provisions of the law.

Meanwhile, according to General Dictionary of the Indonesian Language², balance means a condition in which different elements are equal or in the correct proportions. In general it can be said that the balance is a state where there is harmony or harmony, and not in the trend of one-sided or biased in a particular case, having regard to their respective proportional components surrounding it.

Some philosophers and jurists associate problems with the balance of justice. Plato was quoted as saying by Theo Huijbers³ illustrate the fairness of the human psyche by comparing it to the life of the state, argued that the human soul consists of three parts, namely the mind (logistikon), feelings and desires both psychic and physical (epithumatikon), a sense of good and evil (thumoeindes). The soul is well organized if produced a harmonious unity between the three parts of it. Justice situated within the limits of the balance between the three parts of the soul in accordance with the reality of each.

Roscoe Pound⁴, an American legal expert said that the law guarantees social cession (social cohesion) and change the social order by balancing the conflicting interests that include:

1. The interests of the individual;
2. Social interests (arising from the general conditions of social life); and
3. The public interests, especially the state interests.

Imam Ali was quoted by Sukarno Aburaera⁵ said "The principle of fairness is a significant principle in maintaining the balance of public and gained public attention. Its application can ensure public health and bring peace to their souls. Instead of oppression, injustice and discrimination will not be able to bring peace and happiness."

Of understanding and opinions of the philosopher and jurist above, it can be concluded, that the principle of balance is a combination of several components that form the basis of harmony, and always contain an element of fairness, which is put in proportion, that if one component is ignored or disturbed, it will result in injustice.

3.2. Principle of Interests Balance in Business Competition

In the era of globalization, the demands and interests of the protection of members of the community in realizing the ideals of the welfare state requires legal order legislation is increasingly widespread. In the theory of Neo Classical⁶, demands economic transformation is no longer simply the pursuit of growth (growth), but further transformation is demanded and pursued a life concerning the scope of the primary needs of global, regional, and national dimension on:

- 1) Equity

¹ WJS.Poerwadarminta, *Kamus Umum Bahasa Indonesia*, (Jakarta: PN.Balai Pustaka, 1976), page.61.

² *Ibid*, page.375

³ Theo Huijbers, *Filsafat Hukum dalam Lintasan Sejarah*, (Yogyakarta: Kanisius, 1986), hlm. 23

⁴ Roger Cotterel, *The Sociology of Law*, diterjemahkan oleh Achmad Ali, berjudul *Bunga Rampai Bacaan Teori Hukum*, hlm. 76.

⁵ Sukarno Aburaera, *Naskah Pidato Guru Besar Tetap*, Fak.Hukum, Universitas Hasanuddin, disampaikan pada tanggal 06 November 2006.

⁶ M.Yahya Harahap, *Pengembangan Yurisprudensi Tetap*, makalah dalam Seminar Hukum Nasional IV, dimuat dalam Pustaka Peradilan Jilid VIII, Proyek Pembinaan Tehnis Yustisial Mahkamah Agung RI, 1995, hlm. 35-36.

That is, a pattern of development that is capable of sustaining a balance between too much and too little power consumption sumder earth. Thus will materialize uniform distribution in the economic role and control of resources and economic activities are evenly distributed throughout society. Economic strength is not stacked centrally in the hands of a man causing gaps that undermine the ideals of economic order Self Government Enterprise or economic unity.

2) Sustainable

That requires increased production economy is not arbitrary drain it out of earth resources and the ability of ecosystems. However desired that every generation recognizes the obligation to maintain power sumberr earth and the ecosystem as a right that must be preserved for the next generation.

3) Inclusiveness

To give and to open the widest possible opportunity to participate playing a role in economic life in order to achieve improved welfare for the whole society. The opportunity is not only given to a small group which could then be considered as centralized which could lead to inequality and social conflict.

As the global economy has changed rapidly, the ideals toward equitable, sustainable and inclusiveness in economic development which demanded by the values of globalization also requires a fast laws and regulations. In general, the law has the objective to create a balance of interests in the form of legal certainty so was born a proportional equity in a prosperous society¹. The balance function also includes the livelihood of the local economy in order to meet their needs. The balance of the order is very important for the economic order embodied in the form of legislation.

For Indonesia, the legal system must be rooted in the values of Pancasila and the 1945 Constitution of the Republic of Indonesia as the basic norm (ground norm) that serves as a source of supreme law. In the preamble and body of the 1945 Constitution of the Republic of Indonesia, the principles of law in the field of economic law and welfare are embodied, both general and specific, as follows:

- 1). That have been stated and implied from 1945 Constitution of The Republic of Indonesia Preamble:
 - a. principles of acknowledgement in Believe in One Supreme God;
 - b. principles of patriotism toward homeland, nation, and country;
 - c. principles of justice and civilized prosperity;
 - d. principles of social welfare;
 - e. principles of freedom of act in humanitarian and justice way, and;
 - f. democratic principle for discussion and agreement.
- 2). That have been stated and implied in the body of 1945 Constitution of The Republic of Indonesia:
 - a. principles of equality in law and government;
 - b. principles of economic interest protection that control livelihood of the people.;
 - c. principles of people prosperity virtue;
 - d. principles of democratic economy;
 - e. principles of rights equality to employment opportunity and decent livelihood;
 - f. principles of the poor and homeless child protection, and;
 - g. principles of family value.
- 3). That have been stated and implied in the explanation of 1945 constitution:
 - a. principles of state law;
 - b. principles of recognition of unwritten law as the source of national law in addition to law and fixed jurisdiction;
 - c. principles of regulations of law hierarchy; and
 - d. principles of noble characters.

These law principles should have been permeated and get a place in Indonesian law provision, either it is direct or implied in law. It can be also in form of principles and aim of these rules. Therefore, there is a hope for the law to take parts in creating equitable and prosper society, or at least reach the aim to create harmonious interest inside the society.

3.3. Economic Principles in Business Competition

¹ Sri Redjeki Hartono, *Hukum Ekonomi...*, *op.cit.* hlm. 35.

The use of economic principles in production, distribution, price fixing activity and even in national income theory is not depending on embraced economic system principles in a country. In any economic system, economic theory was needed to analyze the existing economic problem in that country.¹ Economic principle that held by the business agent will affect the shapes of competition in the market.

Several economic principles that can affect business agent behavior in running their business, namely:

a. Business competition principles

In economic science, business competition is a tool to push someone to get things that he or she need right now so the items that they will purchase can be better than the previous one. Competition is a requirement in order to boost efficiency, production, market transparency, and get suitable profit. Therefore, the business agent must offer their product with best quality and also with the most possible low price. This will indirectly push new technology development to increase productivity with innovation. For consumer, the tighter the competition means they can get lower and competitive price. Judging from law aspect, competition is a right, so this competition must not be eliminated by other party. Law is viewing competition as a right, thus it must be protected and arranged in order to run properly.

b. Principles of Business Maintenance

If the price is smaller than mean cost then total reception is smaller than total revenue, the company is at loss in this state. But if the price is still higher than variable mean cost this means the company can still afford all of the variable cost and some of the fixed cost. In this condition, the company must consider to close their business, with consequence to pay all of the fixed cost, or continuing it, but they have to pay some fixed cost. Company that consider to continue will receive less loss than closing it. Besides that, closing means they will find difficulty to find new market for their later product.

c. Principles to Maximize Profit.

It is fair, if business agents are aiming to get maximum profit from their business. But with more company that enter in certain industry, there will be more items that offered to the consumer, thus this will lower the price and maximum profit will not be acquired.

d. Principle of Vertical Integration.

Inside Black's Law Dictionary, Vertical Integration formulation means: "combination of two or more business on different levels of operation such as manufacturing, wholesaling and retailing the same product".² Meanwhile in Dictionary of Economics second edition, vertical integration is interpreted as element from market structure where a company do consecutive phases in offering their product, this was reversed process from a one-step phase which is horizontal integration.

From definition above, it can be concluded that vertical integration is a behavior or strategy in business world where the business agent is aiming to dominate the production of certain product and services that included in series of production of processed goods whether it is from series of direct or indirect production.

In economic science point of view, vertical integration gives big benefits. This is because the involved company can reduce production and distribution cost with integrating a series of activities. Integration is also important to maintain income and trusted distribution channel, then competitiveness will be maintained. The bigger impact of vertical integration is in the implementation of market process, where in one side it can increase efficiency in terms resource usage. Meanwhile on the other side because limitation in terms of competition it will affect in less efficient resource allocation.

If a company is dominating one or more vertical process, then vertical integration can create a condition of "anti-competition," where the market is closed for other potential competitor.

e. Principles of Price Discrimination

In Black's Law Dictionary, price discrimination is:

"Exists when a buyer pays a price that is different from the price paid by another buyer for an identical product or service. Price discrimination is prohibited if the effect of this

¹ Didiet W. Udjiyanto dan Sri Isworo Ediningsih, *Dasar-Dasar Teori Ekonomi Mikro*, (UPN Veteran: Yogyakarta Press, 1998), page. 7.

² Henry Campbell Black, *Black's Law...*, *op.cit*, page. 35.

discrimination may be to lesson substantially or injure competition, except where it was implemented to dispose of perishable or obsolete goods, was the result of differences in costs incurred, or was given in good faith to meet unequally low price of a competitor.”¹

Meanwhile according to Dictionary of Economic second edition, price discrimination is: “the ability of a supplier to sell same product in several separated markets with different price. This markets can be separated in several ways, this includes different geographical location (for example domestic and overseas market), product characteristic (for example original parts and substitute items of a car), and needs of the consumer (for example industrial and household electricity consumption)”²

In economic science point of view, price discrimination can give profit, then it used as a tool to push a factory to produce items with full capacity so it is possible to get a big scale of economic production. However, the effect of price discrimination can result in a monopoly, especially if profit is the priority.

f. Principles of Price Fixing

According to Black’s Law Dictionary, price fixing is stated as “a combination formed for the purpose of and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity”.³ On the other hand according to Economic Dictionary arranged by Christopher Pass and Bryan Lowes, the meaning of price fixing is act of determining general price for items or services by certain group of suppliers that act together as the reverse activity from a single supplier that free to determine its own price. Price determining is mostly a reflection of irregular oligopoly market.⁴

3.4. Principles of Law in Business Competition

In the field of law, written or unwritten rules is always based on general law principles. These law principles namely:

a. Principles of Freedom to Form a Contract

Principles of freedom to form a contract is a principle that generally accepted in the field of law. Thus, as the law principle that generally acknowledged in international contract, this principle is not only regulated in countries law, it has become a habit in international law field, as stated in UNIDROIT (International Institute for the Unification of Private Law) principle, it is an international principle of freedom to form a contract. Regulation of it in international regulation was based on the idea when freedom of contract is not regulated, it can cause distortion. Otherwise, if the regulation was too strict, it will remove the meaning of it.⁵ In accordance, UNIDROIT is trying to accommodate various interest that hopefully will give solutions to the problem of different law system and other economic interest. According to UNIDROIT, freedom of contract principles was categorized into five forms, namely:

- (a) Freedom to determine contract content
- (b) Freedom to determine contract form
- (c) Contract is binding as law
- (d) Mandatory rules as an exception
- (e) International characteristic and purpose of UNIDROIT principles which must be payed attention in contract interpretation.

Principles of contract in Indonesian civil code have been known and was implied in article 1338 Civil Code, that state:” every agreement that was legally made, will act as law for the makers”. Therefore, the agreement here also must not conflict with current law, binding both side, and generally cannot be withdrawn except with agreement from both sides or based on reasons that have been stated by law. Besides that, provision of article 1338 according to Subekti is loading a statement of every agreement

¹ Henry Campbell Black, *Black s Law...*, *op.cit*, page. 67.

² Christopher Pass dan Bryan Lowes, *op. cit.*, page. 91.

³ Henry Campbell Black, *Black s Law...*, *op.cit*, page. 73.

⁴ Christopher Pass dan Bryan Lowes, *op.cit*, page.101.

⁵ Taryana Soenandar, *Prinsip-Prinsip Unidroit*, (Jakarta: Sinar Grafika, 2004), page.37.

must be held because of good intention. This means that an agreement must not conflicted with decency and justice.¹

Expansion of binding agreement power is also arranged in article 1339 Civil Code, that determine: “an agreement not only bind based on what have been included in the agreement, but also in the property of the agreement is required by justice, practice, and law.”

b. Principles of Justice Certainty

One of the function that stated by law norm is to guarantee existence of law certainty itself. Gustav Radbruch as cited by Esmi Warassih,² stated that there are three basic value that was pursued by law, they are: justice value, law certainty and, law certainty and the benefits. With the existence of law certainty and law norm, then control of people behavior will be more easily to directed, more in order, and as the consequence to offender of existed norm or law rules, there will be an action that function as a sanction that will be applied to the offender.

c. The Principle of Justice

According to the view of Ethical Theory follower, the itself is aimed to find the justice. The content of law is determined by the ethical belief of the fair and the unfair one. The nature of justice according to the Ethical Theory follower lies toward the statement of an action, which are the one who treats and the one who is treated. Difficulty of applying the nature of justice occurs on giving restrictions of the contents were treated and those who were treated. Difficulties in implementing the essence of justice lies in the provision of restrictions on the content of justice, therefore in its practice, there are tendencies to give the statement toward justice that depends to the party receiving treatment alone.³

Aristoteles divides justice into two types, namely distributive justice (*justisia distributive*) which requires each person to get their own rights, and commutative justice (*justisia commutative*) which requires the same rights quantity for everyone. While Roscou Pound saw justice in the concrete results which can be presented to people.⁴

d. The Principle of Balance

The principle of balance is the implementation of good intention principle, honest transaction principle and justice principle. The stability in law is based on large disparity reality in the society. Thus, a certain regulation system is needed to protect the party that are in disadvantageous position. According to *UNIDROIT* principles, one of the party can abort whole or partial individual requirements from contract, if the contract or the requirement illegally gives excessive profits to one party only. These conditions are based on two cases :

(a). the fact that other party has illegally obtained profits from dependency, economy crisis or an urgent need, or from extravagance, unknowingness, lack of experience or experts in bargaining;

(b). the characteristic and the purpose of contract.

According to the principle of balance, one of the party is allowed to cancel the contract if there is *gross disparity* which illegally gives excessive profits to other parties. The excessive profits should be visible when manufacturing the contract. The term “excessive profits” is interpreted as an important difference in price or other elements. It bothers the stability in the implementation and harmony of society, that it can be used as the reason of contract cancellation request through the court. The imbalance is such a great thing that it becomes a peculiarity for people.

e. The Principle of Negotiation in Bad Faith Prohibition

There is an important principle organized by the principles of *UNIDROIT*. This principle is about the scope of good faith principle that applicable since the negotiatiton of certain agreements. According to *UNIDROIT* principles, the law responsibility has occured since the process of negotiation, in which there are valid provisions in this process namely:

¹ Subekti, *Pokok-Pokok Hukum Perdata*, (Jakarta: PT.Intermasa, 1987), page.139.

² Esmi Warassih, *Pranata Hukum, Sebuah Telaah Sosiologis*, (Semarang: PT.Suryandanu Utama), page. 13.

³ *Ibid*, hlm. 24.

⁴ Satjipto Rahardjo, *Ilmu Hukum*, (Bandung: PT.Citra Aditya Bakti), hlm. 50.

- (a) the freedom of negotiation;
- (b) the responsibility of negotiation in bad faith; and
- (c) the responsibility of cancelling negotiation in bad faith.

Those three provisions mean that each person can freely determine the requirements in negotiation, however the negotiation should not contradict with the good faith and fair dealing principles which is organized in *UNIDROIT*. This is an important fundamental to guarantee the healthy competition of the business agent engaged in trading. Furthermore about the responsibility of negotiation in bad faith is limited only on the loss caused by the negotiation toward other party. The aggrieved party could ask the refund of the cost that had been spent in negotiation, and the compensation of opportunity loss in doing contract with the third party, which is also known as negative interest rate. However in this case, there are no obligations to replace the profits that supposed to be obtained from the contract. This is also known as positive interest rate. The rights of cancelling negotiation obeys on the good faith and fair dealing principles, therefore if a tender is already being offered, then the offer can only be withdrawn based of the time limit as confirmed in *UNIDROIT*

f. The Principle of Compensation toward Unlawful Act

In the view of Civil Law, Indonesian Civil Code (KUH Perdata) especially provision Article 1365 can be used as the fundamental opinion in proposing compensation accusation toward the party of fraudulent business competition and/or monopoly which causes disadvantages for other party, with a requirement that the action of the cheating party is included in the definition of unlawful act criteria (*onrechtmatige daad*). The interpretation of unlawful act experiences a development in jurisprudence, in which it is signed by the decision of *Hoge Raad* (the highest judiciary in Netherland) from the phenomenal case of *Lindenbaum Cohen* in 1919.

Before 1919, jurisprudence in Netherland believed that violating the law contradicts with the Constitution, as decided by *Hoge Raad* on 20 February 1852. It declared that "Breaking the law is an act contrary to the law or legislation." . Ever since the decision had decided in the case of *Lindenbaum Cohen* in 1919, there was a major change occurred in giving the definition toward unlawful act, from a brief definition of simply violating Constitution into a wider definition, which can be explained into four criteria of unlawful act, namely :

- 1) contradict with the legal obligations of the subject ;
- 2) violation toward other people subjective rights;
- 3) violation toward the rules of ethics; and
- 4) contradict with the principle of decency, accuracy and caution that should be owned by someone in association with other people or to property of others.

The first and second criteria are related with the written law that is the rules of the old criteria, while in the third and fourth criteria are related with unwritten law, which is a development in Constitution interpretation.

g. The Principle of Fault in Unlawful Act

Schuld or fault is known widely in both civil law and criminal law. To determine whether an action is considered as unlawful act or not, commonly it is questioned that if the action is acceptable or not in the law where there are applicable objectified fault elements in civil law, then the fault is separated from conditions included from the subject, such as age, proficiency, mental condition and others.

In the system of *Anglo Saxon*, the problem of fault is discussed in the theory about *Negligence*, which is narrowly interpreted as the *code of conduct*, inaccurate attitudes or actions and carelessness. In a wide definition it can be an avowed as the part of the theory about unlawful act. The reason behind the existence of *negligence* can be a base of proposing compensation demand toward unlawful act. In the system of *Anglo Saxon*, this is known as "*Law of Tort*". Inside *Law of Tort*, an action can be considered as unlawful act dan can generate a responsibility of compensation, if it is fulfilled the elements of :

- a. *Duty of Care*; and
- b. *Breach of Duty*

4. Conclusion

Each of countries has its own purposes for its nation. For Indonesian, those purposes are written in the preamble of The 1945 Constitution, on fourth line, namely: to form a government of the state of Indonesia which shall (1)

protect all the people of Indonesia and all the independence and the land that has been struggled for; (2) to improve public welfare; (3) to educate the life of the people; and (4) to participate toward the establishment of a world order based on freedom, perpetual peace, and social justice.

That the follow-up arrangement of those purpose of Indonesia people, is applied into the provisions of the articles in The 1945 Constitution. The purposes of Indonesian people especially the purpose of public welfare improvement, are the common purposes in economy development. In Article 33 of The 1945 Constitution states that:

Article 33 section (1):

“The economy shall be organized as a common endeavour based upon the principles of the family system.”

Article 33 section (2):

“Sectors of production which are important for the country and affect the life of the people shall be under the powers of the State”.

Article 33 section (3):

“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.

Article 33 section (4):

“The organization of national economy shall be conducted on the basis economic democracy upholding the principles of togetherness, efficiency with justice, continuity, environmental perspective, self-sufficiency, and keeping a balance in the progress and unity of the national economy”.

The Law of The Republic of Indonesia Number 5 Year 1999 which is one of the regulations in economy, placed economic democracy and balance principle, as stated in Article 2 The Law of The Republic of Indonesia Number 5 Year 1999 as follows: “Business actors in Indonesia must conduct their business activities based on the principles of economic democracy, with due observance of the equilibrium between the interests of business actors and public interest.”

In accordance with the legislation order, thus every products of regulations should not contradict with the values contained in Pancasila and The 1945 Constitution. Started from this idea, a benchmark can be achieved for the principle of balance of interest occurred in the provisions of the articles in The Law of Republic of Indonesia Number 5 Year 1999 toward the values contained in The 1945 Constitution, especially to the economic democracy principle with the principle of justice, togetherness, efficiency, balance principle, sustainable, environment oriented and by keeping the stability of economy development and unity of Indonesia.

As for the criteria which can be used to determine the principle of balance of interest in the law of business competition, it can be derived from several balance benchmarks as follows:

a. The principle of *Monodualistic*

According to the principle of *Monodualistic*, balance is put and measured between the public interests and the individual interest. In its relation with the law of business competition, the principle of *Monodualistic* is placed in:

1. The balance between the business agent interests and the public interests; and
2. The balance between the interests of the business agent with other business agents.

b. The balance between the value of legal and justice certainty.

c. The balance between economic growth and law enforcement.

d. The balance between economics value and social value.

e. The balance between the principle of formal legality and material legality..

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