CONSTITUTIONAL DESIGN OF HETEROGENEOUS SOCIETIES

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ABSTRACT

Objective: This paper sets out to explore the intricacies of the "Constitutional Design of Heterogeneous Society” utilizing the analytical lens of deconstruction. The primary objective is to dissect and comprehend how the constitution in diverse societies functions as a state consensus, offering legitimacy to agencies and institutions that represent the state. The focus extends beyond the mere governance of self-government, aiming to understand how this constitutional framework ensures democratic principles rooted in human rights.

Theoretical Framework: Embedded within the theoretical framework are perspectives from both liberianists and communitarianists. The paper delves into the ideologies of these schools of thought, seeking to understand their implications for the modern constitutional design in heterogeneous societies. The exploration unfolds as we scrutinize the constitution's role in regulating not only the satisfactions of being free but also navigating the delicate balance between individual desires and the collective vision of the society.

Methodology: Employing deconstruction analysis as the chosen methodology, this paper aims to unravel the layers embedded in the constitutional design of heterogeneous societies. Deconstruction, as a critical tool, allows us to dissect the elements that constitute the constitution, unveiling the nuanced relationships between state agencies, institutions, and citizens. Through this methodological approach, we endeavor to offer a comprehensive and insightful examination of the complex dynamics at play.

Results: The analysis reveals a profound conclusion regarding the constitution in heterogeneous societies. It emerges as a state consensus meticulously documented to provide legitimacy for agencies and institutions, portraying them as an "artificial man” vested with the power to regulate citizens. The emphasis lies not solely on self-government but, significantly, on guaranteeing democratic principles anchored in human rights. This exploration draws from the perspectives of liberianists and communitarianists, asserting that the modern constitutional design serves as a constitution in the narrow sense, meticulously regulating the satisfactions of being free.

Conclusion: In the culmination of this paper, we arrive at a compelling conclusion regarding the constitutional design of heterogeneous societies. The constitution, far from being a mere legal document, emerges as a pivotal state consensus. It provides legitimacy to institutions, portraying them as artificial entities tasked with the responsibility of exercising power to regulate citizens. Crucially, the focus of this regulation extends beyond self-government to encompass democratic principles grounded in human rights. As espoused by liberianists and communitarianists, the modern constitutional design is revealed to be a meticulous regulator of the satisfactions of being free, distinguishing it from the unbridled pursuit of individual desires.

Originality/Value: The originality and value of this paper lie in its innovative use of deconstruction analysis to illuminate the nuanced dimensions of constitutional design in heterogeneous societies. By amalgamating perspectives from liberianists and communitarianists, this work contributes to the discourse by offering a unique perspective on the constitution's role in regulating freedom and democracy within diverse social contexts. It brings to light the significance of democratic principles rooted in human rights and emphasizes the delicate balance

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between individual liberties and collective well-being. In doing so, this paper adds a fresh layer of understanding to the evolving landscape of constitutional studies.

Keyword: Constitutional, Design of Heterogeneous, Societies.

PROJETO CONSTITUCIONAL DE SOCIEDADES HETEROGÊNEAS

RESUMO

Objetivo: Este artigo se propõe a explorar os meandros do "Desenho Constitucional da Sociedade Heterogênea" utilizando a lente analítica da desconstrução. O objetivo principal é dissecar e compreender como a constituição em diversas sociedades funciona como um consenso estatal, oferecendo legitimidade a agências e instituições que representam o Estado. O foco vai além da mera governança do autogoverno, visando entender como essa estrutura constitucional garante princípios democráticos enraizados nos direitos humanos.

Estrutura teórica: Dentro da estrutura teórica, há perspectivas de libertaristas e comunitaristas. O artigo se aprofunda nas ideologias dessas escolas de pensamento, buscando entender suas implicações para o projeto constitucional moderno em sociedades heterogêneas. A exploração se desenvolve à medida que examinamos o papel da constituição na regulamentação não apenas das satisfações de ser livre, mas também na navegação do delicado equilíbrio entre os desejos individuais e a visão coletiva da sociedade.

Metodologia: Usando a análise da desconstrução como metodologia escolhida, este artigo tem como objetivo revelar as camadas embutidas no projeto constitucional de sociedades heterogêneas. A desconstrução, como ferramenta crítica, nos permite dissecar os elementos que compõem a constituição, revelando as relações sutis entre órgãos estatais, instituições e cidadãos. Por meio dessa abordagem metodológica, nos esforçamos para oferecer um exame abrangente e perspicaz da complexa dinâmica em jogo.

Resultados: A análise revela uma conclusão profunda sobre a constituição em sociedades heterogêneas. Ela surge como um consenso estatal meticulosamente documentado para dar legitimidade a agências e instituições, retratando-as como um "homem artificial" investido do poder de regular os cidadãos. A ênfase não está apenas no autogoverno, mas também na garantia de princípios democráticos ancorados nos direitos humanos. Essa exploração baseia-se nas perspectivas dos liberacionistas e comunitaristas, afirmando que o projeto constitucional moderno serve como uma constituição em sentido estrito, regulando meticulosamente as satisfações de ser livre.

Conclusão: No final deste artigo, chegamos a uma conclusão convincente sobre o projeto constitucional de sociedades heterogêneas. A constituição, longe de ser um mero documento legal, surge como um consenso fundamental do Estado. Ela dá legitimidade às instituições, retratando-as como entidades artificiais encarregadas de exercer o poder de regular os cidadãos. Crucialmente, o foco dessa regulamentação se estende além do autogoverno para abranger princípios democráticos baseados em direitos humanos. Conforme defendido por liberacionistas e comunitaristas, o projeto constitucional moderno se revela um regulador meticuloso das satisfações de ser livre, distingui-lo da busca desenfreada de desejos individuais.

Originalidade/valor: A originalidade e o valor deste artigo estão no uso inovador da análise de desconstrução para iluminar as dimensões diferenciadas do projeto constitucional em sociedades heterogêneas. Ao reunir perspectivas de libertaristas e comunitaristas, este trabalho contribui para o discurso ao oferecer uma perspectiva única sobre o papel da constituição na regulamentação da liberdade e da democracia em diversos contextos sociais. Ele traz à tona a importância dos princípios democráticos enraizados nos direitos humanos e enfatiza o delicado equilíbrio entre as liberdades individuais e o bem-estar coletivo. Ao fazer isso, este artigo acrescenta uma nova camada de compreensão ao cenário em evolução dos estudos constitucionais.

Palavra-chave: Constitucional, Projeto de Sociedades Heterogêneas.
autogobierno, con el objetivo de comprender cómo este marco constitucional garantiza los principios democráticos arraigados en los derechos humanos.

**Marco teórico:** En el marco teórico se incluyen perspectivas tanto de los liberales como de los comunitaristas. El documento profundiza en las ideologías de estas escuelas de pensamiento, tratando de comprender sus implicaciones para el diseño constitucional moderno en sociedades heterogéneas. La exploración se desarrolla a medida que escudriñamos el papel de la constitución en la regulación no sólo de las satisfacciones de ser libre, sino también en la navegación por el delicado equilibrio entre los deseos individuales y la visión colectiva de la sociedad.

**Metodología:** Empleando el análisis de la deconstrucción como metodología elegida, este trabajo pretende desentrañar las capas incrustadas en el diseño constitucional de sociedades heterogéneas. La deconstrucción, como herramienta crítica, nos permite disecionar los elementos que constituyen la constitución, desvelando las matizadas relaciones entre las agencias estatales, las instituciones y los ciudadanos. Mediante este enfoque metodológico, nos esforzamos por ofrecer un examen exhaustivo y perspicaz de las complejas dinámicas en juego.

**Resultados:** El análisis revela una profunda conclusión sobre la Constitución en sociedades heterogéneas. Emerge como un consenso estatal meticulosamente documentado para dotar de legitimidad a organismos e instituciones, presentándolos como un "hombre artificial" investido del poder de regular a los ciudadanos. El énfasis no reside únicamente en el autogobierno sino, de manera significativa, en garantizar los principios democráticos anclados en los derechos humanos. Esta exploración se basa en las perspectivas de liberianistas y comunitaristas, afirmando que el diseño constitucional moderno sirve como constitución en sentido estricto, regulando meticulosamente las satisfacciones de ser libre.

**Conclusiones:** Como culminación de este trabajo, llegamos a una conclusión convincente sobre el diseño constitucional de las sociedades heterogéneas. La constitución, lejos de ser un mero documento legal, emerge como un consenso estatal fundamental. Proporciona legitimidad a las instituciones, presentándolas como entidades artificiales encargadas de ejercer el poder para regular a los ciudadanos. Y lo que es más importante, el objetivo de esta regulación va más allá del autogobierno para abarcar los principios democráticos basados en los derechos humanos. Tal y como propugnan liberianistas y comunitaristas, el diseño constitucional moderno se revela como un regulador meticuloso de las satisfacciones de ser libre, distinguiéndolo de la búsqueda desenfrenada de los deseos individuales.

**Originalidad/Valor:** La originalidad y el valor de este trabajo residen en su uso innovador del análisis de la deconstrucción para iluminar las dimensiones matizadas del diseño constitucional en sociedades heterogéneas. Al amalgamar las perspectivas de liberales y comunitaristas, este trabajo contribuye al discurso ofreciendo una perspectiva única sobre el papel de la constitución en la regulación de la libertad y la democracia en contextos sociales diversos. Pone de relieve la importancia de los principios democráticos arraigados en los derechos humanos y subraya el delicado equilibrio entre las libertades individuales y el bienestar colectivo. Con ello, este documento añade una nueva capa de comprensión al cambiante panorama de los estudios constitucionales.

**Palabra clave:** Constitucional, Diseño de Sociedades, Heterogéneas.

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1 INTRODUCTION

In the midst of the pragmatism that engulfs the political battles of the modern world, ideological debates have become quiet and are seen as politically irrelevant, as national identity in contemporary political situations both at the national and global levels. The following quote from Chantal Mouffe may need to be reflected upon in order to understand identity properly: "It seems that in the realm of collective identity, it is as if people can create a "collective "

"otherness" that only survives if "they" are destroyed." Mouffe wants to provide insight that there is never a finished identity, there is a never-ending process of collective identity construction. "Niemals Identität, immer Identifizierungen" - "There is never an identity, but a process of identification."

A constitution must be based on identities, the constitution is the body for identities that are under state power. The heterogeneity of identities that exist in society is the spirit of a constitution, a constitution can only run based on its sovereignty if there is a spirit (Geist). K.C. Wheare interprets the constitution in two meanings, namely the constitution in the narrower sense and in the wider sense. A constitution in the narrow sense is not only a collection of rules, written or unwritten (legal or extra-legal), but is a selection of rules that are usually institutionalised in one or more documents. Thus, a constitution in the narrow sense according to Wheare is -a selection of the legal rules which govern the government of the country and which have been embodied in a document. Meanwhile, Wheare defines constitution in a broad sense associated with the opinion of Bolingbroke who said that - by constitution, we mean, whenever we speak with propriety and exactness, that assemblage of laws, institutions and customs, derived from certain fixed principles of reason.... In the broad sense, the constitution is the law made by the representative body, the institutions (of the state), the customs derived from certain fixed principles of reason which compose the general system according to which the community has agreed to be governed. Thus, a constitution in the narrow sense according to Wheare is a documented constitution, specifically one that is institutionalised in a document.

Some understanding of the constitution in a narrow sense can also be seen from the opinions of James Bryce and C.F. Strong. James Bryce, as quoted by C.F. Strong, says that a constitution is - a frame of political society, organised through and by law, that is to say one in which law has established permanent institutions with recognised functions and definite rights.

4 Chantal Mouffe, _über das Politische_. Wider die kosmopolitische Illusion (Frankfurt am Main: Suhrkamp, 2007), p. 12. Hirschl, Ran, From comparative constitutional law to comparative constitutional studies, International Journal of Constitutional Law, 2013, Vol.1, p.1-12 There is no doubt that comparative constitutional law has enjoyed a certain Renaissance since the mid-1980s. However, despite the field’s many scholarly advances, too little has changed since Wigmore’s days with respect to comparative (constitutional) law’s ambivalence towards the social sciences, admiration on the one hand, resentment and exclusion on the other.
7 Ibid.
Bryce's opinion emphasises more on the arrangement of fixed (state) institutions with certain functions and rights. More broadly than the above opinion, C.F. Strong said that the constitution is a collection of principles according to which the power of the government, the rights of the governed, and the relation between the two are adjusted. In addition to the powers of the government, the constitution according to Strong also includes principles governing the rights of the governed (the people) and the relationship between the government and the people. Both opinions are complementary, but Strong's opinion is more complete than Bryce's to describe the meaning of the constitution.

2 THEORETICAL FRAMEWORK

Embedded within the theoretical framework are perspectives from both libertarianists and communitarianists. The paper delves into the ideologies of these schools of thought, seeking to understand their implications for the modern constitutional design in heterogeneous societies. The exploration unfolds as we scrutinize the constitution's role in regulating not only the satisfactions of being free but also navigating the delicate balance between individual desires and the collective vision of the society.

3 THE HETEROGENEITY OF MODERN SOCIETY

Heterogeneity is one of the characteristics of modern society. Life together in modern society is characterised by a diversity of views, values, ideologies and cultural traditions. This diversity not only colours the public sphere, but also infiltrates the private sphere. Referring to John Rawls' A Theory of Justice, Rawls starts from the basic question, what are the characteristics of just social institutions? Rawls does not ask what a just action is or what characterises a good human being. The formal object of the concept of justice is the basic structure of society. Rawls writes: "Justice is the first virtue of social institutions."

Rawls grounds his theory in the intellectual experiment of the original position. Rawls is in the tradition of social contract theory developed by Hobbes, Locke, Rousseau and Kant. He revitalised the long-forgotten tradition of the social contract. His aim was to build an ethical-

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9 Ibid.
argumentative construction of a just society. According to Rawls, participants in the default position have several idealised characteristics: strategic rationality, absence of empathy and envy for one another, physical and mental health, interest in the meaning of justice and the development of a personal concept of happiness. Members in the default position have a certain understanding of alternative basic norms, including historical concepts of justice such as utilitarianism as well as new models including Rawls' own concept of justice.¹²

In this default position, people make decisions behind the "veil of ignorance" (Schleier des Nichtwissens). That means they do not know their future social position and standard of living, gender, identity of origin, interests, attitudes, talents, aptitudes and so on. The choice to be made from the available ethical models in the default position is rule-oriented by selecting the most favourable norm system under the most difficult conditions. Based on the above conditions, Rawls says, participants in the default position will accept two kinds of principles of justice:¹³ Firstly, everyone has an equal right to the broadest basic freedoms that can be matched with similar freedoms for all people. Here Rawls embraces egalitarianism. Freedoms such as the right to speech, the right to follow one's conscience, the right to assembly, and so on must be available in the same way to everyone. Society is not organised fairly if only one group is allowed to express its opinion or all citizens are forced to follow one religion. These freedoms should be as broad as possible, but there are limits too. The limit to one person's freedom is the freedom of all others. It is not fair for me to be so free that others are no longer free.

Secondly, social and economic inequalities are organised in such a way that they: a) favour the least privileged, and simultaneously so; b) are attached to positions and offices that are open to all in circumstances that ensure fair equality of opportunity. The second principle of part a is called the difference principle. In order for society to be organised fairly, it is not necessary that everyone gets the same things. Rawls therefore rejects radical egalitarianism. There may be differences in what is shared in society. But the differences must be such that they favour the least advantaged. The second principle of part b is called the principle of fair equality of opportunity. The existence of an important office or position also results in inequality in society. High positions have always been coveted by people, along with the perks

¹³ Ibid., p. 77.
and privileges attached to them. This should not be considered unfair, provided that these positions are in principle open to everyone.\textsuperscript{14}

There is a relationship between the above principles. The first principle of "as much equal freedom as possible" must be given absolute priority. It can never be overridden by other principles. Economic gain cannot be used as a legitimate basis for violating basic rights. Meanwhile, the principle of "fair equality of opportunity" must be placed above the principle of difference. On the scale of values in the just society that Rawls envisions, the classical human rights of freedom must be placed at the top. Then equal opportunities for all citizens to hold important positions must be guaranteed. Finally, certain socio-economic differences can be accepted in order to improve the welfare of the least privileged.

Relevant to the discussion of social cohesion is that according to Rawls, social cohesion is formed through the rational underpinning of the two principles of justice above.\textsuperscript{15} Since these two principles are considered rational for all human beings, they are the expression of a just society. Social cohesion is built on the two principles of justice, or more concretely, on the liberal-democratic structuring of social institutions.

In contrast to Rawls, Michael Walzer.\textsuperscript{16} Walzer's communitarian thinking emphasises that norms are always anchored in linguistic, cultural and religious communities. Walzer's communitarian thinking emphasises collective morality as the normative basis for judging every action in the community. According to the communitarian perspective humans cannot be thought of as atomistic individuals or "unencumbered self" (Sandel) as designed in liberal anthropology. Human beings in the view of liberals are understood as isolated individuals who float in empty space and are placed in spaces of freedom rights. In reality, say communitarians, humans have always lived in communities, traditions and social ties. A social system that ignores these social aspects and restricts itself to an understanding of human beings as legal persons in spaces of freedom, destroys the social substance of human life and tends to lead society to the dangers of individualisation, atomisation and the destruction of the value of solidarity. Communitarism develops social anthropology by reviving the Aristotelian concept of humans as social beings. The starting point of Walzer's view of justice is the political community that is formed from a collective awareness of common language, history and


\textsuperscript{16} Michael Walzer, Sphären der Gerechtigkeit. Ein Plädoyer für Pluralität und Gleichheit (Frankfurt am Main: Campus Verlag, 1992).
culture. Justice is a relative concept that is always linked to the traditions and structures of each community. Walzer rejects Rawls' view that seeks principles of justice behind the "veil of ignorance". According to Walzer, principles of justice can only be constructed in the context of concrete cultural and historical experiences. Ignoring the concept of value experiences born from cultural and historical contexts is a form of injustice, according to Walzer's thesis. Every community has its own understanding of justice that must be practised and reflected upon. Justice is not a transhistorical abstract principle, but always in the form of concrete realisation. Walzer therefore starts from the view that the social meaning of goods determines their distribution. Distribution is only just in relation to the meaning of those goods in a community. Justice is rooted in "objects that express a shared way of life".17

In contrast to liberalism, communitarianism emphasises social differences in the form of familial, cultural, state or moral community ties. These models of social units are the basis for social cohesion. If these social ties are not given sufficient attention or if the social cohesion order is seen as an abstract formal principle, then there is a danger of the collapse of social ties.

In contrast to liberalism, communitarianism places more emphasis on the aspect of community. Communitarianism is also sceptical of the concept of the rationality of the social order.

4 LEGITIMISING HETEROGENEITY

The relationship between the state and society as developed by communitarians can be used as a model for the relationship between the state and society. In line with the communitarian view, the constitution as the basis of the state (a form of state sovereignty) is a model of the relationship between the state and society.18 requires that the concept of justice and law be based on a view of good life and presupposes the concept of good life. Without the choice of the meaning and value of a good life that is lived and based on ethical-religious and ideological traditions, the modern legal system (rights and justice) will crumble instantly.

From the perspective of communitarianism the constitution can emphasise some of the central issues of the modern state. Modern principles such as democracy and the notion of human rights are the starting point for the substance and understanding of human beings. The notion of human rights as a universal concept needs a locus of contextualisation in Indonesia in order to become part of people's lives. Pancasila prevents the danger of privatising the concept

17 Ibid., p. 443
18 David Held, democracy and the global order: from the modern state to cosmopolitan governance, Polity Press. 1995. P 48
of good life as practised in liberal societies. The constitution with its central role must always be thematised in discourse in the public sphere. Thus the constitution takes part in the process of shaping the collective legal consciousness of citizens.\textsuperscript{19}

The differentiation and atomisation of modern systems of interaction live and function only on the basis of cultural preconditions. A state legal order based on the concept of human rights is indeed a necessary condition, but not a sufficient condition for a just and prosperous society. Even the most rational constitution and laws are no guarantee in fighting against a society that is egoistic, intolerant, familiar with violence, authoritarian culture, and totalitarianism.

The existence of the constitution guarantees legal autonomy to citizens as juridical persons to build communitarian relationships with others. The tension-filled dialectic between state, justice and society can be seen in Ernst Wolfgang Böckenförde’s statement: "Der freiheitliche, säkularisierte Staat lebt von Voraussetzungen, die er selbst nicht garantieren kann".\textsuperscript{20} A modern democratic state can only legitimately exist if it is able to guarantee and protect the freedom of its citizens. On the one hand, individual freedom is the purpose and basis of a state's existence. However, on the other hand, the core of this freedom, namely conscience, should never and cannot be regulated according to the norms of positive law. This is because when the state through positive law enters into the private realm of freedom of conscience, it has actually become totalitarian.

Human freedom is revealed through autonomous decisions and the consideration of conscience, which can never be and cannot be intervened by outside agencies. Freedom can only regulate itself from within, from the moral substance of each individual and the homogeneity of a society. The danger of totalitarianism begins to peek when the state, for example through positive law, wants to regulate the conscience and personal virtues of citizens. Here the state has the ambition to regulate everything, including the way of thinking and morality of its citizens, which it should not be able to do. Such state ambition creates conflict and endangers public peace because it denies the plurality of cultures, religions, behaviours and freedom of thought in a modern state.\textsuperscript{21}

\textsuperscript{19} Prasetyo, Kukuh Fadli (2019) "TWO IDEAS OF ECONOMIC DEMOCRACY: CONTEXTUAL ANALYSIS ON ROLE OF INDONESIAN CONSTITUTIONAL COURT AS A GUARDIAN OF DEMOCRACY," Indonesia Law Review: Vol. 9: No. 1, Article 5. DOI: 10.15742/ilrev.v9n1.357 Available at: https://scholarhub.ui.ac.id/ilrev/vol9/iss1/5
\textsuperscript{20} Ernst Wolfgang Böckenförde, \textit{Staat, Gesellschaft, Freiheit. Studien zur Staatstheorie und zum Verfassungsrecht} (Frankfurt am Main: Suhrkamp, 1976), p. 60.
Constitution with the spirit of heterogeneity does not mean that it does not dismiss the distinction between the state and society, between juridical and ethical personalities and wants to revive a state of "truth" (religious regime, ideology, worldview). Because the tendency of heterogeneity that is sublimated by intolerant communitarianism always appears in the forms of fundamentalism, fascism, capitalism, liberalism, which range to carry out terror and justify violence to eradicate other groups. By hijacking procedural democracy, these isms have succeeded in creating and passing a number of anti-multicultural laws such as laws and hundreds of local regulations with capitalist and liberal nuances. The aspiration to build a state based on a particular ideology is a setback in the history of human civilisation. To overcome this, procedural democracy must be complemented by the substance of democracy (constitution) that limits the arbitrariness of power and the arbitrariness of the will of the majority and power holders. The substance of democracy is human rights.  

Habermas in his works encourages emancipation and democracy, mobilises people to participate in the socio-political process and contributes more to public discourse. The basic idea of his philosophy stems from the situation of ordinary daily conversations. Habermas emphasises that it is impossible for humans not to talk to each other. In conversation, they communicate in different ways. That is the basic idea of discourse theory. So language is not only a form of intersubjectivity, but also simultaneously a fundamental step towards emancipation and communication. For with the utterance of the first sentence "is also clearly expressed the intention of a universal and non-coercive consensus".

The basis of this theory of democracy is a concept of society that is built on three components: the Lebenswelt, the public sphere (Öffentlichkeit) and the system. In the Lebenswelt or lifeworld are anchored models of human communication. Intuitively, humans act communicatively and seek communication in the context of everyday life. Meanwhile, the principle of publicity is tasked with capturing all the issues that arise in the Lebenswelt and voicing them in the public sphere and putting pressure on the political system. The realm of systems regulates that human also act strategically, meaning that they pursue certain goals functionally.

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24 Jürgen Habermas, Technik und Wissenschaft als Ideologie (Frankfurt am Main: Suhrkamp,1968), p.163.
By referring to the fundamental experience of communication, humans ethically recognise that norms can only be recognised as legitimate if they can be agreed upon by all. The principle of discourse ethics is, "that only those norms can claim validity that have the (anticipatory) consent of all those participating in the practical discourse". Behind this principle lies the assumption that a person who begins to argue implicitly always already accepts the rules of communication that he cannot deny. Whoever speaks must always have accepted these rules, otherwise he will be trapped in a performative contradiction. So discourse ethics stems from the reality of human Lebenswelt. Discourse ethics is a formal ethics. In the tradition of Kantian enlightenment, Habermas believes that humans can communicate rationally and build consensus (in the state called constitution) in a discourse.

This communicative rationality provides the basis for a dialogical ethic. Norms for common life can only be extracted from dialogical argumentation and not from monological intellectual speculation. In many of his works Habermas succeeds in showing how philosophical views can be applied politically. One example is the concept of "deliberative democracy". This means that the process of opinion and will formation must be institutionalised. This way, as many citizens as possible can participate in discourses on critical questions of common life. Spontaneous, creative and decentralised publicity ensures a plurality of public opinion. The goal of this process is a communicatively formed rational consensus. Only in this way can the norms of common life gain sufficient legitimacy and encourage citizens to apply them in their respective Lebenswelt.

On the basis of the above considerations, for Habermas social cohesion succeeds or becomes a legitimate goal if deliberative structures and procedures are established that support the ethical view of discourse. If society creates a procedure in which all relevant people take part in it and the purpose of the procedure is the building of rational consensus for social conflicts, then the deliberative design is a guarantee for social cohesion or unity. Constitution as a result of deliberative procedures that illustrate communicative rationality strengthens unity in Indonesia's heterogeneous society.

In the 1980s with Ernesto Laclau, Mouffe laid the social philosophical basis for her view of democracy. The social, according to Mouffe, does not unfold positively before us, but constantly actualises itself as a complex form of discursivity. For Mouffe, it is not reference to the empirical world that creates meaning, but meaning is only constructed in the midst of social

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25 Jürgen Habermas, Faktizität und Geltung (Frankfurt am Main: Suhrkamp, 1992).
and political discourse. Discourse is a social totality that is always changing dynamically. Based on this dynamic and the impossibility of reducing the social to a single meaning, society is always questionable and fragile. Therefore, new discourse battles always emerge to stabilise the discourse. And this condition is known as the political. Drawing on Carl Schmitt's political philosophy and theory of the state, Mouffe presents his views. The essence of the political according to Schmitt is the distinction between friend and foe. Society is made up of collective identities that inevitably exclude and fight each other. Here Schmitt begins to criticise liberalism. Firstly, liberalism, Schmitt argues, is too focused on the individual and ignores collective identities. Secondly, liberalism is also too confident in the ability of social consensus.

Mouffe shows her sympathy for the concept of democracy as a pluralisation of these political struggles. However, Mouffe is at odds with Schmitt because Schmitt's considerations tend to produce a totalitarian society. Mouffe therefore advocates a conceptual transformation from the inevitable antagonism of social forces to agonism. It is not the enemy (Feind), but the opponent (Gegner) whose position can be vigorously contested in a democracy. The concept of opponent reveals that everyone has the right to defend his or her position. In a sense, opponents are understood as legitimate enemies.

From the perspective of radical democracy, Mouffe criticised Habermas' concept of deliberative democracy. According to her, Habermas and other liberal thinkers fail to understand the political as an open arena of struggle. Of course, Mouffe does not understand the fight as a debate between individuals, but rather a fight in the midst of discourse realities. Therefore, in her considerations, she pays special attention to discursively structured power relations. The second criticism is that liberal democratic theories ignore relations within a society. Like Walzer, Mouffe emphasises the moment of militancy (Leidenschaft) which he interprets as the driving force of the democratic process. "Politics is always linked to a dimension of militant partisanship. That is precisely what is missing today in the glorification of democracy without militancy and partisanship."


5 CONCLUSION

Constitutions in heterogeneous societies are documented state consensus to provide legitimacy for the government to represent the state as an artificial man to exercise power to govern its citizens, guaranteeing democratic principles based on human rights rather than self-government. As espoused by liberianists and communitarianists, it can be argued that modern constitutional design is indeed a constitution in the narrow sense of regulating the satisfactions of being free, but not the fruits of the blooming of desire.

REFERENCES

Chantal Mouffe, Über das Politische. Wider die kosmopolitische Illusion (Frankfurt am Main: Suhrkamp, 2007),

David Held, democracy and the global order: from the modern state to comopolitan governance, polity press. 1995.

Ernst Wolfgang Böckenförde, Staat, Gesellschaft, Freiheit. Studien zur Staatstheorie und zum Verfassungsrecht (Frankfurt am Main: Suhrkamp, 1976),


John Rawls, Eine Theorie der Gerechtigkeit (Frankfurt am Main: Suhrkamp, 1979/1971),

Jürgen Habermas, Faktizität und Geltung (Frankfurt am Main: Suhrkamp, 1992).

Jürgen Habermas, Moralbewusstsein und kommunikatives Handeln (Frankfurt am Main: Suhrkamp, 1983),

Jürgen Habermas, Technik und Wissenschaft als Ideologie (Frankfurt am Main: Suhrkamp, 1968).

K.C. Wheare, Modern Constitution, Oxford University Press, London, 1975,


Michael Walzer, Sphären der Gerechtigkeit. Ein Plädoyer für Pluralität und Gleichheit (Frankfurt am Main: Campus Verlag, 1992)


Prasetyo, Kukuh Fadli (2019) "TWO IDEAS OF ECONOMIC DEMOCRACY: CONTEXTUAL ANALYSIS ON ROLE OF INDONESIAN CONSTITUTIONAL COURT AS A GUARDIAN OF DEMOCRACY," Indonesia Law Review: Vol. 9: No. 1, Article 5. DOI: 10.15742/ilrev.v9n1.357 Available at: https://scholarhub.ui.ac.id/ilrev/vol9/iss1/5


