

CONSTITUTIONALIZED BUT NOT CONSTITUTE: THE CASE OF RIGHT TO SOCIAL SECURITY IN INDONESIA

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Abstract

Previous studies on the development of socio-economic rights in Indonesia heavily focus on the Constitutional Court's decisions in upholding the rights. But there is still minimum study on the political economy behind the development of socio-economic rights in Indonesia. This article will analyze the development of socio-economic rights through the lenses of the right to social security. This article relies on two major theoretical frameworks to analyze the development of the right to social security in Indonesia. The first theoretical framework is the authoritarian constitutionalism in the economic sphere. The second theoretical framework in this article is Kathrine Young's theory of the construction of socio-economic rights. This article postulates that the rights to social security has been constitutionalized but not constituted in Indonesia for several reasons. First, and foremost, the legacy of authoritarian constitutionalism that prioritizing economic growth over the fulfilment of social economic rights. The "growth" ideology has contributed to the discrepancy between the constitution and reality, in which the government merely considers protection of socio-economic rights as extra cost, which will hamper the growth of the economy. Second, the lack of philosophical and comparative analysis in the interpretation of rights to social security. Third, the transformation of the Court as a detached court in the enforcement of the rights to social security. The element of detachment is clearly seen in the Court's

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too much deferral to the Executive and Legislative branches in defining the scope and meaning of the right to social security. Finally, the failure of social movement to create a new narrative on injustice and the importance of rights to social security.

Keywords: Authoritarian Constitutionalism, Indonesia, Constitutional Court, Judicial Review, Right to Social Security, Social Economic Rights.

I. INTRODUCTION

The establishment of a new constitutional court, i.e. the Indonesian Constitutional Court and the inclusion of socio-economic rights were among the outcomes of the constitutional reform in Indonesia. But these two pivotal inclusions Constitutional Court do not automatically resolve the issues of growing income and wealth inequality in Indonesia. While the last four administrations (Wahid, Megawati, Yudhoyono and Widodo) have advocated for the social safety net policies, the government has been struggling to deal with the issue of wealth and income inequality in recent decades.

The current President Joko Widodo, commonly known as Jokowi, has made increasing the welfare of citizens and addressing social inequality key priorities of his presidency. The Jokowi administration has advocated the social safety net policies, the National Health Insurance-Healthy Indonesia Card, and the educational program through the Smart Indonesia Program. Nevertheless, these policies do not seem to have been implemented in the context of the fulfillment of socio-economic rights. At the same time, the Constitutional Court has not been successful in defining the scope and meaning of socio-economic rights, and it often defers to the Executive and Legislative branches of government to give the normative meaning of the rights. The civil society and people organizations also have limited success in claiming socio-economic rights, and the Jokowi administration has mostly hijacked their agenda.

This article will analyze the development of socio-economic rights through the lenses of the right to social security. The right to social security deserves attention because it is not only aimed to extend benefits to citizens, but also to advance social and economic rights through complex social policies. In other

words, the government's policies on social security and the Court's decisions on the issues are the miniature of the struggle to constitute the socio-economic rights in the Indonesian political and legal system. Moreover, with a major objective to universalize health insurance and pensions in Indonesia, the Indonesian government has an ambitious attempt to deliver particular forms of social economic protection on a national scale.

1.1. The Authoritarian Constitutionalism in the Economic Sphere Framework

This article relies on two major theoretical frameworks to analyze the development of socio-economic rights in Indonesia. The first theoretical framework is the authoritarian constitutionalism in the economic sphere. Michael Albertus and Victor Menaldo argue that one key function of authoritarian constitution is to consolidate a new distribution of power, which includes economic power.¹ To accomplish this goal, an authoritarian regime can use constitution to weaken or destroy some sources of political and economic power of certain group and distribute those sources to a new autocratic coalition.² According to Albertus and Menaldo, there are two features of political economy of authoritarian constitution: first, authoritarian constitutionalism can enable a dictator to co-opt threats to his rule and create stronger property rights protection for his array of supporters. Second, authoritarian constitutionalism usually linked to higher private investments rates, so that the regime can generate financial resources to sustain their rule.³ These features suggest that authoritarian constitutionalism can also have other consequences beyond serving the regime's political interest.

Before jumping into the discussion, a few caveats and clarifications are necessary about the authoritarian constitution and authoritarian constitutionalism. Constitutionalism is not necessarily applicable to all states that have written constitutions, even if such constitution contains

¹ See Michael Albertus and Victor Menaldo, "The Political Economy of Autocratic Constitutions," in *Constitutions in Authoritarian Regimes*, ed. Tom Ginsburg and Alberto Simpser (New York: Cambridge University Press, 2014), 53.

² Albertus, "The Political Economy," 58.

³ Albertus, "The Political Economy," 54.

institutional arrangement and individual rights. For example, the 1982 Constitution of People's Republic of China (hereinafter "PRC") contains the Fundamental Rights and Duties of Citizens, but the PRC was fully authoritarian. In this article, I define the authoritarianism in a general term, in which the dictator or the autocrat usually makes all decisions that both formally and practically cannot be challenged.

Mark Tushnet has described two other versions of non-liberal constitutionalism: the "mere" rule of law constitutionalism and authoritarian constitutionalism.⁴ The "mere" rule-of-law constitutionalism implies "the decision maker conforms to some general procedural requirements and implements decisions through, among other things, independent courts, but the decision maker is not constrained by any substantive rules regarding, for example, civil liberties."⁵ In general, the system under the mere rule of law constitutionalism satisfies the minimum core of the rule of law requirement; the government is limited by law, but it may alter the laws whenever it discovers a problem. The government usually respond to the law after it encounter some obstacles and it alters the laws according to the procedural requirement.⁶

Some characteristic of the authoritarian constitutionalism according to Tushnet are the following: the regime is controlled by a domination party; the regime does not arrest political opponents arbitrarily, but it may impose a variety of sanctions; the regime allow reasonable open discussion and criticism of its policies; the regime operates reasonably free and fair elections; the dominant party is sensitive to public opinion and alters its policies to response to public views; there is a mechanism to ensure that the amount of dissent does not exceed the level it regard as desirable.⁷

Drawing from Tushent's formulation, this paper tries to analyze some characteristic of constitutionalism in Indonesia. In the case of Indonesia,

⁴ Mark Tushnet, "Authoritarian Constitutionalism: Some Conceptual Issues," in *Constitutions in Authoritarian Regimes*, ed. Tom Ginsburg and Alberto Simpser (New York: Cambridge University Press, 2014).

⁵ Mark Tushnet, "Authoritarian Constitutionalism," *Cornell Law Review* 100, no. 2 (January 2015): 391, 396.

⁶ Tushnet, "Authoritarian Constitutionalism: Some Conceptual Issues," 39.

⁷ Tushnet, "Authoritarian Constitutionalism: Some Conceptual Issues," 45.

Soeharto's New Order regime (1966 – 1998) was operating under the framework of absolutist constitutionalism, in which General Soeharto made the decision alone and his decision can't be challenged formally and practically. The New Order regime manipulated the election with fraud and intimidation in a systematic way. Moreover, the regime arrested political opponents arbitrarily and it does not allow any dissents.

There are two features of political economy of New Order regime: first, Soeharto protected the economic interest of his main allies, i.e., the military and conglomerates; second, the regime encourage private foreign investment (in addition to the oil revenues) with the hope for stimulating economic activity and therefore economic growth, and, eventually sustaining their rule.⁸ The emphasis on economic growth was also coupled with social programs in the education and health care sector, and primary in the agriculture sector, with the emphasis on food security.⁹ Nevertheless, the emphasize on economic growth will trump the social programs, as those programs will depend upon the flow of foreign investments.¹⁰ Based on the combination of two features of political economy of the New Order regime, one can label the regime as the authoritarian-crony capitalist regime.

Authoritarian-crony capitalism was put to halt in 1998 after the fall of Soeharto. Nevertheless, from 1999 to 2014, there was no new political-economic system that emerged or consolidated to replace the New Order's authoritarian – crony capitalism. This period was a period of contestation between many new political forces and the old one.¹¹ In the realm of

⁸ See Richard Robison, *Indonesia: The Rise of Capital* (North Sydney, NSW, Australia: Allen & Unwin, 1986).

⁹ For an analysis on the New Order Regime and Food Security policy, please see Jamie Davidson, "Then and Now: Campaigns to Achieve Rice Self-Sufficiency in Indonesia," *Bijdragen tot de Taal-, Land- en Volkenkunde* 174 (2018): 188–215.

¹⁰ For a detailed analysis on the role of investments and economic growth during the New Order regime, please see Rizal Mallarangeng, "Liberalizing New Order Indonesia: Ideas, Epistemic Community and Economic Policy Change, 1986 – 1992," (PhD diss., the Ohio State University, 2000). See also Rizal Mallarangeng, *Mendobrak Sentralisme Ekonomi Indonesia* [Breaking the Economic Centralism in Indonesia] (Jakarta: Kepustakaan Populer Gramedia, 2002), 1986-1992.

¹¹ For an excellent analysis of the political economic in the post New Order period, please see Vedi R. Hadiz and Richard Robison, "The Political Economy of Oligarchy and the Reorganization of Power in Indonesia," in *Beyond Oligarchy: Wealth, Power and Contemporary Indonesian Politics*, ed. Michael Ford and Thomas B. Pepinsky (Ithaca, New York: Southeast Asia Program, Cornell University, 2014).

constitutionalism, there was a series of constitutional reforms that took place from 1999 to 2002. The constitutional reforms have generated a new constitutionalism that stand in between a “mere-rule” of constitutionalism and authoritarian constitutionalism. The dominant party system has gone, and the new regime has run reasonably fair and free election. While, the government does not arrest political opponent arbitrarily, it still imposes a variety of sanctions against the opposition and political dissidents. Moreover, the government still ensured that the amount of dissent does not exceed the level that it regards as tolerable.

The rise of Jokowi in 2014, however, restored the authoritarian constitutionalism in the economic sphere, in which Jokowi emphasize infrastructure and economic growth, with a clear focus towards making it easier for foreign investors to invest in Indonesia.¹² While the military has (partially) retreated from the political and economic arena, President Jokowi and his allies in different political parties still maintain a cozy relationship with large number of private conglomerates. Consequently, the Jokowi administration could not mobilize significant scale of capital from Indonesia a by increasing taxes for the private conglomerates. As his administration cannot impose taxes for the private conglomerates, Jokowi then has to use the same playbook as Soeharto, which is to rely on foreign investment. Indeed, Jokowi has been advocating social security policies, but the priority of his administration is about the economic growth. The “growth” ideology, however, has contributed to the discrepancy between the constitution and reality,¹³ in which it merely considers the protection of socio-economic rights as the extra cost that will hamper the growth of the economy.

¹² For a detailed analysis of the political economy of Jokowi’s administration, please see Max Lane, “Amidst Indonesia’s Nationalist Atmospherics: The Changing Politics of Jokowi’s Economics,” *ISEAS Perspective*, no. 64 (2015).

¹³ The core argument in this article was inspired by the analysis of the co-relation between neoliberalism and socio-economic rights in South Korea. Please see Joo-Young Lee, “Neoliberal Developmentalism in South Korea and the Unfulfilled Promised of Economic and Social Rights,” in *Economic and Social Rights in a Neoliberal World*, ed. Gillian Macnaughton & Diane F. Frey (Cambridge University Press, 2019).

1.2. Young's theory on constituting socio-economic rights

The second theoretical framework in this article is Kathrine Young's theory of the construction of socio-economic rights.¹⁴ Young's theory clarifies the Indonesian Constitutional Court's approach to judicial review. Like many newly established constitutional courts, the Indonesian Constitutional Court are still struggling to develop legal or doctrinal approach to decisions. Therefore, one must take many other factors into account in understanding the Court. Young postulate three crucial elements for the construction of socio-economic rights: interpretation, enforcement and contestation. First, the methods of interpreting social and economic rights are achieved through a combination of philosophical and comparative legal analysis.¹⁵ For instance, there is a trend among the judges in different jurisdictions to refer to the notion of human dignity or the "minimum core" created by the United Nations of Economic, Social and Cultural Rights.¹⁶

This article argues that the constitutional guarantee of socio-economic rights and the ratification of the International Covenant on Economic Social and Cultural Rights have failed to be constituted as part of legal and social norms in Indonesia. The Constitutional Court decisions on the socio-economic rights, especially on the right to social security, are neither based on the concept of minimum core nor the human dignity. Moreover, the Court did not interpret the socio-economic rights in light of the notion of individual rights, in which the rights holder can demand the enjoyment of the ensured rights. Instead, the Court has interpreted socio-economic provisions as obligation on the state to ensure citizens would enjoy social security benefits. The bottom line is that there is lack of philosophical and comparative analysis in the Court's interpretation of rights to social security.

¹⁴ Katharine Young, *Constituting Economic and Social Rights* (Oxford: Oxford University Press, 2014).

¹⁵ Young, *Constituting Economic*, 27-31.

¹⁶ Young, *Constituting Economic*, chapter 2 and 3. The Courts in South Africa, India, Germany, and Canada are examples among many domestic courts that draw on the concept of human dignity in their decisions. In the meantime, the Colombian Constitutional Court is the exemplar of the domestic court that chose to accept a minimum core requirement.

Young's second dimension of constituting social rights is the process of enforcement of the rights. Young explains that there are two wrong models of enforcement; first, judicial usurpation, which occurs when the judiciary interprets the rights by assuming control of the political system, and, second, the abdication models, in which the judiciary decline to protect constitutional rights.¹⁷ Apart from these wrong models, Young posited five different typologies of judicial review in socio-economic rights adjudication. First, *deferential review*, in which the court defer the substantial interpretation of socio-economic rights to the elected branches.¹⁸ Second, *conversational review*, in which the Court engages in the interbranch dialogue to resolve the scope and meaning of rights.¹⁹ In the third model, *experimental review*, the court seeks to engage the stakeholders – government, interest groups and political parties in providing immediate steps toward solution of the enforcement of socio-economic rights.²⁰ A fourth type of review is *managerial review*, which occurs when the court is not only prescribe the substantive content of the right and its remedies, but also involve in the ongoing supervision of the detailed plans of the implementation of the remedies.²¹ Finally, *preemptory review*, which involve rigorous scrutiny of government legislation and the court might overturn the legislation and followed by the issuance of remedies in the form of positive obligation.²²

In the context of right to social security in Indonesia, this article argues that the Court has failed to engage in a meaningful review of the rights. The Court gives to the Executive and Legislative branches too much leeway in defining the scope and meaning of the right to social security. One of the major recurring issues raised before the Court is the issue of mandatory participation in the social security program. In the last decade, the Court had consistently deferred to the Executive and Legislative branches to determine

¹⁷ Young, *Constituting Economic*, 134.

¹⁸ Young, *Constituting Economic*, 143 -147.

¹⁹ Young, *Constituting Economic*, 147 -150.

²⁰ Young, *Constituting Economic*, 150 -155.

²¹ Young, *Constituting Economic*, 155 – 162.

²² Young, *Constituting Economic*, 162 – 166.

the existence of mandatory participation in the social security program. Nonetheless, the Court had defined the obligation for the employers to charge the premium to their employees could be understood as a social security tax. For the Court, such tax is necessary for the government to maintain the national insurance system. Indeed, the compulsory participation is a delicate issue, yet the Court should be more proactive in finding a balance between government's reliance on the compulsory premium and individual citizens who want to keep their own doctor. In sum, the Court has chosen a deferential model and decide that the decision-making authority on right to society security is placed on the elected branches of government.

Finally, Young posits that the legal meaning of socio-economic rights is the product of social movements.²³ She believes that social movements are instrumental in constituting socio-economic rights through contestation, mobilization, agitation, articulation and insistence upon the fundamental importance of socio-economic rights. For Young, through constitutional contestation, social movements are capable to create a new “constitutional culture” in three different ways.²⁴ First, the movement is successful in creating a new constitutional vision; second, the movement provides an alternative presentation of the orthodoxies that exclude socio-economic rights; finally, the movement engages in framing the injustice, by creating a new narrative about injustice that form a new consciousness and support for socio-economic rights.

This article posits that the social movements in Indonesia has contributed to the creation of the new narrative on the rights to social security prior to the adoption of the law. Indeed, the advocacy group under the banner of Social Security Action Committee has mobilized and pushed for the adoption of social security legislation. Nevertheless, the social movements have stop short because it does not continue the contestation by litigation in the Constitutional Court. Most of the claimants that came before the

²³ Young, *Constituting Economic*, 223-225.

²⁴ Young, *Constituting Economic*, 23-234.

Court on right to social security are individual workers or political activists that has a different constitutional vision.

In sum, this article postulates that the rights to social security has been constitutionalized but not constituted in Indonesia for several reasons. First, and foremost, the legacy of authoritarian constitutionalism that prioritizing economic growth over the fulfilment of socio-economic rights. Second, the lack of philosophical and comparative analysis in the interpretation of rights to social security. Third, the Court has transformed itself as a detached court in the enforcement of the rights to social security. The element of detachment is clearly seen in the Court's too much deferral to the Executive and Legislative branches in defining the scope and meaning of right to social security. Finally, the failure of social movement to create a new narrative on injustice and the importance of rights to social security.

II. CONSTITUTIONAL GUARANTEE OF SOCIAL AND ECONOMIC RIGHTS IN INDONESIA

2.1. The Second Amendment

The Second Amendment of the 1945 Constitution in the year of 2000 adopted a lengthy provision of Bill of Rights. Nevertheless, despite its impressive results, there was no significant philosophical debate on the idea of human rights.²⁵ A plausible explanation for the lack of debate was because the Bill of Rights in the Second Amendment was based on the Human Rights Law.²⁶ Presumably, the drafters believed that they had discussed the issue during the passing of the Human Rights bill, and, therefore, they could quickly move to adopt those provisions without any further debate.²⁷

But, looking back at the drafting of the Human Rights bill, one can question the commitment of the drafters in entrenching the Bill of Rights in the top hierarchy of constitutional values. The then Minister of Justice

²⁵ See Denny Indrayana, *Indonesian Constitutional Reform, 1999-2002* (Jakarta: Kompas Book Publishing, 2008), 217 - 221.

²⁶ Law No. 39 of 1999 on the Human Rights.

²⁷ For instance, Muhammad Ali from PDIP argued the protection provided in the Human Rights Law and the MPR decree on human rights was more than enough. See Indrayana, *Indonesian Constitutional Reform*, 217.

Muladi stated that the Government had selected those rights from the Universal Declaration of Human Rights (UDHR), which did not conflict with the spirit of the nation, the 1945 Constitution, and the Pancasila.²⁸ For example, the Second Amendment recognizes the right to choose a religion but does not include the right to change one's religion. Thus, the Bill of Rights in the Second Amendment has been customized in a manner considered to be reflective of the spirit of authoritarian constitutionalism.

The Second Amendment guarantees a catalog of socio-economic rights. But the Socio-Economic rights provision in the new Constitution is somewhat limited. The Second Amendment only provides a single primary provision on socio-economic rights in Article 28H, which are included the rights to housing, healthy environment, medical care,²⁹ and the right to social security.³⁰ In addition, the Fourth Amendment, in 2002, stipulates that "every citizen has the right to education"³¹ and it required an education budget of 20% of the national budget.³² There is a contrast between the Indonesian Second Amendment and the Universal Declaration of Human Rights (UDHR). In the UDHR, at least six provisions explicitly guarantee socio-economic rights, including the right to food, clothing, housing, medical care, education, and leisure.³³ The provision of the socio-economic rights in the Indonesian Constitution is not as comprehensive as the UDHR.

Indonesia ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR) in 2005³⁴ long after the adoption of the Second Amendment. While the ratified international treaties have the same effect as domestic law,³⁵ the language of socio-economic rights in the ICESCR has not been part of the common vocabulary in the political and legal discourse

²⁸ Nadirsyah Hosen, "Reform of the Indonesian Law in Post-Soeharto Era (1998 -1999)" (Ph.D. diss., the University of Wollongong), 243.

²⁹ The 1945 Constitution of the Republic of Indonesia, Art 28H (1).

³⁰ The 1945 Constitution of the Republic of Indonesia, Art 28H (3).

³¹ The 1945 Constitution of the Republic of Indonesia, Art 31 (1).

³² The 1945 Constitution of the Republic of Indonesia, Art 31 (4).

³³ The Universal Declaration of Human Rights, Art 22-27.

³⁴ The United Nations recorded that Indonesia formally ratified the Covenant on Feb 23, 2006. Nevertheless, Indonesia adopted the Covenant into domestic law on October 28, 2015.

³⁵ The Covenant was adopted into Law No. 11 of 2005.

in Indonesia. First, the Committee on Economic, Social and Cultural Rights has emphasized on the notion of “minimum essential levels of each of the rights”,³⁶ which related to essential foodstuffs, primary health care, basic shelter and housing, and the basic forms of education.³⁷ But one could not find the language of “basic needs” or “minimum core requirements” in the Indonesian Constitutional Court’s jurisprudence. Second, the preamble of the ICESCR acknowledges that the rights enshrined in the documents derive from the inherent dignity of the human person.³⁸ But the concept of “human dignity” is largely absent from the vocabulary of the Indonesian Constitutional Court.³⁹

2.2. Article 33

A part of constitutional provision that related to the debate on socio-economic rights is Article 33 on economic clause. Article 33 stipulates: (1) the economy shall be structured as a common endeavor based upon the family principle; (2) Branches of production that are important to the state, and that affect the common good, are to be controlled by the state; and (3) the earth and water and the natural resources contained within them are to be controlled by the state and used for the greatest prosperity of the people.⁴⁰ The constitutional reform process left the original version of the Article 33 untouched, but also added a new provision which states that “the organization of the national economy shall be conducted on the basis of 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.”⁴¹

³⁶ UN Economic and Social Council (ECOSOC), Committee on Economic, Social and Cultural Rights, Report on the Fifth Session, Annex III, UN Doc. E/1991/23 (1990) [“General Comment No.3”].

³⁷ UN Economic and Social Council (ECOSOC).

³⁸ International Covenant on Economic, Social and Cultural Rights, Adopted by General Assembly resolution 2200A (XXI) of 16 December 1966.

³⁹ The term “human dignity” can be translated in a rough way as “*manusia yang bermartabat*.” The term “*manusia yang bermartabat*” appears in Article 28H (1) on the right to Social Security and article 34 (2), which mandated the government to establish social security policy. Nevertheless, in the Court’s jurisprudence on the right to social security, the Court never develop what is the meaning of the term “*manusia yang bermartabat*” within the context of right to social security.

⁴⁰ The 1945 Constitution of the Republic of Indonesia, article 33 (1), (2), (3). The English translation of article 33 is my translation.

⁴¹ The 1945 Constitution of the Republic of Indonesia, article 33 (4).

Article 33 is not supposed to be part of the provision of the Socio-Economic rights, but in reality, the Court has often conflated the notion of socio-economic rights with state control over natural resources under Article 33.⁴² Instead of defining socio-economic rights as individual rights, the Court has consistently granted privileges to the State to control natural resources in the name of protecting of socio-economic rights.⁴³ Moreover, the Court relied heavily on the notion of a state's duty to fulfill citizens' rights. The Court repeatedly ruled that the state has a duty to fulfil socio-economic rights, but the Court was rarely upholding socio-economic rights as positive rights, entitling the rights holder to demand that enjoyment of the rights be ensured.⁴⁴ In sum, the Court has often interpreted socio-economic provisions with the communitarian element, which stressed the role of the state to ensure citizens enjoy their rights.

III. SOCIAL SECURITY POLICIES AND SOCIO-ECONOMIC RIGHTS IN INDONESIA

3.1. The Wahid and Megawati Administration

The contagion from the Thai Baht crisis in July 1997 triggered an economic crisis, which spread rapidly across Southeast Asia. The value of Indonesian rupiah fell by 85 percent in one year; domestic, domestic prices skyrocketed by 78 percent, and the national poverty rate increased from 15 percent in mid-1997 to 33 percent by the end of 1998.⁴⁵ The economic crisis, eventually, became one among many factors that accelerated the

⁴² See Stefanus Hendrianto, "The Divergence of A Wandering Court: Socio-Economic Rights in the Indonesian Constitutional Court," *The Australian Journal of Asian Law* (University of Melbourne)16, no. 2, Article 5 (2016).

⁴³ Hendrianto, "The Divergence of," 9-10, 14 -15.

⁴⁴ According to a traditional approach, social economic rights require from the state to act positively (positive rights), imposing on the state duties to provide goods or services such as work, housing, health care, education, welfare, and social security. Nevertheless, the debate on socio-economic rights reveals that socioeconomic rights have a negative articulation, such as protecting the weakest members of society, like the poor or workers or marginalized. For further analysis of various philosophical and legal approaches on the nature of socioeconomic rights please see Jorge M. Farinacci-Fernós, "Looking Beyond the Positive-Negative Rights Distinction: Analyzing Constitutional Rights According to their Nature, Effect, and Reach," *Hasting Int'l and Comp Law Review* 41, no.1 (2018).

⁴⁵ See Sudarno Sumarto and Samuel Bazzi, "Social Protection in Indonesia: Past Experiences and Lessons for the Future" (MPRA Paper No. 57893, SMERU Research Institute, University of Muenchen, March 18, 2011).

fall of Soeharto's New Order regime. The acute economic crisis posed a huge challenge for the government to reduce the poverty rate. Surprisingly, during the period of recovery from the crisis under the Wahid-Megawati administration (1999 – 2001), the poverty incidence declined by approximately 1.3% per year.⁴⁶ The trend continued when Megawati took over the Presidency after the removal of Wahid from office, in 2001. The poverty rate was around 18.2% in 2002 and fell to 16.7%, when Megawati left office in 2004.⁴⁷

In March 2001, the Wahid administration established a Task Force to design a National Security System.⁴⁸ But Wahid was removed from office in July 2001, and Megawati took over the presidency, and she continued to push for the National Social Security System.⁴⁹ Megawati was interested in the program for re-election purposes as her party relied on electoral support from the workers and urban poor. On January 26, 2004, the Megawati administration submitted the bill on the National Social Security System (*Sistem Jaminan Sosial Nasional* or SJSN) to the House of Representatives (*Dewan Perwakilan Rakyat – DPR*), but DPR did not pass the bill until September 29, 2004.⁵⁰ By that time, Megawati already lost her-election bid to Susilo Bambang Yudhoyono.

Megawati signed the bill on her last day in office, October 19, 2004. The preamble of the general elucidation of the SJSN declares that the Law was passed to fulfil the mandates of Articles 28H and 34 of the Constitution. Article 28H (3) says that everyone shall have the right to social security, and art 34(2) says that the state shall develop a system of social security

⁴⁶ See Arief Anshory Yusuf and Andy Sumner, "Multidimensional poverty in Indonesia: How Inclusive has Economic Growth been?" (Working Paper No. 2017/09, ANU College of Asia & Pacific, June 2017).

⁴⁷ See Mudrajad Kuncoro, Tri Widodo and Ross McLeod, "Survey of Recent Developments," *Bulletin of Indonesian Economic Studies* 45, no. 2 (2009): 151–76.

⁴⁸ In March 2001, Vice President Megawati instructed her secretary to establish the Working Committee on National Security system based on the Decision of the Secretary of the Vice President No. 7 of 2001 (Kepseswapres, No. 7 Tahun 2001, 21 Maret 2001 jo. Kepseswapres, No. 8 Tahun 2001, 11 Juli 2001). When Megawati became President, she elevated the status of the Working Committee into an official government's team to prepare the bill on the National Security system (*Tim Sistem Jaminan Sosial Nasional* -Tim SJSN - Keppres No. 20 Tahun 2002, 10 April 2002).

⁴⁹ For a more detailed analysis of the development of social security policies in Indonesia, please see Dinna Wisnu, "Governing Insecurity in Indonesia and the Philippines: The Politics of Social Protection Reform," (Working Paper for 2nd Joint Symposium KSEAS and CSEAS, Kyoto University Japan, October 27 – 29, 2011).

⁵⁰ Law No 40 of 2004 on the National Social Security System (*Sistem Jaminan Sosial Nasional*) – SJSN Law.

for all of the people. Moreover, the Preamble also referred to the Universal Declaration of Human Rights and the International Labor Organization that provide a safety net for workers. Despite the fact that the right to social security was the basis of the enactment of the SJSN Law, the Law does not explicitly recognize the right to social security,⁵¹ but instead, it narrowly defines the rights as five different forms of social insurance, which include health insurance, old-age savings, worker pensions, work-accident insurance, and death benefits.⁵²

3.2. The Yudhoyono Administration

The Yudhoyono administration, however, did little to implement the benchmark legislation of his predecessor, partly because the SJSN would have large fiscal consequences that had not been anticipated by Megawati administration. Nevertheless, the Yudhoyono administration adopted a populist approach through his pro-poor policies. From 2005 to 2008, the budget for poverty alleviation increased by 283%; most of the expenses have been in the form of subsidies to compensate for the impact of the increase of gasoline price. It was estimated 19.5 million households received an unconditional cash transfer from the government.⁵³ The Yudhoyono administration also promised to provide health insurance for the poor even though the SJSN law had been passed. Nevertheless, the rate of poverty reduction was only 0.5% per year in the Yudhoyono first term of office; the poverty rate was around 16.0% in 2005 and then fell to 15.4% in 2008.⁵⁴

⁵¹ See Surabhi Chopra, "Legislating Safety Nets: Comparing Recent Social Protection Laws in Asia," *Indiana Journal of Global Legal Studies* 22 (2015): 573, 611.

⁵² The SJSN version of the social security is quite narrow because it only recognizes one type of social security, that is social insurance. Theoretically, social security takes three main forms: First, *social insurance*, which is a form of social security generated from contributions by the individual earner, the employer and sometimes also by the state, generally paid out for a period of time to meet certain contingencies. Second, *social transfers*, which can be non-contributory and financed through the tax system. Universal schemes may be available to all residents or to all members of certain groups such as the elderly. Third, *social assistance*, which is a form of social security for qualifying groups facing poverty or life-cycle circumstances requiring support. It is generally targeted at such groups, usually by way of a means test. See Peter Townsend, "Social Security and Human Rights," in *Building Decent Societies: Rethinking the Role of Social Security in Development*, ed. Peter Townsend (Basingstoke: Palgrave Macmillan, 2009); see also ILO (International Labour Organization), *Social Security for Social Justice and a Fair Globalization* (ILC. 100/VI) (Geneva: International Labour Office, 2011).

⁵³ See Eunsook Jung, "Campaigning for All Indonesians: The Politics of Healthcare in Indonesia," *Contemporary Southeast Asia* 38, no. 3 (2016): 476-94, 482.

⁵⁴ See Kuncoro, Widodo, and McCleod, "Survey of Recent Development," 166.

The SJSN Law required the government to establish the Social Security Administrative Body (*Badan Penyelenggaran Jaminan Sosial* – BPJS) to administer the National Social Security System, within five years after the enactment of the Law. The Yudhoyono administration, however, missed the five years deadline in 2009. During his second term of presidency, Yudhoyono again did not show any sign that he wanted to implement the SJSN Law. It was only after some pressure from the NGOs that Yudhoyono passed the 2011 Law on Social Security Administrative Body (hereinafter the “BPJS Law”). In a nutshell, the Law establishes two social security administrative bodies, the Healthcare BPJS (BPJS *Kesehatan*), to administer health insurance and the Labor BPJS (BPJS *Ketenagakerjaan*) to administer old-age savings, worker pensions, work-accident insurance, and death benefits. Interestingly, the Preamble of the Elucidation of the BPJS Law stated that the Law was enacted to implement the Constitutional Court Decision No.7/PUU-III/2005 that mandated the implementation of the National Security System in Indonesia. I will explain in the latter part of the paper about the Court’s decision.

The BPJS Law tasked BPJS Health to implement the National Health Insurance Programme (*Jaminan Kesehatan Nasional* - JKN) on January 1st, 2014. The Yudhoyono administration did comply with the mandate, and the JKN was officially launched on January 1st, 2014. President Yudhoyono stated that after the JKN, no more Indonesian people should be living without health coverage. The President stated that from now on, the poor could get treatment free of charge at Community Health Centres and hospitals by using the JKN coverage, managed by the BPJS.⁵⁵ Nevertheless, President Yudhoyono did not have a chance to enjoy the success of the JKN because he had to leave office in October 2014 because of the presidential term limit was due.

⁵⁵ “There should be No More Indonesians without Health Coverage: SBY,” *The Jakarta Post*, December 31, 2013, available at <https://www.thejakartapost.com/news/2013/12/31/there-should-be-no-more-indonesians-without-health-coverage-sby.html>.

3.3. The Jokowi Administration

Joko Widodo, who succeeded Yudhoyono, proposed various populist program during his campaign. Jokowi, adopted a similar scheme to his program when he was the Governor of Jakarta, in which he offers the Indonesian Smart Card (*Kartu Indonesia Pintar - KIP*), and the Indonesian Health Card (*Kartu Indonesia Sehat - KIS*). Jokowi also determined to issue the Prosperous Family Card (*Kartu Keluarga Sejahtera*). Jokowi envisioned that his Health Card should be distributed via Health BPJS. But the distribution of the Health Card has created confusion, whether the JKN and KIS should be combined into one scheme.⁵⁶

The JKN was not a product of Jokowi administration, and, therefore Jokowi has been reluctant to fully support the program. One of the biggest problems for the JKN is that the fund is constantly in deficit because it spending more money to cover the cost of the treatment than it receiving in contributions.⁵⁷ In October 2018, Jokowi publicly criticized the Director of the Health BPJS for turning to the President to bail out the deficit.⁵⁸ In his public rebuke, Jokowi said the Director of BPJS should fixed the management of the JKN instead of depending on the state budget. A few months after Jokowi made his public rebuke, the Ministry of Health issued a new ministerial decree that places caps on medical procedures covered by JKN and imposing co-payments for hospital care. While the Ministerial Decree aims to curb the deficit, it does not offer a solution to its dependency on the state budget.⁵⁹ The bottom line is that the JKN

⁵⁶ There are several differences between JKN and KIS; under JKN, one has to enroll in the program and pay the premium, while KIS will be given and assigned by the government and free of charge as the government will cover all of the cost. KIS was explicitly designed for low income and poor families, while the JKN is a compulsory program all of the citizens. KIS shall be applied to every health clinic or hospital, while JKN is limited to registered clinic or hospital. For a more detailed analysis of the differences between JKN and KIS, please see Zahry Vandawati, Hilda Yunita Sabrie, Widhayani Dian dan Rizky Amalia, "Aspek Hukum Kartu Indonesia Sehat, "The Legal Aspect of Indonesian Health Card," *Yuridika* 31, no. 3 (September-December 2016).

⁵⁷ See Ade Prastyani, "Who'll Pay for Indonesia's National health insurance?" *New Mandala*, published February 28, 2019, <https://www.newmandala.org/wholl-pay-for-indonesias-national-health-insurance>.

⁵⁸ "President Rebukes Minister, State Insurer over Health Insurance Deficit," *The Jakarta Post*, Oct 17, 2018. <https://www.thejakartapost.com/news/2018/10/17/president-rebukes-minister-state-insurer-over-health-insurance-deficit.html>.

⁵⁹ By the time of the writing of this article, there are several events that took place concerning the tug of war between the Jokowi administration and the BPJS. On Oct. 30, 2019, Jokowi signed the Presidential Regulation No. 75/2019, doubling the premium for the first-class and second-class service while increasing the premium for the third-class service by 64 percent. In February 2020, the Supreme Court, however, has granted a judicial

still does not receive payment contributions from most citizens who are unresponsive in contributing to the program. The issue of contribution will then become a significant issue in the Constitutional Court, which I will analyse in the following section of the article.

IV. INEFFECTIVENESS OF THE COURT'S DECISIONS IN UPHOLDING THE RIGHT TO SOCIAL SECURITY

4.1. The First Wave of the Constitutional Court Litigations on the Right to Social Security

Only within four months following the enactment of SJSN, the Law was challenged in the Constitutional Court. In the *SJSN I* case,⁶⁰ a few managers of the provincial-level Public Health Insurance Administering Body challenged the provision that required the government to establish the Social Security Administrative Body (*Badan Penyelenggaran Jaminan Sosial – BPJS*).⁶¹ They did not raise the right to social security, but rather, they framed their argument in the context of relation between the central and regional government. The claimants argued that the SJSN Law violated the Constitution because it authorized the central government to regulate social security issues.⁶² They argued that the social security issue should fall under the jurisdiction of regional governments instead of the central government⁶³ Interestingly, the central government invoked the right to social security (art 28H) as the justification for the establishment of BPJS.⁶⁴

The Court held that the SJSN Law was compatible with the art 34(2) of the Constitution, which requires the state to develop a national security

review of Presidential Regulation no. 75/2019 on health care security, effectively revoking the policy to increase the premiums for the Health Care and Social Security Agency (BPJS Kesehatan). On May 5, 2020, President Jokowi defied the Court's decision and issued Presidential Regulation (Perpres) No. 64/2020 on health insurance, which raised the premiums for BPJS Kesehatan.

⁶⁰ Judicial Review of Constitutional Court Law, Decision No 007/PUU-III/2005 (hereinafter the *SJSN I* case) (The Constitutional Court of the Republic of Indonesia 2005).

⁶¹ SJSN Law, 2004, Art 5.

⁶² The *SJSN I* case, 2005, 19.

⁶³ The 1945 Constitution of the Republic of Indonesia, Art 18 and 18A.

⁶⁴ The *SJSN I* case, 2005, 47.

system for the citizens.⁶⁵ The Court also ruled, however, that the authority to administer the Social Security System lies not only on the central government but also on regional governments. Therefore, the SJSN may not prevent regional governments from developing social security systems as subsystems of the National Social Security System.⁶⁶

Although the Executive invoked the right to social security in its oral argument, the Court did not address the issue in its judgment. The Court held that the SJSN was following the art 34(2) of the Constitution, which requires the state to develop a national security system for the citizens.⁶⁷ The Court also ruled, however, as already mentioned above, that the authority to administer the Social Security System lies not only on the central government but also on regional governments. The Court's ruling thus has no significant impact on socio-economic rights in Indonesia because it does not recognize a right to social security. Indeed, there is a constitutional guarantee of rights to social security in art 28H (3), but the Court decided the case merely on the grounds of the state must develop a social security system (art 34).

In sum, the decision is too simplistic because it cognizant of the dichotomy between positive article of socio-economic rights on the one hand (article 34), and negative socio-economic rights on the other (article 28H §3). This issue is related to the vertical-horizontal dichotomy, while socio-economic rights are normally adopted in vertical way, to impose on the state duties to provide goods for citizens, the socio-economic rights also have horizontal articulation, that is to protect citizens against private powerful economic forces. While the issue is not really at stake in this case, the Court must be aware of the dichotomy, especially as the Court must deal with the similar issues in the subsequent cases.

⁶⁵ The *SJSN / case*, 2005, 263.

⁶⁶ The *SJSN / case*, 2005, 264-65.

⁶⁷ The *SJSN / case*, 2005, 263.

The issue of mandatory participation in the program began to arise in the *SJSN II* case.⁶⁸ Several individual citizens and political activists challenged a provision in the SJSN Law, which provides that a member of the National Security program must pay the contribution, which based on certain percentage of their income.⁶⁹ The Law states further that every employer must collect the contribution from their employees and send the fees to the BPJS.⁷⁰ The claimants argued that the Constitution guarantees the rights to social security, and, therefore, the government must cover all the costs for healthcare services instead of imposing fees on the citizens. The Court held that the Constitution never specify a model for the social security system.⁷¹ The Court ruled that it is within the domain of the Executive and Legislative branches of government to pick any model of social security system, as long as it aims to empower the poor and the marginalized. The Court ruled further that the lawmakers have chosen the social insurance system, which was funded by a combination of the insurance premium and social subsidy through tax revenue.⁷² The Court opined that while the social insurance system has its flaws, but it is within the domain of the executive and legislative branches to pick up such a system. In the end, the Court rejected the claimant's argument entirely.

In the *SJSN III* case,⁷³ a few political activists under the banner of Social Security Advocacy Team challenged the constitutionality a provision in the SJSN Law, which provides that the national health program shall be based on the principle social insurance and equity.⁷⁴ The claimant argued that the social insurance system requires the citizens to pay the premium to claim their rights. The claimants posited that the right to social security, in essence, means the citizens should enjoy their rights without any cost. The

⁶⁸ Judicial Review of Constitutional Court Law, Decision No 50/PUU-VIII/2010 (the *SJSN II* case).

⁶⁹ Art 17 (1)

⁷⁰ Art 17 (2).

⁷¹ The *SJSN II* case, Para. 3.14.3

⁷² The *SJSN II* case, Para. 3.14.5

⁷³ Judicial Review of Constitutional Court Law, Decision No. 51/PUU-IX/2011 (hereinafter the *SJSN III* case).

⁷⁴ The SJSN Law, Art 19 (1).

claimants asked the Court to scrutinize the case because the violation of socio-economic rights is hard to be proven, especially in comparison with the violation of civil and political rights, which are more palpable.⁷⁵ The Court rejected the claimant's petition on the ground that the merit of the case was pretty much the same as the previous case, and so the Court's holding in the *SJSN II* case shall be applied to this case.

The Court's momentous decision on the right to social security is in the *SJSN IV* case,⁷⁶ which involves the constitutionality of the workers' participation provisions of the SJSN Law. The SJSN Law provides that employers must register their employees as participants in a social security program, under which they would be entitled to receive the benefits bestowed by the program.⁷⁷ Some labour unions went to the Court and argued that the SJSN Law had curtailed those rights, as the fulfilment of social security rights would be dependent upon the employers' good faith in registering their employees in the program.⁷⁸

The Court ruled that the provision was unconstitutional as long as it was interpreted as a way to eliminate workers' rights to register in the social security program when their employers failed to register them.⁷⁹ It ruled that the provisions should be interpreted as follows: employers must register their employees as participants in a social security program, but workers have the right to register in a social security program if their employers fail to register their employees with the Social Security Administrative Body'.⁸⁰ Moreover, the Court seemed to move a step ahead in addressing the scope and meaning of rights to social security. In its judgment, the Court ruled that the provision was contrary to art 28H(3), which guarantees the right to social security because the employers could refuse to register their employees in the Social Security Program.⁸¹ The Court held further that the State has

⁷⁵ The *SJSN III* case, 65.

⁷⁶ Judicial Review of Constitutional Court Law, Decision No. 70/PUU-IX/2011 (the *SJSN IV* case).

⁷⁷ The SJSN Law, art 13(1).

⁷⁸ The *SJSN IV* case, 2011, 7.

⁷⁹ The *SJSN IV* case, 2011, 44.

⁸⁰ The *SJSN IV* case, 2011, 44.

⁸¹ The *SJSN IV* case, 2011, 40.

a responsibility to provide human rights protections, including rights to social security. In sum, the Court ruled that the SJSN Law does guarantee a right to social security, but at the same time, it held that social security is a state obligation instead of an individual right.

The nature of the *SJSN IV* case signified that almost by definition right to social security is horizontal in nature. The case explains the fact citizens operate against private employers; thus, the citizens, especially the weak and marginalized, need some protection against those private powerful corporations. This fact is crucial in the effort to change our view that socio-economic rights are merely a laundry list for the government to provide some goods or entitlements to citizens. Nevertheless, the Court had missed the opportunity to widen the scope of right to social security and instead it merely declaring that state has responsibility to give citizens what they are entitled to receive.

4.2. The Second Wave of the Constitutional Court Litigations on the Right to Social Security

After a long delay, finally, President Yudhoyono implemented a new health care program through Law Number 24 of 2001 on the Social Security Administrative Body (*Badan Penyelenggara Jaminan Sosial* – BPJS – hereinafter BPJS Law). One of the key provisions of the BPJS Law states that employers must periodically register themselves and their employees as the Participant to the BPJS (hereinafter the “participation provision”).⁸² The Law also imposes a penalty for employers who fail to register their employees periodically to BPJS. Moreover, the Law also stipulates that employers must charge a premium and-submitted the premium collection to BPJS.⁸³

Not long after the enactment of the BPJS Law, the claimant in the *SJSN IV* case came back to the Court and challenged the “participation provision” in the BPJS Law because it is similar to the SJSN Law. In the *SJSN Law IV* case, the Court held the SJSN Law was conditionally unconstitutional if

⁸² Law No. 24 of 2011, the Social Security Administrative Body Law, Art 15.

⁸³ Law No. 24 of 2011, the Social Security Administrative Body Law, Art 19.

the “participation provision” was interpreted as a way to eliminate workers’ rights to register in the social security program when their employers failed to register them. The similar provision, however, reappeared in the exact wording in BPJS Law. In the *BPJS Law I* case, the claimant asked the Court to declare the “participation provision” unconstitutional. The Court accepted the argument and held that the “participation provision” in the BPJS Law was conditionally unconstitutional, and it must be interpreted that workers have the right to enroll themselves in the social security program if their employer fails to enroll them in the BPJS.

In the *BPJS Law II* case,⁸⁴ the claimants are several workers and labor unions who challenged BJPS Law and posited that the government had deprived their rights to health care and the right to social security through the enactment of the Law. The claimants raised the general quality health care under the BPJS and argued that the Law deprived their rights to enroll in a different program that provides better health care service than the BPJS. In their petition, the claimants invoked both the right to health care (article 28H section 1) and the right to social security (article 28H section 3).

The Court held that based on article 28H (3) the citizens has right to social security, which means that the state has a responsibility to develop a program that guarantees the fulfillment of that right, including a national insurance program.⁸⁵ The Court held further that the BPJS was developed to fulfill the constitutional mandate of right to health care (article 28H), under which the government must guarantee the health care service for the citizens who could not afford to pay the services. The Court then explained that for those who have higher income and want to enjoy a better health care service they are free to upgrade the health care service and payout of the pocket.⁸⁶ Thus, the government never deprive the rights of its citizen who want to enjoy a particular health care service. Concerning the premium, the Court held that the obligation for the employers to charge the premium

⁸⁴ Judicial Review of Constitutional Court Law, Decision No. 138/PUU-XII/2014 (hereinafter the *BPJS Law I* case).

⁸⁵ Judicial Review of Constitutional Court Law, Decision No. 138/PUU-XII/2014, 200.

⁸⁶ Judicial Review of Constitutional Court Law, Decision No. 138/PUU-XII/2014, 204.

to their employees could be construed as a social security tax.⁸⁷ The Court explained that if the government does not impose such tax, then some people would refuse to pay the premium, which could jeopardize the national insurance system. The Court then rejected the claimant's petition entirely. In short, the Court acknowledged that BPJS Law does guarantee a right to social security and also right to health care, and its holding gives a stronger affirmation that the state must fulfill the social security rights.

The issue of compulsory participation in the BPJS Law did not die quickly. In the *BPJS Law V* case,⁸⁸ a few members of the Union of the State Electricity Company (*Serikat Pekerja – PLN*) challenged a provision in the BPJS Law, which provided that the participation in the national social security program is compulsory.⁸⁹ The claimants posited that they had received excellent health care insurance from the State Electricity Company, but the BPJS Law has deprived their excellent health care services, and instead, they have to enroll in the BPJS program that provided worse health services than their previous insurance. The Court rejected the petition and ruled that the Court has considered the subject matter in the *BPJS Law II* case, therefore the Court's previous decision shall be applied to this case.

The latest case that related to the compulsory nature of BPJS is the *BPJS Law VI* case, in which an individual continued to challenge the compulsory nature of the BPJS program. The claimant challenged the provision, which provided that "everybody, including a foreigner, who has been employed for at least six months in Indonesia, must enroll the Social Security system."⁹⁰ The claimant argued that she already has her private insurance, but now she has to enroll in the National Health Insurance program. While the claimant admits that the Law let her keep her private insurance, nonetheless, she argued she has to pay extra fees for her participation in the BPJS. The claimants argued that her private insurance provides a better converge and

⁸⁷ Judicial Review of Constitutional Court Law, Decision No. 138/PUU-XII/2014, 210.

⁸⁸ Judicial Review of Constitutional Court Law, Decision No. 47/PUU-XIV/2016 (hereinafter the *BPJS V* case).

⁸⁹ The BPJS Law, Art 4 (g).

⁹⁰ The BPJS Law, Art 14.

so she will rely on her private insurance instead of the BPJS. Moreover, the claimant argued that she could not file two separate claims to BPJS and her private insurance, as the BPJS would presume that her private insurance has covered her. The Court ruled that crux of the matter of this case is dual enrollment in two different insurance programs instead of the constitutionality of a statute. The Court opined that it is a blessing that the claimant can enjoy her private insurance and while her contribution to National Health Insurance system will be enjoyed by other poor and marginalized people who are in much-needed health care services than the claimant. So, the Court rejected the claimant's argument.

In sum, the Court's decisions related to the right to social security have focused on the compulsory nature of the program. But, the Court has not been able to define the scope and meaning of the rights. So far, the Court's decisions have been focusing on reaffirming that the State has an obligation to guarantee the right to social security to the citizens.

V. EVALUATING THE LEGACY OF AUTHORITARIAN CONSTITUTIONALISM AND ITS IMPACT ON THE SOCIAL SECURITY POLICY

Almost twenty years have passed since the adoption of the Socio-economic rights in the Indonesian Constitution. The socio-economic rights, however, has not contributed a lot in fulfilling the promise of poverty alleviation by the Indonesian government. Three different administration has ruled the country since the adoption of the socio-economic rights, but none of these administrations have any drive to fulfill the promise of socio-economic rights. While each administration has launched different populist programs, the socio-economic rights have not played an important role in those programs. The exclusion of the socio-economic rights from the political and economic discourse in Indonesia can be understood through the legacy of authoritarian constitutionalism /authoritarian-crony capitalist regime.

As mentioned earlier, there are two main characteristics of the authoritarian capitalist regime in Indonesia: first, the regime protects the economic interests of its allies; second, the regime aims to foster economic growth by relying on private foreign investment. At the same time, the economic growth was also coupled with social programs with the final objective of sustaining the regime.

While Indonesia has moved beyond the authoritarian system and adopted a “mere” rule of law constitution, with the direct presidential election, but in reality, the post-New Order governments continue to apply the same playbook like Suharto’s New Order regime. Considering that Megawati did not serve the full term, and she inherited the administration after the removal of Wahid, this paper will focus its analysis on the Yudhoyono and Jokowi administration.

5.1. The Yudhoyono Administration

Yudhoyono came to power during the early 2000s global commodity boom, and therefore, his administration immediately attracted capital-investments in natural resources extraction.⁹¹ These investments drove the Indonesian GDP, but it failed to generate jobs for millions of young people entering the market every year. The GDP growth rose steadily in the first three years of Yudhoyono’s administration and reached its peak at 6.3% in 2007 before falling to 6.1% in 2008 and then 4.4% in the first quarter of 2009 when the country was affected by the global financial crisis.⁹² At the same time, labor-intensive manufacturing also declined during the Yudhoyono administration. When he came to power in 2004, the labor-intensive manufacturing sector was around 28%, and it dropped a level of 24% by the time he left office in 2014).⁹³ One of the consequences of the “growth” policy is that there is a certain percentage of the Indonesian workforces trapped in jobs in the informal sector.

⁹¹ For an excellent summary of political economy under the Yudhoyono administration, please see Marcus Mietzner, “Reinventing Asian Populism: Jokowi’s Rise, Democracy and Political Contestation in Indonesia,” *East-West Center Policy Studies*, no. 72 (2015).

⁹² Kuncoro, Widodo, and McCleod, *Survey of Recent Developments*, 166.

⁹³ Mietzner, “Reinventing Asian Populism,” 14.

Yudhoyono also promised to fulfill his commitment to the poor through his social justice program. As mentioned earlier, Yudhoyono did not prioritize a national security policy, though he did introduce some pro-poor policies. In 2005, Yudhoyono administration introduced Health Insurance for the Poor (*Asuransi Kesehatan Masyarakat Miskin – Askeskin*). In 2008, the government replaced the Health Insurance for the Poor with People's Health Insurance (*Jaminan Kesehatan Masyarakat – Jamkesmas*). It was reported that around 75 million people were enrolled in the pro-poor insurance program. Apart from this program, Yudhoyono also introduced the Hope for Family Program (*Program Keluarga Harapan – PKH*) in 2007, under which the government will grant some cash to the family, as long as the mother went for regular check-ups during pregnancy and the children (aged 7 -15) stayed in school.⁹⁴

Despite his pro-poor policies, Yudhoyono never made any explicit reference to the socio-economic rights in the Constitution. First, and foremost, the priority of the Yudhoyono administration is on economic growth. When he ran for re-election in 2009, one of Yudhoyono's campaign promises was to reach an economic growth of 7% per year.⁹⁵ In his State of the Union address in 2012, Yudhoyono made it clear that economic growth was one of the priorities of his administration.⁹⁶ In his address, Yudhoyono promised that his administration would launch the BPJS health, and by 2019, all citizens would enjoy the National Health Insurance. But the fact of the matter was that the total spending on health care was relatively low; in 2012, the government only allocate 3% of the GDP. Interestingly, Yudhoyono referred to the UN Millennial Development Goal, but he neither

⁹⁴ "Program Keluarga Harapan: Two Case Studies on Implementing the Indonesian Conditional Cash Transfer Program" (The Pro-Poor Planning and Budgeting Project, Working Paper No. 5, June 2008).

⁹⁵ "15 Janji Duet SBY-Boediono [15 Promises of Duo SBY-Boediono]," *Detik.com*, July 4, 2009, available at <https://news.detik.com/pemilu/1159103/15-janji-duet-sby-boediono>.

⁹⁶ "Inilah Isi Pidato Kenegaraan Presiden SBY [President SBY' State of Union Address]," *BeritaSatu.com*, August 16, 2012, available at <https://www.beritasatu.com/nasional/66461/inilah-isi-pidato-kenegaraan-presiden-sby>; see also "The State Secretariat Summary on the President's State of the Union Address," available at https://www.setneg.go.id/baca/index/pidato_kenegaraan_presiden_dalam_sidang_bersama_dpd_dan_dpr.

mentioned the constitutional provision on socio-economic rights nor the UN Convention on Socio-Economic Rights in his speech.⁹⁷

5.2. The Jokowi Administration

Jokowi, came to power with the charisma of a man of action; thus, he became the antidote of Yudhoyono, who is known as a “thinking general” who put emphasize on many pompous speeches.⁹⁸ While Jokowi secured the presidency with his persona as a pragmatic and down-to-earth leader, in essence, his economic policies have not many differences with his predecessor. Like his predecessor, Jokowi has also been emphasizing the “growth” ideology.⁹⁹ In his 2014 campaign, Jokowi vowed to accelerate the GDP growth to reach 7% by the end of his first term. Although Jokowi managed to achieve a stable growth at 5% each year in his first term, nonetheless, his economic performance had fallen short of his promises. During his re-election campaign, Jokowi promises a more modest 5.5 percent growth for 2020. Jokowi has been under increased pressure to show that he was managing the economy well.

Apart from his emphasis on economic growth, Jokowi’s economic strategy has also focused on the investment in infrastructure. At first, Jokowi’s infrastructure strategy is a counterstrategy to his predecessor; under Yudhoyono’s rule, Indonesia only spent around 4% of the GDP on infrastructure. But Jokowi is also hoping that his infrastructure strategy will be translated into manufacturing gains, which eventually will lead to economic growth. Thus, Jokowi began his administration by setting out a plan to spend 32% of the GDP by addressing infrastructure needs in the form of new roads, railroads, airports, seaports, and power stations.¹⁰⁰ But this infrastructure strategy has not yet been translated

⁹⁷ While this fact does not necessarily mean that the Yudhoyono administration denies socio-economic rights, the absence of reference to constitutional provision and the UN Convention on Socio-Economic rights signify that Indonesian political lexicons lacks a vocabulary for expressing normative and moral concepts that Indonesian legal culture after the fall of New Order regime have put emphasis on constitutional rights, which include socio-economic rights (as opposed to the non-rights legal culture under the New Order regime).

⁹⁸ For an excellent analysis of the rise of Jokowi, please see Mietzner, “Reinventing Asian Populism,” 23-28.

⁹⁹ For an excellent analysis of the economic growth under Jokowi’s administration, please see Timothy Cheston, “Indonesia and the Quest for 7% Growth: Overpromise or Underperformance?” (ATLAS of Economic Complexity -Center for International Economic Development at Harvard University), available <http://atlas.cid.harvard.edu/stories/indonesia>.

¹⁰⁰ Cheston, “Indonesia and the.”

into manufacturing gains. At the same time, Jokowi's infrastructure strategy has resulted in significant losses in manufacturing exports in high-value sectors as the government did not make considerable investments in developing electronics and machinery industries.¹⁰¹ In short, Jokowi's has been pressured by his promise of economic growth, the moderate pace of his infrastructure strategy, and the stagnant manufacturing exports.

Jokowi's economic strategy, which emphasizes on the growth ideology and infrastructure strategy, has overshadowed the promise of socio-economic rights. In 2014, Jokowi ran for presidency based on the programs so-called *Nawacita*, a Sanskrit term for nine programs. One of these nine programs include the improvement of the quality of life,¹⁰² but the language of socio-economic rights is nowhere to be found in these nine programs.¹⁰³ The crux of the matter is Jokowi's priority on the economic growth and infrastructure strategy depends upon capital accumulation, which marginalized labor and social security because those elements could undermine growth and competitiveness. Jokowi has indeed improved the healthcare budget significantly during his first term in office,¹⁰⁴ but the improvement of the healthcare budget does not translate into an improvement of social security.

As mentioned earlier, Jokowi was quite reluctant to support the National Health Insurance Program (JKN) because it was not his project, but instead, he prefers to support his program known as the Indonesian Smart Card. BPJS Healthcare that oversees the JKN program has suffered deficits in five of the six years since it opened its business in 2014.¹⁰⁵ In 2019, it was predicted that

¹⁰¹ Cheston, "Indonesia and the."

¹⁰² The *Jakarta Post*, "Jokowi-Kalla Hawkish on Economic Policies," May 21, 2014. Available at <https://www.thejakartapost.com/news/2014/05/21/jokowi-kalla-hawkish-economic-policies.html>.

¹⁰³ Again, the "missing language of rights" and to be precise, the "missing language of socio-economic rights" in Indonesian political discourse does not automatically mean that the inexistence of these rights. Nevertheless, an increasing emphasis on individuals' rights in the Indonesian political dialogue is a necessary concomitant to the rights enshrined in the text of the constitution. While Jokowi may not deny the existence of rights, at the very least, his *Nawacita* does not frame the issue within the context of socio-economic rights. Such formulations will ultimately lead to unsatisfying social political arrangements.

¹⁰⁴ The government plans to spend IDR 132 trillion on healthcare in 2020, double the amount in 2015. But apparently, the focus of the healthcare program will be stunting prevention and reducing the maternal mortality rate.

¹⁰⁵ Shotaro Tani and Ismi Damayanti, "Indonesia Struggles to Pay for Huge Universal Health Care Program," *Nikkei Asian Review*, (August 2019), available at <https://asia.nikkei.com/Economy/Indonesia-struggles-to-pay-for-huge-universal-health-care-program>.

the deficit is set to balloon nearly \$2 billion. As Jokowi administration has been reluctant to bail out the BPJS, the BPJS has announced its plan to raise the premium and removed 5.2 million people from the list of beneficiaries. In short, the Jokowi administration was reluctant to support the social security program. All of Jokowi's populist policies were only to serve his vote-getting priorities as evidence through greater spending on energy subsidies, and village fund program and three "magical" cards (the Smart Card – *Kartu Indonesia Pintar*, Pre-Employment Card – *Kartu Pra-Kerja*, and Cheap Food Card – *Kartu Sembako Murah*).

Jokowi's economic policies had also brought some negative implication on the social security system. Since the New Order period, manufacturing has become the main driving factor of economic growth. But as Jokowi's infrastructure policy had failed to boost the manufacturing industry, the growth in manufacturing had slowed significantly in recent years. As the manufacturing industry is shrinking, the informal sector workers continue to dominate Indonesia's workforce (58% of a total of 73.98 million workers). The workers from informal sectors were not automatically enrolled in the JKN program, because the Law prescribed that it is the employers who must register their workers. Thus, it is estimated that around 40 million workers in the informal sector are missing from the JKN enrollment.¹⁰⁶

In sum, the socio-economic rights have not become adopted social and political norms. The last two administrations did not include the protection of socio-economic rights as part of their rhetoric. While they have launched different pro-poor policies, those policies are directed into vote-getting instead of the fulfillment of socio-economic rights. The "growth" ideology of both Yudhoyono and Jokowi administration consider that social security as costs that undermine growth; strengthening progressive taxation is also considered to hinder business activities and economic growth. At the same time, the government has been struggling to boost the participation from the working population to pay health premiums for the national insurance program. Indeed, the participation in the

¹⁰⁶ Prastyani, "Who'll pay for," *New Mandala*.

national insurance program has become one of the main issues that has been litigated a lot in the Indonesian Constitutional Court.

VI. THE FAILURE TO CONSTITUTE THE RIGHT TO SOCIAL SECURITY

The Indonesian Constitutional Court has significantly contributed to the democratic process in Indonesia by providing an avenue for the citizens to defend their rights. Nevertheless, the Court has not been successful in conducting a meaningful review of socio-economic rights. The Court's decisions in the series of the right to social security cases are the exemplar of the Court's failure to engage a meaningful review of socio-economic rights. Part of the problem is that the Court had missed to recognize the horizontal nature of socio-economic rights, especially right to social security. Not all sources of oppression and threats to individual liberty come from the government. Powerful private interests also affect the individual liberty. In the context of right to social security, the Court could not envision that right to social security is also meant to shield against or create an entitlement opposable to non-governmental actors. Instead of the Court merely prescribed the mandate for the government to develop a social security program.¹⁰⁷ Moreover, the right to social security encompasses the right to access and maintain benefits, whether in cash or in kind. Under the current arrangement, the Court fails to move from the traditional work-related formulation of social security to broader inclusion of causes of poverty, especially for millions of workers who have no access to formal employment, and thus, they have no access to government sponsored social insurance.

6.1. The Devoid of substance and meaning of the Court's decision on Social Security

Overall, the Court's decisions in the cases of rights to social security reflects the lack of philosophical and comparative knowledge of the judges.

¹⁰⁷ If many political rights are easily enforced because of their negative character, like with their socioeconomic counterparts, political and civil rights can also come in the positive and horizontal variety. See Farinacci-Fernós, "Looking Beyond the," 42.

Historically, social security is a central feature of the modern welfare state that emerged from late-nineteenth century Europe.¹⁰⁸ The most detailed elaboration of the right to social security by a United Nations treaty body is General Comment No. 19 on the Right to Social Security produced, in 2007, by the Committee on Economic, Social and Cultural Rights (CESCR), which is responsible for the ICESCR. While a full examination of the international law on the right to social security is not possible in this paper, I would like to give a brief overview of the right to social security. The right to social security encompasses the right to access and maintain benefits, whether in cash or in a different kind of support to protect citizens from the following predicament: (a) lack of work-related income caused by sickness, disability, maternity, employment injury, unemployment, old age, or death of a family member; (b) unaffordable access to health care; (c) insufficient family support, particularly for children and adult dependents.¹⁰⁹

In the past several decades, the welfare state arrangements have become more limited in Western Europe, especially in the time of austerity when the states have gone extra miles in limiting social security.¹¹⁰ Indonesian just started its ambitious project to provide social insurance to the citizens, and, consequently, all the constitutional stakeholder must learn and re-learn from the experience of the developed countries in ensuring the right to social security. Indonesia does not need only the fundamental rights-based recognition on the social security but also the arrangements to ensure that a minimum level of social security protection is at all times guaranteed.

In almost two decades of the Constitutional Court's existence, one can hardly find any reference to the International Covenants on Economic, Social and Cultural Rights despite the Indonesian has ratified the covenants. Apart from the Constitution, the Covenant should be appropriately cited in the Court's decisions, especially considering that the legislature has ratified the

¹⁰⁸ Townsend, 52.

¹⁰⁹ The CESCR General Comment No. 19, para. 2.

¹¹⁰ See Ingrid Leijten, "The German Right to an Existenzminimum, Human Dignity, and the Possibility of Minimum Core Socioeconomic Rights Protection," *German Law Journal* 16, no. 1 (2015): 23.

Covenant into Indonesian Domestic Law. Moreover, one could not find the language of “basic needs” or “minimum core requirements” in the Indonesian Constitutional Court’s decisions either. The Committee on Economic, Social and Cultural Rights has emphasized on the notion of “minimum essential levels of each of the rights,”¹¹¹ which related to essential foodstuffs, primary health care, basic shelter and housing, and the basic forms of education.”¹¹² Many international experts on human rights have drawn the connection between the material protection necessary for the right to life and the rights to water, health, water, and housing.¹¹³ Nevertheless, the language of “basic needs” or “minimum core requirement” or “right to life” are mostly absent from the Indonesian Constitutional Court decisions.

The preamble of the International Covenant on Civil and Political Rights acknowledges that the rights enshrined in the documents derive from the inherent dignity of the human person.¹¹⁴ At the domestic level, many courts have linked the notion of human dignity and the protection of socio-economic rights. Nevertheless, the concept of “human dignity” is also largely absent from the vocabulary of the Indonesian Constitutional Court. The term “human dignity,” however, does not have a prominent place in the Indonesian Constitution. Therefore, it is not a surprise that the concept was mostly absent from the Court’s jurisprudence. Moreover, the Court appears to be unaware of such a concept, and there is no attempt from the judges to borrow such language and apply it in the Court’s jurisprudence.

6.2. A Detached Court

The Court’s decisions in the right to social security also reflect the general trend in the Court’s approach, in which the Court relied heavily on the notion of a state’s duty to deliver social security benefits. Most of the Court’s decisions in the social security related cases were framed in

¹¹¹ UN Economic and Social Council (ECOSOC), Committee on Economic, Social and Cultural Rights, Report on the Fifth Session, Annex III, UN Doc. E/1991/23 (1990) [“General Comment No.3”].

¹¹² UN Economic and Social Council (ECOSOC).

¹¹³ Young, *Constituting Economic and Social Rights*, 35 -39.

¹¹⁴ International Covenant on Economic, Social and Cultural Rights, Adopted by General Assembly resolution 2200A (XXI) of 16 December 1966.

the context of article 34, which provided the State's obligation to develop a system of social security for all of the people. As explained earlier in this article, the Court has failed to understand the negative – positive and vertical-horizontal dichotomies of socio-economic rights. The Court merely see the right to social security as the positive rights, in which the State has duty to provide social security. Nevertheless, almost by definition, socio-economic rights aim to protect weaker and vulnerable groups in the society.¹¹⁵ Therefore, socio-economic rights have a negative articulation that aims protect the weakest members of society, like the poor or workers, against powerful private economic forces or even the state.

Moreover, the Court was leaving the scope and meaning of the right to social security to the legislative and executive branches of government. As mentioned earlier, neither the SJSN Law or the BPJS Law explicitly recognize the right to social security. The fact of the matter is that the Laws define the rights to social security more narrowly as five different forms of social insurance, which include health insurance, old-age savings, worker pensions, work-accident insurance, and death benefits.

In recent years, the Court has taken a non-interventionist approach,¹¹⁶ but the Court should be more active in defining the scope of the rights to social security. For instance, there is an issue of whether the livelihood assistance is included in the rights to social security. In the past, the Yudhoyono administration provided an unconditional cash transfer from the government, and, the Jokowi administration provided many different cards, such as the Cheap Food Card. But it was not clear whether those assistances as part of the social security rights. The issue is that livelihood assistance has not been considered as part of the social security, but rather

¹¹⁵ See Farinacci-Fernós, "Looking Beyond the," 39. Many scholars simply see socioeconomic rights only as positive or vertical rights. This view is most likely to be influenced by the U.S.-centered view, which view the negative political rights opposable to the state are the norm, and, therefore, socio-economic rights are merely positive rights. See Diana Kapiszewski, Gordon Silverstein and Robert A. Kagan, "Introduction," in *Consequential Courts: Judicial Roles in Global Perspectives*, eds., Diana Kapiszewski, Gordon Silverstein & Robert A. Kagan (Cambridge Univ. Press, New York, 2013), 17.

¹¹⁶ Stefanus Hendrianto, *Law and Politics of Constitutional Court: Indonesian and the Search for Judicial Heroes* (Milton: Routledge, 2018).

as vote-getting strategy for politicians. At this moment, there is no clarity on the status of livelihood assistance, which include the minimum necessary for basic living expenses.

In short, there is a gap between the Constitutional recognition of socio-economic rights and their protection in the Constitutional Court. Instead of defining the scope of the rights to social security, the Court repeatedly ruled that the state must fulfill rights to social security. Thus, the Court has interpreted socio-economic provisions as an obligation for the state to ensure citizens enjoy their rights.

6.3. The lack of support structures for the Court.

As mentioned earlier, Kathrine Young argued that one of the critical dimensions of constituting socio-economic rights is the contestations of social movements.¹¹⁷ The social movements contribute to the entrenchment of socio-economic rights can take place in several ways: first, the social movement may counter the current obstacles to socio-economic rights present in the law through “the disturbance of orthodoxies and the framing of injustice.”¹¹⁸ Second, the social movement may provide a new narrative about rights, constitutions, and treaties, a new narrative that helps to bridge the gap between the formal recognition of rights and its protection in daily lives.¹¹⁹

The failure of the Indonesian Constitutional Court to engage socio-economic rights, especially the right to social security, is linked to the weak of social movements in advocating the right to social security in the Indonesia Constitutional Court.¹²⁰ Most of the claimants in social security

¹¹⁷ Young, *Constituting Economic, Social Rights*, 291.

¹¹⁸ Young, *Constituting Economic, Social Rights*, 291.

¹¹⁹ Young, *Constituting Economic, Social Rights*, 291.

¹²⁰ Despite the flaws, the adoption of Socio-economic rights in the Second Amendment has paved the way for citizens to demand the fulfillment of those rights through judicial review in the newly established constitutional court. The 2003 Constitutional Court Law allows individual citizens to file a claim before the Court, but in theory, the claimants can only challenge statutes in an abstract way rather than to solve a concrete constitutional case. Most of the claims related to socio-economic issues invoked third-party or large groups standing, in which the petitioner inserted constitutional claims on behalf of public interests or injury that suffered by a large group of citizens or class. For a detailed analysis of the role of public interest litigation in the Indonesian Constitutional Court, please see Dominic Nardi, Jr., “Embedded Judicial Autonomy: How NGOs and Public Opinion Influence Indonesia’s Constitutional Court” (Michigan: Ph.D. Thesis-University of Michigan, 2018).

cases are individual workers or political activists. But the influence of the civil society and people organization in the social security litigation has been limited. The lack of support structure from the civil society is quite surprising considering that the civil society was heavily involved in pushing the government to implement the SJSN Law. An Advocacy group under the banner of the Social Security Action Committee (*Komite Aksi Jaminan Sosial*, KAJS) was at the forefront of the struggle to pressure the government to implement the SJSN Law.¹²¹ The KAJS advocacy was successful in prompting the Executive and Legislative branches to pass the BPJS Law that created the JKN. The launching of the JKN might be seen as the victory for the KAJS and eventually led them to stop the battle. But the advocacy must not stop with the launching to JKN because they must ensure the sustainability of the program, and more importantly, they should help the Court to define the meaning and scope of the rights to social security.¹²²

VII. CONCLUSION

The pattern of prioritizing economic growth and reliance on foreign investment for infrastructure will remain central to Jokowi's presidency. This approach will continue to generate a contradiction with his pro-poor policies because the Jokowi administration will refuse to impose a progressive tax on the rich to finance the JKN as it will be considered hampering economic growth. At the same time, the administration will continue to prioritize the magical card program and to show lukewarm support for the National Health Insurance program. Above all, the pro-poor policies were not framed within the rhetoric of the socio-economic rights.

The Constitutional Court has not taken any interventionist approach in the litigation related to the rights to social security. The socio-economic rights jurisprudence in the Indonesian Constitutional Court is not based on the notion

¹²¹ For a detailed analysis of the role of KAJS please see Dinna Wisnu, *Governing Insecurity*; see also Jung, *Campaigning for All Indonesians*.

¹²² The KAJS leading activist Surya Tjandra was recently named as the Deputy Ministry of Agrarian Affairs and Spatial Planning in the Jokowi's second administration.

of individual rights, in which the rights holder can demand enjoyment of the right to be ensured. Instead, the Court has interpreted socio-economic provisions as an obligation on the state to ensure citizens enjoy their rights. The absence of robust jurisprudence on socio-economic rights in Indonesia will allow the posture of socio-economic rights to remain at a low level. Until there is a breakthrough in the Constitutional Court or a decisive constitutional moment, the socio-economic rights in Indonesia will remain to be constitutionalized but not constituted in Indonesia.

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