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Reconstruction of Constitutional Tradition in the Indonesian and Malaysian Constitutions : A Comparison

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Abstract

The study focuses to compare the ideas, norms, and practices of the reconstruction of statecraft tradition between Indonesian and Malaysian constitutional legal system. Conceptually, there are two model of reconstruction of tradition in the constitution, namely the particular-absolute and the particular-relative. The first emphasizes on the absolute aspects of genuine tradition, which essentially different from the values of modern state. The later stresses more on relative aspects of the proper genuine tradition with the values of the modern state. Historically, before the amendment of the Indonesian Constitution, the reconstruction of tradition was practiced based on particular absolute model, while after the constitutional amendment tends to reject to reconstruct the tradition at the national structure, but recognize the traditions at local structure. Generally, it can be concluded that the amendment of the Indonesian Constitution does not have an obvious pattern of reconstruction of tradition. It contradicts with the original meaning of the Indonesian founders, who obviously believed tradition as a basic to create a national constitutional system. Meanwhile, Malaysia has been practicing reconstruction of tradition based on particular relative model by applying the *perpatih* tradition in the Malaysian elected monarch system.

Keywords: the Indonesian Constitution, the Malaysian Constitution, reconstruction of tradition, particular absolute, particular relative

I. Introduction

Indonesia and Malaysia are the members of ASEAN with many similarities in traditions, which are culturally included in Malay civilization. However, differences in the history of both countries made a difference in their legal system.

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Indonesia adopts a civil legal system as a consequence of Dutch colonialism, while Malaysia applies a common law system as a legacy of British colonialism. In addition, Indonesia chooses a republic and unitary state, while Malaysia preserves monarchy and federalism.

Nevertheless, as the decolonization nation-states, Indonesia and Malaysia have a similar idea to reconstruct traditions in their respective countries. Both countries reconstruct their tradition to leave the colonial influences and to shape their national identities. Although Indonesia reconstructs its tradition in the form of republic and Malaysia reconstructs its monarchy tradition in Federation, they have something in common: both have the same aspiration to reconstruct the tradition of democracy into the constitution. However, the constitutional amendments in Indonesia in 1999-2002 have left the reconstruction of tradition in national structure, while Malaysia consistently maintains the reconstruction of tradition in its constitutional legal system.

The paper describes and compares how Indonesia and Malaysia reconstruct the traditions of democracy in their constitutional legal system. The next section will analyze the basic theory and model of the reconstruction of tradition. The third section describes the reconstruction of tradition in Indonesia from the constitutional making in 1945 to the constitutional amendment in 1999-2002. The fourth section reviews the reconstruction of the tradition in Malaysia, followed by the comparison between Indonesia and Malaysia in the fifth section. The final section will synthesize all the discussion into conclusion.

II. Reconstruction of Tradition : A Theoretical Perspective

The term of 'constitutional tradition' in this research refers to the tradition of managing the state affairs in the legal sense, particularly in the constitutional law studies. There are various meanings regarding the 'tradition' itself. Generally, 'tradition' is contrasted to 'modern'. Tradition means everything comes from the past, while modern refers to that found in the present and future. Traditional society is different from that of modern, post-industrial, and let alone post-modern. Tradition evokes myths and ancient heritage, while modern implies rationality and science-technology. As the West has played an important role in rationality, science and technology, then it is identical to modernity. To be modern means to be westernized, and hence modernization equals to westernization.

Karl Popper argued that there are problems with the way of thinking. Popper said that even rationality in the West has been a tradition inherited from the Greek civilization. Rationality is a logic system, which can be traced back to the Greek philosophers such as Pythagoras, the first mathematician who created several mathematic formulas and Aristotle who created system of logic. Rationality in Greek philosophy has created a rationality or scientific tradition for the Western society (Popper, 2007: pp. 169-170).

Popper suggests that tradition must be understood as human need for order or regularity. He argues further that, "similarly, the creation of traditions, like so much of our legislation, has just that same function of bringing some order and rational predictability into the social world in which we live" (Popper, 2007: p. 175). Thus, tradition has a social function to give people a certainty to rationally plan their acts in the future. The social function of tradition pointed out that tradition cannot be distinguished from rationality. Rationality itself is part of the tradition of Western society and some other traditions. However, all traditions have a logic system to maintain the social order and certainty.

In legal context, as Popper argues, traditions have parallel function with legislation or law to give people some order. There is no contradiction between tradition and legislation related to their function. For this reason, some traditions have been developed into customs obeyed by a community as legal norms—namely customary law. People have adopted several customary legal norms to be part of positive law in a modern state. It means that the positive law, which naturally has foundation on rationality, in modern state exists based on traditions because they have similar function to create and maintain the social order.

Although tradition and law have a similar function to create the social order, their binding power is different. Austin argues that, before the custom or tradition is adopted by courts or legislation, it is merely a rule of positive morality. However, tradition or custom is transmuted into positive law, when it is adopted as such by the courts of justice, and when the judicial decisions fashioned upon it are enforced by the power of the state (Austin, 1954: p. 104). In this regard, Kelsen said that "custom has to be, like legislation, a constitutional institution" (Kelsen, 1973: p. 126). What he meant actually refers to the hierarchy of norms, where the constitution is the highest of norms in a legal order.

He argued further that it is possible "only if the constitution … institutes custom, just as it institutes legislation, as a law-creating procedure" (Kelsen, 1973: p. 126). Therefore, tradition or custom can be transmuted into a positive law when the court and legislation adopt it, or – in the highest hierarchy of norms – determined by the constitution.

In the present study, the adoption of custom into the positive law, particularly into the constitution, represents a kind of reconstruction of the tradition. This is a common phenomenon as the consequence of the growth of nation-state around the world. Historically, there are four kinds of nation states: (1) the classic nation states in Northern and Western Europe based on Westphalia Agreement of 1648; (2) 'belated' nation states based on the national or cultural consciousness disseminated by propaganda such as those found in Central and Eastern Europe; (3) decolonization nation states that emerged from the process of decolonization, primarily in Africa and Asia; and (4) the independent nation-states in Eastern and Southern Europe that emerged after the collapse of the Soviet Empire (Habermas, 1999: pp. 105-106).

In legal aspect, the nation state has two consequences, namely positive law and identity, which are related to one another. First, the nation-state cannot be separated from the positive law. Kelsen argued that, positive law appears empirically in the form of national legal order, whereas the state is personification of the national legal order (Kelsen, 1973: p. 181). Positive law is always distinguished from divine law or natural law—the law as expression of the "will of nature" or of "pure reason" (Kelsen, 1973: p. 114). Positive law, Austin wrote, is "the law set by political superiors to political inferior". The term of political superiors refers to "persons exercising supreme and subordinate government, independent nations, or independent political societies" (Austin, 1954: pp. 88-89). This means that positive law is created based merely on the sovereign in the state, without referring to any divine or natural law.

Second, a nation-state expresses an identity of a nation. The common characteristic of nation states is that they were founded based on the idea of nation. The idea of nation refers to "the unique spirit of the people—the first truly *modern* form of collective identity—provides the cultural basis for the constitutional state" (Habermas, 1999: p. 113). Obviously, the idea of nation refers to the traditions inherited by a community from the past. The traditions containing the unique spirit of the people provide the cultural basis to create a collective identity as a nation and give a political legitimacy to establish the state.

Accordingly, the independence movements exploit traditions to create a national consciousness to move the decolonization toward independence.

There is a connection between positive law and identity in the nation state: the positive law expresses the identity of a nation. There are various national legal systems such as French, English, China, Indian and Malay legal system, each of represents its own national identity. Those national legal systems are the positive laws in the states having the cultural basis in their own traditions. This shows the nation-state gives a frame for positive law to represent an identity of a nation—by adopting the tradition into the law. This also gives a cultural basis for the constitutional state when the constitution as the highest norm of positive law determines traditions or customs as a legal norm in the state.

However, not all positive laws in the world automatically represent the national identity based on the tradition. Relations among nations, globalization and modernization influence the establishment of the national legal systems. Therefore, most countries in the world have national legal systems with 'foreign influence'. Some countries acquire influence from foreign legal systems intentionally, such as Japan that got the influence from the German legal system based on the government policy. Some other countries receive foreign influences by coercion due to colonialism, occupation, and other ways. The foreign legal system also influences several countries due to the needs in economy or business relations. In globalization era, it is difficult to find a national legal system with 'pure national identity' because the growth of information and communication technology has made different states relatively opened and transparent. Meanwhile, modernization, which is often identified as westernization, causes some countries to establish their national legal system following the modern western legal system.

Nevertheless, a national identity remains a fundamental reference to establish a national legal system. Although receiving foreign influences, most countries maintain their national identity as the basis for their national legal system. Some countries even tend to reinforce ethno-nationality—a contradiction in globalization, which causes the spreading of anti-foreign influences in some legal system. The phenomenon shows that a national identity is still very important for most countries to build their national legal order.

Although there is an ideological reason, sociologically the needs for stability and certainty represent the major reason to maintain the national identity as the foundation of establishing the national legal system.

With all above, reconstruction of tradition has been for transmuting traditions into the positive legal order, particularly into the constitution. Rothermund argued that nationalism becomes a prime over Asian society to create "a reconstruction of tradition", including the reconstruction of "genuine democracy". The reconstruction of tradition is a reflection of the need to create and maintain a nation state. The reconstruction of tradition in democratic living finds its relevance in a nation state because it has implication in defining territory with a relatively homogeneous population and a representative government (Rothermund, 1997: p. 14).

In general, there are two models of the reconstruction of tradition in constitutional law. First, it emphasizes more on the relative aspect of the proper genuine tradition with the values of modern state. Second, it emphasizes on the absolute aspect of genuine tradition essentially different from the values of modern state (Azhari, 2011: pp. 53-65).

The first model views tradition that evolved within the Indonesian society as the basis to build the society toward the modern society (Noer, 1986: p. 72). Although it criticizes western democracy as a system with individual values, the view does not put constitutional traditions in Indonesia in opposition to modern constitutional state. The main perspective is expanding and adapting constitutional tradition with the modern time to create Indonesia as the modern constitutional state (Hatta, 1977: p. 43).

The second model views the tradition of Indonesian society as something different from the modern state. This perspective commonly refers to the social harmony – known as *selaras* and *serasi* – in communalism of rural society. This perspective views democracy in the sense of unity and consensus—namely 'genuine democracy', which is distinguished from western democracy with freedom and competition values (Hatta, 1977: pp. 51-52; Nasroen, 1971: p. 52). The proponent of 'the genuine democracy' requires tradition to be applied originally in the nation-state without any change or modification.

III. Reconstruction of Tradition in Indonesia

Ideas about the reconstruction of tradition in Indonesia have correlation with the growth of nationalism of Indonesia, which has developed since the early 20th century and gained its formation around 1930s. Nationalism of Indonesia was transformed from ethno-nationalism or group-nationalism toward Indonesian-nationalism (Kartodirdjo, 1997: pp. 75-81; Rambe, 2008). The transformation of nationalism influenced the development of reconstruction of tradition among the founding fathers when they engaged in the constitution creating process in BPUPKI (Agency for Investigating the Preparatory for Indonesian Independence) and PPKI (The Preparatory Committee for Indonesian Independence) in 1945.

Generally, there were two perspectives of the reconstruction of tradition developed by the founding fathers of Indonesia. The first perspective insisted that the reconstruction of tradition had to emphasize the originality of tradition and preserve it in the nation-state structure. The second perspective argued that the reconstruction of tradition had to emphasize the universal values of tradition so that the tradition could be adapted in the modern nation state. Those perspectives created two models of reconstruction of tradition in the Indonesian constitutional law.

The first perspective refers to Soepomo who had main role in making the Indonesian Constitution—formally called as *the Constitution of 1945*. In his speech on May 31st 1945, he argued that every state had its own peculiarity in history and society. The establishment of the Indonesian state, therefore, should accord with the social structure of the Indonesian society and fit for the contemporary ideas (Kusuma, 2004: p. 125). He argued that the genuine constitutional structure can be found in the traditional villages or *desa in* Java, Sumatera, and entire Indonesian archipelago. In those villages, state officials were the leader who integrated spiritually with their people and they had obligation to maintain the unity and harmony in the society (Kusuma, 2004: p. 126).

Therefore, Soepomo concluded that the establishment of Indonesian state had to be based on the peculiarity of Indonesian characters, namely the idea of "*negara integralistik*" (or integral state): where the state was united with all people, and group in any sector.

In the integral state, there was no dualism between state and individual; no contradiction between the state and the individual aspirations; no dualism between "Staat und staatsfreie Gesselschaft"; and consequently there was no necessary for human rights and freedom (*Grund und Freiheitsrechte*) of individual contra state (Kusuma, 2004: p. 127). Obviously, Soepomo emphasized more on particularity of tradition as a part of the Great Eastern traditions. However, he argued that there were several similar characteristics between totalitarian state in Germany and Japanese (before the World War II) and integral state in Indonesia. Therefore, he actually did not reject completely Western traditions, but he refused the Western liberal democratic system only. In this context, he used totalitarian ideology to legitimize and point out that peculiarity of tradition in Indonesia was appropriate to modern times.

The second perspective was represented by Soekarno and Mohammad Hatta. Although Soekarno and Soepomo had the same background as Javanese aristocrats, Soekarno had more democratic view than Soepomo. On the contrary to Soepomo, Soekarno rejected Western democracy, and he did not accept totalitarian ideology. Consequently, Soekarno denied both Western European parliamentary and American presidential that he believed as the instrument of capitalism. He suggested a *politiek economische democratie* or politic-economy democracy that is a democracy in politic with social justice (*sociale rechtvaardigheid*), namely a democracy with prosperity, a socio-democracy (Kusuma, 2004: pp. 162-164).

Particularly, Soekarno proposed Pancasila— "the five principles", which was finally accepted by all of the founders as the foundation of the state. He called Pancasila as a *Weltanschauung* (or a world view) and a *philosofische grondslag* (or a fundamental philosophy). Pancasila contains five principles that is monotheism, humanism, nationality of Indonesia, consensus or democracy, and social welfare. Soekarno believed that the five principles of Pancasila represented an authentic tradition of Indonesian people (Kusuma, 2004: p. 165).

The descriptions above point out that Soekarno had inclusive and dynamic views. He viewed that tradition had to be adjusted with the modern democracy. However, he denied liberal democracy and believed that it only gave equality in politics but created disparities in economy. Therefore, he proposed a democracy with social justice which was considered as an authentic aspiration of Indonesian people.

Muhammad Hatta had a similar position with Soekarno. Hatta also opposed individualism and proposed collectivism. He described collectivism as *gotong royong* (or mutual assistance) and *usaha bersama* (or common endeavor). However, he disapproved of Soepomo about totalitarian or integral state notion. He worried that Indonesia would developed into a totalitarian state as applied in Russia and Germany. Hatta confirmed that collectivism gave people freedom and right to express their opinion. He argued that collectivism will create "the governance state" (or *negara pengurus*), not the repressive state (Kusuma, 2004: p. 355).

In his paper in 1932, Hatta argued that the original democracy in Indonesia should refer to the "*demokrasi desa*" (or the traditional village democracy). The original democracy should be revived, not in the old-fashioned, but in a more advanced form in accordance with modern time. The *desa* democracy should be extended on a scale of the state and must be adapted to the development of civilization (Hatta, 1977: p. 42-43).

Generally, Soekarno and Hatta have a similar position in their opinion about the reconstruction of tradition. They believed that the Indonesian state had to be established based on the genuine tradition of Indonesian society, but the tradition should be adjusted with the modern democracy. Both believed that the reconstruction of tradition had function to maintain a certainty for people to reach their purpose to realize the social justice. Referring to Popper, there is a reason to reconstruct the tradition to maintain social regularity created by tradition during centuries. In the other sense, there is a belief that western democracy cannot ensure Indonesia to get social justice, even Indonesia will fall into destruction. Therefore, the Indonesian founders decided to reconstruct the tradition into the constitution to ensure Indonesia could realize social justice for all people.

Competition between two paradigms during the construction of the constitution finally results in a compromise in a constitution: the Constitution of 1945. There are several points of the compromise relating to the reconstruction of tradition. Generally, the founders accepted Pancasila as the basis of the state. They believed that Pancasila is a kind of reconstruction of tradition that has been adapted to a modern state structure. They agreed to use republic as the form of the state and they refused monarchy as an expression of feudalism.

They accepted republic as a continuity of democracy applied in the traditional villages or *desa* (Kusuma, 2004: pp. 357-370).

Practically, the ideas of reconstruction of tradition had created two authoritarian regimes during the Guided Democracy and the New Order eras. However, the same idea also created a democratic system during the parliamentary government. In fact, authoritarian regimes were evolved after the Constitution of 1945 reapplied on 5 July 1959. Those facts show that the reconstruction of tradition in the Constitution of 1945 was interpreted based on authoritarian sense. Moreover, democratic practice during the parliamentary era was also viewed as an expression of liberal democracy that contradicted with the genuine democracy of Indonesia.

Regarding the Guided Democracy, Soekarno believed that it was a kind of reconstruction of the Indonesian traditions. However, his interpretation was different from his opinion in the constitutional constructing process in 1945. Shortly after the Indonesian independence Soekarno saw the Indonesian tradition as a democratic tradition, but in the era of the Guided Democracy, he reinterpreted the Indonesian tradition based on autocratic paradigm (Seoekarno, 1959: p. 20). He believed democracy would be more effective to achieve the social prosperity if it was controlled by a concentric leadership. He also believed that a concentric government and a strong leader were more suitable with the native structure of Indonesian society. Particularly in the Javanese tradition, where Soekarno came from, the State or *Nagara,* is believed as a concentric power with the leader as the center whose absolute power controls not only human and society but also the universe (Lombard, 2008: pp. 60-71).

The New Order, basically, maintained the interpretation of Soekarno about the genuine Indonesian democracy. However, the interpretation of genuine democracy did not refer to Soekarno anymore, but formally referred to the idea of an integral state (Decree of MPR, 1993). Unlike Guided Democracy that provided legitimacy personally tor Soekarno, the idea of integral state provided many benefits to the rulers of the New Order to get legitimacy, and it can be exploited to eradicate Soekarno's influences in constitutional discourse of Indonesia.

Based on the idea of integral state, the New Order established the concept of the democracy of Pancasila as a manifestation of the genuine democracy of Indonesian people.

In this democracy system, the relations between citizen and the state were interpreted based on a Javanese concept of "*manunggaling kawula lan Gusti*": the unity of the people protected and the Lord as the protector. This was a patron-client relationship to create a political hegemony, where the state's interests transcended the citizen ones. As intended by the integral state, the New Order developed into a totalitarian state, where the state and its apparatus, particularly the army, controlled all of the people, over their consciousness and activities.

Those phenomena show that the New Order exploited concept of integral state to legitimize their interests to maintain hegemony in Indonesia. Culturally, those phenomena show that the New Order interpreted the Constitution of 1945 based on the Javanese traditions. This was comparable with Soekarno who also used the Javanese traditions as a basis for legitimacy of the Guided Democracy. Both Soekarno and Soeharto interpreted Indonesia constitutional system as a concentric state, where President or Government as the centre of the State. This indicates that Soekarno and Soeharto interpreted the reconstruction of tradition within the Constitution of 1945 based on the Javanese traditions.

In general, both Guided Democracy and New Order interpreted the reconstruction of tradition in the Constitution of 1945 based on the absolute particular model. The tradition represents norms, institutes, and procedures that are different completely from similar things in a modern state. In cultural context, the interpretation related to the Javanese traditions which emphasize on the concentric state.

After Soeharto resigned on 13 May 1998, Indonesia has changed dramatically. In relation to the constitution, in four years, the People's Consultative Assembly or the MPR (*Majelis Permusyawaratan Rakyat*) has carried out constitutional amendment four times, namely in 1999, 2000, 2001 and 2002. The major reasons of the constitutional amendment were the distortions and violations in the implementation of the Constitution of 1945, such as manipulation of the representative bodies in both national and local level, centralized government, lack of check and balanced mechanism, lack of protection of human rights, compulsory deliberation, and economic discrepancy (Badan Pekerja MPR, 2000: pp. 10-13; Azhari, 2011: pp. 305-319). Those reasons have infringed universal aspects of democracy.

Obviously, there is no strong effort to reconstruct the traditions as previously carried out by the founders of Indonesia. Although the constitutional amendment recognize the local customary or the *adat* law in relation to decentralization of local government (Art. 18B of the Indonesian Constitution), the recognition of the *adat* law was aimed more to preserve the tradition at local structure than to reconstruct the tradition at national structure. The amendment of the Constitution of 1945 became a new pattern of the reconstruction of the tradition.

Normatively, at national structure, the constitutional amendments have made several fundamental changes, particularly on the application of the American presidential system which represents a reinforcement of presidential government as the Constitution of 1945 had not yet been defined clearly. Before the amendments, the Constitution of 1945 applied a quasi-presidential system, in which a president as the head of government elected by the MPR should be responsible to the MPR (Huda, 2010: p. 324). Indeed, it was the original system of government in the Constitution of 1945, where the MPR had a status as the highest body in the Indonesian constitutional structure. After the amendments, the position of the MPR is equal with the president because the president is elected directly by the people (Art. 6A of The Indonesian Constitution). It also eliminates the main authorities of MPR to elect the President and to create the guide lines of the state policy.

The constitutional amendments show that the MPR has a tendency to adopt and transplant the presidential system applied in the American constitutional system. Obviously, there is a general opinion among the members of the MPR that the reinforcement of presidential system make the Constitution of 1945 becomes more democratic. At the same time, they refused parliamentary system because they believed that parliamentary system reflected a liberal system, which historically had created political instability during the liberal democracy era in 1950s. Thus, the amendments of the Constitution of 1945 rejected both the original government system in the Constitution of 1945 and the parliamentary system applied during the liberal democracy period.

The rejection of the original system of the Constitution of 1945 and parliamentary system on one side, and the acceptance of the American presidential system on the other side, developed as the main problem of reconstruction of tradition during the process of the amendments of the Constitution of 1945.

On one party, there were some members of the MPR who asked about philosophical and cultural basis of the acceptance of presidential system (Huda, 2010: pp. 324-325). However, several members of the MPR gave a reason that decision to choose the American presidential system solely based on practicality and empirical reality. In addition, there was an opinion that tradition and rationality was diametrically different, so that Indonesia has to choose presidential system to express rational choices in the constitutional system (Huda, 2010: pp. 327-328).

However, the members of MPR denied the absence of tradition discourse in the amendment of the 1945 Constitution. Hamdan Zoelva, the judge of the Indonesian Constitutional Court who engaged in constitutional amendment process, argued that practically the constitutional system under the amendment still maintains the tradition of deliberation (or *permusyawaratan*) in every decision making process. Although the amendment maintains deliberation as a primary principle in the Indonesian constitutional system, it determines that all decision should be taken by a majority rule or voting (Art. 2:3 the Indonesian Constitution), but every decision-making process gives a priority to use deliberation before majority rule. In addition, Zoelva confirmed that the amendment of the Constitution recognizes and respects the speciality of some regions, such as the monarchy of Yogyakarta, the Islamic law enforcement in Aceh, and the *adat* law enforcement in Papua (Art. 18B:1 of the Indonesian Constitution). The constitutional amendment also recognizes and respects the various native structures that remain exist in local traditional communities such as *Desa* in Java, *Nagari* in Minangkabau-West Sumatra, and *Banjar* di Bali (Art. 18B:2 of the Indonesian Constitution).

However, deliberation cannot replace direct general election in the presidential system. In fact, Local Governance Act of 2004 states that the procedure of direct election is applied not only to the presidential election, but also to all of the election of head of regional government. However, the amendment of the Constitution of 1945 stipulates that the head of regional government shall be elected democratically, without explicitly referring to the procedures of general election applied in the presidential election (Art. 18:5 of the Indonesian Constitution). The tendency points out that direct election or majority rule become the main procedure in the Indonesian constitutional system, while deliberation is just a complementary procedure in the presidential government system.

In the perspective of Popper, this view is not completely correct because there is no conflict between tradition and rationality. Rationality in Western constitutional system does not automatically indicate any progress, because rationality is also a legacy of Western tradition derived from the ancient Greek civilization (Popper, 2007: p. 171). Tradition should be seen in its social function to maintain regularities and certainty in a community. In this perspective, the reconstruction of tradition in the constitutional amendment should not only be seen as a restoration of authoritarian system as practiced in Guided Democracy and New Order. The reconstruction of tradition should be considered as an effort to maintain social order and certainty for Indonesian society. The reconstruction of tradition maintains society to face the social change without loosing their cultural basis and value that they believe.

Nevertheless, there is another development: when the constitutional amendment leaves tradition and adopts Western constitutional system at the national structure, at the same time the constitutional amendment applies Islamic law at the national level by arrangement of the Religion Courts (Art. 24:2 of the Indonesian Constitution). The constitutional amendment maintains deliberation or *permusyawaratan* as a constitutional practice, where *permusyawaratan* derived from Islamic tradition, then arrangement of Religion Court and the practice of deliberation have to be understood as a reconstruction of Islamic tradition at the national structure. Therefore, while the constitutional amendment only preserves the customary law at the local structure, the constitutional amendment reconstructs the Islamic tradition at the national level.

IV. Reconstruction of Tradition in Malaysia

The reconstruction of tradition in Malaysia has connection with nationalism of Malay, which has evolved since the end of 19th century. Unlike Indonesia of which independence had to be fought with a revolutionary war, Malaysia's evolution towards independence was largely free of violence or war. The nationalism movement got a momentum when the British proposed a Malayan Union in 1946 that would greatly reduce the powers of Malay Rulers and give citizenship to foreign immigrants. Under intense pressure from the multi-racial alliance organizations the British withdrew the proposal and agreed the formation of *Persekutuan Tanah Melayu* (the Federation of Malaya) on 31 August 1957.

In connection with the formation of the Federation, a commission of distinguished constitutional experts headed by Lord Reid was appointed—known as the Reid Commission—to prepare a constitution of the Federation of Malay (Gullick, 1981: p. 98). There are some recommendations of the Commission:

(i) The establishment of a strong central government with the States and Settlements enjoying a measure of autonomy and with machinery for consultation between the central Government and the States and Settlements on certain financial matters to be specified in the Constitution;
(ii) The safeguarding of the position and prestige of Their Highnesses as constitutional Rulers of their respective States;
(iii) A constitutional *Yang di-Pertuan Besar* (Head of State) for the Federation to be chosen from among Their Highnesses the Rulers;
(iv) A common nationality for the whole of the Federation;
(v) The safeguarding of the special position of the Malays and the legitimate interests of other communities (Commision, 1957: par. 2).

Those recommendations pointed out that the Malays have a special position in the government of the Federation. The Malays and their traditions should be protected and implemented in the constitutional legal system. It means those recommendations also indicated a reconstruction of the Malay tradition in the constitution of Federation.

Commonly, Malay society has two traditions or *adats*—particularly in Western Malaysia or Peninsula—namely the *Adat Perpatih* and the *Adat Temenggong*. Both traditions originally came from Minangkabau, West Sumatera (Windstedt, 1950: p. 87). For several centuries, migrants from Minangkabau came to Peninsula Malaya and influenced the formation of Malay culture. They also established some monarchies in Peninsula, such as Johor, Perak, and Negeri Sembilan. Among these monarchies, Negeri Sembilan applies the Adat Perpatih and the others practices the Adat Temenggong. Particularly, Negeri Sembilan was established by Minangkabau people with *Raja Meulawar* as the first ruler. The relationship between Negeri Sembilan and Minangkabau is expressed in following stanza:

Beraja ka-Johor
Bertali ka-Siak

Bertuan ka-Menangkabau;
Sultan Besar di-negeri Seri Menanti;
Pertuan Muda di-negeri Rembau.

Our suzerain is Johor;
We have ties with Siak;
Menangkabau is our master;
Our highest local chief is the Ruler of Seri Menanti;
Our second local chief is Yamtuan Muda of Rembau.

In constitutional legal perspective, the Adat Temenggong is *autocratic,* while the Adat Perpatih is a *democratic* (Siddik, 1975: p. 110; Samad, 1974: p. 3). According to the Adat Temenggong, Raja as the ruler has a final authority in decision making. In addition, the Adat Temenggong practices a hereditary monarch. In contrast, the Adat Perpatih practices a decision making based on a consensus (*muafakat*) within a tiered-representative. The most important is the ruler, namely *Yang di-Pertuan Besar*, who should be elected by the *Undangs* or 'Law givers', that is the title of the superior *adat* chief in the *luak* of Sungei Ujong, Jelebu, Johol and Rembau (Art. 7:2 of the Negeri Sembilan Constitution). This is an *elective monarch system* (Siddik, 1975: p. 110; Hooker, 1970: p. 7).

The Malaysian founding fathers had adopted the elective monarch of Negeri Sembilan as a system of the constitutional monarchy of the Federation of Malay (Windstedt, 1950: p. 87; Awang, 1998: p. 114; Jewa, 2007: p. 39). The *Yang di-Dipertuan Agong* (He who is made Chief Lord) is the head of state of the federation and is elected from among the nine Malay rulers to serve for a term of five years. His election is on a rotation basis (Art. 32:3 of the Malaysian Constitution). In the original draft of the constitution, the title of the head of state of the federation even was called '*Yang di-Pertuan Besar'*—similar with the title of the head of state of Negeri Sembilan. However, to avoid confusion with the title of the head of state in Negeri Sembilan, the founders of Malaysia used the *Yang di-Pertuan Agong* as the title of the head of state of the federation (Commision, 1957: par. 17).

The decision of the Malaysian founders pointed out that they had conducted the reconstruction of tradition in the constitution.

The reconstruction has been conducted not only in several principles or concepts of democracy such as *muafakat*, but also in the structural or institutional aspects as expressed in the election of *Yang di-Pertuan Agong*, which obviously is originated from the constitutional tradition of Negeri Sembilan. It means that Malaysian constitutional system has adapted and expanded the tradition of the elected monarch of Negeri Sembilan with the characteristics of the federation as the modern nation-state. Nevertheless, although the royal institution of the *Yang di-Pertuan Agong* is originated from the *Adat* law, it does not mean that the elective monarch system is separated from the religious Islamic law (or *shara'*). The *Adat Perpatih* expresses the relationship between adat and shara' in a stanza:

Adat berpanas, syarak berlindung
Syarak mengata, adat memakai
Adat dan syarak sandar menyandar
Adat bersendi syarak
Syarak bersendi Kitabullah

Adat gets hot, shara' gives protection;
Shara speaks out, adat uses it;
Adat and shara' back each other
Adat based on shara'
Shara based on the Book of God

Based on the stanza, there is a close relationship between *Adat* and *Shara'*. It means the *adat* cannot be separated from *shara'*. Based on the Malaysian Constitution, this is expressed in the function of the *Yang di-Pertuan Agong* as the head of Islam in the Federal Territories of Kuala Lumpur, Putra Jaya and Labuan (Art. 3:5); in his own State (Art. 34:1); and in Malacca, Penang, Sabah and Sarawak (Art. 3:3). He presides over the Council of Islamic Religious Affairs in Kuala Lumpur, Putra Jaya and Labuan (Art. 3:5). Therefore, the *Yang di-Pertuan Agong* has the position as the head of the state as well as the head of religion (Islam).

Conceptually, although the constitution of Malaysia has implemented the reconstruction of tradition in the structure of government, not only in principles or concepts, but also in the relative-particular model.

It means the reconstruction of tradition in the constitution of Malaysia emphasize more on relative aspect of the genuine tradition which is suitable with the values of modern state. The elective monarch is genuine and unique, but it is not an absolute system, which is essentially different from the modern state. Indeed, the tradition of the elective monarch can be adapted to the modern constitutional democracy.

V. Comparison

Comparatively, there are some similarities between Indonesia and Malaysia in relation with reconstruction of tradition in their constitution. First, both Indonesia and Malaysia have a paradigm to reconstruct the tradition of democracy. The tradition of democracy in Indonesia particularly is originated from the *Desa* (the traditional village), while that of Malaysia refers to the constitutional custom or *adat* of Negeri Sembilan, namely the elective monarch tradition.

Second, both Indonesia and Malaysia have a similar source of democratic tradition, namely the *Adat Perpatih*, which originated from Minangkabau. Although there are a lot of democratic traditions that are practiced in the *desa* in Indonesia such as the election of *Lurah* in the Javanese traditional village, they essentially share similar tradition of democracy in Minangkabau. Although they do not directly point to the *Adat Perpatih*, the basic notion of *musyawarah* (deliberation/consultation), *mufakat* (consensus), and *perwakilan* (representative) clearly inform the *Adat Perpatih* of Minangkabau. The founders from Minangkabau such as Mohammad Hatta and Muhammad Yamin surely have an important role in reconstructing the *Adat Perpatih* in the constitution of Indonesia.

Third, both Indonesia and Malaysia essentially have a similar pattern to reconstruct the democratic tradition based on a relative-particular model. Both countries emphasize more on the relative aspect of democratic tradition, which can be adapted and expanded in a modern nation-state.

Nevertheless, there are some differences between the reconstruction of tradition in Indonesia and Malaysia. First, the Indonesian founders rejected the monarchy system, with exception in monarchy of Yogyakarta, and tended to practice the tradition of democracy in *desa*. Therefore, the founders of Indonesia chose Republic as the transformation of *desa* in a modern nation-state.

On the contrary, Malaysia preserves an elective monarch as a reconstruction of democratic tradition in the contitutional monarchy.

Second, after the constitutional amendment in 1999-2002, Indonesia has left the democratic tradition as the basis of constitutional system. Although the constitutional amendment recognizes the traditional customary law or *adat* at the local structure, particularly in the traditional villages such as *desa* (Java), *nagari* (West Sumatera), and *banjar* (Bali), however at the national structure Indonesia has left the democratic tradition of *desa* and turn to the Western democracy. Conversely, Malaysia has preserved the elective monarch tradition in its constitutional monarchy system. Ironically, the elective monarch system practiced in Malaysia is actually originated from Minangkabau in Indonesia.

Third, the Indonesian constitution separates the *Adat* and the Islamic law (*sharia*). The amendment of the Indonesian constitution preserves the customary law at the local structure, but at the same time reconstructs the Islamic tradition at the national level, except in the Province of Aceh where the *adat* and the *sharia* are practiced simultaneously based on the Aceh Governance Act of 2006 (Art. 16:2b). Conversely, according to the *Adat Perpatih,* Malaysia integrates the *adat* and the Islamic law, where *The Yang di-Pertuan Agong* represents the traditions as well as the religion institutions.

Theoretically, according to Popper's view, the constitutional amendment in 1999-2002 has a paradigm fallacy as Indonesia left the reconstruction of tradition in the consitution. The Indonesian leaders and politicians, who engaged in the constitutional amendment, tend to view that tradition is contradicted with modernity, whereas according to Popper modernity is a part of the Western tradition. Tradition should be viewed in its social function as an instrument to maintain order and regularity. In this case, Malaysia is more consistent with the Popper's paradigm, by preserving the tradition of elective monarch in the modern nation-state as the way to maintain order and regularity of community in the modern era.

VI. Conclusion

Based on the description above, it can be concluded that, first both Indonesia and Malaysia have a similar position to reconstruct the democratic tradition in their constitutional legal system. However, Indonesia employs the tradition of democracy practiced in the traditional villages or *desa*, while Malaysia applies a democratic tradition practiced in the constitutional *adat* of Negeri Sembilan, namely the adat of elective monarch.

Second, both Indonesia and Malaysia reconstruct the tradition of their constitution based on the democratic tradition of the *Adat Perpatih*. However, after the constitutional amendment in 1999-2002, Indonesia has left the tradition and turned to the Western democracy. At the same time, Malaysia consistently preserves the elective monarch originated from the *Adat Perpatih*. Ironically, the *Adat Perpatih* actually is originated from Minangkabau in the West Sumatera, Indonesia.

Third, shortly after the independence, Indonesia reconstructed the tradition based on a particular-relative model. Indonesia applied a particular-absolute model during the Guided Democracy and the New Order eras. Finally, after the constitutional amendment in 1999-2002 Indonesia preserves tradition at local structure, but adopts the Western democracy at national structure. In contrast, since the beginning Malaysia consistently has maintained the reconstruction of tradition based on the particular-relative model.

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