

Association of Indonesian Muslim Intellectual (ICMI). That development, obviously, has shifted a constitutional reference from Javanese to Islamic politics. It also means a paradigm shift from Javanese to non-Javanese tradition. It also encouraged Islamic traditions as an antithesis of the concentric Javanese state, which later led to democratization process in Indonesia—in addition affected by democratization trend at global level. Finally, those development forced Soeharto to resign on 21 May 1998, which marked formally the end of the New Order regime after 32 years in power in Indonesia. A reformation era purposed to eradicate the New Order system and build a democratic state in Indonesia. Among the reform agendas, the constitutional amendment was a main agenda that aim to create a more democratic constitution.

In general, both Guided Democracy and New Order interpreted reconstruction of tradition in the 1945 Constitution based on absolute particular model that emphasized on originality of tradition absolutely. The tradition was viewed as norms, institutes, and procedures that different completely from those similar things in modern state. In cultural context, the interpretation referred to Javanese traditions that emphasize on a concentric state, which exploited to provide legitimacy for authoritarian practices.

IX. RECONSTRUCTION OF THE TRADITION AFTER THE CONSTITUTIONAL AMENDMENT

For four years, the MPR has carried out the constitutional amendment four times, namely 1999, 2000, 2001 and 2002. In general, the first and the second amendments contain limitation of Presidential term, reinforcement of the DPR, decentralization, and strengthen of the human rights. The third and the fourth amendment contain the alteration of government system, reduction of authority of the MPR, and establishment of some new organs namely

Regional Representative Council or Senate (DPD), General Election Commission, Judicial Commission and Constitutional Court.

The main reason of amendment of the 1945 Constitution was the distortions and violations in implementation of the 1945 Constitution, 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 (General Secretary of MPR, 2000). Those reasons referred to universal aspects of democracy. Obviously, there is no strong reason to reconstruct the traditions as carried out by the founders when the constitutional making in 1945. Indeed, the constitutional amendment reinforces local customary or *adat* law in relation to decentralization of local government. However, strengthen of *adat* law aimed more to preservation of tradition at local structure than reconstruction of tradition at national structure. This phenomenon, that is universal in national structure and particular in local structure, became a pattern of the reconstruction of tradition in the amendment of the 1945 Constitutional.

Normatively, in national structure, constitutional amendment determined several fundamental changes, particularly the application of a pure presidential or American presidential system. The application of a pure presidential system was viewed as the reinforcement of presidential government because the 1945 Constitution had not yet determined clearly. Before constitutional amendment, the 1945 Constitution applied a hybrid system or quasi-presidential system, where President as the head of government elected by MPR and should responsible to the MPR (Book IV, 2010: 324). That was the original system of government of the 1945 Constitution. Based on the original system, the MPR has status as the highest body in the Indonesian constitutional structure before amendment. After the amendment, the position of the MPR is equal with the President because the President elected directly by the people (Art. 6A of the 1945 Constitution). The MPR has similar status with

the Congress in the American constitutional structure. It also erases the main authorities of MPR namely electing the President and creating the guide lines of the state policy.

Those constitutional amendments point out that the MPR have a tendency to adopt and transplant the presidential system that practiced in the American constitutional system. Obviously, there is a general opinion among the members of the MPR that the application of presidential system as a way to make the 1945 Constitution becomes more democratic. At the same time, they refused parliamentary system because they believed that parliamentary system reflected a liberal system that historically had created political instability during liberal democracy practice in 1950s. Thus, the amendment of the 1945 Constitution refused both the original government system in the 1945 Constitution and the parliamentary system that had ever practiced during liberal democracy era.

In that context, actually, the MPR show historical reasons more than ideological reasons. In ideological perspective, refutations of the original system of the 1945 Constitution and parliamentary democracy have different reasons. The first rejects authoritarianism that practiced by Guided Democracy and New Order, and the later refuses liberalism that practiced by parliamentary democracy during 1950s. However, the rejection of liberalism is incoherent with the acceptance of presidential system, which believed by the founders as a kind of liberalism that practiced in the American constitutional system. Therefore, rejection of original system of the 1945 Constitution and parliamentary system in the amendment of the 1945 Constitution mainly based on more historical reasons than ideological reasons.

The rejection of the original system of the 1945 Constitution 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 in process of the amendment of the 1945 Constitution. On one party, there are some members of the MPR, who ask about

philosophical and cultural basis of the acceptance of presidential system. Soedijarto from Fraction of Group Delegation indicated this position with rhetorical question:

I agree ... that we apply a Quasi-Presidential Cabinet and there is no mistake with that system. [However], what is the philosophy when we choice a directly presidential election When we proclaimed the proclamation in 1945 the American presidential system has been exist.... However, why did [the founders] not choice it? I believe there was no a vested interest among the founders to become a President. They were still uncontaminated just to create a stable political system. However, [there are opinion] about equality, majority, transparency, independency, rational choices. Which one of those that exist in Indonesia? Are we equal within illiterate with academician? How many of us who illiterate? In study of political culture, there is a term about a political system that incongruent with his political culture. Therefore, in England there is an opinion that required a civic culture, a meeting between traditionalism and modernization without conflict, not a jumping to the modern one. The United State of America also passed it, at a moment the American people elected indirectly their senators, but House of Representatives in each States elected them. After several times, the provision was amended so that the Senator should be elected directly by people in each State (Book IV, 2010:324-5).

Ramlan Surbakti from Team of Political Expert gives a respond to the question:

Concerning the reason of directly presidential election ... I think that is an old principle, the new principle is about practicality and reality. ... If the people is considered has no capacity to choose a wisdom President and so forth, then we become inconsistent when we give a guarantee to the people to choose the members of national and local legislatures. If right to choose the members of legislature is considered as a capacity, why right to choose the president is considered as incapacity. I think because we follow a presidential system, not a monarchy, and a republic is presidential, then [the president] should be chosen [directly].... Thus, we have to distinguish between principle and reality. Have we prepared culturally? ... This is a debatable concerning the essence of constitution. If in ideal, law is a social engineering or political engineering.... Therefore, there is usually dialectic between ideality and reality.

In addition, Suwoto Mulyosudarmo from Team of Legal Expert gives a similar respond:

If we remain to apply presidential system, then the election system is directly. Then as said by Prof Soedijarto that the founding father knew that the constitution of several countries such as France and the USA has apply a directly presidential election. However, it is not mean that after 50 years the constitution applied there is no chance to evaluate what the people representatives has done in electoral process until now. Concretely, the MPR had made some mistakes in choosing a leader, but the people

have not ever been tried [to choose the leader], is it better or worse? ... I emphasize that if the people must be given a trust to choose their representatives, then the people also must be given a similar trust to choose their president (Book IV, 2010:327-8).

Thus, obviously, that the choice of the pure presidential system did not consider the aspects of tradition and ideology or philosophy, but solely based on practicality and empirical reality, particularly reality of New Order. Even, the choosing of the pure presidential system is conducted based on 'trial and error' namely to give the people a trust to choose president directly after the MPR had made some mistakes in choosing the leader. In addition, there is an opinion that distinguishes diametrically between tradition and rationality, so that Indonesia has to choose presidential system to express rational choices in the constitutional system.

On the other part, the PCA more emphasizes on legal systematic than tradition as indicated by Hamdan Zoelva:

Then, finally, regarding the formulation of popular sovereignty, we view that the formulation ... indeed proper systematically with the later formulations, namely about bicameral system that replace the MPR from the highest or supreme institution. It is only a joint session. Therefore, logic if the power of the MPR to conduct popular sovereignty should be erased. ... The MPR is only a joint session for the DPR and DPD. And, the popular sovereignty is conducted by the state organs, which their tasks and authorities determined by the constitution. This means checks and balances in implementation of popular sovereignty by the state organs. If the MPR is the highest organ, then there is no check and balance. Principally, the MPR takes and conducts all (Book II, 2010:355).

Thus, reduction of the MPR from the highest organ was encouraged by reason to maintain a systematic to bicameralism, particularly bicameralism practiced in American constitutional system. In opinion of the Assembly, the Congress in the American constitutional structure is a joint session for House of Representatives and Senate, so that the Assembly in the Indonesian constitutional system has to be set as the joint session too. In that point, obviously, ground of the constitutional amendment do not refer to tradition, but

merely to legal systematic that isolates reason of constitutional amendment from reconstruction of tradition.

However, Hamdan Zoleva, who engaged in the constitutional amendment and judge in Constitutional Court, denied the absence of tradition discourse in the amendment of the 1945 Constitution. In an interview on 17 September 2012, Zoelva argued that practically the constitutional system under the amendment of 1945 Constitution still maintaining tradition of deliberation (or *permusyawaratan*) in every decision making process. The constitutional amendment maintains deliberation, which is rooted in tradition or adat law, as a primary principle in Indonesian constitutional system. However, normatively, the amendment of the 1945 Constitution determines that all decision should be taken by a majority rule or voting (Art. 2:3). Every decision-making process usually gives a priority to use deliberation before majority rule. This means that, according to opinion of Zoelva, although structurally the constitutional amendment has no strong reference to tradition, procedurally it maintains practices of deliberation as a main procedure in the Indonesian constitutional system.

In addition, Zoelva confirmed that the constitutional amendment recognizes and respects units of regional that are special and distinct, such as a monarchy in Yogyakarta, an Islamic law region in Aceh, and adat law enforcement in Papua (Art. 18B:1). The constitutional amendment also recognizes and respects various native structure that remain exist in local traditional communities such as *Desa* in Java, *Nagari* in Minangkabau-West Sumatra, and *Banjar* di Bali (Art. 18B:2).

However, Zoelva's opinion about deliberation practices normatively cannot replace direct general election in presidential system that change fundamentally the original system of government under the 1945 Constitution before amendment. Deliberation practices only become a complementary procedure within the presidential system that essentially apply majority rule, particularly in the form of directly general election, as a main procedure. In

development, Local Government Law 32/2004 determined that procedure of directly general election is applied not only in presidential election, but also in all of the election of head of regional government, both provinces (*Governor*), municipality (Mayors or *Walikota*) and regency (Regents or *Bupati*). Whereas, the amendment of the 1945 Constitution determines that head of regional government shall be elected democratically, without explicitly refer to direct general election as practiced at the presidential election (Art 18:5). The tendency points out that direct general election or majority rule become a main procedure in the Indonesian constitutional system, while deliberation just is a complementary procedure in the presidential government system.

Meanwhile, the provisions about recognition and preservation of local customary law or *adat* law more demonstrate the conservation of local tradition in comparison with the reconstruction of tradition in the sense of extension or improvement and adjustment of tradition with the life of a modern state. Those provisions only regulate in regional and local government because tradition or *adat* law exist in local communities, where Indonesia has approximately 1.128 ethnics (*Jawa Pos*, 3 Februari 2010). The plurality causes no single national tradition. Therefore, at the national structure, the constitutional amendment has a tendency to adopt a foreign constitutional system, particularly the American presidential system, which considered more advanced and rational. Consequently, the reconstruction of tradition disappears from the constitutional amendment discourse in the national structure.

The perspective of the Assembly members in the constitutional amendment contradicts with the original intents of the founding fathers. The founding fathers have a strong consideration concerning the tradition and endeavor to reconstruct the tradition in the modern-state of Indonesia. On the contrary, the Assembly members did not consider the tradition and believe that tradition as opposed to progress and rationality of the modern-state. They believe that the constitutional amendment should leave tradition, which has created

authoritarian in the past, and adopt or transplant the Western constitutional system, particularly the American constitutional system, which considered more advanced and modern.

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 that rationality is also essential as a legacy of Western society derived from the ancient Greek civilization (Popper, 2001:171). 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 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 at the time of social and political changes, including the constitutional changes. The reconstruction of tradition maintains society to face the social change without loss their cultural basis and values orientation that they believe in their life.

Nevertheless, there is another development: when the constitutional amendment leaves tradition and adopt Western constitutional system at the national structure, at the same time the constitutional amendment applies Islamic law at the national level by arrangement about the Religion Courts (Art. 24:2). The Religion Court is an Court of Islamic Law (Sharia) that since 1882 has been recognized by Netherlands-Indie and has continued after independence that regulated in several statutes. Arrangement about the Religion Courts under the constitution makes the Religion Courts and Islamic law have more powerful constitutional base than when they were regulated by statute. If considering at the same time the constitutional amendment maintain deliberation or *permusyawaratan* as a constitutional practice, where *permusyawaratan* derived from Islamic tradition, then arrangement of

Religion Court and practice of deliberation have to be understood as a reconstruction of Islamic tradition at the national structure. Thus, while the constitutional amendment only preserves the customary law at the local structure, at the same time the constitutional amendment reconstructs the Islamic tradition at the national level.

At this point, there are three parallel developments in the constitutional amendment: the national structure occurred the adoptions of the Western modern constitutional system on one side and the reconstruction of Islamic tradition on the other side, while at the local structure is occurred the preservation of customary or *adat* law. Those developments essentially reflect the rejection against Javanese tradition. Hegemony of Javanese tradition that conducted in interpretation practices by Guided Democracy and New Order regimes encourages the constitutional amendment rejects domination of a certain tradition and more emphasizes to preserve traditions at local structure. At the same time, rejection of Javanese tradition has a meaning as a reinforcement of non-Javanese tradition that in many aspects parallel with Islamic tradition. This means reinforcement of non-Javanese tradition also means as strengthening of Islamic tradition. It can be happened because Javanese tradition itself, at least as demonstrated by Soepomo with integrality state idea, Soekarno with Guided Democracy system and Soeharto with New Order system, has a tendency to oppose the Islamic tradition. Therefore, rejection of Javanese tradition has double effect: reinforcement of non-Javanese and Islamic tradition.

In relation to the reconstruction of tradition, those developments points out that there is no clear pattern of reconstruction of tradition in the amendment of the 1945 Constitution. Essentially, non-Javanese and Islamic tradition have is a similar tendency to conduct the reconstruction of tradition according to relative-particular model. This model tends to view tradition that evolved within Indonesian society as the basic to build Indonesian society toward modern society. However, reinforcement of non-Javanese and Islamic tradition did

not use a model of relative-particular to reconstruct the tradition in the constitutional amendment. Conversely, the constitutional amendment conducts a separated agenda: adopting the Western constitutional system, but at this same time accept the Islamic tradition to be applied simultaneously in the Indonesian constitutional system.

Both non-Javanese and Islamic tradition have a same interest to reject authoritarian interpretation of Javanese tradition so that both traditions adopt Western constitutional system that considered more democratic. However, because there is no conflict between non-Javanese and Islamic tradition, so there is no resistance to accept Islamic tradition in the constitutional system of Indonesia. Consequently, although structurally the constitutional amendment adopts the Western constitutional system, particularly American presidential system, but Islamic law can be operated as a part of Indonesian constitutional law.

X. CONCLUSION

Conceptually, tradition cannot be distinguished from modern rationality because rationality in the Western modern society essentially is a tradition derived from the ancient Greek civilization. Tradition, similar with law or legislation, has a social function to maintain social order and certainty. Therefore, in line with development of nationalism and modern nation state, many countries maintain their tradition by a reconstruction of tradition in each constitutional system.

However, there is no single pattern of reconstruction of tradition. In history of Indonesia, there are two patterns of reconstruction of tradition, which used as model for the reconstruction of tradition in the constitutional system of Indonesia. First, the absolute-particular model that emphasizes on originality of tradition so that tradition should be reconstructed in the constitution absolutely without a significant modification or adjustment. Second, the relative-particular that emphasizes on relativity or universality aspect of tradition