

IV. TRADITION, POSITIVE LAW, AND NATION STATE

Term of 'constitutional tradition' in this research refers to tradition of managing the state affairs within a legal meaning. In the legal meaning, constitutional tradition points toward aspects of tradition related to constitutional and administrative law. Particularly, this research is emphasized on the study about aspects of constitutional law of tradition. Related to those aspects, the research focused on structure of the state as a main scope of constitutional law studies. In constitutional law studies, structure of the state means structure of the main bodies (i.e. legislative, executive, and judicial bodies) and relations between those bodies. This research is focused on, especially, structure of legislative and executive and relations between the two of bodies to determine the system of government.

Regarding the 'tradition' itself, there are various meanings. In general sense, 'tradition' is distinguished from 'modern'. Tradition means everything comes from the past, while modern refers to everything found in the present and future. Traditional society is distinguished from modern, post-industrial, or even post-modern. Tradition is often thought in relation with myth and ancient heritage, while modern points to rationality and science-technology. And because rationality, science and technology was created by Western, then modern is identical with Western world. Accordingly, to be modern means to be Western. It means modernization is equal with westernization.

Karl Popper points out that there are problems with the way of thinking. Popper said that even rationality in Western is a tradition, which is inherited from the Greek civilization. Rationality is a logic system, which can be traced to Greek philosophers such as Pythagoras, the first mathematician who created several mathematic formulas or Aristotle who created system of logic. Rationality of Greek philosophy has created a rationality or scientific tradition for the Western society (Popper, 2002:169-170).

Accordingly, there are non-rational or other-rational traditions outside the Western world. The existence of those traditions relate to the tradition of social function. Popper suggests that tradition must be understood in the light of 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, 2002:175). Thus, tradition may give people a certainty to plan rationally their acts in the future.

The social function of tradition point out that tradition cannot be distinguished from rationality. Rationality itself is a part of tradition of Western society and some other traditions, while some other traditions have non-rational values. However, every tradition has a logic system to maintain the social order and certainty, whether or not they are rational or non-rational traditions.

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 that are obeyed by a community as legal norms—namely customary law. Moreover, several customary legal norms have been adopted by legislation to be part of positive law in a modern state. It means that the positive law in modern state, which naturally has foundation on rationality, can be created based on traditions because they have similar function to create and maintain the social order.

Although tradition and law have a similar function given to social order, but the power of their binding are different. As Austin argues, 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, 1869:104) This can be considered as the positivization of custom or tradition. In this regard, Kelsen said that “custom has to be, like legislation, a constitutional institution” (Kelsen, 1973:126). Kelsen says about this in relation to the hierarchy of norms, where the constitution is the highest of norms in a legal order. Kelsen argues further that it is possible “only if the constitution ... institutes custom, just as it institutes legislation, as a law-creating procedure” (Kelsen, 1973:126). Therefore, tradition or custom can be transmuted into a positive law when it is adopted by court and legislation or – in the highest hierarchy of norms – determined by the constitution.

In relation to this research, the adoption of custom into the positive law, particularly into the constitution, can be viewed as 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, which were shaped based on Westphalia Agreement of 1648; (2) ‘belated’ nation states, which were established based on national consciousness or cultural that disseminated by propaganda. Those nation states developed in Central and Eastern Europe; (3) decolonization nation states that emerged from the process of decolonization, primarily in Africa and Asia; (4) the independent nation-states in Eastern and Southern Europe that emerged after the collapse of the Soviet Empire (Habermas, 1999:105-6).

In legal aspect, the nation state has two consequences, e. g. positive law and identity, which are related to one another. First, the nation-state cannot be separated from the positive law. As Kelsen argues, positive law appears empirically in the form of national legal order, whereas the state is personification of the national legal order (Kelsen, 1973: 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, 1973:114). Positive law, as Austin says, 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, 1869:88-9). This means that positive law is created based on merely sovereign in the state, without refers to divine law or natural law. This refers to nation state as a kind of state founded based on the idea of nation.

Second, a nation-state expresses an identity of a nation. There is a common characteristic of those nation states: the states 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, 1999:113). Obviously, the idea of nation refers to traditions that inherited by a community from the past. Traditions contain the unique spirit of the people and provide the cultural basis to create a collective identity as a nation and give a political legitimacy to establishment of the state. Accordingly, the independence movements exploit traditions to create a national consciousness to move decolonization process toward nation independence.

There is a connection between positive law and identity in the nation state: the positive law expresses identity of a nation. Accordingly, there are various national legal systems such as French, English, China, Indian and Malay legal system, which represent each national identity. Those national legal systems are the positive laws in each state that created based on cultural basis provided their own traditions. This shows the nation-state gives a frame for positive law to represent identity of 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 every positive law in the world automatically represents national identity based on each tradition. Relations among nations, globalization and modernization also influence the establishment of the national legal systems. Therefore, most countries in the world have national legal system with ‘foreign influence’. Some countries acquire

influence from foreign legal system intentionally, such as Japan got influence from Germany legal system based on government policy. Some other countries receive foreign influences by coercion due to colonialism, occupation, or the other ways. The foreign legal system also influences several countries due to 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 that creates every state relatively opened and transparent. Meanwhile, modernization, which is often identified as westernization, causes some countries establish their national legal system following the modern western legal system.

Nevertheless, national identity remains a fundamental reference to establish the national legal system. Although it receives foreign influences, most countries maintain national identity as a basis for their national legal system. Even, there is a tendency to reinforce ethno-nationality in several countries—a contradiction in globalization, which causes the spreading of anti-foreign in some legal system. That phenomenon pointing out national identity is still very important for most countries to build their national legal order. Although there is an ideological reason, sociologically the need for stability and certainty become a reason to maintain national identity as a basis for institute national legal system.

V. TWO MODELS RECONSTRUCTION OF TRADITION

In this regard, the reconstruction of tradition has been used as a way to maintain national identity in the national legal system. The reconstruction of tradition commonly accompanies the establishment of the nation states, primarily in Asia and Africa. For those states, reconstruction of the tradition enables adjustment of the tradition into the structure of nation state that inherited from western colonialism. Most countries in Asia and Africa, which experienced decolonization process after World War II, have inherited the colonial