

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

structures, included institutions and legal system. Those colonial legacies originated from western tradition with rationalistic character. This creates problems for new nation states in Asia and Africa, which have many different traditions. On one side, they have to find the nation state according to modern order. On the other hand, they have to keep their traditions to maintain their national identity. There is a strained situation caused by ideology of nationalism that make them have to carry out decolonization with the establishment of the nation state and maintaining their traditions at the same time. In this situation, reconstruction of the tradition has been used to adjust traditions into the structure of nation state. In legal aspect, the reconstruction is carried out by the adoption of traditions into positive law, particularly into the constitution as the highest norm in the national legal order.

In line with this research, the reconstruction of tradition focuses on the Indonesian constitutional traditions, which the 1945 Constitution reconstruct. Actually, many researchers have conducted studies on the reconstruction of constitutional tradition in Indonesia. However, those studies were conducted in relation to the development of the authoritarian system in the period of the Guided Democracy (Old Order) and the New Order. Among other thing, research of Benedict R O’G Anderson (1990) which became a major reference in the study of the reconstruction of tradition in Indonesia. Later, study of Dietmar Rothermund (1997) examines the reconstruction of tradition in several countries, including in Indonesia. In addition, Azhari’s study (2005) concluded that the Indonesian founding fathers had deliberated the reconstruction of tradition as a basis of democracy in Indonesia. For them, Indonesian democracy should be invented based on historical experiences and cultural values.

However, until now there have been no in-depth studies on the reconstruction of constitutional tradition in the post-amendment of the 1945 Constitution. The amendment of 1945 Constitution refers more to the current theories and ideas that related to democratization process after the end of the Cold War and the collapse of communism in Eastern Europe,

which viewed as a victory of liberal democracy. Therefore, the reconstruction of tradition becomes a new thing because it is outside the mainstream of constitutional studies in Indonesia.

In that context, this study uses the reconstruction of tradition as the main theory to explain development of the reconstruction of tradition in the 1945 Constitution and to build a model of reconstruction of tradition in constitutional system in Indonesia. The reconstruction of tradition is a theory from Dietmar Rothermund who states that nationalism becomes a prime over for Asian society to create “a reconstruction of tradition”, included the reconstruction of “genuine democracy”. The reconstruction of tradition is a reflection of 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 territorial with a relatively homogeny population and a representative government (Rothermund, 1997:14).

In general, there are two models of the reconstruction of tradition in Indonesian constitutional law. First, it emphasizes more on relative aspect of the proper genuine tradition with the values of modern state. Second, it emphasizes on absolute aspect of genuine tradition so that viewed essentially different from the values of modern state (Azhari, 2010:53-65).

The first model views tradition that evolved within Indonesian society as the basic to build Indonesian society toward modern society (Noer, 1986:72). Although it contains criticism against western democracy as system with individual values, that view does not opposed between constitutional traditions in Indonesia and modern constitutional state. The main perspective is expanding and adaptation of constitutional tradition with the modern time to create Indonesia as the modern constitutional state (Hatta, 1975:43).

The second model views tradition of Indonesian society as very different from the modern state. This perspective commonly refers to social harmony – called in bahasa

*Indonesia 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, 1975:51-2; Nasroen, 1971:52). The proponent of ‘the genuine democracy’ requires tradition applied as originally in the nation-state without change or modification.

## **VI. ISLAMIC LAW AND ADAT LAW**

The Indonesian society identifies a legal tradition that evolved among various ethnics in Indonesia called *adat* law. The Indonesian Constitution recognizes and respects *adat* law along with its traditional customary rights as long as this remain in existence and is in accordance with the societal development and the principles of the Unitary State of the Republic of Indonesia (Art. 18: 2). Some special provinces such as Papua, West Papua, and Yogyakarta, apply *adat* law as the local or regional distinction. In addition, thousand villages in Indonesia apply *adat* law as a kind of recognizing and respecting to particularities and diversities of traditional communities in Indonesia.

*Adat* law exists in Indonesian national legal system in common with Islamic law and modern western law. Those legal systems represent three historical layers in Indonesia. *Adat* law is the oldest layer, which represents indigenous communities in Indonesian archipelago. Islamic law represents Muslim belief as the majority in Indonesia, which has grown since Islamic kingdoms were ruled in most Indonesian archipelago in 14<sup>th</sup> century. Meanwhile, modern-western law is the legacy of Dutch colonialism, particularly since 1840 when Netherlands Kingdom applied the first Netherlands Indie Constitution. Practically, most Indonesian apply more than one legal system, for example, most Moslems practice all of legal system because they act as part of indigenous, Moslem and modern community at the same time.