CHAPTER II
LITERATURE REVIEW

A. 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.

B. 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.

C. ISLAMIC LAW AND *ADAT* LAW

The Indonesian society indentifies 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 14th 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.

In correlation with Islam, there is a controversy about the relation between Islamic and *adat* law. Previously, Dutch legal scholars assumed that *adat* law represented Islamic law because Moslem was the most population in Indonesia. This paradigm was popularly called *receptio in complexu* theory, which argued that Islamic law was practiced effectively in local communities and it modified some *adat* law, particularly in family law, so that it was suitable with Islamic law (Lukito, 1998:44). On the contrary to the previous theory, the *receptie* argues that Indonesian living law is not Islamic law. Although several religions live in Indonesia, including Islam, *adat* law is still preserved and practiced among various local communities without any significant influences, particularly the influences from Islamic law (Lukito, 1998:43).

Approximately in 1900, when Indonesian nationalist movement arose, the legal policy of Dutch colonial administration in *adat* law (or *adatrechtpolitiek*) tended to support *adat* law to Islamic law. It means receptie theory had more influence to Dutch legal policy. Daniel Lev explained that the legal policy has not only legal purpose, but also political intention (Lev, 1985:64). The political intention of *adatrechtpolitiek* was illustrated in its struggle with Islamic law. It was articulated in Vollenhoven statement, who said, "destroying the adat law cannot smooth out the way to codification of our law, but only to create social disruption and Islam" (Lev, 1985:66).

The controversy between Islamic and *adat* law actually expressed the struggle concerning tradition among Indonesian founding fathers, which was articulated at the constitutional making process at BPUPKI. They, who supported the receptie theory, tended to separate the Indonesian tradition from Islamic one and refused Islamic tradition as a part of national identity. They viewed Islam as a foreign tradition so that Islamic tradition cannot be used as the reference to reconstruct the tradition. Soepomo—the main drafter in constitutional making—stated that Indonesia, based on its location, had different characteristics with other countries such as Iraq, Iran, Egypt or Saudi Arabia that had Islamic characteristics or *Corpus Islamicum*. He insisted that Indonesia was not part of *Corpus Islamicum*, so that Islamic traditions cannot be used as the reference to reconstruct national identity (Kusuma, 2004:129).

On the contrary, they who viewed Islam and adat law tended to integrate Islamic traditions into national identity. They viewed that Moslems as the majority population had evolved Islamic tradition for centuries in Indonesia. Consequently, the reconstruction of

tradition particularly had to refer to Islamic traditions. Ki Bagoes Hadikusumo—the prominent Islamic leader—showed this stance when he stated that Indonesia had to be established based on Islamic religion due to the fact that ninety percent of population in Indonesia were Moslems (Kusuma, 2004:147).

In relation with the reconstruction of tradition, they who supported receptie theory tended to keep particularly absolute model. The stressing to originality or genuine aspect of tradition made their stance more resistant against foreign influences. Consequently, they had a tendency to reconstruct the traditions as originally practiced by adat or indigenous communities.

On the contrary, they who supported receptie in complex theory had a tendency to hold reconstruction of tradition in particularly relative model. Because they viewed that Islam and adat law were integrated, their stance was more open-minded against some strange influences. Consequently, they tended to maintain traditions appropriately with modern structure. For instance, Mohammad Hatta—a prominent nationalist leader—argued that traditions had to be maintained as a basic to create a modern nation through adaptation and expanded with the modern time. Personally, Hatta came from Minangkabau, an important ethnic in Indonesia, which had strongly Islamic traditions. In Minangkabau , Islam and tradition (or adat) cannot be separated due to tradition had to be evolved based on Islamic law (Kusuma, 2002).