

v. 11 n. 1 (2019): Janeiro/Abril

PUBLICADO: 2019-07-22

APRESENTAÇÃO

- **Apresentação**

Anderson Vichinkeski Teixeira

1

- **PDF**

ARTIGOS

- **La cooperazione amministrativa in materia fiscale nell'Unione Europea: analisi e prospettive**

Fabio Saponaro

2-22

- **PDF**

- **Constitutionalism in a Post-Colonialism State: Socio-Cultural and Historical Perspective of Indonesian Constitution Identity**

Muhammad Fauzan, Tedi Sudrajat, Sri Wahyu Handayani

23-43

- **PDF**

- **Fundamentos do Direito à Igualdade na Aplicação da Lei**

Antonio Moreira Maués

44-57

- **PDF**

- **Jurisprudência na suprema corte brasileira: das antigas súmulas às súmulas vinculantes**

Alexandre Coutinho Pagliarini, Vinicius Hsu Cleto, Walber Toffoli

58-81

- **PDF**
- **Direitos sexuais, democracia e cidadania na experiência transexual e travesti**

Adriana Dias Vieira, Tuanny Soeiro Sousa

82-98

- **PDF**
- **População ribeirinha no Amazonas e a desigualdade no acesso à saúde**

Isabela Moreira Domingos, Rubén Miranda Gonçalves

99-108

- **PDF**

ENTREVISTA

- **Entrevista com Pedro Calafate**

Sandro Alex de Souza Simões

109-121

- **PDF**

RESENHA

- **Multiculturalismo como religião política de Mathieu Bock-côté**

Monica Paraguassú Correia da Silva

122-128

- **PDF**

IDIOMA

- [English](#)
- [Português \(Brasil\)](#)

INFORMAÇÕES

- [Para Leitores](#)
- [Para Autores](#)
- [Para Bibliotecários](#)

Desenvolvido por

[Open Journal Systems](#)

RECHTD

ISSN 2175-2168

Platform &
workflow by
OJS / PKP

Editorial Team

Editor

1. [Anderson Vichinkeski Teixeira](#), Professor do Programa de Pós-Graduação em Direito da Universidade do Vale do Rio dos Sinos (UNISINOS), Brazil

Editorial Board

1. [Fernanda Frizzo Bragato](#), Unisinos, Brazil
2. [Wilson Engelmann](#), Universidade do Vale do Rio dos Sinos, Brazil
3. [Têmis Limberger](#), UNISINOS, Brazil
4. [Leonel Severo Rocha](#), UNISINOS, Brazil

Scientific Committee

1. [Roberto Omar Berizonce](#), Universidad Nacional de La Plata - UNLP, Argentina
2. [Alvaro Sanchez Bravo](#), Universidad de Sevilla, Spain
3. [Alfonso de Julios Campuzano](#), Universidad de Sevilla, Spain
4. [Vincenzo Carbone](#), Università degli Studi Internazionali di Roma, Italy
5. [Jesús M. Conill-Sancho](#), Spain
6. [Giancarlo Corsi](#), Universidade de Modena-Reggio Emilia (Itália)
7. [Costas Douzinas](#), Birkbeck Institute for the Humanities, United Kingdom
8. [Luc Foisneau](#), CNRS, France
9. [Oscar Guardiola-Rivera](#), Birkbeck School of Law, United Kingdom
10. [José Manuel Aroso Linhares](#), Universidade de Coimbra, Portugal
11. [José Reinaldo Lima Lopes](#), Universidade de São Paulo (USP), Brazil
12. [Manuel Cancio Meliá](#), Universidad Autónoma de Madrid, Spain
13. [Jorge Miranda](#), Universidade de Lisboa, Portugal
14. [Francis Jay Mootz III](#), University of Nevada, United States
15. [François Ost](#), Université Saint-Louis de Bruxelles, Belgium
16. [Joan Picó i Junoy](#), Universidad Rovira i Virgili, Spain
17. [Flávia Piovesan](#), PUC-PR e PUC-SP, Brazil
18. [Raúl Madrid Ramirez](#), Pontificia Universidad Católica, Chile, Chile
19. [Dominique Rousseau](#), Ecole de Droit de la Sorbonne, France
20. [Emilio Santoro](#), Università degli studi di Firenze/IT, Italy
21. [Boaventura de Sousa Santos](#), CES - Centro de Estudos Sociais, Portugal
22. [Fabio Saponaro](#), Università Telemática Roma La Sapienza., Italy
23. [Deisy de Freitas Lima Ventura](#), USP, Brazil

ISSN: 2175-2168 - **Best viewed in Mozilla Firefox**



This work is licensed under a [Licença Creative Commons Attribution 3.0](#)

São Leopoldo, RS. Av. Unisinos, 950. Bairro Cristo Rei, CEP: 93.022-000. Atendimento Unisinos +55 (51) 3591 1122

Designed by Jully Rodrigues

Indexing



Revista de Estudos Constitucionais, Hermenêutica e Teoria do Direito (RECHTD) is indexed in the following databases:

Scopus

Portal Capes de Periódicos

EBSCO

Ulrich's Database

Latindex

Dialnet

IBICT – Instituto Brasileiro de Informação em Ciência e Tecnologia

ROAD – Directory of Open Access Scholarly Resources

DOAJ – Directory of Open Access Journal

Google Scholar

Universal Impact Factor



ISSN: 2175-2168 - **Best viewed in Mozilla Firefox**



This work is licensed under a [Licença Creative Commons Attribution 3.0](https://creativecommons.org/licenses/by/3.0/)

São Leopoldo, RS. Av. Unisinos, 950. Bairro Cristo Rei, CEP: 93.022-000. Atendimento Unisinos +55 (51) 3591 1122

Designed by Jully Rodrigues

Constitutionalism in a Post-Colonialism State: Socio-Cultural and Historical Perspective of Indonesian Constitution Identity

Muhammad Fauzan¹

Universitas Jenderal Soedirman, Indonesia
fauzanhtn@yahoo.co.id

Tedi Sudrajat²

Universitas Jenderal Soedirman, Indonesia
tedi.unsoed@gmail.com

Sri Wahyu Handayani³

Universitas Jenderal Soedirman, Indonesia
Ayufh27@gmail.com

Abstract

Since the establishment of Indonesian State, the idea of constitutionalism has increasingly existed and demanded a change values as a move towards good state administration. However, building a tradition of constitutionalism as a sustainable effort cannot be executed simply by relying on the text/editorial of a constitution alone. In other words, the success of developing a constitutionalism culture within government administration is also significantly determined by the willingness of every element of the society and the state organizers in the effort to understand the content written in the text of a constitution. The effort to understand the contextually of ideas in the constitution is to seek an identity underlying the creation of a constitution. This is clearly correlated with Indonesian historical aspect as a colonized country. Historically, the substance of colonial state administration system would affect the identity of Indonesian constitution as a post-colonial state, which then created an identity of Indonesian constitution along with the legal implications that accompanied it.

Keywords: constitution, constitutionalism, constitution identity, colonial state, post-colonialism, Indonesian characteristics.

¹ Jl. Prof. Dr. H.R. Boenjamin 708. Purwokerto. Central Java. 53122. Indonesia.

² Jl. Prof. Dr. H.R. Boenjamin 708. Purwokerto .Central Java. 53122. Indonesia.

³ Jl. Prof. Dr. H.R. Boenjamin 708. Purwokerto. Central Java. 53122. Indonesia.

Resumo

Desde o estabelecimento do Estado indonésio, a ideia de constitucionalismo tem aumentado cada vez mais e exigido uma mudança de valores como um movimento rumo à boa administração do Estado. No entanto, construir uma tradição de constitucionalismo como um esforço sustentável não pode ser feito simplesmente baseando-se no texto de uma constituição. Em outras palavras, o sucesso de desenvolver uma cultura de constitucionalismo dentro da administração do governo também é significativamente determinado pela disposição de todos os elementos da sociedade e dos organizadores do Estado no esforço de entender o conteúdo escrito no texto de uma constituição. O esforço para entender o contexto das ideias na constituição é buscar uma identidade subjacente à criação de uma constituição. Isto está claramente correlacionado com o aspecto histórico indonésio como um país colonizado. Historicamente, a substância do sistema de administração do Estado colonial afetaria a identidade da constituição indonésia como um Estado pós-colonial, que então criou uma identidade de constituição indonésia junto com as implicações legais que a acompanharam.

Palavras-chave: constituição, constitucionalismo, identidade constitucional, Estado colonial, pós-colonialismo, características indonésias.

Introduction

The reform order has been going on in Indonesia for more than a decade, an order/era fought by the people who initially presented a depiction of improvement optimism over all the order of national and state life. As an order/era of total correction over the practice of governance, the new order under President Soeharto 1967-1998 was perceived as an authoritarian government supported by a corrupt culture in all lines of state power, not only in the dimension of executive power, but also "penetrating" into the judicial power, including the legislative power.

As generally known, the demand for reform which culminated in the declaration of President Soeharto's resignation on Thursday, May 21, 1998 has brought a great theme of change which includes upholding the rule of law, eradicating corruption, collusion and nepotism (KKN), prosecuting Soeharto and his cronies, amending the 1945 Constitution (hereinafter, UUD'45), repealing dual function of Indonesian Armed Forces (ABRI), and granting regional autonomy to a greatest extent.

The implication of such series of constitutional changes in Indonesia was the amendment of UUD'45 for 4 (four) times in 1999-2002 accompanied by several fundamental agreements, which include: First, Not Changing the Preamble of UUD'45 of the State of the Republic of Indonesia; Second, Maintaining the Unitary State of the Republic of Indonesia; Third, Reinforcing the presidential government system; Fourth, the Elucidation of UUD'45 of the State of the Republic of Indonesia which includes that normative matters shall be incorporated into the articles (the body) and; Fifth, Creating changes with addendum.

Historically, the creation of Amendment UUD'45 is a manifestation of Political and Constitutional Reform which took place democratically. The Reform Era was marked with a reformation in Politics and Constitutional in the course of refining the substance according to the needs and conditions underlying the reform. In this regard, the constitutional reform was

carried out due to several weak aspects within UUD'45 which implies undemocratic governance in Indonesia. The said weaknesses were, First, the UUD'45 built on a heavy executive political system by providing a great portion of power to the President without a proper check and balance mechanism; Second, UUD'45 provided an excessive attribution and delegation of authority to the President to regulate substantial issues using Law or Government Regulations; Third, UUD'45 includes several ambiguous articles or multiple interpretations that may be interpreted with various interpretations, however, interpretations that should be accepted were only interpretation made by the President; and Fourth, UUD'45 preferred the spirit of organizing the state rather than the system.

The various issues related to the undemocratic governance of Indonesia under the New Order era have created a condition that required changes within the constitutional order based on constitutionalism. The fundamental of constitutionalism is a general agreement or consensus among majority of the people regarding an idealized building with regard to the state. Pattern of such relationships is required by the political community so its common interests can be protected or promoted through a formation and the use of mechanism so-called 'the state'. (Jimly Asshiddiqie, 2014)

In principal, a consensus is directed to ensure the establishment of constitutionalism understood based on element of agreement on a common goal or ideal, agreement on the rule of law as the basis of government or state administration, and an agreement on the form of state institutions and procedures. By way of implementation, constitutionalism regulates two interrelated relationships, i.e. the relationship between the government and its citizens, and between one governmental institution to another. Based on the above explanation, constitution may serve as a determinant and limiter of state organ power, relation regulators between state organs, relation regulators of state organs and citizens, the source of legitimacy of state power, diversion of authority, unifier, reference of identity and grandeur of nationality, center of ceremony, means of community control, and as the means of engineering and society renewal.

William. G. Andrews (1968) said that in the context of governance, consensus or general agreement is intended to ensure an establishment of modern constitutionalism which is understood to rely on 3 (three) elements of agreement, namely:

- a. A state, or any system of government, should be founded upon law, while the people exercised within the state should conform to definite legal rule and procedures (the idea of constitution or fundamental law).
- b. The institutional structure of government should ensure that power reside with, or is divided among, different branches which mutually control their exercise of power and which are obliged to co-operate (the ideas of mixed government, separation of powers, checks and balances). The structure of government institutional shall ensure that power is in the hands, or divided amongst the different branches that mutually control the execution of their power and who are obliged to cooperate (the idea of mixed government, separation of power, check and balance system) mutually check and balance.
- c. The relationship between the government and the individual members of society should be regulated in such manner that it leaves the letter's basic rights and freedoms unimpaired. The relationship between the government and the individual members of society should be regulated in such manner that it leaves the letter's basic rights and freedoms unimpaired.

By looking at the three basic elements of constitutionalism, in the context of Indonesianess, constitutionalism can create a state identity through the means of constitution in the form of: First, a public authority can only be legitimated based on constitutional provisions; Second, the execution of popular sovereignty (through representation) should be implemented by applying the principle of universal and equal suffrage, and the appointment of the executive through a democratic election; Third, the separation or sharing of power, and limitation of authority; Fourth, the existence of an independent judicial power able uphold the law and justice, both to the people and authorities; Fifth, the existence of a control system on military and police in order to enforce the law and respect the rights of the people; and Sixth, protection guarantee of human rights. (Mahfud MD, 2003)

The Problem

According to constitutionalism, the study on Indonesian identity-forming elements in UUD'45 is as a form of understanding concerning the ideals of a state and the law to be inscribed by the founding state. The study on Indonesian identity-forming elements in UUD'45 of Republic of Indonesia is critical to be examined in order for us to understand how political and legal dynamics occurred during the establishment of the state constitution and the creation of UUD'45. UUD'45 of the Republic of Indonesia is generally acknowledged as a manifestation of democratization to achieve a constitutional democracy. Based on the above background, this article discusses: First, the Meaning of Constitutionalism in Indonesia and the historical relationship in the aspect of constitutionalism in Indonesia; Second, the development of post-colonialism within Indonesian Constitution and; Third, the establishment of Democratic State of Law within Indonesian Constitution and its implications in state administration structure in Indonesia. Based on the above points, we will understand the foundations of Indonesian constitutional identity formation as a post-colonial state and the legal implications towards future development of Indonesian State administration system. By using the above mentioned criteria and essence of constitutionalism, this short article discusses the identity of Indonesian constitution within the perspective of constitutionalism in post-colonial state.

Discussion

Defining Constitutionalism in Indonesia

The Constitution of the United States of America signed by 39 delegates on September 17, 1787 in Philadelphia, Pennsylvania, where the Constitutional Convention was established, encouraging the birth of constitutional states in several regions of the world, including in monarchies known as: constitutional monarch. In its development, several constitutional states recognized that the constitution of the concerned states did not include regulations on limitation of the authority and recognition of civil rights of the people. Thereafter, It came the idea that the constitution shall regulate some kind of constitutional government, which in principle embodied matters on limiting the government aimed to keep the government in order. The above notion was designed to initiate the adoption of constitutionalism in constitutional change. (Laica Marzuki, 2010)

With regards to terminology of constitutionalism, its meaning differs from the meaning in constitution terminology. Simply put, one can argue that constitutionalism is a philosophy, while constitution is a "tool" used to realize that ideology. The above notion occurs

due to the meaning of an in depth constitution in "constitutionalism". In connection with the term 'constitution', Brian Thomson (1997) stated that "...a constitution is a document which contents the rule for the operation of an organization. Constitution has a broader understanding than the Constitution as in Undang-Undang Dasar (UUD), in that. The whole written and unwritten rules governing in binding regarding the way a government is organized in a society. (Dahlan Thaib, 2001) .

Carl J. Frederich (1968) stated that constitutionalism ..." A set of activities organized and operated on behalf of the people but subject to a series of restraints which attempt to ensure that the power which is needed for such governance is not abused by those who are called upon to do by governing". Restriction is applied by dividing power, constitutionalism establishes an effective system of restrictions on government measures. These restrictions are reflected in Undang-Undang Dasar (UUD) or Constitution. Thus, in this assumption, constitution has a special function and is the embodiment or manifestation of supremacy of law which should be obeyed, not only by the people but also by the government and even the authorities. (Miriam Budiardjo, 1989)

Taking into consideration some of the above understandings, the ideas and concept of constitutionalism are the ideas that put forward a paradigm that power in the life of state administration requires a restriction set forth in the form of laws or rules that carry the highest position of UUD or constitution. In other words, it can be argued that constitutionalism is essentially a notion that recognizes the necessity of a constitution for governing a state.

Within the context of Indonesians', Indonesian constitutionalism is constrained by a constitution both of codified constitution or non-codified constitution (unwritten rule). For the Indonesian nation, the state rules of modern system cannot be separated from the history of formation of laws which was the first thing performed after the proclamation of independence. The use of UUD'45 (1945-1949), UUD'49 (1949-1950), UUD'50 (1950-1959), and UUD'45 (1959-present), all constitute a written rules/laws which are based on constitutional democracy derived from Indonesian customs from the very first form of culture. It is inevitable that during 1945-1950, the Dutch kept intervening the Indonesian state system. Although the content of Constitution has changed and amended for four times during 1999-2002, the spirit and enthusiast of the constitution is greatly influenced by the constitutional system established by the colonists. This means that the content in the constitution had been inspired by a colonial system, and therefore Indonesia became a post-colonial state.

The Historical Relation Aspect of Constitutionalism in Indonesia

From the time the proclamation of independence was declared on August 17, 1945, the journey of constitutional life of the Republic of Indonesia as a sovereign state is considered relatively "young" i.e., 71 years, compared to 240 years of that of the United States of America, whose independence was declared on July 4, 1776. Nevertheless, admittedly the idea and or concept of constitutional implementation has always accompanied the state administration, regardless implementation empirical level of this idea often experienced the ups and downs, it is therefore interesting to analyze the notion, as the turn of the era in a nation's history has often encompassed a completely different characteristic.

Awareness of the state's constitutionalism founders has grown and developed in line with the founder of nation's activities to fight and prepare for the independence of Indonesia.

This is documented in the series of history of formation and discussion of UUD as stated in meeting minutes of BPUPKI and PPKI which may then be ratified on August 18, 1945 by the Preparation Committee for Indonesian Independence (PPKI).

One evident of the struggle to present the idea of constitutionalism can be seen from the speech of Mohammad Yamin during BPUPKI meeting session, in which Yamin clearly stated, among others, that the need for protection of citizen freedom should be perfectly guaranteed and the division of people's power over the six power bodies (read = MPR, House of Representative, President and Vice President, Advisory Council, Ministries and the Supreme Court) shall be applied in just and disregard absolutism and oligarchy. (M. Yamin, 1998)

The establishment of UUD'45 (before the amendment) is a concrete awareness of the need to limit the power in administration of governance in an independent Indonesian state and guarantee of human rights protection as an essential element of constitutionalism, even as it was realized by the forming elements that the UUD adopted on August 18, 1945 was a temporary UUD, and because it was a temporary UUD, there were several definite imperfections.

Several events in the first decade after the independence which showed paradoxes related to implementation of constitutionalism was the issuance of Government Declaration on November 14, 1945 in which the said declaration resulted in the change of previously presidential government system into a parliamentary government system, whereas, as it is known that based on UUD'45, Indonesia adopted a presidential government system.

The change of governmental system based on the above Government Declaration on a certain level is considered to have created a poor legal culture, as it is considered to have disregarded the constitution, i.e. UUD'45, 1 (one) year after the ratification by the PPKI, or in other words, such declaration offered a reflection of a weak culture of respect towards the constitution. At the time, however, the public generally regarded that the turn of the presidential government system into parliamentary government system was an unconstitutional act, while others argued that it was not an implementation of a legal culture that did not respect and appreciate UUD'45 or the constitution.

A change of the said system was regarded as the birth of constitutional convention, i.e. a non-legal and extra-legal constitutional precedent, when in fact, it should be understood that the constitutional convention was not essentially matters that demeaned the constitutional provisions. (Margarito Kamis, 2014) In practice of other country, a convention should always remain a reflection of respect towards the existence of constitution and implementation of an constitutionalism idea, as is the case of US presidential election during President George Washington era; the lack of clarity in their constitution concerning US presidential term of office was responded very well by George Washington by way of rejecting to be re-elected for the third term and a brilliant consideration, and it was the embodiment of a constitutionalism idea, as overlong power will regenerate a feudal system.

However, it should also be noted, that in the early period of independence, there was an event categorized as a reflection of implementation of constitutionalism idea in the state administration, namely: the issuance of Vice President's Declaration No. X on November 16, 1945. This is due to the said Vice President's Declaration, first, the regulation become the means for democratic values to grow and expand within the governance by giving an opportunity for the birth of political parties as a forum to channel people's aspirations. Second, functional and positional transformation of the Central Indonesian National Committee (KNIP) is a legislative body prior to the establishment of People's Consultative Assembly (MPR). The above change within the perspective of constitutionalism has given a "role" sufficiently to prevent an unlimited power to the President. The issuance of Vice President declaration did not necessarily eliminate the power of the President as the head of

government, but it only changed the position of KNIP from assistance to the President to a legislative body that was equal to the position of the President and together with the President had the power to create laws.

In the subsequent development, the enactment period of the 1950 to 1959 Provisional Constitution (UUD) is considered as a period of constitutionalism culture fragility, characterized by the overturning cabinet events that were too often based on arguments that were not extremely urgent, even at a certain level, the reason for the cabinet change in the system parliamentary government was often towards like and dislike matters. The above events serve as a valid evidence of the depletion of constitutionalism culture among the state administrators.

The practice of state management became ineffective, let alone consolidating the growth of the basic idea of constitutionalism, whereas in this phase, there were some amazing phenomena as well, namely: the indiscriminate legal action of the Attorney General Suprpto as guardian of the law, who brought a minister to justice. Likewise, he summoned several generals examined by the AGO. When he was replaced, he refused to go to the presidential palace due to his firm belief.

The dynamics idea of constitutionalism entered a period of a decline in the old order and the new order, i.e. the 1960-1998 period. Under this period, UUD'45 received legitimacy after the issuance of Presidential Decree on July 5, 1959. Traced back to the decree issuance, the purpose was to overcome the various constitutional issues occurred in the period of UUDS'50 (Provisional Constitution), the failure of Constituent Assembly to carry out its duty to create an UUD marked a starting point for the abandonment of constitutionalism ideas in the practice of administering state power.

Immediately after the decree, with a great confident in the state of emergency, the revolution received a strategic spot. For and on behalf of the revolution which has always been considered unfinished, the law of revolution was enforced. Yet, surely it was the constitutional law conceptualized as a revolution rule of law, and received the support of several highly ideological law experts, loyal to the Boss of Revolution, the idea of revolution law took a real form, and determined its preys and immediately preyed on them. The House of Representatives elected in 1955 was dissolved and replaced by Gotong Royong House of Representatives (DPR-GR) whose membership was appointed by the President and far from democratic values, whereas, as most law and political experts believed, the House of Representatives of the 1955 election was recognized as the first and most democratic election in the history of election until recently, was dissolved by the Father of Revolution because it rejected the Draft of State Budget.

Several legal products issued at the time did not equally reflect the legal product laden with the idea of constitutionalism, for example, a product issued by the MPRS as a state institution whose membership was appointed by the President, and this was far from the essence of constitutionalism idea, at the time also resulted in the form of, among others, MPRS Decree No. II/MPRS/1960 President Soekarno was appointed as the Mandate of Provisional People's Consultative Assembly with full power.

The power of revolutionary law had also given the President a great clearance and this resulted in the President's authority being unlimited not only within executive territory, but it could also extend to other areas of authority. The above power was stated in Article 19 of Law No. 19 of 1964 regarding Basic Provisions of Judicial Power which stated that: For the sake of the revolution, the honor of our State and Nation, or the urgency of public interest, the President may participate or interfere in court matters.

In addition to the above, the said period also includes a big event that offers an evidence of depletion or otherwise said as the loss of implementation of the constitutionalism idea, among others, by the appointment of the Great Leader of Indonesian Revolution Ir. Soekarno to become the President of the Republic of Indonesia for life by the Provisional People's Consultative Assembly (MPRS) during the General Session of MPRS in Bandung on May 15, 1963 as stipulated in MPRS Decree No. III/MPRS/1963.

The appointment of Ir. Soekarno as a lifetime president has obviously abandoned the idea of constitutionalism in UUD'45 (before amendment), as it is explicitly stipulated in Article 7 that: The President and Vice President hold an office for a period of five years and thereafter may be re-elected. Even though it was not explained how many times a president can be re-elected, Article 7 of UUD'45 has by some degrees given a very clear signal that a presidency should be carried out periodically, meaning that the UUD does not provide an opportunity to be elected as a lifetime president.

The turning point of the constitutional law disorder under the old order ended with the birth of an era popularly known as the new order under Suharto's leadership. The old order is a period considered or at least presented as a period that was 'far away' leaving the UUD'45. The above assessment is justifiable as it was normatively seen by the issuance of MPRS Decree No. 5 of 1966 that requested President Soekarno to complete his accountability speech. Although President Soekarno fulfilled MPRS request in his letter dated January 10, 1967 called "Complementary of Nawaksara", however, it apparently did not meet expectations of the people. After discussing the said President's letter, Chairman of MPRS concluded that President Soekarno had been negligent in fulfilling his Constitutional obligations.

The succession of national leadership in 1967 from President Ir. Soekarno to Major General Soeharto, on March 12, 1967 took place during MPRS Session which appointed Soeharto to become the President of Indonesia, it was understood as the beginning of an era or order called the New Order, an era which stood as correction of the previous era. An era was born with a commitment to implement UUD'45 unitedly and consequently.

In the course of its actions and policies implemented by the New Order government, the New Order originally regarded as an order that would amend the old order, was considered in many ways harming the idea of constitutionalism, even when closely observed, in almost every policy, it stated the legal basis and there were few policies that were not reinforced in legal form; and when we analyze/review them, there are a lot of legal products that were inconsistent with the spirit of constitutionalism idea as mentioned earlier.

There were many policies packed as legal products, but material of the legal products was essentially contrary to the idea of constitutionalism, such as the legal products in political field, e.g. Law on Structure and Composition of MPR/DPR/DPRD under the New Order era which clearly gave power to the President to appoint members of the legislature through a mechanism of appointment, as shown in Law No. 16 of 1969 regarding the Structure and Composition of People's Consultative Assembly, People's Legislative Assembly and Regional People's Legislative Assembly as amended by Law No. 5 of 1975.

The above legal products have resulted in the President "incarnated" as an unparalleled force, the MPR, which was normatively the highest institution and based on Article 6 Paragraph (2) of UUD'45 (before the amendment) had the authority to appoint and dismiss the President as the Mandate, had been made 'submissive' in the presence of the President who was in fact appointed and dismissed by MPR. MPR merely acted as an institution that "sanctified" or more explicitly acted as a "stamp institution", complied to

whatever the President wished. The above condition was similar to other institutions such as the House of Representatives (DPR) and the Supreme Court (MA).

MPR as the supreme body of the state has in fact also committed the same "mistake" as MPRS did in the old order which explicitly appointed Bung Karno as a lifetime president, the difference was that the policy of electing and appointing Suharto as a 'lifetime' president by MPR of the New Order was covered with a rigid interpretation of Article 7 UUD'45 which states that: The President and Vice President shall hold an office for a period of five years and thereafter may be re-elected. The sentence "...shall hold an office for a period of five years and thereafter may be re-elected..." was in fact interpreted indefinitely, which means that while the presiding president was to be re-nominated for the next period, it was interpreted as conflicting to UUD'45.

The government (read = authority) became the only interpreter that was considered as the most correct authority in interpreting UUD, different interpretations of articles in UUD'45 with interpretation set by the authority was considered as an act of treason and unconstitutional, as observed from interpretation on the article by Drs. Soerjadi, former Chairman of Indonesian democratic party (PDI), that the following sentence states as '...may be re-elected', means that it is only for 1 (one) period, so a president shall only serve for 2 periods or 10 (ten) years. The consequence of his interpretation resulted in the death of Drs. Soerjadi's political career.

Interpretation of Article 7 UUD'45 by the government has made Suharto successful in becoming the president for 32 (thirty two) years with enormous power, if compared to Bung Karno's presidential power, the person that should be called as the lifetime president is Suharto, because Bung Karno only served as president for 21 (twenty one) years. In spite of the above, it can be concluded that the two national leaders and members of the MPRS or MPR that have enabled them to serve as the presidents for a long time, in as much as they are unfaithful to the choice of basic idea of the state republic, as mandated in Article 1 UUD'45 which specifies that: The State of Indonesia is a unitary State of the Republic. As a state of republic, the term of public office will always recognize a time period, indeed article 7 recognizes the term for the president and vice-president, i.e. 5 (five) years, but if the sentence "and thereafter may be re-elected" with no restriction, then there is no the difference between the form of republic and monarchy or kingdom.

In short, the period of 1960 - 1998 is a destruction period of constitutionalism culture. Manipulation over the spirit, norm and rule of the constitution went on very publicly. The Old Order and the New Order share the same means. However, they have different reasons. Both of these orders are precisely categorized as the non-constitutional Government or authoritarian Government with Bung Karno and Pak Harto as the sources of all sources and not the constitution.

The strength of power of these two national figures was actually also caused by UUD'45 before the amendment, the constitution did normatively give and put the two presidents at the top of the pyramid of power, even though Article 1 paragraph 2 specifies that: Sovereignty is in the hands of the people and is fully implemented by the People's Consultative Assembly. As stated above, such provision does not necessarily mean the MPR becomes the dominant in the administration of sovereignty in its implementation, because other provisions in UUD'45 before the amendment also stipulate that: The President is the state highest governing body under the People's Consultative Assembly. In governing the State, the concentration of power and responsibility lies upon the President. Even Article 5 paragraph (1) states that: The President holds the power to create laws with the approval of

the House of Representatives. Thus the eigenaar over the power to create law actually lies not on the House of Representatives but on the President.

UUD'45 before the amendment did not provide a clear regulation concerning matters relating to the reflection of the idea of constitutionalism such as openness, responsible or accountable government, except for matters related to limitation of term of office (article 7), judicial authority, membership of MPR/DPR, but they are inexplicitly regulated because those matters are further regulated in the laws.

The fall of Soeharto after he stated his resignation on May 21, 1998 was greeted with great excitement by most people, people's resentment towards the new order and Suharto, and his cronies has "forced" MPR of the 1999 election to carry out a total revolution of administration of the State of the Republic of Indonesia, the notion was marked with the amendment of UUD'45 for 4 (four) times, whereas in the era of New Order, the UUD'45 was positioned and sacred, so as there shall be no amendment. The jargon to implement UUD'45 purely and consequently that was initially echoed in every heartbeat and every step of the governance, echoed by the new order regime, thereafter seemed disappeared. Entering the second decade of post-reformation, the eagerness to amend UUD'45 for the fifth time has been clearly sounded, both among the political elites and academicians, because they perceived that there are still several imperfections on the amendments of UUD'45. There have been at least four amendment processes which were meant to answer the various problems facing the nation.

The amendment of UUD'45 post reformation marked the re-enactment of implementation idea of constitutionalism, as evident from the paradigm that was "introduced" by the new constitution (UUD) of amendment, namely the accommodation of check and balances mechanism in the implementation of state power. This changes the paradigm that heavy executive and implementation of sovereignty should only be executed according to the Constitution (UUD). Guarantee of human right is increasingly gaining reinforcement, as well as regulation regarding the status, duties and authority of major state institutions which show a reflection of a strengthening idea of constitutionalism. Likewise, the introduction of new state institutions in Chapter IX which regulates the judicial power, namely the presence of Constitutional Court which is given the authority, among others, to conduct a judicial review of laws against the Constitution (UUD), and the Judicial Commission which is given the authority to propose the appointment of Supreme Court and other authorities in order to maintain and uphold the honor, dignity, and behavior of the judges.

Post-Colonialism in Indonesian Constitution

Post-Colonialism is generally known as an idea that emerged after the colonial period. As with other academic terms that often use post terminology such as post-modernism or post-structuralism, post-colonialism also means "after" colonialism. Post-colonial is to show to the West (as the colonist) a non-Western state resistance as former colony. If it is postulated that one of the major aspirations of postcolonial theory is to re-establish a balance in the relationship between the (former) colonizer and the colonized, on the other hand to illuminate how power relations of the present are embedded in history.(Ana Tomicic and Filomena Berardi, 2017)

Indonesia cannot be separated from colonization. The history states that Indonesia was colonized nearly 350 years and it has only been independent for several decades. The colonization by colonial government did not only affect the economic, commercial, and social

aspects, but also the vital aspects of judicature. Daniel S. Lev states that new states owe a great deal to colonial precedent. The above notion offered a suggestion that decolonized countries owed their colonial states because they have provided the way, guidance, or tradition directly or indirectly. The legal system in Indonesia is considered as an expansion of the Dutch colonial government. (Daniel S Lev, 1985). For Lev, the law also became a colonial configuration which later adopted as the fundamental view of national structure determination as well as social, political and economic distribution in an independent state. However, the law seems technically develop as a justification of hegemony between the colonial government as the ruler and the independent state that used to be the object of their colonies. The above notion is reinforced in four explanatory arguments which include plurality law and judicial organizations within a colonial system, common law policy, the role of private law, and the transmission of colonial traditions to an independent state. More specifically, Aidul Fitriadi Azhari states that the State of Indonesia is a nation-state which was formed due to a process of decolonization after the Second World War. The character of such decolonization will certainly greatly influence the formation of ideology and constitution of Indonesian state of as an ideology and post-colonial constitution. (Aidul Fitriadi Azhari, 2013). Aidul Fitriadi Azhari added that Proclamation text is a clear statement regarding decolonization of Indonesia from Dutch colonial state, and a national identity of Indonesian nation. (RM A.B. Kusuma, 2004) The proclamation text of Indonesian independence carries a juridical meaning to decolonization process of Indonesian state and was the first legal product that marked the establishment of Indonesian state as well as ended colonialism in Indonesia. (Aidul Fitriadi Azhari, 2011)

The spirit of proclamation full of decolonization process was then carried on in the preamble of UUD'45 (UUD). The historical purpose of the noble spirit and ideals of Indonesian nation to be free from colonialism is further embodied in the preamble of UUD'45 which is as one unity with the body of UUD'45. This means that the identity of Indonesian constitution formed from the post-colonial nation state is the identity of post-colonial constitution as stated in UUD'45.

Normatively, Indonesian constitutional identity is incarnated in a consensus that maintains the upholding of Indonesian constitutionalism into the five basic principles of Pancasila served as an ideological-philosophical foundation in achieving and realizing the four goals of the state. The five fundamental principles are:

- (1) Belief in the One and Only God;
- (2) A just and civilized humanity;
- (3) A unified Indonesia;
- (4) Democracy, led by the wisdom of the representatives of the People; and
- (5) Social justice for all Indonesians.

The four goals of the state to be achieved include: (1) to protect the entire nation and Indonesian homeland; (2) to improve the public welfare; (3) to educate the life of the nation; and (4) to participate in the implementation of world order based on independence, lasting peace, and social dignity. Departing from the consensus that serves as the foundation of ideological philosophy, subsequently the Indonesian constitution was created, and its substance served as a reflection of constitutionalism understanding adopted by Indonesia.

It is evident that the modern constitution has influenced the substance of Indonesian constitution. (Albert H. Y. Chen, 2010) In spite of the above, Indonesian nation also provides its own specific identity in the said substance of constitution, in the form of:

1. An Idea of Nationality

An idea of nationality was originally a product of European history, created after the Westphalia treaty on October 24, 1648, which ended the 30-year war in Europe. Under the above agreement, the Dutch gained its independence from the Spain. Based on this background, the Dutch is also a country created based on the idea of nationalism as with the state of Indonesia. However, contrary to the idea of the expansive Dutch nationalism, the Dutch created the colonialism. On the other hand, Indonesian nationalism rejects colonialism in all its forms.

2. An Idea of Popular Sovereignty

Initially, sovereignty of the people as written in Article 1 paragraph (2) UUD'45, stated that, "Sovereignty shall be in the hands of the people and shall be exercised in full by People's Consultative Assembly" (referred to as Majelis Permusyawaratan Rakyat (MPR)). Based on the above Article, the state of Indonesia is based on people sovereignty which is institutionally carried out by the MPR. Structurally, this means that there was MPR supremacy as executer of people sovereignty. This idea emerged as a form of rejection against the autocratic practice undertaken by the Dutch East Indies colonial government. The Dutch East Indies colonial government acquired power from the Dutch Empire, therefore, it was not an embodiment of people sovereignty in the Dutch Indies.(Aidul Fitriada Azhari 2005) This condition underlines a notion that the idea of people sovereignty as stated in UUD'45 insomuch purely as the element forming the identity of post-colonial Indonesian constitution. However, in line with democratization and dynamics of UUD'45, the third amendment of UUD'45, which reinforces the essence of sovereignty, becomes sovereignty in the hands of the people and implemented according to Constitution (UUD)".

3. An idea of a structure of Indonesian state government

The founders of Indonesian state basically adopted the structure of Dutch Indies government in the Indische Staatregeling 1925. They modified the six state institutions in the Indische Staatregeling 1925. Details of the above are as follows: Kroon was changed into People's Consultative Assembly; Gouverneurs-generaal into President; Volksraad into the House of Representatives; HogeRaad into the Supreme Court; Raad van Indie into the Supreme Advisory Council; and AlgemeneRekenkamer into the Audit Board of the Republic of Indonesia.

The conversion of Kroon into MPR showed a fundamental change in the principle of popular sovereignty. Accordingly, the form of state of Indonesia was not a monarchy as with Dutch East Indies, but a Republic. The President as the head of Indonesian state was not a representative of the King/Queen as in the Dutch East Indies, because the Head of Indonesian state was accountable to Indonesian People represented in the MPR. Therefore, the structure of government in UUD'45 has an authentic post-colonial constitutional identity.

There was a hierarchy of the state institutions within the government structure based on UUD'45, i.e. the highest state institution and state high institutions. The highest state institution is MPR. Those state high institutions are namely President, DPR, MA, DPA, and BPK. The shift of paradigm from constitution-identity forming elements of post-colonial UUD'45 into a post-authoritarian constitutional identity, especially in the constitution-identity

forming element which was the idea of Indonesian government structure, has created an extensive legal implication. The said implications existed in consolidation and relationship between the state institutions. The current reality demonstrates that it is impossible for the branches of power (executive, legislative and judiciary) not to interconnect with each other, even stand as equals, and control each other in accordance with the principle of checks and balances. (Aidul Fitriadi Azhari, 2005)

4. The idea of equal rights before the law and government and religious freedom

The idea of religious freedom stated by Soekarno, the most influential nationalist leader (and Indonesia's first president), proposed a compromise in June 1945, according to which the country's ideological foundation would be the "Five Principles" (Pancasila). (Hanna Lerner, 2013). What eventually became the first of these principles affirmed that the basis of the Indonesian state was "Belief in the Oneness of God". (Robert W. Hefner, 2013)

The identity of post-colonial relating with the equal rights before the law and government and religious freedom is also reflected in Articles 27 and 29. These articles are also referred to as part of "essentials of UUD'45", - plus Article 33 - so they may not be changed. Article 27 states the principle of non-discrimination in contrast with colonial regulations that embraced a racial division between the Indies population consisting of European, Foreign Eastern and Indigenous groups in matters relating to law and government. Article 29 includes a provision that explicitly rejects a secular system that separates religious and state affairs. The Dutch colonial government has consciously created a policy that curbed and limited the freedom of religion among the Muslims in Indonesia, even though the sole tendency to provide support for Christianity was very strong. The constitution-identity forming elements of post-colonial UUD'45 as stated in articles 27 and 29 had legal implications, that the state strengthened the guarantee of everyone's position before the law and government. The state also guaranteed the right to freedom of religion while promoting religious life and is officially actively involved in maintaining religious life in Indonesia.

5. An idea of National Economic System

The principle of kinship is stated in Article 33 Paragraph (1) UUD'45 as follows: "The economy is structured as a joint effort based on the familial principle". Based on the above provision, the principle of kinship is related to national economic system. During the discussion at BPUPK, this article was described briefly by Sukarno as "collectivity". The next paragraph states: "Sectors of production which are important to the state and affect the life of the people shall be under the authority of the State", described briefly as "socialism". The collectivist-socialist economy of UUD'45 is clearly an antithesis to the liberal system of Dutch Indies colonialist economy. Founders of the state clearly rejected the liberal system of Dutch East Indies colonialism that led to the resource exploitation of Indonesian nation. According to creators of UUD'45, the principle of kinship is not solely in regards to economic life, but it is the foundation that underpins Indonesian state administration system as a whole.

The five ideas led the Indonesian nation to have a constitutional identity that breathed on Pancasila. Historically, the idea was evident both during the movement and at the time when UUD'45 was drafted as the constitution of Indonesian nation, to include understandings of religious teachings, customs and combined them with the rule of law. Such visions and dissent did not diminish their equality of opinion regarding several principal matters, i.e.:

First, to designate the concept of people sovereignty as one of the link of an independent Indonesia;

Second, the democracy used as one of the links is not only interpreted as a political system, but also as an economic system. Democracy also includes political democracy and economic democracy;

Third, in political understanding, the democracy to be carried out is not a copy of democracy in the Western or Eastern countries;

Fourth, institutionally, various modes of modern constitution such as representative system are adopted. (I Gde Pantja Astawa, 1999)

Based on the above statements, there were high expectations for Democratic Pancasila which was supposed to act as the "middle path," neither liberal nor socialist, that charted a new course for philosophy and politics. (Pranoto Iskandar, 2016) It can also be argued that Pancasila is a unifying means for the heterogeneity of Indonesian nation which consists of various ethnic groups, religions, cultures and languages. Pancasila is also essentially a form of awareness of all elements of the nation, regardless to the differences and barriers among differences to unite within the Unitary State of the Republic of Indonesia.

These differences are in fact considered as a national treasure that can foster a common belief to achieve the noble goals and ideals, which was long fought by Indonesian predecessors, namely the creation of a just and prosperous society, which, according to terminology by President Soeharto: "... the creation of a just society in prosperity, and prosper in justice." From the legal perspective (juridic), the existence of Pancasila becomes a legal idea (rechtside) which always serves as a fundamental formation and the purpose of every existing legislation, therefore, the law or regulation created should essentially be further reflections of the values stated in Pancasila. Pancasila should always serve as the guidance and direction of every norm creation.

Pancasila is not necessarily formulated in one article of UUD'45, but it was written as the closing of the opening. The expressive statements mentioned in the preamble serve as the embodiment of the principles in Pancasila, which become the ideals of the State of Indonesia. Moreover, if we further examine the body of UUD'45 before it is amended, there was no term of 'Pancasila', which is different from UUD'45 after the amendment, in which Article 36A states that the term Pancasila converted into a unified entity in the sentence "Garuda Pancasila" in which Article 36A states that: The State Symbol is Garuda Pancasila and the State Motto is Bhineka Tunggal Ika (Unity in Diversity), however, the term Pancasila has already existed when the founding fathers were involved in the drafting of Constitution (UUD).

This is evident from the statement of Ir. Soekarno who studied Pancasila and stated that: "... it is proven that Pancasila that I examine and dedicate to Indonesian people, is genuinely a dynamic foundation, a foundation that can truly muster the entire energy of Indonesian people, a foundation that can truly unite Indonesian people". Thus, it can be argued that Pancasila is the embodiment of the values that grow and develop in the life of Indonesian nation stretching from Sabang to Merauke and existed since the ancient time.

Noting the foregoing, any laws created in the form of legislation or any other forms in Indonesia which are parts of the development of national law, should be based on Pancasila by accommodating the text consistency, from the highest to the lowest hierarchy. In other words, Pancasila should be continuously pursued to be the guidance to implementation of national and state governance, including preparation of national legal development policy.

The law and regulation in Indonesia should also be directed to achieve the state's goals as stated in Preamble of UUD'45 i.e. to build the whole nation and homeland, to enrich

and educate the life of the nation, to advance the common prosperity, to participate toward the establishment of a world order. The above goals should be promoted as political orientation of development and law, to the extent that the legal politics should be regarded as the endeavor to make the law as the means to achieve state goals from time to time, in accordance with the stages of society development. Thus Pancasila, which is intended as the principle to achieve the goal of the state, creates some legal guiding principles, namely: First, the laws created in Indonesia shall aim to build and ensure integration of Indonesian state and nation, both territorially and ideologically. The laws in Indonesia shall not contain any substances that have the potentials to cause regional and ideological disintegration, as they are contrary to the goal of protecting the whole nation and homeland bound in unity; second, the laws created in Indonesia should be based on democracy and nomocracy at the same time. Democracy which serves as the basis of politics (populist) requires the creation of law based on popular agreement or its legally elected representatives, either through acclamation agreements or a majority vote when a consensus cannot be achieved; whereas nomocracy which serves as the principle of state law, requires the laws in Indonesia be created based on legal substance, which philosophically, in accordance with Pancasila rechtside as well as with the correct procedure. Thus the law in Indonesia cannot be created on the basis of merely to win the number of supporters, but it should also come from the philosophy of Pancasila and a correct procedure.

Third, the laws created in Indonesia shall be directed to build social justice for all Indonesians. Based on the foregoing, there is no justification for laws that encourage or allow socio-economic gap due to exploitation by the strong against the weak without protection from the state. Indonesian law should be able to protect the weak from being confronted by the strong that will certainly always be won by the strong. Consequently, Indonesian law should be able to provide a special protection for the weak, in order to narrow socio-economic gap that may arise due to exploitation by the strong on the weak. The laws of social justice are therefore intended to narrow the gap between the strong and the weak, and between the rich and the poor; Fourth, the laws created in Indonesia should be based on religious tolerance which is civilized, i.e. the laws that do not give privilege nor discriminate certain groups based on the number of the believers. Indonesia is neither a religious state (i.e. not based on one particular religion) nor a secular state (i.e. indifferent to or without religious zeal). Indonesia as Pancasila State is a religious nation state, a religious nationhood that provides a strong protection to every citizen to embrace and practice his or her own religious believes without interfering each other, or even leading to disintegration. Within such conception, the law of the state cannot oblige the practice of religious law, however, the state shall facilitate, protect, and ensure their security when its citizens practice their religious believe based on their own beliefs and conscience. Accordingly, the state does not impose the enactment of religious laws into exclusive formal law, but rather to facilitate, protect, and ensure the security of those who wish to worship with tolerance. The enforcement of such guidance is crucial considering the issues of religion is the most fundamental issues, thus no one is allowed to force or be forced to embrace or not to embrace a particular religion. Implementation of religious teachings, therefore, should be carried out with full tolerance and civility.

Based on the above description, the spirit and soul of every law/norm/legislation in Indonesia should therefore be an implementation of the spirit and soul of Pancasila, hence the state organizers at the central and regional levels with the authority to form and formulate laws of government regulation, presidential regulation to local regulation, including those of the governors/regents/mayors, should be able to present a "figure" of law with the spirit of Pancasila, or in other words, Pancasila as the legal ideal should be implemented and realized

in the form of law with Pancasila, signifying that any laws and regulations cannot be in conflict with the principles of Pancasila. Based on the above reasons, the state of law within Indonesian version of constitution is called the legal state of Pancasila. (Janpatar Simamora, 2014)

The Creation of Democratic State of Law within Indonesian Constitution

Based on the identity of constitutional text formation, there are some changes and strengthening in the state administration structure within the development of constitutionalism in Indonesia that juxtapose the concept of nomocracy and democracy. The concept of 'nomocracy' derives from the words 'nomos' and 'cratos'. The term 'nomocracy' is comparable to 'demos' and 'cratos' in 'democratic'. 'Nomos' means the norm, while 'cratos' means the power, the determining factor in the exercise of power is the norm or the law. Thus the term nomocracy is closely related to the idea of rule of law or the principle of law as the supreme power.

Democracy cannot be discussed separately or without relating it to the concept of state of law, because the state of law is one of democratic state, and democratic state is one of the safest ways to maintain control over the state of law (a democratic state of law). The idea of a state of law is that state of law should be well executed, in the sense that it is in accordance with what is expected by the society from the law and just (the fundamental goal of law is justice).

Substantially, there are two significances of democracy from the perspective of law that is related to the norms, i.e. the way to gain power and to exercise power. (Zulfirman, 2006) Sovereignty of the people (democracy) as defined in Article 1 Paragraph (2) and the rule of law (nomocracy) regulated in Article 1 Paragraph (3) UUD'45 are the two things that correlate and cannot be separated in a democratic state that upholds the law and justice like Indonesia.

After the change of democratic system as stated in Article 1 Paragraph (2) UUD'45, characterized by a direct democracy by the people, from the people and for the people, the head of state which before the Amendment was elected by the MPR RI, has been changed into elected directly by the people through presidential and vice presidential election and likewise with regional head election (pemilukada). Democratization aims to create justice in politics. Additionally, democracy can create social justice for all Indonesian people in politics, economy and other fields. Democracy in economy is called economic democracy. Democratic politics and democratic economy of Bung Karno is called Socio-Democracy. (Djauhari, 2006)

With the development of modern state of law characterized by the rule of law (ROL) and the development of law affecting Indonesia, not only derived from rechtsstaat but also the rule of law, the framework of substantive justice is thus taken from the values of society by the judges/jurist, so the state of law written in Article 1 Paragraph (3) Amendment to UUD'45 combines the rechtsstaat and the rule of law.

Constitution (UUD) as a common ground of nation and state finally created UUD'45. (Fatkhurohman, 2009) UUD'45 became the source of legal order. This signifies that both in the making and enactment of any legislation, there should not be any conflicts with UUD'45, let alone used as a source or legal basis of a regulatory product.

Indonesia already has the characteristics of a legal state, i.e. First, Supremacy of the law regulated in Article 1 paragraph (3) UUD'45; Second, equality before the law is regulated in

Article 27 paragraph (1) UUD'45, and law enforcement with due process of law, is regulated in Article 24 UUD'45.

The principle of a legal state adopted by the Unitary State of the Republic of Indonesia (NKRI) is a prismatic and integrative "State of Pancasila", i.e. the principle of a legal state that integrates or unifies the good elements of several different concepts (rechtsstaat, the rule of law, the concept of formal and material legal state), and provided the values of Indonesians' (e.g. parenting, paternity, harmony, balance and deliberation are at the roots of Indonesian legal culture) so they become the principles of "Pancasila State of Law".

The consequence of being a state of law, by way of *mutatis mutandis* raises the obligation for the state to implement the principle of justice. The principle of justice in a legal state are seeking to gain a midpoint between two interests, providing opportunities for the state to run the government with its power, but also on the other hand, the people should be protected for their rights through the principle of legal justice.

As Indonesia becomes a constitutional state in UUD'45, it strengthens the position of UUD'45 as a state constitution which should be maintained and enforced. The above notion provides the role for judicial institutions i.e. Constitutional Court in upholding UUD'45.

Article 1 paragraph (2) UUD'45 affirms that democracy which serves as a manifestation of people sovereignty by leaving it to the people to make political decisions within state administration. Meanwhile, paragraph (3) states the concept of nomocracy in the form of submission to the law to solve various issues against democracy and people's rights. With reference to the above provision, it is a necessity to build and enforce the law based on a balanced democracy and nomocracy. Indeed, democracy and nomocracy may describe different aspects but that does not mean that it cannot be balanced. Democracy will always discuss the political aspects on how to uphold people sovereignty, while nomocracy discusses the legal perspective. Therefore, without legal guardianship, people sovereignty will inevitably lead to unbalanced condition.

Democracy should be built within the limits of nomocracy, for democracy cannot be realized without the rule of law. Democracy requires clear rules of conduct and strictly adheres to them together. Without rules, democracy will never achieve its substantial goals. In implementing the principles of nomocracy, the concept of democratic state of law is applied; democracy is regulated and limited by the rule of law, while the law itself is determined through democratic means based on the constitution. Thus, the basic rules of state administration, with all its legal politics, should be consistently relegated to the constitution. Without exception, all rules of law created through a mechanism of democracy should not be in conflict with the constitution. In other words, the state of Indonesia is a state of law so any political activities e.g. direct democracy in General Election (Pemilu) or the process of lawmaking and its implementation, shall not be in conflict with the Constitution or UUD'45. If in fact, a law is in conflict with the constitution, the law shall then undergo a judicial review by the Constitutional Court. This is to ensure that the constitution is upheld so Constitutional Court is constituted as a constitution guardian or enforcement body.

The Amendment of UUD'45 seeks to empower the people reconstructed from various aspects, namely First, the aspect of strengthening the representative institutions; Second, the executive aspect (direct presidential election); Third, the judicial aspect (the emergence of Constitutional Court); and Fourth, aspects related to human rights. (Septi Nur Wijayanti, 2009)

Within constitutional structure, there is a new institution called Constitutional Court. The institution presents to equalize the principles of democracy and nomocracy, referred to as the guardian institution of democracy and constitutional enforcement. There are 4 (four)

important changes within the judicial power or judicial authority, namely: First, before the amendment of UUD'45, the guarantee of judicial authority was only existed within the explanation, after the amendment, such guarantee was explicitly mentioned in the body of UUD'45; Secondly, the Supreme Court and others were no longer the sole judicial power because there is also Constitutional Court which also serves as a judicial authority; Third, the existence of new institutions, independent in the judicial authority structure i.e. the Judicial Commission authorized to nominate the appointment of Supreme Court Justice and other authorities, is to maintain and uphold the honor, dignity and behavior of the judges; Fourth, the authority and power of judiciary, which in this case is executed by Constitutional Court to examine the law against the constitution, is to decide any disputes regarding authority of state institutions whose authorities are granted by the constitution, to decide upon dissolution of political parties, and disputes concerning election results. (Muhammad Fauzan, 2008).

Based on the above matters, the amendment of UUD'45 (1999-2002) brought in a new spirit within Indonesian state administration system, both in Legislative Power as the power of lawmakers, executive power as the power of law enforcement, as well as judicial power (which defends and enforces the law). Within the judicial power system, in addition to the Supreme Court and the courts under the Supreme Court within the general court, the religious court, military court and state administrative court, there have emerged new state institutions, namely Constitutional Court and Judicial Commission as implications of the amendment UUD'45.

There are 4 (four) points underlying the establishment of Constitutional Court; First, Understanding of Constitutionalism, is a belief that there is a limitation of power. This understanding has two important points, i.e. the concept of a legal state, that the law overcomes state power, the law will exercise control over politics, and the concept of civil rights of the state citizens states, that the freedom of citizens and state power is limited by the constitution; Secondly, check and balance mechanism, a good governance system is characterized, among others, by a mechanism of checks and balance in the authority of state administration. Check and balance allows a mutual control among branches of existing power and avoids any tyrannical measures and power decentralization to prevent overlap between existing authorities. By relying to the principle of state of law, the relevant control system is a judicial control system; Third, implementation of a clean state, whenever a good governance system requires a clean state to be administered; Fourth, the protection of human rights asserting that uncontrolled power often commits arbitrary actions in its conduct and not to exercise the human rights.

Several considerations on the establishment of Constitutional Court as stipulated in Law No. 24 of 2003 regarding Constitutional Court, that the unitary state of the Republic of Indonesia is a state of law based on Pancasila and UUD'45 which aims to create the life order of a nation and a state that is orderly, clean, prosperous and just; that the Constitutional Court as one of the executor of judicial authority carries a critical role in the endeavor to uphold the constitution and the principle of legal state in accordance with its duties and authority, as stipulated in UUD'45; that pursuant to the provisions of Article 24C Paragraph (6) of UUD'45 needs to regulate the appointment and dismissal of constitutional judges, procedural law, and other provisions concerning Constitutional Court; that pursuant to considerations as mentioned in letters a, b and c and to implement the provisions of Article III of the Transitional Rules of UUD'45, it is necessary to create a Law on Constitutional Court.

The Constitutional Court is regulated in Article 24 of Amendment UUD'45 and subsequently regulated in Law No. 24 of 2003 regarding Constitutional Court. The

Constitutional Court is the embodiment of a just democracy in upholding the constitution. (Pan Muhammad Faiz, 2016)

Conclusion

The course dynamics of constitutionalism idea in the history of the Republic of Indonesia constitution has experienced ups and downs in line with the existing legal political regime. Building a tradition of constitutionalism as a sustainable effort cannot simply be executed by relying on the text/editorial of the constitution. The success to develop a constitutionalism culture in governing administration is also significantly determined by the willingness of every element of the society and the state organizers in the effort to understand the content stated in the text of the constitution.

The idea of constitutionalism would simply be a meaningless idea if there is no systematic effort from all elements of the people to jointly manifest, not only normatively written in "gold ink" stated in hundreds or even thousands of white papers scattered in various forms of legislation, but there should be a support and determination to manifest all of them in implementing the national and state life.

Acknowledgments

We gratefully acknowledge the support of Center for Legal Studies and Regional Partnerships of Universitas Jenderal Soedirman.

References

- ANDREWS, W. G. 1968. *Constitutions And Constitutionalism*. 3rd edition. New Jersey, Van Nostrand Company.
- ASSHIDDIQIE, J. 2014. *Konstitusi & Konstitusionalisme di Indonesia [Constitution & Constitutionalism]*. Jakarta, Sinar Grafika.
- ASTAWA, I Gde Pantja, 1990. *Hak Angket Dalam Sistem Ketatanegaraan Indonesia Menurut Undang-Undang Dasar 1945 [Right for Inquiry in the Indonesian National Government System based on 1945 Constitution]*. Bandung, Padjadjaran University of Bandung.
- AZHARI, A. F. 2013. Ideologi dan Konstitusi dalam Perkembangan Negara-Bangsa Indonesia: Rekonstruksi, Tradisi, Dekolonisasi, dan Demokratisasi [Ideology and Constitution within the Development of The State-Nation of Indonesia: Reconstruction, Tradition, Decolonialization, and Democratization]. *Jurnal Media Hukum, Universitas Muhammadiyah Yogyakarta*, **20**(1):103.
- _____. 2011. *UUD 1945 Sebagai Revolutive groundwet – Tafsir postkolonial atas Gagasan-gagasan Revolusioner dalam Wacana Konstitusi Indonesia [1945 Constitution as the Revolutive groundwet – postcolonial Interpretation of The revolutionary ideas on the Perspectives of Indonesian Constitution]*. Yogyakarta, Jalasutra.
- _____. 2005. *Menemukan Demokrasi [Finding Democracy]*. Surakarta, Muhammadiyah University Press.
- BUDIARDJO, M. 1989. *Dasar Dasar Ilmu Politik [Fundamental Political Sciences]*. Jakarta, Gramedia.

- CHEN, A. H. Y. 2010. Pathways of Western Liberal Constitutional Development In Asia: A Comparative Study of Five Major Nations. *I•CON*, **8**:849–884.
- DJAUHARI. 2006. Konsep Negara Kesejahteraan Pra Kemerdekaan RI [The Concept of Prosperous Country before the Independence day of the Republic of Indonesia]. *Law Journal, Sultan Agung University*, **16**(2):300-323.
- FAIZ, P. M. 2016. Legal Problems Of Dualism Of Judicial Review System In Indonesia. *Jurnal Dinamika Hukum. Faculty Of Law, Universitas Jenderal Soedirman*, **16**(2):187-195.
- FATKHUROHMAN. 2009. Memahami Pembubaran Partai Politik Era Orde Lama Di Indonesia [Understanding the Dismissal of the Old Order Political Parties in Indonesia]. *Jurnal Media Hukum, Universitas Muhammadiyah Yogyakarta*, **16**(2):289-319.
- FAUZAN, M. 2008. Eksistensi Komisi Yudisial Dalam Struktur Ketatanegaraan Republik Indonesia dan Yang Seharusnya Diatur Dalam Peraturan Perundang-undangan [The Existence of Judicial Commissions in the National Government Structure of The Republic of Indonesia and those should be Regulated within the Regulations of Law]. *Jurnal Dinamika Hukum, Faculty of Law Universitas Jenderal Soedirman*, **8**(1):43-50.
- FREDERICH, C. J. 1968. *Constitutional Government And Democracy: Theory And Practice in Europe and America*. Waltham, Mass., Blaidel Publishing Company.
- HEFNER, R. W. 2013. The Study of Religious Freedom In Indonesia. *The Review of Faith & International Affairs*, **11**:18-27.
- ISKANDAR, P. 2016. The Pancasila Delusion. *Journal of Contemporary Asia*, **46**(4):723-735
- KAMIS, Margarito. 2014. *Jalan Panjang Konstitusionalisme Indonesia [The Long Road of Indonesian Constitutionalism]*. Malang, Setara Press.
- KUSUMA, RM A.B. 2004. *Lahirnya Undang-Undang Dasar 1945 [The Birth of 1945 Constitution]*. Jakarta, Publisher FHUI.
- LERNER, Hanna. 2013. Permissive Constitutions, Democracy, and Religious Freedom in India, Indonesia, Israel, and Turkey. *World Politics*, **65**:609-655.
- LEV, D. S. 1990. *Hukum dan Politik Di Indonesia Kesenambungan dan Perubahan [Law and Politic in Indonesia: Sustainability and Changes]*. Jakarta, LP3ES.
- _____. 1985. Colonial Law and the Genesis of the Indonesian State. *Indonesia*, **40**:57-74.
- MAHFUD, M. MD. 2003. *Demokrasi dan Konstitusi Di Indonesia Studi Tentang Interaksi Politik dan Kehidupan Ketatanegaraan [Democracy and Constitution in Indonesia: A Study on Political Interaction and Civic Life]*. Jakarta, Rineka Cipta.
- MANAN, B. 2006. *Konvensi Ketatanegaraan [Convention of National Government]*. Yogyakarta, UII Press.
- MARZUKI, M. L. 2010. Konstitusi dan Konstitusionalisme [Constitution & Constitutionalism]. *Jurnal Konstitusi*, **7**(4):01-08.
- SIMAMORA, J. 2014. Tafsir Makna Negara Hukum Dalam Perspektif Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 [Interpretation of the Meaning of Law State in the Perspective of Constitution of the Republic of Indonesia. *Jurnal Dinamika Hukum, Faculty of Law – Universitas Jenderal Soedirman*, **14**(3):547-561.
- SOEKARNO. 2006. *Filsafat Pancasila Menurut Bung Karno [The Philosophy of Indonesian Five Basic Principles Proposed by Bung Karno]*. Yogyakarta, Media Presindo.
- THAIB, D. 2001. *Teori dan Hukum Konstitusi [Constitution Theory and Law]*. Jakarta, Rajawali Press.
- THOMSON, B. 1997. *Textbook on Constitutional and Administrative Law*. Ed 3th. London, Blackstone Press Ltd.
- TOMICIC, A.; BERARDI, F. 2017. *Between Past and Present: The Sociopsychological Constructs of Colonialism, Coloniality and Postcolonialism*. Springer Science+Business Media. LLC

WIJAYANTI, S. N. 2009. Studi Evaluasi Terhadap Amandemen UUD 1945 (Amandemen Sebagai Upaya Pemenuhan Kebutuhan Hukum Masyarakat Indonesia) [An Evaluation Study on Amendments of 1945 Constitution (Amendments as the Efforts to fulfill the needs of Law for Indonesian People)]. *Jurnal Media Hukum, Universitas Muhammadiyah Yogyakarta*, **16**(2):232-233.

YAMIN, M. 1948. *Risalah Sidang Badan Penyelidik Usaha Usaha Persiapan Kemerdekaan Indonesia (BPUPKI) [The Hansard of The Investigating Committee for Preparatory Work For Independence]*. Preparation Committee for Indonesian Independence (PPKI) May 28, 1945 – August 22, 1945. Jakarta. Secretariat of the Republic of Indonesia.

ZULFIRMAN. 2006. Ontologi Demokrasi. *Jurnal Hukum Sultan Agung University*, **14**(2):137-138.

Submetido: 13/11/2018

Aceito: 15/07/2019