

DEMOCRATIC STATE OF LAW IN A POST-COLONIALISM STATE : AN ANALYSIS OF THE IDENTITY OF INDONESIAN AND MALAYSIAN CONSTITUTION

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DEMOCRATIC STATE OF LAW IN A POST-COLONIALISM STATE : AN ANALYSIS OF THE IDENTITY OF INDONESIAN AND MALAYSIAN CONSTITUTION

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Abstract

Identify forming elements in the constitution is important to understand the concept of ideals of a state. The study of the constitution in some ASEAN country such as Indonesia and Malaysia can describe how political and legal dynamics influenced the establishment of its constitution. Based on that condition, this manuscript discusses First, the meaning of Constitutionalism in Indonesia and Malaysia; and Second, the establishment of Democratic State of Law within the Constitution and its implications in state administration structure in Indonesia and Malaysia. In this form, the constitution not only as a normative text and the embodiment of constitutionalism values but also having a sociological and historical function to create a social change in their legal development.

Keywords : the constitution, democratic state, identity, post colonialism

17

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INTRODUCTION

Indonesia and Malaysia are two countries in Southeast Asia region with their history of being former colony of foreign countries. This historical condition of both countries has inspired the formation of a constitution which followed the state of law principle, intended to embody a prosperous, safe, peaceful, and well-ordered live as a state, which ensures that all members of the society are equal before the law. Practically, the condition of legal formation was not necessarily correlated to the intension, because the ruler's interests and the people's needs did not always go hand in hand a 23, sometime they might conflict with each other. Insofar, the legal development in Indonesia and Malaysia tends to move within artificial space, which indicates the existence of dissatisfaction gap between the rulers and the people. This implication create legal development in reactive and partial ways. It should be emphasized that Legal development is not merely limited to regulations or legal substance, but it also includes the legal structure or institution and the legal culture. (Harjono, D.K., 2011)

Based on the conditions above, each state required a fundamental framework for an orientation of legal development which serves as a guidance, to allow the legal development to be actually orientative and an way to empowering the people, towards the basic ideals as a state, namely people's welfare, both physically and mentally (*bonnum publicum*). It means that state goal is to give the best possible goodness for the people, rather than for goodness itself. The state should always strive and protect optimal goodness for its people both in terms of its quality a 23 quantity. In a state, the humans serving as its citizens should enjoy a safe and peaceful life, both mentally and physically. Therefore, it is important to have the methods of legal

settlement which can connect the needs for legal development based on the characteristics of its nation. A simple way of finding this pattern is by finding the identity in their lives as a nation through their constitution and constitutionalism from the history of how the state was formed.

In principle, to understand a material of constitution and constitutionalism contents, it is not enough only by analyze the constitutional doctrine, it is essential to thoroughly see the constitution as a whole. (Strong, C.F, 1952) However, historical theories are not the main thing in constitution interpretation since constitution interpretation should also understand the occurring principles of constitution when the constitution is in full effect and force. Ferejohn, et al (2001) states that constitution should be understood historically and culturally or there should be a historical and cultural interpretation. According to John, constitution interpretation can be done in backward-looking and forward-looking form. Backward-looking sees the constitution historically and culturally to discover the strength of constitution text. Forward-looking, on the other hand, is considering the effect of a law condition on the political system function and people's life. This issue is important to be analyzed when Indonesia and Malaysia were parts of colon 11 countries. This paper is written to explain the importance of existence of democratic state of law in post-colonialism based on constitution identity in Malaysia and Indonesia.

THE MEANING OF CONSTITUTIONALISM IN INDONESIA AND MALAYSIA

The essence of constitution is who keep the sovereignty anyway? The sovereignty issue has been critical since it is formally a centrum of power dividing the sub-powers downward.

In this light, sovereignty contains an acknowledgement of a power, because behind sovereignty, power is embedded. Implementatively, power will have something to do with the authority to execute a legal action which is based on the office institutionalized by the constitution. It is this which becomes the source of legality for the state agencies to perform legal actions under the constitution.

It is the existence of this constitution which creates constitutionalism as an integral component of democratic government. Without applying constitutionalism to itself, it is impossible to establish a democratic government. (Besar, 2002:36) Therefore, each state of law can be confirmed to have a constitution. In a state of law, the legal content materials are embodied in certain forms in the highest structure in the form of constitution, both the ones embodied in written and unwritten constitutions. (15) In relation to the term constitution, Brian Thomson (1997) states that "...a constitution is a document which contains the rule for the operation of an organization. Substantively, Fauzan (2019) said constitution reflect the way of a government to organized the society. It means that the constitution has a broader meaning, which is the whole written or unwritten rules governing in binding regarding the way a government is organized in a society. (Thaib, 2001)

With regard to the correlation between constitution and constitutionalism, we may simply said that constitutionalism is a concept, while constitution is a "tool" used to manifest the concept. This is because a thorough meaning of constitution exists in "constitutionalism". Although the constitutionalism concept is derived from constitution, and, in its development, it even promotes the existence of constitutional state, however, the essence (3) of constitutionalism initiates limitation of power in a state. Constitutionalism implements the rule of laws; it brings about predictability and security in the relations of individuals and the government by defining in the power and limit of that government. In this connection, constitutionalism contains an idea that a government organized by and on behalf of the people is subject to certain limitation as expected to secure the power not to be misused by ones who are on duty to govern. This becomes an integrated part of post-colonialism study in finding of the identity of constitution, especially in Indonesia and Malaysia.

Discussion on post-colonialism is not limited to the effort to seek for independence of a state but is of a broader area. According to Lomba (2005), Post-colonialism can be considered as a resistance against the domination of colonialism and the heritages of colonialism. Post-colonialism is considered as a subjectivity of resistance against discourses and practices of imperialism or colonialism. Post-colonialism is also not limited only to resistance against seeking for independence of a state, but also resistance against domination of colonialism and its heritages. Therefore, post-colonialism cannot be interpreted in a single and static concept. In addition, this analysis on colonial discourse and post-colonial theory is concluded by William as critics of a process of knowledge production of the other. (William & Chrisman, 1994) In this case, political-legal context in law formation has synthetic and dynamic characteristics, made and built by social awareness to settle conflict at each stage of evolution, that is conflict arising from the existence of influence of external factors, which is domination and pressure of colonialist's culture, to survive and develop. This is a condition that results in difference and equality in the meaning of constitutionalism in Indonesia.

CONSTITUTIONALISM IN INDONESIA (28)

Indonesian Constitution is referred to as *Undang-Undang Dasar Negara Republik Indonesia Tahun 1945* (the 1945 Constitution), which is the written basic law. The 1945 Constitution is enacted as the constitution by the Preparation Committee For Indonesian

Independence (PPKI) on August 18, 1945. Based on the development of Indonesian state administration system, within the period of 1999-2002, the 1945 Constitution has been amended 4 times (amendment), which change the structure of bodies in the state administration system of the Republic of Indonesia.

Before amendment, the 1945 Constitution consists of Preamble, Body (16 chapters, 37 articles, 65 paragraphs (16 paragraphs derived from 16 articles consisting only of 1 paragraph and 49 paragraphs derived from 21 articles consisting of 2 or more paragraphs), 4 articles of Transitional Rule, and 2 paragraphs of Additional Rules), and Explanatory Notes. And now after 4 amendments, the 1945 Constitution has 16 chapters, 37 articles, 194 paragraph, 3 articles of Transitional Rule, and 2 articles of Additional Rules.

Based on the 1945 Constitution material, Indonesia is a state of law on the basis of Pancasila ideology. The relation of the national principle and the constitution of a state is noticeable in the state's basic ideas, and goals as contained in the Preamble of the Constitution. It is from this national principle that the state life as expressed into laws and regulations is governed and manifested. One of the manifestations in governing and organizing the state administrative life of a state is constitution.

The basic relation of the state and the Preamble of the 1945 Constitution can be illustrated as follows:

1. Abstract philosophy of the national principle, Pancasila, is reflected in the Preamble of the 1945 Constitution, which is a detailed description of August 17, 1945 Proclamation.
2. Pancasila as formulated in the Preamble of the 1945 Constitution is a perfect and systematically and hierarchically arranged unity. One principle inspires and comprises the other principles hierarchically.
3. The abstract spirit of Pancasila, upon its expression into the August 17, 1945 Independence Proclamation of the Republic of Indonesia is reflected in the main ideas contained in the Preamble of the 1945 Constitution.
4. The unity of interpretation of Pancasila principles must be derived from and based on the Preamble and the articles of the 1945 Constitution.

The Pancasila principles, in relation to the articles of the 1945 Constitution, are contained in the following articles:

1. The Belief (32) One and Only God. This principle is closely related to article 29 paragraph (1) and (2) of the 1945 Constitution
2. A just and civilized humanity is closely related to articles 27, 28, 28 A-28 J, 29, 30, 31, 32, 33, and article 34 of the 1945 Constitution
3. A unified Indonesia principle is closely related to articles 1 paragraph (1), 32, 35, and article 36 of the 1945 Constitution
4. The Democracy, led by the wisdom of the representatives of the People principle is closely related to articles 1 paragraph (2), 2, 3, 22 E, 28, and article 37 of the 1945 Constitution
5. The Social justice for all Indonesians principle is closely related to articles 23, 27 (2), 31, 33, and article 34 of the 1945 Constitution

Observing the foregoing, it is clear that the identity of the Indonesian constitution is Pancasila. Pancasila is the basic ideas, norms, and guidelines in the organization of statehood to achieve the goals of the sovereign Indonesia, since it is in line with the dynamics of developing life of the people and the nation, Pancasila becomes the main source to resolve nation's multi-dimensional problems. Nation's problem solving is made through

derivation of Pancasila values as the nation's basic value. When the basic value is related to the human nature, the value is derived from the human nature, as often termed human basic rights (human rights). (Kaelan, 2002) In addition to basic value, there is also instrumental value, which is a means to manifest the basic value into praxis life. If the instrumental value is related to an organization or a state, the instrumental value becomes the direction of wisdom or strategy, sourced from the basic value. Instrumental value is the explicit form of basic value. Meanwhile, praxis value is further description of instrumental value in real life. The three values are likely to be different in nature, but they should not contradict to each other. Basic value, instrumental value and praxis value are unity that must not deviate.

The overview confirms the position of Pancasila as the view of life, ideology, and ideals of state's law in the qualification of value system occupying the basic value. Its existence must be complied with by all of the state administrators and the Indonesians. Meanwhile, instrumental value serves as a means to manifest the basic value into the constitution with formulation and parameters as reflected in the existing articles. All of the existing value qualifications can be formulated into the state's course of politics that serves as the praxis value with more concrete formulation and parameters as initial foothold towards state's ideals to promote public welfare.

Pancasila as the basic value in the state administrative organization has three main basic values, which are divinity basic value as manifested into the first principle, humanity basic value as formulated into the second principle, and state administrative organization life basic value in the qualification of the third, fourth and fifth principles. The formulation of divinity basic value as expressed in the Belief in the One and Only God principle is absolute, on the basis of as widest as possible freedom for citizens to choose their own religion and belief based on divinity value.

Divinity basic value contains demand to the nation not to interfere citizen's right in using their individual absolute freedom in embracing their religion. On the contrary, the existing basic value simultaneously contains demand to the state to outline policy for the citizens to use their rights for religion and belief choice. Instrumentally, the divinity value has been expressed into Article 29, that the State shall be based upon the belief in the One and Only God and that the State guarantees all persons the freedom of worship, each according to his/her own religion or belief.

The 'humanity' basic value is essentially formulated in the second principle. This value is in nature related to human basic rights and is essentially expressed in various human rights as formulated in Chapter XA Article 28A to Article 28J of the 1945 Constitution. Meanwhile, some basic values in the third to fifth principles as the basic value that develops from the essence of state life are contained in the unity basic value, democracy basic value, and justice basic value. The unity value is formulated in Indonesia as a unitary state in Article 1 paragraph (1) of the Constitution. The democracy basic value is negated in Article 1 paragraph (2) where sovereignty is in the hands of the people and is implemented according to the Constitution. Finally, the justice value can be implicitly construed in Article 1 paragraph (3) where Indonesia is a state of law that mandates division of power and formation of judiciary power. The existing three values are the basic values for the organizational life to achieve the state's goals.

CONSTITUTIONALISM IN MALAYSIA

Legal system in Malaysia is based on the common law system. This is the direct result of UK colonialism from early 19 century to 1960s. Federal Constitution of Malaysia is the supreme law in Malaysia. Federation of Malaya is initially called the Federation of

Malaya, and the name Malaysia starts to be used when Sabah, Sarawak, and Singapore (now independent) become part of the Federation. This Constitution establishes the Federation as a constitutional monarchy led by Yang di-Pertuan Agong. This Constitution provides for the establishment and the organization of three main branches of the government: the bicameral legislative branch called the Parliament, which consists of the House of Representatives and the Senate; the executive branch led by the Prime Minister and his Cabinet Ministers; and the judicial branch headed by the Federal Court.

Based on the Constitution of Malaysia, terms law and Malaysian citizen's rights are stipulated. The federal laws enacted by the Malaysian Parliament apply throughout the nation. State legislation enacted by the State Legislative Proceeding applies in certain state. The Constitution of Malaysia also provides unique double judiciary system, which are secular law (criminal and civil laws) and sharia law. Article 73 to 79 of the Federal Constitution determines that the federal and state governments may arrange legislation. The Parliament has exclusive authority to arrange legislation of matters which fall under the Federal List such as citizenship, defense, domestic security, civil and criminal law, finance, trade, industry, education, labor, and tourism. Meanwhile, each state through legislative council has legislative power with regard to matters which fall under the State List such as land, regional government, Sharia court, State holiday, and state general work. However, Article 75 sets out that in case of conflict, the Federal law shall prevail above state law.

The constitutional content in Malaysia is influenced by Malaysian ideology of the National Principles established on August 31, 1970 by the National Operations Council, which is a year after tragedy of May 13, 1969. In this regard, Malaysia has the following ambitions:

1. Achieving a more perfect unity amongst the whole of her society;
2. Preserving a democratic way of life;
3. Creating a just society where the prosperity of the country can be enjoyed together in a fair and equitable manner;
4. Guaranteeing a liberal approach towards her rich and varied cultural traditions; and
5. Building a progressive society that will make use of science and modern technology.

On that basis, Malaysia pledges to achieve the ambitions guided by the following principles:

1. Belief in God;
2. Loyalty to King and Country;
3. The Supremacy of the Constitution;
4. The Rule of Law; and
5. Courtesy and Morality.

To achieve the goals, Malaysia conducts various policies, one of which is to create identity politics. This is the big problems faced by Malaysia in the nation-building process. Such problem arises right after the nation obtains its independence from British colonization, where the newly independent national government applies polity to protect and preserve Islamic characters and makes Malay language as its official language. There is something interesting with regard to Privileges in possession of Malay ethnic group guaranteed by the Federal Constitution. It is interesting not in regard to what special rights obtained by the Malay ethnic group, but in the Malay criteria in the Federal Constitution stating that a person will be called a Malay if he/she; "Professes to be a Muslim, Speaks the Malay language and Adheres to Malay Customs".

In this regard, the Nation-Building concept is a concept which describes the development or formation of national identity of a nation, which includes the process of development and formation of various aspects, such as social, institutional, intellectual, ideological, and political aspects. In this case, there are serious problems which directly affect the Malaysian national identity formation process. One of the main goals in the national building process in Malaysia is formation of national identity, where previously there is no one identity that unites the existing various ethnics in Malaysia. In Malaysia, one of the main goals is to form one identity for all Malaysians from various ethnics, which is identity as Malaysian. Previously, ethnical identity is still clear, which disregards national identity, something which then causes conflict between ethnics in the nation. With a national identity built, it is expected that there will be unity among ethnics in the future, thus the national development process will run better.

THE ESTABLISHMENT OF DEMOCRATIC STATE OF LAW WITHIN THE CONSTITUTION AND ITS IMPLICATIONS IN STATE ADMINISTRATION STRUCTURE IN INDONESIA AND MALAYSIA

The definition of democracy is complex. In general, democracy is defined as people's government, i.e. the effort of giving all citizens the right to govern. Democracy can also be interpreted as a form of power (kratein) from/by/for people (demos). Power implies politic and government, while people along with members of society is defined as citizens. In democracy, the power of government in that country lies in people's hands. People are the holders of highest power or sovereignty in people's hands. Democracy can also be interpreted as Abraham Lincoln's ideas where government is "from people, by people, and for people". Being "from people," it means the government is originated from the people through their collective agreement, through a procedural, social contract. "Government from people" means that the state is mandated by their people to organize the government, and "for people" means that the government is managed for their people's interests. (Suyahmo, 2014).

In regard to democracy, many terms have developed. In Indonesia, some terms using democracy emerge, namely; liberal democracy, parliamentary democracy, guided democracy, and Pancasila democracy. All of these concepts use the term democracy, which is originated from the Greek "demos" (meaning "people") and "kratos/kratein" (meaning "power" or "having power" and according to its modern definition it means "people have the power" or "government are ruled by the people". Democracy is deemed as the system capable of bringing the state's goodness to its people. The fact that democracy is accepted as the best system in a state because it can unify the many groups of people and it has the principle of making people in a state to coexist without being discriminated by race, religion or ethnic. (Purba, 2015)

The contemporary interpretation of democracy is multidimensional, and it no longer refer to the dominating liberal democracy's interpretation. How democracy is implemented is substantially being debated, including the studies on views of democracy in several European and Latin American countries. Results of these studies show that democracy has evolved and they have their own philosophical and theoretical arguments. To talk about democracy is to try to answer the fundamental questions on who to rule, how the government administration should be governed, and how people through their representatives can supervise and control the government in the best possible way to side with people's interests. Democracy can contemporarily be interpreted with many definitions, including the ideas of freedom, equality, participation, contestation, republicanism, representation, and protection of citizens' rights, which remain intertwined. (Canachel, 2012)

In theoretical and paradigmatic perspective, democracy so far has reached an unrivaled political position. This means, systematically, theoretically, and normatively speaking, democracy contains the justice, equality, freedom or non-dominating values. This assumed values have their sources from Liberal Theory which focuses on freedom and justice concepts developed by John Rawls. Likewise, republicanism, Marxism and critical theories have its principles on non-dominating value. The strategy developed for democracy concept has its starting point from the social side, rather than in narrow notion of democracy. The assumption comes from sociological interaction regarding social life, understanding democracy as an unfinished agenda to reach a form of ideal community. Freguain that democracy serves as a form of commitment to relational values, inclusive authority and social involvement, providing useful orientation to be involved not only with intellectuals, but also with wider dimension of civil society.

It is understood that the currently desired democracy is the one which increasingly shows its quality. The quality here is the quality of the requirements and processes, the content and the outcome, procedural democracy including rule of law, participation, competition and accountability (vertical and horizontal) and substantive dimensions, respect for civil and political freedom and equality. In addition, the government should be responsive by keep on evaluating the impacts of its policies as seen from what their citizens expect. Therefore, the basic principles of democracy is political equality, freedom, and political power control. Democracy has better quality when it has the democracy basic principles, namely: freedom; political equality; and control. (Pickel, et.al, 2016)

Democracy substantively in theory and practice does not exist as a commonly agreed universal model. According to such views and schools of thought as direct, republican, elitist, New Left and New Right participatory democracies, its value emphasis lies in the core idea of participation, freedom, equality, leadership and democracy processes. In addition, the most important essence of deliberative democracy is the existence of political communication and public sphere that became the center of attention of the democracy process. (Henneberg, et.al, 2009) Substantively, the main principles of democracy are twofold, namely: 1) Freedom/equality and 2) People's sovereignty.

Based on the identity of formation of constitution content, in the development of constitutionalism there are changes and strengthening in the constitutional structure which couples the concept of democracy and democracy. The 'nomocracy' concept derives from the words "nomos" and "cratos". The word "nomocracy" can be compared to "demos" and "cratos" in the word democratic. "Nomos" means norm, and "cratos" means "power" and serving as the determinant factors in the organization of power are norms or laws. Therefore, the nomocracy is tightly related to the idea of law sovereignty or law principle as the highest power.

Democracy can no longer be discussed separately from or without relating it to the concept of state of law, because state of law is one of democratic countries, and being democratic is one of the safest way to maintain the control of state of law (a democratic state of law). The idea of state of law is that the state's law should be implemented well in a sense that it is as expected by the people from the law and justly (because the basic goal of law is justice). Substantially, there are two meanings of democracy from law perspective, i.e. they have something to do with the norms in the form of how power is obtained and how this power is implemented. (Zulfirman, 2006)

IMPLEMENTATION OF DEMOCRACY IN INDONESIA AND MALAYSIA

Democracy in Indonesia

Indonesia is one of the countries which adopt democracy system. The application of democracy in several variants has been tested, including liberal democracy, parliamentary democracy, and Pancasila democracy. The implementation of democracy is considered to have failed in providing an order of life as a nation and country which is consistent with and based on the values and rules of democracy in its actual sense. According to Purnaweni (2004) from time to time the democracy in encounters many issues, and these problems are:

1. During the Old Order, the occurring changes were mostly in aesthetic-symbolic ranks, rather ethical-substantive ones. The *egalitarian* spirit of democratic culture dreamt of by the people faded away, after the statement of independence was tried to be embodied politically in a form of choices between liberal and parliamentary democracies, and economically in the form of choice in the creation of a robust indigenous middle class. The requirements to realize this, particularly the existence of robust middle class as the central actor to support democracy, were not found. The development of universe promoted by the President Soekarno to change the colonial economy into the national one of a more socialistic color was found to have completely failed, due to the absence of an established and democratic political structure support. The middle class expected to be born from it was also hard to find. The failure of such practice of grounding liberal and parliamentary democracy was then reduced as the Western-style democracy's failure to match Indonesian national identity and culture;
2. During the New Order, it was interpreted that the political cultures were explained in such a way that the state acted as the only, central actor. This logical of placing the state as the only actor was articulated through the explicit and absolute authorization for the state's centrality along with

all of its bureaucratic and military agencies for the sake of economic and political developments. The democracy issues during Old Order could be identified as follows; Firstly, through integration of, cleaning and unifying state and military bureaucracy under one command. This attempt opened the way for a new explanation and reasoning in Indonesia's national cultural feudalism in a real and operational manner. This new explanation and reasoning found its momentum when in reality the people were in the midst of severe economic adversity in one hand, and the state's obsession to build economic growth as the one laying the cornerstone for poverty eradication on the other. Secondly, the establishment state qua state was also done by eliminating mass politics. Excessively wide and uncontrolled political participation was deemed as dangerous to the political stability which constituted a *conditio sine qua non* for the economic development to continue to roll. Therefore, the state involvement through bureaucratic and military agencies were authorized to include all aspects of people's life.

3. During the Reform Era, not many socio-political powers have the real determination to guide democracy. Despite the many recently-formed democracy construction institutions, democracy paradoxes can still be found here and there. The democracy being constructed and understood refers more to a procedural, institutional democracy rather than the value-oriented one. These many paradoxes developing even in this reform era have frequently made us think twice and prioritize the critical question: Will this transitional time will elapse well so that a *consolidated democracy* is formed, or will we fail to pass through it and hence a *consolidated anarchy* occurs, bringing us back to the authoritarian and militaristic system.

The basic differences in the implementation of democracy in Indonesia can be formulated in the matrix below;

Table 1. Comparison of Implementation of Liberal, Guided and Pancasila Democracies

No	Indicator	Liberal Democracy	Guided Democracy	Pancasila Democracy
1	Channeling Demand	high yet the system is inadequate	high yet not channelled due to the existence of the National Front	Seemingly high
2	Value Maintenance	high human rights acknowledgment	low human rights acknowledgment	high human rights acknowledgment
3	Capability	only partially used, most of the parts are still potential	abstract, distributive and symbolic, economy did not advance	initially balanced, then it is unfulfilled due to fusion
4	Vertical Integration	two-way, top-to-bottom and bottom-to-top	top-to-bottom	top-to-bottom
5	Horizontal Integration	disintegrated, solidarity makers and administrator emerge	playing the role as solidarity makers	Visible
6	Political style	ideological	ideologist, (nationalism, communism) <i>nasakom</i> religion,	intellect, pragmatic, development concept
7	Leadership	Class of 1928 Youth Pledge	Charismatic and paternalistic figures	Charismatic figure
8	Mass participation	Extremely high, and even coup d'etat emerged	limited	initially limited free, then mostly limited
9	Military	military was	military entered	Limitation

	involvement	overpowered by civil	government administration	
10	State officers	loyal to group or party's interests	loyal to the state	loyal to the government
11	Stability	unstable	stable	stable

The issues of democracy in Indonesia from the Old Order, New Order and Reform Order lie in the fluctuating civil society's dynamics. The freedom requirement becomes a tug of war according to the growing political interests. Likewise, during the reform era the issue encountered revolves around freedom and transparency being interpreted differently from the state's interests. Hence, it is important for the state and the civil society to synergize to each other in order to realize a better democracy.

The basis of Indonesia's democracy concept is Pancasila which textually exists in the Preamble of the 1945 Constitution. The keyword of the fourth principle is 'populism' which means people's sovereignty, which is equal in some sense to the term "democracy". In this case, the democracy includes at least three aspects, namely political democracy, socio-cultural democracy, and economic democracy. However, in general when people talk about democracy it mostly refers to the political aspect, rather than the economic or socio-cultural one. (Zubaidi, 2011)

The democracy practiced by Indonesians is not the one imitated from other countries, rather it was born from the noble cultural values from many ethnics within Indonesians themselves, i.e. from Sabang through Merauke. Its founding fathers had agreed that the basis for Indonesia's democracy was Pancasila. The democracy in Indonesia is implemented based on the values of Pancasila. Therefore, the democracy in Indonesia is known as Pancasila Democracy.

Pancasila Democracy

In summary, Pancasila democracy has some definitions as follows: 1) Pancasila Democracy is a democracy based on kinship and mutual assistance aiming for prosperous society, which contains religious awareness elements, based on truth, love and noble characters with Indonesian personality of sustainable nature, 2) In Pancasila democracy the state organization system is performed by the people themselves or upon the people's approval, 3) In Pancasila democracy individual freedom is not absolute, rather it has to be synchronized with social responsibility. In Pancasila democracy the universality of democracy ideals is combined with the Indonesian's ideals inspired by the spirit of kinship, leading to the absence of majority or minority dominance. (Hatta, 1998)

Democracy in Malaysia

Malaysia is actually not a country fully adopting democracy as their state system. Thus, it is safe to say that Malaysia is a semi-democratic state. Malaysia is currently trying to implement and move towards democracy system. This can be seen from the abolition of ISA (Internal Security Act) by the ruling kingdom. Malaysia used to have ISA, an Act through which the government could arrest and sentence any individual making their aspirations heard or doing some political activity which endangered the state's security and had the possibility of causing problems in accordance with what was specified in this ISA. However, recently the ruling kingdom has abolished this Act. Thus, nowadays many Malaysian citizen may do some political activities. People want Malaysia to be more transparent in its democracy dynamics, where opinions and aspirations from the people ought to receive more attention to allow the equality among all citizens, according to the democracy system with its universal philosophy of being from the people, by the people and for the people.

Malaysia is heading towards democracy (because during his reign, Tun Muhatir used an authoritarian system, a system where only one party dominates the government of a kingdom). As for the reason why Malaysia wants to be a democratic state because the kingdom has no willingness of losing their power to rule and they want to keep on ruling and the parties opposing the kingdom have not had enough power and are still in doubt to be the government. Thus, the kingdom tries to change to be more democratic to sustain people's support to it.

CONCLUSION

In principle, the policy of legal development must be rational, and upholding spiritual, ethical and moral values, built on the principle of respecting human dignity and prestige by providing guarantees for the protection of human rights both in Indonesia and in Malaysia. In this light, the aim is to serve the interests of the nation, and build on the principle of popular sovereignty, meaning that in every formation and reform of law it should provide the greatest possible space for all elements of society to be engaged in the formulation and formation of the law.

In its implementation, the direction of legal development is not something that stands alone, rather it is integrated with the identity of the state. A legal norm has always had two faces (das Doppelte Rechtssantlitz); moving upward the legal norm derives from and is based on legal politics and its formation history, and moving downward it is also the basis and a source for any legal norm below it. In regard to Indonesia and Malaysia's constitution identity, both have the identities which were formed by the influence of their colonized countries as embodied in the form of their national ideologies. In this regard, Malaysia's ideology took the form of Rukun Negara and that of Indonesia was Pancasila.

In terms of the application of national ideology through the concept of democracy in Indonesia and Malaysia, it is confirmed that the democracy was built within democracy boundaries, because it is impossible to realize democracy without a rule of law. Democracy requires a clear and collectively complied rule of law. Without this rule of law, democracy can never reach its substantial goals. In the implementation of democracy principle, democracy is governed and limited by a rule of law, and the law itself is determined through democratic ways under the constitution. Thus, the basic rule for organizing a state, along with its legal politics, should be grounded back consistently to the constitution. With no exception, all rules of law passed through a democratic mechanism should not conflict the constitution and the state identity which was embodied as a result of historical process as a social contract.

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REFERENCES

1. Harjono, Dhaniswara K. (2011). Konsep Pembangunan Hukum dan Perannya Terhadap Sistem Ekonomi Pasar [The Concept of Legal Development and Its Role Against the Market Economic System]. *Jurnal Hukum Ius Quia Iustum*, 18 (4), 564-584.
2. Strong, C. F. (1952). *Modern political Constitutions*. London: Sidwick&Jakson Limited
3. Frejohn, John; Rakove, Jack N & Rile, Jonathan. (2001). *Constitutional Culture and Demokrasi Role*. United kingdom: Cambrige University Press
4. Besar, Abdulkadir. (2002). *Perubahan UUD 1945 Tanpa Paradigma (amandemen bukan, konstitusi baru setengah hati) [Amendment to the 1945 Constitution Without a Paradigm (amendment is not a new, half-hearted constitution)]*. Jakarta: Pusat Studi Pancasila
5. Thomson, Brian. (1997). *Textbook on Constitutional And Administrative Law*, 3, Ed 3th. London: Blackstone Press Ltd
6. Fauzan, Muhammad; Sudrajat, Tedi & Handayani, Sri Wahyu. (2019). Constitutionalism in a Post-Colonialism State: Socio-Cultural and Historical Perspective of Indonesian Constitution Identity. *Revista de Estudos Constitucionais, Hermenêutica e Teoria do Direito (RECHTD)*. 11 (1), 23-43
7. Thaib, Dahlan. (2001). *Teori dan Hukum Konstitusi [Theory and Constitutional Law]*. Jakarta: Rajawali Press
8. Loomba, Ania. (2005). *Colonialism/Post colonialism*. New York: Routledge
9. Williams, Patrick & Chrisman, Laura. (1994). *Colonial Discourse and Postcolonial Theory*. New York: Harvester Wheatsheaf
10. Kaelan. (2002). *Filsafat Pancasila dalam Pandangan Hidup Bangsa Indonesia. [Pancasila Philosophy in the View of Life of the Indonesian Nation]*. Yogyakarta: Penerbit Paradigma
11. Suyahmo (2014). *Demokrasi dan Hak Asasi Manusia [Democracy and Human Rights]*. Semarang: Unnes press
12. Purba, Ardyantha Sivadabert. (2015). Potret Pandangan Akademisi Di Jurnal Ilmu Sosial Dan Ilmu Politik UGM (JSP) Mengenai Permasalahan Demokrasi Di Indonesia [A Portrait of Academic Views in the Journal of Social and Political Sciences UGM (JSP) Regarding the Problem of Democracy in Indonesia]. *Jurnal Politik Muda*. 4 (1), 1 - 12
13. Canachel, Damarys. (2012). Citizens' Conceptualizations of Democracy: Structural Complexity, Substantive Content, and Political Significance. *Comparative Political Studies*. 45 (9), 1132-1158
14. Frega, Roberto. (2017). The normativity of democracy IMM-CNRS, Paris, France *European Journal of Political Theory*, 1-2
15. Pickel, Susanne; Breustedt, Wiebke, & Fern, Theresia Smolka. (2016). Measuring the quality of democracy: Why include the citizens' perspective?. *International Political Science Review*. 37(5), 645-655
16. Henneberg, Stephan C, et.al, (2009). Political marketing management and theories of democracy. *Marketing Theory Journal*. 9 (2), 165-188
17. Zulfirman. (2006). Ontologi Demokrasi. [Ontology of Democracy] *Jurnal Hukum*. 14 (2), 137- 138
18. Purnaweni, Hartuti. (2004). Demokrasi Indonesia: Dari Masa Ke Masa. [Indonesian Democracy: From Time to Time]. *Jurnal Administrasi Publik*. 3 (2), 118-131
19. Zubaidi, Ahmad. (2011). Landasan Aksiologis Pemikiran Bung Hatta Tentang Demokrasi. [The Axiological Basis of Bung Hatta's Thinking About Democracy]. *Jurnal Filsafat*. 21 (2), 87-98
20. Hatta, Mohammad. (1998). *Indonesia Merdeka" in Bung Hatta's complete work. Book I: Nationality and Democracy*. Jakarta: Penerbit LP3ES

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