

# The Enforcement of Constitutional Democracy: Creativity in Growing Responsive Law in Indonesia

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The term of democracy for many people is considered as a word that implicates noble values, a struggle for independence, and a better way of life. Democracy constitutionally means that democracy is not only a method of majority in authority through people's participation and independent competition, but also means that democracy contains similar values, independence, and pluralism. In line with it, the existence of democracy gives participation space for the people is expected to be able to control legal system, hence, law must be returned to its substance, which is in order to give a sense of justice, a sense of pleasantness, and a sense of welfare for people's survival. Therefore, a change of democracy constitutionally aims at forming a responsive legal character following people's noble desire, which is social justice for all people.

**Key words:** *Constitutional, Democracy, Responsive, Law, Creativity.*

## Introduction

Indonesia is a country that brings a democratic system (Rosana, 2016), hence, people have a role in state management. (Arifin, 2015, p. 33) Besides, people also have rights and obligations for controlling and monitoring the system of state management. (MD M. M., 2006, pp. 16-17) In this case, people have a role for assuring democratic system as an effort to realise the sovereignty system of the people and as a spirit of the democratic system. (Gatara, 2008, pp. 252-253)

In a democracy, it is needed for an organised freedom, at least, in democracy in the wide scale, such as the nation state. Thus, autonomous organisations will be realised. (Pringgodigdo, 1994) However, the autonomous organisations are more in direct consequences from the democratization of nation-state governance. Besides, an autonomous

organisation is also important for its function in the democratic process, minimising government pressure, increasing political freedom and human welfare level. (Dahl, 1985, p. 1)

Moreover, the presence of autonomous organisation or institution is expected its role in optimising the society as an effort for controlling, (Frank, 2013, p. 213) monitoring, and evaluating all aspects of state management, particularly in the context of law enforcement (MD M. M., 2011, p. 178). In a democratic system, the role of society is really needed to monitor the legal system so that law is not exploited to strengthen power or is used to satisfy the interests for certain groups. Furthermore, the law must be returned to its substance, which is for giving a sense of justice, giving a sense of peacefulness, giving a sense of pleasantness, and giving a sense of welfare for people's survival. (Martitah, 2013, p. 45)

In addition, the law is a norm system that manages life in society. Along with manners norm and morals, legal norms belong to the general norm of human behaviour. (Suseno, Etika Politik: Prinsip-Prinsip Moral Dasar Kenegaraan Modern, 2001, p. 68) Hence, the law is as an arrangement of human deeds, (Kelsen, 2006, p. 3) and this perspective is in accordance with the purpose of the rule in law.

Law and democracy are for maintaining continuity of human life dynamically and harmoniously (Rahardjo, Memahami Hukum : Dari Konstruksi sampai Implementasi, 2009, p. 3) by the purpose of avoiding human exploitation of humans. Hence, the existence of law and democracy must reflect a sense of justice that is appropriate with noble values of human conscience. Therefore, the character of law and democracy must be appropriate with sense, expectation, and idea which are from people of the nation. (Rahardjo, 2009, p. 47)

Essentially, in order to form character from a law which is in line with people's purpose is a must from a country that is based on the law in a democratic framework. (Nurtjahjo, 2004, p. 21) Establishing the legal character that is appropriate with people's purpose will not be formed if the existence of people's freedom is not well, which means the democratic system is not developed well as a people's aspiration zone in the government system. (L & Dkk, 2006, p. 33)

Democracy must be enlivened and developed as people's expression and aspiration zone for controlling and monitoring State power so that it will not be dictatorial and arbitrary in using the law. Therefore, democracy with all aspects must be maintained in order to form a responsive legal character based on people's noble desire, which is social justice for all people.

## Changing Constitutional Democracy

Democracy means people's power and it is from Greek that *Demos* is people and *Kratos* is power. Historically, the term of democracy had been known since the 5<sup>th</sup> century BC, which in the beginning, it was as a response against the bad experience of monarchy and dictatorship in Ancient Greek city-states. On that time, democracy was applied as a system which all citizens formed legislative institutions. This was enabled by the reality of city-states population which was about 10.000 populations, either in male or female. Children and slaves did not have any political rights. There was no separation of power at that time and all dignitaries had full responsibility on People's Assembly which qualified for controlling several executives, judicative, and legislative matters. (Abdillah, 1999, p. 71)

Meanwhile, according to Sidney Hook in *Encyclopedia Americana*, stated that democracy was a government form which the government's important decisions – or the policy direction behind this decision – either directly or indirectly was based on majority agreement which was given freely from the adult people. (Hook, 1994, p. 683) Meanwhile, Abraham Lincoln as United States President in his speech on inauguration of the Gettysburg national tomb gave strong definition about democracy in American history. He stated that democracy was government from the people, by the people, and for the people. (Urofsky, 2001) From several definitions about democracy, it can be understood that democracy is a system that intends people's power for participating in the legal system of government. Besides, people's rights must be protected by a clear rule of law (democracy is assured constitutionally). Therefore, democracy must be in line with the existing rule of law .

Democracy enforcement must be actualised based on existing rules of law and this is very needed for a democratic system, which the correlation between citizen and government, who is as a full power holder, does not exploit the democratic values frontally to the citizen. This is known as a constitutional democracy with special character that democratic government is a government whose power is limited and is not permitted to act arbitrarily against the citizens.

The limitation on the government's power is mentioned in the constitution: Therefore, it is often to be known as “*pemerintah demokratis berdasarkan konstitusi*” (Democratic and Constitutional Government). Thus, democratic and constitutional government is governance that is conducted democratically and based on law. (Budiardjo, 2000, p. 25)

Concerning with enforcement of constitutional democracy, Franz Magnis Suseno specified five intrinsic characteristics: 1) State Law; 2) Government under real control from the citizens; 3) independent elections; 4) majority principles, and 5) there was a warranty against democratic rights. (Suseno, 1995, p. 58) More explicitly, according to Robert A.

Dahl, he stated that ideal constitutional democracy enforcement process must qualify five criteria: 1) similarity in suffrage in making binding decision, such as determining a selection in elections; 2) effective participation, role of people in Nation management process for presenting their rights and obligations as citizens; 3) exposing the truth in the effort of expressing and controlling government system for realising the truth in various dimensions of life; 4) Final control against agenda; the people must have exclusive power for controlling and monitoring government system so that it would not have occurred with arbitrariness in government, and 5) coverage; citizens might not be differentiated and must be equalised in all aspects of life, particularly in similarity of law aspect.

The active role from the people in bringing democratic system was a must, and also the government with all of its attributes must be opened and must give openness access for the people as an effort to realise constitutional democratic values in various dimensions of life. Besides, in the law aspect, without any openness access for the people in democratic value, the law would be more tended to strengthen the power and to sacrifice people's interests.

Conservative character of law as what has occurred in Indonesia is a law which only focuses on procedural justice without any substances. Democracy is needed to be activated and developed as absolute requirements for changing the law to be law in social justice. Without activating democratic values, law enforcement will tend to be conservative- being controlled by the person in charge. Likewise, the enforcement of democracy, without any rule of law, democratic values will be nothing- lose control. (Riwanto, 2018, pp. 56-57)

In countries which are based on constitutional democracy, such as Indonesia, the constitutions have a specific function, which is limiting government power. Hence, the implementation of power will not be arbitrary. Therefore, it is expected that citizens' rights will be protected. However, this idea is called as constitutionalism. According to Carl J Friedrich, constitutionalism is an idea which the government is activities collection that is conducted by and for the people, but it has several limitations which are expected that it will assure if power needed by the government is not abused by them who have a job in governing. (Asshiddiqie, 2014, p. 267)

Democracy has an important meaning for the people who use it because through democracy, people's rights for determining the nation. (Adam, 2010, p. 11) Therefore, almost all understandings which are given for this term of democracy always give an important position for the people although operationally, its implication in several countries is not always similar. (Denzin & Lincoln, 2009, p. 301)

Democracy is a hard thing, even perhaps it is the most difficult and complicated government form. There are many tensions and contradictions. Besides, democracy requires the

perseverance for the organisers so that they can be successful. (Indrayana, 2011, p. 99) Democracy is not designed for efficiency, but responsibility. A democratic government in Indonesia perhaps cannot take action as fast as a dictatorial government, but once taking action, we can be sure that there is public support for this step. Democracy is not a completed product, but it is a thing which continuously changes and improves better (Huda & Nasef, 2017, p. 236)

### **Legal Character Changes to Be Responsive**

In UUD (constitution) of 1945, it is implied basic democratic values which are fundamental for organising State administration of the Republic of Indonesia and the life of society, Nation and State. The democratic values are in: proclamation idea, the purpose of State, *rechtsidee*, *staatsidee*, basic principles of state administration and noble morale and spirit of a struggle to become the basis in building a life in having democratic legal state in the future. (Lubis, 1997, pp. 30-37) The basic values must be explored, nurtured, maintained, and developed. Hence, it forms a constitutional system and a state life system for the people and the nation of Indonesia. Besides, the system is always evaluated and reviewed more so that it will create a responsive law that is ideal and per the current development. Thus, it can take the people and Nation of Indonesia to reach its idea of proclamation. (Arto, 2001, p. 32)

According to the fundamental values, it is expected that we will change a legal character to be social justice that reflects a sense of justice for the people. The products of law in Indonesia still use the legacy products from Dutch colonialists (such as the codification of Criminal Law, civil law, commercial law) and it is not appropriate with the character of Indonesian society. (Haris, 2014) The law is not responsive again. Thus, it needs a renewal of the legal system. Even, the legal products of colonialism are not in line with the spirit of the basic values of democracy and justice which are implied in *UUD* 1945 (constitution). Indonesia allows being independent, but from the legal system aspect, it has not reflected the legal character that is in accordance with the Indonesian spirit of justice and responsiveness for Indonesian people. (Marijan, 2010, p. 80)

Changing legal character so that it will be in line with democracy and basic values of the constitution is not be separated with the influence of political power. In Indonesia, political configuration develops through either democratic or authoritarian process. Meanwhile, the legal products which follow it are in mutual attraction between responsive and conservative aspect. (Zuhro R. S., 2019) Whether, in order to build a legal system and minimise political influence, “judicial review” actually can be become a control tool or good guardian. However, the stipulations about judicial review in several legislations in New Order era implies disturbance; thus, it cannot be operated. (MD M. M., 2006, p. 64)

Political power in either old order era or new order era is slowly but exactly it intervenes for the forming of legal character. Hence, the legal character is depended on the power of person in charge in governing, (Kuntjaraningrat, 1983) as in legal character in old order era, which the political configuration in old order era was strong and the legal character tended to be conservative in which the material of legal product was more reflected on social vision of the political elite, more reflected on the government's will rather than the people's will. Besides, it was positivist-instrumentalist, which was becoming ideology implementation tools and State program. (Zuhro & dkk, 2011)

Meanwhile, in the new order era, the political power of work was dominant, thus, the law has become a tool for cutting the power. Then finally, the character of the legal product was very elitist, it became an authorities instrument to preserve and secure power, and acted in the name of law for the people who were not in line with the authorities and control in society for the security of power.

In the reform order era, loud voices from various communities of people were in the name of themselves who were pro-reform. They expressed loudly to do legal reform in line with the current development era. Finally, giving implication to the government for conducting legal reform was starting from making the process of law, the institution of law, and until the law enforcement aspect.

Reform order with dynamic political configuration caused a demand to activate democratic values in the theoretical and practical order. Thus, it gave implication to responsive legal character, which meant that legal product reflected a sense of people's justice and fulfilled the people's expectations. Law in making process gave an important role and participation fully to social communities or individual in society. The result was a law that was yielded in the reform era was responsive against demands from social communities or individuals in society. (MD M. M., 1998, p. 25)

Therefore, in order to make responsive legal character, firstly, must activate democratic values in constitutional and practical order, (Aspinall & Marcus Mietzner, 2010) then, allowing all of the people for voicing democratic values as a common will, which means that democratic enforcement must be in accordance with sense of people's justice, not based on sovereign's wants. (Cassinelli, 1961) Meanwhile, according to Eep Saefullaoh Fatah, there are four main criteria in democratic practice that must be realised in social life, nation, and state; 1) wide and autonomous political participation; 2) circulation of political leadership effectively and competitively; 3) Control against effective authority, and 4) unrestricted and healthy political competition in independence atmosphere. (Fatah, 2000, pp. 14-15)

Regarding the framework of growing democratic values which is as a space to form responsive legal character, according to Amin Rais, ten criteria of democracy must be in a Democracy Country: 1) participation in making decision; 2) equality in law aspect; 3) distribution of income fairly; 4) having similar opportunity in education aspect; 5) four kinds of freedom, which are freedom in giving opinion, freedom in having news/ press, freedom in assembly and having religion; 6) availability and transparency of information; 7) noticing more the *fatsoen* (political order); 8) individual freedom; 9) spirit of cooperation; and 10) rights for objection. (Rais, 1986, pp. xvi-xxv)

Therefore, it can be understood that in order to change the legal character to be responsive, the efforts that must be conducted are, firstly, developing democratic values. Giving role for the people to take part in voicing democratic values in the effort to monitor and control the law enforcement so that a certain community will not abuse it. Hence, the law really gives a sense of social justice for all people. Secondly, the political configuration must be in line with the existing rule of law and it may not abuse the democratic values. Constitutional democracy must be based on human rights so that the legal product must reflect human values and respect for citizens' rights. Thirdly, the law is made based on social reality and it gives the purpose to protect and prosper the people. Law is from the people, made by the people, and its purpose is for the people. In this context, the law may not be made based on the sovereign's interests but must be based on people's interests

## Conclusion

The founders of the Republic of Indonesia, although all of them are different in giving an opinion, finally, they agree in one opinion and one belief that the Republic of Indonesia must be based on people's sovereignty and the democracy is accepted unanimously as the basis of the Republic of Indonesia. In other words, this is a strong consensus. An intention to form a democratic government has been stated explicitly in the opening of UUD 1945 (constitution) in 4<sup>th</sup> paragraph, "...*negara Republik Indonesia yang berkedaulatan rakyat...*" ("...Republic of Indonesia which has people's sovereignty..."). Likewise in State ideology in life perspective of the nation and Indonesian people, in 4<sup>th</sup> *sila* emphasizes that "*kerakyatan yang dipimpin oleh hikmat kebijaksanaan dalam permusyawaratan/perwakilan*" ("democracy is led by wisdom in consultation / representation"), then, in article 1 paragraph (2) of UUD 1945 (constitution) emphasizes that "*kedaulatan berada ditangan rakyat dan dilaksanakan menurut Undang-Undang Dasar.*" ("Sovereignty is in people's hands and it is implemented according to the constitution"). Through this perspective, it is very clear that Indonesia develops a constitutional democratic system in practice of its national matters. A democratic system, which the democratic values are clarified further in the stipulation of UUD 1945 (constitution), is as a rule in social life, nation and state.



Democracy is not only an authority method mostly through people's participation and independent competition, (Dowse & John A, 1986) but it also contains universal values, especially for similarity values, independence, and pluralism although the operational concepts are varied based on cultural conditions of certain countries. Democracy also relates to the existence of human rights. (Asmerom & Reis, 1996) Philippe C. Schmitter and Terry Lynn Karl even characterise that democracy is not as a power of 'Autocracy, authoritarian, ruthless, dictatorial, tyrannical, totalitarian, absolute, traditional, monarchical, oligarchic, plutocracy, aristocratic and sultanate'. (Schmitter & Kar, 1991) This also means that democracy does not only relate with the formal institution, but also with the existence of its values in the legal system. In the law aspect, the existence of democratic values must become a basis in building a legal system that reflects social justice values. Law is made for building people's life so that it will be better and prestigious. Hence, the products of law and law enforcement that is conducted by the government must notice more the values which grow and develop in people's life.

Building a responsive legal character is an effort to elevate the noble values of humanity and justice that must be realised in various dimensions of people's life. (Zulfadli, Abdullah, & Nu) The responsive legal character will be formed if the existence of democratic values that relate to the existence of noble values of humanity and justice are well in people's life. (Ahmadi, 2016) Thus, democratic enforcement for building responsive legal character will be realised. Besides, the law is populist which reflects and fulfils the people's expectation, which in making law, it gives role and participation entirely to the social communities and individual in society. Therefore, democracy is the safest and the most effective way to maintain control for State law.

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