



**CONSTITUTIONALIZING THE FAMILY STATE IDEOLOGY IN SOUTHEAST
ASIA: THE CASE OF INDONESIA AND SINGAPORE**

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**To the memory of my late grandfather, Sri Soemantri, for his lifetime
commitment to built democratic constitution for Indonesia.**

ABSTRACT

This thesis wants to understand the influence of the family state concept on the constitution of two Southeast Asian nations, namely Singapore and Indonesia. By analogizing the relationship between the state and its people like the father to his children, the family state concept assumes that the government leaders are good persons who must be trusted and respected by its people. This makes the constitution of Indonesia and Singapore was created to give broad power to the ruler, rather than to limit it. This certainly contradicts the basic concept of liberal-democratic constitutionalism which emphasizes the role of the constitution as a document to limit government power and protect individual rights. The main reason why both countries incorporate the idea of the family state in their constitutions is related to the claims from the elite in Indonesia and Singapore that the family state concept has an indigenous root in their respective societies, while the liberal-democratic values were seen by these elites as an alien concept that contradicts the communitarian culture of their societies. However, this study found that the family state concept does not quite resemble both countries' indigenous culture, instead this study showed that the adoption of the family state concept is strongly influenced by the interests of the dominant group in both countries to maintain their hegemony.

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TABLE OF CONTENTS

ABSTRACT	i
ACKNOWLEDGMENTS	ii
TABLE OF CONTENTS	iii
INTRODUCTION	1
CHAPTER 1: THE CONCEPT OF THE FAMILY STATE	5
1.1 History and Development	5
1.2 The Migration of (Non-)Constitutional Idea: The Family State in Southeast Asia	8
CHAPTER II: THE CONSTITUTION OF THE FAMILY STATE	15
2.1 INDONESIA	15
2.1.1 The 1945 Constitution and Its Making: Constitutionalizing the Family State	15
2.1.2 The Family State in Action	18
2.2 SINGAPORE	26
2.2.1 The Early Years (1965-1984): The Birth of Authoritarian Constitutionalism	26
2.2.2 The Confucianization of the Constitution (1980s-Early 1990s)	29
2.2.3 The Family State in Action (1990s-Now)	31
CHAPTER III: THE PARADOX OF INDIGENOUS CONSTITUTIONALISM	38
3.1 The Colonial Legacy	39
3.2 Questioning the Indigenous Argument	42
CONCLUDING REMARKS	46
BIBLIOGRAPHY	48

INTRODUCTION

Today the term ‘constitution’ is commonly defined as a document that has the main goal of preventing the centralization of power and protecting the rights of citizens.¹ This is owed to the fact that the emergence of the modern concept of constitutionalism is inseparable from the development of liberalism, which is deeply rooted in the struggle of Western countries against the arbitrariness of the rulers.² However, not all countries adhere to liberalism in Southeast Asia,³ several states in this region explicitly reject liberalism and built their constitutions with the foundational concept that equates the state to a big family, where the government act as a parent and the people are treated as a children.⁴

This concept can be found in Indonesia, the largest country in Southeast Asia. Throughout the drafting process, Soepomo, the main architect of the Indonesian 1945 Constitution, believed that Indonesian society has a communitarian culture that differs from Western individualism. Therefore, he insisted on creating a constitution that would truly reflect Indonesia’s indigenous tradition of leadership, which he believed was based on the spirit of family principle.⁵ According to Pranoto Iskandar, in this conception, the State should be seen as a family in which “the government serves a benevolent fatherly role in guiding its children (the people) to the right choice”.⁶ Therefore, this concept does not require any limitation of power because as a

¹ Dieter Grimm, ‘Types of Constitutions’ in Michel Rosenfeld and András Sajó (Eds.), *The Oxford Handbook of Comparative Constitutional Law* (OUP 2012) 100.

² Andras Sajo and Renata Uitz, *Constitution of Freedom: An Introduction of Legal Constitutionalism* (OUP 2017) 13-19; Fareed Zakaria, ‘The rise of illiberal democracy’ (1997) 76 *Foreign Affairs* 22, 26.

³ Li-ann Thio, ‘Constitutionalism in Illiberal Polities’ in Michel Rosenfeld and András Sajó (Eds.), *The Oxford Handbook of Comparative Constitutional Law* (OUP 2012), 134.

⁴ Li-ann Thio, ‘Lex Rex or Rex Lex? Competing Conception of the Rule of Law in Singapore’ (2002) 20 *UCLA PAC BASIN L J* 1, 36; Rawin Leelapatana, ‘The Thai-Style Democracy in Post-1932 Thailand and its Challenges: A Quest for Nirvana of Constitutional Samsara in Thai Legal History before 1997’ in Andrew Harding and Munin Pongsapan (Eds.), *Thai Legal History from Traditional to Modern Law* (CUP 2021) 218; Pranoto Iskandar, ‘Indigenizing Constitutionalism: A Critical Reading of “Asian Constitutionalism”’ (2017) *Oxford U Comparative L Forum* 2. <<https://ouclf.law.ox.ac.uk/indigenizing-constitutionalism-a-critical-reading-of-asian-constitutionalism/>>

⁵ Iskandar (n 4).

⁶ Ibid.

family, the people should not be suspicious toward the government.⁷ This is the reason why, the original version of the 1945 Constitution, only had a few articles on human rights; and lacked a mechanism to check and balances the performance of government. After Indonesia transitioned to democracy in 1998, many elements of the family state concept were removed from the 1945 Constitution.⁸ However, this does not mean that this concept has disappeared from the Indonesian political discourse.⁹

Similar views that equates the state to a family unit can also be found in Singapore, especially in the soft constitutional law norms that affect the implementation of the Singapore Constitution, namely the government-authored Shared Values White Paper which was officially released in 1991.¹⁰ This paper sets out five values which according to the Singapore government reflect the ideology of Singaporean society, which is influenced by Confucianism.¹¹ The white paper emphasizes that a government leader must be seen as a father who knows best about his child's interests (citizen), which creates an environment where citizens cannot politically criticize them.¹² This concept of the state successfully legitimizes the practice of authoritarian constitutionalism in Singapore, which persists until now.¹³

In general, both countries see the ruler as a wise person who should be trusted by the people of the nation.¹⁴ That is why in these states, the constitution does not function as a document to limit government power and protect individual rights; rather, it is viewed as a tool to achieve

⁷ A.B. Kusuma, *Lahirnya Undang-Undang Dasar 1945* (Universitas Indonesia 2001) 366-367.

⁸ Tim Lindsey, 'Indonesia Devaluing Asian values, rewriting rule of law' in Randall Peerenboom (ed) *Asian Discourses of Rule of Law* (Routledge 2004) 226.

⁹ David Bouchier, 'Two Decades of Ideological Contestation in Indonesia: From Democratic Cosmopolitanism to Religious Nationalism' (2019) 49 *J. Contemp. Asia* 713.

¹⁰ Li-ann Thio, 'Soft constitutional law in nonliberal Asian constitutional democracies' (2010) 8 *ICON* 766, 771.

¹¹ *Ibid* 771.

¹² Thio (n 4) 36.

¹³ Mark Tushnet, 'Authoritarian Constitutionalism' (2015) 100 *Cornell L Rev* 391.

¹⁴ Kusuma (n 7) 365; Thio (n 4) 32.

harmony,¹⁵ which is believed to be achievable only if the government does not have to deal with political opposition.¹⁶

However, while the proponents of the family state concept often claimed that it has an indigenous root in their respective societies, a closer look reveals that the concept itself is very superficial. For example, Soepomo claimed that he drafted the 1945 Constitution from the family state concept that has a deep root in the Indonesian culture. However, there is evidence to show that the idea of the family state was originated in Japan, and Soepomo was influenced by this idea after Japan occupied Indonesia during the Second World War.¹⁷ Apart from that, some aspects of the original version of the 1945 Constitution – which Soepomo's claimed as the manifestation of the family state concept – are very similar to the Constitution of the Netherlands Indies,¹⁸ which was used by the Dutch colonial government to rule Indonesia from 1855 until 1942. Meanwhile, when the Singapore government established the Shared Values White Paper in 1991, they claimed that this soft constitutional norm originates from the culture of the Singaporean people who embraced Confucianism. This has to be viewed against the reality that, when this paper was drafted, most Singaporean were unfamiliar with Confucian ideas.¹⁹ In fact, the government had to introduce massive indoctrination projects to Confucianize the Singapore population since the early 1980s.

With this background, this thesis seeks to unpack the relationship between the family state ideology with the constitutions of Indonesia and Singapore. To answer this main issue, it is necessary to identify the basic elements of the family state concept, and how these elements are

¹⁵ See Eugene K.B. Tan, 'Autochthonous constitutional design in postcolonial Singapore: Intimations of Confucianism and the Leviathan in entrenching dominant government' (2013) 4 *Yonsei L.J.* 273, 283; See also David Bourchier, *Illiberal Democracy in Indonesia The Ideology of the Family State* (Routledge 2015) 71.

¹⁶ Thio (n 4) 37.

¹⁷ Kusuma (n 7) 126.

¹⁸ Koerniatmanto Soetoprawiro, 'Sistem Pemerintahan Republik Indonesia' in Susi Dwi Harijanti (Et. Al) (Eds.), *Interaksi Konstitusi dan Politik: Kontekstualisasi Pemikiran Sri Soemantri* (Padjadjaran 2016), 21-22.

¹⁹ Beng-Huat Chua, *Communitarian Ideology and Democracy in Singapore* (Routledge 2002), 30.

manifested in both countries' constitutions. After analyzing the relationship between these elements and the constitution, this thesis proceeds to assess whether the influence of the family state concept produces a particular concept of the constitutions which reflect the culture of the people in these two countries. The idea is to test the common claims from the elite in both states that this concept, having indigenous roots in their respective societies, lends greater legitimacy to the authoritarian forms of constitutionalism that exist in both polities. Because if some of the evidence mentioned above are correct, that the family state concept did not come from the indigenous traditions of the people in these two countries, then the legitimacy of the authoritarian form of constitutionalism in Indonesia and Singapore would become questionable, which in turn can provide a legitimate reason to conduct democratization process or to reject any authoritarian agendas – performed under the narratives of the family state – by the rulers in both states.

CHAPTER 1: THE CONCEPT OF THE FAMILY STATE

1.1 *History and Development*

The concept that equates the state with the family has a long history in Europe; it could be traced back to the view of many European philosophers during medieval times, such as in the works of Jean Bodin who made the family a role model of the state, or in the views of Sir Robert Filmer who analogizes the king role as a father.²⁰ This view is commonly used by European philosophers to reject the concept of popular sovereignty because they believe that sovereignty is one and indivisible, as exemplified by the role of the father as the head of a family.²¹

However, even though the equation of the state to a family originally came from Europe, it was further developed in Japan, especially throughout the era of the Meiji Restoration up until the Second World War.²² At that time, Japan which wanted to compete with Western powers experienced a dilemma; on the one hand, there was an urgency to adopt Western ideas to modernize their country, on the other hand, they also sought to pursue modernization process that would not disrupt the authority of the Emperor.²³ Amidst the modernization process in 1889, the Japanese government created the Meiji Constitution, which was influenced by extant Western ideas of liberal-democracy. Due to this influence, the Constitution adopted some concepts that can be found in most modern constitutions such as the bill of rights and separation of powers. However, in practice, this constitution was not actually worked according to liberal-democratic values.²⁴

²⁰ Adrian Daub, 'The State as a Family: The Fate of Familial Sovereignty in German Romanticism' (2011) 2 *Republic of Letters*. <https://arcade.stanford.edu/rofl/state-family-fate-familial-sovereignty-german-romanticism>

²¹ David Parker, 'Law, Society and the State in the Thought of Jean Bodin' (1981) 2 *History of Political Thought* 253, 262.

²² Bourchier, (n 15) 37.

²³ *Ibid.*

²⁴ Akiko Ejima, 'Implications of culture for constitution-making in Japan: constitutional culture or cultures?' (2018) *International Idea: Melbourne Forum on Constitution-Building*, 3.

In 1890, Japanese philosopher, Inoue Tetsujiro, developed a concept which he called the ‘family state’ (*Kazoku kokka*), which was aimed at maintaining the authority of the emperor and develop a sense of nationalism among the Japanese people.²⁵ The family state concept was developed by Inoue through a combination of Confucian values which analogize the role of the ruler to a father in the family, and the concept of an organic state that comes from Europe and sees individuals as organic parts of the state.²⁶ The concept of the family state then influenced the official interpretation of the then newly liberal-democratic Meiji Constitution. Aside from maintaining the authority of the emperor against the pressure from liberal-democratic ideas in the Meiji Constitution, the establishment of the family state concept was also related to the interests of the Japanese elites, especially the aristocrats. During that time, the majority of the Japanese elites saw Western individualism and socialism as foreign ideologies that threatened their position in the society, which is why this group later became the main supporter of the family state concept.²⁷

In the Japanese concept of the family state, the Emperor was considered to be the imperial father of all Japanese citizens, with the imperial family acting as the main family of the Japanese nation.²⁸ Since this concept views the state as one family, it does not recognize the separation between the ruler and the ruled, as it places individuals as an organic part of the state in which each of them has a different function in the society.²⁹ This is why this concept always results on political inequality as it leads to the concentration of power only in the Emperor which has been hailed as the sole leaders of the society.³⁰

²⁵ Bouchier (n 15) 41.

²⁶ Ibid 39.

²⁷ Julian Brook Ruszel, ‘The Fall of the Family-State and Rise of the Enterprise Society: Family as Ideology and Site of Conservative Power in Modern Japan’ (2019) 10 *Arbutus Review* 21, 24.

²⁸ Bouchier (n 15) 43.

²⁹ Phillip Goggans, ‘Political Freedom and Organic Theories of States’ (2004) 38 *Journal of Value Inquiry* 531, 533.

³⁰ David Bouchier, ‘Organicism in Indonesian Political Thought’, in Leigh K. Jenco, Megan C. Thomas, and Murad Idris (eds.), *The Oxford Handbook of Comparative Political Theory* (OUP 2020) 601.

The vision of this concept – which sees the government and the people as a united front – causes this concept to contradict the liberal conception of constitutionalism that emphasizes the limitation of power through the doctrine of separation of power and human rights protection in the Constitution.³¹ This contradiction then hinders the Meiji Constitution from working effectively and in accordance to the liberal democratic values within its text; for example, the legislature (*Diet*) failed to play a role in limiting executive power,³² and in fact gave room for the Emperor to be perceived as the true holder of the legislative power.³³ The family state concept also prevents the effective implementation of the bill of rights within the Meiji Constitution, due to the perspectives that deems the bill of rights as “gifts” from the Emperor to his children (the people) that can be curtailed by the Emperor and the government whenever and wherever they deem it necessary.³⁴ Furthermore, it should also be highlighted that the Japanese concept of the family state did not accept the mechanism of judicial review, since the basic vision of this concept – which concentrating the state power in the hands of the Emperor – led the Emperor be regarded as the “sole interpreter of the Constitution”.³⁵

The family state concept then contributes to the emergence of a particular concept of fascism in Japan, which differed from the German or the Italian fascism,³⁶ for its emphasis on the role of the Emperor as the father of the Japanese nation. Apart from giving birth to a fascist government, the influences of the family state concept also block the Meiji Constitution from preventing the involvement of the Japanese government in so many wars, which culminated in Japan’s involvement in the Second World War.³⁷

³¹ Sajo and Uitz, (n 2) 35-36.

³² Christopher A. Ford, ‘Indigenization of Constitutionalism in the Japanese Experience’ (1996) 28 Case W Res J Int’l L 3, 12.

³³ Ibid.

³⁴ See Ejima, (n 24) 2.

³⁵ Ford (n 32) 18.

³⁶ Bouchier, (n 15) 45.

³⁷ Ejima (n 24) 4.

Ironically, it was Japan's involvement in the Second World War that ended the hegemony of the family state in Japan's constitutional politics. Japan's devastating defeat in this War forced the government to replace the Meiji Constitution, which had been influenced by the family state concept, with the 1946 Constitution (*Nihonkoku Kenpō*) – which to some extent – had been imposed by the US occupying authorities.³⁸ The 1946 Constitution, like the Meiji Constitution, contains liberal democratic values. However, this document tries to cover some of the weaknesses contained in the Meiji Constitution, and in practice, this Constitution successfully creates a liberal culture in Japanese politics.³⁹

1.2 The Migration of (Non-)Constitutional Idea: The Family State in Southeast Asia

Although the hegemony of the family state concept had ended in Japan after the Second World War, this did not prevent this idea to migrate to other parts of the world.⁴⁰ One of the places where the family state concept has 'successfully' migrated was Indonesia. In 1945, when the Indonesian founding fathers and mothers drafted the Constitution, the Japanese concept of the family state inspired them to design the frameworks of the 1945 Constitution.

The reason why the instigators of the Indonesian Constitution borrowed the family state concept from Japan cannot be separated from Indonesia's position as a former Japanese colony between 1942-1945. During the colonization process, Japan recruited many Indonesian elites, especially those coming from nationalist groups, to become an agent of propaganda to support Japanese occupation, with the promise that Japan will give independence to Indonesia after they win the Second World War.⁴¹ At that time, many of these elites were attracted to the thought of Japanese

³⁸ Nikolai G. Wenzel, 'Constitutional Culture in Japan and the Philippines: Success and Failure in Post-War Constitutional Choice' (2010) XXV Pacific Focus 396, 403.

³⁹ David S. Law, 'Imposed Constitutions and Romantic Constitutions' in Richard Albert, Xenophon Contiades & Alkmene Fotiadou (eds.), *The Law and Legitimacy of Imposed Constitutions* (Routledge 2018).

⁴⁰ See Sujit Choudry, 'Migration as a new metaphor in comparative constitutional law' in Sujit Choudry (Ed.) *The Migration of Constitutional Ideas* (CUP 2006).

⁴¹ Bouchier (n 15) 50.

fascism which is built from the concept of a family state, because similar to Japanese conservatives, many Indonesian nationalists also had a deep distrust toward Western liberalism.⁴² This distrust cannot be separated from their negative experiences during Dutch colonialism, an experience which cause them to have negative prejudices and deep suspicion to many ideas coming from the West. With this in mind, the elite nationalists found it easier to accept the family state concept, especially considering the fact that it was created to combat and overcome Western liberalism.⁴³

One of the most important figures in the development of the family state concept in Indonesia was Soepomo, a professor of *adat* (Indigenous) law who was also the main drafter of the 1945 Constitution.⁴⁴ As an *adat* law scholar, Soepomo argued that the Indonesian Constitution should be formed by “the spirit of the Indonesian people”, and he believed that most of the Indonesian society usually was constructed based on the family values (*prinsip kekeluargaan*),⁴⁵ that views the leader and its subordinate as a unity (*manunggaling kawulo-gusti*). Thus, Soepomo used these family values as a basis to develop his conception of the state, which he referred to as “integralism” or “*negara kekeluargaan*” (family state), in this conception, the government should be seen as a wise parent who knows best about the interest of its people.⁴⁶

Soepomo argued that in his concept, the state does not need to recognize the existence of individual rights, because the collective interests of the state must transcend individual interests.⁴⁷ Further, he also explained that the existence of individual rights will contradict the basic logic of the family state, since it indicates that the people are suspicious of the action of the government. He elaborated that in the family state, it is impossible for the government to

⁴² Ibid 48-49.

⁴³ Ibid 40.

⁴⁴ Iskandar, (n 4).

⁴⁵ Peter J. Burns, *The Leiden Legacy Concepts of Law in Indonesia* (Pradnya Paramita 1999) 302.

⁴⁶ Kusuma (n 7) 126.

⁴⁷ Ibid 127.

harm its people since their relationship is like a parent to its children.⁴⁸ He also emphasized that in his concept of the family state, the individual is an organic part of the state.⁴⁹

Apart from the influence of indigenous culture, there is clear evidence that Soepomo's concept of the family state was inspired by the Japanese conception of the family state. This can be traced within Soepomo's statement during the drafting process of the 1945 Constitution:⁵⁰

We are now observing the Asian country, the Dai Nippon (Japanese Imperial Government). The Dai Nippon State is based on the eternal and inner unity of the Noble *Tennoo Heika*, the nation, and the people of Nippon in all... The basis of unity and family principles is very compatible with the culture of Indonesian society.”

The statement above certainly shows how the concept of the family state from Japan influenced the substances of the 1945 Constitution. This influence caused the 1945 Constitution to reject the separation of power doctrine, in accordance with Soepomo's argument that such doctrine was developed from a view that suspects the power of the ruler, and thus is incompatible with the family state concept that emphasizes the trust toward the ruler.⁵¹ The family state concept also contributed to the near-absence of any human rights provisions in the 1945 Constitution. Based on its substance and roots, it is no coincidence that the 1945 Constitution invariably gave birth to an authoritarian government, every time it was enforced.⁵²

Aside from Indonesia, the family state concept has also migrated to Singapore. Singaporean adaptation of the concept differs from Indonesia. Instead of using the concept as the basis of their constitution, the Singaporean government borrowed the family state concept in the Shared Values White Paper, a quasi-constitutional document that guides the interpretation of many constitutional articles in the Singapore Constitution.⁵³ This paper was enacted by the Singapore

⁴⁸ Ibid 367.

⁴⁹ Ibid 127.

⁵⁰ Ibid 126.

⁵¹ Ibid 365.

⁵² Tim Lindsey, 'Indonesian Constitutional Reform: Muddling towards Democracy' (2002) 6 *Sing J Int'l & Comp L* 245.

⁵³ Benedict Sheehy, 'Singapore, "Shared Values" and Law: Non East versus West Constitutional Hermeneutic' (2004) 34 *Hong Kong L J* 67, 73.

government in 1991 as an attempt to create a national ideology that is distinctive from the Western concept of individualism.⁵⁴ This paper consists of five values: (1) Nation before community and society above self, (2) family as the basic unit of society, (3) regard and community support for the individual, (4) consensus instead of contention, and (5) racial and religious harmony. Although the Singapore government claims that the white paper was formed based on the teachings of all religions in Singapore,⁵⁵ it cannot be denied that the Confucian values associated with the Chinese majority groups in Singapore dominates the substance of the white paper.⁵⁶

The white paper conceptualizes the role of the government in Singapore differently than the role of the government in Western society which has been shaped by the concept of liberal constitutionalism.⁵⁷ According to the white paper, the government leader is a *junzi* (honorable man), who should be positioned as the father, with the citizens acting as the leader's children. As a parent, the government should be seen as the one who understand the interests of their children the most,⁵⁸ and also have an inherent sense of duty to fulfill the welfare of its people.⁵⁹ In exchange, the people are required to trust the government fully and not criticize it politically.⁶⁰ This line of thinking is no different from the family state concept in Indonesia, which sees that individual interests should not precede the collective interests of the state, with the rulers acting as the legitimate and authorized power to determine the collective interests of the state.

The Singaporean government's persistence in constructing their concept of the family state cannot be separated from the interests of the People Action Party (PAP) as the ruling party in

⁵⁴ Chua, (n 19) 32.

⁵⁵ Thio, (n 10) 778.

⁵⁶ Chua (n 19) 35.

⁵⁷ Ibid.

⁵⁸ The Singapore Shared Values (1991), 41.

⁵⁹ Ibid.

⁶⁰ Thio (n 4) 37.

Singapore. Since Singapore gained its independence in 1965, Singaporean political system has always been controlled by the PAP with its figurehead Lee Kuan Yew. This made many scholars consider Singapore as an authoritarian state.⁶¹ The PAP itself needs legitimacy to perform its authoritarian rule. In the early years of its rule from 1965 until the middle of the 1980s, this legitimacy was obtained by the PAP from the threat of communism against Singapore during the Cold War, as well as from the threat of ethnic riots stemming from Singaporean plural society.⁶² For these reasons, this legitimacy is known as the “ideology of survival” because the main goal of this ideology is to legitimize the emergence of a strong and authoritarian government that can maintain Singapore’s existence from both internal and external threats.⁶³ After the Singapore economy experienced rapid development and the geopolitical conditions became more stable in the early 1980s, the public began to exhibit dissatisfaction with the PAP’s authoritarian-style of government.⁶⁴ This situation prompted the PAP regime to create the Singaporean conception of the family state to maintain its hegemony in Singaporean politics.

Interestingly, evidence shows that there is an indirect influence from the original concept of the family state which developed in Japan, to the Singapore concept of the family state, even though the Singaporean concept was built when the family state no longer dominated Japan’s politics. The Singapore concept of the family state was built in accordance with the goal of the PAP regimes that wishes to Confucianizes the Singaporean society in order to reject liberal values that could threaten their authoritarian government.⁶⁵ During this process, the Singapore government used the management system of large Japanese companies as an example to build the family state concept because they view this system – which prioritizes team-work rather

⁶¹ Jothie Rajah, *Authoritarian Rule of Law: Legislation, Discourse and Legitimacy in Singapore* (CUP 2012) 7; Tushnet, (n 14).

⁶² Rajah (n 61) 51-52.

⁶³ Chua (n 19) 18.

⁶⁴ *Ibid* 21.

⁶⁵ *Ibid* 29.

than individualism – as the manifestation of Confucian values.⁶⁶ Although the Japanese management system was not intended to be applied on constitutional matters, this system actually originates from the Japanese concept of the family state. This is due to the fact that the family state collective culture that has been built since the Meiji Restoration still shapes the attitude of Japanese society despite the abolishment of Meiji Constitution, and thus contributed to the creation of peculiar management system in Japan which emphasizes team-work rather than individualism.⁶⁷

Apart from maintaining their hegemony, it should also be noted that the Singapore Constitution was not formed through a democratic process that could create a “constitutional moment”.⁶⁸ This Constitution was adopted in a messy circumstances by only a small handful of elites in 1965,⁶⁹ where the majority of its contents was derived from the 1963 State Constitution (Singapore’s state Constitution when it was still a member of the Malayan Federation) coupled with some additions from the Malaysian Federal Constitution.⁷⁰ As explained above, this situation forces the PAP to rely on a non-constitutional reason to legitimize their authoritarian rule. Thus, by creating the concept of the state that can help them interpret the substances of the Singapore Constitution, coupled with their self-proclamation that this concept was the manifestation of the Singaporean society culture, the PAP regimes attempt to make this concept as a basis to legitimize the Singapore Constitution without changing the state’s authoritarian structure, which they had constructed since 1965.⁷¹

⁶⁶ Beng-Huat Chua, ‘SINGAPORE IN 1981: Problems in New Beginnings (1982) *Southeast Asian Affairs* 315, 326.

⁶⁷ Ruszel, (n 27) 30.

⁶⁸ Jaclyn Neo and Andrea Ong, ‘Making the Singapore Constitution: Amendment as Constitution-Making’ (2019) 14 *JCL* 72, 72.

⁶⁹ Kevin Y.L. Tan, ‘Foundational Moment: The Singapore Constitution’ in Kevin Y.L. Tan and Bui Ngoc Son (Eds.), *Constitutional Foundings in Southeast Asia*, (Hart, 2019), 161.

⁷⁰ Neo and Ong (n 68) 73.

⁷¹ Sheehy (n 53) 11.

This elaboration shows how the family state concept migrated from Japan to Indonesia and Singapore and then was used by elites in both states to legitimize their authoritarian rule. While the evidence shows that the concept of the family state in these two countries comes from Japan, there are several notable differences between the family state concept that has been practiced in Indonesia with the family state concept in Japan and Singapore.

In both Singapore and Japan, Confucian values are the main foundation of the family state concept, especially the classical thought of Confucianism that equates the role of the state with the role of parents in a family.⁷² Whereas in Indonesia, considering that the main architect of the family state concept in Indonesia was *adat* law expert Soepomo, the family state concept was built not with the Confucian values, but from Indonesia's indigenous customs. Interestingly, during the Indonesian Constitutional Drafting process, Soepomo emphasized that there are similarities between the *adat* in Indonesia with the Confucian values in Japan, in which both values rest upon familial principles. This similarity prompts the Indonesian concept of the family state like its Japanese counterpart, to adopt a view that considers the superiority of interest of the state over the rights of the individual.⁷³

⁷² Bui Ngoc Son, 'Confucian Constitutionalism: Classical Foundations' (2012) 37 Australian Journal of Legal Philosophy 61, 78.

⁷³ Burns (n 45) 302.

CHAPTER II: THE CONSTITUTION OF THE FAMILY STATE

As has been discussed in the previous chapter, both Singapore and Indonesia borrowed the family state concept from Japan. In this section, the influences of the family state concept on the constitutional practices in Indonesia and Singapore will be examined. Here, Indonesia and Singapore provide an example where their usage of this concept of the state were used to legitimize the authoritarian constitutional order that centralizes the state power in the hand of the government leader – in this case, the Indonesian President and the Singaporean Prime Minister. This section will also elaborate the current development of the family state concept in both states.

2.1 INDONESIA

2.1.1 The 1945 Constitution and Its Making: Constitutionalizing the Family State

During the drafting process of the 1945 Constitution from June until August 1945, the framers of the 1945 Constitution insisted on creating a constitution that reflects the culture of Indonesian society and rejects liberalism.⁷⁴ The reason was, at that time there was a common perception among many Indonesian elites that the values of liberalism is an alien concept that comes with Western colonialism.⁷⁵

Historically, this rejection toward liberalism cannot be separated from the influence of Van Vollenhoven – a Leiden law professor who was known as a father of the study of ‘*adat law*’ in Indonesia – on the Indonesian political traditions.⁷⁶ Influenced by Savigny’s *volkgeist* doctrine, Van Vollenhoven believed that the law should be made according to the unique “spirit of the people”.⁷⁷ He then used this view to oppose the policy of Dutch liberal groups who wanted to modernize the colony by creating the unified civil code that applies to all residents of the

⁷⁴ Iskandar (n 4).

⁷⁵ Burns, (n 45), 292-296.

⁷⁶ Ibid.

⁷⁷ Ibid 290-291.

Netherland East Indies, including its native population.⁷⁸ Van Vollenhoven believed that this policy cannot be implemented, because the Indonesian native has a different legal understanding compare to Western society, therefore, this policy has the potential to fail and make the unified civil code only a dead letter.⁷⁹

Van Vollenhoven's thoughts then influenced many framers of the 1945 Constitution, especially Soepomo. As a student of Van Vollenhoven himself,⁸⁰ Soepomo believed that each country's legal structure should be formed based on the characteristics of its society. According to Soepomo, the legal structure of the Indonesian society is not be based on liberal thinking, but on family principles that emphasizes unity and harmony between the head of state and other elements of the state, including its people.⁸¹ This line of thinking is strongly influenced by the idea of power in the Javanese culture which sees that power must be concentrated in the hand of one single ruler whose role is equivalent to a father in the family.⁸²

Based on that concept, then Soepomo affirmed that the 1945 Constitution did not adopt the separation of power doctrine like many of the Western constitutions. Rather, the framers of the Indonesian Constitution construct their own system which – according to Iskandar – forced political institutions “to fully cooperate with the executive”.⁸³ This “distribution of power” system,⁸⁴ places the People Consultative Assembly (MPR) – which comprises the members of the House of the Representative and some appointed members – as the highest state organ that reflects people's sovereignty (*pouvoir constituant*).⁸⁵ The 1945 Constitution also equipped the

⁷⁸ Zezen Zaenal Mutaqin, 'Indonesian Customary Law and European Colonialism: A Comparative Analysis on Adat Law' (2011) 2 JEAIL 351, 364.

⁷⁹ Ibid.

⁸⁰ Burns (n 45), 295.

⁸¹ Kusuma, (n 7) 127-128.

⁸² Benedict Anderson, *Language and Power: Exploring Political Culture in Indonesia* (Cornell University Press 1990) 29.

⁸³ Iskandar, (n 4).

⁸⁴ Ibid.

⁸⁵ Koichi Kawamura, 'The Origins of the 1945 Indonesian Constitution', in Kevin Y.L. Tan and Bui Ngoc Son (Eds.), *Constitutional Foundings in Southeast Asia*, (Hart, 2019), 56.

MPR with the power to elect the President every five years, and once the President was elected, he/she was seen as the MPR mandate bearer (*mandataris MPR*).

Due to its position as the MPR mandate bearer, the 1945 Constitution provides the President with very broad powers that required “concentration of power and responsibility upon the president”.⁸⁶ This can be seen from the substance of the 1945 Constitution which assigns the President both the title of the head of government and the main legislator;⁸⁷ it also gave the President very broad authority to declare the state of emergency without any oversight from the legislature.⁸⁸ Apart from that, the 1945 Constitution only mandated the MPR to appoint President every five years, without giving a limit on the number of times a person can be appointed for that position.⁸⁹

Another example of the 1945 Constitution concentrating the state power in the hands of the executive could be seen in the provisions regarding the judiciary, where it did not specify in detail how the organization of the judiciary will be conducted, and only stated that this issue should be regulated by the Law,⁹⁰ which means the President as the main holder of legislative power can determine how judges should be appointed and how their authority should be performed.⁹¹ The 1945 Constitution also rejects the existence of a judicial review mechanism. During the formulation process of the 1945 Constitution, Soepomo views this mechanism as only necessary in a liberal-democratic system, and since Indonesia did not use that system, this mechanism must be rejected.⁹²

⁸⁶ See the Official Elucidation of the original version of the 1945 Constitution, which stated that when implementing the state power, concentration and responsibility is upon the President.

⁸⁷ Article 5(1) of the original version of the 1945 Constitution.

⁸⁸ Article 12 of the original version of the 1945 Constitution.

⁸⁹ Article 7 of the original version of the 1945 Constitution.

⁹⁰ Article 24(2) of the original version of the 1945 Constitution.

⁹¹ Kawamura (n 51) 66.

⁹² Kusuma (n 7) 390.

In addition to giving a broad power to the President, the 1945 Constitution also had little human rights protection, which was caused by the drafter's assumptions that the concept of human rights contradicts the family state concept which prioritizes collective interest and absolute trust toward the ruler. While, there were still some inclusion of human rights provisions in the 1945 Constitution, these rights are only to be seen as an act of benevolence from the state that can be curbed should the government deem it necessary to do so.

2.1.2 The Family State in Action

With such characters, it is not surprising that every time the 1945 Constitution was enforced it always resulted in the emergence of an authoritarian government,⁹³ especially before the 1945 Constitution was comprehensively amended in 1999. After the 1945 Constitution was amended, there is some impression that the family state concept no longer reigned the Indonesian public life. However, more recent evidences that will be discussed in the following part reveals that this is actually a false belief since this concept continues to influence political and legal institutions in Indonesia.

2.1.2.1 The Soekarno Guided Democracy Period (1959-1965)

When in 1959, Indonesia's first President, Soekarno, reinstated the 1945 Constitution – after a brief experiment with two liberal democratic constitutions in 1949 until 1959 – he followed Soepomo's path by constructing his Guided Democracy regime from the idea that the national unity could only be achieved through the existence of the wise leader who can guide the people like a father to its children, rather than through the process of political contestation and majority vote. This belief and the subsequent regime borne out of it led him to concentrate the state power upon his hand.⁹⁴

⁹³ Lindsey (n 52) 245.

⁹⁴ Anthony Reid, 'Political "Tradition" in Indonesia: The One and the Many' (1998) 22 Asian Studies Review 23, 26.

During his Guided Democracy regime, Soekarno utilized the President's massive legislative power to manipulate the political system by creating a regulation that enables him to appoint all members of the MPR. This provides him a leverage over the members, who in turn was to appoint him as the President for life. His government also enacted a regulation that empowers him to supervise and control political parties.⁹⁵ But the most important move to concentrate the state power was his government decision to issue Law 19/1964, which provided the President with the large authority to interfere in any stage of the judicial process under the reason of 'revolutionary interest',⁹⁶ this Law also put the judiciary under the control of Minister of Justice, and Judges were positioned as part of the civil servants.⁹⁷

2.1.2.2 The Soeharto New Order Regime (1966-1998)

After Soekarno's Guided Democracy regime was overthrown by Suharto's New Order regime in 1965, the New Order regime continued to use the 1945 Constitution, and it was during this regime the authoritarian concept of the family state found its ultimate expression.⁹⁸ In contrast to the Guided Democracy regime, which relied upon the central figures of Soekarno as Indonesia's founding father, the New Order regime built their family state upon the state ideology of Pancasila – which was contained in the Preamble of the 1945 Constitution – and associated this ideology with indigenous and collectivist values that the family state promoted such as unity and harmony.⁹⁹ As the MPR mandate bearer, the President was perceived to be the only figure that can understand the Pancasila correctly, thus every element of the state, including other state institutions, need to obey the President's command in all circumstances. During his regime, Suharto's government conducted a massive Pancasila indoctrination

⁹⁵ Kawamura (n 51) 68.

⁹⁶ Daniel S. Lev, 'Judicial Authority and the Struggle for an Indonesian Rechtsstaat' (1978) 13 *Law & Soc'y Rev* 37, 50; See also Sebastiaan Pompe, *The Indonesian Supreme Court: A Study of Institutional Collapse* (Cornell Southeast Asia Program 2005) 61.

⁹⁷ David Bouchier, 'Magic memos, collusion, and judges with attitude: Notes on the politics of law in contemporary Indonesia' in Kanishka Jayasurya (Ed.) *Law, Capitalism and Power in Asia* (Routledge 1999), 202.

⁹⁸ Bouchier (n 30) 611.

⁹⁹ *Ibid.*

program, that repeatedly emphasized that the 1945 Constitution did not recognize the existence of opposition,¹⁰⁰ so everyone that performs oppositional politics will automatically be hailed as the enemy of Pancasila.¹⁰¹

Soeharto also took advantage of the immense power that the 1945 Constitution gave to the President. Through a series of laws on legislative compositions, he skilfully manipulated the electoral system, by constraining the role of the political parties, while strengthening the power of the Functional Group (*Golongan Karya* or Golkar) to dominate the MPR.¹⁰² This led him to be elected as President for seven times by the MPR from 1966 until 1998. The Soeharto regime also continued its predecessor's authoritarian legacy by maintaining the position of the judiciary under the control of the government, through the enactment of Law 14/1970.¹⁰³ This forced the Supreme Court to closely co-operate with the government when performing its functions. According to Ismail Saleh, a former Justice Minister in the New Order era, this co-operation is a form of application of the family state concept, one that emphasizes the unity between the government and the other elements of the state including the judiciary.¹⁰⁴

As a result of this approach, the New Order government was enabled to act in a violent way to control the citizen without fear of being challenged in the Court,¹⁰⁵ as shown in the *Tanjung Priok* massacre – a massacre of thousands enacted by state apparatuses – which was not legally tried.¹⁰⁶ Even if the citizen successfully brought the government action to the Court, the government can determine the outcome, as exemplified in the *Kedung Ombo* case when the

¹⁰⁰ Michael Morfit, 'Pancasila: The Indonesian State Ideology According to the New Order Government' (1981) 21 *Asian Survey* 838, 838.

¹⁰¹ Bouchier (n 30) 612.

¹⁰² Kawamura (n 51) 69.

¹⁰³ Bouchier (n 97) 203.

¹⁰⁴ *Ibid* 203.

¹⁰⁵ Lindsey (n 8) 293.

¹⁰⁶ In 2003, after Indonesia's transition to democracy and the establishment of an ad hoc Human Rights Court, this case finally has been brought to the Court. However, the Court fail to convict all defendants in this case. See Ken Setiawan, 'The Human Rights Courts Embedding Impunity' in Melissa Crouch (Ed.), *The Politics of Court Reform: Judicial Change and Legal Culture in Indonesia* (CUP 2019) 305.

Supreme Court decided to cancel its own ruling, after Soeharto himself directly pressured the Supreme Court Chairman.¹⁰⁷

This heavy-handed approach, which required obedience from every element of the state to the President, had dubbed Soeharto's style of leadership as '*Bapakism*' – from the Indonesian word '*bapak*', literally translated to 'father',¹⁰⁸ – because, in this style of leadership, the President was considered as a wise father, so its decision cannot be questioned.¹⁰⁹

2.1.2.3 The *Reformasi* Period (1998-now): A Brief Elimination of the Family State?

For 32 years, Soeharto's government have built an impression to the public that the original version of the 1945 Constitution – which has been constructed based on the family state concept – as a sacred and untouchable document, in which its substances must be immune to any changes.¹¹⁰ The family state concept, for the public, is synonymous with Soeharto's regime, as it was his self-proclaimed key in maintaining Indonesia's economic stability and development.¹¹¹ However, the failure of his government to handle the economic crisis that hit Indonesia from 1997 until 1998 – which later forced Soeharto to resign from his position in 1998 – prompted public outrage and demanded that the family state concept be removed completely from the 1945 Constitution.¹¹²

As a result, of this outward distrust, from 1999 until 2002, the 1945 Constitution was massively amended by the MPR. The amendment transformed the 1945 Constitution, from a document that manifested the authoritarian concept of the family state, into a document that manifesting liberal-democratic values.¹¹³ The most obvious evidence could be seen in the inclusion of

¹⁰⁷ Pompe (n 96) 149-152.

¹⁰⁸ Dody W. Irawanto, 'Bapakism: Indonesia' (May 20, 2019) Global Informality Project. <[https://www.informality.com/wiki/index.php?title=Bapakism_\(Indonesia\)](https://www.informality.com/wiki/index.php?title=Bapakism_(Indonesia))>

¹⁰⁹ Adnan Buyung Nasution, 'Toward Constitutional Democracy in Indonesia' (2011) 1 Adnan Buyung Paper on Southeast Asian Constitutionalism. <<http://alc.law.unimelb.edu.au/>>

¹¹⁰ Simon Butt and Tim Lindsey, *The Constitution of Indonesia: A Contextual Analysis* (Hart 2012) 6.

¹¹¹ John Gillespie, 'Public Discourse and Constitutional Change: A Comparison of Vietnam and Indonesia' (2016) 11 *AsJCL* 209, 213.

¹¹² *Ibid* 214.

¹¹³ Susi Dwi Harijanti and Tim Lindsey, 'Indonesia: General elections test the amended Constitution and the new Constitutional Court' (2005) 4 *ICON* 138, 138.

comprehensive protection of human rights that was previously absent in the original version of the 1945 Constitution, where many of these provisions were lifted directly from international human rights documents such as the Universal Declaration of Human Rights (UDHR) or the International Covenant on Civil and Political Rights (ICCPR)).¹¹⁴ The inclusion of the human rights protections in the 1945 Constitution certainly contradicts the basic logic of the family state, that is, the belief that the existence of individual rights in the Constitution is unnecessary.¹¹⁵

Another important change that marked the abolishment of the family state was the decision to institutionalize separation of power. In the original version of the 1945 Constitution, the framers of the 1945 Constitution rejected the doctrine of separation of power due to their conviction that this doctrine was outdated and contradicted the idea of the family state.¹¹⁶ During the amendment process, the MPR decided to shift the main legislative power from the President to the legislature, by adding Art. 20(1) to the 1945 Constitution which states that the House of Representatives “holds the power to make laws”, a clear example of the doctrine of separation of power.

The amendment also changes the position of the MPR as the highest state organ into a consultative forum between the two legislative bodies, the House of Representatives and the Senate.¹¹⁷ The President’s election mechanism and term of office was also amended and limited; a person may only be elected as a President for two five-year terms, and he is to be elected through direct election rather than an appointment from the MPR. However, arguably the most important change brought forth by the amendment is perhaps the establishment of the new Constitutional Court with the power to conduct a judicial review. In the original version of

¹¹⁴ See Lindsey (n 52) 254.

¹¹⁵ Kusuma (n 7) 367.

¹¹⁶ Ibid.

¹¹⁷ Kawamura (n 51), 72.

the 1945 Constitution the proposal to adopt a judicial review mechanism was rejected by Soepomo, who saw this mechanism as a manifestation of separation of power doctrine.¹¹⁸

After this comprehensive amendment, Indonesia surprisingly emerged as the most functional democracy in Southeast Asia.¹¹⁹ In 2010, the Freedom House categorized Indonesia as the only ‘free’ country in this region.¹²⁰ Marcus Mietzner believes that the success of this transition cannot be separated from the role of the Indonesian Constitutional Court.¹²¹ In the first ten years after its establishment in 2013, especially under the leadership of its first two Chief Justices, Jimly Asshiddiqie and Mohammad Mahfud, the Indonesian Constitutional Court successfully solved many political conflicts peacefully in a constitutional way, as well as ensuring that the authoritarian concept of the family state has been eliminated from the text of the 1945 Constitution.¹²²

For example, in 2006 the Court invalidated some provisions in the Criminal Code which penalize the act of defaming the President by declaring such law as contrary to the principle of equality before the law and freedom of expression that has been guaranteed in the amended version of the 1945 Constitution.¹²³ The Court argued that such provisions open loopholes that are prone to be abused, since the government can classify any critics directed to the President as defamation, thus contradicting the essence of democracy that requires the President to be responsible to the people.¹²⁴ This decision confirmed that the amended 1945 Constitution rejects the family state concept,¹²⁵ since it shows that the relation between the President and the

¹¹⁸ Kusuma (n 7) 390.

¹¹⁹ Marcus Mietzner, ‘Political Conflict Resolution and Democratic Consolidation in Indonesia: The Role of the Constitutional Court’ (2010) 10 *Journal of East Asian Studies* 397, 397-398.

¹²⁰ *Ibid* 398.

¹²¹ *Ibid*.

¹²² *Ibid* 398; See also Stefanus Hendrianto, *Law and Politics of Constitutional Court: Indonesia and the Search of Judicial Heroes* (Routledge 2018).

¹²³ Indonesian Constitutional Court Decision No. 013-022/PUU-IV/2006.

¹²⁴ *Ibid* 59-60.

¹²⁵ Mietzner (n 119) 409.

people are no longer resembling that of a parent-child dynamic, as the changes gave more room for the citizens to be critical of the government.

Aside from the role of the Constitutional Court, from 2004 until 2014, Indonesia's political constellation had also begun to enter its most stable phase. This is attributed to the success of President Susilo Bambang Yudhoyono in consolidating various political forces in Indonesia, which in turn was able to ensure that the relationship between all of the state institutions was functional.¹²⁶ Such condition was also followed by significant economic growth during his reign.¹²⁷

However, this does not mean that the family state concept was entirely dismantled.¹²⁸ While there is an undeniable improvement on the economic growth, such improvements are also accompanied by increasing levels of inequality in the society.¹²⁹ This in turn fuels a nostalgic sentiment among some Indonesians to return to the Soeharto era.¹³⁰ But, it was only during the reign of President Joko Widodo (popularly known as 'Jokowi') – who previously has been hailed as the savior of democracy¹³¹ – that the authoritarian concept of the family state started to re-emerge in Indonesian politics.

Jokowi is the first Indonesian President after Soeharto who reintroduces a massive Pancasila indoctrination program to all elements of the society.¹³² Previously, this program was used by Soeharto to legitimize his authoritarian rule, and there is suspicion that Jokowi's government

¹²⁶ Marcus Mietzner, *Reinventing Asian Populism: Jokowi's Rise, Democracy, and Political Contestation in Indonesia* (East West Center 2015) 10.

¹²⁷ Ibid 14.

¹²⁸ Some scholars argued that even shortly after the 1945 Constitution was amended, the family state concept still exists in the Indonesian constitutional systems. See Petra Stockmann, *Indonesian Reformasi as Reflected in Law: Change and Continuity in Post-Soeharto Era Legislation on the Political System and Human Rights* (Lit Verlag Muenster 2004) 334.

¹²⁹ Mietzner (n 126) 14.

¹³⁰ Olivia Rondonuwu, 'Suharto nostalgia grows as Indonesia heads for elections' (March 27, 2014) The Jakarta Post. <<https://www.thejakartapost.com/news/2014/03/27/soeharto-nostalgia-grows-indonesia-heads-elections.html>>

¹³¹ Marcus Mietzner, 'Indonesia's 2014 Elections: How Jokowi Won and Democracy Survived' (2014) 25 *Journal of Democracy* 111.

¹³² Pranoto Iskandar, 'An Indonesia that thinks, that's all we need' (December 17, 2018) Blog of the Indonesian Journal of International & Comparative Law. <<https://www.ijil.org/post/an-indonesia-that-thinks-that-s-all-we-need>>

wants to use this program for the same purposes. The suspicion is further fuelled when in 2017, Jokowi also signed an emergency regulation (*Perppu*) that provides the government a sweeping power to disband any societal organization that is considered to contradict the principles of the Pancasila.¹³³ This move raises a worry among observers due to the absence of a clear standard to decide what constitute as a deviation of Pancasila.¹³⁴ Thus, it opened new chances for the government to bring back some of the old habits in the New Order era, where the government often exploited the Pancasila ideology to repress their opposition.

Apart from that, it was during the Jokowi reign that the idea to revive many backward norms that were previously contained in the original version of the 1945 Constitution come into mainstream political discourse. For example, Hendropriyono, a notorious former military general who has been known as an avid Jokowi supporter, wants the position of the MPR to be returned as the highest state organ in the 1945 Constitution, and to achieve that he proposed the idea to make the “fifth amendment” to the 1945 Constitution.¹³⁵ Further, he also argued that the President should be elected by the MPR again, because similar to Soepomo’s view, Hendropriyono believes that Indonesia has a concept of democracy that different from the West. Meanwhile, other supporters of Jokowi, such as Bambang Soesatyo who headed the MPR also proposed an idea to abolish the two five-year term limits in the amended version of the 1945 Constitution, in order to allow Jokowi – who is currently entering its second term of office – to serve as a President for the third time.¹³⁶

These ideas to reintroduce some provisions in the pre-amended version of the 1945 Constitution confirmed that the family state concept is back to the Indonesian public life since some of these

¹³³ Government Regulation in Lieu of Law No 2 of 2017 on Societal Organizations.

¹³⁴ Usman Hamid and Liam Gammon, ‘Jokowi forges a tool of repression’ (July 13, 2017) New Mandala. <<https://www.newmandala.org/jokowi-forges-tool-repression/>>

¹³⁵ Ardito Ramadhan, ‘Hendropriyono Usul Presiden Kembali Dipilih MPR’ (July 12, 2019) Kompas.com. <<https://nasional.kompas.com/read/2019/07/12/16325421/hendropriyono-usul-presiden-kembali-dipilih-mpr>>

¹³⁶ Editorial Board, ‘Di Balik Wacana Jokowi Tiga Periode’ (November 22, 2019) Pinterpolitik. <<https://www.pinterpolitik.com/di-balik-wacana-jokowi-tiga-periode/>>

ideas such as returning the position of the MPR as the highest state organ was related to the essence of the family state concept that used the distribution of power doctrine rather than separation of power. The return of the family state concept is also compounded by the weakening role of the Constitutional Court, due to the various corruption scandals that reduced its legitimacy in the eyes of the public.¹³⁷ As a result since its fourth Chief Justice, Hamdan Zoelva (2013), assumed leadership, the Court seemingly tries to avoid conflict with the government and the legislature.¹³⁸ In fact, in some of their recent decisions, the Constitutional Court even legitimized the government's actions that reintroduced the authoritarian conception of the family state.¹³⁹

The most obvious example can be found in the *Perppu* case (2017) where the Court refused to annul the emergency regulation which gives the government a broad power to dissolve societal organizations that have been regarded as the enemy of Pancasila.¹⁴⁰ In this decision, the Court argued that it was the duty of the government to protect Pancasila, since replacing Pancasila is equal to disbanding the state itself.¹⁴¹ Thus, it legitimizes Soeharto's style of politics that often used Pancasila as a basis to oppress the oppositions, given that the enactment of this regulation is closely related with the interest of Jokowi's government to dissolve one radical Islamic organization that previously involved in the Islamist movement that challenged his political allies in regional election.¹⁴²

2.2 SINGAPORE

2.2.1 The Early Years (1965-1984): The Birth of Authoritarian Constitutionalism

¹³⁷ See Dominic J. Nardi Jr, 'Can NGOs Change the Constitution? Civil Society and the Indonesian Constitutional Court' (2018) 40 *Contemporary Southeast Asia* 247, 254.

¹³⁸ Hendrianto (n 122) 209.

¹³⁹ See Rawin Leelapatana and Abdurrachman Satrio, 'The Relationship Between a Kelsenian Constitutional Court and an Entrenched National Ideology: Lessons from Thailand and Indonesia' (2020) 14 *ICL Journal* 497.

¹⁴⁰ Indonesian Constitutional Court Decision No 02/PUU-XVI/2018.

¹⁴¹ *Ibid* 212-213.

¹⁴² Abdurrachman Satrio, 'Constitutional Retrogression in Indonesia' (February 15, 2019) *Int'l J. Const. L. Blog* <<http://www.icconnectblog.com/2019/01/constitutional-retrogression-in-indonesia>>

After Singapore was expelled from the Federation of Malaysia and forced to become an independent state in 1965, the then Prime Minister of Singapore, Lee Kuan Yew, declared that his government will draft a new constitution, especially that can help them to address some problems in the Singaporean society such as the need to develop the economy and to maintain the harmony between the Chinese majority and the Malay minority.¹⁴³ However, such an idea was quickly abandoned,¹⁴⁴ and instead of establishing a new constitution, the Singapore government decided to retain the 1963 State of Singapore Constitution – which was built as the state constitution when Singapore was still a part of Malaysia – with some additions to its substance that came from the Malaysian Federal Constitution through the Republic of Singapore Independent Act of 1965.¹⁴⁵ At the end of 1965, the Singapore Parliament also passed an amendment through the Constitution of Singapore Amendment Act, which changed the procedure to amend the Singapore Constitution from requiring a two-thirds majority vote in the Parliament to a simple majority.¹⁴⁶ This led the Singapore Constitution to become a very flexible document, that can be amended easily like ordinary acts.

When the Singapore Constitution came to being in 1965, its substance retained the Westminster style of the parliamentary system,¹⁴⁷ which they inherited from British colonialism. Accordingly, the Constitution rests on some principles commonly known as the bulwark of the British parliamentary system such as the supremacy of the parliament, the rule of law, and the common law principles.¹⁴⁸ It also organized the state power around the three separate powers: the executive, the legislative, and the judiciary.¹⁴⁹ Besides that, the Singapore Constitution contained some mechanisms with purpose to check the state power such as the existence of

¹⁴³ Kevin Y.L. Tan and Li-ann Thio, *Constitutional Law in Malaysia and Singapore* (Lexis Nexis 2010) 73.

¹⁴⁴ *Ibid.*

¹⁴⁵ Neo and Ong (n 68) 73.

¹⁴⁶ *Ibid* 73

¹⁴⁷ Li-ann Thio, 'Rule of Law within A Non-Liberal 'Communitarian' Democracy' in Randall Peerenboom (ed.) *Asian Discourses of Rule of Law* (Routledge 2004) 187.

¹⁴⁸ *Ibid.*

¹⁴⁹ *Ibid*; See also Tan (n 15) 277.

periodic elections and judicial review mechanism.¹⁵⁰ Although this Constitution seemingly adheres to the concept of constitutionalism, in practice the Singapore Constitution fails to deliver its promise. Instead, it becomes a pragmatic document which set up the rules for the PAP government to consolidate their hegemony in the Singapore political system.¹⁵¹

For example, the adoption of the first past the post electoral system in the Singapore Constitution allow the PAP to won all post-independent elections.¹⁵² In fact, between 1968 and 1981, the PAP was the only party present in the Singapore's unicameral parliament. Such condition enabled the fusion between the legislative and the executive, which in turn led the concentration of power in the hand of the cabinet.¹⁵³ The Singapore government also decided to keep the existence of a preventive detention mechanism adopted from the British colonial era. This draconian mechanism enabled the government to detain a person without trial if he/she was considered a threat to Singapore security.¹⁵⁴ During the early years of Singapore, this mechanism – that was later has been regulated in the Internal Security Act (ISA) – was extensively used by the PAP regimes to detain many members of Barisan Socialist, a leftist opposition party,¹⁵⁵ which resulted in the absence of an effective opposition in Singapore politics since the 1970s. This situation effectively transformed Singapore into a one-party authoritarian state, where the state power was concentrated in the hand of one party, without any serious political competition.¹⁵⁶

¹⁵⁰ Thio (n 4) 14.

¹⁵¹ Gordon Silverstein, 'Singapore's Constitutionalism: A Model but of What Sort?' (2015) 100 Cornell L Rev Online 1, 9.

¹⁵² Tan (n 15) 277.

¹⁵³ Li-ann Thio, 'The Post-Colonial Constitutional Evolution of the Singapore Legislature: A Case Study' (1993) *Sing J Legal Stud* 80, 94.

¹⁵⁴ Thio (n 4) 55.

¹⁵⁵ See the discussion of this issue in Michael Hor, 'Constitutionalism and subversion an exploration' in Li-ann Thio Et.Al (Eds.), *Evolution of a Revolution: Forty Years of the Singapore Constitution* (Routledge 2009) 264-266.

¹⁵⁶ Rajah (n 61) 8.

Apart from exploiting several provisions in the Singapore Constitution, the success of the PAP regime in building its authoritarian rule – especially from 1965 until the middle of the 1980s – cannot be separated from the chaotic situation that Singapore had experienced during its early beginning. At that time, Singapore had faced economic difficulty due to the confrontation with Indonesia.¹⁵⁷ Furthermore, the memory of the racial riots that led to the expulsion of Singapore from the Federation of Malaysia still haunts the Singaporean public, and further fuelled by the growing threat of communism in Southeast Asia during the 1970s.¹⁵⁸ To respond this complex situation, the PAP government under the leadership of Prime Minister Lee Kuan Yew, developed the concept of the state known as the ideology of survival, which believed that the survival of Singapore as a nation depends on the success of the government to transform its population into highly disciplined citizens that will always be ready to sacrifice their personal interest to the interest of the nation.¹⁵⁹ This concept then legitimizes the government to control all aspects of Singaporean society to achieve stability, which in turn can contribute to economic growth.¹⁶⁰

2.2.2 The Confucianization of the Constitution (1980s-Early 1990s)

Initially, the ideology of survival was successful in giving legitimacy to the PAP authoritarian rule in Singapore. However, since the mid-1980s, public support toward this ideology began to weaken, as displayed in the results of the 1984 general election. While the PAP still won the aforementioned election, they lost 12 percent of their voter count percentage. Meanwhile, the opposition successfully collected 37 percent of the votes.¹⁶¹ Sociologist Beng-Huat Chua argued that the weakening influence of this ideology cannot be separated from the development of Singapore society. In its early days, Singapore had problems in the form of internal and

¹⁵⁷ Ibid 22.

¹⁵⁸ Chua (n 19)

¹⁵⁹ Ibid 18.

¹⁶⁰ Kevin Tan, *The Constitution of Singapore: A Contextual Analysis* (Hart 2015) 224.

¹⁶¹ Chua (n 19) 21.

external threats, which in turn provided the PAP regime enough reason and urgency to construct an ideology that can legitimize the establishment of a strong government. However, in the 1980s these threats have almost completely disappeared. In fact, at that time Singapore had successfully transformed into a country with the fastest economic growth in Southeast Asia.¹⁶² Such conditions shifted the perspectives of many Singaporeans – especially the younger generation who did not experience the past economic struggle – and popularized the belief that they no longer needed an authoritarian government.¹⁶³

In response to these changing circumstances, since the middle of the 1980s, the PAP regime started to design a new concept of state that can maintain its authoritarian rule, and since the majority of Singaporeans come from a Chinese background, the government decided to construct this concept from the Confucian political concept which believes that the government – as the recipient of mandate from heaven – will work for the best interest of its people, thus in exchange, the people should comply and obey to the government.¹⁶⁴ As explained before, the adoption of Confucian values in Singapore politics can be seen from the formation of the shared values white paper in 1991. This paper – which is operated as a soft-constitutional norm that guides the state institutions in interpreting the text of the Constitution¹⁶⁵ – is the ultimate expression of the PAP’s mission to indoctrinate Singaporean society with Confucian tradition.

The substance of the white paper contained the principle of “nation before community and society above self”, which means that the interests of the state must be prioritized over individual interests. The white paper also emphasizes that the government leader is a *junzi* or a wise person who knows best about the interests of its people. This led Li-Ann Thio, a leading Singapore constitutional law scholar, to conclude that the white paper places the relationship

¹⁶² Ibid 20.

¹⁶³ Ibid 23.

¹⁶⁴ Ibid 28.

¹⁶⁵ See Thio (n 10); see also Sheehy (n 53).

between the state and society in accordance to the Confucian relational hierarchies (*wulun*) which presupposes the state as a family, where the government played a role of a father to its children, the people.¹⁶⁶ This hierarchical relationship can be observed in the statement of the former Prime Minister of Singapore, Goh Chok Tong, who claimed that he played a role as an “older brother” to its citizens, while his predecessor Lee Kuan Yew was more like a “stern father”.¹⁶⁷

Goh’s statement was based on his belief that his government is practicing a more “open and consultative form of governance” compare with Lee’s government.¹⁶⁸ During his reign (1990-2004), Singapore began to practice the family state concept through the enactment of the white paper, and it was in his term of government that the Non-Constituency Member of Parliament (NCMP) and the Nominated Member of Parliament (NMP) schemes were effectively operated in the Singapore political system, allowing some seats in the Parliament to be reserved for non-elected members outside the ruling party to accommodate the opposition voices, even though this mechanism still places the opposition in an unequal position with the ruling party.¹⁶⁹ Meanwhile, Lee’s reign as a Prime Minister (1965-1990) was marked by the threat of communism and the conflict with Indonesia. This led his government to use a much tougher approach when managing its citizens, as shown by the massive use of the preventive detention mechanism towards the opposition.

2.2.3 The Family State in Action (1990s-Now)

As already been mentioned, since the early 1980s, there have been demands from the increasingly individualistic Singaporean society to democratize the political system. This was followed by some decisions of the Singapore courts in the early to late 1980s that tended to use

¹⁶⁶ Thio (n 4) 36.

¹⁶⁷ Ibid.

¹⁶⁸ Ibid.

¹⁶⁹ Tan (n 15) 288.

individual rights approach when interpreting the Singapore Constitution such as in *Ong Ah Chuan v PP* (1981) and *Haw Tua Tau v PP* (1981),¹⁷⁰ where the Judicial Committee of the Privy Council acknowledged the existence of the extra-textual principle in the Singapore Constitution which they called “the fundamental rules of natural justice”.¹⁷¹ This obliges any legislation and executive decisions need to conform with the rights in the Singapore Constitution which has been classified as fundamental rules of natural justice.¹⁷²

This trend toward individualism then reached its peak in 1988, when the Singapore Court of Appeal in *Chng Suan Tze v Minister for Home Affairs* on the matter of the legality of preventive detention order for some suspected Marxist conspirators.¹⁷³ In this case, other than annulling the detention order, the Court of Appeal also asserted that “all power has legal limit”,¹⁷⁴ thus enabling previous practices – which ascribes the Minister of Home Affairs absolute discretion to issue detention order for security reason – to be reviewed by the Court, especially to ascertain whether the detention order is made with regard to objective standards, such as fundamental rights guaranteed in the Constitution.¹⁷⁵

However, in 1989, the PAP government overruled the *Chng* decision, through the amendment to both the Singapore Constitution and the ISA. These amendments affirmed that the executive decision to issue detention order can only be reviewed by the courts through procedural grounds, and it also exempted detention order made for security reasons from conforming to various rights in the Singapore Constitution such as fundamental liberties (Art. 9), protection

¹⁷⁰ Li-ann Thio, ‘An ‘I’ for an ‘I’? Singapore’s Communitarian Model of Constitutional Adjudication’ (1997) 27 Hong Kong LJ 152, 160.

¹⁷¹ See H.F. Rawlings, ‘Constitutionality of the Death Penalty: *Ong Ah Chuan v. P.P.*; *P.P. v. Yee Kim Seng*; *P.P. v. Lau Kee Hoo*’ (1983) 25 Malaya Law Review 148, 152; See also J.A. Coutts, “Judicial Committee of the Privy Council: Comments on Cases (*Haw Tua Tau v. PP & Jayakumal v. PP*)” (1982) Journal of Criminal Law 39, 40.

¹⁷² Thio (n 170) 164-165.

¹⁷³ *Chng Suan Tze v Minister for Home Affairs* [1988] 2 SLR(R) 215.

¹⁷⁴ Jaelyn L. Neo, “All Power has Legal Limits” The Principle of Legality as Constitutional Principle of Judicial Review’ (2017) Singapore Academy of Law Journal 667, 667-668.

¹⁷⁵ *Ibid.*

against retrospective legislation (Art. 11), freedom of movement (Art. 13), and freedom of speech, assembly, and association (Art. 14).¹⁷⁶ In addition to enacting these amendments, the government also urged the Singapore courts to consider more local values when deciding a case.¹⁷⁷

After these amendments, coupled with the government's move to adopt the family state concept at the end of the 1980s, there is a shift of direction in the Singapore court's decision. The pro-individual approach was slowly discarded in the 1990s, as the Singapore courts tended to use a more communitarian or statist approach when interpreting the Constitution, which is more in line with the family state concept in the white paper. This tendency was marked by the Singapore decision to cut the relation between the Singapore courts with the Privy Council in 1994.¹⁷⁸ In the same year, the Singapore courts also issued a statement emphasizing that the jurisprudences of the Privy Council will no longer be binding to the Court of Appeal.¹⁷⁹

Evidence of the shift towards communitarianism could be found in the stance of the Court of Appeal in *Jabar v PP* case (1995), when the Court was asked about the constitutionality of the "death row" phenomenon with Art. 9 of the Singapore Constitution that prohibits illegal deprivation of people's life and personal liberty.¹⁸⁰ In this case, the Court declared the death row phenomenon was not against Art. 9, because according to the Court of Appeal "Any law which provides for the deprivation of a person's life or personal liberty, is valid and binding so long as it is validly passed by Parliament".¹⁸¹ This decision indicates that the Court no longer prioritize individual rights by indirectly placing the legislature which was dominated by the PAP government as the only institutions that can check their own power. This interpretation is

¹⁷⁶ Thio (n 4) 59.

¹⁷⁷ Ibid 61.

¹⁷⁸ Ibid 67.

¹⁷⁹ Ibid.

¹⁸⁰ Thio (n 170) 170.

¹⁸¹ Ibid.

in line with the basic logic of the family state which considers the government leader is a *junzi* who must be trusted by its people so that their power cannot be supervised.

The shift toward communitarianism is also marked by the adoption of the “four walls doctrine” by the Singapore courts during the tenure of Chief Justice Yong (1990-2006).¹⁸² This doctrine was originated from the Malaysian court, and was borrowed by the Court of Appeal in the *Colin Chan v. PP* case (1995), where the Court needed to decide about the scope of religious freedom in Art. 15 of the Singapore Constitution.¹⁸³ This doctrine believes that the court cannot use the decision of the foreign courts as an example when interpreting the Singapore Constitution.¹⁸⁴ The adoption of this doctrine certainly shows that the Singapore courts follow the steps of the government in understanding the Singapore Constitution from the local perspectives, which is the values of Confucianism in the white paper.¹⁸⁵

The influence of Confucianism in Singapore’s constitutional politics that started in the 1990s can also be found in other decisions of the Singapore courts, especially those that are related to political defamation cases. In contrast to Western countries where public officials can be awarded damage for defamation only if he/she can prove that the defendant critics was made recklessly with malicious purpose – which is a very high burden to prove¹⁸⁶ – the Singapore courts, in accordance with *junzi’s* principle,¹⁸⁷ preferred the protection of public official’s reputation rather than people’s freedom of speech, thus making it easier for public officials to

¹⁸² See Ibid; See also Arun K. Thiruvengadam, ‘The Continuing Resistance to Foreign Law in Constitutional Adjudication in Singapore’ in Jaelyn L. Neo (Ed.), *Constitutional Interpretation in Singapore* (Routledge 2016) 319.

¹⁸³ See Li-ann Thio, ‘The Secular Trumps the Sacred: Constitutional Issues Arising From *Colin Chan v Public Prosecutor*’ (1995) 16 *Sing L Rev* 26.

¹⁸⁴ Ibid 92.

¹⁸⁵ Ibid 94.

¹⁸⁶ In *New York v. Sullivan* 376 U.S. 254 (1964), Justice Brennan argued that public officials can only recovering damages for defamatory falsehood relating to his official conduct only if he/she can prove that the statement was made with actual malice.

¹⁸⁷ Tsun Hang Tey, ‘Singapore’s jurisprudence of political defamation and its triple-whammy impact on political speech’ (2008) *Public Law* 452, 460.

be awarded damage in defamation cases.¹⁸⁸ As a result, since independence, no member of the ruling party has ever lost a defamation case against the opposition or the media.¹⁸⁹

The approach that prioritizes the reputation of public officials can be seen in several cases. For example, in the *J.B. Jeyaretnam v. Lee Kuan Yew* (1992), Jeyaretnam, an opposition politician, was sued by the then Prime Minister Lee Kuan Yew, after he criticized the Prime Minister at a political rally. In this case, the Court of Appeal – besides concluding Jeyaretnam’s critic as defamatory – argued that they reject the Western perspective which requires public officials to be more tolerant toward critics in order to protect people’s freedom of speech.¹⁹⁰

After that case, the Singapore courts further cemented their position that prioritizes the protection of public officials’ reputation, as shown in more recent defamation cases such as in *Tang Liang Hong v Lee Kuan Yew* (1997) or *Goh Chok Tong v. Chee Soon Juan* (2005).¹⁹¹ In the *Goh* case, another opposition figure, Chee Soon Juan, was found guilty of defamation by the High Court after he criticized Prime Minister Goh Chok Tong during the electoral campaign. In this case, the High Court decided to increase the amount of damage awarded to Mr. Goh, after considering the importance of Mr. Goh’s public reputation for him to successfully work as a Prime Minister.¹⁹²

Apart from political defamation cases, the influence of the Confucian political concept can be found in cases related to contentious topics in the Singapore society, such as in *Lim Meng Suang v. Attorney General* (2014),¹⁹³ where the Court of Appeal was asked about the constitutionality of Section 377A of the Singapore Penal Code that criminalizes male homosexual conduct, a

¹⁸⁸ See Cameron Sim, ‘The Singapore Chill: Political Defamation and the Normalization of a Statist Rule of Law’ (2011) 20 Pac. Rim L & Pol’y J. 319, 329.

¹⁸⁹ Tey (n 187) 452-453.

¹⁹⁰ Ibid 455.

¹⁹¹ Li-ann Thio, ‘Between Apology and Apogee, Autochthony: The ‘Rule of Law’ Beyond the Rules of Law in Singapore’ (2012) Singapore Journal of Legal Studies 269, 288.

¹⁹² *Goh Chok Tong v Chee Soon Juan* (No 2) [2005] SGHC 3, 69.

¹⁹³ *Lim Meng Suang v. Attorney-General*, [2014] SGCA 53.

provision which has been originated from the British colonialism.¹⁹⁴ In this case, the Court of Appeal decided not to annul Section 377A, by emphasizing that it is best left to the legislature to decide the issue about morality, as shown in their statement below:¹⁹⁵

“The Legislature is an elected body and thus has the mandate from the electorate to promulgate laws which reflect as well as preserve societal morality. Whilst it might (as is the situation in the present proceedings) be difficult to ascertain what the prevailing societal morality on a particular issue is at any given point in time, it is still the Legislature’s task to make this determination.”

This argument suggests the limited role of the Singapore courts. It also affirms the influence of Confucianism to Singapore judiciary, because by delegating the power to determine what has been considered as societal morality to the legislature, the Court of Appeal reaffirms *Junzi*’s principle that views public officials (including the legislature) as a man with a high moral duty, which in turn put them on a better position to decide the issues about morality.

Outside some of the cases above, it should also be noted that since independence, the Singapore judiciary has never declared any legislation as unconstitutional,¹⁹⁶ even though Art. 4 and Art. 93 of the Singapore Constitution provided the judiciary with a strong textual basis to do so.¹⁹⁷ In fact, the Singapore courts repeatedly emphasized in their decisions that they did not want to be dominant on the Singapore constitutional landscape,¹⁹⁸ and the powers of the Parliament to repeal legislation are far greater than their powers to annul legislation in the judicial review case.¹⁹⁹ This attitude to never strike down legislation indirectly shows the similarity between Indonesia and Singapore as countries that adhere to the family state concept, because both states

¹⁹⁴ See Yi Wei, ‘Towards the Full Promise of Liberty: A Comparative Approach to the Decriminalization of Male Homosexual Sex in Singapore’ (2018) 20 Asian-Pacific Law & Policy Journal 50, 53.

¹⁹⁵ Lim Meng Suang v. Attorney-General, [2014] SGCA 53, 171.

¹⁹⁶ Lynette J. Chua and Stacia L. Haynie, ‘Judicial Review of Executive Power in the Singaporean Context, 1965–2012’ (2016) Journal of Law and Courts 43, 44.

¹⁹⁷ Tan Yann Xu, ‘The Limits of Judicial Review’ (May 23, 2020) Modern Law Blog. <<https://medium.com/@ModernLawBlog/the-limits-of-judicial-review-21d838c01c41>>

¹⁹⁸ Swati Jhaveri, ‘The Coming of Age of Constitutional Judicial Review in Singapore: The Advent of “Proportionality”?’ (December 17, 2020) IACL-AIDC Blog. <<https://blog-iacl-aide.org/constitutional-landmark-judgments-in-asia/2020/12/17/the-coming-of-age-of-constitutional-judicial-review-in-singapore-the-advent-of-proportionality>>

¹⁹⁹ See Lim Meng Suang v. Attorney-General, [2014] SGCA 53, 171; See also Yong Vui Kong v Public Prosecutor [2015] 2 SLR 1129, 121.

view judicial review mechanism as contrary to the main elements of the family state concept which emphasizes the trust in the political institutions, so even though the judicial review mechanism was existed, but it does not work as a mechanism to check the political institutions.²⁰⁰

²⁰⁰ Weitseng Chen, 'Same Bed, Different Dreams' in Philipp Dann, Michael Riegner, and Maxim Bönnemann (Eds.), *The Global South in Comparative Constitutional Law* (OUP 2020) 263.

CHAPTER III: THE PARADOX OF INDIGENOUS CONSTITUTIONALISM

As previously explained, both Singapore and Indonesia place the family state concept as a basic principle of their constitution. This concept, which concentrates the state power in the hands of the government views the government leader as a wise parent who knows best about the interest of its children (the people), hence the constitution's purpose in these two states is to strengthen the government power rather than to limit it.

The proponents of the family state in Indonesia and Singapore also claim that this concept represents the culture of the people in both countries. For example, in Singapore, the PAP government – which codified this concept in the shared values white paper – view the family state concept as the manifestation of Confucian teachings adhered by the Singapore ethnic Chinese majority. While in Indonesia, the framers of the 1945 Constitution claim that this concept is deeply rooted in the culture of the Indonesian indigenous population. This belief often makes these two countries proclaim that they have a different understanding of the constitution compared to Western countries, who build their constitution from liberal democratic values.

In this chapter, I will try to unravel these claims, especially those that claiming that the constitution in both states has an indigenous character. The aforementioned claims often resulted in several scholars from Indonesia and Singapore uncritically hailing both countries' constitutions as an example of a post-colonial constitution which has an anti-colonial and anti-Western character.²⁰¹

²⁰¹ See Muhammad Fauzan, Teddy Sudrajat and Sri Wahyu Handayani, 'Constitutionalism in a Post-Colonialism State: Socio-Cultural and Historical Perspective of Indonesian Constitution Identity' (2019) 11 *Revista de Estudos Constitucionais, Hermenêutica e Teoria do Direito* 23, 36; See Thio (n 3) 143; See also Aidul Fitriaciada Azhari, 'Ideologi dan Konstitusi dalam Perlembangan Negara-Bangsa Indonesia: Rekonstruksi Tradisi, Dekolonisasi, dan Demokratisasi' (2013) 20 *Jurnal Media Hukum* 99, 103.

3.1 *The Colonial Legacy*

Even though the constitutions of both states are claimed to have an anti-colonial character due to the influence of the family state concept, it cannot be denied that these constitutions do have very strong colonial elements. For example, the substance of the Singapore Constitution is predominantly derived from the 1963 State of Singapore Constitution, where the 1963 State Constitution itself was previously known as the State of Singapore Act 1958 which was formed by the British Parliament when Singapore was still part of the British colony.²⁰² This led the substance of the Singapore Constitution was heavily influenced by the British constitutional system, as exemplified through the adoption of a parliamentary system coupled with the first past the post electoral system. Further, the Singapore Constitution also maintains several features that were previously contained in the British colonial system, such as the draconian preventive detention mechanism in Art. 149, which gives the government almost unlimited powers to detain a person for security reasons.²⁰³ In hindsight, Singapore's independence failed to induce a so-called "constitutional moment",²⁰⁴ thus forcing the founders of the state to enact a constitution that was originated from the colonial period.

Meanwhile, prior of and shortly after its independence, Indonesia succeeded in forming a new constitution through two bodies called the Committee for Examination of Indonesian Independence (BPUPK) who worked from 29 May until 17 July 1945 and then the Committee for the Preparation of Indonesian Independence (PPKI) who worked on 18 August 1945.²⁰⁵ During this constitution-drafting process, the drafters of the 1945 Constitution often claimed that this constitution was formed based on the cultures of the Indonesian people.²⁰⁶ Soekarno, one of its main drafters who also became Indonesia's first President, even considered the 1945

²⁰² Tan and Thio (n 143) 71.

²⁰³ Hor (n 155) 260.

²⁰⁴ Neo and Ong (n 68) 72.

²⁰⁵ A.B. Kusuma and R.E. Elson, 'A note on the sources for the 1945 constitutional debates in Indonesia' (2011) 167 *Bijdragen tot de Taal-, Land-en Volkenkunde* 196, 196.

²⁰⁶ Iskandar (n 4).

Constitution as a revolutionary document that was formed to transform the culture of Indonesian people from a colonial to independent society.²⁰⁷

However, regardless of the claims from its founders, some evidences suggest that many parts of the 1945 Constitution have strong colonial influences. For example, during the constitutional drafting process, Soepomo argued that the 1945 Constitution created a system of government that concentrates the state power upon the head of government (President) because it was a consequence and requirement of the family state logic.²⁰⁸ In truth, Soepomo did not invent this system by looking at the culture of Indonesian society, rather, he was adopting this system from the Constitution of the Netherlands Indies, which was previously used by the Dutch colonial government to rule over Indonesia.²⁰⁹ The aforementioned Constitution, despite having the People's Council (*Volksraad*) as the legislative institution representing the interest of the native people, places the power to form laws in the hands of the Governor-General as the head of the executive.²¹⁰

The strong colonial influences are also proven by the adoption of several institutions from the Constitution of the Netherland Indies into the 1945 Constitution, such as the establishment of the Financial Audit Boards (BPK) in the 1945 Constitution, which was modelled after the *Algemeene Rekenkamer*, an institution that tasked to assist the legislature in auditing the state finances during the Dutch colonial rule;²¹¹ and the creation of the Supreme Advisory Council (DPA) in the 1945 Constitution which emulated the role of the Council of Netherlands

²⁰⁷ Aidul Fitriaciada Azhari, *UUD 1945 Sebagai Revolutiegrondwet: Tafsir Postkolonial atas Gagasan-Gagasan Revolusioner dalam Wacana Konstitusi Indonesia* (Jalasutra 2011).

²⁰⁸ Kusuma (n 7) 365.

²⁰⁹ Koerniatmanto Soetoprawiro, 'Latar Belakang Konsep Ketatanegaraan Undang-Undang Dasar 1945 (Sebelum Amandemen)' in Sri Rahayu Oktoberina and Niken Savitri (Eds.), *Butir-Butir Pemikiran dalam Hukum* (Refika Aditama 2008) 162.

²¹⁰ Nick Efthymiou, 'The First World War and Constitutional Law for the Netherlands Indies' (2014) 7 *Erasmus L Rev* 54, 61.

²¹¹ Soetoprawiro (n 209) 163.

Indies (*Raad van Nederlandsche-Indie*) that served mainly as an advisory body to the head of government (Governor-General).²¹²

These facts show how the texts of both constitutions were deeply influenced by colonial values. And this led to one fundamental question regarding the family state concept; does this concept of the state come from colonial ideas in both states?

In the context of Singapore, this assumption seems to be hardly proven, considering that Singapore developed the concept of the family state in the white paper with the intention to give local nuances to the Singapore Constitution, which was a product of British colonialism.²¹³ On the other hand, in the Indonesian context, because the proponents of the family state manifest this concept into the text of the 1945 Constitution, the family state concept certainly derives from the colonial values. As has been stated before, the substance of the 1945 Constitution is very similar to the Constitution of the Netherlands Indies, even down to the principle of “concentration and responsibility upon the government”, which, according to Soepomo, formed the essence of the family state concept.

The colonial influence in the Indonesian concept of the family state can also be observed from the drafting process of the 1945 Constitution. As previously stated, the 1945 Constitution was formed mostly by a body called the BPUPK, with 79 members who are claimed to represent the plurality of the Indonesia society.²¹⁴ Although some scholars consider this body to successfully represent only Indonesian interest,²¹⁵ it cannot be denied that this body was formed by Japan, when Indonesia was still part of the Japanese colony in 1945. This caused the body’s membership and composition only consist of people who held political and bureaucratic positions in the Japanese colonial administration, without representatives from political groups

²¹² Efthymiou (n 210) 55-56.

²¹³ Sheehy (n 53) 73.

²¹⁴ See the list of the BPUPK members in Kusuma (n 7) 84-86.

²¹⁵ Kawamura (n 51) 55; Kusuma (n 7) 42.

that at that time opposed Japanese colonialization in Indonesia, such as the leftist and the youth.²¹⁶

Reflecting from such context, it is understandable if the 1945 Constitution is also had a strong Japanese influence. For example, Soepomo, the main drafter of the 1945 Constitution who also held a Chief Justice position under the Japanese occupation, admitted that he also was influenced by the Japanese constitutional practices when designing the Indonesian concept of the family state.²¹⁷ With the evidence that the family state concept was formed under the influence of the Japanese colonial government, coupled with the many similarities between the text of the 1945 Constitution with the Constitution of the Netherlands Indies, it is safe to say that the 1945 Constitution is a very colonial document, where its substance was influenced by colonial values derived from Indonesia's two former colonial masters, Netherlands and Japan.

3.2 Questioning the Indigenous Argument

In addition to the issue of anti-colonialism, another important characteristic of the family state concept in Indonesia and Singapore is the view from its proponents that this concept has an indigenous character. As the previous chapters showed, the family state concept actually originates from the Japanese constitutional practices and does not emanates from the constitutional traditions of these two countries. However, some proponents of the family state concept in Singapore and Indonesia still consider this concept has values that are compatible with the culture of the people in Indonesia and Singapore.

Referring to the Indonesian example, this claim needs to be put into test, especially considering that the previous section has proven that many provisions claimed to be embodying the family state concept in the Indonesian 1945 Constitution was apparently adopted from the Constitution

²¹⁶ P.J. Drooglever, 'The Genesis of the Indonesian Constitution of 1949' (1997) 153 *Bijdragen tot de Taal-, Land- en Volkenkunde* 65, 67.

²¹⁷ Kusuma (n 8) 126.

of the Netherlands Indies. Even if there is some similarity between the family state concept with the culture of Indonesian people, but it only has compatibility with the concept of power in the culture of Javanese people, which believe that the power must be concentrated in the hands of a single rulers,²¹⁸ and the ruler itself is expected to perform a role as a father figures who display benevolence and correct behaviour.²¹⁹

Although Java is the largest and the most dominant ethnic group in Indonesia,²²⁰ this does not mean that the family state concept could represent the views of all Indonesian population, since Indonesian society is very plural and consists of thousands of tribes and ethnicities.²²¹ The decision to adopt the family state concept shows the hegemony of Javanese ethnicity during the drafting process of the 1945 Constitution; when the Japanese colonial administration formed the BPUPK, they restricted its membership only to the people from Javanese background or persons who previously worked with the Japanese 16th Army in Java.²²² That is why the majority of the members who hold an important position in the BPUPK such as Soepomo, Soekarno, and DR. Radjiman were people with Javanese background, whereas, some of the most vocal opponents against the family state concept during this process were members who did not have a Javanese background, such as Muhammad Yamin and Mohammad Hatta, two members who came from Minangkabau ethnic group.²²³

Besides that, it should also be noted that the formulation process of the 1945 Constitution did not involve public participation, since all members of the BPUPK were appointed by Japan's

²¹⁸ Anderson (n 82) 36.

²¹⁹ Dodi Wirawan Irawanto, Phillip L. Ramsey, and James C. Ryan, 'Tailoring Leadership Theory to Indonesian Culture' (2011) 12 *Global Business Review* 355, 357.

²²⁰ Almost all of the Indonesian Presidents such as Jokowi, Soeharto, and Soekarno was come from a Javanese background.

²²¹ Even if Java was the largest ethnic group in Indonesia, but it only consists of 40% of the Indonesian population. See Akhsan Na'im and Hendry Syaputra, *Kewarganegaraan, Suku Bangsa, Agama, dan Bahasa Sehari-Hari Penduduk Indonesia* (Badan Pusat Statistik 2010) 5.

²²² Bouchier (n 15) 64.

²²³ Ibid 74.

colonial administration.²²⁴ Therefore, it is difficult to argue that the composition of the BPUPK represents the plurality of Indonesian society.²²⁵ Soekarno even emphasized that the 1945 Constitution was only a provisional constitution, that later would be replaced with a new constitution that will be formed through a more democratic process.²²⁶

Interestingly, when Indonesia obtained the opportunity to form a constitution through the democratic process involving public participation, the public always refuses to adopt the family state concept. Instead, they always choose to make a constitution based on liberal-democratic values. The first was in 1956-1959 when Indonesia through an institution called the '*Konstituante*' (Constitutional Assembly) – whose members were directly elected by the people through very democratic election in 1955 – decided to form a new liberal-democratic constitution.²²⁷ The second was between 1999 up to 2002, when the MPR whose members were elected in the 1999 election – the first true democratic election in Indonesia after 32 years under Suharto's New Order authoritarian regimes – successfully conducted comprehensive amendments to democratizes the 1945 Constitution.

Meanwhile, in Singapore, there is an impression that the family state concept contained in the white paper was adopted to give local nuance to the Singapore constitutional practices, due to the origin of the Singapore Constitution which comes from British colonialism. Such impression arises because according to the Singapore government, the white paper was made to promote the culture of the people of Singapore, which the government believes is adhering

²²⁴ Melissa Crouch, 'Constitution making and public participation in Southeast Asia' in David Landau and Hanna Lerner (Eds.), *Comparative Constitution Making* (Edward Elgar 2019) 505.

²²⁵ Apart from being filled mostly by the people who have Javanese background, there were only two female members in the BPUPK, that is why it is difficult to see this body as a true representative of the Indonesian nation. See Kevin W. Fogg, *Spirit Islam pada masa Revolusi Indonesia* (Translated from *Indonesia's Islamic Revolution CUP*) (Noura 2020) 231.

²²⁶ See Soekarno's speech during the formulation process of the 1945 Constitution on the 18th August 1945. Kusuma (n 8) 479.

²²⁷ Unfortunately, the efforts of the *Konstituante* failed after President Soekarno, together with the military, dissolved the *Konstituante* through a Presidential Decree on July 5, 1959, even though at that time the *Konstituante* almost completed the new constitution. See Adnan Buyung Nasution, *The Aspiration for Constitutional Government A Socio-Legal Study of the Indonesian Konstituante*, (CIP-Gegevens Koninklijke Bibliotheek, 1992).

Confucian teachings that emphasize communitarianism. This was also followed by the Singapore government's aggressive move to overrule several decisions from the Singapore courts which have been deemed as promoting individualism, as well as cutting off ties between the Singapore courts and the last colonial institution in the Singapore judiciary, the Privy Council.

The problem is, the claim that during the creation process of the white paper, most people in Singapore especially its ethnic Chinese majority adheres to Confucianism, is not entirely true. Before the white paper was enacted, it can be said that the people of Singapore were not familiar with Confucianism, considering that Singapore had become a British colony for a very long time.²²⁸ In fact, in the early 1980s there was a tendency for the Singaporean people – especially its younger generation – to become more individualistic as a result of Singapore's economic growth. During this period, there was also a growing demand from the Singaporean people to democratize the political system.

That is why to maintain its authoritarian government, since the early 1980s the PAP government implemented a massive Confucianization program toward its population,²²⁹ especially the younger generation. They even invited several Confucian scholars from abroad (notably from East Asian states) to help them develop the syllabus of the Confucianization program.²³⁰ During this period, several Singaporean political figures also began to implant Confucian values in Singapore political discourses,²³¹ especially those emphasizing communitarian virtue such as loyalty and obedience of the citizens to the government.

²²⁸ Chua (n 19) 166.

²²⁹ Ibid 158-159.

²³⁰ Ibid 159.

²³¹ Ibid 156.

CONCLUDING REMARKS

Some Southeast Asian states deprived their constitutions from provisions that limit government power and protect individual rights — values that are identical to Western-liberalism — because these states believed that their people have a communitarian culture that is different from the individualist culture of the people in the Western countries. However, this study found that the family state concept — the preferred concept to be used as the basis for some of these countries' constitutions, namely Indonesia and Singapore — does not quite resemble the region's indigenous population and culture; rather, this study confirmed that the family state concept was actually originated from Japanese constitutional tradition, and had previously been used by Japan's fascist regime to legitimize their authoritarian rule during the Meiji era until the Second World War.

Furthermore, this study showed that the adoption of the family state concept is strongly influenced by the interests of the dominant group in both countries. In Indonesia, apart from the influence of Japan and the Dutch as Indonesia's former colonial rulers, the adoption of the family state concept during the drafting process of the 1945 Constitution was void of any public participation, showing the hegemony of the Javanese ethnic group. Meanwhile, when the Singapore government adopted this concept within its soft constitutional norms (The Shared Values White Paper) which affect the implementation of the Singapore Constitution, it cannot be denied that this concept was closely related to the interests of the PAP regime to maintain its authoritarian rule. Even if the PAP regime claimed that the family state concept they adopted reflects the culture of the majority of the Singaporean people, especially its Confucian values, this claim is inconclusive at best considering that during the enactment of the white paper, most Singaporean people were not familiar with Confucianism.

This finding also confirms that any claims of indigeneity made by the rulers when forming the constitution need to look with caution, because as this study shows, local values that considered

to be the basis for the constitutions of Indonesia and Singapore, actually come not from their indigenous culture. But, this narrative of indigeneity was exploited by the dominant groups in both societies as a justification to construct an authoritarian form of constitutionalism that can help them maintain their hegemony. This provides an important lesson to other countries beyond Southeast Asia, especially with the current global trends where contemporary autocrats often use nativist and indigenous sentiments to create a constitution that can justify their illiberal agendas.²³²

²³² See the process to create a new illiberal constitution in Hungary by Viktor Orban's government, which used nativist and traditional sentiments. Gabor Halmai, 'The making of "illiberal constitutionalism" with or without a new constitution: the case of Hungary and Poland', in Hanna Lerner and David Landau (Eds.), *Comparative Constitution Making* (Edward Elgar 2019) 304-311.

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