

Chapter II

LEGAL SYSTEM

A. LEGISLATION AND SUBSIDIARY LEGISLATION

Hans Kelsen's hierarchy of norm theory (*stufentheorie*) and Hans Nawiasky's hierarchy of legal norm theory (*die theorie vom stufentordnung der rechtsnormen*) can be used to explain the system of legal norms in Indonesia. Both theories suggest that the legal norm is always structured in tiers and is hierarchical in nature, particularly that the lower norm is based on the higher norm until the point where it meets the highest norm which then becomes the basic norm.

In the current Indonesian law the hierarchy of legal norms is regulated in *Ketetapan MPR No. III Tahun 2000 tentang Sumber Hukum dan Tata Urutan Peraturan Perundang-Undangan* (MPR Decree of 2000 on The Source of Law and Hierarchy of Laws). The basic hierarchy includes *UUD 1945* (the "Constitution"), *Ketetapan Majelis Permusyawaratan Rakyat* (the "Decree of the People's Representative Assembly"), *Undang-Undang* (the "Laws"), *Peraturan Pemerintah Pengganti Undang-Undang* or PERPU (the "a Law in Lieu of a Law" or an "Interim Law"), *Peraturan Pemerintah* (the "Government Regulation"), *Keputusan Presiden* ("Presidential Decree"), and *Peraturan Daerah* ("Regional Regulation").

In theory the hierarchy creates at least two problems. First, that the hierarchy is based on the concept of *Peraturan Perundang-Undangan* (formal laws and regulations that bind the public). However, according to the hierarchy of norm theory *Peraturan Perundang-undangan* may include formal Laws (*Formell Gesetz*), Executing Regulations (*Verordnung*), and Autonomous Regulations (*Autonome Satzung*). The Constitution and the *Ketetapan MPR* are the basic law of the State (*staatsgrundgesetz*) and in this theory should be considered as at a higher norm level and technically outside of the hierarchy as neither of them are a *Peraturan Perundang-Undangan* (prevailing laws and regulations). The second problem is related to the absence of *Keputusan Menteri* (“Ministerial Decree”) in the hierarchy. This absence has become a contentious issue as it has been interpreted by many Regional and Local Governments that any Ministerial Decree that is issued and purportedly binds Regional and Local Government is not effective. Therefore, Regional and Local Government Regulations hold a higher position in the hierarchy of Indonesian laws than that of Ministerial Decrees because Ministerial Decrees are some form of quasi legislation not contemplated in the hierarchy of Indonesian laws. The persistence of this omission results in a high degree of disharmony in legislation between the Central and Regional/Local Governments in several important matters, such as taxation, business licensing procedures, and investment, among others.

The laws and regulations noted in the hierarchy are made by a varied number of State institutions. The Constitution can only be amended by the MPR. MPR Decrees are made by the MPR. Laws are made by joint agreement between the DPR and the President. Interim Laws are made by the President. Government Regulations are made by the President. Regional Regulations are made by joint agreement between the Head of the Regional or Local Government and the Regional House of Representatives (the “DPRD”).

To understand the legislative system in Indonesia emphasis must be made on the review of *peraturan perundang-undangan* or

laws that bind the public. *Undang-Undang* is the highest law in the hierarchy of *peraturan perundang-undangan*. It can determine applicable penal, civil, or administrative sanctions. It is also a form of law that can immediately apply to and bind the public. Every *Undang-Undang* is enacted through three phases, a) preparation of a bill, essentially the researching and drafting of the bill, b) elaboration and approval of the bill, essentially the discussions held between the DPR and the President to reach a consensus, and c) the enactment. After a bill is passed by both the DPR and agreed by the President, the President must sign it. To ensure the President's power to veto a bill is not absolute the MPR amended the Constitution to stipulate that after 30 days should the President fail to sign the bill, the bill would self-enact and automatically become Law.

There are a number of ambiguities in society about several of the key concepts related to the process leading to enactment of *Undang-Undang*. First, is the ambiguity related to the concept of *Undang-Undang* in a *formal sense* and *Undang-Undang* in a *material sense*. Those two terms are based on the distinction between *wet in formele zin* dan *wet in materiele zin* that exists in the Netherlands. Traditionally, the common misconception that many people held was that the terms refer to two separate kinds of *Undang-Undang*. However, this misconception is rare nowadays, as people see *Undang-Undang* in the *formal sense* that is any law that is named a *Undang-Undang*, while *Undang-Undang* in the *material sense* are any kind of laws that bind the public. In other words, there is only one kind of *Undang-Undang*.

Second, is the ambiguity with respect to the concept of *Undang-Undang Pokok* and *Undang-Undang Payung*. Many people believed that *Undang-Undang Pokok* could be used as the mandatory source of law for another *Undang-Undang*. However, that conception is not popular currently, because many people have accepted the point of view that all *Undang-Undang*, regardless of name, are at the same level of the hierarchy. Therefore, an *Undang-*

Undang can not act as the mandatory source of law for another *Undang-Undang*.

PERPU is a form of law that exists at the same level of hierarchy as *Undang-Undang*. A *PERPU* is issued by the President and is immediately in force. The basic requirement that must be satisfied before a *PERPU* is issued is that the legal matter that is to be regulated is an emergency, the need is immediate, and cannot be legislated or regulated in any other way. A *PERPU* once enacted is only applicable for a definite period of time; namely, a *PERPU* must be ratified by the DPR in their first sitting after the enactment of the *PERPU*. Should the DPR ratify the *PERPU* then it will be re-enacted as an *Undang-Undang*. In contrast, where the DPR rejects the *PERPU* then it is void at law and the regulatory framework returns to the status quo that existed prior to the enactment of the *PERPU*.

Peraturan Pemerintah functions as a law that is used to implement an *Undang-Undang*. It can only be made if it relates to a particular *Undang-Undang*. Nevertheless, a *Peraturan Pemerintah* can be made even if it does not mention explicitly the *Undang-Undang* to which it relates. A Government Regulation may only contain sanctioning provisions if the Law to which it relates also contains those same sanctions.

Generally, *Keputusan Presiden* is issued in one of two forms; namely, a declaration or a public rule. That second form of *Keputusan Presiden* is considered as a *peraturan perundang-undangan*. In assisting the President, Ministers can also enact regulations called *Keputusan Menteri*, and only those *Keputusan Menteri* that function as public rules can be considered to be *peraturan perundang-undangan*. There are three Ministerial levels; Ministers of a Department (*Menteri Departemen*), State Ministers (*Menteri Negara*), and Coordinating Minister (*Menteri Koordinator*). State Ministers and Coordinating Minister cannot issue *Keputusan Menteri* that bind the public, they can only enact internal rules and regulations.

Peraturan Daerah is enacted by the Head of the Regional/Local Government (the “Governor”, the “Regent”, or the “Mayor”) upon approval of the DPRD. This law regulates matters related to regional autonomy or as the implementation provisions for higher laws. *Peraturan Daerah* can determine penal sanctions up to six months in prison or fines to a maximum of IDR 5 million. In order to facilitate implementation of the *Peraturan Daerah* the Head of the Regional/Local Government can pass a *Keputusan Kepala Daerah* (Head of the Regional/Local Government Decision). *Peraturan Daerah* and *Keputusan Kepala Daerah* that regulate and bind the public must be published in the *Lembaran Daerah* (Regional/Local Gazette).

The amendment of a particular *peraturan perundang-undangan* means one of two things has occurred; namely, a provision has been added or erased or the law has been revoked in its entirety. The first type of amendment does not result in the revocation of the whole law and only applies to the stated provisions. In contrast the second type of amendment renders the whole law void usually meaning that the law needs to be replaced with a new set of provisions. Amendments can only be enacted by the DPR however it is possible that amendments to the law may be implemented through the use of PERPU by the President. Nevertheless, it is important to note that ultimately the DPR must approve or reject the PERPU at the next sitting of parliament. Any amendments made must stipulate the law being amended, the specific provisions, and the number of times the law has been amended.

Laws (or *Undang-undang*) are usually issued with a corresponding Elucidation. The Purpose of the Elucidation is to provide additional clarification and explanation with respect to interpretation of provisions to eliminate ambiguity and subsequent misapplication or interpretation of the relevant law. Unfortunately, there is a misconception prevalent in the community that Elucidations do not have any binding power and consequently are

an optional feature of the legislative process. However, the Elucidations specifically address interpretative matters and endeavor to eliminate ambiguity and consequently are a key aspect of judicial review and interpretation of laws.

B. CIVIL LEGAL SYSTEM

Background

The basis for all private law applicable in the European group, and former colonies of the European Group, has been the Dutch Civil Code (*Burgelijk Wetboek – Kitab Undang-Undang Hukum Perdata*) of 1848. Subsequent amendments to the Dutch Code were also incorporated into the Codes for Indonesia as well based on the principle of concordance.

It was not uncommon that changes to the Dutch Codes were never fully realized nor implemented in the Indonesian Codes. It can be argued that even aside from the varied special regulations incorporated into the Indonesian codes that deviated from the Dutch codes that the two codes were never exactly the same.

According to Article 163 of the *Indische Staatsregeling* (the “IS”), the population was divided into groups and special laws were enacted to govern and regulate the actions of each group. Article 163 of the IS was an amendment to Article 109 of the *Regerings Reglement* of 1920, and later incorporated into the IS requiring all persons living in Indonesia to be classified into one of three groups; namely:

- (1) European
- (2) Natives

- (3) Foreign Orientals which was further distinguished into Chinese and non-Chinese.

Following independence, the principle of concordance was abandoned, and was a direct consequence of the recently acquired independence of the State. Independence gave rise to a desire to ensure that Indonesia was not merely free of the Dutch Colonialists but also free from Dutch influence in all of the recently independent nation's institutions. It can be fairly stated that since independence legislative development in Indonesia has generally not followed the Dutch model. Nevertheless, there remain many remnants of Dutch law within Indonesian laws and a movement to modernize and Indonesianize law has developed since independence despite the deviations between Indonesian and Dutch codes becoming more pronounced than ever before.

Transitional Provision Articles I and II of the Constitution states explicitly that all existing institutions and regulations valid at the date of Independence shall continue to be valid pending the enactment of new legislation complying with the Constitution to the contrary.

One of the major criticisms of the continued existence of Dutch laws within the Indonesian codes is that despite claims that the laws were drafted to maintain peace and order, it is clear that the primary purpose was to protect the interests of the Dutch colonialists. Therefore, any maintenance of elements of Dutch law in the Indonesian codes is clearly contrary to the tenets of the Indonesian Revolution.

Nevertheless, it was quickly realized that the revocation in its entirety of all Dutch influenced Indonesian law would lead to chaos as the new legislation had not been drafted. Therefore, in order to avoid the legal vacuum that uniform revocation would cause, all laws and institutions valid at date of Independence would continue until such time as they were revoked and replaced.

The difficulty in determining which laws remain valid and which laws have been revoked is a complicated and somewhat unsatisfactory process. Government Regulation No. 2 of 1945 states that all Dutch law whether amended or replaced is to be deemed invalid when it does not comply with the Constitution. The complication and difficulty arises because the mechanism to determine constitutionally valid of laws was through judicial review by a competent court. Therefore, until such time as a provision was challenged through the courts then it was to be inferred that the Dutch laws remained valid enforceable.

The Indonesian Civil Code

The Indonesian Civil Code contains four books that regulate all private law matters:

1. Book One – titled Individual, regulates all aspects concerning the enjoyment and loss of civil rights, assets and the distinctions between them, residence or domicile, matrimony, the rights and obligations of spouses, legal community property and management thereof, prenuptial agreements, community property or prenuptial agreements in the event of second or further marriages, the division of assets, the dissolution of marriage, separation from bed and board, paternity and the descent of children, the relationship by blood and marriage, parental authority, amendment and revocation of support payments, minority and guardianship, emancipation, and conservatorship.
2. Book Two – titled Goods, regulates all aspects concerning assets and the distinctions between them, possession and the rights resulting there from, ownership, the rights and obligations among owners of neighboring plots of land, the rights and obligations of spouses, servitude, the right to build, the right of tenure by long lease, land rent, use of proceeds, use and occupation, succession by demise, last wills, executors of last

wills and managers, the right of deliberation and the privilege of estate description, the acceptance and rejection of inheritances, estate division, ungoverned inheritances, priority of debts, pledges, mortgages.

3. Book Three – titled Contracts, regulates all aspects concerning contracts in general, disputes arising from contracts or agreements, disputes arising by force of law, rescission of contract, sale and purchase, exchange, granting and acquiring leases, agreements regarding the performance of services, partnerships, legal entities, gifts, deposits, lending for use, loans for consumption, fixed or perpetual interest, aleatory agreements, the issuance of mandates, guarantees, and settlement.
4. Book Four – titled Evidence and Procedure, regulates all aspects concerning general evidence, evidence by witnesses, inferences, confessions, legal oaths, and Procedure.

The Indonesian Civil law has been in a constant state of development since independence. In 1963, the Supreme Court issued Circular Letter No. 3 which specifies a certain number of Articles of the Civil Code that are no longer valid. Specifically, eight Articles are noted:

- Articles 108 and 110 regarding the competence of a married woman to undertake legal action and appear in Court without the assistance of her husband.
- Article 284(2) concerning the acknowledgment (*erkenning, pengakuan*) by a European father of a child born out of wedlock to a Native Woman.
- Article 1683 which requires that all gifts be effected by a notarial deed.
- Article 1579 which stipulates that a lessor cannot terminate a lease on the ground that he intends to use the leased property

himself, unless the lease agreement explicitly permits him to do so.

- Article 1238 which provides that a written demand to perform must precede any civil suit for breach of contract.
- Article 1460 which assigns the risk of loss to the purchaser from the moment a contract of sale is concluded even though delivery has not been made.
- Article 1603X(1) and (2) which regulated what was regarded to be European Labor and what was non-European labor. This Article distinguishes and discriminates between European and Native laborers.

Law of Marriage

After the promulgation of the new Indonesian Marriage law (*Undang-Undang No.1 tahun 1974 tentang Perkawinan*) the Marriage Law was deemed to be a uniform law and as such applicable to all Indonesian nationals without any differentiation between ethnic groups. The law also replaced the Marriage law in Book One of the Indonesian Civil Code.

The Indonesian Marriage Law requires a one step procedure for all persons seeking to divorce that the divorce petition be administered through the General Court system. However, Moslems are required to process their divorce petitions through the Religious Court (*Pengadilan Agama*) system.

The definition of mixed marriage has changed as a result of the enactment of the new Marriage Law. Mixed marriage no longer means the marriage of persons from different Indonesian ethnic groups but rather refers to marriages between Indonesians and non-Indonesians.

Land Law

The Basic Agrarian Law (1960) ended the dualism that had existed in Indonesian Agrarian law between the Adat Law and European Law. The Basic Agrarian Law has revoked all regulations relating to land and the whole of Book Two of the Civil Code as it relates to matters of soil and water. All regulations relating to the provision and administration of mortgages were revoked with the enactment of the Mortgage Law (“*Undang-Undang No. 4 tahun 1996 tentang Hak Tanggungan*”). The Law has been very successful in terms of unifying the national law on land rights and mortgage law.

C. CRIMINAL LEGAL SYSTEM

The Indonesian Criminal Code in force since independence is in essence the Netherlands Indies Criminal Code and which came into force in 1918. It incorporates certain amendments promulgated by the revolutionary government in 1946 and since 1958 it has been applied uniformly throughout the Republic of Indonesia.

The criminal law is one of three systems of law in operation in the nation since the nineteenth century, the other two being a system of European-derived commercial codes and a civil law based on customary law (*adat*), which included Islamic law (“*syaria*”). The criminal law is the only one of these three systems that was essentially codified and applied uniformly throughout the national territory. Prior to January 1918 the Indonesian Criminal Legal System was divided into a dual system containing two distinct penal codes; one for native Indonesians (from January 1873) and one for Europeans (from January 1867).

The Indonesian Criminal Code or Kitab Undang-undang Hukum Pidana (the “KUHP”) and also known as *Wetboek van Strafrecht* remained valid after Independence in accordance with the Transitional provision Articles of the Constitution which state that, all regulations in force at the time of Independence are declared to remain valid unless or until they are such time as they are replaced in a manner prescribed by the Constitution; namely, Statute (Article I Transitional Provisions). Evidently this transitional provision was to ensure that there was no legal vacuum in the intervening period between initial independence from the Dutch and full independence of Indonesian institutions and the legal system.

The KUHP qualifies two types of criminal behavior; offences and crimes. Offences can be described as misdemeanor crimes where the applicable criminal penalty is a fine. An example of this type of criminal behavior is a driver who does not have a driving license when he or she drives a car or ride a bicycle at night without a lamp. In contrast crimes are defined as felonies or serious criminal behavior such as murder, abuse, theft, and robbery, among many others. Crimes can be further distinguished into:

Crimes or Felonies committed against the government and government institutions – these would include such crimes and felonies as insubordination; subversion; condemnation of the President or desecration of State symbols (national flag); tax delinquency, or a crime committed against a government official while they are on duty.

Crimes or Felonies committed against humanity – these would include crimes against the right to life such as murder; abuse; crimes against the right of freedom; kidnapping; crimes against human dignity; crimes against property.

This discussion of the Indonesian criminal legal system will explore the principles and theories of the system. The first principle is the legality or validity principle as stated in Article 1(1) of the Criminal Code or KUHP. This principle allows at least three

possible consequences to occur, namely: an act cannot be punished if at the time of the alleged commission of the act it was not a crime - *nulla poena sine lege nula poena sine crimene nullum crimen sine poena legali*; the criminal law and statutes cannot be enforced retroactively – an exception exists where the alleged crime is committed in a transitional period between laws where the most favorable statute or law to the benefit of the accused shall be applied therefore if the previous law is more favorable then it will be applied in spite of any non-retroactivity principle; and, analogy and interpretation are not permissible in criminal law.

In order to determine the validity of the KUHP and its subsequent application with respect to an alleged offence or crime, there are four principles applied; namely, the Territorial Principle, the Active Nationality Principle, the Passive Nationality Principle, and Universality Principle. The Territorial Principle specifies that the KUHP may be applied if the locus of the crime is within Indonesian territory irrespective of the accused's citizenship. The Active Nationality Principle specifies that the KUHP may be applied if the accused has Indonesian Citizenship. The Passive Nationality Principle states that the KUHP may be applied if there is an Indonesian legal interest that has been violated. Finally, the Universality Principle states that the KUHP may be applied if there is a legal interest of all humankind that has been violated.

Causality theory – simply relies on there being a causal condition between the effect of the crime and the action. This theory can be applied to *materiel delict* (crime) because this kind of crime specifies the effect of the crimes. It also can be applied to qualifying crimes (*door het gevolg gequalifiseerde delicten*).

The *Conditio Sine Qua Non* theory can be separated from Von Bury, a jurist whose theories are applied to criminal law in Indonesia, that each and every single action or cause cannot be dismissed in order to determine the subsequent effect.

The Criminal Law Code is contained in three chapters. Chapter I defines the terms and procedures to be followed in criminal cases and specifies any mitigating circumstances that may affect the severity of a sentence. Chapters II and III, respectively, define the categories of felonies and misdemeanors and prescribe the penalties for each type of offense. The distinction between felonies and misdemeanors generally conforms to the same distinction that is maintained in Western countries. As noted above, several other statutes dealing with criminal offenses are also in force, the most significant of which are laws concerning economic offenses, subversive activities, and corruption.

As of 2004, the available penalties for serious offenses included death, life imprisonment, local detention, and fines. The total confiscation of property is not permitted. Penalties for minor crimes and misdemeanors include the deprivation of specified rights, forfeiture of personal property, and publication of the sentence of the court. Punishments listed in the code are the maximum allowable; therefore judges maintain some discretionary authority to impose lesser punishments. A public campaign for the abolition of the death penalty was launched in 1980 following the execution of two individuals convicted of murder. However, the death penalty remains in force and it seems that this public campaign has made little headway in the elimination of this type of punishment. Nevertheless, despite the death penalty being available to judges, Indonesia has a significantly small proportion of people of death row. The majority of people sentenced to death were convicted of drug related offences. After a long hiatus in executions Indonesia has recently resumed the execution process.

Widespread complaints regarding the penal code and a perception that it is not reflective of Indonesian society or modern criminality as it is an archaic relic of Dutch Colonialism has been gaining ground over a number of years. However, the committee that was established in the early 1980s to overhaul the criminal code to Indonesianize and modernize it has been largely unsuccessful in

its endeavors to do so. Nevertheless, a recent draft of the new criminal code is expected to reach the floor of the parliament for debate sometime during the 2004-2009 parliamentary sessions.

Under Indonesian law, certain categories of crime may be dealt with under purposively drafted statutes outside the penal code]. . Offenses such as bribery, the assessment of illegal "levies," and the diversion of public funds for private use by business figures or officials formed a special class of crime usually handled under a 1955 statute on Economic Crimes (the statute no longer put into effect) and a 1971 statute on Corruption which has been revised as Law.No. 31 of 1999 on Corruption which also has been revised by Law No. 20 of 2001 on Revised of Law. No 31 of 1999 on Corruption. Political offenses and acts that Indonesian authorities regarded as threats to national security were usually prosecuted under Presidential Decree No. 11 of 1963 on the Elimination of Subversive Activities (the "Subversives Law"). This Decree was promulgated as a Law in 1969 and to all intensive purposes remains in force to this day. The law grants far-reaching powers to the relevant government authorities in dealing with almost any act that does not conform to government policy. The law allows for a maximum sentence of death to be imposed on individuals convicted under its provisions.

The National Commission of Human Rights (Komnas HAM)

During the New Order period one of many problems that confronted human rights activists was the protection of human rights is a system that granted little or no legal protection to human rights. Until very recently the sources of legal authority in Indonesian law for the protection and maintenance of human rights remained uncertain and were not formulated in a cohesive manner. This was the result partly from a historical legacy of the Dutch and partly as a result of the omissions of the New Order State. The history of the modern Indonesian State exhibits considerable resistance to absorption of the notion of the rule of law or *negara*

hukum, both as a founding constitutional principle and as a basis upon which to build a working legal infrastructure. Many basic civil and political rights rest upon rule of law concepts, particularly in relation to notions of equality before the law and the right to a fair trial. Nevertheless the current climate of political reform in Indonesia offers considerable opportunities for reform and the establishment of a legal system based on the rule of law. Understanding why the Indonesian legal system currently still falls short of the rule of law ideal requires a review of the historical development of the legal system as it currently exists. Following the resignation of Soeharto in 1998, the Habibie government appeared to adopt a more conducive stance towards human rights law reform and protection. Upon assuming office the Habibie administration immediately announced that it would undertake a program of human rights reform, electoral reform including bringing forward the MPR/DPR and Presidential elections, as well as reform of the State apparatus. To be sure, the Habibie administration remained dominated by allies of the recently resigned Soeharto, but nonetheless prevailing public opinion, expressed in social unrest, required at least modest reform. The Habibie administration set about signing and or ratifying a number of International Conventions (see below), and revoking some of the more excessive legislation of the Soeharto era (examples include law with respect to the Press, public demonstrations, and subversive activities). While such moves were uneven, and often incorporated attempts to preserve restrictive laws by moving them to other legislative instruments, the overall pattern of reforms favored a more open and democratic political environment.

In addition to the ongoing efforts to establish a permanent human rights court within the existing court structures, a number of important *ad hoc* courts have been established to try matters pertaining to particular human rights abuses. While generally viewed as a step forward in the efforts to hold those responsible for

human rights abuses accountable these *ad hoc* courts have also come under some severe criticism.

Komnas HAM as the national independent investigator of human rights abuses has been strengthened after the resignation of Soeharto. In September 1999 the Habibie government introduced, and the DPR approved, legislation which increased the number of members sitting on the commission and provided a more legislatively secure framework under which it works; namely, the repeal of the original Presidential Decree establishing the commission and replacing it with a Regulation. In doing so Komnas HAM in effect was granted a greater level of autonomy and independence from executive interference than it had enjoyed before. With respect to the day-to-day workings of Komnas HAM, the Habibie legislation also granted the commission subpoena powers for the first time, thus increasing its effectiveness as an investigative body. During the Abdurrahman Wahid administration Komnas HAM was also empowered to seek immediate clarification from the Attorney General's Office with respect to the progress of human rights prosecutions. This important additional power introduces a degree of accountability in the prosecution of human rights cases by the Attorney General's Office, which it is hoped will lead to an improvement in the performance of the Attorney General's Office and prosecutors with respect to human rights cases in the future.

The National Commission of Women (Komnas Perempuan)

In an attempt to uphold human rights in the Indonesian Criminal Legal System and in particularly Criminal justice, the new Indonesian Criminal Procedure Code affords suspects and defendants many rights to ensure some basic protections of their human rights. Unfortunately, it would appear that the new code opportunely forgot to protect the rights of victims and witnesses of and to crime that is critical in gaining the convictions desired. In response to rapid increases of domestic violence and sexual crimes

committed against women and children a group of leading Indonesian feminists set out to found an organization to advocate for these rights and protections. Consequently, the National Commission of Women was established. The primary purpose of the national commission is to advocate for change to the legal system to ensure that the rights of women are protected and that these protections are guaranteed. One of the most notable changes that has occurred as a result of this advocacy is a greater understanding of domestic violence and an appreciation that long-term violence can lead to murder. The Indonesian Criminal Code now recognizes self-defense as a legitimate defense for women who have been subject to long-term violence at the hands of their husbands. This is most often referred to as 'battered women's syndrome' the ability to prove this defense is a matter of fact however if so proven then the defendant is entitled to plead not guilty and where the facts bear out a judgment for acquittal (Putusan Bebas).

D. CUSTOMARY LAW/ADAT LAW

Introduction

Indonesia is a country with a very rich and diverse cultural history. The diversity of and between cultures is enhanced because of the physical nature of the Republic – an archipelago. The Indonesian archipelago consists of thousands of islands and hundreds of different ethnic groups, each with their own laws and customs. Consequently, there is no single Adat or customary law that is common to the whole of Indonesia. On the contrary, as was so ably pointed out by Snouck Hurgronje that Adat law (“*adatrecht*” in Dutch), the law of the archipelago was dominated by the customary or adapt practices of the indigenous (“*native*”)

populations. The term *adatrecht* was later popularized by Van Vollenhoven and then translated to English as Adat law. The major question facing legal scholars and experts has always been how to define Adat law. Adat law is not easy to define because of the breadth and variety of legal principles between groups nevertheless the definition promulgated by Ter Harr is the one that has received most discussion. Ter Harr defines Adat law as decisions made by the law enforcer within the relevant society. Decisions in Adat law include not only decisions made by judges, village leaders, and religious leaders but also decisions made by the village assembly. Adat law itself can be in either statutory or non-statutory forms. However, the reality in Indonesia is that Adat law is predominantly non-statutory.

Types of Adat Society

All Adat law is unique. Adat law developed according to the needs of each community (adat society). There are 3 types of adat society that are territorial in structure:

1. Village society

Included in village society are groups of natives who live by the same principles, ways of life, and have the same beliefs. The community is fixed, remaining at the same location, and is governed by a village chief.

2. District society

The adat district society comprises of a number of village societies of the same adat that live within the same district but with each community retaining its independence. As noted earlier each village society will retain its own organizations and structures but remain united under the district society in that singular village communities cannot be separated from the whole.

3. Village union society

The village union is formed on the basis of cooperation between the district societies that are located within the same adat territory. The aim of the cooperation between district societies is to work together and create a good and prosperous adat society where all activities are undertaken and completed in the best interest of the adat society as a whole.

Before the unification of laws it is important to note that adat law was the only source of law for and among Indonesian natives. The introduction of Islam to the archipelago through trade and other activities with middle-eastern merchants and emissaries, particularly to the islands of Sumatra, Java, Borneo, and the Celebes allowed for adat law to be influenced by Islam. The Acehnese, located at the northern most tip of the island of Sumatra, based their adat law specifically on the principles and tenets of Islam. Islam has exerted a similar influence over the adat law of West Sumatra as well.

Adat Law in the Indonesian Legal System

There is not one single Article in the Indonesian constitution that clearly regulates Adat Law or its application. However, Article I of the Transitional Provisions of the Constitution, stipulates that all regulations in existence are to remain in force for so long as there are no new laws or regulations established pursuant to the provisions of the Constitution.

Adat Law varies between the different parts of Indonesia. Adat is simply traditional or community law and reflects the norms of the relevant community. The major areas where Adat law differs from other laws in the Indonesian legal system are:

1. Marriage law
2. Inheritance law

3. Land law
4. Law of Delict

Marriage Law

Marriage in Adat communities is the means by which organized relationships within the group form to define the autonomous community and personal concerns. Marriage in Adat communities can also be a matter that reflects social status – either in a positive or negative manner. Marriage is an integral part of the renewal process of village and regional communities as it often results in the addition of new members to the community or the social nucleus. Marriage also carries with it the heavy burden and privilege of responsibility for the spiritual and material welfare of the community.

Marriage ceremonies reflect the often primitive and animistic ideas and customs of the community even in this modern world. The cultures of all Adat communities reflect the integral role of religion in the community's social interactions with each other and particularly during the ritual of marriage.

Marriage law in Adat communities differs between the regions, some are more influenced by religion and others remain more true to Adat culture that may have existed prior to any religious influence. The marriage law includes not only the rules and regulations governing marriage but also the rules and regulations as they relate to the dissolution of marriage, divorce. In marriage and divorce law, particularly the requisites of marriage, the rights and obligations of the husband and wife, the grounds for divorce, have always been, and are now still heavily influenced by Adat Law. Consequently, the intricate details on the above noted matters may vary from village to village and region to region. Nevertheless, it is interesting that a primary principle that is uniform to most adat law is the sharp distinction maintained

between '*original*' property (goods owned by either party before entering the marriage) and '*common*' property (gained or acquired by their joint efforts of the husband and wife during the marriage).

In a marriage that has not resulted in children being born of the marriage then on dissolution the *original* property must return to the respective families while *common* property must be divided between the husband and wife. This usually would occur as part of a court sanctioned divorce petition and dissolution with the court resolving the most equitable division of property. In contrast the adat system provides a greater amount of this responsibility for determining the division of property to the parents of the husband and wife, as they were responsible for 'arranging' the marriage. The parental responsibility for the division of property is substantially different from Western cultural perspectives on marriage where the marriage contract is executed only between the parties to the marriage and not their respective families.

Inheritance Law

The Adat law with respect to inheritance is a series of legal regulations that govern the eternal process of passing material and non-material property from generation to generation.

The rules of inheritance in adat systems are not only subject to influences from social changes in the community and the expansion of family ties and the family tree which usually includes a concomitant decrease of the influence of clan and tribal ties, but also to the influence of rules of inheritance contained in foreign legal systems. The rules of inheritance of foreign legal systems that enter into adat systems of law are a result of certain external connections within the adat community to the elements outside the adat community, most often through religion.

The most common system that is used in Adat Law with respect to inheritance is the bilateral system. This system gives the

children equal rights to inherit from both parents. In case of adoptive children, they have the same rights as legitimate children with respect to the *common* property of both parents. Nevertheless, adopted children do not have rights to *original* property as this may only be inherited by legitimate children born of the marriage. Furthermore, children of deceased parents can inherit from their grandparents' estates the same share that was to be inherited by those parents.

Land Rights

Prior to the Basic Agrarian Law there were two legal systems that had been used to determine and distinguish rights to land, namely:

1. rights based on Adat Law
2. rights based on the Civil Code

For indigenous Indonesians these rights were based upon Adat Law and for foreigners these rights were based upon the Civil Code. The Basic Agrarian Law revoked all regulations concerning land including all of Volume II of the Civil Code concerning 'soil and water'. However, the parts of Volume II of the Civil Code that related to the provision and administration of valid 'hypothec' or mortgage securities were not revoked. Rights to land under adat law were not entirely extinguished with the enactment of the Basic Agrarian Law as '*ulayat*' rights or the rights of certain communities over certain parcels of land were maintained.

There are several characteristics of rights to land that are recognized according to Adat law. Adat law recognizes a distinction between the rights to land and the rights to everything on or above the land. Simply stated this means that a right to land does not necessarily include any right to the development of that land or any structures that may be on it. A further example of this unique characteristic relates to debts where the security is land. When a person incurs a debt to any other party and gives their land as a

collateral guarantee (pledge of land) as security against any future failure to pay those debts, the creditor may become the owner of that land through the exercise of their right over the security. However, with the aim of protecting the weakest party in a pledge of land states that where a pledge has been in existence for more than 7 years shall be deemed to have expired thereby allowing the person pledging the land to reclaim that land free of any debt.

The Law of Delict

Adat law also recognizes delict – a disturbance to the equilibrium of an individual or the community that is deemed unacceptable by the community. Any such action that disturbs this equilibrium requires some form of reaction to restore the equilibrium. In most cases where the delict relates to money or property which can be quantified in financial terms then equilibrium is restored through a series of fines.

However, the motives or objective of disturbance and the subsequent restoration of the equilibrium include the consideration of highly personal elements such as being made feel ashamed for the conduct, rage, the need for revenge for the victim,, and the negligence and (or) intent of the perpetrator. The process is not exclusively personal as it requires the blending of the best interests of the individual and the wider adat community to ensure the full restoration of the equilibrium.

When delict occurs and both the victim and the offender are from the same adat community then the overall ‘well-being’ of the community requires that a remedy be found to restore equilibrium irrespective of whether the victim may have claimed any injury or damage. The village chief is obligated to take any necessary action to remedy the injury or damage to ensure that there is no further weakening of the community and to prevent more serious repercussions from the original act. In this instance the fine that may be payable as a consequence of the delict may be received by

the victim, or by the victim and the community, or just by the community dependent on the offence committed.

In the event that the injury or damage is caused by an outsider or someone within the district community but not of that village, then the relevant district and village chiefs acknowledge the breach and seek to remedy the situation as quickly as possible. Any injury or damage by an outsider will be perceived as an attack not only on the individual but also an attack on the community at large. To ensure that the original delict does not escalate into a viscous circle of reprisals then it is the responsibility of the district and village chiefs to remedy the situation. The most common remedy even during inter-village disputes is to return to a point of acceptable equilibrium and is usually similar to those processes undertaken within the communities themselves to resolve internal delict acts. In the event there is a specifically mandated board or authority to deal with these matters then representatives of each of the communities will appear as individuals on behalf of their respective communities.

Indonesia has numerous Adat laws and each with different characteristics and each with their own particular influence within the Indonesian legal system. Some of these distinct adat characteristics are listed below:

1. the Adat communities of North Sumatra usually follow a patriarchal form of family relationships meaning that inheritance is from father to son(s)
2. the Adat communities of West Sumatra usually follow a matriarchal form of family relationships meaning that inheritance is from mother to daughter(s)
3. the Adat communities of Java usually follow a bilateral system that allows inheritance from both parents.

The unique nature of the adat law system does not prohibit the relevant communities from following or practicing these laws so

long as they are not in conflict with the national system of Indonesian law.

E. CONSTITUTIONAL LAW

One definition of Constitutional Law widely used in Indonesia is that constitutional law is a set of rules that regulate and govern the organization, relationship, and interaction of the institutions of the State both vertically and horizontally. However, an alternative definition often noted in Indonesia is that of Oppenheim and Van Vollenhoven that is constitutional law as the law of States in hiatus mode.

As an organization Indonesia is a Republic based on the sovereignty of its people. The primary goals of the State are:

1. to protect all Indonesian people;
2. to advance the general welfare of the people;
3. to raise educational standards, and
4. to contribute in maintaining world order based on the principles of independence, eternal peace, and social justice.

In order to satisfy these goals the Republic of Indonesia has adopted a basic set of principles known as Pancasila. Pancasila simply means the five principles. These principles are:

1. a belief in one God;
2. a just and civilized humanity;
3. the unity of Indonesia;
4. socialism that is lead by wisdom with conference/representation,
5. social justice for all Indonesians.

All of these basic principles are written in the Preamble of the Constitution.

The Preamble of the Constitution of Indonesia is a part of the Constitution and may be considered with regard to statutory interpretation. Nevertheless, the majority of the substance of the Constitution is contained in the *Batang Tubuh* or the Content. The Content contains a series of provisions which can be said to set out the basic legal norms of the Indonesian community. The first Constitution consisted of just 37 Articles, 2 Additional Provisions, and 2 Transitional Provisions. The Constitution clearly states that it is only the Parliament that may amend the Constitution and sets out very specific rules governing how these amendments are to be enacted.

Constitutional amendment in Indonesia has moved through several distinct and identifiable phases. Initially, the Constitution that was drafted for the purposes of Indonesian independence was introduced and applicable to all the parts of the Netherlands East Indies that came under the auspices of the Indonesian Government on independence. During the period of 27 December 1949 – 17 August 1950 There was a period of change and flux in Indonesia resulting in the Declaration of the Unitary Republic of Indonesia from the previous union and the 1950 Constitution was applied. The 1950 Constitution was an early draft of the new Constitution under development by the *Konstituante*. The application of the 1950 Constitution was temporary as the *Konstituante* was never able to complete the drafting of a new Constitution and in fact was dismissed by former President Sukarno on 5 July 1959 for this failure. The dismissal of the *Konstituante* included the reapplication of the 1945 Constitution.

During the Presidency of President Soeharto any amendment to the Content of the Constitution was expressly forbidden. The Constitution to all intensive purposes had assumed the status of being a 'sacred' text not in need of any amendment. Furthermore, any person that demanded or even suggested that the

Constitution should be amended fell victim to the Soeharto government policy of declaring all opposition or activism for change the enemy of the State that must be eliminated to maintain stability, security, and prosperity. The sacred nature of the Constitutional text ceased on the resignation of Soeharto from the Presidency on 20 May 1998 with the amendments coming at regular intervals. The first amendments were completed in October 1998, the second series of amendments were completed in October 1999, the third series of amendments were completed in October 2000, and the fourth series of amendments were completed in October 2001.

According to the Constitution of Indonesia the State body must at a minimum include the following:

1. *Majelis Permusyawaratan Rakyat* (People's Representative Assembly);
2. *Dewan Perwakilan Rakyat* (House of Representatives);
3. President;
4. Ministers;
5. *Mahkamah Agung* (Supreme Court);
6. *Mahkamah Konstitusi* (Constitutional Court);
7. *Komisi Yudisial* (Judicial Commission);
8. Central Bank;
9. *Dewan Perwakilan Rakyat Daerah* (House of Regional Representatives); and
10. *Pemerintah Daerah* (Regional Government).

If these State bodies are viewed from the perspective of a division of power, then the MPR is a constitutive body, the DPR and the DPD the legislative body, the President, Ministers, Central Bank, and Regional Government is the executive body, and the

Supreme Court, the Constitutional Court, and the Judicial Commission are the judiciary.

The remainder of State bodies and institutions are to be regulated and governed by other types of subsidiary law to the Constitution.

This subsidiary law cannot be classified as a source of constitutional law. However, it is critical to acknowledge that a significant portion of law is related to the establishment and implementation of mechanisms set out in the Constitution. Some of the more significant of these include Law No. 24 of 2003 on the Constitutional Court, Law No. 5 of 2004 on Judicial Power, Law No. 5 of 2004 on the Amendment of Law No. 14 of 1985 on the Supreme Court, Law No. 4 of 1999 on the Organization and Position of the MPR, DPR, and DPRD, Law No. 23 of 2003 on the General Election of the President and Vice President, Law No. 12 of 2003 on the General Election of Members to the DPR, the DPD, and the DPRD, Law No. 31 of 2002 on Political Parties, Law No. 22 of 1999 on Regional Government, Law No. 39 of 1999 on Human Rights, and Law No. 62 of 1958 on Citizenship.

Human Rights in Indonesia are seen to be a set of rights that attach to the nature and existence of human beings as creatures of the one and only God. These human rights must be respected, honored, and protected by the State and its laws, government, and citizen. Several sources of law that play an important role in the protection of human rights in Indonesia are the Second Amendment of the Constitution, particularly Articles 28 A-J, Law No. 39 of 1999 on Human Rights, and Law No. 26 of 2000 on the Human Rights Court.

Indonesian citizenship laws have undergone several phases of development. Prior to the enactment of Law No. 62 of 1958 on Citizenship the principle used to determine nationality in Indonesia was *ius soli* or nationality determined by the place of the individual's birth. This meant that a) all descendants of the Dutch

who were either born in Indonesia or who had been resident for at least the 6 months prior to 27 December 1949 were given the chance to choose to become citizens of the new Republic of Indonesia, b) indigenous Indonesians qualifying or holding Dutch citizenship residing in Indonesia were given the opportunity to assume Indonesian citizenship, and c) Arabs and Chinese resident in Indonesia and who were classified as Dutch citizens in Indonesia were also afforded the opportunity to assume Indonesian citizenship.

This principle of citizenship changed with the enactment of Law No. 62 of 1958 with the introduction of *ius sanguinis* or nationality based on blood relations. However, based on the Sonario-Chou agreement any Chinese descendants of Indonesian citizens have the right to choose and or remain Indonesian citizens. Foreign people may become citizens of Indonesia in either one of two ways; namely, and official request or the State grants citizenship on the grounds of some kind of State interest in doing so or a significant contribution made by the foreign individual to Indonesia.

F. ISLAMIC LAW

Islamic law is often stated to be universal in nature. This is because in part the law constitutes a basic tenet of the religion. Theoretically, Islamic law by its very nature should be applied to Muslims wherever they may reside and irrespective of any nationality they may hold. This is in contrast with National law or the applicable law of individual States regulating and governing the behavior of its citizens.

Islamic law entered Indonesia with traders and emissaries from neighbouring Islamic sultanates and spread peacefully

throughout the archipelago. The Dutch colonial government continued to allow this peaceful spread of Islamic law in Indonesia. Notably the Dutch colonial government even arranged and published a resume (*compendium*) about Islamic marriage law and the Islamic inheritance law that was to be used by the Indonesian court system to resolve disputes among Moslems. Even during the period of British colonial rule this situation did not change as Thomas Raffles stated that the Koran formed the general law of Java.

Islamic law is a law that finds its primary sources to be the *Al-Qur'an* and the *hadist* of the Prophet Muhammad SAW and is referred to as *syari'at*. This law was then developed, enhanced, and refined through *ijtihad* or evaluation and examination by expert scholars of Islamic law. These expert scholars were tasked with interpreting the law based on the teachings of the *Al-Qur'an* and the *hadist*. Aside from the *syari'at*, there is the science of establishing the basic legal norms to be applied to all Muslims from the specific provisions contained in the *Al-Qur'an* and general rules of Islam as set out in the *hadist*. This process gives rise to *Fikih* or the understanding of the law in the *Al-Qur'an* and the *hadist* that is to be applied to all Muslims. This system has seen the creation of five basic norms in the Islamic legal system – *al-ahkam al-khamsah*. The norms are *fard* (obligation), *sunnah* (suggestion), *ja'iz/mubah/ibadah* (allowed), *makruh* (denunciation), and *haram* (prohibition).

The first and the main source of Islamic law is the *Al-Qur'an*. The *Al-Qur'an* is the holy text that contains the written statements of Allah's vision as given to the Prophet Muhammad SAW. According to experts, the *Al-Qur'an* generally consists of matters related to faith, rules governing interaction between people and people with Allah, general behavior, stories of human history, stories of the future, core principles of science including the basic laws of the universe.

The second source of Islamic law is the *Sunnah* or the *Hadists*. The *Hadists* is an authentic interpretation and explanation of the *Al-Qur'an*. These interpretations and explanations are based on the statements, actions, and unspoken behavior of the Prophet Muhammad SAW in spreading Islam. The *Hadists* explains almost all aspects of life that are regulated in the *Al-Qur'an*.

The third source of Islamic law is *Ijtihad*. *Ijtihad* is the human investigation and pursuit of interpretation of the fundamental legal norms contained in the *Al-Qur'an* and the general legal norms of the *Hadists*. This pursuit leads to the formulation of the applicable law. The person who completes the *ijtihad* is called a *mujtahid*. The methods of *ijtihad* are:

1. *Ijma'*

It is the agreed opinion of the experts about a particular problem that has occurred in any one place at any one time.

2. *Qiyas*

It is a legal analogy with respect to a matter that is not clearly regulated in the *Al-Qur'an* by comparing the similarities to other similar matters that are regulated.

3. *Istidal*

A conclusion drawn from two or more different legal systems that regulate the same matter or problem.

4. *Al-masalih al mursalah*

It is finding an acceptable legal norm based on the public interest, public policy, or public order for a matter which has not been regulated in the *Al-Qur'an* or the *Hadists*.

5. *Istihsan*

Law that is made parallel to existing rules of justice and public interests, policy, and order.

6. *Istishab*

Similar to precedent in that it is law that has developed on previous occurrences of the matter that remains in force until such time as there is concurrence in opinion that changes the law.

7. *'Urf*

'Urf is a traditional custom that does not conflict with the principles of Islamic law and it can be applied to all members of a certain community.

Despite there being no sanctions for non-compliance individuals comply with the tenets of the law as part of their faith. The binding power of Islamic law is equivalent to the level of each individual Moslem's faith and subsequent acceptance of the law. Islamic law has a very broad scope and includes not only human interaction with each other and their community (*muammalah*) but also the relationship between people and Allah (*ibadah*). Islamic law is not limited to worldly matters as it also expresses a view of the hereafter.

Islamic law does not differentiate between civil law and public law because it views each as being part of the other. The parts of Islamic law are:

1. *Munakhat* (private law)

This includes marriage and divorce law and the consequences of each.

2. *Wirasah* (inheritance law)

This includes the method by which property is inherited.

3. *Mu'amalah* (trade law)

This includes all matters related to the regulation of property and rights over property with respect to trading, leasing, and other agreements, among others.

4. *Jinayat/'Ukubat* (criminal law)

This includes all criminal regulations where there is a relevant threat of punishment either as determined by the *Al-Qur'an* (*jarimah hudud*) or by the relevant authority (*jarimah ta'zir*).

5. *Al-ahkam as-sulthaniyah* (constitutional law)

This includes the regulation of all matters related to governance such as the Office of the President, Central and Regional government relationships, soldiers, and taxation, among others.

6. *Siyar* (international law)

This includes the regulation of all matters related to war and peace as well as relations between States.

7. *Mukhasamat* (legal proceeding)

This includes the regulation of all matters related to the judiciary and *legal procedure* (*hukum acara*).

In summary the main characteristics of Islamic law are:

1. Part of the religion of Islam;
2. Strong correlation between faith and behavior;
3. Two main sources of law the *syari'at* (Al-Qur'an) and the *fikih* (Hadists),
4. Two primary relationships : *ibadah* (with Allah) and *muamalah* (with other people);
5. Structure: (a) Al-Qur'an, (b) Hadist, and (c) Ijtihad, and (d) Practices,
6. Obligations rather than rights;
7. Universal – applied to all Moslems all over the world;
8. Respect of human values; and
9. Enforcement.