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The Role of Law in Contemporary Indonesia

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Abstract

The lecture opens with an observation on the declining role of law in contemporaneous Indonesia. Conflict resolution tends increasingly to take place outside of socially approved instruments, which in turn undermine credibility. One reason for this is the foreign-ness of present-day law; colonial law became Indonesian law minus relatively small areas specifically relating to the new nation. A contrast with pre-colonial law as reconstructed from pre-colonial Javanese manuscripts emphasizes the enormous differences with the current laws of the Republic. Explanation for these remarkable changes lies in differential impact of colonial authority at different levels of society wrought by cash, during the Dutch East India Company period, and coercion, during that of the Netherlands East Indies. Prognosis for the future suggests that the on-going legal reform will, hopefully, bring the country into closer conformity with its own proclivities.

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The Role of Law in Contemporary Indonesia

At risk of being facetious, the role law in Indonesia can be compared to a lacklustre Division I football club. Its role on the pitch is modest, if not declining, its performance lacks credibility, and to make matters worse it is mostly foreign. Yet no matter how bad it plays or how many red cards are handed out, it cannot be sent down.

Role

Here it must be conceded that law in Indonesia has never played the expected role of furthering civil society. During the era of President Soekarno (1949-66) nation building took precedent over law; during that of his successor President Suharto the state was a law unto itself. The New Order (*Orde Baru*), as the era 1966-98 is called, monopolized interpretation of law, which it exercised in ways benefiting itself. As a half-decade has now passed since Suharto's withdrawal from the presidency, one would expect to see Indonesia enjoying the fruits of civil society. Yet in some respects the 'Reformation Era' is a rerun of the previous two regimes. With the parliamentary elections last month and the presidential ones likely for the next three, the political spectacles of Bung Karno's Indonesia are matched only by un-charismatic political actors and lack of ideology offered voters. At the same time New Order settlement by military power has given way to the phenomena of social conflicts being contested by armed struggles falling outside the instruments provided by civil society.

Decreasing reliance upon socially approved manners of handling legal conflict is disconcerting. Added to it is an increasing dissatisfaction with the judiciary, even on issues that have run the full course of judicial process. Criticism of doing too much is almost as frequent as that of doing too little. A recent example revolves about Prudential Life Assurance, a replay of a similar judicial snafu two years ago, in which the company was declared bankrupt even though it was solvent. A bazaar article in the new bankruptcy law, replacing a Dutch law from 1906, allows the commercial court to declare a company insolvent for unsettled debts, no matter how small. (*Economist* 1 May 2004)¹. Instances of what appear to be judicial malfunction abound. Those brought down on grounds of KKN (corruption, collusion, and nepotism) are more likely to have been done on political than legal grounds;

¹ Annulled by ruling of Supreme Court, 7 June 2004 as was also done in the Manulite Financial Corporation case in 2002 (*Koran Tempo*, 8 June 2004). Editors note.

those freed are for the same reason. In still others legalities are simply ignored as in the case against General Wiranto, who is implicated in Human Rights violations occurring during the May 1998 riots and in East Timor. Even in key issues as terrorism – for which Indonesia has passed draconian and retroactive laws – initiative seems to have passed from the judicial to the political with reference to Haji Abu Bakir Ba'asyir.

Credibility

The declining role of law within Indonesian society tends to undermine credibility in legal institutions as a whole. 'Reformation era' expectations of a civil society, complete with democratization and the rule of law, have been cruelly dashed by realities of post-Suharto political life. Particularly interesting in this respect is how Indonesians themselves have reacted. A survey conducted in Bandung during 2002 invited response to the question, "What is your view of Indonesian law enforcement (*penegakan hukum*).” The answer was that 22.6% believed that Indonesian law enforcement was not yet in agreement with the demands for reform, 25.4% that intervention took place on the part of various parties in Indonesian law enforcement, 26.8% that the law was still on the side of officials and the rich, and 25.2% believed that sometimes that which is true becomes false and that which is false becomes true (*Pikiran Rakyat*, 8 April 2002).

A nation-wide survey a year later conducted by *Kompas* in March 2003 suggested that Indonesian law enforcement's greatest obstacle lay not only in the system of law and public disobedience but even more so in the moral integrity of those enforcing the law. A half-dozen or so cases in the past two years (March 2002-2003) were cited illustrating KKN within the judiciary. In response to the question: "Are you satisfied or dissatisfied with the work of the judges in the High Court (*Mahkama Agung*) in combating the judicial mafia?" the answer was overwhelmingly dissatisfied, 84.5%; with satisfied at 9.2%; and no opinion at 6.3%. For a similar question as the preceding year's *Pikiran Rakyat* survey, "According to your opinion is the condition of law enforcement in Indonesia today good or poor?" the answer was: good 10.7%; bad 86.6%; don't know 2.4%; not answered 0.3%. (*Kompas*, 17 March 2003). Even more recently Prof. Dr. Dewi Fortuna Anwar, deputy chairperson of the Indonesian Institute of Sciences (LIPI) concluded at a recent seminar on upholding the supremacy of law (17/5) that the public's trust in law enforcement officials such as police, prosecutors, and judges was

as low as it had been six years ago before the 'Reformation Era' (*The Jakarta Post*, 18 May 2004).

Foreign-ness

This brings us to the question of foreign-ness. Obviously football players and managers can be imported and exported, but can law? Law as foreign to those under its jurisdiction sounds like a contradiction in terms. In this context it should be noted that 'foreign-ness' operates on different levels. A relative low-level is that witnessed within the European Union. Much of the law of the nations comprising the European Union are rapidly becoming foreign in the sense that they must conform to Brussels' guidelines. For Sweden this loss of sovereignty lies primarily in the alcohol policy and economic support to depopulated regions, but is rapidly spreading to other areas. With reference to Indonesia, the Union's anti-terrorist laws, ratified by Swedish Parliament with what many consider undue haste, raise a more worrying issue. Even the unlikely scenario of Swedish citizens – Hassan di Tiro and his colleagues – falling under draconian anti-terrorist sanctions is a sobering prospect. In any event such contests between national laws and those automatically binding by virtue of belonging to the European Union illustrate the reality of increasing foreign-ness of law.

What distinguishes most the Third World countries is that alienation of law took place involuntarily a century or so ago under the auspicious of foreign European colonialism. The impact on Southeast Asia – including Thailand, which was not formally colonized – is that their legal systems are generally considered as imperfect copies of European models. According to the *International Encyclopaedia of Comparative Law*, Burma/Myanmar, Malaysia, and Thailand belong to the Common Law system, along with the American variant in The Philippines; Vietnam and Laos (as the People's Republic of China) to the Socialist system; and Indonesia to the Continental system, the latter via The Netherlands during the period of the Netherlands East Indies (1816-1942).

This touches upon the issue of history. No danger here. Lund University's Centre of East and Southeast Asian Studies have relegated history to the lowest division. Regardless of this, it seems clear that without a fairly good grasp of history, even that going back a good bit in time, understanding of contemporaneous society is not merely incomplete but erroneous. China and Vietnam obviously have not always been representatives of the Socialist system. Their own legal systems pre-date Marx by give or take a couple of

millennium. The same applies to the older legal systems of Southeast Asia vis-à-vis their younger upstarts from northwest Europe. Indonesia's legal system, at least in Java, had functioned apparently satisfactorily since the ninth century until benched by Dutch colonial law in the course of the eighteenth.

Indonesian Law

The Indonesian legal system is complex because it is a confluence of three distinct systems. ... *adat* law, Dutch colonial law and national law co-exist in modern Indonesia. For example, commercial law is grounded upon the Commercial Code 1847 (*Kitab Undang-Undang Hukum Dagang* or *Wetboek van Koophandel*), a relic of the colonial period. ... Adat law is less conspicuous. However, some adat principles such as 'consensus through decision making' (*musyawarah untuk mufakat*) appear in modern Indonesian legislation (Tabalujan).

Yet if we go beyond such retrospective descriptions to consider functional categories, a convenient point of departure is the contrast between present-day Indonesian law and what can be reconstructed of law on Java in, say, the late seventeenth century. Again history raises its face in the question of terminology. What does one call the period preceding the relatively short colonial era without implying an inevitable period of European dominance? It is probably termed the same as the first year of the 30-Years War. At any rate such a reconstruction has been attempted in Figure 1.

Figure 1.

Laws of the Republic	Laws of Java
<p>Function:</p> <p>decide legal conflicts following set rules of procedure acting in accordance with substantive law</p>	<p>avoid formal legal conflicts through construction of legal typology relegating cases into self-regulating categories with stringent requirements for process and (semi) automatic results.</p>
<p>Instruments: Western-type courts</p>	<p>Javanese concepts: <i>aksara</i>, <i>uger-uger</i>, <i>sloka</i></p>

Type:	
‘continental-inquisitor’ system.	‘no process without (personal)
Prosecutors, judges and police	complaint’
not functionally separate	
Division:	
civil-criminal	<i>padu-pradata</i>
(abstract/absolute division)	(subject law - ruler law)
Source:	
statute, i.e. man-made and thus	law bearers: Jaya Lengcara,
changeable	Surya Alam, Jugal Muda,
	Senopati Jimbun, Arya Dilah
Application:	
ambiguous: national laws v. <i>adat</i>	unambiguous territorial, Laws of
including religious (Islam); after	Java were standard; law = that
2000- <i>Otda</i> = norm shopping	practiced in central courts
Character:	
European transplants in form whose	Authentic Asian law functioning
most striking characteristic is KKN	before European colonial presence

Laws Of Java

For convenience the term ‘Laws of Java’ is used for the laws applicable to the greatest number of the inhabitants of the archipelago, which would in the second half of the twentieth century become the Republic of Indonesia. In a pre-colonial legal context this embraced a considerably larger area than it has come to mean in the interim. The fact that Javanese-language legal sources as stone and copper plate inscriptions and manuscripts written on European, Chinese, and native paper (*dulong*) are found spread from Lampung, south Sumatra, in the west to Bali and Lombok in the east inclines one to think in terms of a common legal culture. The fact that many of the same texts are document able from West Java to Bali, with considerable parallels in the contents of specific legal paragraphs from Banten/Lampung, strengthens the argument for a widespread legal culture employing chancellery Javanese, but not necessarily the idiom of the Central Javanese courts, as the medium of communication. Although occasionally awkward, the term the ‘Laws of Java’ for reasonably consistent body of legal precepts seems preferable to ‘Javanese’.



Robert Cribb and Mason Hoadley, *Concise Historical Atlas of Southeast Asia*. (London:Palgrave, forthcoming 2004).

After the nineteenth century the latter has come to be restricted to the ethno-linguistic region defined by those with Javanese as their native language as opposed to those speaking Malay, Sundanese, Madurese, or Balinese. More problematic, in the late nineteenth and early twentieth centuries what is considered here as the Laws of Java became parts of a half-dozen ‘adat law circles’ (*adatrechtkring*) (Ter Haar). It is the contention here that such represented the effects of different aspects of colonial policy articulating with the Laws of Java to produce recognizable variants.

Character of the Laws of Java

In essence the Laws of Java attempted to establish a hierarchical legal taxonomy. All actions or conditions, including legal response and relevant principles, were formally classified through assignment of a label. The terms and concepts applied for these labels are neither functional, descriptive, nor in most cases mnemonic. Some can be traced back to Old Javanese usage and may have originally derived from Sanskrit legal terminology, although not necessarily its contents. Many definitely do not refer to Indian models. In any event their contents reflect Indonesian rather than Indic concerns. By and large the bulk of these labels are purely local. One whose actions deviate from those expected by authorities becomes a ‘slander of kings’ (*raja wisuna*); one who in all probability had full knowledge of a crime being committed but did

nothing to hinder it or report it to the authorities becomes guilty of ‘crime of silence’ (*mneng menung*), the equivalent of *sapratikah* or ‘one knowing the actions of an evil doer (*durjana*)’, and so on. These sub-categories of individual actions are in turn gathered into a higher order of legal categories as the *sadatatayadi* (The Six Tyrants) or the *asta-dusta* (Eight Thieves). Provisions for punishments are specified under the auspices of the legal authority as defined by the *aksara* – here legal precepts defining crimes and punishment. Additional sanction is given through quotation of a *sloka*, which further gathers diverse acts into more or less standardized legal pigeon-holes (see Hoadley and Hooker 1980, 209 n 1, 212 n 22; and 1986, under ‘*atatayadi*’, ‘*corah*’, ‘*dusta*’, and ‘*sloka*’). The act of classifying and labelling with the appropriate etiquette completed the task of the jurors. Assignment or application of specific punishments, supervision of the actual carrying out of decisions, entertaining possibilities of appeal, or even concern with the relationship existing between law, the legal apparatus, and society were foreign to them. These were duties falling to the lot of the executive authority. In short the ‘judge’ (*jaksa*) acted in much the same way as the Old Swedish ‘law sayer’.

A number of techniques ensured that only a minimal number of cases would come before the jurors. Certain types of cases were simply not acceptable. Some of these were considered anti-social, such as disputes over debts from gambling, a woman’s dowry, *riba* etc. Those falling under the *asta-dusta*, *asta-corah*, and *sadatatayadi* presented no problem as punishment fell more or less automatically under sovereign executive authority. Others were declared invalid at an early state. Most common were technical difficulties within the suit as, for example, the two dozen listed by the text published in Raffles’ *History of Java* (Appendix C) and to a lesser extent repeated in British Library Additional Manuscript 12303 (f. 6v-7v). Existence of any of the listed characteristics automatically invalidated the case. Another large category of some three dozen cases categorized as being of questionable validity, in that ‘... it will be for the *jaksa* to consider and determine when a lawsuit can, and when it cannot, be instituted.’ To these can be added a small number of lawsuits that could be instituted with success, but under stringent circumstances. Yet when all is said and done the most common reason for mustering out cases from formal litigation came from the long lists of conditional *uger-uger* paragraphs. Were ‘any present the case was [automatically] lost.’ If this was not enough there were still stringent requirements on the validity of witnesses, much of this being based more on relative social and/or official status than the presence or absence of knowledge

relevant to the case. The *Jaya Lengkara* states that ‘...for a woman to speak the truth [be a reliable witness] is tantamount to finding a river without bends, a road without curves, or a flower without roots’ (*Pepakem Tjerbon* of 1768, p.39). The important point here is that the texts’ contents served to screen out the majority of possible points of dispute. One assumes that those cases that could not be considered by the legal tribunal would be resolved either by negotiating or, as the last resort, appeal to the central authorities.

Causation

The very starkness of the contrast raises the question as to how it was possible for the Laws of Java became those of the Republic of Indonesia? They would seem to exist in different worlds. A simplistic answer is that the colonial period intervened. While this provides a convenient scapegoat, it fails to explain the foreign-ness of Indonesian laws for the Indonesian people. Explanation resolves about differential impact of colonial authority at different levels of society. For the purposes of analysis two sets of complementary contrasts can be identified, one within society itself and another coming from external stimuli, i.e. European colonialism.

Internal

The first of these contrasts is that obtaining within the society itself. This is between what Redfield has termed the ‘greater’ and ‘lesser’ traditions. On a fairly high level of generalization the traditions distinguish between the realm’s political and ritual center and its outlying parts. Its usefulness lies in its character of relative rather than absolute categorization. It recognizes the superiority of the greater tradition in terms of physical power, social status, and ritual influence without negating the lesser tradition’s contribution to the manner in which these are expressed. Even more important in this context is the reciprocity existing between the two. The lesser tradition imitates the greater tradition but is also looked upon as the source of that tradition. Javaness is not confined to the court (*kraton*), but also flows out of, or is thought to flow out of, the village (*desa*). This is presented in Figure 2.

Figure 2.

Greater Tradition	Lesser Tradition
<ul style="list-style-type: none">- Laws of Java = court law in Java'- law bearer: Jaya Lengcara, Surya Alam, etc.- written texts, therefore fixed- cosmopolitan- general	<ul style="list-style-type: none">law of <i>desa</i> (village) or what 'greater became <i>adat</i>informal, from usage or the ancestorsoral and thus changeableparochial/territorialspecific

Evident here is the fact that the greater tradition - lesser tradition relationship is dynamic one. It changes in response to the alterations experience in every society, albeit at rates depending on the nature of both internal developments and external stimuli.

Colonial Change

This brings us to the second set of contrasts; namely, external v internal. Externally motivated change came about through the activities of Dutch colonialism. To do it justice a thumbnail sketch of the development of Indonesian law under European tutelage is necessary, if for no other reasons than to emphasize the enormous changes taking place.

Indonesian Law under colonial influence

Without going into the details of Indonesia's colonial history – which is taught at Lund University within the author's course on Southeast Asian History 800 AD to the present – one can identify two phases in the exercise of European/Dutch authority. Crucial to the division is the means through which changes were brought about. Roughly corresponding to the period of the Dutch East India Company (1604-1799) and that of the Netherlands East Indies (1816-1942), their methods were respectively **cash** and **coercion**.

Cash = Dutch East India Company

During the eighteenth century the Company created a new economic system, one based on agriculture production of tropical goods for export to the European markets. The goods consisted mostly of non-native crops as indigo, coffee, etc introduced specifically for the profitable export market. To make the system possible certain inflexible demands were made on the local

socioeconomic system. Undisturbed access to land and labor was indispensable for the commercial entrepreneur, the Dutch East India Company. As both were alien to Java, new relations had to be created, such as land ‘ownership’, stable concentrations of population, and motivation for the latter to work the former in order to bring profits to the Company’s owners (Hoadley 1994b and 1994a). Changes did not stop there. For the new socioeconomic order to function profitably, the law had to be adjusted. Such alterations were subsequently institutionalized through the introduction of statute law with assistance of ‘tame’ local potentates. ‘Tame’ is perhaps too strong a word as it implies a moral judgement. What is meant here are that a number of local potentates came to see their own interests served better by the new Dutch-created economic system than the one they had heretofore represented. They simply ‘went modern’. In doing so they set their own resources in terms of control of manpower behind that of the Dutch Company, thus making the new system feasible. For this they were richly rewarded in terms of status, position, and materials goods unimaginable under traditional conditions. Those who did not adapt to the new system went under, thereby disappearing from the power structure (Hoadley 2004, forthcoming).

In terms of the law, this meant that the intent of the law bearers from time immortal, as found in the Laws of Java legal tradition, gave way to Javo-Dutch statute law. In West Java examples of the latter abound as the *Undang Nitih Cirebon* of 1723, the *Layang Ubaya Cirebon* of 1691, and the *Surat Undang-undang Cirebon* of 1721 (Hoadley and Hooker, 1980, pp. 258-69). For the former the Mataram Empire divided by the Treaty of Gianti in 1755, the whole genre of the *angger-angger* can be seen as Javo-Dutch creations. All had more in common with Dutch East India Company statute law than the preceding Laws of Java. We can summarize the results through a modification of Figure 1 earlier used to contrast the Laws of the Republic with the Laws of Java. Additions are indicated in bold script, deletions in strikethrough.

[Laws of the Republic]	Laws of Java
Javo-Dutch Laws	
Function: yes, first steps	
decide legal conflicts following set rules of procedure acting in accordance with substantive law	avoid formal legal conflicts through construction of legal typology relegating cases into self-regulation

~~categories with stringent requirements for process and (semi) automatic results.~~

Instruments: Western-type courts
Residents Court at Cirebon
Semarang Landraad

~~Categories: aksara, uger-uger, sloka~~

Type: **no, Dutch still under Old Dutch law**
'continental-inquisitor' system.
Prosecutor, judges, and police not functionally separate

modified: 'natives' = 'no process without (personal) complaint'
+ **state initiative for Dutch-defined 'crimes'**

Division: **yes, recognized by Dutch-influenced courts**
civil-criminal (abstract/absolute division)

~~padu-pradata (subject law – ruler law)~~

Source: **yes, Javo-Dutch Statute replaces lawgivers**
statute law, i.e. man-made and changeable

~~law bearers: Jaya Lenggara, Surya Alam, Jugal Muda, Senopati Jimbun, Arya Dilah~~

Application: **yes, beginnings of personal laws and Islamic courts**
ambiguous: national laws v *adat*, including religious (Islam), after 2000 = *Otda*

~~unambiguous territorial, Laws of Java were standard; law = central courts~~

To the extent that the argument holds, cash liberally distributed, was a more potent instrument for legal and socioeconomic change than the coercion utilized during the succeeding period of direct colonial rule. The Company, a form of joint stock company, made the break through; the colony of the Netherlands East Indies merely dotted the 'i's and crossed the 't's.

Coercion = Dutch under the Netherlands East Indies

Through the course of events totally outside of Java, the Dutch, now under a monarch, received the island back in 1816 as part of the attempt to restore the status quo in Europe following the Napoleonic wars. The aim of government over the newly created Netherlands East India colony was to gain as much

profit as possible as quickly as possible. Explanation for undue interest in exploiting the region is to be found in Dutch financial embarrassment. The country was broke. The immediate cause was the enormous expenditures entailed in putting down the rebellion led by Pangeran Dipanagara, one exacerbated by the revolt of Belgium. Granted the end of the Java War of 1825-30 found the Dutch as masters of the island. Their political and military hegemony would never again be challenged as all potential contenders were silenced, exiled, or under the threat of both. Yet this was cold comfort to the Dutch crown. Not only was it unable to reap any profits from the island but also it had gone into debt in acquiring factual control over the possession restored by the Congress of Vienna. What they needed was a foolproof scheme to recoup their losses. The key to their fortunes was supplied by the British, namely the application of the (alien) concept that the sovereign is the direct and absolute master of all land.

These 'ownership' rights, supplemented by the means to enforce it in the form the standing army recruited for the Java War, provided the instruments for the enormous prosperity of the colony's masters. On the assumption that the sovereign owned all land, alienation to cultivators such as direct producers, speculators, plantations, etc must be accompanied by some sort of reciprocity in the form of taxes in cash, kind, or labor. In essence what the Dutch did was to commute the cultivators' debt for use of the sovereign's land into a work obligation. This in turn was used to force direct producers to cultivate crops specified by the landlord on his own fields and subsequently to assist in their processing. All proceeds went to the landlord, i.e. the Dutch crown. Most commonly this system was applied to sugar cane. In retrospect the scheme was a very lucrative one. Within a few years not only did it repay earlier debts but also filled the coffers of the Dutch government at home. It also altered fundamentally the legal system.

Cultivation System Administration

For convenience the new economic system based on Javanese obligations to work their own fields in order to provide crops for their overlords is termed the Cultivation System. The system was run by a rule of men not law. An alternative description of the system from the point of view of justice for the period 1816-54 was expressed by Logeman as a 'police state' while Fasseur adds that '[O]ne looks in vain, for instance, for a statute creating and defining the famous Cultivation System though statutes will help in indicating what the government hoped to have happen at any given time' (van Niel 1992, 87, 89). More important here, there are no indications of how disputes between state and subjects and among subjects were to be settled or on what basis. This

is a particularly striking oversight during a period in which enormous changes were taking place in the economy.

Having broached the power of Indonesian law, more specifically the Laws of Java, via attractions of the Company system, the next step was to rule via statutes promulgated by the sovereign. After 1848 this was the Dutch parliament. In principle the various statutes were brought together in a unified whole as a constitution (the *Regeringsreglement* of 1854). This was, however, not without problems as the irony of history came into play. The Dutch colonizers themselves were law-less during the second quarter of the nineteenth century in the sense that they were in the process of building a nation via a constitution for the newly created Kingdom of the Netherlands. Uncertainty concerning their own constitution delayed plans for one for the Indies. Even more problematic was the great debate over whether to apply Dutch law to the colony as a whole, or alternatively to create a single code from existing ones applying in different parts of the colony. Arguments for the latter were found in administrative expediency grounded on the parallel of the unification of law in the kingdom of the Netherlands. If the differing laws of the 'Germanic' provinces of Groningen, Drente, Overijssel, Guelderland, those from the maritime provinces of Holland and Zeeland, the city-state of Amsterdam, and the Bishopric of Utrecht could be amalgamated into a single body of civil law and integrated with the Napoleonic code with regard to criminal law, then in theory the same could be done in the Indies. That is, the prevailing Javo-Dutch laws could be replaced by a unified code applicable equally to all those residing in what would become Indonesia. Most legal scholars are now in agreement that such a legal unity would have provided a far better starting point for the laws of the Republic than that actually received.

On the other side were ranged the economic interests of the Cultivation System which wished to continue the legal status quo. This was a continuation of the Company 'let be' system given a rational form in the 'duality principle', the cornerstone of the apartheid-like system of the Dutch colony. Europeans were to be under European law, 'natives' under 'native' law. A third group consisting of 'foreign orientals' was officially recognized in 1920. In principle their position was equivalent to that of the Europeans plus their own set of personal laws in the areas of marriage, the family, and inheritance. The understanding was that its own laws and customs would exclusively serve each legal ethnic group.

Perhaps the best-known example of how bazaar the system could be is found in Pramoedya Ananta Toer's novel *This Earth of Mankind* (*Bumi*

Manusia). The Eurasian heroine is taken from her husband, Minke, and shipped off to Holland where she dies, all because her father, a besotted Dutchman, had acknowledged paternity. Legally she was 'Dutch'. Unmarried Dutch women at this time were under the authority of the male next-of-kin, so she could not be married to an Indonesian. Her mother, who had no authority over her 'European' daughter, was guilty of immorality in encouraging her to co-habit with a 'native.' The exception to this multiple-ethnic system – whose most characteristic feature was to decide who was what for the purposes of litigation – was criminal law. It applied equally all inhabitants in the Indies.

More telling was that a number of high Dutch officials in the Indies argued that the applying Dutch law to the colony would require large administrative expenditures (see Ball 1982, 197ff, esp. 214, 218-220). As the existing Dutch administration was already overworked and understaffed and a miserly colonial office was unlikely to grant further funding, any extra demands would have had to be made at the expense of ensuring the proper functioning of the Cultivation System. This would bring about a risk of diminishing its returns, which was in no one's interest. The state was not willing to forgo revenues. Neither were the administrators, Dutch and Javanese alike, who received a percentage of the profits, the 'Cultivation Percentages' as a further incentive for seeing to it that the Cultivation System functioned profitably. However this was not the only reason for deciding not to extend Dutch law to the inhabitants of Java. There were a number of features of the Cultivation System that would not pass muster seen from the point of view of Dutch law. Among others the principle of sovereign domain, the assignment of tasks and rewards by village, and the quantity of work demanded for rent would be questioned in a European court of law. 'Natives' with knowledge of Dutch law could be a fly in the ointment of the smooth functioning of the money machine the Cultivation System had become.

The Constitution of 1854 marks a turning point in the development of Javanese/Indonesian substantive law. Marks rather than constitutes, because it merely recognized and hence gave sanction to the system which had de facto cropped up during the post-1816 period. Herein is found one of many inconsistencies in Dutch legislation with regard to Java. This is between the clause invalidating '... all laws, customs, regulations, and all written and unwritten law then in force' [that is before 1854] and the clause that for '...natives or other persons equated with them'... 'their religious laws, institutions, and customs are to remain in force' (*Ibid.* 110). Developments here seemed to be moving simultaneously in two directions.

With the ultimate elimination of Laws of Java and the Javo-Dutch statute law, which had applied almost exclusively to the greater tradition, the Javanese legal component at the highest level of society was greatly reduced. Those members of Javanese society who represented the greater tradition, the *priyayi*, were 're-feudalized' (in fact feudalized) in such a manner as to render them most serviceable for supporting the Cultivation System. Specific examples are seen in Dutch guaranteeing them inheritable official positions, the *hormat* or excessive honors that had to be shown them on occasion of public gatherings, and their being allowed to extract personal services from the population at large as the natural 'native chiefs'. Even within the area of customs, to the extent that they applied to the greater tradition, they were made conditional. The 'as long as they are acceptable' clause as the *sine qua non* of all local laws acted to further reduce this area. It rejected all provisions not acceptable as determined solely by Dutch legal sensibilities, established of Dutch 'ideals' to which upwardly mobile *priyayi* aspired and against which their level of civilization was measured, and provided exemplary pressure as a result of socialization with Dutch-Indies contacts both within the official sphere and on the informal plan. Whatever was intended by the Constitution of 1854, little or no 'custom' (*adat*) remained in the Javanese greater tradition. They had become creations of the Cultivation System.

More directly counterproductive via inconsistencies was the situation in the lesser tradition or what would become the village sphere. On the one hand, the scope of that tradition was reduced. Criminal law deriving from European models was applied universally, Dutch law in civil and commercial affairs acted as instruments of 'Europeanization' of justice, and external religious rules stemming from Islam, Christianity, and Hindu-Buddhism further reduced the scope of the lesser tradition. Simultaneously the scope of the lesser tradition was formally increased. Custom (*adat*) was formally recognized as applying in all areas not specifically covered by the rules and regulations of the Netherlands East Indies. To put it the other way around, the (*adat*) became the lesser tradition minus specific Dutch impositions.

In courts of the first instance as district courts, the Dutch or indigenous judge applied (*adat*) principles to specific cases. However any appeal to higher courts reviewing cases – all presided over by Europeans – meant that *adat* became the *adatrecht*, a form of statutory law. In this respect the discovery of *adat* by van Vollenhoven and his disciples was simultaneous with its 'statute-ization'. To this came the influence of precedent. Although not automatically binding, as in the Common Law system of England or the United States, it was natural for newly arrived Dutch officials to refer to how similar cases had

been settled. This not only facilitated their task but also fulfilled basic judicial demands of consistency and predictability. The ‘discovery’ plus formal utilization in judgments resulted in freezing *adat* into a precedent, which tended to become (statute) law, thus complementing Dutch East Indies regulations.

Putting together the two sets of contrasts at the end of the colonial period gives Figure 3 (reproduced from Hoadley 2002).

Figure 3.

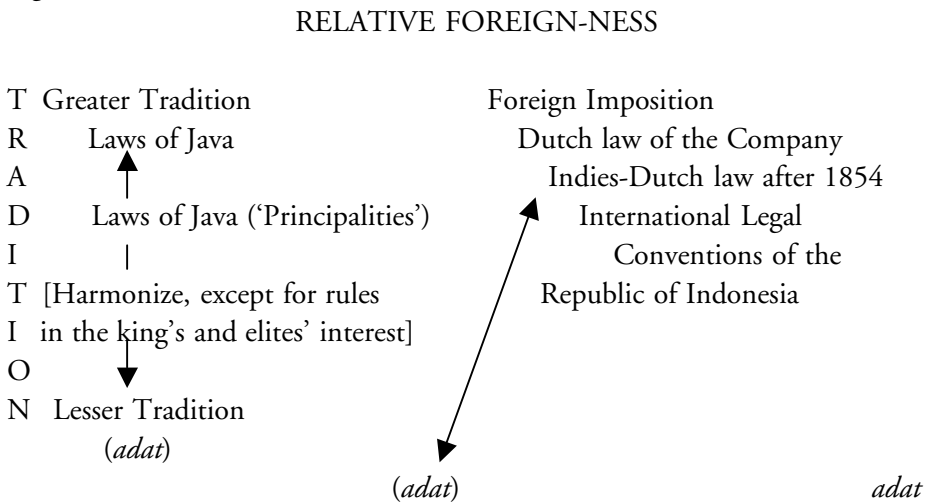


Figure 3 illustrates a couple of important points. The first of these is that the meeting of foreign and indigenous legal principles took place within the greater tradition. The Dutch chose to work through the local rulers as the most effective manner of achieving their objectives, often to the point of artificially supporting chosen potentates. The engagement led to incorporation of Dutch governmental principles within the Javanese legal context. In a relatively short period the Laws of Java were subsumed under those of the Dutch East India Company. Any compromise the Company had been willing to make was definitely stopped by the police-like state during the Cultivation System era ushering in the Netherlands East Indies. The artificial situation of the ‘Native States’ or ‘Principalities’ was allowed to continue in a small area of South Central Java until 1945 and its incorporation within the Republic of Indonesia.

With regard to the interrelationship obtaining between the greater and lesser traditions the table is equally illustrative. Under normal circumstances the two

traditions influence one another. The reasonably normal exception exists in the fact that the interests of king and the ruling elite always take precedent over local ones at the village level. This applied especially to matters concerning land and labor, which automatically became questions for the central court. Control over the means of production was a court prerogative; hence all intra-village issues by definition became intra-elite contests and were settled at the central level under the auspices of the greater tradition (Carey & Hoadley 2000, 435-446, esp. 443-44). Other than these types of issues and those of law and order for the realm as a whole, disputes at the level of the lesser tradition must have been settled locally in accordance with tradition.

In Figure 3 local custom or *adat* representing the situation prior to the twentieth century are given in parenthesis. This is done to indicate that this area of legal studies is an unknown area for modern scholarship. It will most likely remain so due to lack of reliable sources. More problematic is the middle '(*adat*)'. The parenthesis again marks our ignorance on the subject. The problematic side comes from the fact that in reformulating the laws that would apply in the Dutch East Indies after the middle of the nineteenth century, the Dutch government consciously chose to raise the (*adat*) to a part of the colony's formal laws by expressly recognizing their validity in areas not covered by the Constitution of 1854. This contrasted to the reverse situation in Holland. There in 1848 all the local, medieval, and city laws were abolished in favor of a unified code applicable throughout the kingdom. Just to make things more complicated the 'adat' referred to by scholars of Indonesia was 'discovered' by van Vollenhoven almost a half century after the 1854 constitution (See Holleman 1981, I-lviii). As we have no way of knowing whether the (*adat*) of the company period was the same or nearly so as that of the colony or that of the early twentieth century when it was studied, they have been put at different levels in the table.

Republic of Indonesia

When it comes to the legal system of the Republic, it can be observed that its founders were split. On the one side there were those who extolled the virtues of the customary village ideal in which life was ordered by the immortal *adat*, which have been dubbed 'Romantics'. On the other side were the 'Positivists' who were orientated to formal legality (Bourchier 1999). More important the early Indonesian leaders were inconsistent in their choice between them. This is nowhere better illustrated than in the contents of the *Undang-Undang Dasar 1945*. Certain paragraphs envisage the state in positivist terms as a

hierarchy of laws (Governmental Order no. 2 of 10 October 1945). Others, as Article 33, argued for a more *teori integralistik* in which the communal principles underlying *adat* came to the fore. Still other paragraphs have both. For example Art. 2 specifies that parliamentary decisions are to be made on the basis of western-style voting, yet retains the expressed provision for *musyawarah* (deliberation) a la the village writ large. Soekarno himself tended to swing from one to the other depending upon his personal reading of the situation and his own experiences. Obviously detention by the Dutch, which was completely legal within the context of the Dutch East Indies, did not endear him to the ideas of the *rechtsstaat* with its binding rules. On the other hand, experiences with the Japanese excesses following the (national) romantic ideals likewise cooled enthusiasm for the Historical/romantic school. Similar swings can also be marked in the implementation of the new constitution of 1950 and the subsequent return to the 1945 Constitution in 1959 simultaneous with the launching 'Guided Democracy.' This probably explains the fact that only two years ago did Indonesia officially proclaimed itself to be a *rechtsstaat* via re-writing of the constitution, specifically Article 1:3 which reads: 'The Indonesian State is a state ruled by law (*negara hukum*)'. For the first half century it was only terms such by Supomo. It was neither binding under constitutional law nor observed in practice.

Under the New Order it was no longer a matter of swings between Romanticism v. Positivism, but an opportunistic mixture of both depending on the interests of the political and economic elite. Indonesia's lip service to being a *rechtsstaat* was further belied by its proclaimed *Panca Sila* basis stemming from its Indonesian historical/romantic ideas. Elements of the *adat* were specifically allowed. Yet when they stood in the way of development, as in conflict with western-style ownership rights and unlimited access to natural resources, they were ignored in favor of the exigencies of the developmental state. Perhaps best known of these mixtures is again Article 33, which seems to raise the fundamental village principles of family-ness, co-operative economy, social equality, and community responsibility to the constitutional level. At the same time it places the country's natural resources under the disposal of the state apparatus without reference to indigenous ownership rules (*adat*) or access to society's commonly held goods. Access to the means of production is governed by the positive rules of the *rechtsstaat*.

Future

The question remains as to what the future holds. In addition to death, tide, and taxes, one of the most certain developments will be increasing foreign elements in Indonesian law along the EU/globalization. So much seems obvious. Yet before turning to a 'the East is East and the West is west and if the twain shall meet', it behoves us to at least consider the possibilities of a resurgence of Indonesian-centric law.

Otda (*Otonomi daerah* = local autonomy)

As we have seen, colonial law had supplanted Laws of Java at the level of the greater tradition. Furthermore these had been accepted en masse as valid laws in the Republic subject only to repeal by specific legislation. A half century later a surprising amount of Dutch law remains in effect – possibly over half. Whatever the case, their replacement is primarily by more modern international laws, in short up-dates of European law. On the level of the lesser tradition the *adat* has survived, at least on paper. These were, however, considerably modified by articulation with the Dutch greater tradition during colonial times, Indonesian ambivalence during the Soekarno period, and by being either ignored or re-written by the New Order during the Suharno period.

Stemming from a desire to bring democracy to the people, the 'Reformation era' has made possible resuscitation of local laws and customs. This has come about through the decentralization attempts of 1999 (in force 2000) produced by Governmental Regulations 22 and 25. The measures allow regional and local government considerable freedom to order their own affairs. One of the most natural reactions to this freedom from the heavy hand of Jakarta over the last three decades is 'let us be more us', 'us Sundanese', 'us Minangkabau', 'us Acehenese' 'Balinese', Javanese, etc. What distinguishes 'us' from 'them' is custom or *adat*. Despite this, and outside of appealing to the *Adatrecht* Institute in Leiden for help in finding their own traditions, local identity in terms of defunct *adat* has proved to be a non-starter. More to the point, local empowerment via decentralization was aimed at modern, non-*adat* spheres of public life. Such measures revolve about improvements in infrastructure, granting of concessions, issuing licenses, and awarding contracts. Not infrequently this came into direct conflict with the *adat*. The most obvious was in exploiting for private gain or the common weal local natural resources of forests, oil reserves, etc over which the *adat* community is supposed to have

sole rights of avail. In fact the return of *adat* possibilities has manifested itself almost solely in religious issues, i.e. Islam, to which we can now turn.

Islam

The second certain trend of the future is that Islam will play a much larger role in Indonesian society than has been the case to present. On the one hand, Islam constitutes an element as foreign to Indonesian law as that stemming from European sources. On the literal level the dictates of the *Sharia* are no more indigenous than Roman or Cannon law were to the indigenous laws of Holland or Sweden even while they still professed the Catholic faith, which has been some time ago. On the other hand, it is just within local customs (*adat*) that Islamic elements, including implementation of the *Sharia*, have been most successful. Aceh, now ruled by *Sharia* is a case and point. What has been changing is that introduction of Islamic forms of law have become less dependent upon riding the shirttail of local custom, which have been at least formally protected under Indonesia law. Demands are increasingly heard for Islamic law as a guide for Muslims. That is, a foreign 'ought to be' law is seen as an instrument for bringing about desired change in the 'what is' of existing conditions.

While a modern of the Nahdlatul Ulama type of Islam will undoubtedly be an increasingly important source of inspiration and identity in Indonesian life, it is unlikely that this will be reflected in the nation's laws or regulations. That *sharia* is not always seen as coterminous with justice has been pointed out in public debate in Indonesia. The example often cited is that of Aceh where the *sharia* court was inaugurated by Public Law no.11 of 2003. Yet as pointed out by Muslim organizations themselves there has been little change in justice, people's welfare, or corruption (*The Jakarta Post*, 17 march 2003). In any event it has not lead to the meaning of justice in the Koranic sense:

Lo! Allah enjoineeth justice (*adl*), and kindness (*ihsan*), and giving (of your wealth) to kinsfolk, and forbiddeth lewdness and abomination and wickedness. He exhorteth you in order that ye may take heed.
(*Sura XVI: an-Nahl: 90*)

A more likely scenario is some sort of rewriting of national law to bring the on-going project of Indonesian nation building into better harmony with Indonesian sensitivities. An example of this eclecticism is already found in the national laws on marriage imposing Indonesian limits of acceptable behavior without negating the provisions of the *Sharia*. That this in-between form

indeed reflects local ideas can be seen in the negative reaction to revelations that predominant public figures have more than one wife. Another example of such eclecticism can be seen in the non-interest banking forms, which have greatly increased in popularity. Much of this spirit is captured in a recent book entitled *Eklektisme Hukum Nasional*.

West via economic power

How about foreign elements from the West? Given the fact that Indonesia is one of the world's great debtor nations, resisting demands of international world should be well nigh impossible. Indonesia is dependent upon the credit of the world finances just to roll over the interest on the staggering loans contracted in the past. Kwik Gian Gie – former Coordinating Minister for Economic Affairs and now chef for the National Planning Board – has warned that if Indonesia applied all its state income to the national debt, thus without any public services, then it might still take a century or so to pay them off (*Kompas*, 10 August 1998).

Yet despite the apparent power of international demands, Indonesia can and does make decisions against these interests. The Prudential decision mentioned earlier, to which many could be added, exemplifies this possibility, as does the collective dragging of heels in selling off the debt-ridden companies resulting from the economic crash of 1997/98. The fact that some years have passed since then has led observers to question Indonesia's real intentions. What this means is that despite creditor nations' seemingly unlimited potential for putting pressure on Indonesian to conform to international practice as Commercial Law, Human Rights, and furtherance of civil society, these are in practice limited. The unlikely scenario of Indonesian defaulting on her debts – with considerable losses for numerous Western financial institutions – guarantees that everyone supports the *status quo* or glacial-speed reforms.

Most affected here would seem to be the very modest progress within the field of Human Rights, under the suggestive acronym HAM in Indonesian. Indonesian rights groups have been quite active, but how much progress has actually been made is open to question. A recent court decision in May 2004 convicting some three dozen officials of West Sumatra for KKN has surprised most Indonesians, as well as outside observers, as much as the defendants themselves. This says a great deal about trust in judicial institutions, including Human Rights. President Megawati Sukarnoputri reminded the Indonesian armed forces (TNI) last year that in dealing with the Aceh insurgency only Indonesian law governed military action, regardless of what Human Rights

conventions say. Moreover the fact that one of her leading rivals, General Wiranto, who is the presidential candidate of the largest party in the new parliament ($\pm 23\%$), was to a certain degree responsible for the excesses of the May 1998 riots and even more clearly so with regard to human rights violations in East Timor. This tends to increase scepticism concerning the Republic's commitment to a rule of law, at least on Western terms. Even the front-runner for president, Susilo Bambang Yudhoyono, was also a general of the Suharto era. Hence his own role in the 1998 riots needs clarification as he was responsible for territorial security at the time and has been pointed out by Wiranto as bearing some responsibility for what happened.

Conclusion

It has been argued here that one of the problems of Indonesian law is its foreign-ness. It is a hopeless mixture of *adat*, colonial prescriptions, and New Order regulations. To this comes the selective use of *sharia*. These features constitute a negative or inverted variant of more normative relations existing between law and its observation. In studying contemporaneous society one tends to equate the existence of civil society with the rule of law, the assumption being that law to a great extent is self-enforcing.

[F]rom the point of view of legal duties [is that] the citizen should feel himself committed to compliance, not merely in a formal manner because he is within the jurisdiction of the law, nor solely because he fears that a breach of his duty will bring punishment upon himself, but because the rule of law itself is a vital part of the social morality of his community. (Lloyd, 310).

Does the heretofore foreign-ness of law to Indonesian subjected to it make compliance less likely? Put the other about, does its lack of 'indigenous-ness' undermine motivation for citizens to internalize the laws and thus obey them out of conviction rather than state coercion? The answer is crucial to the future of law in Indonesia. A positive answer to the latter question would argue for a stronger, not weaker, centralized state, one that may or may not conform to Western expectations of civil society. A positive answer to the former question would suggest that increased national legislation should work to remove this obstacle to compliance with the law. Herein lies the positive note on which I should like to end. Substantive law reforms of the type now in progress will, I am convinced, lead to a law more in step with Indonesian

society. This in turn should bring Indonesia closer to a law, which is to a great extent self-regulating. After all Swedes are generally more law-abiding than most, at least according to Transparency International. This is certainly not because they are by nature honest, but because since Gustaf Vasa's time they have had a lot more indigenous laws to abide by.

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