

## **LAW TO OVERCOME LEGAL CONFLICTS AMONG THE ADAT, ISLAMIC AND WESTERN LAWS IN FORCE IN INDONESIA**

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First of all, I would like to express my gratitude for this great opportunity afforded me to present this short paper in order to give you, in a simple and popular manner, a glimpse of how Indonesia settles legal problems that arise among several legal systems held equally valid in that country today.

Also, I would like to apologize for some deficiencies and weaknesses in this paper's content or in its presentation. These can be attributed to the lack of time given me to prepare this paper and because of this lack, I found it almost impossible to document my references by including here the exact Act numbers, various Government decisions, regulations and so on, and their dates of effectiveness. Thus I must admit that this short presentation cannot classify as a "scientifically" prepared work.

I believe that in order to discuss this topic, it would be proper for me to begin by presenting to you a short introduction on the development of a legal system that strictly cannot be separated from the historical progress of the region or country in which this system is enforced. I am speaking of the legal system that is valid in the national territory of the Republic of Indonesia today. This legal system arose from several historical stages, each stage having its own, peculiar characteristics.

The existence of kingdoms, large and small, in many Indonesian regions of the past is well known. Foreign influences, such as culture, religion, as well as the legal systems from other countries did not then have opportunity to penetrate these kingdoms. Each of them had its own authority within its jurisdiction. The people — or peoples — were composed, as they still are, of many ethnic groups, each having its own individual, cultural and unique mode of living. After a

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while, foreign influences arrived and penetrated these societies. There was felt the cultural influences from the Hindu, Islam and other religions and beliefs. After that period, there also began the arrival of European peoples, foremost among whom were the Dutch. Their purpose in coming to Indonesia was, in the beginning, trade and commerce. However, when the Dutch became powerful, they formed in Indonesia a colonial government, which was in power for several centuries. Moreover, it was during the said rule that the Dutch was successful in giving laws which naturally originated from the west.

The Japanese occupation, which lasted about three and a half years, had no direct bearing on the legal development in Indonesia. However, since the proclamation of the Indonesian Independence on August 17, 1945 and in accordance with Article II of the Transitory Regulations of the 1945 Constitution, the validity of the Laws that existed in the past was recognized.

I have already mentioned that long before the coming of the Europeans, particularly the Dutch, there were found many large and small *governments* among a number of ethnic and cultural groups in the various regions of Indonesia. These groups followed traditional patterns and some of them followed legal norms similar to those now found in our world's laws. These norms regulated conduct in the communities. They contained prohibitions and commands and provisions against violation. It would probably be proper to label such norms as "Adat laws."

Many Adat laws are found in as many regions in Indonesia. Each has its own unique traits created, accepted and obeyed by the people of the community from one generation to the next. Indeed, the study and the examination of the Adat laws in Indonesia — a country which consists of thousands and thousands of islands and has a population of over 120 million people, with a large number of ethnic groups — is a very interesting endeavor. Mainly, the interest is in the large number of variety by which these laws are manifested. For instance, one can observe that an Adat law valid in the region, say, of Minangkabau is different from that found in Aceh, and different from that found in Java, and still different from that obeyed by people in Maluku, and so on.

The Adat is a law that sprang from the legal consciousness of the community, a law that is not written or codified. As to why, up to the present, it is a law that is not written can be explained, among

others, by the following reasons:

First, the codification of the Adat law can result in the obscurity of the spirit of the law itself, by rendering it less flexible in accommodating changes that occur in the community. Of course, on the other hand, without the written form, an Adat law can lead to apprehensions over the absence of certainty as to how the law may be interpreted and handled by authorities.

Also a complex form of law, the Adat Law possesses a deep philosophy and contains similes needing qualitative interpretation. As such, it requires someone with a definite expertise, who can understand, appreciate, and interpret it correctly before it can be applied in conventional "modern" legal practice. Because of this difficulty, there are several regions in Indonesia that acknowledge the existence of an Adat assembly, which consists of respected citizens who are viewed by the local community as wise and just, possessed of knowledge and esteemed capable of giving advice, deciding on and settling Adat problems of the region concerned. Recently, the Government also created an Adat court and autonomous courts in several regions. However, with the enactment of laws (Emergency Act No. 1, year 1951) that supervise existing legal bodies throughout Indonesia, the said courts have been abolished gradually. For example, the Decree of the Minister of Justice, No. Y.S. 4/8/16, dated March 19, 1952, abolished the autonomous court in Bali. Again, the Decree of the Minister of Justice No. 4/3/17, dated August 21, 1951, did away with the autonomous and Adat courts throughout the Province of Sulawesi, and so on. Since then, all cases involving Adat law are being handled by normal court procedures, that is, through the National lower courts, the Court of Appeal and the Supreme Court.

It is well known that culture and religion and even the Laws derived from the West have great influence on the local Adat Law. For example, the influence of Islam, the religion embraced by a majority of the population of Indonesia, is vastly felt, such that in several Adat regions Islamic Law appears to dominate over the Adat Law. In Aceh, for instance, marriage ceremonies, settlements of inheritance, and other matters are administered in accordance with Islamic Law. Because of mutual tolerance and cooperation, the Adat Law can exist side by side with Islamic Law, although there are some unwritten regulations and guides showing how to settle problems that occur between the Adat and Islamic laws.

Although the Adat has been greatly influenced by Islamic Law, consistent with the legal consciousness of the majority of the population, the Adat in Indonesia is not identical with Islamic Law. Also, not all Adat customs of the local inhabitants can be construed as Adat law. Oftentimes, a confusion arises over the difference in meaning between customs which form the laws and customs which are legalized. This resulted in the haziness of the Adat and Islamic laws. Moreover, in the relationship between the Adat and Islamic laws, it must be recognized that Islamic law is accepted by people as part of the local custom; in some areas, Islamic law has even been integrated into the local Adat law, the sources being the Holy Quran, Hadis and Sunnah Nabi, which helps settle public and private legal problems, consistent with the legal convictions of the majority of the inhabitants. Naturally, because a greater part of the Adat community in Indonesia embrace Islam, not many legal conflicts are found between the Adat Law and the Islamic Law.

The significance of Islamic Law has reached such a stage for the people of Indonesia that the Government deemed it necessary to continue to protect the validity of Religious (Islam) Courts which, according to Government law, are entitled to try particular matters involving marriage, divorce, inheritance and other cases based on Islamic Law (Government Regulation No. 45, year 1957, Gazette No. 99, Year 1957).

That Adat Law originated from the legal consciousness of the local community is well known, and such a law can be said to have started from "below." Needless to say, this law is different from the western law brought by the Dutch to Indonesia which was just enforced on the people. Among these laws were Constitutional Law, Criminal Law, Civil Law, Commercial Law and other laws as well as Colonial Government Regulations. I would like to mention here that the Criminal and Civil Laws were copied from the Penal and Civil Codes of France, which had been evidently valid in the Netherlands when it was governed by France during the reign of Emperor Napoleon Bonaparte. In the compilation of the Laws that were made enforceable in Indonesia then, the "Principle of Concordance" was used, meaning the principle of adjusting the contents of the colonial laws with the laws which were then valid in the Indonesian region.

Strictly speaking, the Dutch government did not close its eyes to the fact that before its coming there existed a solid legal system (the Adat and Islamic laws, that was obeyed by a large majority of

the people of Indonesia. It was also evident that the legal subjects of Indonesia consisted of several population groups, like the Dutch/European group (a population with a familiar legal system similar to the Western Legal System), the Oriental group other than the Chinese, the Chinese, and the aborigines. In enforcing the colonial laws, it was not possible to render equal treatment for all the groups because of the varied interests of each, foremost of which was the interest of the Colonial Government of that period.

The heroic Dutch saviours of the Adat Law who could be considered as "Orientalists" were Professors Ter Haar and Van Vollenhoven, together with the perseverance of Indonesian legal luminaries like Professors Supomo, Hazairin, and Joyodiguno, who delved into and maintained the validity of the Adat law. Their contention was that the Adat law which come from long ago is entitled to exist normally and hold an equal rank with the law that originated in the West.

A legal decision, based on the principle of "equalization of levels" between Western law and the Adat law was made by the Dutch government for its colonized areas in Indonesia. This means that the legal status of both had been made equal so long as this equality did not disrupt public order. Furthermore, the colonists divided the populace into groups which obeyed the western law and groups which obeyed the Adat. Such a decision was published in the "Law Governing the Civic Affairs of the Dutch East Indies" (Gazette No. 447, Year 1925) and "General Decisions on the Laws of Indonesia," dated April 30, 1847.

Aside from the obvious political purposes it exhibited in its discretion to divide the populace into groups, the Dutch Colonial Government showed also how careful it had been in its action towards the Adat law. The decisions on the Adat which were appended into the written laws were made flexible. In order for the Adat to assume realistic legal functions (the legality being subordinate to the Adat Law and to religion), the aboriginal groups were given opportunities to voluntarily surrender to the Western law.

In practice, conflicts or contradictions oftentimes arise among the Adat, religious and western Laws. Contradictions can even be found among population groups that obey other laws. However, it is rather fortunate that several articles in the laws or regulations which were issued by the Dutch Government gave instructions on which law to apply under what circumstances, in order to settle legal

incidents which internally involve conflicts among many existing laws in the locality. Thus "the law within the legal system" consisted of guiding decisions.

I would like to add that there are unwritten decisions which are characteristically used as guides in solving conflicts. But more particularly these are based on the principle of "equalization of levels" among the laws. I would also like to emphasize here that the "law within the legal system" is not a "super law" enacted above the other existing laws.

People may ask about the practical uses of such a law. Or they may criticize the absence of unity in the written Law which must have a nationalistic colour and an applicability to all the population and all the citizens of Indonesia. The criticism is justifiable. However, steps taken by the government of the Republic of Indonesia since the Proclamation of Indonesian Independence on August 17, 1945, aside from continuing the past legal system based on Article II of the Transitory Provisions of the 1945 Constitution, are intended to alter that legal system according to natural local conditions.

In implementing these changes, the government attempts to reach a unified national law that shall be consistent with the times. These steps also involve modernizing all the laws, including the Adat law. However, although such modernization is hoped to be able to fulfill the needs of international legal intercourse, in practice we find many obstacles and difficulties in this process of changes. One of the obstacles that exists is the problem of admitting the principles of the Adat law — the spirit of which can be felt by all inhabitants and citizens of Indonesia throughout the national territory of the Republic of Indonesia — that somehow clashes with the written National Law.

The modernizing of the Adat law grows slowly, but it grows. The attempt to unify the Adat is made together with the attempt to assimilate the many population groups and Indonesian citizens who have foreign ancestry into the patrimony of the Indonesian people without prejudice to the national law. Such an attempt requires a long period of labor because of the many ethnic and ancestral groups that have different cultures, religions, philosophies of life, etc.

Meanwhile, the National Philosophy is called the Pancasila philosophy, consisting of the principles of the Belief in the One, Supreme God, a just and civilized humanity, the Unity of Indonesia, a Democracy which is guided by the inner wisdom in the unanimity

among representatives, and Social Justice for the whole people of Indonesia. This Philosophy underlined a wise foundation of National Law. In the future, differences in action towards the various religions and beliefs may no longer be evident in the National Law.

I would like to note here that in matters of Public Law (principally Criminal and other such laws) the Government, properly, would not surrender the settlements of legal issues to the Adat or to the beliefs of the local community. Rather, the Government should maintain one Criminal Code that would be valid for all the population groups in Indonesia, as it had been so stipulated in the Decision of the Kingdom of the Netherlands No. 33 of the Year 1915 in the National Gazette No. 732 effective January 1, 1918. Private Law, on the other hand, which involves the interest of one individual in relation to others should be handed over to the Adat law and religious law for settlement. At this point, one can see the existence of a law within a legal system used as a way of settling legal conflicts within equal legal systems in force in Indonesia.

It would now be proper to talk about how the policy of the government of the Republic of Indonesia in the judiciary has lately faced the questions of the legality of many laws which were legacies of the past. The subject can be simplified as follows:

We repeat that the foundation of National Law is cradled in the National Philosophy of Pancasila and is enforced among all the inhabitants/citizens of Indonesia. This Law is implemented without disregard of the principles of the Adat and Religion and therefore makes adjustments here and there to fulfill the needs of human association in modern living. Those principles of the Adat and Religious Laws that are considered consistent with the demands of the times can be included in the written National Law. However, for those principles of the laws that are behind the times, attempts are being made to eliminate or improve them through the National Law.

An example of the attempt to eliminate dualism is found in the defense laws. The question is whether to include them in the Civil Code or, as being applied by the Adat law, to the subject and object of the law. The government of the Republic of Indonesia was able to enact Law No. 5 of the Year 1960 cancelling several specific articles of the said Civil Code that were considered to be contradictory with the concept of natural freedom because these articles were found to be oriented to the colonial laws.

Another example that can be presented is that the government

of the Republic of Indonesia is in the course of processing a law on marriage, which it hopes to apply as an instrument to solve marital cases. Lately, there are several kinds of law in force for this purpose.

Until we enact new laws that are national in scope, there is still a need to continue with the existence of these laws within the legal system. These laws are a means to settle legal conflicts resulting from the many legal system in Indonesia that are valid for the many population groups having different Adat (Customs), religions and beliefs and adhering to the "Principles of Equalization of Levels" of these laws.

In closing, allow me to draw the following conclusions:

1. That lately in Indonesia, there have been many Legal Systems for the many population groups;

2. That the conflicts within the Legal Systems can be overcome by the existence of the Law within the Legal System based on the principles of equal status;

3. That the Law within the Legal System is not a law above existing laws; rather, to a certain extent, it serves as a compass or guide for whatever laws one can apply to solve the conflicts among the said Legal Systems; and

4. That the Law within the Legal System is at present needed, as long as we cannot find one written National Law enforceable for all the inhabitants/citizens of Indonesia throughout the National territory of Indonesia and having no prejudice to religious or ancestry.