Sudargo Gautama and the Development of Indonesian Public Order: A Study on the Application of Public Order Doctrine in a Pluralistic Legal System

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Abstract

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A sweeping proviso that protects basic or fundamental interests of a legal system is known in various names – *ordre public*, public policy, public order, government's interest or *Vorbehaltklausel*. This study focuses on the concept of Indonesian public order in private international law. It argues that Indonesia has extraordinary layers of pluralism with respect to its people, statehood and law. Indonesian history is filled with the pursuit of nationhood while protecting diversity. The legal system has been the unifying instrument for the nation. However the selected cases on public order show that the legal system still lacks in coherence. Indonesian courts have treated public order argument inconsistently. A *prima facie* observation may find Indonesian public order unintelligible, and the courts have gained notoriety for it. This study proposes a different perspective. It sees public order in light of Indonesia's legal pluralism and the stages of legal development. With regard to responding to public order argument this study finds that the courts faced systemic and practical challenges. Legal pluralism – in its broadest sense – creates confusion on the part of the court. The stages of legal development shows that (in)dependent judiciary reacted differently to public order argument. Inconsistent treatment is

due to lack of operable framework. The study finds that Gautama doctrine for Indonesian public order can provide consistent application and coherence to the legal system. The doctrine can serve as cohesion for the legal system and an operable framework for Indonesian private international law by striking a balance between legal unity and legal pluralism, national interests and international demands.

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LIST OF ABBREVIATIONS

AB	*Algemene Bepalingen van Wetgeving voor Indonesië* (General Provisions of Legislation for Indonesia)
ANI	Astro Nusantara International Company BV
APP	APP International Finance Company BV
Art.	Article
The Bill	Bill on PIL prepared by BPHN but never adopted
BPHN	*Badan Pembinaan Hukum Nasional* (National Law Development Agency)
BPUPKI	*Badan Penyelidik Usaha Persiapan Kemerdekaan Indonesia* (Investigating Committee for Preparatory Work for Indonesian Independence)
BRN	PT Bungo Raya Nusantara
BULOG	*Badan Urusan Logistik* (State Logistics Agency)
BV	*Besloten Vennootschap* (Dutch private limited liability company)
Ch.	Chapter
Const.	Constitution/Constitutional
Ct.	Court
Dist.	District
DPR	*Dewan Perwakilan Rakyat* (House of the Representatives)
EGBGB	*Einführungsgesetz zum Bürgerliches Gesetzbuch* (Introductory Law to the Civil Code of Germany)
ESC	Energy Supply Contract
FLP	Foreign Language Press of the People's Republic of China
G	*Himpunan Jurisprudensi Indonesia yang Penting untuk Praktek Sehari-hari (Landmark Decisions) (Berikut Komentar)* (collections of judicial decisions selected and published by Sudargo Gautama)
GBHN	*Garis-garis Besar Haluan Negara* (Main Outlines of State's Policy)
Gw	*Grondwet*
H	*Hukum – Majalah Perhimpunan Ahli Hukum Indonesia* (Law – Journal of Indonesian Jurists Association)

HIR	*Herziene Indonesisch Reglement* (Revised Indonesian Regulation) (civil procedure applicable for the islands of Java and Madura)
ICSID	International Center for Settlement of Investment Disputes
IMF	International Monetary Fund
IS	*Wet op de Staatsinrichting van Nederland-Indië* (a quasi constitution for the Netherlands Indies)
JOC	Joint Operation Contract
JRL	PT Jambi Resources Limited
KBC	Karaha Bodas Company LLC
Keppres	*Keputusan Presiden* (Presidential Decree)
Ldr	*Landraad* (Court of First Instance that had jurisdiction for native in the Dutch East Indies)
LG	*Landgericht* (county or regional court of Germany)
LLC	Limited Liability Company
LNRI	*Lembaran Negara Republik Indonesia* (State Gazette of the Republic of Indonesia)
LPHN	*Lembaga Pembinaan Hukum Nasional* (Institute of National Law Development)
MA	*Mahkamah Agung* (Supreme Court of the Republic of Indonesia)
MK	*Mahkamah Konstitusi* (Constitutional Court of the Republic of Indonesia)
MPR(S)	*Majelis Permusyawaratan Rakyat (Sementara)* (Provisional) People's Consultative Assembly)
NTC	PT Nusantara Thermal Coal
NV	*Naamloze Vennootschap* (public limited liability company in the Netherlands)
OLG	*Oberlandesgericht* (county court of appeal of Germany)
Para.	Paragraph
PIL	Private International Law
PLN	*Perusahaan Listrik Negara* (State Electricity Company)
PPKI	*Panitia Persiapan Kemerdekaan Indonesia* (Preparatory Committee for Indonesian Independence)

Prolegnas	*Program Legislasi Nasional* (National Legislation Program)
PT	*Perseroan Terbatas* (Indonesian limited liability company)
RBg	*Reglement tot Regeling van het Rechtswezen in de Gewesten Buiten Java en Madura* (Civil Procedure for outside the islands of Java and Madura)
Rv	*Reglement op de Burgerlijke Rechtsvordering* (Code of Civil Procedure for the now-defunct RvJ)
RvJ	*Raad van Justitie* (Court of Justice of the Netherlands Indies)
S	*Staatsblad van Nederlands Indië (Indonesië)* (State Gazette of the Netherlands Indies)
Sembako	*Sembilan Bahan Pokok* (Nine Basic Commodities considered pivotal for the people's livelihood)
Sdn Bhd	*Sendirian Berhad* (Malaysian private limited liability company)
Tap	Short for *Ketetapan MPR* (MPR Decree)
Tbk	*Terbuka* (literally "open", denoting a PT is publicly owned)
TLNRI	*Tambahan Lembaran Negara Republik Indonesia* (Supplement to the State Gazette of the Republic of Indonesia)
UNTS	United Nations Treaty Series
UU	*Undang-Undang* (Act, statute)
WTO	The World Trade Organization

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DEDICATION

For my parents

who forewarned that the cross of my generation would be made of steel.

Chapter 1

DEVELOPING COHERENCE OUT OF PLURALISM THROUGH LAW

"The life of the law has not been logic; it has been experience."[1]

1.1 OVERVIEW

Sudargo Gautama developed a doctrine on public order (*ketertiban umum*) for Indonesian PIL. He proposed that public order should gravitate toward the state philosophy of Pancasila and the 1945 Constitution.

This chapter provides the background of Gautama doctrine. Its application in Indonesian law and legal system are important. The gravitation of public order towards its legal system has been recognized in PIL literature.[2] Not only do they become the context and provide categories for the operation of public order, but the very thing that it protects. In this chapter I will also point out that evolution of the legal system is also important for the operation of public order.

Justice Oliver Wendell Holmes Jr. has rightly put that law is shaped by experience instead of logic. This chapter will show that it is not the internal logic that has dominantly shaped the Indonesian legal system, but the prevailing political idea of the time. The case of Indonesia politics of law (*politik hukum*), the policy of the state determines the trajectory as well

[1] Oliver Wendell Holmes, Jr., *The Common Law*, with a new introduction by Sheldon M. Novick (New York: Dover, 1991), 1.
[2] *Cf*. Paul Lagarde, "Public Policy," *International Encyclopedia of Comparative Law*, vol. 3, part 1, *Private International Law*, ch. 11, ed. Kurt Lipstein (Leiden: Martinus Nijhoff, 2011), 3-61.

as the substance of the law[3], is instructional. It is part and parcel of legal development and has influence on the roles of the judiciary.

This study attempts to understand Gautama doctrine by taking into account three factors: geography, international politics, and legal culture. While I examine the doctrine, three recurring themes surface: the artificiality of Indonesia as a nation-state; extraordinary pluralism that makes Indonesia as one of the most pluralistic countries in the world; and a unifying process of the politico-legal structure. These themes explain, what I call, systemic and practical challenge for the doctrine. While the systemic challenge comes from the legal system; the practical challenge is centered mainly in judges as operators and interpreters of the law.

The objective of this chapter is to provide proper understanding about Indonesia, the people, and its legal system. Using historical narrative I unfold layers of pluralism that make Indonesia "Indonesia".

Section A presents the socio-legal setting pivotal to the doctrine. It shows that the idea of Indonesia both from ethnographical and political perspective was a carryover from the Netherlands (East) Indies.[4] It also shows three paradoxes about Indonesia. First, it is an archipelago, but it takes the form of unitary state. Second, it is home of the world's largest Muslim population, but a non-Islamic state. Third, it is striving for unity, but embracing plurality. This section shows how Indonesia works diversity through legal unity.

Section B, however, shows that the legal unity is incoherent. From almost every perspective the law is a carryover from the colonial period. Like its society, Indonesian law is pluralistic and a hodgepodge, if not syncretic, of notions of law from legal traditions consisting

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[3] *Cf*. Padmo Wahyono, *Indonesia Negara Berdasarkan atas Hukum* (Jakarta: Ghalia Indonesia, 1986), 160. *See infra* pp. 185-189.
[4] During nineteenth century the Dutch word *Oost* (East) disappeared from the official title the Netherlands' colony in Southeast Asia. *See* Peter Burns, *Concept of Law in Indonesia* (Leiden: KILTV Press, 2004), xvii.

of customary law, the so-called *adat*, Islamic, civil and common law.[5] All in all it makes Indonesia the "jungle of legal pluralism".

This section also demonstrates legal development in Indonesia. It starts with the legacy of colonialism and the impact of Japanese occupation. It continues with expectation of law as a means to achieve the ideals of independence. Legal development, however, has been heavily shaped by politics. Four periods of development show that politics of law set the function and trajectory of law in different directions.

Despite its incoherence and susceptibility to politics of law, Section C shows that law functions as the unifying instrument that upholds the nation. Pancasila and the 1945 Constitution were the fundamental norms that the nation built upon. In the course of time these norms have come in handy both for authoritarian and democratic presidents. In the twenty-first century they have become rallying points for the nation.

This chapter is to partly prove two of five propositions of the study.

Proposition 1 is "Indonesian legal system should be analyzed with reference to Indonesian history and culture." Discussion of this chapter will show that legal pluralism is the vantage point to understand Indonesian law in which public order operates. Chapters 3 and 4 will also do their part in proving this proposition.

Proposition 2 is "modern judicial reasoning has obscured the underlying characteristics of Indonesian law." This chapter goes as far as displaying relevant facts about legal pluralism as the salient characteristic of Indonesian law. Chapter 3 will show that judicial decisions are either mostly negligent to, or neglected, this feature. As a result public order fails to properly serve its function.

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[5] Adat law is a translation of *adatrecht*, a term introduced to the West by Christiaan Snouck Hurgronje. *See* Christian Snouk Hurgronje, *The Acehnese (De Atjehers)*, trans. A.W.S O'Sullivan (Leiden: E. J. Brill, 1893), 9.

1.2 SECTION A: THE ARCHIPELAGO THAT BECAME INDONESIA

1.2.1 *Brief Historical Account*

Stretching from Sabang to Merauke, the archipelago famously coined by Multatuli as "a girdle of emerald flung across the equator" has had many names. It had been known as 'the East Indies', 'the Eastern Seas' or 'the Indian Archipelago'.[6]

George Samuel Windsor Earl coined 'Indu-nesians' as a distinctive name for the brown races of the Indian Archipelago. Yet he found the name 'too general' and immediately rejected it in favor of 'Malayunesians'.[7] J. R. Logan employed the word 'Indonesia' to describe however loosely to the geographical region of the archipelago. He divided 'Indonesia' into four distinct geographical regions stretching from Sumatra to Formosa (now Taiwan).[8] It was, however, Adolf Bastian the famous German ethnographer, who brought 'Indonesia' to prominence by employing the term in his five-volume *Indonesien oder dei Inseln des Malayischen Archipel* (1884-94).[9]

The archipelago's richness has created a myth that every foreigner wants a share of its wealth.[10] There is a grain of truth in the myth as Indonesia has been on the center stage of world history. Columbus set sail to establish trade route to the East Indies.[11] To justify the Netherlands' access to its trading posts in 'the Spice Islands', Hugo Grotius wrote his *Mare*

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[6] *See* R. E. Elson, *The Idea of Indonesia: A History*, (Cambridge: Cambridge University Press, 2008), 1.
[7] G. Windsor Earl, "On the Leading Characteristics of the Papuan, Australian, and Malayu-Polynesian Nations," *The Journal of the Indian Archipelago and Eastern Asia* 4 (1850): 71.
[8] J. R. Logan, "The Ethnology of the Indian Archipelago: embracing enquiries into the continental relations of the Indo-Pacific Islanders," *The Journal of the Indian Archipelago and Eastern Asia* 4 (1850): 254 .
[9] P. A. van der Lith, A. J. Spaam & F. Fokkens, *Encyclopaedië van Nederlandsch-Indië*, vol. 1 (Leiden: Martinus Nijhoff, 1894), 126-7.
[10] Charles Himawan, *The Foreign Investment Process in Indonesia* (Singapore: Gunung Agung, 1980), 4.
[11] *See e.g.* George Masselman, *The Cradle of Colonialism* (New Haven, CT: Yale University Press, 1963), 215.

Liberum and shaped international law.[12] Three centuries later Japan had to attack Pearl Harbor so it could have a free hand to capture oil fields in Sumatra and secure energy supply for its armaments.[13] Sometimes Indonesians themselves invited foreign powers to intervene on the archipelagic affairs.[14]

The first Dutch merchant ships arrived on the northwestern part of Java on June 22, 1596.[15] In 1602 the State General granted a charter establishing the Dutch East Indies Company (*Vereenigde Oost-Indische Compagnie* or VOC) and put an end to fierce competition among Dutch merchants. The charter not only specified the VOC's trading rights, but also administrative as well as political powers.[16] Using the VOC as its alter ego the Netherlands outsmarted all other Western nations in trading with local sovereigns.[17] It squeezed out the Portuguese from the Spice Islands and its stronghold in Malacca. It also successfully curtailed the English of the archipelago.[18]

An assessment of the VOC's activity concluded that from 1680 on the Netherlands controlled trade in the archipelago.[19] It monopolized trades either by actual territorial possession of productive areas, or by commercial treaties extorted from defeated or indebted local rulers, or

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[12] *See* Hugo Grotius, *Hugo Grotius Freedom of the Seas or the Right Which to the Dutch to Take Part in the East Indian Trade*, vol. 1, trans. Ralph Van Deman Magoffin, ed. James Brown Scott (New York: Oxford University Press, 1916), v-vi. For the political and ideological relation between Grotius' works and the Dutch sea-borne empire *see* Martine Julia van Ittersum, *Profit and Principle: Hugo Grotius, Natural Rights Theories and the Rise of Dutch Power in the East Indies 1595-1615* (Leiden: Brill, 2006).

[13] *See* Daniel Yergin, *The Prize: The Epic Quest for Oil, Money, and Power*, (New York: Simon & Schuster, 1991), 316-327.

[14] Long before Sukarno made great play of the U.S. and the Soviet Union on the eve of the Cold Ward to free West Papua, the Acehnese for instance had offered itself to the U.S. *See* James W. Gould, *Americans in Sumatra* (The Hague: Martinus Nijhoff, 1961), 4-7.

[15] J. C. van Leur, *Indonesian Trade and Society: Essays in Asian Social and Economic History* (The Hague: W. van Hoeve, 1955), 3.

[16] John Ball, *Indonesian Legal History 1602-1848* (Sydney: Oughtershaw Press, 1982), 1-2.

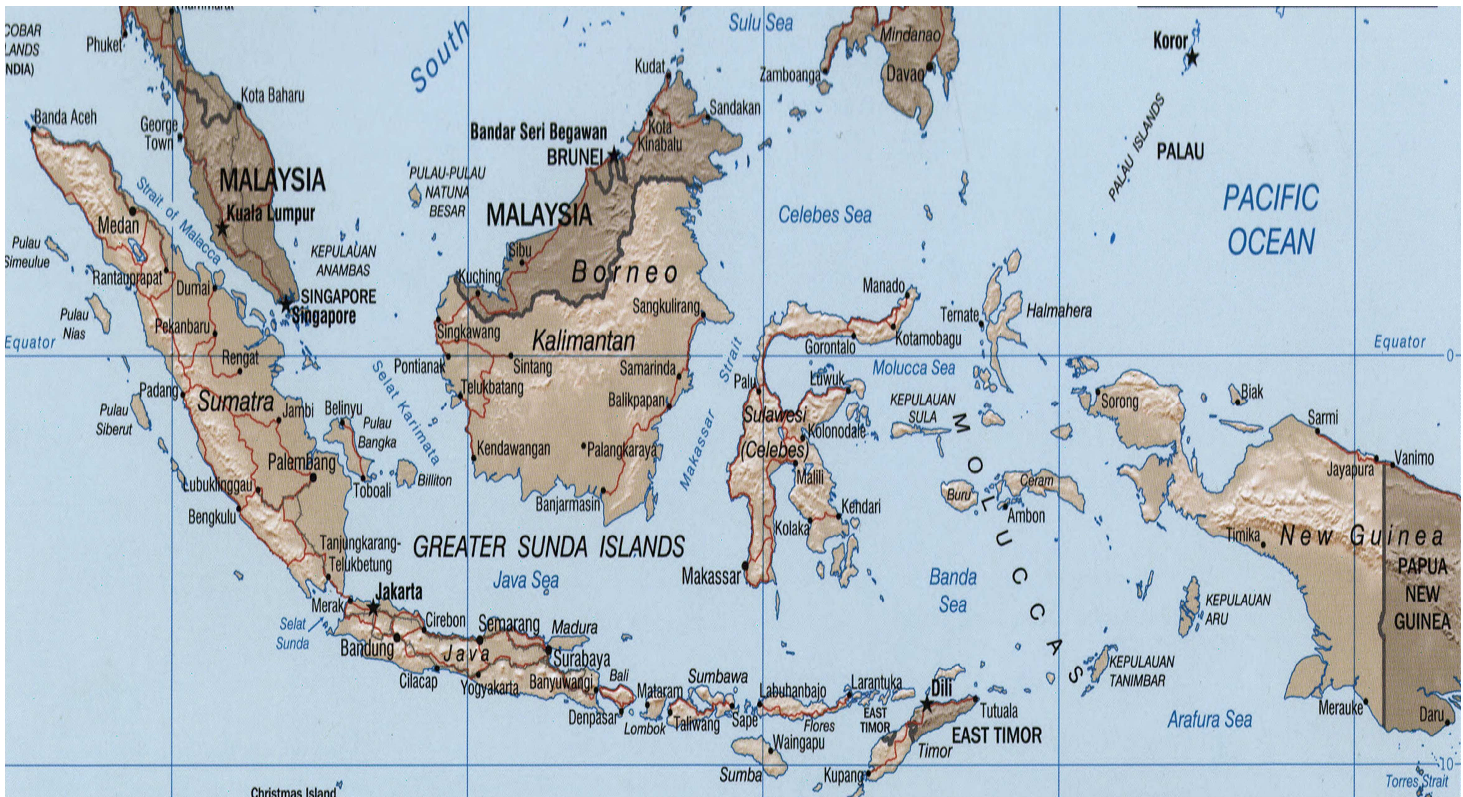
[17] J. H. Parry, *Trade and Dominion: The European Overseas Empires in the Eighteenth Century* (London: Weidenfeld and Nicolson, 1971), 72-81.

[18] For the VOC's operation and role in European-Asian trade, *see e.g*. Angus Madisson, *Countours of the World Economy, I-2030 AD* (Oxford: Oxford University Press, 2007), 112-115.

[19] Bernard H. M. Vlekke, *The Story of the Dutch East Indies* (Cambridge, MA: Harvard University Press, 1946), 118.

by a combination of the two.[20] When the VOC went bankrupt and was dissolved on January 1, 1800, the Netherlands took over from it all its territorial possessions and agreements with local rulers.[21]

Map 1: The Indonesian Archipelago[22]



The name ‘Netherlands Indies’ was used to refer to an autonomous legal community, and a territory or colony of the Netherlands in the East. Together with “the Kingdom in Europe” and

[20] Parry, *supra* note 17, at 74.

[21] The VOC went down in the maelstrom of events taking place both in Europe and the Netherlands Indies. Although it was not corruption alone that caused its downfall, its initial was derisively interpreted: *Vergaan Onder Corruptie* (Ruined by Corruption). *See* E. S. De Klerck, *History of the Netherlands East Indies*, vol. 1 (Rotterdam: WL & J Brusse, 1938), 425-448.

[22] Washington, DC: Central Intelligence Agency, 2002] taken from: http://commons.wikimedia.org/wiki/File:Indonesia_2002_CIA_map.png (last visited June 1, 2015, 1:00 PM).

the West Indies (consisted of Suriname and Curacao), it formed the Kingdom of the Netherlands.[23] As colonies, both the East and West Indies were autonomous territories of the Kingdom.[24] The constitutional structure and internal affairs of the Netherlands Indies was regulated by statute.[25]

In the beginning of the twentieth century, two high-ranking colonial officials made exaggerated statements about the length and power of the Netherlands in Indonesia. Governor-General Bonifacius Cornelis de Jonge remarked that the length of Dutch power would be for another three hundred years.[26] Hendrikus Colijn, Dutch prime minister and minister of the colonies for several terms, repetitiously made boastful comment about the nature of Dutch power.[27] These statements rubbed salt into the wound of a new generation of Indonesian and partly led the way to nationhood.[28] In reality, however, the Netherlands Indies was one of political units in the archipelago. Gertrude Resink later showed that at least until 1910 the archipelago was consisted of sovereign kingdoms and independent entities practicing to some degree international law between them and with the Netherland Indies.[29]

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[23] *See* Grondwet voor het Koninkrijk der Nederlanden [Constitution of the Kingdom of the Netherlands] (1922), art. 1 [hereinafter Gw].

[24] *See* B. P. Paulus, *Garis Besar Hukum Tata Negara Hindia Belanda* (Bandung: Alumni, 1979), 13-36.

[25] Gw, arts. 60-61. *See supra* note 66.

[26] In his interview to an English traveller he said, "I always preface my remarks to the nationalists with one sentence: 'We Dutch have been here for three hundred years; we shall remain here for another three hundred. After that we can talk.'" *See* R. H. Bruce Lockhart, *Return to Malaya* (New York: GP Putnam's Sons, 1936), 244.

[27] He wrote, "[T]hat the Dutch authority is absolutely unassailable, that it is as securely fixed in the Netherlands Indies as Mont Blanc is in the Alps. (**"***[D]at het Nederlandsche gezag volstrekt onaantastbaar is; dat het in Indië even hecht gevestigd is als de Mont Blanc in de Aplen rust*.") *See* H. Colijn, *Koloniale Vraagstukken van Heden en Morgen* (Amsterdam: NV Dagblad & Drukkerij de Standaard, 1928), 39.

[28] *See e.g.* T. B. Simatupang, *Membuktikan Ketidakbenaran Suatu Mitos* (Jakarta: Penerbit Sinar Harapan, 1991), vii.

[29] G. J. Resink, "The Significance of the History of International law in Indonesia," in *An Introduction to Indonesian Historiography*, ed. Soedjatmoko, Mohammad Ali, G. J. Resink and G. McT. Kahin (Ithaca, NY: Cornell University Press, 1965), 359-379.

The new generation, later known as "Generation 28", assessed that the Dutch implemented *divide et impera* policy and had been successful in conquering the archipelago.[30] Disunity had made various campaigns for throwing off the Dutch came to no avail in all parts of Indonesia. Therefore in October 28, 1928 this generation made the historic Youth Pledge to have "one homeland, Indonesia"; to be come "one nation, the nation of Indonesia"; and to uphold "the language of unity, Indonesian." Almost a decade later Sukarno delivered his pleading titled "Indonesia Accuses" before a colonial court for his political activities.[31] The use of 'Indonesia' is therefore a political statement against colonialism.[32]

However until at least the second decennium of the twentieth century the word continued to be anthropologically problematic.[33] The idea of Indonesia is a result of Dutch colonialism. Like the Netherlands of the late Middle Ages distinguished from its adjoining territories not as a separate state but by having cultural and linguistic similarity,[34] Indonesia was shaped by centripetal force.

Before the World War II broke out the Netherlands Indies had been fully formed as a legal entity. However its colonial structure was challenged by the idea of Indonesia. Putting things into perspective both centripetal and centrifugal forces came into play. This situation, as later becomes obvious, is *sine qua non* for Indonesia and its legal development.

The Netherlands lost control of Indonesia to Japan on March 8, 1942. From the start the Japanese military government promised to foster Indonesian nationalism and recruited Sukarno

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[30] *See e.g.* Gerry van Kliken, *Minorities, Modernity and the Emerging Nation: Christians in Indonesian a Biographical Approach* (Leiden: KILTV Press, 2003) , 118.
[31] *See* Sukarno, *Indonesia Menggugat* (Djakarta: SK Seno, 1951).
[32] Even though the words "*Indië*" and "*Indonesische Taalstam*" [Indonesian Regional-language] were included in Netherlands Indies encyclopedia, "Indonesia" was excluded. *See* P. A. van der Lith, *Encyclopaedië van Nederlandsch-Indië*, vol. 2 (Leiden: Martinus Nijhoff, 1897), 4.
[33] *See* J. P. Kleiweg de Zwaan, "The Anthropology of the Indian Archipelago and Its Problems," *Science in the Netherlands East Indies*, ed. L. M. R. Rutten (Amsterdam: De Bussy, 1929), 192-206.
[34] Vlekke, *supra* note 19, at 65.

and Mohammad Hatta to its civil administration. The administration immediately outlawed the use of Dutch as a crime subject to prosecution.[35] By doing so it promoted the use of Indonesian language for the public and juridical world.

As losing war in the Pacific theater was imminent, the 16th Army (*Rikugun*) established the Investigating Committee for Preparatory Work for Indonesian Independence (*Badan Penyelidik Usaha Persiapan Kemerdekaan Indonesia* hereinafter the BPUPKI).[36] Consisting of prominent Indonesian nationalists, the BPUPKI had two plenary meetings: May 29–June 1 and July 10-17, 1945. During these meetings Sukarno gave his famous speech about Pancasila as the *Weltanschauung* for independent Indonesia.[37]

After Japan surrendered to the Allies, on August 17, 1945 Sukarno and Hatta proclaimed Indonesia's independence. Immortalized as the Duumvirate, they became the first President and Vice President of the Republic of Indonesia.

1.2.1 *A Twentieth Century Invention*

The BPUPKI considered three options for territory of Indonesia. They were the territory of (1) the Netherlands Indies; (2) the Netherlands Indies including Malaya, North Borneo, Papua, Timor and its adjacent islands; and (3) the Netherlands Indies, North Borneo, and Timor. The majority of its members voted for the second option.[38] Although the Preparatory Committee for Indonesian Independence (*Panitia Persiapan Kemerdekaan Indonesia* hereinafter the PPKI), the successor of the BPUPKI, was fully aware of this vote, it decided that the territory of Indonesia

[35] *See* KAN PO, Oct. 10, 1942 and Dec. 25, 1942.
[36] *Dokuritsu Junbi Chōsa-kai*.
[37] *See infra* pp. 45-47.
[38] *See* Muhammad Yamin, *Naskah Persiapan Undang-Undang Dasar 1945*, vol. 1 (Djakarta: Jajasan Prapantja, 1959), 201-214. *Cf* A. B. Kusuma, *Lahirnya Undang-Undang Dasar 1945* (Depok: Penerbit Universitas Indonesia, 2004), 251-262.

would be the former Netherlands Indies only.[39] The fourth paragraph of the Preamble to the 1945 Constitution poetically states this territory, without being specific, as "the whole land of Indonesian blood, sweat and tears" (*seluruh tumpah darah Indonesia*).

Despite the Youth Pledge, Indonesia was still a disjointed concept not fully bound as a nation. During the sessions of BPUPKI its members pointed out that Papua, on the extreme east of the archipelago, was ethnologically different from the rest of Indonesia. Conscious of this conundrum the founding fathers made reference to Otto Bauer and Ernest Renan for support of Indonesian nation-state and nationhood.[40] It is therefore instructive to evoke Ernest Douwes Dekker's argument on the final years of the Netherlands Indies that Indonesia was first bound by its 'legal unity'.[41] Benedict Anderson later defined this type of nation as 'imagined community', an imagined political community both inherently limited and sovereign.[42]

The induction of Indonesian as the national language fulfilled the Youth Pledge in its entirety.[43] The Indonesian Language Committee, established by the Japanese administration on October 20, 1942, was responsible for cataloging and creating scientific vernacular.[44]

All in all Indonesia – be its territory, people and language – is a twentieth century invention.

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[39] *See* Sekretariat Negara Republik Indonesia, *Risalah Sidang Badan Persiapan Usaha-usaha Persiapan Kemerdekaan Indonesia (BPUPKI) – Panitia Persiapan Kemerdekaan Indonesia (PPKI)* (Jakarta: Sekretariat Negara Republik Indonesia, 1998), 547. *Cf* Kusuma, *supra* note 38, at 480. *See also* D. Sidik Suraputra, *Revolusi Indonesia dan Hukum Internasional* (Jakarta: UI Press, 1991), 20.

[40] Kusuma, *supra* note 38, at 157.

[41] Douwes Dekker, a Eurasian-Indonesian, who fought for Indonesian independence argued that 'it is not racial unity, not unity of interests, not unity of language, which form the state, but it is *legal unity* which governs the expansion of the state'. (Italic is mine.) Douwes Dekker, "Verevening," *De Tijdschrift*, Feb. 1913, as quoted by Elson, *supra* note 7, at 17 (Quoting Anon., *Vervolg der nota I, betreffende de geschriften van Douwes Dekker* (1913), 3-4).

[42] Benedict R. O'G. Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (New York: Verso, 2006), 6.

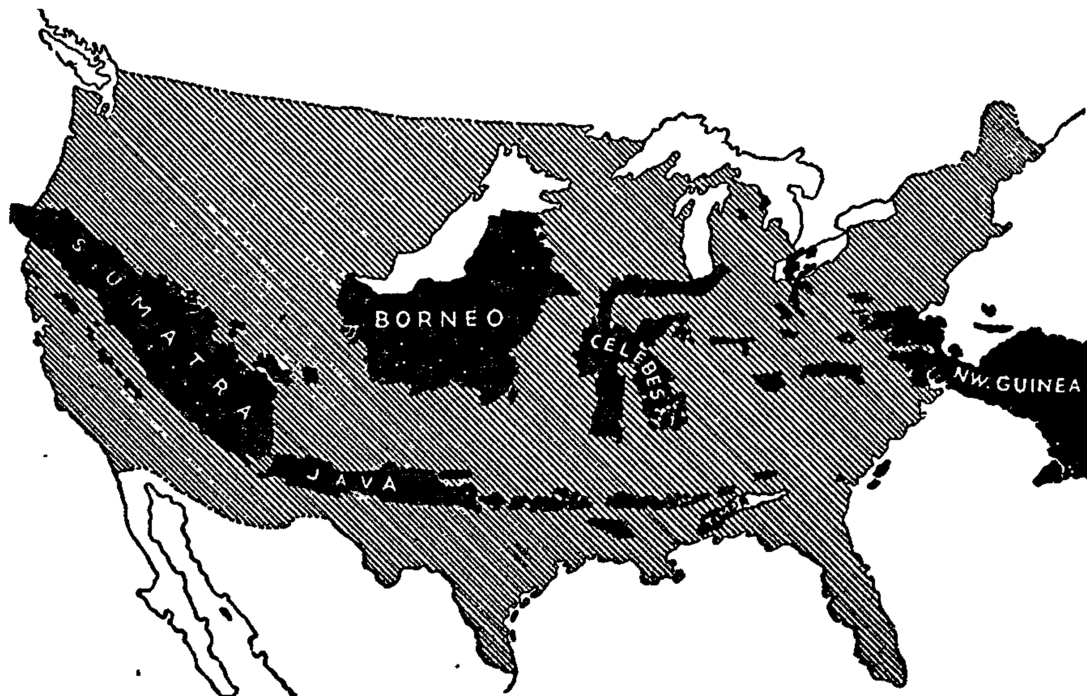
[43] *See* Undang-Undang Dasar 1945 [Constitution], Aug. 18, 1945, art. 36 (Indon.) [hereinafter the 1945 Const.]. In the text "the (original) 1945 Constitution" is used when I refer to the pre-amendment version. I add ordinal number whenever I refer to articles that have been amended.

[44] *See* Java (Japanese Military Administration, 1942-1945), Komisi Bahasa Indonesia, S. Alisjahbana, *Kamoes Istilah I Asing-Indonesia* (Batavia, Java: Japanese Military Administration[?], 1945).

Progress however is a path dependent process. In this case the idea of Indonesia is curbed by the ingredients that made it 'Indonesia'. Here enter the paradoxes.

Unity (*persatuan*) becomes the buzzword that entails oneness (*kesatuan*). Legally speaking this is translated into the creation of a unitary state. Despite its archipelagic feature Indonesia paradoxically chose unitary form instead of federalism. It chose the highway to nation-state and endured the Cold War.

Map 2: The Territory of Indonesia Compared to the U.S.[45]



It is home of the world's largest Muslim population. But it has pockets of Christian majority. Additionally the island of Bali stands out predominantly Hindu.[46] Thus Indonesia as a

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[45] Source: Alex ter Braake, *Mining in the Netherlands East Indies* (New York: Institute of Pacific Relations, 1944), 8.

[46] *See* Badan Pusat Statistik, *Sensus Penduduk 2010*, available at http://sp2010.bps.go.id/index.php/site/tabelprint?wid=0000000000&tid=321&lang=en&fi1=58&fi2=3 (last visited October 16, 2014). The census shows that 87% of Indonesians are Muslims.

whole rejects the idea of Islamic state.[47] But it is not a secular state either, because the nation is built upon a belief in the One Almighty God.[48]

Map 3: Ethnic Groups in Indonesia[49]

The people are racially and ethnologically diverse. Most of them are brown color belonging to Malay race. Some of them are black belonging to Papuan people. Internally they identify themselves according to their ethnic group (*suku bangsa*). The 1930 census listed sixteen ethnic groups. However, according to one count, there are four hundred and fifty three ethnic groups in Indonesia.[50] International trade brought Chinese, Indian, Arabs, and European to the archipelago. Intermarriage brought about people of mixed-blood. According to the 1930 census, regardless nationality, there were 240,162 European population, 1,233,000 Chinese, and

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[47] The 1945 Const. 3rd Amend., art. 1:3 asserts that, "The Indonesian State is a law-state (*negara hukum*)." The Indonesian government only recognizes six religions: Islam, Protestantism, Roman Catholicism, Hinduism, Buddhism, and Confucianism.

[48] *Id*. art 29:1 echoes the First Principle of Pancasila about a belief in the One Almighty God.

[49] Gunawan Kartapranata, "Ethnic Groups in Indonesia," *Wikipedia* (May 14, 2015, 1:20 PM), http://en.wikipedia.org/wiki/Ethnic_groups_in_Indonesia#mediaviewer/File:Indonesia_Ethnic_Groups_Map_English.svg.

[50] *See* M. Junus Melalatoa, *Ensiklopedi Suku Bangsa di Indonesia*, vol. 1 (Jakarta: Departemen Pendidikan dan Kebudayaan Republik Indonesia, 1995), xiii-xix.

116,000 other Asians.[51] Population censuses after independence did not provide information about ethnic composition.[52] The 2000 census was the first to include this information.[53]

The kinship systems are also pluralistic. Most of the ethnic groups, including Javanese, adopt bilateral system. Some of them, like the Batak of North Sumatra, are patrilineal. The Minangkabau, a small but influential ethnic group and vivid adherent of Islam, in the West Sumatra however sticks to matrilineal system. It had been recognized that family law would remain plural.[54]

Table 1.1: Ethnic Composition[55]

1930				*BPS Official Publication (2000)**				*Suryadinata, Arifin & Ananta's Recalculation***			
No	Ethnic Group	Number	%	No	Ethnic Group	Number	%	No	Ethnic Groups	Number	%
1	Javanese	27,808,623	47.02	1	Javanese	83,752,853	41,65	1	Javanese	83,865,724	41.71
2	Sundanese	8,594,834	14.53	2	Sundanese	30,978,404	15,41	2	Sundanese	30,978,404	15.41
3	Madurese	4,305,862	7.28	3	Madurese	6,771,727	3.37	3	Malay	6,946,040	3.45
4	Minangkabau	1,988,648	3.36	4	Minangkabau	5,475,145	2.72	4	Madurese	6,771,727	3.37
5	Buginese	1,533,035	2.59	5	Betawi	5,041,688	2.51	5	Batak	6,076,440	3.02
	Chinese	1,233,000	2.03***	6	Buginese	5,010,423	2.49	6	Minangkabau	5,475,145	2.72
6	Batak	1,207,514	2.04	7	Bantenese	4,113,162	2.05	7	Betawi	5,041,688	2.51
7	Balinese	1,111,659	1.88	8	Banjarese	3,496,273	1.74	8	Buginese	5,010,421	2.49
8	Betawi	980,863	1.66	9	Others	56,452,563	28.07	9	Bantenese	4,113,162	2.05
9	Malay	953,397	1.61					10	Banjarese	3,496,273	1.74
10	Banjarese	898,884	1.52					11	Balinese	3,027,525	1.51
11	Acehnese	831,321	1.41					12	Sasak	2,611,059	1.30
12	Palembangan	770,917	1.3					13	Makassarese	1,982,187	0.99
13	Sasak	659,477	1.12					14	Cirebon	1,890,102	0.94
14	Dayak	651,391	1.1					15	Chinese	1,738,936	0.86
15	Makassarese	642,720	1.09					16	Gorontalo/Hulandalo	974,175	0.48
16	Toraja	557,590	0.94					17	Achenese	871,944	0.43
17	Others	5,641,332	9.54					18	Toraja	750,828	0.37
								19	Others	29,857,346	14.66
	Total	57,138,067	100			201,092,238	100			201,092,238	100

* Eight largest ethnic groups as listed in the census volume on Indonesia as a whole (Badan Pusat Statistik, *Population of Indonesia. Results of the 2000 Population Census*. Jakarta, 2001).
** Compiled and calculated from the 30 publications on the provinces (Source: Badan Pusat Statistik, *Population of Indonesia. Results of the 2000 Population Census*. Jakarta: 2001.)
*** In the 1930 census, the ethnic Chinese, regardless of their "nationalities", were classified as "foreign oriental", and they were calculated separately from the "indigeneous population". The number of ethnic Chinese was 1,233,000, constituting 2.03% of the total population in colonial Indonesia (*see* Central Kantoor voor de Statistiek, 1934). When calculating the percentage of each "indigenous" ethnic group, however, the total number of the Indonesian population used was that of the "indigenous population", hence the Batak formed 2.04% of the Indonesian population although its number was only 1,207,514, i.e. fewer than that of the ethnic Chinese.

The Indonesian language is indeed the language of unity. However hundreds of "regional languages" (*bahasa daerah*) remain important as means of communication. It is noteworthy that Indonesian is not based on Javanese the language of the largest ethnic group, but Malay one of

[51] Department of Economics Affairs, Central Bureau of Statistics of the Netherlands Indies, *Statistical Pocketbook of Indonesia 1941* (Batavia, Java: Koninklijke Boekhandel en Drukkerijen G. Kolff & Co., 1947), 7.
[52] The censuses took place on 1961, 1971, 1980, and 1990.
[53] Badan Pusat Statistik, *Sensus Penduduk Indonesia, 2000* (Jakarta: Badan Pusat Statistik, 2005). For further classification *see* Leo Suryadinata, Evi Nurvidya Arifin, and Aris Ananta, *Indonesia's Population: Ethnicity and Religion in a Changing Political Landscape* (Singapore: Institute of Southeast Asian Studies, 2003).
[54] *See e.g*. Frans H. Visman, *The Provisional Government of the Netherlands East Indies* (New York: Pacific Affairs, 1945), 8.
[55] Suryadinata et al., *supra* note 53, at 12.

the smallest. It was its prominence as *lingua franca* that christened the Low or Bazaar Malay language as Indonesian.[56] Resink pointed out that it was congruent to the Dutch's wishes to have Malay as the common language for the archipelago.[57]

The national motto works through these paradoxes. *Bhinneka Tunggal Ika* is commonly translated into English as "Unity in Diversity". However a translation more faithful to its meaning will be "Diverse yet One".[58] The motto, as I will show, is instructive to understand the legal system that the doctrine serves.

Tabel 1.2: The Larger Ethno-Linguistic Groups of Indonesia[59]

Language	*1930 Population (in thousands)*	*% of Total Population*
Javanese	27,000	45.0
Sundanese	8,500	14.2
Madurese	4,500	7.5
Coastal Malays (Sumatra & Kalimantan)	4,500	7.5
Makassarese-Bugisnese	2,500	4.2
Minangkabau	2,000	3.3
Balinese	1,200	2.0
Batak	1,000	1.7
Acehnese	750	1.3
Totals	51,920	86.7

This section shows that Indonesia does not fall into the logic of majority rules. Muslim majority does not make Indonesia an Islamic state. The high portion of Javanese speakers does not make it the basis of national language.

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[56] *See e.g*. Takdir Alisjahbana, "The Indonesian Language-By-product of Nationalism," *Pacific Affairs* 22 (1949): 388.

[57] Rudolf Mrázek and Gertrudes Johan Resink, "Coughing Heavily: Two Interviews with Professor Resink in His Home at Gondangdia Lama 48 A Jakarta, on July 17 and July 25, 1997," *Indonesia* 74 (2002): 156-157. *Cf*. G. H. Bousquest *A French View of the Netherlands Indies*, trans. Philip E. Lilienthal (London: Oxford University Press, 1940), 84-91.

[58] The motto is of Sanskrit or Old Javanese origin. Its Indonesian translation is "*Berbeda-beda tapi satu jua*", literally "though diverse, yet it is one".

[59] Source: R. Kennedy, *The Ageless Indies* (New York: John Day Co, 1942), 23-26.

On the contrary this section shows that ideal trumps reality. The pursuit of independence overcomes disunity. Unitary form brings under control its archipelagic state. The above discussion also shows that in order to achieve the ideal Indonesia is pragmatic. The Indonesian language is a showcase for this attitude.

1.3 SECTION B: THE JUNGLE OF LEGAL PLURALISM

The "jungle of legal pluralism" is rarely shown on the map of legal science.[60] It happens most likely because it presents problem for any attempt to classify national law. In this section I will show that conventional legal classification is either too simplistic or inaccurate when treating Indonesian law.

1.3.1 *Oversimplification about the Legal System*

Taking into account the statistics that majority of Indonesian are Muslim, David and Brierley conclude that Indonesian legal system belongs to Muslim law that amalgamates with custom.[61] Following their analysis, but recognizing the influence of religion or a transcendental philosophy, Ugo Mattei classifies Indonesia into Islamic Law that has strong characteristics of the rule of traditional law.[62] From a different standpoint, JuriGlobe classifies Indonesia as civil law with pockets of Islamic and customary law.[63] It obviously takes account of the historical fact that the Netherlands once ruled over the archipelago.

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[60] Franz von Benda-Beckmann's inaugural speech at University of Wageningen (1983), quoted in Christoph Antons, *Intellectual Property Law in Indonesia* (Boston: Kluwer Law International, 2000), 3.
[61] René David and John E. C. Brierley, *Major Legal Systems in the World Today* (London: Stevens, 1985), 480.
[62] Ugo Mattei, "Three Patterns of Law: Taxonomy and Change in the World's Legal System," *American Journal of Comparative Law* 45 (1997): 36.
[63] JuriGlobe–World Legal Systems Research Group, *World Legal Systems*, University of Ottawa, http://www.juriglobe.ca/eng/index.php. (last visited May 14, 2015, 1:50 PM).

These classifications fail to scrutinize the juridical fact that the Constitution clearly stipulates that Indonesia is a law-state (*negara hukum*) based on the One Almighty God.[64] From the three perspectives of population, history and law, pace the above scholars, the Indonesian legal system is a hodgepodge where adat, Islamic, and civil law coexist as its roots, if not sublegal systems. It is therefore pivotal to any investigation on Indonesian law to have from the outset the proper understanding by having legal pluralism as its vantage point.

1.3.2 *A Hodgepodge Legal System*

When Indonesia proclaimed independence, it inherited from the Netherlands Indies a country with many applicable laws to its inhabitants.[65] During the colonial era, by virtue of article 163 of the Constitutional Regulation of the Netherlands Indies (*Indische Staatsregeling* hereinafter IS) they were classified into the so-called "population groups" (*bevolkingsgroupen*) – European, Foreign Oriental, and Native.[66] Population groupings necessitated different applicable laws as stipulated in article 131 IS.[67] This so-called "principle of concordance" embodied in article 131(2)(a) IS required the colonial government to implement so far as possible the civil and commercial laws applicable at that time in the Netherlands in matters pertaining to the European group.[68] The Foreign Oriental group was also subject to the Commercial Code and

[64] The 1945 Const. 3rd Amend., art. 1:3; and art. 29:1.
[65] *See* Sudargo Gautama, *Indonesian Business Law* (Bandung: Citra Aditya Bakti, 1995), 3-4.
[66] Wet op de Staatsinrichting van Nederland-Indië, S. 1925-415. IS could be regarded as a quasi constitution of the Netherlands Indies.
[67] In 1914 the colonial government had successfully unified criminal law under the Criminal Code. Therefore legal pluralism has been mainly in the domain of private law. However, according to Supomo, for certain areas like Aceh, Tapanuli, Kalimantan, Gorontalo that had adat judges, criminal law and procedural law, adat law remained their positive laws until replaced by written law. *See* Supomo, "The Future of Adat Law in the Reconstruction of Indonesia," *Southeast Asia in the Coming World*, ed. Philip W. Thayer (Baltimore: Johns Hopkins Press, 1953), 219.
[68] *See* Sudargo Gautama and Robert N. Hornick, *An Introduction to Indonesian Law: Unity in Diversity* (Bandung: Alumni, 1983), 5-8.

most of the Civil Code.[69] The native population was left to their adat law. In short these groups were subject to different substantive and procedural law.[70]

In order to avoid any legal vacuum, Article II of the Transitory Provisions of the 1945 Constitution cautiously stipulated that existing regulations remained applicable provided they conformed to the Constitution.[71] Presidential Decree No. 2/1945 reiterated the wording of Article II in rejecting the continuance of colonial law.[72] Since independence was aimed at liberating the people from colonialism, from a politico-legal perspective a divisive institution like population groups could not be condoned. However it is noteworthy that no law or document specifically revoked the groupings.

I argue that independence broke off the chains of colonialism to the extent it was practical for the young republic, and that a legal document was not essential. My argument is supported by the fact that the inhabitants were later categorized into citizens and foreigners. The Eurasian, Chinese, Arab, and other non-indigenous inhabitants fell under the "people of other nations" classification. They had to opt for citizenship.[73] More than twenty years later a non-statutory instrument forbade the civil registry from classifying Indonesians based on population

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[69] *See* Bepalingen voor geheel Indonesië betreffende het burgerlijk en handelrecht van de Chineezen (Ketentuan–ketentuan untuk Seluruh Indonesia tentang Hukum Perdata dan Dagang untuk Golongan Tionghoa) [Regulation for the Whole Indonesian on Civil and Commercial Law for the Chinese], S. 1917-129.
[70] *See infra* pp. 32-33.
[71] The Fourth Amendment to the 1945 Constitution, while maintaining the wording, reassigns this article into Article I of the Transitory Provisions of the 1945 Constitution.
[72] Soetandyo Wignjosoebroto points out that the decree is the only normative statement that refuses the continuance of colonial laws. *See* Soetandyo Wignjosoebroto, *Dari Hukum Kolonial ke Hukum Nasional: Suatu Kajian tentang Dinamika Sosial-politik dalam Perkembangan Hukum Selama Satu Setengah Abad di Indonesia, 1840-1990* (Jakarta: RajaGrafindo Persada, 1994), 190.
[73] *See* UU No. 3/1946, Warga Negara dan Penduduk Negara Indonesia [Act No. 3/1946, Citizens and Inhabitants of Indonesian State], Apr. 10, 1946, art. 1. *See also* Sudargo Gautama, *Warga Negara dan Orang Asing* (Bandung: Alumni, 1997), 109-125; Ko Swan Sik and Teuku Moh. Rhadie, "Nationality and International Law in Indonesian Perspective," *Nationality and International Law in Asian Perspective*, ed. Ko Swan Sik (Dordrecht: Martinus Nijhoff, 1990), 134-135.

groupings and simultaneously declared that it was open for all residents.[74] By saying that article 131:2(a) IS has been "abandoned" after independence, Gautama shares my opinion that no document was necessary to reject the legacy of colonialism.[75]

Obliteration of the institution of population groups however does not entail on the relevant law. Apart from public law Indonesians were, and to some extent are, subject to different applicable laws. All persons belonging to the defunct groups and their descendants remain under their corresponding laws. In other words independence has transformed the legal landscape of "intergentiel law", scientifically developed by R. D. Kollewijn,[76] to the problems of law group (*groeprecht*).[77] As a result legal pluralism survived independence. It poses a different set of problem (i.e. what is the positive law?).

This question proliferates in Indonesia. Promulgation of statutory law after independence partly settles the issue. However there are different layers of problem, i.e. the coexistence of written and unwritten law, and rivalry of legal traditions in the development of national law.

1.3.2.1 *Adat Law Aspect of the Legal System*

Many languages of the archipelago adopted the Arabic word 'adat' [*ᶜādat*] that means 'custom'. These languages however employ 'adat' for a variety of meanings: customs, usage,

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[74] *See* Instruksi Presidium Kabinet [Instruction of the Cabinet Presidium] No. 31/U/IN/12/1966, Dec. 27, 1966. *See* Sudargo Gautama, *Hukum Antar Tata Hukum: Kumpulan Karangan* (Bandung: Alumni, 1977), 47 [hereinafter Gautama, *Kumpulan*]. The fact that after independence a majority of Indonesians remained excluded from civil registry until 1966 has been pointed out as evidence that population groupings based on article 163 IS remained effective. *See* e.g. H. Sukarno, *Perkembangan Catatan Sipil di Indonesia* (Jakarta: n.p., 1985), 59-65.

[75] Sudargo Gautama, "International Civil Procedure in Indonesia," *Asian Yearbook of International Law* 6 (1996): 87.

[76] *See e.g.* R. D. Kollewijn, "Interracial Private Law (The Colonial Conflict of Laws)," *The Effect of Western Influence on Native Civilisations in the Malay Archipelago*, ed. B. Schrieke (Batavia, Java: G. Kolff & Co., 1929), 204-236. *See infra* pp. 32-33.

[77] *See* Gautama, *Kumpulan*, *supra* note 73, at 221.

'adats that have legal consequence', and customary law as opposed to *hukum* (Islamic law). They also used it in coupling of word with custom like 'customary adat' (*adat kebiasaan*).[78]

Adat law was unwritten and based on custom as well as tradition.[79] Being uncodified and unwritten enabled adat law to develop dynamically in accordance with its associated society (*masyarakat hukum adat*). No distinction is made between individual and societal dimensions. Consequently legal classification as generally made in civil law countries can hardly be applied.[80] This unity concept is a showcase for the influence of Hindu cosmic on Indonesia.[81]

Cornelis van Vollenhoven made adat law intelligible for the colonial government.[82] Using language as the basis for classification, he identified nineteen "law areas" (*rechtskringen*).[83] His findings and persuasion forced the colonial government to launch a series of sequential investigations to discover and codify the provisions of adat law.[84] Supomo investigated West Java (1933), while Djojodigono and Tirtawinata were responsible for Central Java (1939). Japanese occupation prematurely ended similar investigations in South Tapanuli, South Sulawesi and East Java. It took almost three decades to resume research on adat law.[85]

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[78] *See* Hurgronje, *supra* note 5, at 9. *See also* Cornelis Van Vollenhoven, *Van Vollenhoven on Indonesian Adat Law (Selections from Het Adatrecht van Nederlandsch-Indie (Volume I, 1918; Volume II, 1931)*, ed. J.F. Holleman (The Hague: Martinus Nijhoff, 1981) 1-6. It should be noted that the use of *hukum* – in *hukum adat* – has become generic to refer to law in general sense.

[79] *See e.g.* Jan Prins, "Adatlaw and Muslim Religious Law in Modern Indonesia: An Introduction," in *Die Welt des Islams* 1 (1951): 283-300.

[80] Supomo, *Hubungan Individu dan Masyarakat dalam Hukum Adat* (Jakarta: Pradnya Paramita, 1978). *See also* Soerjono Soekanto, *Hukum Adat Indonesia* (Jakarta: Rajawali, 2003), 117-123.

[81] Bernard H. M. Vlekke, *Nusantara, A History of Indonesia* (Chicago: Quadrangle Books,1960), 22-24.

[82] *See* Burns, *supra* note 4, at 1-24. It was however William Marsden, a British official, who made the first attempt to understand the government, laws, customs, and manners of the peoples of Sumatra and published it in 1783. He found that the peoples of Madagascar and the Philippines bore some resemblance in customs to Sumatra. *See* William Marsden, *The History of Sumatra*, 3rd ed. (Oxford: Oxford University Press, 1966) 242 and 302.

[83] Van Vollenhoven, *supra* note 77, at 41-53.

[84] *See* R. Soepomo, "Hukum Adat Dikemudian Hari Berhubung dengan Pembinaan Negara Indonesia" *Hukum* 4-5 (1952): 4 (hereinafter H).

[85] J. C. T. Simorangkir, *Pembinaan Hukum Nasional bagi Masyarakat Indonesia* (Jakarta: Badan Pembinaan Hukum Nasional, 1980), 27 *passim*.

The influence of van Vollenhoven on the investigators was prominent. They were all his students. Supomo stood out among them. He was the fifth Indonesian student who wrote his doctoral dissertation in Leiden University under van Vollenhoven.[86] Before World War II broke out he was already appointed to chair adat law at the Law College (*Rechtshogeschool*) in Batavia (now Jakarta). Later he became a member of the BPUPKI and the principal drafter of the 1945 Constitution.

Despite waxes and wanes after independence, adat law has been identified as the living law. However, its existence has been susceptible to written law or statute. This type of existence is partly a result of the intake of civil law to the legal system and the pursuit of legal certainty.[87]

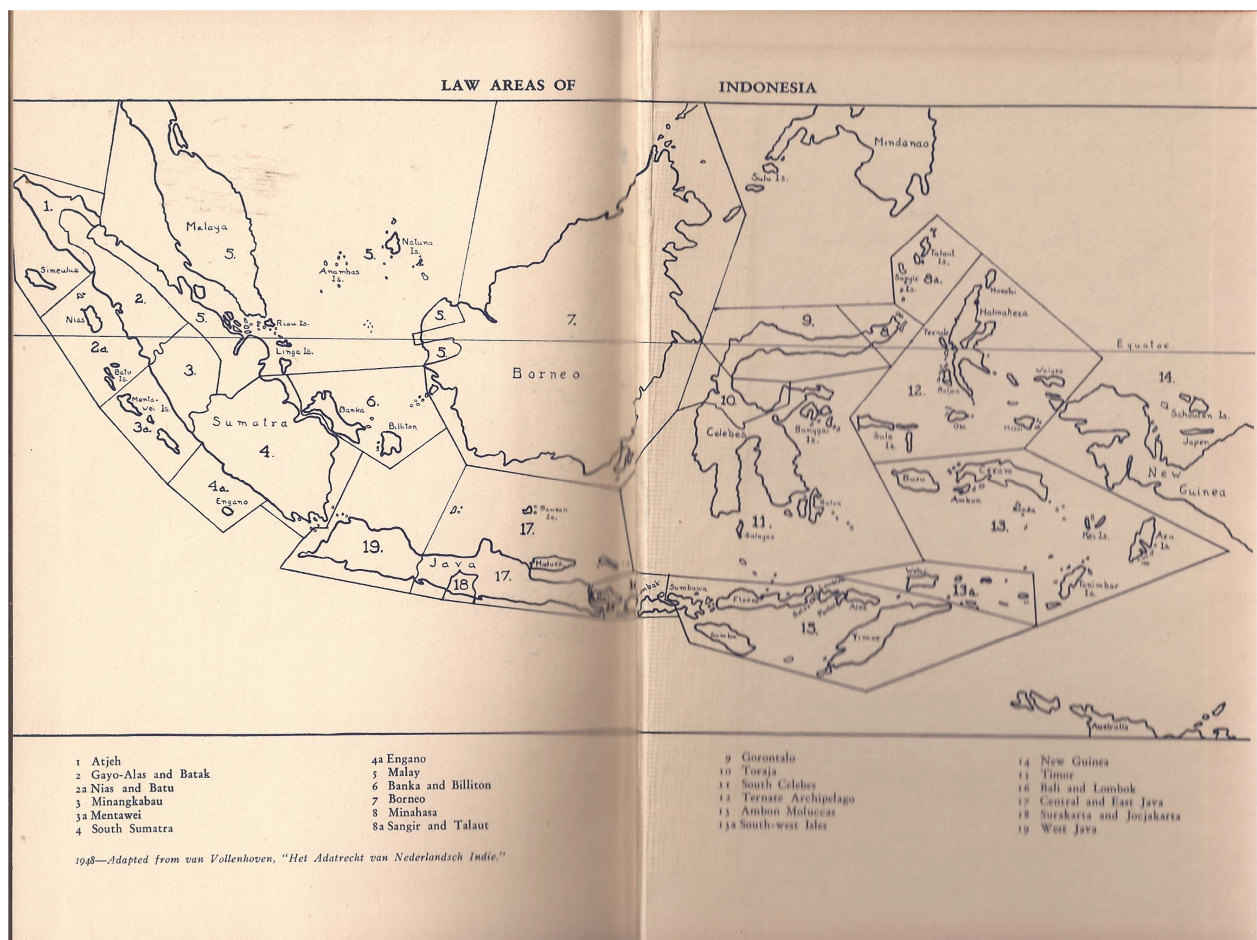
Although esteemed by most of the first generations of Indonesian jurists, many have heavily criticized van Vollenhoven for romanticizing adat law with his personal ideals and sentiments. Alisjahbana argued that the emergence of adat law created problem for Indonesia in catching up with the rest of the world.[88] Under this pretense, many scholars have found that the understanding and the myth of adat as well as the relationship between adat and state authority was a Dutch creation.[89]

Two points are important to this study. First, politics of law was, and is, the reason for the recognition of adat. The promotion of adat law had created legal pluralism that was carried over to post-independence. Second, adat law judges were responsible for maintaining social harmony. By default they had active roles in adjudication. Contrary to civil law judges, they

[86] One of the four, Kusumah Atmadja, later became the first Chief Justice of the Supreme Court. *See* G. J. Resink, "In Memoriam Supomo sebagai Sardjana," *Padjadjaran* 1 (1958): 6. *See also* C. De Waaij-Voster, "Doctoral Theses on the Netherlands-Indies Accepted at the Faculty of Law of Leiden University in Period 1850-1940," *Indonesia* 56 (1993): 89-97.
[87] Otje Salman Soemadiningrat, *Rekonseptualisasi Hukum Adat Kontemporer* (Bandung: Citra Aditya Bakti, 2002), 9.
[88] St. Takdir Alisjahbana, *Indonesia: Social and Cultural Revolution* (Kuala Lumpur: Oxford University Press, 1966), 71-72. Alisjahbana, a jurist by training, was an influential figure in the development of Indonesian language.
[89] *See e.g.* Daniel S. Lev, "Colonial Law and the Genesis of the Indonesian State," *Indonesia* 40 (1985): 63-66.

were to seek substantive truth and not to adjudicate only based on the parties' submission. Indonesian judges have maintained both of these traits. As it will later be clear, they are to try cases under the Civil Code of colonial origin with the traits of adat law judges. This fact shows how confluence of law Indonesia intermixes not only substantive civil law with adat law, but also the substantive law of the former with the procedural law of the latter.

Map 4: The Law-Areas of Indonesia[90]



[90] Source: Barend Ter Haar, *Adat Law in Indonesia*, ed. E. Adamson Hoebel and A. Arthur Schiller (New York: Institute of Pacific Relations, 1948).

1.3.2.2 *Islamic Law Aspect of the Legal System*

Muslim traders from the Arabian Peninsula entered the archipelago as early as the eighth century. However the spread of Islam only began at the end of the thirteenth century.[91] As the royalties converted to Islam, the religion became dominant in the region. The influence of Arabic in Indonesia is profound. The vernaculars legal terms were Arabic: *hukum* (law), *keadilan* (justice), *hak* (right), and *hakim* (judge). All of these led the Dutch – both the VOC and the colonial government – to fall under the erroneous impression that the people were subject to Qur'an and old Javanese books.[92]

Historically Islamic law had a delicate relation with adat law. Advocates of the *receptio in complexu* theory argued that Islamic law had been received entirely by adat law, and subsequently the latter had to conform to the former. The opposing camp submitted the contending theory of *receptio a contrario* that suggested that adat law only received parts of Islamic law. Once adat law had received it it ceased being Islamic law.[93]

Although this study does not discuss both laws at length, the debate is important. It shows that the question of what is the positive law is debatable. Like the case of adat law, the politics of law made the difference. The colonial government was in favor of adat law, and considered Islamic law as one of its components.

Another important point for this study is that public order is the opposite of Muslim predominance. In *Lie Kwie Hien v. Tjien Tjheuw Jie*, the court dismissed that *talaq*, a divorce in Islamic law effectuated by a husband's repetition of the word constituting a formal repudiation of his wife, constituted a ground for mutual agreement to end a marriage for non-Muslim Chinese

[91] Richard C. Martin (ed.), *Encyclopedia of Islam and the Muslim World*, vol. 2 (New York: MacMillan, 2004), 644.
[92] Soepomo, *Kedudukan Hukum Adat Dikemudian Hari* (Djakarta: Pustaka Rakjat, 1951), 7-8.
[93] Mohammad Daud Ali, *Kedudukan Hukum Islam dalam Sistem Hukum Indonesia* (Jakarta: Yayasan Risalah, 1984), 15-18.

nationals.[94] This shows that legal pluralism constrained the application of Islamic law to the general population.

Even though the closing decade of the twentieth century witnesses two important development of Islamic law in Indonesia – promulgation of the Compilation of Islamic Law and the emergence of sharia economy, the legal system remains the same.[95] Except for *Lie Kwie Hien*, this study deals with the so-called "neutral legal issues".[96]

1.3.2.3 *Civil Law Aspect of the Legal System*

Civil law features are evident in at least three facets of the legal system. First, Indonesia received codified law from the Netherlands Indies. These are the Civil Code,[97] the Commercial Code,[98] Regulation on Civil Procedure (*Reglement op de Rechtvordering* hereinafter Rv),[99] and the Criminal Code.[100] It is noteworthy that these codes are in Dutch and have no official Indonesian translation.

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[94] Jakarta Dist. Ct. No. 373/1952 G, Dec. 5, 1953, published in H 7-8 (1958): 45, and Sudargo Gautama, *Himpunan Jurisprudensi Indonesia yang Penting untuk Praktek Sehari-hari (Landmark Decisions) (Berikut Komentar)*, vol. 1 (Bandung: Citra Aditya Bakti, 1992), 55 (hereinafter G). *See infra* pp. 114 *et seq*.

[95] *See* e.g. R. William Liddle, "The Islamic Turn in Indonesia: A Political Explanation," *Journal of Asian Studies* 55 (1996): 613. The introduction of this law and the establishment of Islamic institution may, to a certain point, Islamize the legal system. However it remains the same since the supreme values of sharia remain confined to Muslims who willingly accept them. *See* Arskal Salim, *Challenging the Secular State: The Islamization of Law in Modern Indonesia* (Honolulu: University of Hawaii Press, 2008), 11-12; *see also* Suha Taji-Farouki, "Islamic State Theories and Contemporary Realities," *Islamic Fundamentalism*, ed. by Abdel Salam Sidahmed and Anoushiravan Ehteshami (Boulder, CO: Westview Press, 1996), 37.

[96] *See infra* 32-33.

[97] Burgerlijk Wetboek voor Indonesië (Kitab Undang-Undang Hukum Perdata) [Civil Code for Indonesia], S. 1847-23 (hereinafter CIV. CODE) consists of four books: Individual (arts. 1-489), Assets (arts. 499-1232), Contracts (arts 1233-1864), and Evidence and Prescription (arts. 1865-1993).

[98] Wetboek van Koophandel voor Indonesië (Kitab Undang-Undang Hukum Dagang Indonesia) [Commercial Code for Indonesia], S. 1847-23 consists of two books: Trading in General (arts. 1-308), and Rights and Obligations Arising from Shipping (arts. 309-754).

[99] Reglement op de Rechtvordering (Reglement Acara Perdata) [Regulation on Civil Procedure], S. 1847-52 as amended by S. 1849-63.

[100] Wetboek van Strafrecht voor Indonesië (Kitab Undang-Undang Hukum Pidana) [Criminal Code for Indonesia], S. 1915-732 as amended by S. 1917-497 and 1917-645. It is noteworthy that the Code accommodates "European" and "Indigenous" criminal law. Its promulgation put an end to pluralism of criminal law. *See* C. Fasseur, "Colonial Dilemma: Van Vollenhoven and the Struggle between Adat Law and Western Law," *European Expansion and Law:*

The Civil Code is a revised version of Napoleon Code with old customary law and institutions of the Netherlands.[101] The first generations of Indonesian jurists repeatedly pointed out that the code centered on individualism. Consequently, they argued that it was incompatible with Indonesian society, which emphasizes the familial principle (*asas kekeluargaan*). Despite such, application of warning its Book Three on Contracts has expanded as a result of its compatibility with international practice.

The Rv was the civil procedure for the Civil Code. It was applied to the now defunct Court of Justice (*Raad van Justitie*) that had jurisdiction mainly over European and Foreign Oriental groups. According to the Rv, judges were to play a passive role and wait for the parties to convince the court of their legal relationships. Judges were active only to ensure that the parties complied with civil procedure.[102]

Parallel to the Rv, the Netherlands Indies also had the Revised Indonesian Regulation (*Herziene Indonesisch Reglement* hereinafter HIR)[103] and the Regulation for Outside Java and Madura (*Reglement tot Regeling van het Rechtswezen in de Gewesten Buiten Java en Madura* hereinafter RBg),[104] both were applicable to the Country Courts (*Landraden*) respectively in the islands of Java and Madura, and the rest of Indonesia. Compared to its counterparts, the Rv is more detailed. Even though the HIR and the RBg forbid judges to apply other procedural law, in

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The Encounter and Indigenous Law in 19th- and 20th-Century Africa and Asia, ed. W. J. Mommsen and J. A. de Moor (New York: Berg, 1992), 251.

[101] Ball, *supra* note 16, at 197.

[102] *See* Supomo, *Hukum Atjara Perdata Pengadilan Negeri* (Jakarta: Pradnya Paramita, 1972), 18 [hereinafter Supomo, *Acara*]. *See also*, [C. F. G. Sunaryati Hartono?], "The Indonesian Legal System Following Independence," in *ASEAN Legal Systems*, ed. ASEAN Law Association (Singapore: Butterworths Asian, 1995), 19.

[103] Herziene Indonesisch Reglement (Reglemen Indonesia yang Diperbaharui) [Revised Indonesian Regulation], S. 1941-44.

[104] Reglement tot Regeling van het Rechtswezen in de Gewesten Buiten Java en Madura (Reglemen Acara Hukum untuk Daerah Luar Jawa dan Madura) [Regulation for Outside Java and Madura], S. 1927-227.

practice after independence they have to consult the Rv when both law are silent.[105] The practice of law establishes that judges may apply the institutes of Rv as a result of judge-made law.[106]

The second feature is the court system. Indonesia has a three-tier structure consisting of district court (*pengadilan negeri*) as court of the first instance; high court (*pengadilan tinggi*) as appellate court; and the Supreme Court (*Mahkamah Agung*) as court of cassation. Although the legal system does not recognize the principle of binding precedent, it acknowledges reference to 'jurisprudence' (*yurisprudensi*) and the power of judges to make law.[107]

The final feature is the term "law" (*hukum*). Indonesian law follows the system of two terms for "law".[108] Supomo explained to the BPUPKI that he used "*hukum*" as the translation of the Dutch word "*recht*" covering both written and unwritten law.[109] He employed the word "*undang-undang*" (act) for "*wet*" exclusively for written law. Henceforth these usages have been established.

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[105] HIR, art. 393. *See* Subekti, *Yurispudensi, Hukum Tidak Tertulis dan Hukum Adat dalam Pola Perencanaan Hukum dan Perundang-undangan Nasional* (Denpasar, Bali: Biro Dokumentasi dan Publikasi Hukum, Fakultas Hukum & Pengetahuan Masyarakat, Universitas Udayana, 1978), 37-39 (hereinafter Subekti, *Yuriprudensi*).
[106] *See* Supomo, *Acara*, *supra* note 102, at 9-11.
[107] *See* Lie Oen Hock, *Yurisprudensi sebagai Sumber Hukum* (Djakarta: Fakultas Hukum Universitas Indonesia, 1959), 27. This was Lie's inaugural lecture to hold the chair of professor of law for introduction to legal science and Indonesian legal system at the Faculty of Law and Social Science of the University of Indonesia. *Cf.* Oey Pek Hong, *Peranan Kodifikasi, Jurisprudensi dan Ilmu Pengetahuan Hukum dalam Perkembangan Hukum Perdata* (Surabaya: Fakultas Hukum Universitas Airlangga, 1959), 14. This was Oey's inaugural lecture to hold the chair of professor of law for private law at the Faculty of Law of Airlangga University. *See also* C. F. G. Sunaryati Hartono, *Peranan Peradilan dalam Rangka Pembinaan dan Pembaharuan Hukum Nasional* (Jakarta: Bina Cipta, 1975), 12.
[108] George P. Fletcher and Steve Sheppard, *American Law In a Global Context* (New York: Oxford University Press, 2005), 54-55.
[109] *See* Yamin, *supra* note 38, at 300-301, *cf.* Kusuma, *supra* note 38, at 356.

1.3.2.4 *Common Law Aspect of the Legal System*

Indonesia has abandoned one of the salient characteristics of civil law that a court is a faceless unit.[110] It was the Constitutional Court (*Mahkamah Konstitusi*) that initiated the breakaway by accommodating dissenting opinions in its decision.[111] The Supreme Court and the courts under its purview later followed suit. With the introduction of the 2004 Judicature Act, court decisions may no longer be delivered collegially.[112] Disagreement during discussion that impedes the bench from reaching a consensus will be incorporated as dissenting opinions in the judgment.[113]

1.3.3 *Fabricating National Legal System*

1.3.3.1 *Netherlands Indies Legal System*

Initially the colonial government planned to administer the archipelago under unified law. By its appointment Cowan submitted a draft consisting of two thousand articles applicable to all inhabitants aimed at ensuring legal certainty. This led to a debate on the politics of law involving two schools of thought. The Utrecht school was in favor of legal unification. Led by van Vollenhoven, the Leiden school defended legal pluralism.[114] He jumped on the code and pointed out that unification could never achieve the objective of legal unification. He added that

[110] John Merryman and Rogelio Pérez-Perdomo, *The Civil Law Tradition*, 3rd ed. (Stanford, CA: Stanford University Press, 2007), 37.
[111] *See* UU No. 24/2003, Mahkamah Konstitusi [Act No. 24/2003, Constitutional Court], Aug. 13, 2003, amended by UU No. 8/2011, Perubahan atas UU No. 24/2003 [Act No. 8/2011, Amendment on Act 24/2003], July 20, 2011 (hereinafter Const. Ct. Act), art. 45:10.
[112] UU No. 4/2004, Kekuasaan Kehakiman [Act No. 4/2004, Judiciary Power], Jan. 15, 2004 (hereinafter the 2004 Judicature Act), art. 19:5. The Act was repealed by UU No. 49/2009, Kekuasaan Kehakiman [Act No. 48/2009, Judiciary Power], Oct. 29, 2009 (hereinafter the 2009 Judicature Act).
[113] *See* the 2009 Judicature Act, art. 14:3, which is verbatim to the 2004 Judicature Act, art. 19:5.
[114] *See* Burns, *supra* note 4, at 77-89.

the code was doomed to failure due to the high cost of administration of justice and the disparity of existing legal culture.[115]

The Leiden school won the debate. As a result the government abandoned the idea of legal unification and adopted the "Principle of Dualism", in which adat law was conserved.[116] With an eye to the origin of the rules of law, the law for Indonesians presented a composite effect. In the first place there was adat law. Then there was governmental law, which were regulations specifically enacted for the Indonesian group. Finally there was the Western law, consisting of Dutch laws that were in force in the Netherlands and applicable based on the principle of concordance.[117]

As a consequence of legal pluralism, intergentiel law flourished in the Netherlands Indies. Ter Haar pointed to this abandonment as the turning point of adat law politics with catalytic effect on the birth of intergentiel law as a distinctive branch of law.[118] The debate revived almost a half-century later when Indonesian jurists had to determine which law should be the pivot of national law.

1.3.3.2 *Impact of Japanese Occupation*

It is important to mention the impact of Japanese occupation on the legal system. The Japanese occupation administration made two significant decisions that have had lasting effect.

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[115] It should be noted that in drafting the code Cowan did consider pluralism. Using Macaulay's principle of unification in British India – "Uniformity when you can have it, diversity when you must have it, but in all cases certainty!" – he attempted to unify the law while recognizing pluralism as exception. *See* Sudargo Gautama, *Pembaharuan Hukum di Indonesia* (Bandung: Alumni, 1973), 17-20 [hereinafter Gautama, *Pembaharuan*]; *see also* Wignjosoebroto, *supra* note 72, at 178.
[116] *See* Sudargo Gautama, "Indonesia," in *International Business Series: Legal Aspects of Doing Business in Asia and the Pacific*, vol. 3, ed. Dennis Campbell (Deventer: Kluwer Law and Taxation Publishers, 1984), 195; *see also* Fasseur, *supra* note 100, at 248-250.
[117] B. ter Haar, "Western Influence on the Law for the Native Population," ed. Schrieke, *supra* note 76, at 158.
[118] *See* Gautama, *Pembaharuan*, *supra* note 114, at 20. Supomo and Djokosoetono also use it as the beginning of a new chapter in the development of law in Indonesia. *See* Supomo and Djokosoetono, *Sedjarah Politik Hukum Adat*, vol. 2 (1954).

First, it simplified the judiciary by dissolving the Court of Justice, which was the court of law for European and foreign Oriental inhabitants. It chose the Country Court, which was the court for native inhabitants, to survive and administer justice to all after giving it its Indonesian name of *Pengadilan Negeri*. Second, by outlawing the use of Dutch, it encouraged the development of Indonesian legal vernacular. The Indonesian Language Committee had a subsection on law. It took cues from Indonesian terms and the public for translating Dutch legal terms. The dictionary of terms, which published the list of translation, contained 605 legal terms.

1.3.3.3 *Stages of Legal Development*

The founding fathers emphasized that independence was to create a just and prosperous society with egalitarian ideas where all elements of colonialism abolished. Attempts to break away from colonial laws were based on the rationale that the law subjugated the people to colonial interests. However, they failed to introduce drastic change to the law.

The failure was due to a combination of factors. Legal pluralism presents an insurmountable problem. Colonial law on the other hand had been systematically established.[119] Indonesian jurists found it difficult to shift their legal paradigm. At the same time they had to resolve the more pressing problem of national unity.[120] Absence of domestic model that could become the backbone of national law, as lamented by Djokosoetono, frustrated any attempt to break away from colonial law.[121] Therefore the landscape of positive law has been the theater of struggle to this day.

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[119] *See* Wignjosoebroto, *supra* note 72, at 187-189.

[120] *See e.g.* Daniel S. Lev, "Judicial Unification in Post-Colonial Indonesia," *Indonesia* 16 (1973): 1-37.

[121] Slametmuljana, *Perundang-undangan Madjapahit*, (Djakarta: Bhratara, 1967), 18.

1.3.3.3.1 *Struggle for Independence and Pretext for Guided Democracy (1945-1959)*

At the conclusion of the World War II, the Netherlands was eager to reclaim its colony in the East. As a result all Indonesian resources were devoted to preserving its newly proclaimed independence. Throughout this period almost the entire body of colonial law continued to have effect. The only exception was colonial law that contradicted the spirit of Independence.

The fight ended when the Republic of Indonesia and the Kingdom of the Netherlands signed the Round Table Conference on December 1949.[122] As a result, the Republic of Indonesia became one of the states that formed the United States of Indonesia.[123] Consequently the 1945 Constitution ceased to have effect over the archipelago, and was replaced by the 1949 Federal Constitution.

However, it was obvious from the start that diplomacy was only a tactic to achieve *de jure* recognition from the Netherlands. On August 17, 1950 Sukarno, the President of the United States of Indonesia, dissolved the federal state. Other states then amalgamated with the Republic of Indonesia forming a unitary state.[124] Supomo submitted the 1950 Provisional Constitution to replace the Federal Constitution.[125] The former promoted what is called in Indonesian history as "liberal democracy" with its parliamentary system.

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[122] *See* Sekretariat Umum Konperensi Medja Bundar, *Hasil-Hasil Konperensi Medja Bundar sebagaimana diterima pada Persidangan Umum yang kedua Terlangsung Tanggal 2 Nopember 1949 di Ridderzaal di Kota 'S-Gravenhage* (Djakarta: Kolff, 1950). In the RTC, the Netherlands "transferred sovereignty" to the Republic of Indonesia. Indonesia, however, has always recognized the RTC as de jure recognition of its international law personality from the Netherlands.

[123] This federal state later formed a union with its former colony: the Netherlands-Indonesia Union. *See* MIT Press, "Statute of the Netherlands-Indonesia Union, signed at the Round Table Conference, the Hague, November 2, 1949," *International Organization* 4 (1950): 177.

[124] *See* George McTurnan Kahin, *Nationalism and Revolution in Indonesia* (Ithaca, NY: Cornell University Press, 2003), esp. 446-469.

[125] Supomo, *Undang-Undang Dasar Sementara Republik Indonesia*, (Jakarta: Pradnya Paramita, 1974), 4-17.

In 1955 Indonesia held two general elections. The first was to elect members of the House of Representatives (*Dewan Perwakilan Rakyat* hereinafter DPR). The second was to elect members of the Constitutional Assembly (*Konstituante*).[126] Parliamentary cabinets were always short-lived and the Constitutional Assembly failed to deliver a draft of constitution in time. On July 5, 1959, as the political pressure intensified, Sukarno dissolved the Constitutional Assembly and restored the 1945 Constitution.[127]

Indonesian jurists were conscious of legal pluralism and its problems. As part of the attempt to develop national law, in 1956 the Indonesian Law Graduates Association petitioned to Prime Minister for the establishment of a state agency. Two years later the Institute of National Law Development (*Lembaga Pembinaan Hukum Nasional* hereinafter LPHN) was established.[128] In 1974 LPHN was transformed into the National Law Development Agency (*Badan Pembinaan Hukum Nasional* hereinafter BPHN).[129]

In this period the debates on national law were twofold. The first focused on the debate between the unification and harmonization of law. The second, within the idea of legal unification, was a debate on which law was to survive. The Western law camp proposed that the Civil and Commercial Codes replaced adat law, and that future legislation should be oriented to Western law. Adat law camp proposed otherwise. However most jurists agreed that adat law could not keep up with modern trade.[130]

A compromise was achieved by classifying legal issues as either sensitive or neutral. Harmonization of law was for the issue classified as sensitive, whereas unification of law was

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[126] *See* Adnan Buyung Nasution, *The Aspiration for Constitutional Government in Indonesia: A Socio-legal Study of the Indonesian Konstituante, 1956-1959* (Jakarta: Pustaka Sinar Harapan, 1992).
[127] Daniel S. Lev, *The Transition to Guided Democracy: Indonesian Politics, 1957-1959* (Ithaca, NY: Cornell University, 1966).
[128] Keppres No. 107/1958, Lembaga Pembinaan Hukum Nasional [Presidential Decree No. 107/1958, the Institute of National Legal Development].
[129] Keppres No. 45/1974 [Presidential Decree NO. 45/1974]. *See* Simorangkir, *supra* note 85, at 25-61.
[130] Gautama, *Pembaharuan*, *supra* note 115, at 29-30.

feasible for the latter. Usually the ones classified as sensitive were laws concerning personal status, such as the law on person, marriage, and inheritance.[131] Henceforth the Civil Code, especially its Book Three on Contract, and the Commercial Code have been used by most, if not all, Indonesians as the applicable law for national and international business transactions.

In this period the Supreme Court had two Chief Justices. From 1945 until his death in 1952 Kusuma Atmadja was the first Chief Justice. He was another van Vollenhoven's student and former member of the BPUPKI. He is known for having a strict character and resisting Sukarno's pressure. The Atmadja court is considered as the epitome of a free and independent judiciary.[132] His successor, appointed on October 13, 1952, Chief Justice Wirjono Prodjodikoro, could not maintain the independence and the Court became subservient to Sukarno.

1.3.3.3.2 *Sukarno Guided Democracy (1959-1966)*

"Revolution" was the watchword for this period. Sukarno identified the phases of Indonesian revolution that culminated in him taking full-control through Guided Democracy. In the name of revolution, "disavowing the letters" was inevitable.[133] Having learned that jurists could not make a breakthrough, President Sukarno opened the Indonesian Judges Association congress on November 26, 1961 with a rebuke. Quoting Wilhelm Liebknecht he scornfully pronounced that, "You cannot make revolution with jurists".[134] Politics became the leader

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[131] C. F. G. Sunaryati Hartono, *Bhinneka Tunggal Ika sebagai Asas Hukum bagi Pembangunan Hukum Nasional*, (Bandung: Citra Aditya Bakti, 2006), 11-16 [hereinafter Hartono, *Bhinneka*].
[132] *See* Sebastiaan Pompe, *The Indonesian Supreme Court: A Study of Institutional Collapse* (Ithaca, NY: Cornell University Press, 2005), 36-44.
[133] *See* Sukarno, *Penemuan Kembali Revolusi Kita*, presidential speech on Aug. 17, 1959, 8 (1959).
[134] *See* Wignjosoebroto, *supra* note 72, at 217-218.

(*panglima*). Consequently law became supplemental to political objectives. The idea of revolutionary law then launched.[135]

Sahardjo, the then Minister of Justice, advanced his thesis that the Civil and Commercial Codes should be treated merely as "law books" or "commentaries" comparable to the Restatements in the United States.[136] This approach would enable judges to make active, even creative, interpretation in applying all provisions of the codes. Chief Justice Prodjodikoro immediately expressed his approbation to the thesis. In Circular Letter No. 3/1963, the Supreme Court expressed its regret that laws of colonial-thinking were still in effect in the era of independence, and annulled some articles of the Civil Code.[137] Instead of enacting new legislation, the law reform approach evolved, interpreting old laws within the notion of "return to revolution".[138]

Revolution and revolutionary law as its *idée fixe* have brought in the spotlight the hierarchy of positive law. Chief Justice Prodjodikoro explicitly stated that the society's sense of justice was the basis of law.[139] Despite absence of statutory provision, he argued, unwritten law would prevail over written law when the latter was contrary to social justice and

[135] *See* Ruslan Abdulgani, *Hukum dalam Revolusi dan Revolusi dalam Hukum* (Djakarta: Prapantja, 1964). Abdulgani was the chief ideologue in the Sukarno period. He held the same position, *mutatis mutandis*, in the New Order as the leader in promoting the "Internalization and Implementation of Pancasila" (*Penghayatan dan Pengamalan Pancasila*). *See* Oey Hong Lee, *The Sukarno-Controversies of 1980/81* (Hull: University of Hull, Centre for South-East Asian Studies, 1982), 20.
[136] Gautama and Hornick, *supra* note 68, at 181; *see* Wignjosoebroto, *supra* note 72, 219-220.
[137] *See* Surat Edaran Mahkamah Agung No. 3/1963 [Circular Letter of the Supreme Court No. 3/1963]. Prodjodikoro, however, considered the Commercial Code contained internationally-accepted rules and therefore was not of colonial nature. *See* Wirjono Prodjodikoro, "Keadaan Transisi dari Hukum Perdata Barat," (Sept. 5, 1962), unpublished working paper for the second congress of the Indonesian Scientific Society in Yogyakarta (on file with the University of Washington Library classified as Daniel S. Lev archives).
[138] *See* Gautama and Hornick, *supra* note 68, at 179.
[139] *See* Wirjono Prodjodikoro, "Angkatan Pengadilan dalam Ketatanegaraan Kita," *Hukum* 3-4 (1956): 13.

humanitarianism.[140] Judges were allowed to interpret the law creatively. This happened within the context of Pancasila and the 1945 Constitution.

Prodjodikoro's brethren in court, led by Justice Subekti, challenged both Sahardjo's thesis and the circular letter. He argued that such a move would precipitate legal uncertainty and that they could not be sources of law.[141] He was however in the minority and on the wrong side of history.

Sukarno's conception of revolution was manifest in the explicit disavowal of the 1945 Constitution to the extent it was impracticable for his political agenda. Instead of being the supreme constitutional body, the Provisional People's Consultative Assembly (*Majelis Permusyawaratan Rakyat Sementara* hereinafter MPRS) became rubber stamps to Sukarno's policy.[142] The Supreme Court lost its independence when Chief Justice Prodjodikoro accepted Sukarno's appointment to a ministerial post in the Third Working Cabinet (1962-1963).[143]

This period is important to the study since it shows national interest as public order. Indonesia had to cancel unilaterally the results of the Round Table Conference because the Netherlands did not keep its part of the bargain to hand back West Papua.[144] Sukarno put

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[140] Lev pointed out that this idea added to judicial confusion. See Daniel S. Lev, "The Lady and the Banyan Tree: Civil-Law Change in Indonesia," *American Journal of Comparative Law* 14 (1965-1966): 299 (hereinafter Lev, *Lady and Banyan Tree*).

[141] *See* Subekti, *Yurispudensi*, *supra* note 105, at 24-25. *See also* Gautama and Hornick, *supra* note 68, at 180-181; Subekti, "Pembinaan Hukum Perdata Nasional oleh Yurisprudensi Indonesia," *Guru Pinandita: Sumbangsih untuk Prof. Djokosoetono, S.H.*, ed. Selo Soemardjan (Jakarta: Penerbit Fakultas Ekonomi Universitas Indonesia, 2006), 232.

[142] Politically the MPRS became subservient to Sukarno since its Speaker (1960-1966), Chairul Saleh, was also the Minister of Industry (1960-1964) and the Minister of Energy and Mineral Resources (1959-1964). The MPRS was "provisional" (*sementara*) because the 1950 Provisional Constitution did not have it in the constitutional structure. When Sukarno restored the 1945 Constitution he had to appoint all of its members. After the second general election in 1971, it was no longer provisional and thus called the MPR.

[143] Despite further cabinet reshuffles (Fourth Working Cabinet (1963-1964), Dwikora Cabinet (1964-1966), Revised Dwikora Cabinet (February – March 1966), Second Revised Dwikora Cabinet (March – July 1966), Prodjodikoro remained a member of the cabinet as the Chief Justice of the Supreme Court, and in the last cabinet also became the Minister of Justice.

[144] *See* UU No. 15/1956, Pembatalan Hubungan Indonesia-Nederland berdasarkan Perjanjian Konferensi Meja Bundar [Act No. 13/1956, Cancellation of Indonesia-the Netherlands Relation based on the Round Table Conference].

pressure by nationalizing Dutch-owned companies. Using the interest of the national economy as public order, Indonesia only provided compensation in installments. Thus it diverted from the principle of prompt, effective and adequate compensation found in international law. The nationalization was brought to German courts in the famous *Bremen Tobacco* case.[145]

This period is also important because it shows that politics of law was embodied in Sukarno's persona. He had *carte blanche* not because of his formal legal titles, but the informal one.[146] Sukarno, the self-proclaimed "Mouthpiece of Indonesian people", became the embodiment of the nation.[147] Unlike Louis XIV, he was not the state but the people, and achieved the same result.

Furthermore this period reveals the coexistence of informal and formal law. Formal law was susceptible to informal law as evident in Sukarno's accumulation of power. It was not legal unity that held the nation, but Sukarno the person. Throughout this period, Pancasila and the 1945 Constitution were secondary to Sukarno.

1.3.3.3.3 *Suharto New Order (1966-1998)*

The killing of six Army generals at the turn of October 1, 1965 marked the fall of Sukarno. His hesitation to rebuke the Indonesian Communist Party openly, deemed responsible by the Army for the killings, put him in a corner. As the nation was on the brink of political crisis, on March 11, 1966, Sukarno signed a letter ordering the then Lt. General Suharto to take

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[145] *See* Judgment of the Bremen Court of Appeal relating to Sale of Indonesia Tobacco at Bremen, Aug. 21, 1959, translated from official copy (hereinafter Bremen Judgment) (on file with the author). *Landgericht* [LG] [County Court] Apr. 21, 1959, and *Oberlandesgericht* [OLG] Aug. 21,1959 (Ger.) (English translation of the judgments on file with the author).

[146] Besides being the President, Sukarno held the following titles *inter alia*: the Commander-in-Chief of the Armed Forces, the Great Leader of the Revolution, the Mandatory of the MPRS, the Chairman of the Supreme Advisor Council, the Supreme Leader of National Front, and the Commander of the State Police.

[147] Cindy Adams, *Sukarno: An Autobiography* (Kansas City: Bobbs-Merrill, 1965), 312.

necessary steps to maintain order and security. Suharto, however, guilefully used the letter as an instrument of power transfer and kicked Sukarno upstairs.

Suharto's New Order proclaimed itself as the corrective force that would bring the nation back on track. It accused Sukarno was responsible for the killings by letting the Communist Party take a prominent role in politics. It also blamed Sukarno for the failing economy. It concluded that none of these would have happened if Sukarno had properly executed Pancasila and the 1945 Constitution.

The New Order therefore pledged to "pristinely and consistently execute the 1945 Constitution."[148] The New Order restored the MPR(S) as the holder of people's sovereignty and its power to establish the Main Outlines of the Nation's Policy (*Garis-garis Besar Haluan Negara* hereinafter GBHN).[149] The MPR(S) then pronounced Pancasila as the source of all law in Indonesia. It also established the hierarchy of law consisting of: (i) the 1945 Constitution; (ii) Decree of the MPR; (iii) Act or Government Regulation in lieu of Act; (iv) Government Regulation; (v) Presidential Decree; and (vi) other implementing regulations such as Ministerial Regulation, and Ministerial Instruction.[150] Later acts have upheld this legal hierarchy.[151]

The President resumed his task as the mandatory of the MPR(S).[152] Lacking Sukarno's charisma, Suharto relied on formal law for legitimacy. While Sukarno was the extra-

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[148] *See e.g*. A. H. Nasution, *Ketetapan-ketetapan MPRS Tonggak Konstitusional Orde Baru* (Djakarta: Pantjuran Tujuh,1966), 15.
[149] *See* the (original) 1945 Const., arts. 1:2 and 3. The Third Amendment has canceled MPR's power of GBHN.
[150] Tap MPRS No. XX/MPRS/1966, Memorandum DPR-GR Mengenai Sumber Tertib Hukum Republik Indonesia Indonesia dan Tata Urutan Peraturan Perundangan Republik Indonesia [Decree of the MPRS No. XX/MPRS/1966, Memorandum of the People's Representative Council of Mutual Assistance on the Source of Law of the Republic of Indonesia and the Hierarchy of Law of the Republic of Indonesia].
[151] *See infra* 44-45.
[152] The (original) 1945 Const., art 6:2 read, "The President and the Vice President are elected by the Assembly." The word mandatory is found in the Elucidation to the 1945 Constitution where under "State Government System" the President "is 'mandatory' of the Assembly. He must execute decisions of the Assembly." Tap MPRS No. XVI/MPRS/1966 elucidates that as its mandatory the President holds executive power based on the 1945 Constitution, and is under obligation to undertake assignments from the Assembly and to submit a report for his undertakings.

constitutional embodiment of the people, Suharto was the formal recipient of the people's mandate. While Sukarno relied on his charms on the people, Suharto relied on the Army for support. Any criticism of Suharto would be considered unconstitutional and subversive.

In the Second National Law Seminar (1968), Subekti, now the Chief Justice, had the high ground. He contended that Saharjo's thesis and the Circular Letter were not meant to revoke certain articles of the Civil Code, but to encourage judges to test them with the spirit of independence. He then initiated judicial authority freeing judges to exercise their discretion through law-making.[153]

The New Order had a different approach to legal development. The MPR laid down the politics of law in the GBHN and the President would execute it. Indonesian law pivoted Western law, which was deemed practical for economic development. Unwritten law was either formalized in statutory law or marginalized for the sake of legal certainty. Mochtar Kusumaatmadja[154] advocated Roscoe Pound's idea of law as a tool of social engineering to the legal community.[155]

The BPHN, as part of the Ministry of Justice, concerted the preparation for legal development. During this period a bill on Private International Law Code was prepared and completed.

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[153] *See* Subekti, *Pembinaan Hukum Nasional* (Bandung: Alumni, 1981), 23; *see also* ASEAN Law Association, 53-54.
[154] No relation to the first Chief Justice, he was dean of the Faculty of Law of Padjadjaran University, and later became its rector. During the New Order he served as the Minister of Justice (1973-1978), and Minister of Foreign Affairs (1978-1988).
[155] Roscoe Pound, *An Introduction to the Philosophy of Law* (New Haven, CT: Yale University Press, 1954), 47. *See e.g.* Mochtar Kusumaatmadja, "The Role of Law in Development: The Need for Reform of Legal Education in Developing Countries," *The Role of Law in Asian Society*, Papers for Special Congress Session of the 28th International Congress of Orientalists (1973); Mochtar Kusumaatmadja, *Pembinaan Hukum dalam Rangka Pembangunan Nasional* (Jakarta: Bina Cipta, 1975). *See also* Wignjosoebroto, *supra* note 72, 230-233.

Judicial independence initially became one of the central issues in the New Order.[156] The 1970 Judicature Act stipulated that the judiciary as a state authority had freedom to uphold law and justice based on Pancasila for the sake of Indonesian rule of law.[157] As law enforcers, judges had to "explore, follow, and understand the living legal values of the society."[158] They were appointed and dismissed by the President in his role as head of state.[159] Administratively Justices and judges had different status. The former were state officials, but the latter were civil servants. Because the Ministry of Justice was in charge of their logistics, judges were practically subordinated to the government.[160] Consequently the judiciary's freedom was contrived and the government maintained a means of intervention in judicial deliberation.[161] Lacking definite law governing its organization and authority, the judiciary became an Achilles' heel.[162]

This period is important to this study because it shows that legal unity played important role in holding the nation together. The fall of Sukarno did not result in disintegration because Pancasila and the 1945 Constitution regained their primacy. Compared to previous periods, the politics of law and the trajectory of legal development were clear. Formal law trumped on informal law. Law was to support economic development. In this context Indonesian PIL developed. Public order was to serve economic development while simultaneously gravitated toward Pancasila and the Constitution.

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[156] *See* Results of the Second National Law Seminar.
[157] *See* UU No. 14/1970, Ketentuan-ketentuan Pokok Kekuasaan Kehakiman [Act No. 14/1970, Basic Regulation on Judicature Power], Dec. 17, 1970 (hereinafter the 1970 Judicature Act), art. 1. It repealed UU No. 19/1964, Ketentuan-ketentuan Pokok Kekuasaan Kehakiman [Act No. 19/1964, Basic Regulation on Judicature Power], Oct. 31, 1964 (hereinafter the 1964 Judicature Act), where its art. 19 clearly stated that courts were not independent from the executive and allowed the President to intervene on the judiciary in the interests of revolution, national pride, or the society.
[158] *Id*. art. 27:1 of the 1970 Judicature Act.
[159] *Id*. art. 31.
[160] *Id*. art. 32, and UU No. 8/1974, Pokok-pokok Kepegawaian. [Act No. 8/1974, Basic Rules for Civil Servants], Nov. 6, 1974 *See also* K. Wantjik Saleh, *Kehakiman dan Peradilan* (Jakarta: Ghalia Indonesia, 1977), 141.
[161] Government intervention was evident in cases with sensitive political issues.
[162] *See* Himawan, *supra* note 10, at 98-99.

1.3.3.3.4 The *Reformasi (1998-present)*

Corruption, collusion and nepotism proliferated during the New Order. When the fruits of economic development eclipsed all of the unlawfulness, nothing through the formal legal institution could practically succeed in challenging Suharto. A *coupe de grâce* came in the form of the monetary crisis. It greatly depreciated the rupiah against U.S. dollar and quashed the New Order's economic achievements. With that Suharto lost his legitimacy and resigned on May 21, 1998.

The Suharto authoritarian regime had shown that law reform was desperately needed. In the initial years of *Reformasi*, the MPR amended the 1945 Constitution as attempts to provide a system of checks-and-balances.[163] As a result the constitutional structure has been altered. Although the MPR retained its constitutional supremacy,[164] it lost power to elect the President to the people. The President became the mandatory of the people. The DPR holds the power to legislate.[165] An independent judiciary is finally guaranteed.[166] However the newly established Constitutional Court curbs its power with respect to judicial review.[167]

There is no clear-cut politics of law. After the Amendments, the MPR has not produced any GBHN. Legal reform, if any, can be found in the DPR's so-called National Legislation Program (*Program Legislasi Nasional* hereinafter Prolegnas). It contains a list of bills under discussions. It is noteworthy that the bill on PIL Code has been excluded indefinitely.

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[163] Amendments to the 1945 Constitution were made by deleting articles or paragraphs or rewriting the original text, and introducing new articles or paragraphs. It has been amended four times: October 19, 1999, August 18, 2000, November 9, 2001, and August 10, 2002.

[164] I should point out that the majority opinion considers the MPR is at equal status with other constitutional bodies. I maintain the supremacy based on the fact that it has the power to amend the Constitution and dismiss the President from office (art 3:3 the 1945 Constitution (Third and Fourth Amendment). *See* the 1945 Const. 3rd Amend., art. 3:1 and the 1945 Const. 3rd and 4th Amends., art. 3:3.

[165] *See* the 1945 Const. 1st Amend., art. 20:1.

[166] *See* the 1945 Const. 3rd Amend., art. 24:1.

[167] *See* the 1945 Const. 3rd Amend., art. 24C:1.

"Rule of law" has been the gimmick of this period. The formal way to achieve this is by establishing legal certainty. With some adjustments Act No. 10/2004, later repealed by Act No. 12/2011 that has also, confirmed the hierarchy of law.[168] The current hierarchy consists of (1) the 1945 Constitution, (2) Decree of the MPR, (3) Act/Government Regulation in lieu of Act, (4) Government Regulation, (5) Presidential Regulation, (6) Provincial Regulation, and (7) Regency/Municipal Regulation.[169]

Centralistic approach to development during the New Order had caused regional dissatisfaction. Some politicians proposed federalism to cope with this problem. However this proposal was rejected by the nation.

Another point of debate, but with lesser proponents, was the establishment of Islamic state. This proposal was considered highly sensitive to nationhood and was swiftly rejected. An exception is the Province of Aceh in the northern tip of Sumatra. Like most part of Indonesia, Aceh has been predominantly Muslim. But its history has been predominantly Islamic compared to the rest of Indonesia. The legislator has accommodated religious sentiment to uphold Islamic law in Aceh under the framework of unitary state and the 1945 Constitution.[170]

Most of the cases examined in this study happened during the *Reformasi*. The judiciary's newly established independence so far has positive results institutionally. However, lack of politics of law – either in the form of charismatic president or GBHN – has made the courts rudderless. Its decisions on public order issues have been criticized and questioned. Putting any sign of corruption aside, court decisions have been inconsistent and unresolved.

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[168] *See* UU No. 10/2004, Pembentukan Peraturan Perundang-undangan [Act No. 10/2004, Formation of Legislation], June 22, 2004, art. 7:1.
[169] *See* UU No. 12/2011 Pembentukan Peraturan Perundang-undangan [Act No. 12/2011, Formation of Legislation], Aug. 12, 2011, art. 7:1.
[170] UU No. 11/2006, Pemerintahan Aceh [Act No. 11/2006, Governance of Aceh], Aug. 1, 2006, art. 1:2.

1.4 SECTION C: PANCASILA AND THE 1945 CONSTITUTION

1.4.1 *Pancasila*

Radjiman Wediodiningrat, chairman of the BPUPKI, raised a vexing question about the kind of state and its foundation for Indonesia. Sukarno was the only person who responded to it.[171] In his one-hour speech he covered major political theories and concepts known at the time. He discussed Sun Yat Sen's three people's principles (*San Min Chu I*): nationalism, democracy and socialism. He also made reference to Ernest Renan's *le desir d'etre ensemble* and Otto Bauer's *Gemeinschaft* to support his idea of Indonesian nationhood. He shortly discussed communism, French Revolution and Gandhi's humanism and pointed out similar ideas or social progress in the Indonesian society.

He submitted that Indonesia should have one, three, or five principles, but left it to the BPUPKI to decide. Later the BPUPKI decided to have five principles and called it Pancasila. It consists of (1) belief in the One Almighty God; (2) a just and civilized humanitarianism; (3) the unity of Indonesia; (4) a democracy guided by the wisdom arising from consultation and representation; and (5) social justice for the whole Indonesian people.

Indonesia is probably the only country that still emphasizes its state philosophy. However law is after all deeply infused with ideological assumptions. In this context a legal system is built to facilitate the assumptions.

Implementing the ideology, however, is a different matter. Pancasila is too abstract and not sufficiently elaborated. Attempts to concreting Pancasila into legal construct only came

[171] *See* Mohammad Hatta, *Memoir* (Jakarta: Yayasan Hatta, 2002), 435-436.

later.[172] The New Order went as far as indoctrinating Pancasila to the nation as part of its war against communism.[173] However it remains too philosophical and abstract for the general public.

Geography has great impact in shaping Indonesia. Located between two great oceans makes Indonesia open to foreign cultures influence. The importance of Pancasila as *Weltanschauung* can be understood from the first theme of the study – the artificiality of Indonesia. Despite its philosophical notion, Pancasila is instructive to understand how Indonesia syncretizes external and internal values and uses them to position itself on the world stage. It is therefore a means to identify Indonesia as a unified form of people, culture, and values distinguished from the rest of the world. Second only to India, Indonesia is the most populous country to gain independence from colonial rule in the twentieth century. However unlike India, its crossroad location has made Indonesia vulnerable to the Cold War, and now globalization.

1.4.2 *The 1945 Constitution*

The whole Pancasila is restated in the Preamble to the 1945 Constitution. This fact becomes a linear legal narrative that the nation is built upon it. The Preamble has been immune to amendment.

Prior to the Amendments Indonesia had one of the shortest constitutions. The (original) 1945 Constitution only had thirty-seven articles. In his report to the BPUPKI, Supomo explained that he drafted the 1945 Constitution based on familial system.[174] Supomo, an expert on adat law, transformed indigenous social system into a modern concept of nation-state. Like Sukarno, he considered contemporary theories of state and adapted them for Indonesia.

[172] *See e.g*. Soediman Kartohadiprodjo, *Pancasila sebagai Pandangan Hidup Bangsa Indonesia*, ed. Achmad Suhardi Kartohadiprodjo et al. (Jakarta: Gatra Pustaka, 2010).
[173] The author had to immediately take 100-hour course on Pancasila as part of his orientation program upon admitted to the University of Indonesia.
[174] Kusuma, *supra* note 38, at 357.

Mohammad Hatta, an economist by education, was responsible for article 33 on the economic system.[175] Like the state system in general, embracing the familial principle the economy is based on cooperation.[176] Important sectors of the economy that affect the life of the people shall be under the powers of the state.[177] Natural resources are also under the powers of the state to be used to the benefit of the people.[178]

Given its succinctness the 1945 Constitution delegated most of its stipulation to statutory law for implementation. The New Order capitalized the delegation to serve its regime. Its manipulative practice became the rationale for Amendments. Although the numbering of articles remains thirty-seven, the Amendments have practically increased the amount of articles to seven-three.

1.4.3 *Rallying Points of the Nation*

Reformasi has transformed Indonesia into the third largest democratic country. Freedom of speech has made dissenting voices known. Religious fundamentalism is also on the rise. Less then a decade after Suharto's resignation Indonesia had repeatedly found itself on the brink of crises. Given its size and pluralisms, it is therefore noteworthy to quote Sukarno that "[our] greatest achievement is that we have survived!"[179]

Confronted with disintegration and the rising of fundamentalism Taufiq Kiemas, the Speaker of the MPR (2009-2013), proposed his conceptions. He pointed to Pancasila, *Bhinneka Tunggal Ika*, the 1945 Constitution, and the Unitary State of the Republic of Indonesia as the pillars of nationhood. Act No. 2/2011 on Political Party adopted Kiemas' "four pillars of

[175] *Id*.
[176] *See* the 1945 Const., art. 33:1.
[177] *Id*. art. 33:2.
[178] *Id*. art. 33:3.
[179] Adams, *supra* note 147, at 309.

nationhood."[180] Although the Constitutional Court has declared the phrase "four pillars on nationhood and statehood" is contrary to the 1945 Constitution, Kiemas' conception has received wide acceptance.[181] Pancasila and the 1945 Constitution remains the rallying points for Indonesia.

Despite its achievement in democracy, the *Reformasi* has failed to made significant impact on the legal sector. Corruption has become more rampant. The court has not been able to capitalize its independence. Unlike the politicians, judges have not found Pancasila and the 1945 Constitution as unifying tools in discerning legal disputes.

This section has partly shown that in the course of time Gautama doctrine remains instructive. Both Pancasila and the 1945 Constitution have remained important. These fundamental norms have successfully continued their function as the instruments that hold the nation together.

1.5 Conclusion

Public order operates in a legal system to protect its interest. The above discussion has shown the backdrop of Gautama doctrine. It demonstrates the artificiality of 'Indonesia' and the layers of pluralism that surround it. The legal system is a replication of its pluralistic society. Unity – be it the people and the law – is to be achieved by embracing plurality.

This chapter has partly proved Proposition 1. The legal system develops parallel to Indonesian history and culture. Legal unity brought the people to nationhood. In the course of

[180] *See* article 34 of UU No. 2/2011, Perubahan atas UU No. 2/2008 tentang Partai Politik [Act No. 2/2011, Amendment to Act No. 2/2008 on Political Party], Jan. 15, 2011.
[181] *See* Basuki Agus Suparno et al, Constitutional Court decision No. 100/PUU-XI/2013, Mar. 18, 2014, available at http://www.mahkamahkonstitusi.go.id/putusan/putusan_sidang_1668_20140403093814_100%20PUU%202013_telahucap-3april2014_FINAL%20-%20Header%20ok.pdf.

time legal unity, however loosely, has also held the nation together. This discussion has shown that Pancasila and the 1945 Constitution have created that unity.

This chapter has also provided the underlying characteristic of Indonesian law to prove Proposition 2. Chapter 3 will further prove that modern judicial reasoning has discounted or overlooked this feature in relation to public order.

Chapter 2

GAUTAMA PUBLIC ORDER DOCTRINE AND ITS GENIUS

"We have to use this institution of public order as a shield, not as a sword."[1]

2.1 OVERVIEW

Chapter 1 has shown the layers of pluralism that have made Indonesia one of the most pluralistic nations in the world. It has also shown that while the legal system is the source of the systemic challenge, it has become the unifying instrument that keeps the nation together.

This chapter picks up on legal pluralism as *sine qua non* for the development of the legal system. Under this perception I will show how the doctrine developed and what were the contributing factors to its process. Currently the doctrine is transformed into a provision stipulating that, "Foreign law which should be applied according to Indonesian PIL will not be used if those provisions are contrary to public order and good morals."[2]

In this chapter I show that "public order" should be understood as "in compliance with Pancasila and the 1945 Constitution". Gautama proposed public order should be used on exceptional basis. He wanted judges not to be allergic to applying foreign law, but left it to their good judgment when the application would be contrary to Indonesian public order. Taking everything into account the doctrine is designed to anticipate future development of the legal system and simultaneously protect it from intruding foreign law. In other words, public order sets

[1] Sudargo Gautama, *Pengantar Hukum Perdata Internasional Indonesia* (Jakarta: Bina Cipta, 1987), 134 (hereinafter Gautama, *Pengantar*).
[2] *See* Department of Justice, Republic of Indonesia, "Rancangan Undang-Undang Hukum Perdata Internasional (1997/1998)," art. 4 (hereinafter the Bill) (on file with the author). For earlier draft I will refer to as the bill. For the evolution of this formulation, *see infra* pp. 78.79.

the parameters of foreign law application. The discussion will show that Indonesian law encompasses “professorial law” as a consequence of historical events that began with independence and the status quo of colonial legislation. Scholars emerged as intellectual bridges transposing colonial legislation to the objectives of independence. The next generation’s lack of command of the Dutch language helped put the seal on their status as oracles of the law. In the field of PIL Gautama almost stood alone as the authority.

This chapter is divided into four sections. In Section A I introduce Gautama and the vantage point he held. On one hand his professorship gave him academic credibility in formulating the doctrine. On the other hand his private practice gave him insight into the interplay between law and politics at national and international level.

Section B shows that, unlike other branches of law, Indonesian PIL has had more models for comparison. Here I discuss that the doctrine was a result of comparative studies that Gautama put into the context of post-independent Indonesia. In the course of time the doctrine has been formulated with minor revision, but it pivots in Pancasila and the 1945 Constitution. Gautama academic and practical expertise gave him authority over Indonesian legal circle that led to acceptance of the doctrine.

In Section C I unpack implicit assumptions of the doctrine. These assumptions have their roots in the legal system. First it assumes that judges have judicial discretion. Lack of statutory law gives way to jurisprudence in the sense of judicial decisions as gap-filling law. This leads to the second assumption: decisions on public order as judge-made law. Third, public order is determined by informed public opinion. An issue may be considered repugnant to a certain society while at the same time other societies find it less offensive or even acceptable. The

fourth assumption, the taking into consideration of legal pluralism and development of national law, is calibrated to the trajectory of the legal system.

Section D points out the genius of the doctrine. It maintains the role of the legal system as the unifying instrument for Indonesia. At the same time it anticipates legal development without becoming irrelevant when Indonesia experienced regime change and political turbulence. The doctrine therefore has partly surmounted the systemic challenge to remain instructive as a guideline for judges.

This chapter is to partly prove three propositions of the study.

Proposition 3 is “Some parts of Indonesian law are ‘professorial law’”. As I have pointed out in chapter 1, Indonesia has been struggling with jettisoning part of its colonial-interest law by developing national legislation that serves the ideals of independence. This chapter will show that Gautama and his contemporaries served as the intellectual bridge between colonial law and national law. In the absence of national legislation their opinions have been instructive for the academia, the legislators as well as legal practitioners.

By discussing the doctrine I partly show Proposition 4: “the Gautama doctrine provides a uniquely valuable framework which can be operable within the context of Indonesian law.” The discussion of this chapter mostly focuses on examining the doctrine from theoretical perspective. Chapter 3 will examine it from practical perspective. Chapter 4 will finish up by combining the discussions.

I also employ the same approach for Proposition 5: “consistent implementation of the notion of ‘public order’ in judicial decisions is only possible if the broader context of legal pluralism is considered together with the text of legislation”. With its emphasis on how the doctrine developed this chapter proves that legal pluralism is a crucial factor that always comes

into play in the legal system. When judges discount this they are not only fail in understanding the underpinning of the legal system but also interpreting public order. The discussion in chapter 3 will provide evidence on shortage of opinion. Chapter 4 will finish up the discussion.

2.2 SECTION A: THE JURIST-CUM-LAWYER SUDARGO GAUTAMA[3]

2.2.1 *Gautama the Jurist*

In 1924 the colonial government had just upgraded the Law School (*Rechtsschool*) to the Law College (*Rechtshogeschool*) in Batavia (now Jakarta). In terms of education the former was to introduce students to legal studies, which they would later continue in Leiden University in the Netherlands. The school produced the first generation of Indonesian legal scholars, with Supomo being the prominent member of the cohort. Since 1950 the Law College has been transformed into the Faculty of Law of the University of Indonesia.

Gautama was born in Jakarta on March 1, 1928. He started his law studies in mid-1947 at the Law College. On December 18, 1950 he obtained the title Mr. (*meester in de rechten* or master of laws) from the University of Indonesia. He immediately embarked on his doctorate studies at the same university and became a doctor in law in 1955.

Gautama's prominence started with his dissertation that attracted the attention of legal and linguistic scholars. Not only was it the first law dissertation written in Indonesian language, but it was also the first that discussed intergentiel law issue of mixed marriages after independence. Legal scholars were interested in knowing the effects of independence on mixed

[3] Most of the discussion about Gautama in this section is taken from two sources: Yu Un Oppusunggu, "In Memoriam Prof. Mr. Dr. Sudargo Gautama," *Jurnal Hukum dan Pembangunan* 4 (2008): 439-448, and Yu Un Oppusunggu, "Gautama, Sudargo," in *A Biographical Dictionary of Chinese Descent in Southeast Asia*, ed. Leo Suryadinata (Singapore: Institute of Southeast Asia Studies, 2012), 273-276.

marriages, while linguistic scholars, foreign and domestic alike, were keen to learn the translation, or perhaps even transformation of, Dutch legal concepts into Indonesian.

On September 27, 1958 Gautama delivered his inaugural speech as the professor of law responsible for intergentiel law. Succeeding his former professor and promoter, Resink, he filled Kollewijn's shoes to develop intergentiel law for Indonesia. While holding the professorship for a record of 50 years, Gautama also held similar positions at the National Police Institute and the Military School of Law as well as a visiting professor at Padjadjaran University in Bandung, West Java.

Like their seniors, the second generation of Indonesian legal scholars became the intellectual bridges between colonial law and legal development. There were two reasons for this role. First, colonial law has had survived independence based on Article II of the Transitory Provisions of the 1945 Constitution. The law is written in Dutch and no official translation is available. Fluent command of Dutch is therefore required to understand it. With their linguistic skill these generations of scholars translated the law into Indonesian.

Second, independence changed the gravitational center of the law from colonial to national-centric.[4] A transposition that called for interpreting colonial legislation afresh and preparing new law for the objectives of independence.[5] Consequently such pursuit required a combination of legal knowledge and social sensitivity in envisaging the trajectory of Indonesian law. These scholars gave interpretation through their books and writings, which civil law

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[4] *See* Selo Soemardjan, "Mengenang Profesor Djokosoetono S.H.," ed. Soemardjan, *supra* note 140 at ch.1, at ix.
[5] Gautama labeled it as "*visie Indonesia*" (Indonesian vision) where legal scholars were facing the challenge of time to refute any notion that their works were "about Indonesia, but without Indonesian voices". *See* Gouw Giok Siong, *Segi-segi Hukum Internasional pada Nasionalisasi di Indonesia* (Djakarta: Universitas, 1960), i.

tradition calls "doctrine".[6] Through their writings they informed the law. These scholars became oracles of law as well as legal filters for Indonesia.[7]

Doctrinal writings have played an important role in shaping Indonesian law. In the absence of positive written law, the writings instructed the legal system. It is noteworthy that jurisprudence (*yurisprudensi*) has gained its high-status based on doctrine as supported by legal practice.[8]

The intellectual role resulted in what I call professorial law. What I mean by this is the writings of professors that became authoritative for the legal circle in understanding and interpreting the law. This is especially true in legal education. Unable to read the original text in Dutch, students have had to resort to their writings on past, present and future Indonesian law. Lack of command in Dutch has resulted in practitioners' hierophantic attitude toward doctrine and, among other things, cause legal uncertainty.[9]

Gautama carried out his professorial duty proficiently. He wrote an eight-volume treatise on Indonesian PIL. Every chapter starts with his discussion on technical terms in various foreign languages, followed by his assessment of scholarly debates, continues with comparison of PIL in major countries and international conventions, and zeroes in on the need to develop the field for Indonesia. He concludes with his proposal for Indonesia. Less than a decade later he summarized the treatise into a book on introduction to Indonesian PIL.[10]

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[6] Merryman, *supra* note 110 at ch. 1, at 59. For a well-covered description on doctrine also applicable for Indonesia, *see* René David and Henry P. de Vries, *The French Legal System: An Introduction to Civil Law Systems* (New York: Oceana Publications, 1958), 122-126.

[7] I find their challenges and roles have a lot of similarities with those of the French jurists in the fifteenth century. *Cf.* John P. Dawson, *The Oracles of the Law* (Ann Arbor: University of Michigan Law School, 1968), 339-350.

[8] *See* Hartono, *supra* note 107 at ch.1, at 12.

[9] *Cf.* Mohammad Koesnoe, "Dasar-dasar Ketidakpastian Hukum dalam Tata Hukum Kita Dewasa ini," *Varia Peradilan* 133 (1996): 123-132.

[10] *See* Gautama, *Pengantar*, *supra* note 1. The first print was of 1977.

His discussion on public order can be found in the first chapter of Book IV of the treatise.[11] A summary of this discussion is available at chapter four of the introductory book.[12]

Although Indonesia does not adhere to the principle of binding precedent, jurisprudence is influential. In the absence of a PIL code, it serves more than just a gap-filling role. The Bill has become a restatement, if not a source, of law. Coexisting with jurisprudence, which almost always associated with the Supreme Court's decisions, are the so-called "landmark decisions". Gautama handpicked court decisions dealing with PIL issues and published them in a series of landmark decisions to dovetail with his treatise.[13] Because Indonesia does not have a systematic and accessible publication of court decisions, his collections of cases have had great influence on legal scholarship and the courts.

2.2.2 *Gautama the Lawyer*

Besides being a prominent legal scholar Gautama was also known as a respected lawyer. Since the start of his legal practice, he had been a counsel for the Indonesian government. One of his famous cases was the *Bremen Tobacco*, where the newly established state-owned corporation Perusahaan Perkebunan Nusantara (PPN) Baru was brought before a Bremen District Court (*Landgericht*) in West Germany in 1958.[14] The shareholders of Deli-Maatchappijen and Senembah-Maatschappijn argued that the 1958 Nationalization Law did not conform to prompt, effective, and adequate compensations of international law when it confiscated their tobacco

[11] *See* Sudargo Gautama, *Hukum Perdata Internasional Indonesia*, vol. 2 part 3, bk 4 (Bandung: Citra Aditya Bakti, 1989), 3-217 (hereinafter Gautama, *Book IV*).
[12] *See* Gautama, *Pengantar*, *supra* note 1, at 133-147.
[13] He gave this publication the title Himpunan Jurisprudensi Indonesia yang Penting untuk Praktek Sehari-hari (Landmark Decision) (Collection of Important Indonesian Jurisprudence for Daily Practice). Note he employed the word "*jurisprudensi*" (jurisprudence).
[14] Appointed by Decision of the Minister of Agriculture No. 5182/SK/M, June 23, 1959. *See* Gouw, *supra* note 5, at i. For informative report on the case, *see* Martin Domke, "Indonesian Nationalization Measures before Foreign Courts," *American Journal of International Law* 54 (1960): 305-323.

plantations in East Sumatra.[15] As a member of the legal counsel Gautama argued that the nature of nationalization was to transform the economy to serve national interest. Consequently providing compensation as prescribed by international law would be contrary to that purpose.[16]

The *Landgericht* found the prerequisite of an inland connection (*Inlandbeziehung*) was missing because the bales of tobacco were only at Bremen temporarily for trading purposes. Consequently the court found no reason to question the issue of expropriation without compensation.[17] The Bremen Court of Appeal (*Oberlandesgericht*) among others found that there was no serious violation of good morals and the aims of German laws for it to apply articles of the Introductory Law to the Civil Code of Germany (*Einführungsgesetz zum Bürgerliches Gesetzbuch* hereinafter EGBGB).[18] It affirmed the *Landgericht*'s decision. Gautama later used the German courts decisions to support his proposal on Indonesian public order.

His list of legal service for the government includes *Amco*, the first case before International Center for Settlement of Investment Disputes (ICSID).[19] Gautama had also served as expert witness on Indonesian law before foreign courts or arbitrations. In *Karaha Bodas (2004)* he rebuked the use of Indonesian law by arbitrators as nothing but lip service.[20]

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[15] *See* Bremen Judgment, *supra* note 145 at ch. 1, at 15-16 and 26-28. The compensation was stipulated UU No. 86/1958, Nasionalisasi Perusahaan-perusahaan Belanda [Act No. 86/1958, Nationalization of Dutch Companies], Dec. 31, 1958 (hereinafter Nationalization Act), art. 2. The Act was further elaborated in its implementing regulation, i.e. PP No. 2/1959, Pokok-pokok Pelaksanaan Undang-Undang Nasionalisasi Perusahaan Belanda [Gov't Reg. No. 2/1959, Principles for Enforcing the Law on Nationalization of Dutch-Owned Companies], Feb. 23, 1959.
[16] *See* Bremen Judgment, *supra* note 145 at ch. 1, at 19-20 and 38.
[17] *Id*. at 22. *See also* Department of Information of the Republic of Indonesia, *The Bremen Tobacco Case* (Djakarta: Department of Information of the Republic of Indonesia, 1960), 34.
[18] *See* Bremen Judgment, *supra* note 145 at ch. 1, at 95 and 103. For the conformity of this decision to international law, *see* Hans W. Baade, "Indonesian Nationalization Measures before Foreign Courts – A Reply," *American Journal of International Law* 54 (1960): 801-835.
[19] Amco Asia Corporation v. The Republic of Indonesia, *ICSID Reports* 1:377.
[20] *See* Sudargo Gautama, "*Arbitrase Luar Negeri dan Pemakaian Hukum Indonesia*" (Bandung: Citra Aditya Bakti, 2004), 21-30 (hereinafter Gautama, *Arbitrase*).

His private practice attracted Indonesian as well as foreign clients. Through his writing he shared his experience as legal practitioner. Some judicial decisions of litigation cases he handled are published in his collections of cases.[21]

2.2.3 *Gautama and the Development of Indonesian Private International Law*

Independence brought about two-pronged consolidation for Indonesia. Internally it promoted egalitarianism where all Indonesians were to take equal part and share equal burden of development. Externally it paved a way for Indonesia as an active member of the gallery of nations. With respect to law, these consolidations were translated to transformation of intergentiel law, which was an internal conflict of laws flourished in the Netherlands Indies as a result of population groups, and development of PIL.

Indonesian PIL remained, and as a matter of fact it could be said entirely, based on articles 16-18 General Provisions of Legislation for Indonesia (*Algemene Bepalingen van Wetgeving voor Indonesië* hereinafter AB).[22] Guided Democracy did not set its revolutionary hand to the field because most of the time it was inward-looking. The debate between adat law camp and Western law camp was also limited to (national) private law. Moreover the issue of legal unification versus legal pluralism had also sidetracked the debate. Despite the New Order's emphasis on economic development, it took a different approach in regulating PIL issues. During this period Indonesia created investors-friendly atmosphere by regulating that

[21] *E.g.* ED & F Man (Sugar), Sup. Ct. No. 1203 K/Pdt/1990, Dec. 14, 1991 (ED & F Man (Sugar) Ltd./Yani Haryanto) published in G 6 (1993): 1 *et seq*. *See infra* pp. 121-128.
[22] S. 1847-23.

nationalization would conform to principles of international law.[23] Additionally Indonesia also ratified major international conventions to attract foreign investors.[24]

Despite proliferation of legislative product during the New Order a bill on PIL was not passed. For reasons unknown to the author the government never submitted it to the DPR for discussion. Additionally the ratifications were not accompanied by a concerted effort to promulgate law that would elaborate their implementation.[25] Therefore the three articles of AB remain the standalone regulation of Indonesian PIL.[26]

Indonesian legal scholars had long been suggesting the need to have a statute that codifies PIL rules.[27] This suggestion however sailed before the wind despite the New Order's attempt to modernize economic laws. In hindsight PIL received disproportionate attention compared to a series of effort to align Indonesian law to international development. However it found a footing for its development in scholarly works. Lack of legislation therefore has made doctrine the dominant force in calibrating the development of Indonesian PIL.

Five factors shape the development of Indonesian PIL. First, like other branches of law, it gravitated towards the form of law practice in the Netherlands. The writings of Dutch scholars

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[23] UU No. 1/1967, Penanaman Modal Asing [Act No. 1/1967, Foreign Investment], Jan. 10, 1967 (hereinafter the 1967 Foreign Investment Act), art. 22:1.

[24] The conventions *inter alia* are Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965, 575 UNTS 159 (1968), Convention on the Recognition and Enforcement of Foreign Arbitral Award of 10 June 1958, 330 UNTS. 3 (hereinafter N.Y. Convention) (1981), Convention Establishing the Multilateral Investment Guarantee Agency of 11 October 1985 (1986), and Marrakesh Agreement of 15 April 1994 establishing the World Trade Organization, 1867 UNTS 154 (1994). Years in brackets indicate time of ratification.

[25] The implementation of N.Y. Convention was only possible after the Supreme Court issued Perma [Sup. Ct. Reg.] No. 1/1990.

[26] The New Order's failure to change colonial law, despite its hard effort, is a legal mystery. For an interesting yet brief discussion, *see* David K. Linnan, "Indonesian Law Reform or Once More unto the Breach: A Brief Institutional History," in *Indonesia After Suharto: Reformasi and Reaction*, ed. Drew Duncan and Timothy Lindsey (Victoria, BC: Center for Asia-Pacific Initiatives, 1999), esp. 107-134.

[27] *See* Sudargo Gautama, "Diperlukan Kodifikasi dari Hukum Perdata Internasional Indonesia" in *Hukum Perdata Internasional Hukum yang Hidup* (Bandung: Alumni, 1983), 31-37; Sudargo Gautama, "Diperlukan Undang-Undang Hukum Perdata Internasional untuk Indonesia," *Hukum dan Pembangunan* 4 (1983): 289-296

were influential to Gautama.[28] Second, however unlike other branches of Indonesian law, PIL has had more models to follow for its development. The practice of both civil law and common law countries are instructive. Hague Conventions and other international conventions, as evident in the Bill, are influential in aligning Indonesian law to international practice.[29] Third, geography is a pivotal factor. The suggestion of adopting domicile in relation to international family law, for instance, is clearly influenced by the geographical fact of the circumambient common law countries.[30] Fourth, the jurisprudence of intergentiel law is also instructive. Fifth is the government's economic policy. In *Bremen Tobacco*, using the interest of the national economy as public order, Indonesia only provided compensation in installments. The 1967 Foreign Investment Act reversed this approach. It guaranteed that nationalization would only take place with mutual agreement on the compensation based on the principles of international law.[31]

In the late 1970s the BPHN sponsored research on PIL. It appointed Gautama to lead a team of experts to submit an academic paper and a bill on PIL.[32] Both documents gravitated on articles 16-18 AB. They elaborated the articles based on Gautama's treatise. Although the bill maintained inclination to civil law practices, it also took into consideration development of

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[28] Sudargo Gautama and Sri Hanifa Wiknjosastro, "Some Aspects of Indonesian Private International Law," *Malaya Law Review* 32 (1990): 420-432 (hereinafter Gautama and Wikjosastro). Kollewijn's writings are influential for the shifting from nationality to domicile in relation to international family law (the Bill, art. 13:3); Lemaire's for treating *renvoi* as a problem of legal interpretation (*pelembutan hukum*) (the Bill, art. 3); and de Winter's for opting for the theory of "the most characteristic [performance]" as the determinant factor for international contracts in the absence of choice of law (the Bill, art. 18:3).

[29] Paying attention to Gautama's suggestion, although Indonesia was, and still is, not a member of Hague Convention, the Tanjung Pinang District Court turned to article 3(a) of Convention on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoptions in determining the applicable law for inter-country adoption of a Vietnamese refugee by Canadian couple in *the Child of Galang Island*. *See* Tanjung Pinang Dist. Ct., No. 205/Pdt.P/1989/PN.TPI, May 20, 1989 (Louis Philipe & Yvonne Barbeau) available at G 5 (1993):64.

[30] *See* Gautama, *Pengantar*, *supra* note 1, at 86-87. *See also* Badan Pembinaan Hukum Nasional, *Lokakarya Hukum Perdata Internasional* (Jakarta: Badan Pembinaan Hukum Nasional, 1984), 18.

[31] *See* the 1967 Foreign Investment Act, art. 22:1

[32] *See* Badan Pembinaan Hukum Nasional, *supra* note 30, at 67. *See also* Simorangkir, *supra* note 85 at ch. 1, at 28 and 34-35.

Indonesian law as Gautama suggested in his treatise. Since both the academic paper and the bill were obviously the manifestation of his opinion, the documents became a crowning achievement for Gautama.

These documents were later presented in a workshop, also sponsored by the BPHN, on September 29-30, 1983. Since then the bill has been revised many times. The latest version, to the best of my knowledge, is the 1997/1998 Draft (the Bill). The passing of the Bill apparently has not been a priority after *Reformasi*.[33] Despite the legislators' ignorance recently the Ministry of Justice and Human Rights has resumed its preparation to finalize the Bill.[34]

In the field of PIL, no scholar challenges Gautama's authority. His treatise has been instructive for the nation since it was completed in the late 1960s. It later became the basis for the academic paper. Besides chairing professorship in the oldest institution of legal education, Gautama had been representing Indonesia in Hague Conference meetings as observers since 1967. In short Gautama was a towering figure, with whom no other Indonesian PIL jurist can be compared.

2.3 Section B: Developing Doctrine for Indonesian Private International Law

2.3.1 *Characteristics and Functions of Public Order*

"No country", as Martin Wolff rightly put, "can do without such occasional overruling of the normal conflict rules."[35] Pointing out to article 29(2) of the Universal Declaration of Human Rights, Jacob Dolinger goes further by concluding that all rules are susceptible to the exceptional

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[33] A bill on PIL remains excluded in the current Prolegnas. *See* www.dpr.go.id/uu/prolegnas (last visited Feb. 20, 2015).
[34] My colleagues at the University of Indonesia provide this information.
[35] *See* Martin Wolff, *Private International Law*, 2nd ed. (Oxford: Clarendon Press, 1962), 168.

concept of public order.[36] As a member of international community Indonesia needs to clarify its conception of public order. The conception should serve two-pronged interest. Externally it should not make international community allergic to Indonesian national interests. Internally it should sustain the development of national law.

As a legal institution public order has at least three characteristics. First, it contains normative features of a legal system. It operates under predetermined norms of the legal system. Second, it is result-oriented. Regardless how it will be executed, its execution is always to achieve a certain objective. Third, it is judicially administered.[37] Legislators can only state public order, but the court gives its manifestation.[38]

In PIL, the first function of public order is initially to reject foreign laws repugnant to a forum's sense of morality and decency.[39] Polygamous marriage is usually put forward as a classic example.[40] If the *lex fori* only recognizes monogamous marriage, should its court recognize and give effect to a polygamous marriage validly concluded by the law of its celebration? The traditional view would not recognize polygamy on grounds of public order. However, although on principle polygamous marriages are not recognized where monogamy is the norm, depending on the point of contact they make to the forum, the court may extend limited recognition and effect on these marriages. The epicenter of public order has shifted as a result of increased intercourse between nations.

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[36] This article reads, "In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by … public order and the general welfare in a democratic society." *See* Jacob Dolinger, "In Defense of the "General Part" Principles," in *International Conflict of Laws for the Third Millennium: Essays in Honor of Friedrich K. Juenger*, ed. Patrick J. Borchers and Joachim Zekoll (New York: Transnational Publishers, 2001), 32-33.

[37] *See* Kent Murphy, "The Traditional View of Public Policy and *Ordre Public* in Private International Law," *Georgia Journal of International and Comparative Law* 11 (1981): 591.

[38] A fourth characteristic, either offensive or defensive, can be added depending on how the court executes it.

[39] *See* Murphy, *supra* note 37, at 607-609.

[40] Ernest G. Lorenzen, "Territoriality, Public Policy and the Conflict of Law," *Yale Law Journal* 33 (1923-1924): 749-750.

It no longer mainly focuses on the issues of morality and decency, but more on the rising of socio-economic norm as the pillar of the legal system.[41] Successful campaign of arbitration as forum for dispute settlement has led public order to deal more with recognition and enforcement of foreign arbitral awards.[42] The second function of public order is to prevent injustice in the special circumstances of the parties before the court. Finally public order is to reject choice of law made by the parties.

Another way of understanding its function is by implying affirmation. Public order has a 'negative effect' when it excludes the application of foreign law or judgment.[43] This exclusion of foreign law is the concept of *ordre public* in the continental conception, and known in England as *public policy*.[44]

According to the French-Italian concept first expounded by Laurent and Mancini, public order comprises all rules of domestic law (*lois d'ordre public*) which must be applied unconditionally, irrespective of whether or not the applicable foreign law contains different provisions.[45]

Public policy on the other hand is not automatically triggered where foreign law differs with English law. It signifies on the incompatibility of foreign legal rule with the public policy of the respective state. The conception of public policy serves in particular two purposes:[46] first, refusing the application of foreign law that would lead to an infringement of *boni mores* as

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[41] *See e.g*. Joost Blom, "Public Policy in Private International Law and Its Evolution Time," *Netherlands International Law Review* (2003): 374. Morality and decency, however, will not cease to be a ground of public order.

[42] N.Y. Convention, art. V:2(b), provides "Recognition and enforcement of arbitral award may also be refused if the competent authority of the country … finds that: … would be contrary to the public *policy* of that country." Italic is mine. In principle foreign court decision is unenforceable in Indonesia. Rv, art 436:1 *cf*. the Bill, art. 43.

[43] *See* Blom, *supra* note 41, at 375. *See also* Sir Peter North and J. J. Fawcett, *Cheshire and North's Private International Law*, 13th ed. (London: Butterworths, 1999), 583.

[44] *See* Wolff, *supra* note 35, at 176.

[45] István Szászy, *International Civil Procedure: A Comparative Study* (Leiden: AW Sijthoff, 1967), 178.

[46] *See* Wolff, *supra* note 35, at 180-182; North, *supra* note 43, at 191-192.

understood in England;[47] second, protecting the vital interests of the British State. Later, in general, there are four probable classifications:[48] first, where the fundamental conceptions of English justice are disregarded; second, where the English conceptions of morality are infringed; third, where a transaction prejudices the interests of the United Kingdom or its good relations with foreign powers; and fourth, where a foreign law of status offends the English conceptions of human liberty and freedom of action. The doctrine of public policy is far less important in England than in continental countries since English courts invariably apply domestic law in cases of family law.[49] As a consequence of the comity of nations,[50] the general rule is that substantive differences between the law of rendering country and the U.S. or the State will not automatically triggered a public policy exception.[51] Public policy exception can be invoked when the foreign act is inherently inconsistent with the policies underlying comity.[52]

After that exclusion, its 'positive effect' creates an opening for the application of another law, which is almost always the *lex fori*.[53] Between these affirmations, it is submitted that the former dominates.[54] Under both civil law and common law, public order is used to delimit parties' autonomy in international contracts and other "dirigistic" regulations.[55]

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[47] *Cf*. Rule 2 of Dicey and Morris: "English courts will not enforce or recognise a right, power, capacity, disability or legal relationship arising under the law of a foreign country, if the enforcement or recognition of such right, power, capacity, disability or legal relationship would be inconsistent with the fundamental public policy of English law." A.V. Dicey, J.H.C. Morris, and L. A. Collins, *Dicey and Morris on the Conflict of laws*, 13th ed. (London: Sweet & Maxwell, 2000), 81.
[48] *See* North, *supra* note 43, at 126-128.
[49] *See* Collins, *supra* note 47, at 82.
[50] Hilton v. Guyot, 159 U.S. 113, 163-164 (1895).
[51] Society of Lloyd's v. Mullin, 255 F. Supp. 2d 468, 474 (E. D. Pa., 2003).
[52] 731 F. 2d 909 (D.C.Cir.1984).
[53] *See* Wolff, *supra* note 35, at 183. *See also* North, *supra* note 44, at 582-583; Gautama, *Book IV*, *supra* note 11, at 91-99. Very occasionally in cases of *renvoi* when the foreign law as a result of the forum's choice of law rule is the applicable law, but its application would violate public order, the fall back position may well be to apply the domestic law of another foreign country. Blom points out *Vladi v. Vladi* (1987), 39 *DLR* (4th) 562 (NSSSC), as an example. *See* Blom, *supra* note 41, at 376.
[54] *See* North, *supra* note 43, at 583.
[55] *Cf*. Albert A. Ehrenzweig and Erik Jayme, *Private International Law: A Comparative on American International Conflicts Law, including the Law of Admiralty*, vol. 3 (New York: Oceana, 1977), 40.

Brocher, a Swiss jurist, introduced further classification of public order. The external or international public order is aimed at protecting the welfare of the state in general. This type restricts the extraterritorial effect of foreign law in the forum. Another type, the internal or national public order, is to delimit individual freedom.

The central issue of public order remains by what standards courts are to reach the conclusion that foreign law, foreign decisions, or arbitral awards are harmful to national law.[56] Another scholar emphasizes the demands of justice or the controlling policy as the general problem.[57]

2.3.2 *Proposal for Indonesian Public Order*

The term "public order" entered Indonesian legal vernacular as a carryover from colonial law. The French Civil Code was the first European code to adopt *ordre public*.[58] The theory of *ordre public* concerning PIL departs from article 3§1 of the French Civil Code.[59] The Dutch translated the term into *openbare orde* in their legislation and implanted it in the Netherlands Indies.

Gautama identifies that the colonial law employs the term *openbare orde* for at least seven different usages.[60] First, adopting the provision of article 6 of the French Civil Code, article 23 AB uses it to delimit an individual from acting arbitrarily.[61] Second, public order

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[56] *See* Murphy, *supra* note 37, at 596.
[57] *See* Lorenzen, *supra* note 40, at 748.
[58] *See* CODE CIVIL [C. CIV.] art. 6 [Fr.] that reads, "*On ne peut déroger par des conventions particulières, aux lois qui intéressent l'ordre public et les bonnes moeurs*." ["Private agreements cannot derogate from laws which affect *ordre public* and good morals."] Underline is mine. *See* Gerhart Husserl, "Public Policy and Ordre Public," *Virginia Law Review* 25 (1938): 38.
[59] This article reads, "*Les lois de police et de sûreté obligent tous ceux qui habitant le territoire*." ["The laws of police and public security are binding upon all those who live on the territory."]
[60] *See* Gautama, *Book IV*, *supra* note 11, at 56-57.
[61] *See* AB, art. 23: "Law concerning public order or good morals cannot lose its binding effect by means of action or contract." *See* Gautama, *Book IV*, *supra* note 11, at 58-61.

carries the sense of order and welfare, and security.[62] Third is a normative pair of the principle of good morals (*kesusilaan baik*).[63] Fourth is a synonym for legal order (*rechtsorder* or *ketertiban hukum*). Fifth is a synonym for "justice". Sixth, in criminal procedure, is to stipulate that a public prosecutor has to be heard. Finally, civil procedure, it obliges judges to apply certain articles of law.[64] These varieties of meaning are no longer exclusive to each use as Gautama first identified, but connects to the notion of public order in PIL.[65]

Dutch scholars almost unanimously translate *openbare orde* into English as public *policy*.[66] Some of them, however, choose public order as its English translation.[67]

As I mentioned above the Japanese occupation government initiated the translation of Dutch legal terms.[68] In the entry *openbare*, the Committee translated "*openbare rust en orde*" into "*keamanan dan ketertiban oemoem*" (public security and order).[69] Constructing legal language was never a priority after independence. Attempts to standardize legal lexicons, by the Committee and subsequent public and private initiatives, did not meet expectation.[70] Rather than

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[62] *See e.g.* Toelatingsbesluit (Penetapan Izin Masuk) [Entry Permit], art. 4:2, S. 1916-47 as amended by S. 1917-765: public safety and order ("*openbare rust en orde*", "*keamanan umum dan ketertiban*").
[63] *See e.g.* CIV. CODE art. 1337: "A cause is not permissible if it is prohibited by law, or if it violates good conduct, or public order."
[64] *See e.g.* the 2009 Judicature Act, art 50:1.
[65] *See* discussion in chs. 3 and 4.
[66] *See e.g.* R. D. Kollewijn, *American-Dutch Private International Law*, 65 *passim* (1961). Probably for the sake of argument, Kollewijn equates "Dutch *ordre public*" with public policy. *See also* K. Boele-Woelki & D. van Iterson, "The Dutch Private International Law Codification: Principles, Objectives and Opportunities," *Electronic Journal of Comparative Law* 14, no.3 (2010): 8 *passim*; Mathijs H. ten Wolde, "Codification and Consolidation of Dutch Private International Law: The Book 10 Civil Code of the Netherlands," *Yearbook of Private International Law* 13 (2011): 396-398.
[67] *See e.g.* remarks by Coen Drion in The American Society of International Law and the Nederlandse Vereniging voor Internationaal Recht, "*Contemporary International Law Issues: New Forms, New Applications, proceedings of the Fourth Hague Joint Conference, The Hague, July 2-5, 1997*" (The Hague: T.M. C. Asser Instituut, 1998), 342.
[68] *See supra* p. 34.
[69] *See* Alisjahbana, *supra* note 44 at ch. 1 at 118. In the Ophuijsen Spelling System that came in force in 1901, the digraph *oe* was used to write [u]. This digraph was abandoned in the orthography when the Republican Spelling System, also known as the Soewandi Spelling System, became effective on March 17, 1947. The Perfected Spelling System (*Ejaan Yang Disempurnakan*) replaced the previous system in 1972, but has maintained *u* as the official letter.
[70] For example, the Dutch term "*natuurlijke verbintenis*" [literally: natural agreement] of CIV. CODE art. 1359 para. 2 has been translated into eight different terms. *See* St. Moh. Sjah, "Pengumpulan Istilah Hukum: Beberapa

dedicating resources to translate Dutch legal terms to Indonesian, the government chose to develop law by legislating new statutes.[71] The heterogeneity of legal terminology, as a result of various translations of the colonial laws and their gradual canonization, shows a leap into the unknown concepts of civil law that may have enduring effect on the legal system.[72]

However, unlike other Dutch legal terms, it seems Indonesian and Dutch legal scholars come to an agreement to *ketertiban umum* as the translation for *openbare orde*. Massier concludes that the translation has gradually gained acceptance among legal scholars.[73] Another term, "*kepentingan umum*" (literally public interest), though hardly used, is also known.[74] Henceforth the term *openbare orde* is translated into Indonesian as *ketertiban umum* (public order).[75]

At this junction, I find it necessary to explain my use of "public order", instead of "public policy" (literally "*kebijakan umum*") as the English translation of *ketertiban umum*. First, as it will be obvious by now, the conception of Indonesian public order is mainly evolved from civil law. Its doctrinal development has also consistently oriented to continental Europe as Gautama carefully subscribes not only to Germany's concept of *Vorbehaltklausel* (reservation clause), but

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Sumbangan Pikiran kepada Usaha Pembinaan Istilah Hukum Indonesia", ed. Badan Pembinaan Hukum Nasional, *Simposium Bahasa dan Hukum* (Jakarta: Badan Pembinaan Hukum Nasional, 1976), 52-53.

[71] *Cf*. Ab Massier, *The Voice of the Law in Transition: Indonesian Jurists and Their Languages, 1915-2000* (Leiden: KILTV Press, 2008), 196-199.

[72] For the problems with regard to translating Dutch legal concepts to Indonesian *see e.g*. Purnadi Purbacaraka and Soerjono Soekanto, "Pendidikan Hukum dan Bahasa Hukum," *Hukum dan Pembangunan* 3 (1983): 236-239.

[73] Email correspondence with Ab Massier (July 18, 2013).

[74] Gautama also mentions *kepentingan umum* in passing when discussing the comity doctrine. *See* Gautama, *Book IV*, *supra* note 11, at 63. Bayu Seto Hardjowahono uses *kepentingan umum* as a variant of *ketertiban umum*. Whether this term is a translation of *openbare orde* is unclear. *See* Bayu Seto Hardjowahono, *Dasar-dasar Hukum Perdata Internasional* (Bandung: Citra Aditya Bakti, 2006), 122 and 127.

[75] *Ketertiban umum* is found in legal dictionaries published much later. *See e.g*. Asis Safioedin, *Daftar Kata Sederhana tentang Hukum*, 145 (1978); S. J. Fockema Andreae, Nikolaas Egbert Algra, and H. R. W. Gokkel, *Kamus Istilah Hukum Fockema Andreae: Belanda-Indonesia* (Jakarta: Bina Cipta, 1983), 373; A. W. H. Massier, *Beknopt Juridisch Woordenboek Indonesisch-Nederlands* (Leiden: Centrum voor Niet-Westerse Studies, Rijksuniversiteit Leiden, 1992), 171; Marjanne Termorshuizen, Caroline Supriyanto-Breur, and Hilli Djohan-Lapian, *Nederlands-Indonesisch Juridisch Woordenboek* (Leiden: KILTV Press, 1999), 281; Badan Pembinaan Hukum Nasional, *Kamus Hukum Umum* (Jakarta: Badan Pembinaan Hukum Nasional, 2004), 174.

also its *Inlandsbeziehung*.[76] Second, as it will later be clear, the creative function and hierophantic attitude of Indonesian judges are closer to maintaining social *order* than creating policy.[77] Third, even though for the sake of convenience public policy has been used as the translation of *ordre public*, some English-speaking scholars choose "public order" as its proper translation.[78]

In drafting his proposal Gautama refers to two cases after independence. The first is *Lie Kwie Hien*, which he uses to emphasize that public order is flexible and determined by the corresponding society.[79] The second is *Bremen Tobacco*, which he uses to argue that public order should only be invoked on exceptional basis lest it becomes "*rechts-farizeisme*" (legal Pharisaism).[80]

2.3.2.1 *Public Order in German and Japanese Private International Law*

The "exceptional basis" needs to be specified into practical legal categories. Gautama found the practices in Germany and Japan favorable for Indonesia. Firsthand experience with the German concept of *Vorbehaltklausel* in *Bremen Tobacco* seemed to make an impression on him. Article 30 of the German EGBGB does not prescribe public order as a concept, but it will exclude application of foreign law when it offends good morals or is contrary to the purpose of

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[76] *See* Gautama, *Book IV*, *supra* note 11, at 127, 142-150 and 213-214 (1989). *See also* Gouw, *supra* note 5, at 80-81. Initially *ordre public* was translated into German as *oeffentliche Ordnung*. However the translation never gained a footing in the legal language of the German speaking countries. Ernst Zitelmann introduced the word *Vorbehaltsklausel* as substitute. *See* Husserl, *supra* note 58, at 37-38.
[77] *See infra* chs. 3-4.
[78] *See e.g.* John Westlake, *A Treatise on Private International Law, with Principal Reference to Its Practice in England*, 7 (London: Sweet & Maxwell, 1925), 51; *see also* Lorenzen, *supra* note 40, at 746; Dennis Llyod, *Public Policy: A Comparative Study in English and French Law* (London: University of London, 1953).
[79] *Id*. at 33.
[80] *See Gautama Book IV*, *supra* note 11, at 47 and 116.

German law.[81] A prerequisite for invoking the clause was *Inlandsbeziehung*. In *Bremen Tobacco* Gautama found that the German judges prudently took into consideration Indonesia's legal interests as stated in the 1958 Nationalization Act.[82]

The German Law of July 24, 1986 incorporated the respect for fundamental rights into the exception on public order.[83] According to article 6 EGBGB, "A rule of law of a foreign state will be disregarded if its application leads to a result which is manifestly incompatible with fundamental principles of German law. It is to be disregarded in particular, if its application irreconcilable with the fundamental rights." The fundamental rights (*Grundrechte*) are defined as rights guaranteed by the Fundamental Law (*Grundgesetz*).[84]

However the German practice alone was not sufficient. Gautama had to look for a proof that it could be operable elsewhere and found that Japan had followed Germany. Copying the German EGBGB, article 30 of *Horei* stated that foreign law would not be applicable when it violated Japanese public order.[85]

In January 1, 1990 Act No. 27 of 1989 that amended *Horei* came into force.[86] The amendments rearranged the provision on public order to article 33. The revision made it clear

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[81] The article reads: "The application of a foreign law is excluded if this application would offend against good morals (*gutten Sitten*) or would be contrary to the purpose (*Zweck*) of a German law." Translated by Ulrich Drobnig, *American-German Private International Law*, 2 (Dobbs Ferry, NY: Oceana Publications, 1972), 404.

[82] *See* Gautama, *Book IV*, *supra* note 11, at 149.

[83] *See* Lagarde, *supra* note 2 at ch. 1, at 47.

[84] *Id*. at 46.

[85] *See* Horei [Application of Laws in General], Act No. 10 of 1898, art. 30 reads: "In case the law of a foreign country is to govern, it shall not govern if its provisions are contrary to public order or good morals." This English translation is taken from J. E. de Becker, *International Private Law of Japan* (London: Butterworth & Co., 1919), 71. Another translation with slight difference is available at Albert A. Ehrenzweig, Sueo Ikehara and Norman Jensen, *American-Japanese Private International Law* (Dobbs Ferry, NY: Oceana Publications, 1964), 117. This Act was actually the second Horei. The term "Horei" was used in the Jin Dynasty (265-420) as the name of its general rules for statutes. *See* Masato Dogauchi, "New Private International Law of Japan: An Overview," *The Japanese Annual of International Law* 50 (2007): 3-7.

[86] The amendments were in the field of family matter – gender equality with regards to choosing applicable law, easier formation of international family status and new provisions concerning parent-child relation – and the introduction of "habitual residence" and "the place of the closes connection as connecting factors. *See* Junko Torii, "Revision of Private International Law in Japan," *The Japanese Annual of International Law* 33 (1990): 54-71.

that what was tested for a foreign law's incompatibility with Japanese public order was not its provision *per se*, but the result of its application would bring about.[87] This emphasis on the result is in line with article 17 of the Swiss Law on PIL.[88]

Except for the 1989 revision, *Horei* had remained unrevised since its promulgation. Considering development in Europe and increased legal disputes arising from transactions with foreigners, Japanese scholars had long been arguing for a total revision.[89]

In January 1, 2007 Japan replaced *Horei* with a new act on PIL.[90] The new Act is a total revision of the 1898 *Horei*. One of the features in the total revision is the use of modern Japanese to replace classic Japanese of *Horei*.[91] The new Act gives more elaboration and throws the public order provision further to article 42.[92] Although the wordings are adjusted, the new Act has left the provision virtually unaltered.[93]

2.3.2.2. *Prescriptive Function of Public Order*

Both the German and Japanese laws served as the models for Gautama. His initial proposal on Indonesian public order provision reads, "Foreign law that should be applicable

[87] Art 33 [Public Order] reads, "The application of a foreign law designated to govern in this Act shall be refused if such application is contrary to public order or good morals." This *Dogauchi-Momura-Yokoyama Translation* or *ILA* (Japan) version is available in *id*. at 66.

[88] "The application of the rules of foreign law is excluded if [such application] would lead to a result that is incompatible with Swiss public policy (*ordre public*)." *See* English translation by Symeon Symeonides, "The New Swiss Conflicts Codification," *American Journal of Comparative Law* 37 (1989): 199.

[89] *See* The Study Group of the New Legislation of Private International Law, "Draft Articles on the Law Applicable to Contractual and Non-Contractual Obligations (1)," *The Japanese Annual of International Law* 39 (1996): 185-216 and The Study Group of the New Legislation of Private International Law, "Draft Articles on the Law Applicable to Contractual and Non-Contractual Obligations (2)," *The Japanese Annual of International Law* 40 (1997): 57-79.

[90] *See* Hō no Tekiyō ni Kansuru Tsūsokuhō [General Rules of Application of Law], Act No. 78 of 2006. The name of the new Act paraphrases the meaning of the term *Horei*. *See* Dogauchi, *supra* note 85, at 3.

[91] English translation is available at *The Japanese Annual of International Law* 50 (2007): 98. Another English translation with slight difference is made by Kent Anderson and Yasuhiro Okuda available at *Asian-Pacific Law and Policy Journal* 8 (2006): 160 *et seq*, and *Yearbook of Private International Law* 8 (2006): 427 *et seq*.

[92] The article now reads, "Where foreign law is to apply but its application would be contrary to public policy (*ordre public*), it shall not apply." Note that the English translations are not consistent in using the term "public order" and "public policy".

[93] Peter Mankowski, "New Japanese Private International Law Act from a European Perspective," *Japanese Yearbook of International Law* 51 (2008): 292.

based on this state's rules of [PIL] will not be used if that foreign law contradicts to public order and good morals."[94] When Gautama concluded part of his treatise on public order in 1964 the Swiss Law on PIL was unavailable for comparison.[95]

The treatise has been reprinted many times without substantial revisions.[96] Apparently Gautama did not find later development in Germany and Japan substantial enough for him to revise his proposal. It seems emphasis on fundamental rights and incompatible results of foreign law do not need to be accommodated because both have been included in his reference to Pancasila and the 1945 Constitution.[97]

By prescribing the function negatively Gautama metaphorically emphasized on public order "as a shield, not as a sword". Judges should only invoke public order when the result of applying foreign law would be manifestly incompatible for Indonesia. Public order should not be "a sword" because such function would alienate Indonesia from the international community. If public order is "a shield", it will serve national interests well and simultaneously prevent judges from falling into the trap of "legal Pharisaism".

2.3.2.3 *Applying Public Order to Legal System*

The above proposal and function do not necessarily distinguish Indonesian public order from its German and Japanese counterparts. Its implementation therefore begs the question on how to indigenize public order. Like its counterparts the corresponding legal systems should provide operational framework and dictate application of foreign law.

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[94] *See* Gautama, *Book IV*, *supra* note 11 (1st prtg. 1964), at 151.
[95] For countries other than Germany and Japan investigated in his comparative study, *see* Gautama, *Book IV*, *supra* note 11, at 192-212.
[96] For the writing of this dissertation I refer to the 1989 reprint. In his foreword Gautama does not mention any revision, but the cover page states it has been "revised". *Id.* at vii.
[97] *See infra* p. 79.

It must be recognized that the traditional concept of public order was originally tied to the law of the forum. The modern concept, however, is the forum's international public order.[98] This sums up to the *lex fori* to provide categories of public order. The categories may take the form of the purpose of Indonesian law and the ideas of national law.

As discussed in Chapter 1 Indonesian legal system poses systemic challenge to the application of public order. Legal pluralism on the one hand entails different sets of legal norms to measure public order. The pursuit of national law on the other hand envisions a uniform category for public order. Fact and objective may dovetail with, but oftentimes contradict, one another.

Up to this point Gautama proposal still lacks normative guidance. It generally states public order is to protect national interests. However it would be up to erudite minds to determine what constitutes national interest.

2.3.2.4 *Triggering-Factors to Public Order*

The defensive function of public order jots down to what it actually protects. It is not to protect the entire legal system. Nor it is to protect any part of the legal system at all times. It is to protect the core part of the legal system at a particular time.

Gautama calls the core part the bedrock principles (*sendi-sendi asasi*) of the legal system.[99] It is unclear whether he got inspiration from fundamental rights (*Grundrechte*). Since the bedrock principles were only mentioned in passing and no further elaboration was provided, at best they are as abstract as public order itself. Given Indonesia's pluralism determining these principles is undoubtedly a complicated endeavor.

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[98] *See e.g*. William Tetley, *International Conflict of Laws* (Montreal: International Shipping Publications, 1994), 112.
[99] *See* Gautama, *Book IV*, *supra* note 11, at 9.

2.3.2.4.1 *Violation of Pancasila and the 1945 Constitution*

It is not clear from his writing whether Pancasila and the 1945 Constitution can be considered the bedrock principles. Formally speaking, Pancasila is the state philosophy and has been christened as the fountainhead of law in Indonesia. The 1945 Constitution on the other hand sits comfortably at the apex of the hierarchy of law. Both Pancasila and the 1945 Constitution are aptly called the foundation of the legal system. It can be deduced that both are the bedrock principles.

Politically speaking violation of Pancasila and the 1945 Constitution, especially during the New Order, would be treated as treason. Even though Sukarno was never tried before a court of law, he was accused of betraying Pancasila and the 1945 Constitution by budding relationship with the Communist Party.[100] The New Order regime then made use of Pancasila and the 1945 Constitution to suppress any opposition.

Legally speaking Pancasila and the 1945 Constitution became the touchstone for employing any norm to the legal system.[101] The politics of law as stated in the GBHN throughout the New Order was to establish law state (*Rechtsstaat* or *Negara Hukum*) where Pancasila and the 1945 Constitution serve as the source of legal order (*sumber tertib hukum*).[102] At the risk of concreting the abstract, any violation of Pancasila and the 1945 Constitution would have earthquake-like effect to the legal system.

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[100] *See e.g.* Justus M. van der Kroef, *Indonesia after Sukarno* (Vancouver: University of British Columbia Press, 1971), 7-8; Sekretariat Negara Republik Indonesia, *Gerakan 30 September Pemberontakan Partai Komunis Indonesia* (Jakarta: Sekretariat Negara Republik Indonesia, 1994), 147-152.
[101] *See e.g.* Ismail Saleh, "Eksistensi Hukum Islam dan Sumbangannya terhadap Hukum Nasional," *Kompas Daily*, June 3, 1989, at IV. At the time of this writing, Mr. Saleh was the Minister of Justice.
[102] *See* Tap No. IV/MPR/1973, Tap No. IV/MPR/1978, Tap No. II/MPR/1983, & Tap No. II/MPR/1988 all on the Main Outlines of State Policy. These decisions are codified in Department of Information, the Republic of Indonesia, *Himpunan Ketetapan-ketetapan Majelis Permusyawaratan Rakyat Republik Indonesia (1960-1988)*, (Jakarta: Departemen Penerangan Republik Indonesia, 1989), subsequently 404, 561, 703, and 835.

Measuring the violation, however, is a subtle problem. Pancasila are succinct statements encompassing God, humanism, nationhood, deliberative democracy and social justice. Any violation of these statements is purely philosophical. Violation of the 1945 Constitution, on the other hand, is measurable at two levels: constitutional and legislative. At the former the violation can either be conceptual (e.g. the nature of state economy) or practical (e.g. the length and term of presidency).[103] At the legislative level the violation is conceptual (i.e. its compliance to the 1945 Constitution).

It is obvious that measuring violation of Pancasila and the 1945 Constitution generates philosophical or conceptual problem. I call this the systemic challenge.[104] Furthermore in dealing with any violation of this nature as operators and interpreters of law judges may be caught in what I call the practical challenge.[105] All things considered, it raises the question why should Pancasila and the 1945 Constitution be the touchstones?

The answer to this question has politico-legal aspect. In hindsight both Pancasila and the 1945 Constitution have perpetually been the nation's rallying point.[106] Furthermore they have enabled the legal system to evolve while maintaining a unifying function for the nation.[107] It is, therefore, legally understandable that violation of Pancasila and the 1945 Constitution will strike a blow against Indonesia. With respect to PIL, public order is to systematically defend Pancasila and the 1945 Constitution from intrusion of foreign law or contravening foreign arbitral awards.

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[103] *See* consecutively the 1945 Const. 4th Amend., art. 33 & 1st Amend., art. 7.
[104] *See supra* p. 8.
[105] *Id*.
[106] *See supra* pp. 48-49.
[107] *Id*.

2.3.2.4.2 *National Interests*

National or public interest is a factor that can trigger public order. The interest may have territorial dimension. Indonesia nationalized Dutch-owned companies to put pressure to the Netherlands in its fight for West Papua.[108] The nationalization was aimed at strengthening security and national defense.

The nationalization also had economic dimension. It was also aimed at taking control of the economy. This reason was later tried in *Bremen Tobacco*.

Economic policy was the underlying issue in *ED & F Man (Sugar)*.[109] The Central Jakarta District Court found that contracts to import white sugar were in contradiction to the government's general policy with regard to the commodity. Consequently the district court found that the contract did not satisfy an admissible cause and therefore were not valid.[110] Subsequently it found the arbitration agreement in favor of ED & F Man (Sugar) Ltd. violated Indonesian public order. However economic policy was completely ignored in *Karaha Bodas (2004)*.[111]

2.3.2.4.3 *Mandatory Laws*

Before I go any further, it is beneficial to state that theoretically continental scholars distinguish public order from mandatory rules.[112] The latter is sometimes viewed as a particular

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[108] *See* Nationalization Act, considerations.
[109] *See infra* p. 121.
[110] *See* CIV. CODE arts. 1320 and 1337.
[111] Indonesian court, as I will discuss later, is not consistent in its stance on economic interest.
[112] As the case with most issues of PIL, it has many other names: rules of immediate application, peremptory rules, *lois de police* or *lois d'application immediéate* in France, *norme di applicazione necessaria* in Italy, *Eingriffsnormen* (rules which 'intervene') in Germany. *See* Andrea Bonomi, "Mandatory Rules in Private International Law – The Quest for Uniformity of Decisions in a Global Environment," *Yearbook of Private International Law* 1 (1999): 218-219.

category (*règles d'ordre public*) of the former (*principes d'ordre public*).[113] Both operate under the same philosophical justification, i.e. to set a limitation to how far each jurisdiction will tolerate application of foreign rules.[114] Public order is invoked to protect the interests of the *lex fori* from the manifestly incompatible foreign law. The ambit of mandatory rules is more extensive. At all times mandatory rules have circumscribed the operation of foreign law by prescribing the application of domestic rule. Therefore there is no chance for foreign law to penetrate the forum state.[115]

The general provision of mandatory rules in Indonesian law is found in article 23 AB. It stipulates that law concerning public order or good morals cannot be put aside by action or agreement. Gautama finds the inherent nature of this article is mandatory, and calls it as "mandatory rule". However, he argues in PIL not all rules of that nature are *per se* mandatory.[116] As an attempt to distinguish them from rules with mandatory effect operating under normal circumstances in the legal system, he coined a rather hyperbolic term of "super mandatory rules" (*kaidah super memaksa*).[117] In contract law, he finds both public order and super mandatory rules have their own function as the limits in choice of law.[118] As evident in his proposal for public order in the Bill and discussion of these rules in relation to choice of law in his treatise, he mainly considers public order as the ground for excluding foreign law.

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[113] *See* Blom, *supra* note 41, at 379.
[114] *See* Dolinger, *supra* note 36, at 35.
[115] *See* Blom, *supra* note 41, at 379-380.
[116] *See* Gautama, *Book IV*, *supra* note 11, at 60-61 & 142-150.
[117] *See* Gautama, *Pengantar*, *supra* note 1, at 170. Sumampouw translates *Eingriffsnormen* to "rules of public law with private law substance" (*kaidah-kaidah hukum publik dengan isi hukum perdata*). *See* M. Sumampouw, "Pilihan Hukum sebagai Titik Pertalian dalam Hukum Perdjandjian Internasional" (PhD diss., University of Indonesia, 1968), 123. For practical purpose, she uses the term mandatory legal rules (*kaidah hukum memaksa*).
[118] *See* Gautama, *Pengantar*, *supra* note 1, at 170.

2.3.3. *Doctrine and Its Formulation*

The Gautama doctrine on public order can be summarized as follows. Public order is an exception to the general rules of PIL.[119] Its application involves spatiotemporal aspects that make it actual and relevant to the legal system.[120] The best way to test these aspects is by taking the interest of the legal system into consideration.[121] Lest judges fall into the trap of judicial chauvinism, they have to carefully apply it as a defensive tool on exceptional basis using inductive method of interpretation.[122]

This doctrine has been formulated into legal provision. In 1964 Gautama submitted that, "Foreign law that should be applicable based on this state's rules of [PIL] will not be used if that foreign law contradicts to public order and good morals."[123] The academic paper adopted this formulation with some adjustments. It replaced "should be" (*seharusnya*) with "actually" (*sebenarnya*), "this state's" (*negara ini*) with "Indonesia", and omitted the second mentioning of "foreign" (*asing*).[124] This formulation was later adopted in article 3 of the 1983 bill.[125]

The draft of elucidation of article 3 explains that public order is always needed as an "emergency brake".[126] It is put into operation on exceptional basis only to give way to the application of Indonesian (internal) law. The operation of this "defensive tool" should be at the minimum. Public order can be invoked only when it is absolutely obligatory and that the foreign law is obviously incompatible ("*manifestment incompatible*") with Indonesian law.

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[119] *See* Gautama, *Book IV*, *supra* note 11, at 51-54.
[120] *Id*. at 126-127.
[121] *Id*. at 142-150.
[122] *Id*. at 137-140.
[123] *See* Gautama, *Book IV*, *supra* note 11 (1st prtg. 1964), at 151. This formulation is restated elsewhere. *See* Gautama, *Pengantar*, *supra* note 1, at 147.
[124] *See* BPHN, *supra* note 32, at 26.
[125] *Id*. at 73.
[126] *Id*. at 86.

Throughout the years Gautama had promoted this provision in his many writings. Although the substance is basically the same, it should be noted that he was not thoroughly consistent. In the reprint of his treatise Gautama restated the version adopted in the 1983 bill. Writing in English, he revised the formulation by adding "the 1945 Constitution and the [Pancasila]".[127] The Bill maintains the 1983 version, but pushes the stipulation into article 4.

The Bill's elucidation of the article is more succinct. While the 1983 draft explained the article in two paragraphs and specified its use as "defensive tool", the Bill explains it in one paragraph and omits its specified use.

2.3.2 *Acceptance of Doctrine*

The BPHN dedicated a special workshop as an attempt to socialize and invite comments on the academic draft and the bill. The audience reacted to public order provision by suggesting that foreign law should not be applicable when it contradicts to Pancasila and the 1945 Constitution.[128] This suggestion, according to Gautama, was given by a representative of the Supreme Court.[129]

Although Gautama explained that violation of Pancasila and the 1945 Constitution were implied within "the conception of public order", he agreed to this suggestion.[130] This response, most likely, led to his adding Pancasila and the 1945 Constitution in his later formulation.[131] The revision was clearly influenced by the then trend on Indonesian law.[132]

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[127] *See* Gautama and Wikjosastro, *supra* note 28 at 418.
[128] *See* BPHN, *supra* note 32, at 134.
[129] *See* Sudargo Gautama, *Masalah-masalah Baru Hukum Perdata Internasional* (Bandung: Alumni, 1984), 4-5 (hereinafter Gautama, *Masalah*). The minutes of meeting recorded four names representing the Supreme Court: Olden Bidara, Erna Sofyan Syahrie, Justice Asikin Kusuma-atmadja, and Wardiyanti Soeyitno. *See* BPHN, *supra* note 32, at 139 *passim*.
[130] *See* Gautama, *Masalah*, *supra* note 129, at 4-5.
[131] *See* Gautama and Wikjosastro, *supra* note 28, at 418.
[132] Gautama and Wiknjosastro made reference to an article written by Ismail Saleh, *See supra* note 101.

Since the Bill has never been passed, it can be said that it has served as a restatement on Indonesian PIL. There are two reasons for this. The first is the fact that scholars and representatives from the Supreme Court, government officials, legal practitioners as well as private sectors have discussed and agreed on the 1983 bill. The Supreme Court apparently had this formulation in mind when issuing its regulation on the enforcement of foreign arbitral awards.[133] In providing a solution to legal impasse with regard to implementing the 1958 New York Convention, the regulation stipulated that, "An exequatur will not be granted if the foreign arbitral award is clearly on contrary to the bedrock principles of the entire legal system and society in Indonesia (public order)."[134] The second is the fact that the revisions were concerned with editorial issues, not substance. Given these facts it can be concluded that the Bill is a *communis opinio doctorum* on Indonesian PIL.

This section has attested to Gautama's authority on Indonesian PIL. It shows the development of his doctrine and its acceptance. Although a lot has been taking place after he first submitted his proposal, it can be concluded that the doctrine has managed to serve two-pronged objective: aligning Indonesia to international community while simultaneously giving ample room for the development of national law. I find a foothold in the conclusion of the workshop for contextualizing public order in Indonesian constitutional framework and legal pluralism.

[133] Perma No. 1/1990.
[134] *Id*. art. 4:2. My translation from the original text: "*Exequatur tidak akan diberikan apabila putusan Arbitrase Asing itu nyata-nyata bertentangan dengan sendi-sendi asasi dari seluruh sistem hukum dan masyarakat di Indonesia (ketertiban umum)*." This provision has been obsolete since the promulgation of UU No. 30/1999, Arbitrase dan Alternatif Penyelesian Sengketa [Act No. 30/1999, Arbitration and Alternative Dispute Settlement] (hereinafter Arb. Act).

2.4 SECTION C: IMPLICIT ASSUMPTIONS OF DOCTRINE

From the above discussion it is clear that the Gautama doctrine strikes resemblance to German and Japanese conceptions on public order. On paper it does not have distinctive character other than how respective legal systems that set their operational framework. In this section I shall discuss that although the doctrine arrives at the same formulation as its counterparts, it has its own point of departure. The departing point is enveloped by implicit assumptions underlying the proposal. They are: (1) high level of judicial discretion; (2) gap-filling function of court decisions; (3) high level of public opinion; and (4) anticipation of the national law development in light of legal pluralism.

2.4.1 *High Level of Judicial Discretion*

This assumption can be found on the fact that public order both statutorily and academically has no definition.[135] Public order becomes a matter of relevance when a party raises it before the court. In other cases judges found it relevant for consideration. Through their decisions judges identified and/or interpret public order and its manifestation.

Judicial discretion is the output of judiciary power and (in)dependent judiciary. The former sets the substantive scope for judiciary; whereas the latter purports the existence of the judicial arm of the state. Most of the times we can distinguish the power from the (in)dependence. However in some critical times they may conflate into a single issue of administration of justice.

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[135] Londong concludes that article 4:2 of Perma No. 1/1990 defines public order as violating the bedrock principles of the whole legal and social system in Indonesia. *See* Tineke Louise Tuegeh Longdong, *Asas Ketertiban Umum dan Konvensi New York 1958: Sebuah Tinjauan atas Pelaksanaan Konvensi New York 1958 pada Putusan-putusan Mahkamah Agung RI dan Pengadilan Asing* (Bandung: Citra Aditya Bakti, 1998), 12. Budidjaja also reaches the same conclusion. *See* Tony Budidjaja, "Arbitration in Indonesia," *International Commercial Arbitration in Asia*, ed. Shahla F. Ali and Tom Ginsburg (Huntington, NY: Juris, 2013), 218. I reject this conclusion since it fails to explain what are the principles, and at best it only creates vicious circle.

In order to unpack this assumption I need to consider the constitutional structure. First I will discuss the judiciary power and its development. After that I continue with discussing (in)dependent judiciary. Finally I will show the level of judicial discretion.

2.4.1.1 *Judicial Power*

Indonesian judiciary has four types of judicature consisting of general, military, religious, and administrative. Each has its courts of first instance and appeal. All courts are under the supervision of the Supreme Court sitting at the apex of the judicial system as the court of cassation.[136] Except the military judicature, all courts have had their statutory laws.

In trying a particular dispute Indonesian judges will found themselves in one of these situations.[137] First, when the law is clear, they become "the trumpets of law" (*la bouche de la loi*). Second, when the law is unclear, judges must interpret the law methodically. Third, when the legislation violates higher law, judges are engaged in judicial review. Finally, when the positive law is not handy or even unavailable, judges must find the law by delving into the society's legal values.

Since the first two situations need no further discussion, I focus on the third and the fourth.

The (original) 1945 Constitution, as drafted by Supomo, was not based on Montesquieu's doctrine of *Trias Politica* that firmly separates legislative, executive and judicative power.[138] Instead it adopted the theory of distribution of power, and distinguished power between those of

[136] *See* the 2009 Judicature Act, arts. 18 and 21:1.
[137] *Cf*. Purwoto S. Gandasubrata, "Tugas Hakim Indonesia," in Soemardjan (ed.), *supra* note 141 at ch. 1, at 594.
[138] *See* Kusuma, *supra* note 38 at ch.1, at 390. *See also* Jimly Asshiddiqie, *The Constitutional Law of Indonesia* (Petaling Jaya: Sweet & Maxwell Asia, 2009), 136-138.

the President and the judiciary. The "*duo politica*" was consistent with dichotomy as recognized in adat law.[139] The President, with the approval of the DPR, had the powers to establish laws.[140]

The judiciary power was stipulated in Chapter IX of the (original) 1945 Constitution. Article 24:1 succinctly stated that "the judiciary power was exercised by the Supreme Court and other judicial bodies according to statutory law". It continued with a stipulation that statutory law would regulate the structure and powers of judicial bodies.[141] The (original) 1945 Constitution, however, was silent of the power of judicial review.

In his explanation to the BPUPKI Supomo argued that Indonesia did not have experience in judicial review.[142] Furthermore he pointed out that the young republic did not have sufficient number of experts to deal with judicial review. With this rationale Supomo won the argument against Mohammad Yamin about equipping such power to the Supreme Court.[143]

The constitutional silence, however, was not considered as total rejection of judicial review.[144] During Guided Democracy Sukarno promulgated many Presidential Decisions (*Penetapan President*) and Presidential Regulations (*Peraturan Presiden*). In the final years of his power the MPR put all of these decisions and regulations under review.[145] Experience with

[139] Mohammad Koesnoe, "Kedudukan dan Fungsi Kekuasaan Kehakiman Menurut Undang-Undang Dasar 1945," *Varian Peradilan* 129 (1996): 96-97.
[140] *See* the (original) 1945 Const., art. 5:1.
[141] *See* the (original) 1945 Const., art. 24:2.
[142] *See* Kusuma, *supra* note 38 at ch. 1, at 390. *See also* Asshiddiqie, *supra* note 138, at 136.
[143] For the summary of this debate *see* Daniel S. Lev, "Comments on the Course of Law Reform in Modern Indonesia" in Duncan, *supra* note 26, at 89-90. *See also* Daniel S. Lev, "A Tale of Two Legal Professions: Lawyers and State in Malaysia and Indonesia," in *Raising the Bar: The Emerging Legal Profession in East Asia*, edited with an introduction by William P. Alford (Cambridge, MA: East Asian Legal Studies, Harvard Law School, 2007), 395-396.
[144] Soemantri argued that judicial review could be developed through doctrine. *See* Sri Soemantri, *Hak Menguji Material di Indonesia* (Bandung: Alumni, 1977), 53-83. *See also* Soedirjo, *Mahkamah Agung*, (Jakarta: Media Sarana Press, 1987), esp. 63-72.
[145] Tap MPRS No. XIX/MPRS/1966, Peninjauan Kembali Produk-produk Legislatif Negara di Luar Produk MPRS yang Tidak Sesuai dengan Undang-Undang Dasar 1945 [MPRS Decree No. XIX /MPRS/1966, the Review of State's Legislative Products other than those of the MPRS which are Inconsistent to the 1945 Constitution].

Guided Democracy taught Indonesia a lesson for establishing a hierarchy of law.[146] Subsequently the 1970 Judicature Act empowered the Supreme Court with judicial review on law below act (*undang-undang*).[147]

Henceforth judicial review had been a bone of contention. On the one hand the New Order government was adamant that the scope of judicial review conformed to its vow to "pristinely and consistently execute the 1945 Constitution". On the other hand, judges and scholars found that the stipulation in the 1970 Judicature Act could hardly be called judicial review.[148] Pointing to the limited scope, the Indonesian judges' association finally viewed that the 1970 Judicature Act was still inspired by its predecessor.[149] It therefore concluded that the Act was not in full compliance of Pancasila and the 1945 Constitution as campaigned by the New Order.

Since the Amendments, the 1945 Constitution have adopted the doctrine of separation of power based on the principle of checks-and-balances.[150] The Third Amendment has settled the issue of judicial review. A new article stipulating the Supreme Court's power of judicial review on legislation at cassation level has been introduced.[151] The power, however, remains restricted to legislation below act. The Third Amendment gives the greater part of judicial power to the newly established Constitutional Court.[152] The Constitutional Court has the authority to try a case of reviewing acts against the Constitution at the first and final level.

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[146] *See* Tap MPRS No. XX/MPRS/1966.
[147] *See* the 1970 Judicature Act, art. 26.
[148] *See e.g*. Subekti, *Yurisprudensi*, *supra* note 105 at ch. 1, at 26-27.
[149] Ikatan Hakim Indonesia, "Memorandum Ikatan Hakim Indonesia tentang Perbaikan terhadap Kedudukan Kekuasaan Kehakiman yang Sesuai dengan UUD 1945 Menurut Tafsiran Orde Baru (Tap MPRS No. XX/1966)," *Varia Peradilan* (Supplement) 136 (1997): [3-4].
[150] *See* Asshiddiqie, *supra* note 138, at 138.
[151] *See* the 1945 , 3rd Amend., art. 24A:1.
[152] *Id*. art. 24C:1.

If judicial review gives judges political powers of control over the executive and the legislative, the fourth situation puts judges in the shoes of legislators. At this point I will focus on the scope of that power. Later I will discuss the function of that power as a gap-filling law.

Judges must try a dispute. Article 22 AB asserted a right to sue judges for refusing trial because "written law" (*wet*, *undang-undang*) was silent, obscure or insufficient. The promulgation of the 1964 Judicature Act partly revoked the AB. The stipulation of article 22 AB was subsequently subsumed by article 10 of the Law.[153] The latter omitted the right to sue judges, but it expanded the ground for refusal to "law" (*hukum*) – covering written and unwritten law.

As a product of Guided Democracy, the 1964 Judicature Act was grandiloquent with revolutionary theme. In their deliberation judges were accountable to the State and the Revolution. Law was "a tool of Revolution" based on Pancasila to bring about the Indonesian socialist society.[154] As a tool of revolution judges were obliged to "delve, abide, and understand the living legal norms".[155] To get the notion how revolutionary could the judges be it is noteworthy that the Chief Justice Prodjodikoro promoted the society's sense of justice as the basis of law.[156] Later he advocated the superior nature of unwritten law when judges found written law was contrary to social justice and humanitarianism.[157]

The 1970 Judicature Act retained the must-try principle and its scope.[158] It omitted revolution as the watchword, but maintained Pancasila as the basis for upholding the law and

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[153] Lie Oen Hock, "Hakim dan Hukum Tidak Tertulis," in *Cinerama Hukum di Indonesia Himpunan Karangan di Beberapa Bidang Hukum in Memoriam Prof. R. Djokosutono, S.H.* (Bandung: Eresco, 1971), 31-32.
[154] *See* the 1964 Judicature Act, art. 3.
[155] *Id*. art. 20:1.
[156] *See* Prodjodikoro, *supra* note 139 ch. 1, at 13. *Cf*. Wirjono Prodjodikoro, *Kenang-kenangan sebagai Hakim Selama 40 Tahun Mengalami Tiga Zaman* (Jakarta: Ichtiar Baru, 1974), 45.
[157] He introduced this idea in his speech for National Law Seminar in 1961. Daniel S. Lev pointed out that this idea added to judicial confusion of the time. *See* Lev, *Lady and Banyan Tree*, *supra* note 140 at ch. 1, at 299.
[158] *See* the 1970 Judicature Act, art 14:1.

justice.[159] Judges were continued to "delve, abide, and understand the living legal norms of the society".[160] This task has remained virtually the same despite the promulgation of the 2004 Judicature Act, which in turn was revoked and replaced by the 2009 Judicature Act.[161]

In any case Pancasila has consistently been the underlying principle of judiciary. Together with the 1945 Constitution it has been the basis for the judicature in upholding law and justice.[162] The state court must apply and uphold law and justice based on Pancasila.[163]

Despite the struggle for acquiring power to judicial review, the judiciary has had the power to verify the compatibility between legislation and Pancasila. It also has had the power of judge-made law.

2.4.1.2 *(In)dependent Judiciary*

The substantive power of the judiciary is susceptible to its (in)dependence. When the judiciary is free from external intervention, it can meet the expectation of its function. However when it is under the influence of the government, its power will be circumscribed.

Both articles 24 and 25 of the (original) 1945 Constitution did not elaborate the judiciary's independence. Elucidation to these articles, however, asserted that the judiciary was free from government intervention. In light of this, statutory law should guarantee freedom with respect to judges' position.[164] I should point out that there was disagreement whether the

[159] *Id*. art. 3:2.
[160] *Id*. art. 27:1.
[161] *See* the 2004 Judicature Act, art. 28:1 and the 2009 Judicature Act, art 5:1.
[162] *See* the 2009 Judicature Act, art 1:1 and the 2004 Judicature Act, art. 1:1. In the latter, only Pancasila was mentioned.
[163] *See* the 2009 Judicature Act, art 2:2; the 2004 Judicature Act, art. 3:2; the 1970 Judicature Act, art 3.
[164] *See* The (original) 1945 , Elucidation to arts 24-25.

Elucidation was an integral part of the 1945 Constitution.[165] Some argued that it should be read to understand the 1945 Constitution, while others took the stance that the Elucidation should not expand its provisions.

The status and career track of judges influenced their independence.[166] Since the beginning Justices were civil servants. On September 1945 President Sukarno sworn in the first Chief Justice, Kusumah Atmadja, and he automatically held F-8 grade, the highest rank of civil servant.[167] Despite being a civil servant, Atmadja was successful in keeping the Supreme Court an independent branch of the state.[168]

The 1964 Judicature Act defied judiciary freedom. It made the judiciary as another tool of revolution susceptible to the President. For the sake of revolution, the dignity and the state and the nation, or urgent public interest, the President could interfere with administration of justice.[169] The President, goes the rationale, knew the best way to achieve the objectives of revolution. Consequently presidential intervention in judicial process was acceptable.[170]

Suharto's New Order put this forward as a brazen violation of the 1945 Constitution. Consequently it turned the tide by promulgating the 1970 Judicature Act. This Act reestablished the judiciary power as an independent entity that administers justice. Intervention unless

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[165] The 1945 Constitution took into effect on August 18, 1945. The Elucidation, however, would only come later in 1946. *See* Berita Negara No. 1/1946. The Elucidation was attributed to Supomo, who was provoked by the political reality at the time.
[166] *See* Carlo Guarnieri and Patrizia Pederzoli, *The Power of Judges: A Comparative Study of Courts and Democracy*, English ed. C. A. Thomas (New York: Oxford University Press, 2002), 18-77.
[167] At the time the highest position a civil servant could attain was F-7. Ex officio he was also the Chief of the Supreme Military Court with a titular rank of Lieutenant General, whereas the chiefs of staff were only colonels. *See* Purwoto S. Gandasubrata, "Derap-langkah IKAHI dari Masa ke Masa," *Varia Peradilan* 118 (1995): 145.
[168] *See* Pompe, *supra* note 132 at ch. 1, at 36-44.
[169] *See* the 1964 Judicature Act, art. 19.
[170] *See id*. elucidation to art. 19.

otherwise stated in the 1945 Constitution was forbidden.[171] Later the MPR affirmed that the Supreme Court was free from any intervention.[172]

This 1964 Judicature Act started dual-control of judiciary power. The Supreme Court supervised the lower courts only on technical matters. The organization, administration and financial aspects of the General Judiciary (*Peradilan Umum*) belonged to the Department of Justice, the Religious Judiciary (*Peradilan Agama*) to the Department of Religious Affairs, and the Military Judiciary (*Peradilan Militer*) to respective departments of the Armed Forces.[173] The 1970 Judicature Act continued the dual-control.[174]

Despite the New Order's pompous assurance to execute the 1945 Constitution, it always had a means to intervention. Outmaneuvering the law, President Suharto appointed active/retired military generals as Chief Justices.[175] In 1974 Suharto's decision to increase the number of Justices from nine to forty-five also opened up considerable patronage space for retired military officers.[176] Being a retired four-star general and the Commander-of-chief, Suharto made use of military attitude as a means to influence on the judiciary.[177] In other cases, especially ones with a political aspect, high officials in government ministries and military command approached judges in meetings called "consultations". In those meetings, government officials told what

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[171] *See* the 1970 Judicature Act, arts. 1 & 4:3.
[172] *See* Tap MPR No. III/1978, Kedudukan dan Hubungan Tata-Kerja Lembaga Tertinggi Negara dengan/atau antar Lembaga-lembaga Tinggi Negara [MPR Decree No. III/1978, Status and Working Relationship the Highest State Body with/or between State High Bodies], art. 11:1.
[173] *See id*. art. 7:3. The Administrative Court (*Pengadilan Tata Usaha Negara*) was established later in 1986.
[174] *See* the 1970 Judicature Act, art .11:1.
[175] They were Major General (ret.) Mudjono, Lieutenant General (ret.) Ali Said (1984), and Air Marshall (ret.) Sarwata Kertotenoyo (1996). Note none of them was four-star general. *See* Purwoto S. Gandasubrata, "Seputar Suksesi Ketua Mahkamah Agung," *Varia Peradilan* 137 (1997): 136-138.
[176] *See* Lev, *supra* note 143, at 97.
[177] In 1995 the Armed Forces granted Suharto along with Sudirman, the legendary Great Commander during independence war, and A. H. Nasution, the father of the Army and expert on guerilla war, the rank of five-star General of the Army.

they expected from judges. As a result of the meetings, judges were to understand the consequences of non-compliance.[178]

Subsequently there was a discrepancy between the law and the reality of judiciary power. An assessment using the positive law only would conclude that Indonesia had independent judiciary and that judges' freedom was guaranteed.[179] Threats to judicial freedom, it was concluded, would come from press asserting opinionated view and contempt of the court.[180] However, in reality, the judiciary had its hands tied. A more comprehensive assessment that factored in political reality concluded that the judiciary had continuously been under the influence of the executive.[181] A judge for almost forty years of service compared Guided Democracy and the New Order.[182] Even though the 1964 Judicature Act gave Sukarno power to interfere, he never executed it. In contrast, Suharto who never had such statutory power made frequent interference using military code of conduct as well as political means.

The *Reformasi* was aimed to correct the New Order's abuse of power.[183] One of the first steps taken in that light was reaffirming the judiciary as an independent power.[184] The 2004 Judicature Act maintained that intervention as stated in the 1945 Constitution was prohibited, but added criminal sanction for violating it.[185] The limit and sanction have remained unchanged in

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[178] For the structure of political interference *see* Pompe, *supra* note 13 at ch. 1, at 124-129.
[179] *See e.g*. Sri Soemantri, "Pandangan Nasional Mengenai Kekuasaan Kehakiman," in *Mochtar Kusumaatadmadja: Pendidik dan Negarawan*, edited by Mike Komar, Etty R. Agoes and Eddy Damian (Bandung: Alumni, 1999), 110-130.
[180] *See* R. Koebandono et al., "Kesimpulan Panel Diskusi tentang Kebebasan Hakim dalam Negara Republik Indonesia yang Berdasarkan atas Hukum," *Varia Peradilan* 118 (1995): 140-144.
[181] *Cf*. Koesnoe, *supra* note 139, at 89-117.
[182] *See* Adi Andjojo Soetjipto, "Legal Reform and Challenges in Indonesia," in *Indonesia in Transition: Social Aspects of Reformasi and Crisis*, edited by Chris Manning and Peter van Diermen (London: Zed Books, 2000), 269-277.
[183] *See e.g*. Sunaryati Hartono, Astrid S. Susanto, and R. M. Surachman, *Political Change and Legal Reform towards Democracy and Supremacy of Law in Indonesia* (Chiba-shi: Institute of Developing Economies, 2002), esp. 47-60; Petra Stockman, *Indonesia Reformasi as Reflected in Law* (Münster: Lit, 2004).
[184] *See* the 1945 Const. 3rd Amend., art. 24:1.
[185] *See* the 2004 Judicature Act, art. 4:3-4.

the 2009 Judicature Act.[186] The acts after *Reformasi* have given the Supreme Court full control over the courts under its supervision.[187]

While judiciary power and independent judiciary are intertwined, the above discussion shows that political will always plays a part in the administration of justice. Although this is true in political cases, there is not sufficient evidence that the government intervened in cases involving public order.

It is noteworthy that Gautama concluded his doctrine at the year of the 1964 Judicature Act was promulgated.[188] Despite its being detrimental to independent judiciary, it seems Gautama saw the importance of discretion in relation to serving national interest. Although independent judiciary has its ups and downs, judiciary power has been substantially consistent. Putting political predicate of the time aside, the court has had to try cases based on Pancasila.[189] In doing so the function of judges has been virtually unaltered, i.e. "to delve, abide, and understand the living legal norms and sense of justice of the society".[190]

The task of judges, as prescribed in the law, involves judicial discretion so that law and justice at all times are compatible to Pancasila and the 1945.[191] This task, at least on paper, is congruent with Gautama proposal on the role of judges with respect to public order. Alternatively, Gautama found in judicature law that judges have the power to identify public order and its effect on Indonesian law.

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[186] *See* the 2009 Judicature Act, art. 3:2-3.
[187] *See* the 2004 Judicature Act, art. 13:1, and the 2009 Judicature Act, art.21:1.
[188] *See* Gautama, *Book IV* was published for the first time in 1964.
[189] *See* the 1964 Judicature Act, art. 3; the 1970 Judicature Act, art.1; the 2004 Judicature Act, art. 1; and the 2009 Judicature Act, art 2:2.
[190] *See* the 1964 Judicature Act, art. 20:1; the 1970 Judicature Act, art. 27:1; the 2004 Judicature Act, art. 28:1; and the 2009 Judicature Act, art 5.
[191] One may also find that the law is an opening for judicial activism.

2.4.2 *Gap-Filling Law*

The gap-filling assumption is found on the fact that legislator can only prescribe the importance of public order. The largest part of public order remains penumbral. The courts through their decisions that can illumine the penumbra and elaborate what is left by the legislator. Decisions are either to provide interpretation of law on public order or, in a more extreme cases, judge-made law *per se*. Both are possible due to lack of written law.

It is therefore important to investigate whether Indonesian legal system recognizes court decisions as gap-filling law. It should be noted that while judicial decision is left out in the hierarchy of law, its status as a secondary source of law, however, is indubitable.[192]

The function of judicial decisions as gap-filling law is widely recognized. There are at least three reasons for this recognition. First, as a consequence of judicial discretion, judges have law-making power. In case of Indonesia this law-making power can mean giving colonial legislation its Indonesian context. Second, given Indonesia's legal pluralism, it is expected that the Supreme Court can point out or direct a uniform application of law.[193] In doing so the Court also provides a solution to any legal impasse borne out of pluralism. Third, the development of national law could not be entirely left to legislative reform.[194] Judges should actively participate so that the development aims in a uniform trajectory.

The gap-filling law is christened as "jurisprudence".[195] At this juncture I should point out that as a result of legal pluralism Indonesian law recognizes two kinds of jurisprudence.[196] First

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[192] Lie, *supra* note 107 at ch. 1.
[193] *See* Chief Justice Subekti, *Pengantar* (Introduction) to *Jurisprudensi Mahkamah Agung Republik Indonesia* (Jakarta: Mahkamah Agung Republik Indonesia, 1969).
[194] *See* Charles Himawan, "Menerapkan Temuan Ilmiah untuk Mengikis Peran Hukum dalam Pembangunan Ekonomi," *Hukum dan Pembangunan* 5 (1995): 399-402.
[195] Chief Justice Purwoto Gandasubrata (1992-1994) includes lower courts' decisions as jurisprudence. *See* Purwoto S. Gandasubrata, "Pembinaan Yurisprudensi Tetap dalam PJP II," *Majalah Hukum Nasional* 2 (1996): 124.
[196] *See* Purnadi Purbacaraka and Soerjono Soekanto, *Perundang-undangan dan Yurisprudensi* (Bandung: Alumni, 1979), 63-66. *See also* ter Haar, *supra* note 117 at ch. 1, at 159.

is jurisprudence that sets precedent for future cases. This type of jurisprudence is found in decisions of adat law cases. Second is jurisprudence that does not adhere to *stare decisis*. This type of jurisprudence is found in the civil law strand of Indonesian court.

Furthermore there is another classification of jurisprudence. Although it is arguably disorganized, this classification sets a hierarchy of importance and authority. The three known categories of Supreme Court decisions are "permanent jurisprudence", "jurisprudence", and decisions.[197] Theoretically through permanent jurisprudence the court finally settles in principle a question that has been creating doubts for the legal circle. Consequently it becomes guideline or reference for future cases.[198] In practice the criteria for classification, however, are not entirely clear.

Prior to the Internet era a decision was regarded as jurisprudence of either type owing to its publication. Initially the Indonesian Legal Scholars Association (*Ikatan Sarjana Hukum Indonesia*) published a law magazine, *Hukum*, on March 1947. The editors selected judicial decisions to be included in every volume.[199] The publication, however, was short-lived. On November 1951, the Indonesian Jurists Association (*Perhimpunan Ahli Hukum Indonesia*) also published a law magazine using the same name.[200] In many ways the publication resumed its predecessor. However, the magazine shared the same fate and ceased from publication in 1962.[201] The Supreme Court filled the void by publishing *Jurisprudensi Mahkamah Agung Republik Indonesia*.[202] Unfortunately the Court could not publish it consistently either. In its

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[197] *See e.g.* Mahkamah Agung Republik Indonesia, *Naskah Akademis tentang Pembentukan Hukum Melalui Yurisprudensi* (Jakarta: Mahkamah Agung Republik Indonesia, 2005), 28.
[198] *See* E. Utrecht, *Pengantar dalam Hukum Indonesia* (Jakarta: Djambatan, 1962), 209-210.
[199] *See* Kusumadi Pudjosewojo, *Pelajaran Tata Hukum Indonesia* (Jakarta: Aksara Baru, 1976), 40.
[200] Its board of editors consisted of prominent figures like Supomo, Djokosoetono, Sahardjo, and Wirjono Prodjodikoro.
[201] *Cf.* Daniel S. Lev, "Law and State in Indonesia," *Law Reform in Developing and Transitional States*, ed. Tim Lindsey (New York: Routledge, 2007), 236-237.
[202] The first issue of *Jurisprudensi Mahkamah Agung Republik Indonesia* came out on January 1969.

absence Chief Justice Oemar Seno Adji and the Minister of Justice Mochtar Kusumaatmadja collaborated on publishing judicial decisions. The Court would publish its decisions in *Yurisprudensi Indonesia*; the Department of Justice would publish lower courts decisions that had become *res judicata*.[203]

Lack of publication was also a concern for the academia. As gap-filling law court decision is a desideratum for the development of legal science. On the one hand jurisprudence has shaped the development of legal science.[204] Even an exhaustive analysis of interpersonal issues by a court of first instance became a juridical recognition of intergentiel law as a separate branch of legal science.[205] On the other hand court's practice is required for identifying the living law.[206] Publication of judicial decisions therefore has become scholarly duty. Legal scholars take initiative partly because of intermittent publication by the Supreme Court and partly of teaching needs. In some cases leading universities collaborated with lower courts to make inventory of judicial decisions.[207]

Consequently the authority to label jurisprudence is no longer the monopoly of the Supreme Court. Acting as compilers, legal scholars sorted and classified decisions as jurisprudence. It is also noteworthy that the compilers unilaterally classified lower courts decisions as jurisprudence.[208]

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[203] *See* Gandasubrata, *supra* note 195, at 129.
[204] *Cf.* Oey, *supra* note 107 at ch. 1.
[205] W. F. Wertheim, professor of intergentiel law in the Law College before Japanese occupation, celebrated the decision of the Malang Country Court of February 16, 1938 by saying "Victory begins from Malang!" *See* Gautama, *Pengantar*, *supra* note 1, at 30.
[206] *Id*. at 30-31.
[207] Mochtar Kusumaatmadja, then as the Dean of the Faculty of Law of Padjadjaran University, and Purwoto Gandasubrata, then as the Chief Judge of the High Court of West Java, proposed to initiate inventory of decisions in West Java. *See* Hartono, *supra* note 107 ch. 1, at 10. The inventories were published under the title "Jurisprudence of West Java" by Padjadjaran University (covering the years 1969-1972) and the Department of Justice of the Republic of Indonesia (1974-1975 and 1975-1976). Note that the title is an oxymoron both to the unitary state and the judicial system.
[208] *See e.g*. G 1 (1992): v.

Private initiatives therefore show that gap-filling law is somewhat democratic. It also shows that there are wide gaps in Indonesian law that need to be filled with judicial decisions. In the absence of Supreme Court decisions, legal scholars have elevated the importance of lower court decisions as instructive.

With publication of the 1994/1995 study, the BPHN revealed that a decision would constitute as jurisprudence if it fulfilled five criteria.[209] First, it was a decision on an issue that had not been explicitly regulated by law. Second, it had to be *res judicata*. Third, judges facing similar issues reached the same conclusion with it. Fourth, it had to meet the sense of justice. Fifth, the decision was uphold by the Supreme Court. In a study conducted by the Supreme Court 88% judges agreed to these criteria.[210] However 82% of them answered that they could deviate from jurisprudence.

Theoretically a decision needs to build-up recognition to attain the status of jurisprudence. However, recently this practical-test seems to be abandoned. Some decisions are available online immediately after their deliberation with the status of jurisprudence.

Consistent with the function of jurisprudence in the legal system, court decision is to fill in the lacuna of public order. In the absence of Supreme Court decision, lower court decisions are considered instructive to bring Indonesian public order forward.

2.4.3 *High Level of Public Opinion*

The emphasis on spatiotemporal aspects indicates that public opinion is one of the assumptions of the doctrine. PIL scholars agree that public order evolves with time. An issue may lose its repugnancy to a forum over time. Such is the case with divorce in Western Catholic

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[209] *See* Mahkamah Agung Republik Indonesia, *supra* note 197, at 28.

[210] *Id*. at 57-83. In the study 547 judges consisting all judges of the high courts and selected district courts filled out questionnaire.

countries.[211] An issue may also be acceptable in a country, yet at the same time unacceptable in others. Same-sex marriage is a case in point.

Although there is no mentioning about public order in the Marriage Act, same-sex marriage will be repugnant to Indonesia.[212] Since 1974, the Act has imposed the fulfillment of religious law as a prerequisite to registration.[213] Regardless of their creed, religiousness has continued to be core to Indonesians. Thus if Indonesian court faces the issue of same-sex marriage, it will likely defer to public order for dismissal.

Being predominantly Muslim however does not entail that public opinion will be solely based on Islamic values. As shown in *Lie Kwie Hien*, legal pluralism is a counterbalance to public opinion. This is especially true since lack of sanction makes no room for mandatory law.

State policy can also be counted as public opinion. Prior to the Amendments, the people entrusted its sovereignty with the MPR.[214] It had elected as well as appointed members.[215] The latter were to ensure that all elements of the society were represented in the national forum. Subsequently the MPR decisions supposedly had the attributes of sovereignty and popularity. The New Order's planned economy was therefore treated as public order as in *ED & F Man (Sugar)*.

2.4.4 *Legal Pluralism and Development of National Law*

This assumption is evident at two levels. The first is Gautama's scholarship. One of his early publications dealt with the issue of legal reform.[216] He concluded that Indonesia had to

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[211] *De Ferrari* case.
[212] UU No. 1/1974, Perkawinan [Act No. 1/1974, Marriage], Jan. 2, 1974.
[213] *Id*. art. 2.
[214] *See* the (original) 1945 Const., art. 1:2.
[215] *Id*. art. 2:1.
[216] *See* Gautama, *Pembaharuan*, *supra* note 114 at ch. 1.

modernize its law through a combination of harmonization and unification of law. His focus on intergentiel law obviously made him more exposed to legal pluralism than most scholars. The second is Gautama's admission that violation of Pancasila and the 1945 Constitution would trigger public order. During the New Order legal development was oriented to Pancasila and the 1945 Constitution. His admission came partly from his scholarship and partly from providing legal foundation for the doctrine.

This section has shown that Gautama constructed his doctrine of the legal system. It has both theoretical and practical importance. It not only provides legal justification for the doctrine, but also predicts how it can be operable. The practicality, however, is something that I will examine in Chapter 3.

2.5 Section D: Genius of Doctrine

At the risk of ignoring some of the empirical proof, this section shows that the doctrine has stood the test of time. I draw my conclusion not on how the doctrine has been practicable, but on the fact that it has survived regime change. Furthermore anchoring at Pancasila and the 1945 Constitution has made it watertight to the Amendments as well as a series of legal reform.

In hindsight the doctrine struck a balance between legal development and political turbulence. The genius of the doctrine is evident in three instances. First it is in line with preserving legal unity. Second it has proven itself adaptable to political turbulence. Third it manages to anticipate legal development.

2.5.1 *Preserving Legal Unity*

Indonesia as a concept was emerged from legal unity. Any scrimmage of its nationhood found an end in Pancasila. Using the 1945 Constitution as the bellwether of change Indonesia has transposed colonial legislation to serve the objectives of independence. Pancasila and the 1945 Constitution have been the cohesion between peoples who are anthropologically different. The legal system has become the unifying instrument that holds the nation together.

The doctrine has been in support of legal unity. By anchoring at Pancasila and the 1945 Constitution it pensively takes the macro-legal importance. Consequently it helps judges winnow out some of the legal issues and encourages them to focus on the bigger picture that matters most for the legal system. This is in line with the defensive function of public order.

Given the layers of pluralism that Indonesia has, legal unity is of great importance. Not only it keeps the nation together, but it also gives an ample room for future development.

2.5.2 *Adaptable to Political Turbulence*

Indonesia has had experiment with many types of democracy. Unpleasant experience with a parliamentary system led to Guided Democracy and restored the 1945 Constitution. Sukarno declared himself as the alter ego of the people. A combination of the formal legal system and Sukarno's charisma led to authoritarian regime. Suharto's New Order shifted political support to the Army, but made use of the authoritarian style. The *Reformasi* put an end to authoritarian government and has given more political power to the people.

The political timeline stretches for almost sixty years. Throughout this time Pancasila and the 1945 maintain their status in Indonesian law. In addition to being the unifying

instrument for the nation, the timeline shows that both Pancasila and the 1945 Constitution have been legally and politically adaptable to the spirit of time.

The temporal-test has proven than the doctrine has aptly captured the bedrock principles of the legal system.

2.5.3 *Anticipating Legal Development*

Pancasila and the (original) 1945 Constitution are respectively abstract and short. The flip side of being succinct is having an ample room for legal development. The bones of the legal system are embodied in Pancasila and the 1945 Constitution. Legal development is to fill in the meat of the system.

Legal pluralism has been a bone of contention. Should Indonesia conserve or squander it? The colonial government was in favor of conserving pluralism. Independent Indonesia has generally continued the approach, but not without resistance. Yet the proponents of adat law and the advocates of Western law can agree on Pancasila and the 1945 Constitution. Despite their differences of opinion, the fundamental norms have been the *modus vivendi* for national law development.

By anchoring at Pancasila and the 1945 Constitution the doctrine enables judges to participate in legal development without overstepping the mark. It also aligns gap-filling law with parallel efforts of legislative reform.

2.6 CONCLUSION

In this chapter I have shown that Gautama's credibility and his vantage point in constructing the doctrine. I also have shown that the doctrine is an attempt to align Indonesia with the rest of the world without sacrificing its own interest. The balance is a result of comparative study and being embedded in the legal system. The Gautama doctrine has stood the test of time.

The above discussion has partly shown that some parts of Indonesian law are professorial law. This legal reality was a result of historical events. It began with independence and the status quo of colonial legislation. Scholars transposed colonial legislation to the objectives of independence. The next generation's lack of command in Dutch sealed their status as oracles of the law. As the authority on PIL, Gautama almost stood alone.

By discussing the development of the doctrine, I have also partly demonstrated that the Gautama doctrine is a valuable framework that can be operable within the pluralist legal system. I have shown this by unpacking his assumptions. I also have pointed out to the genius of the doctrine is proven by its compatibility with the politico-legal situation of Indonesia.

The discussion in this chapter however is restricted to the doctrine *per se*. In it I have attempted to put forward some evidence that the doctrine has taken legal pluralism seriously. Consequently consistent implementation of the doctrine requires further consideration on legal pluralism. Chapter 3 will show to whether the court practice is consistent with the doctrine. Picking up from the implementation in chapter 4 I will also deal with the practical challenge of the doctrine.

Chapter 3

THE PRACTICE OF LAW AS EVIDENT IN CASES

"Public policy is 'the policy of the day'."[1]

3.1. OVERVIEW

In this chapter I discuss and analyze ten PIL cases where public order was an issue. My aim is to demonstrate how the courts treated motions for public order. A *prima facie* to my analysis is what the decisions tell. Based on the decisions I ascertain and attempt to describe what the courts considered as public order.

Like the introductory quotation, this chapter shows that public order is 'the policy of the day'. It changes over time. What factors influence such changes raises additional questions. Unfortunately the decisions themselves provide little insight on these factors. Suffice it to say at this point that the factors are conflated and intermittent.

Although in PIL public order is distinguishable from public policy, in this chapter the distinction does not apply. As it will later be evident, both the courts and the parties used public order, public policy, and *ketertiban umum* interchangeably.

This chapter is intended to support four propositions of the study. In combination with chapter 1, I seek to demonstrate that the Indonesian legal system should be analyzed with reference to Indonesian history and culture (Proposition 1). The discussion will show two things. First, the decisions reveal the systemic and practical challenges facing by Indonesian law. Although the decisions themselves lack analytical data, the challenges will be evident when I

[1] Carleton Kemp Allen, *Law in the Making* (Oxford: Clarendon Press, 1939), 150.

factor in the stages of legal development. Second, the courts also shape the development of Indonesian law. The decisions show that the courts were confronted to legal pluralism and gave meaning to legal unity. Again when I factor in the stages of legal development, their reaction will be more coherent.

Chapter 1 has partially demonstrated that, as a result of the emergence of Indonesia as an independent state, the underlying characteristics of Indonesian law have become obscured. Picking up from that discussion, this chapter will show that judicial reasoning has obscured these characteristics of Indonesian law (Proposition 2). Only one of the cases took legal pluralism into consideration. The rest tended to either discount or overlook it. Consequently, the courts' treatment to the motion for public order raises a number of questions about Indonesian law. What is the controlling law? How instructive is the legal hierarchy? What influence does "jurisprudence" – that is, decisional law – have on the courts?

In the effort to describe the inconsistency of judicial decisions on Indonesia public order, I argue for proposition 4 that the Gautama doctrine provides a uniquely valuable framework that is operable within the context of Indonesian law. For the most part the decisions speak for themselves. The lack of basis and rationale in most of the decisions will show that the courts need an operating framework for consistency.

Depending on the perspective used, judicial decisions have shown that Indonesian public order is a controversial issue. The decisions, however, were not predictably consistent. I argue that this could be mitigated if the broader context of legal pluralism of Indonesian law is considered (Proposition 5).

In developing these propositions the chapter is divided into four sections. Section A presents a brief description of Indonesian civil procedure. The parties bear the burden to

persuade the court. However, the court's holdings are laconic. The courts apparently feel that they are under no obligation to discuss its deliberation in detail.

This section not only shows how the judiciary works, but also shows that judicial decisions are part of the problem when they fail to comply with the law. Some of the cases I deal with here have their origins in the courts' failure to be responsive. The section also demonstrates the problem of determining the positive law.[2] At some points jurisprudence negates written law. However, the lack of a theory or practice of binding precedent complicates this negation.

The focus of Section B is case selection. In this part I explain that the cases have to fulfill two criteria: they contain PIL elements and raise the public order issue. The section concludes with a summary of the cases.

Section C shows the practice of the law. I begin with underlining the dispute followed by case summary. Next I single out the issue of public order. In doing so I rely on what the decisions tell. Later I provide commentaries, either by scholars or my own, on the cases with special attention to public order. I use additional information or background, when available, related to the cases for analysis.

This section has four objectives. The first is to attain an understanding of the circumstances where the parties would submit the issue of public order to the court as part of their argument. The second is to scrutinize the bases of their understanding of public order. My third objective is to gain insight on the court's response to their submission. The fourth is to elaborate the legal basis or argument used in the decisions. The first and second objectives may be regarded the surrogates for the court's dearth of deliberation. The third and fourth dovetail

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[2] *See supra* p. 24.

with the previous objectives, and they altogether enable a reasonable construction for understanding the role of public order.

Based on the findings, I conclude the practice of the law in Section D. Here I show the common thread found in the cases. I highlight the consistency as well as inconsistency, and their possible causes.

3.2. SECTION A: INDONESIAN CIVIL PROCEDURE IN BRIEF

3.2.1 *The Positive Law for Civil Procedure*

The (original) 1945 Constitution stipulated that judicial powers would be exercised by the Supreme Court and other judicial bodies as regulated by law.[3] After the *Reformasi,* the 1945 Constitution added the Constitutional Court as another agency of justice.[4] While the Supreme Court maintains the authority to hear cases at the highest level (cassation), the Constitutional Court has the authority to adjudicate cases at the first and final level in reviewing acts that are challenged under the Constitution.[5]

The positive law of civil procedure is dispersed among several statutes. They can be classified as statutes that regulate civil procedure *per se* and the judiciary. The former consists of the Revised Indonesian Regulation (HIR), applicable to the islands of Java and Madura, and the Regulation for the Outer Islands (RBg), applicable to other islands. Since independence Indonesia has had several statutes governing the judiciary. The 1964 Judicature Act, was rescinded by the 1970 Judicature Act, which in turn was revoked and replaced by that of 2004.

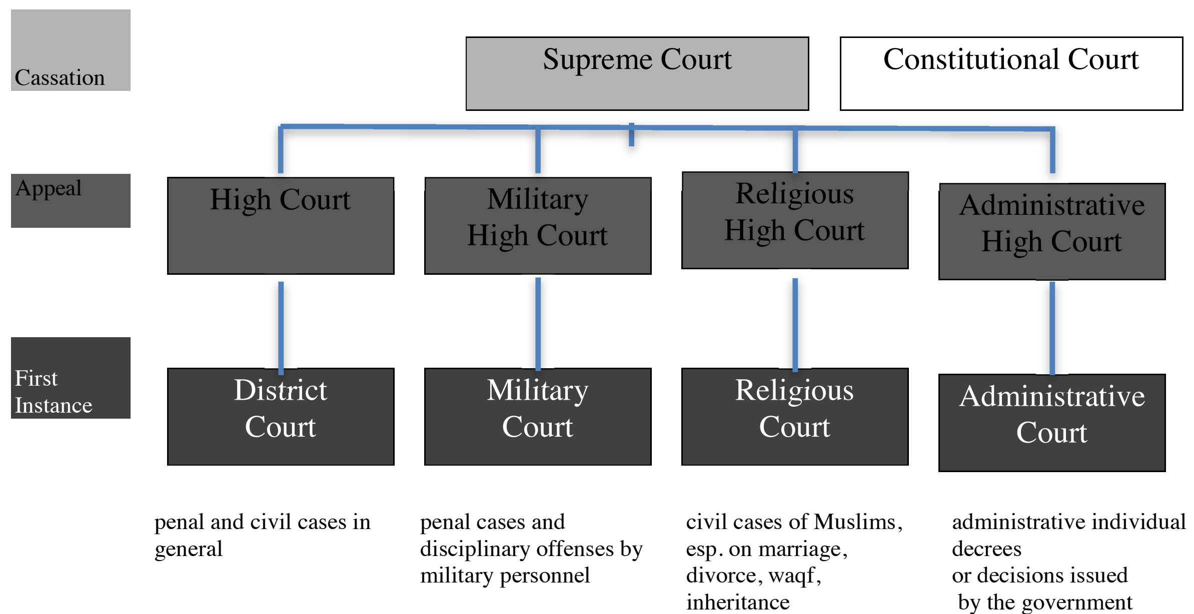
[3] *See* the (original) 1945 Const., art. 24.
[4] *See* the 1945 Const., 3rd Amend., art. 24:2.
[5] *See* the 1945 Const., 3rd Amend., art. 24C:1.

The current statute is the 2009 Judicature Act. Additionally civil procedure is also stipulated in acts concerning the Supreme Court[6] and all courts under its supervision.

Two other significant sources of positive law are jurisprudence and the Supreme Court regulations. According to jurisprudence some provisions of the Code of Civil Procedure of the now-defunct Court of Justice (Rv) are applicable when the HIR/RBg is silent not by themselves but as a result of judge-made law. The regulations, addressed to lower courts but undoubtedly affecting civil procedure, contain instructions and directions on how to administer justice.

3.2.2 *Judicial Structure*

Table 3.1: Judicial Structure



[6] UU No. 14/1985, Mahkamah Agung [Act No. 15/1985, Supreme Court], Dec. 30, 1985 *amended by* UU No. 5/2004, Perubahan UU No. 14/1985 tentang Mahkamah Agung [Act No. 5/2004, Amendment to Act No. 14/1985 on Supreme Court], Jan. 15, 2004, *amended further by* UU No. 3/2009, Perubahan Kedua UU No. 14/1985 tentang Mahkamah Agung [Act No. 3/2009, Amendment to Act No. 14/1985 on Supreme Court], Jan. 12, 2009 (hereinafter Sup. Ct. Act).

The Supreme Court sits at the apex of the ordinary administration of justice. It has authority over the organization, administration, and finance of lower courts – consisting of specialized courts with delineated general, religious, military, and administrative jurisdiction.[7] These courts consist of courts of first instance and first appeal. The courts of general jurisdiction (*peradilan umum*) comprise of one district court (*pengadilan negeri*) at the municipal level and one high court (*pengadilan tinggi*) at the provincial level. Together with the Supreme Court these courts form a three-tier court system.

3.2.3 *A Three-tier Court Structure and Two-stage Process*

As in other civil law jurisdictions, the court system involves a two-stage process. In the standard procedure any party dissatisfied with a district court's decision may lodge an appeal on both law and facts to the high court that supervises it. Like the district court, the high court judges will try the lawsuit based on facts at hand and make judgment. Judges of these two courts, or stage, are called *judex facti* (judges of facts).

If a party is not satisfied with the high court's decision, he can seek review, called cassation, by the Supreme Court. At the cassation level justices will only examine questions of law, and consequently they are called *judex iuri* (judges of law). In addition to examining the application of law by appellate judges, the Supreme Court has the power to quash lower courts' decisions that overstep their jurisdiction.

In an especially regulated procedure, in lieu of the high court, a party may directly lodge an appeal to the Supreme Court. The Court's decision will be final. The only available means to challenge it is an extraordinary review..

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[7] *See* the 2009 Judicature Act, arts. 18 and 21:1.

Once the ordinary course of action, either appeal or cassation, has been used or becomes barred by lapse of time, a judgment will become final and have "binding force" (*berkekuatan hukum tetap*). At that point the judgment is executable.

3.2.4 *Extraordinary Method of Review*

Indonesian civil procedure recognizes an extraordinary method of review called reconsideration (*peninjauan kembali*). Similar to *requête civile* (polite petition),[8] in reconsideration the Supreme Court may reassess judgments, either made by lower courts or itself, that have become *res judicata* for statutorily specified procedural error.[9] The petition for reconsideration can only be submitted once against the same judgment. The submission has to be based *inter alia* on the emergence of substantial evidence after the judgment (*novum*); the judgment granted what was not, or goes beyond what was, demanded in the pleadings (*ultra petita*); the judgment failed to deal with one of the claims or defenses presented by the parties; or the judgment clearly shows that the judges erred in ruling or were at fault.[10]

3.2.5 *The Bench and Its Voice*

As in many if not most civil law jurisdictions, first instance trials usually have three judge panels, with one presiding judge, for every trial.[11] Previously deliberations among the judges made their deliberation in secret.[12] The court decided and delivered its decisions collegially. As a faceless unit it only expressed one voice, and did not reveal any dissenting opinion to the

[8] *Cf*. Peter Herzog and Martha Weser, *Civil Procedure in France* (The Hague: Martinus Nijhoff, 1967), 477-487.
[9] *See* Sup. Ct. Act, art. 34.
[10] *Id*. art. 67.
[11] *See* the 2009 Judicature Act, art. 11:1-2.
[12] *See* the 1970 Judicature Act, art. 17:3.

public.[13] Consequently to what extent each of the judges of any panel actually considered and examined the case was not clear.

The recent introduction of dissenting opinion has changed this. Since 2004, started with the Constitutional Court in 2003, Indonesian judges have deviated from their civil law brethren.[14] A year later the Supreme Court and all court under its supervision followed suit.[15] Although judicial decisions are still composed in the third person singular – "the court" – it no longer speaks in monolithic institutional voice. Dissenting opinion of the bench must now be included in the judgment. It therefore put a name to the *obiter dictum* or the *ratio decidendi*, and has thrown light on existing disagreement during deliberation.[16] Despite this landmark departure from the deliberation of the 1970 Judicature Act, subsequent statutes do not provide any explanation. I tend to conclude that this divergence is partly as a result of democratization and partly of the influence of American judicial practice, which has a significant number of adherents.

[13] Merryman, *supra* note 110 at ch. 1, at 37.
[14] It was the Constitutional Court that first adopted dissenting opinion in its decisions. *See* Const. Ct. Act, art. 45:10.
[15] *See* Sup. Ct. Act, art. 30:1 *cf*. the 2009 Judicature Act, art. 14:3, previously was stipulated by the 2004 Judicature Act, art. 19:3.
[16] *See* Lirik Petroleum (2010) includes the dissenting opinion of Justice Purba. *See* Sup. Ct. No. 904 K/PDT.SUS/2009, June 9, 2010, (PT Pertamina EP & PT Pertamina (Persero)/ PT Lirik Petroleum), at 96-99, available at http://putusan.mahkamahagung.go.id/putusan/90a6f95426c5cf1c154de3dff523d846 (last visited on Mar. 3, 2015). "Persero", usually written between brackets at the back of the names of state-owned enterprises indicating that the Republic of Indonesia owns all or at least 51% of its shares. *See* UU No. 19/2003, Badan Usaha Milik Negara [Act No. 19/2003, State-Owned Enterprise], June 19, 2003, art. 1 point 2. Bank America National Trust includes the dissenting opinion of Justice Imron Anwari. *See* Sup. Ct. No. 1538 K/Pdt/2009, Apr. 20, 2011 (Bank America National Trust Co. & PT Bank Mizuho Indonesia/APP International Finance Co. B.V.), at 352-354, available at http://putusan.mahkamahagung.go.id/putusan/8024ff9cb343b9c91b3a8ca69ee21b95 (last visited on Mar. 3, 2015). BV (*Besloten Vennootschap*) is a Dutch private limited liability company.

3.2.6 *Structure of Court Decisions*

In general court decisions consists of four parts. The first is the heading that confers a judgment with executional force.[17] This requirement was initially stipulated in the Rv.[18] Although the HIR and the RBg do not explicitly require a heading, its absence will hamper the court in executing a judgment.[19] The original heading, obviously, declaimed "*In de naam des konings*" (In the name of the king). As a matter of course after independence the wording was modified,[20] but not always in uniform fashion.[21] In 1950 the heading became "*Atas nama Keadilan*" (In the name of Justice).[22] Since 1964 it has been fixed to bear the phrase of "*Demi Keadilan Berdasarkan Ketuhanan Yang Maha Esa*" (For the Sake of Justice Based on the Almighty God).[23] The phrase demonstrates that justice is administered in light of the First Principle of Pancasila and the 1945 Constitution.[24]

Arbitral awards rendered in Indonesia must also contain the same phrase to be executable.[25] Nonetheless judicial assistance in executing the awards is pressingly needed when the losing party refuses to cooperate.[26] In the case of foreign arbitral awards, *exequatur* from the President of the Central Jakarta District Court is a prerequisite for enforcement.[27]

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[17] *See* Sudikno Mertokusumo, *Hukum Acara Perdata Indonesia* (Yogyakarta: Liberty, 1981), 167 (hereinafter Sudikno, *Acara*); *see also* Wirjono Prodjodikoro, *Hukum Acara Perdata di Indonesia* (Bandung: Sumur, 1978), 128 (hereinafter Prodjodikoro, *Acara*).
[18] Rv., art. 435. *See* Sudikno, *Acara*, *supra* note 17, at 150; *see also* Prodjodikoro, *Acara*, *supra* note 17, at 128.
[19] Respectively arts 224 and 258.
[20] For the evolution of the heading, *see* Sudikno Mertokusumo, *Sedjarah Peradilan dan Perundang-undangannja di Indonesia Sedjak 1942 dan Apakah Kemanfaatannja bagi Kita Bangsa Indonesia* (Yogyakarta: Liberty, 1971), 21, 51 and 134.
[21] *See* Prodjodikoro's comments on *Oey Tjay Nio*, Sup. Ct. No. 98 K/Sip./1952, Feb. 5, 1953 (Oey Tjay Nio/Li A Poeng) *in* H 2-3 (1953): 83-84 .
[22] *See* UU No. 1/1950, Susunan, Kekuasaan dan Jalan-Pengadilan Mahkamah Agung Indonesia [Act No. 1/1950, Organization, Power and Procedure of the Supreme Court of the Republic of Indonesia], May 9, 1950, art. 1:2.
[23] *See* the 1964 Judicature Act, art. 2:1.
[24] *See id*. elucidation to art., 2:1. Subsequent acts have maintained the same elucidation. *See* the 1970 Judicature Act, art. 4:1, the 2004 Judicature Act, art. 4:1 and the 2009 Judicature Act, art. 2:1.
[25] *See* Arb. Act, art. 54:1(a). The absence of this heading was one of the issues in *Lirik Petroleum (2010)*. *See* Lirik Petroleum (2010), at 15-17.
[26] *See* Arb. Act, art. 61.
[27] *Id*. art. 66(d). *See infra* pp. 111-112.

The second part, called *persona standi in judicio*, is where the identities of the parties are stated. The names of the parties and lawyers as well as their historical capacities throughout the proceedings are stated below the heading.

The third is the summary of pleadings and rebuttals that become the grounds of decision (*pertimbangan*).[28] Indonesia follows, though not strictly, the French system in the writing of decision by employing the word "*menimbang*" ("considering" or "whereas") that will culminate in the judgment.[29] Although relatively more extensive than those of the French, the opinion of the court, if any, is still short to American eyes. In this part the court restates the facts and the parties' arguments. It also carries the *obiter dictum* and the *ratio decidendi*, including the written and unwritten law that are the basis for the decision.[30]

The fourth part is the decision (*dictum*, *amar putusan*).[31] The judgment is the court's response to the plaintiff's claim based upon facts found or admitted by the parties or upon default in the course of the suit. The court must adjudicate every part of the plaintiff's claims.[32] It is prohibited from granting what is not demanded or more than what is petitioned by the plaintiff.[33] Previously jurisprudence deemed that to grant more than what was requested (*ultra petita*),[34] to adjudicate only some parts of the claims,[35] or to award what was not sought in the petition constituted a violation of law.[36] Later the Supreme Court reversed its stance on *ultra petita*. It

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[28] *See* HIR, art. 184; RBG, art. 195.
[29] *See* Mertokusumo, *Acara*, *supra* note 17 at 172. *Cf*. Mitchel de S.-O.-L'E. Lasser, *Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy*, (New York: Oxford University Press, 2004), 31-34.
[30] *See* the 2009 Judicature Act, art 50:1.
[31] In civil law dictum means decision, and not a statement of observation.
[32] *See* HIR, art. 178:2; RBG, art. 189:2.
[33] *See* HIR, art. 178:3; RBG, art. 189:3.
[34] *See* Surabaya High Ct. No. 290/1950 Pdt, Aug. 6, 1953 (Liem Gwan Soe/Oei Joe Lie), available at 1 H. 58 (1954).
[35] *See* Sup. Ct. No. 339 K/Sip/1969, Feb. 21, 1970 (*Sih Kanti/Pak Trimo & Bok Sutoikromo*), available at *Jurisprudensi Indonesia,* 1 (Jakarta: Mahkamah Agung Republik Indonesia, 1970): 13.
[36] *See* Sup. Ct. No. 46 K/Sip/1969, June 19, 1971 (Adelan et al/Soekri et al), available at *Jurisprudensi Indonesia* 3 (Jakarta: Mahkamah Agung Republik Indonesia, 1971): 54; Sup. Ct. No. 1399 K/Sip/1975, Aug. 10, 1977 (Anthon Hutubessy/*Ny. Agustina Hutubessy Tetelepta*), available at *Yurisprudensi Hukum Acara Perdata Indonesia* 1, comp. Chidir Ali (Bandung: Armico, 1983): 289.

held that the relevant provision of law should not be strictly applied, and deviation was permissible.[37] In reversing, but without touching upon, the jurisprudence, the Supreme Court demonstrated its "activism" in resolving disputes.

Legal scholars provide explanations for this reversal. Supomo justifies the reversal based on a sensible role of judges compatible with the traditional perception of Indonesians.[38] Keeping in mind that Indonesia has an "inquisitorial" or a "dispositive" system of adjudication that includes fact-finding as a judicial function, judges must take active role throughout the legal proceedings and the execution of their decisions.[39] This role, in contrast to that of the Rv, is to facilitate their freedom to find substantive truth as they take the lead in examining the parties' claims.[40] Pointing out that the judges must resolve disputes justly based on veritable facts, Sudikno Mertokusumo contends that they should have the freedom to apply and interpret the procedural limit, and not be bound by the parties' interests.[41]

The explanations engender questions on judicial power. How can the court circumvent a provision of positive law? On what ground can the court do that? What is the limit of judicial power? These questions, unfortunately, have been left unanswered. In its stead, I find legal scholars are not bothered by and approve the circumventing move.[42] From the perspective of rule of law such circumvention is unwarranted and has created legal uncertainty. However legal scholars commend it as a demonstration of wisdom. From an analytical plane the circumvention of positive law shows that Indonesia is caught in a tug-of-war between rule of law and the so-

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[37] *See* Sup. Ct. No. 499 K/Sip/1970, Mar. 17, 1971 (Haji Kosim/Atjep Masduki cs), available at *Yurisprudensi Hukum Acara Perdata Indonesia* 1, comp. Chidir Ali (Yogyakarta: Nur Cahaya, 1985): 156 and 161.
[38] *See* Supomo, *Acara*, *supra* note 102 at ch. 1, at 15 and 19.
[39] *See* HIR, arts. 119, 132, and 195; RBG, arts. 143, 156 and 206.
[40] *See* Supomo, *Acara*, *supra* note 102 at ch. 1, at 17-19.
[41] *See* Mertokusumo, *Acara*, supra note 17, at 171. The fact that he himself was a judge prior to academia gives Mertokusumo credibility.
[42] *See* Supomo, *Acara*, *supra* note 102 at ch. 1, at 20; *see also* Mertokusumo, *Acara*, supra note 17, at 171-172.

called "rule of *kebijaksanaan*" (rule of wisdom).[43] Adding to the confusion, the jurisprudence is at odds with Supreme Court Act that reiterates the provision on *ultra petita* as a ground for reconsideration.[44]

3.2.7 *Exequatur for Foreign Arbitral Awards*

Foreign arbitral awards rendered in contracting states to the 1958 New York Convention are recognized and enforceable. The Convention leaves the rules of procedure for enforcement to the laws of the contracting parties.[45] For almost a decade after Indonesia acceded to the Convention, the rules were nonexistent.[46] With its Regulation No. 1/1990 the Supreme Court took the initiative to provide the long-awaited procedural rules.[47]

The Regulation vested the Central Jakarta District Court with jurisdiction over enforcement of foreign arbitral awards.[48] An award was enforceable after the winning party obtained exequatur.[49] The party had to file a request for exequatur to the Supreme Court via the Central Jakarta District Court.[50] If the award violated public order, the request would be refused, and therefore the award became unenforceable.[51] This ground for refusal was in compliance with article V:2 (b) of the Convention.

The promulgation of Arbitration Act automatically made the Regulation obsolete. The Act delegates more power to the Central Jakarta District Court. Except the Republic of

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[43] Soemarmo Wirjanto coined the term "rule of *kebijaksanaan*" to show the discrepancy of law in practice. *See* Soemarno P. Wirjanto, "'Perang" antara Rule of Law dan Rule of Kebijaksanaan," *Kompas Daily*, Mar. 3-4, 1969, at III. *See infra* pp. 182-186.
[44] *See* Sup. Ct. Act, art. 67.
[45] *See* N.Y. Convention, art. III.
[46] The nonexistence made foreign arbitral award unenforceable. *See* Sup. Ct. No. 2944 K/Pdt/1983, Aug. 20, 1984 (Navigation Maritime Bulgare (Bulgaria)/PT Nizwar (Indonesia)), available at *Varia Peradilan* 18 (1987).
[47] *See* Perma No. 1/1990.
[48] *Id*. art. 1.
[49] *Id*. art. 3:4.
[50] *Id*. art. 5.
[51] *Id*. art. 4:1.

Indonesia is a party in arbitration, the court can issue exequatur.[52] If the President of the Central Jakarta District Court grants exequatur, the order will be final.[53] However if the President refuses to issue it, the applying party can immediately challenge the non-order by filing a request for cassation to the Supreme Court.[54]

The selected cases will show that exequatur may become a dispute even before it is issued. This may happen either because the winning party seeks enforcement in other countries where the losing party has assets or has not have the chance to file his request. Either way the losing party files a lawsuit to annul the award.[55] Unlike the challenge to the district court's order of exequatur, the unsatisfied party can bring his case to the Supreme Court as an appeal.[56]

3.3. Section B: Case Selection

3.3.1 *Selected Cases*

For this study I investigate ten cases. Chronologically based on the dates of deliberation they are:

1. *Lie Kwie Hien*;[57]
2. *ED & F Man (Sugar)*;[58]
3. *Karaha Bodas (2004)*;[59]
4. *Karaha Bodas (2008)*;[60]

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[52] *See* Arb. Act, art. 65. When the exception applies, the Supreme Court assumes the power, *see* art. 66 (e).
[53] *Id*. art. 68:1.
[54] *Id*. art. 68:2; Sup. Ct. Act, art. 43:1.
[55] *See* Arb. Act, art. 72:1.
[56] *Id*. art. 72:1. *See infra* Table 3.2.
[57] *See supra* note 94 at ch.1.
[58] *See supra* note note 21 at ch. 2.
[59] Sup. Ct. No. 01/Banding/Wasit.Int/2002, Mar. 8, 2004 (Pertamina/KBC LLC & PLN), available at *Varia Peradilan* 223 (2008): 29.
[60] Sup. Ct. No. 444 PK/Pdt/2007, Sept. 9, 2008, (Pertamina/KBC LLC & PLN), available at http://putusan.mahkamahagung.go.id/putusan/53470896b4ed5c05212ca1aa874fc609 (last visited on Mar. 3, 2015).

5. *Astro Nusantara International*;[61]

6. *Bungo Raya Nusantara*;[62]

7. *Lirik Petroleum (2010)*;[63]

8. *Bank America National*;[64]

9. *Lirik Petroleum (2011)*;[65] and

10. *PT Direct Vision v. Astro Nusantara International B.V. et al*.[66]

3.3.2 *Private International Law Aspects*

In PIL, points of contact or connecting factors are used to identify the international nature of a legal relationship or dispute. Such factors evince that the existence of some outstanding facts or foreign elements establish a natural connection between the factual situation before a court and a particular system of law. In the selected cases, nationalities of the parties and foreign arbitral awards were points of contact that made them PIL cases.

The nationalities of the parties were the connecting factors in seven cases. The parties in *Lie Kwie Hien* were nationals of the People's of Republic of China domiciled in Purwakarta, West Java, and Jakarta. The appellant for cassation in *ED & F Man (Sugar) Ltd*. was a private limited company based in London, England, and Yani Haryanto was an Indonesian national. In *Karaha Bodas (2004)* and *Karaha Bodas (2008)*, the Karaha Bodas Company LLC (hereinafter

[61] Sup. Ct. No. 01 K/Pdt.Sus/2010, Feb. 24, 2010 (Astro Nusantara B.V. et al./PT Ayunda Primamitra), available at http://putusan.mahkamahagung.go.id/putusan/0c04cf6239c146bd6c7e22820b4f6c19 (last visited on Mar. 3, 2015).
[62] Sup. Ct. No. 64 K/PDT.SUS/2010, Apr. 26, 2010, (PT Bungo Raya Nusantara/PT Jambi Resources Limited) available at http://putusan.mahkamahagung.go.id/putusan/8024ff9cb343b9c91b3a8ca69ee21b95 (last visited on Mar. 3, 2015).
[63] *See supra* note 16.
[64] *Id*.
[65] Sup. Ct. No. 56 PK/PDT.SUS/2011, Aug. 23, 2011, (PT Pertamina EP & PT Pertamina Persero/PT Lirik Petroleum) available at http://putusan.mahkamahagung.go.id/putusan/7305f26fe6b3d84f5e89d303c8e9c3cd (last visited on Mar. 3, 2015).
[66] Sup. Ct. Decision No. 808 K/Pdt.Sus/2011, June 28, 2012, (PT Direct Vision/Astro Nusantara International BV et al) available at http://putusan.mahkamahagung.go.id/putusan/a27a2be012e0338278320679b8f9fdf0 (last visited on Mar. 3, 2015).

KBC) was a Cayman Islands company having its office in New York City; whereas Pertamina and PLN were Indonesian state-owned enterprises.

Table 3.2: Summaries of Cases

No	Case Name	Court	Stage	Jurisprudence	Stage of Legal Development	Constitution
1	*Lie Kwie Hien*	Jakarta District Court	First Instance	Yes[67]	Pre-Guided Democracy	1950 Provisional
2	*ED & F Man (Sugar)*	Supreme Court	Cassation	Yes[68]	New Order	1945
3	*Karaha Bodas (2004)*	Supreme Court	Appeal[69]	Yes[70]	*Reformasi*	1945 (Amended)
4	*Karaha Bodas (2008)*	Supreme Court	Reconsideration	Yes[71]	*Reformasi*	1945 (Amended)
5	*Astro Nusantara International*	Supreme Court	Cassation	No[72]	*Reformasi*	1945 (Amended)
6	*Bungo Raya Nusantara*	Supreme Court	Appeal	No[73]	*Reformasi*	1945 (Amended)
7	*Lirik Petroleum (2010)*	Supreme Court	Appeal	No[74]	*Reformasi*	1945 (Amended)
8	*Bank America National Trust*	Supreme Court	Cassation	Yes[75]	*Reformasi*	1945 (Amended)
9	*Lirik Petroleum (2011)*	Supreme Court	Reconsideration	No[76]	*Reformasi*	1945 (Amended)
10	*Direct Vision*	Supreme Court	Appeal	No[77]	*Reformasi*	1945 (Amended)

[67] Based on its publication in H 7-8 (1958): 45.
[68] Based on its publication in G 6 (1993): 1.
[69] *See infra* pp. 137-137 and 140.
[70] Based on its publication in *Varia Peradilan* and statement by the Supreme Court in *Direct Vision*.
[71] According to http://putusan.mahkamahagung.go.id/putusan/53470896b4ed5c05212ca1aa874fc609 (last visited on Mar. 3, 2015).
[72] According to http://putusan.mahkamahagung.go.id/putusan/0c04cf6239c146bd6c7e22820b4f6c19 (last visited on Mar. 3, 2015).
[73] According to http://putusan.mahkamahagung.go.id/putusan/8024ff9cb343b9c91b3a8ca69ee21b95 (last visited on Mar. 3, 2015).
[74] According to http://putusan.mahkamahagung.go.id/putusan/90a6f95426c5cf1c154de3dff523d846 (last visited on Mar. 3, 2015).
[75] According to http://putusan.mahkamahagung.go.id/putusan/a839388bb2c8042f3073d0a8c8bd5906 (last visited on Mar. 3, 2015).
[76] According to http://putusan.mahkamahagung.go.id/putusan/7305f26fe6b3d84f5e89d303c8e9c3cd (last visited on Mar. 3, 2015).
[77] According to http://putusan.mahkamahagung.go.id/putusan/a27a2be012e0338278320679b8f9fdf0 (last visited on Mar. 3, 2015).

A group of eight foreign companies were the plaintiffs in *Astro Nusantara International*. Astro Nusantara International BV (hereinafter ANI) and Astro Nusantara Holding BV were private limited liability companies having their offices in Amsterdam, the Netherlands; Astro Multimedia Corporation NV and Astro Multimedia NV were public limited liability companies having their offices in Curacao, the Netherlands Antilles; Astro Overseas Limited had its office in Bermuda; Astro All Asia Network Plc and Measat Broadcast Network System Sdn Bhd[78] were Malaysian legal entities; and All Asia Multimedia Network FZ-LLC was based in United Arab Emirates. All defendants of this case – PT Ayunda Primamitra, PT First Media, Tbk[79] and PT Direct Vision – were Indonesian limited liability companies. The same parties were involved in *Direct Vision*.

Various corporations of multinational origins were involved in *Bank America National Trust*. The appellants for cassation were Bank America National Trust Company (later known as US Bank Trust National Association) had its seat at Charlotte, North Carolina, and PT Bank Mizuho Indonesia was a limited liability company established under Indonesian law. The first appellee was APP International Finance Company BV, a Dutch private limited liability company. Seven of the other appellees had their bases in New York,[80] five in Los Angeles,[81]

[78] Sdn Bhd (*Sendirian Berhad*) is a private limited company based on Malaysian law.
[79] Tbk (*Terbuka*) indicates that the company is a public company or that its shares are publicly traded in the stock market. *See* UU No. 40/2007, Perseroan Terbatas [Act No. 40/2007, Limited Liability Company], Aug. 16, 2007, arts. 1 point 7 and 16:3.
[80] Morgan Stanley & Co. Incorporate, U.S. Bank National Association, Credit Suisse First Boston, the Depository Trust Company, Cede & Co., Cleary, Gottlieb, Steen & Hamilton, and Donaldson Lufkin & Jenrette Securities Corporation.
[81] OCM Opportunities Fund II, L.P., OCM Opportunities Fund III, L.P., Oaktree Capital Management LCC, Gryphon Domestic IV LCC, and Colombia/HCA Master Retirement Trust.

two in Connecticut,[82] one party was an Indonesian limited liability company, the state land administrative agency, and a Singapore-based company.[83]

Unlike previous cases, all parties in *Bungo Raya Nusantara*, *Lirik Petroleum (2010)* and *Lirik Petroleum (2011)* were Indonesian companies. Despite the domestic nature of the parties, these cases fell under PIL domain because they involved the enforcement of foreign arbitral awards in Indonesia.[84]

All of the cases above were brought before Indonesian district court as court of first instance. Despite the presence of foreign elements, only three courts found it important to point out the nature of the case and to use the perspective of Indonesian PIL.[85] As discussed, Indonesian court by default is an interested forum. The court's recognition of the PIL nature serves as the focal point not only for its application of law and public order, but also for how it perceives its role as the vanguard of justice.

3.4 SECTION C: THE PRACTICE OF LAW

3.4.1 *Lie Kwien Hien*

3.4.1.1 *Case Summary*

Lie Kwien Hien and Tjin Tjheuw Jie were born in China. They married in Purwakarta, West Java on September 5, 1950. In April 1952 the husband, Kwien Hien, filed for a divorce to the Jakarta District Court. He contended that according to article 16 AB, Chinese Marriage Law, promulgated on May 1, 1950, was applicable for the divorce. Its article 17 allowed divorce

[82] Gramercy Advisors LLC and General Electric Capital Corporation.
[83] PT Lontar Papyrus Pulp & Paper, Kantor Badan Pertanahan Nasional Kuala Tungkal, and Asia Pulp & Paper Company respectively.
[84] PT Pertamina and PT Pertamina EP, however, contested that the arbitral award should have been domestic rather than foreign. *See* Lirik Petroleum (2010), at 6-12; *see also* Lirik Petroleum (2011), at 8-17.
[85] *See* Lie Kwie Hien, G 1 (1992): 62-66; ED & F Man (Sugar), G 6 (1993): 65-71; Lirik Petroleum (2010), at 97-99.

based on mutual consent or one of the spouses' wishes.[86] He assured the court that at least he, if not both of them, wanted to end the marriage.

3.4.1.2 *Public Order Issue*

The petitioner averred that the application of Chinese Marriage Law would not violate Indonesian public order or good morals. Supporting this submission, Kwien Hien submitted two points to the court. First, as a consequence of independence, the preexisting legal rules had to be differently construed. He argued that mutual consent to divorce might be considered a violation of public order of the Netherlands Indies because it used Dutch standard. However independence had abandoned the standard. Because Indonesia was predominantly Muslim, public order had to be assessed based on the law of the majority. Since article 17 was in conformity with *talaq*, divorce in Islamic law effectuated by the husband's saying of the word constituting a formal repudiation of his wife, Kwien Hien concluded that the application of Chinese Marriage Law in his case did not violate Indonesian public order.

Second, the court had to disregard legal pluralism. Although he acknowledged the continuous effect of population groups with regard to pluralism of positive law, Kwien Hien argued that article 208 of the Civil Code,[87] applicable for European and Foreign Orientals groups, in actuality had become outdated.

The sole judge of the case, Lie Oen Hock,[88] agreed that in principle Chinese Marriage Law would be applicable. However, he maintained that Indonesian positive law remained

[86] The first sentence of this article reads, "Divorce shall be granted when husband and wife both desire it." English translation is taken from Foreign Languages Press, *The Marriage Law of the People's Republic of China* (Beijing: Foreign Language Press, 1959) (hereinafter FLP), and M. J. Meijer, *Marriage Law and Policy in the Chinese People's Republic* (Hong Kong: Hong Kong University Press, 1971), 300-302.
[87] The article reads, "Divorce may never take place by mutual consent."
[88] This was the same Lie Oen Hock who later chaired professorship for introduction to legal science and Indonesian legal system at the University of Indonesia. *See supra* note 107 at ch.1.

narrowly pluralistic for two reasons. First, historically Indonesia had population groups that applied different laws. Second, legal pluralism was explicitly stated in article 142 of the 1950 Provisional Constitution.[89] He concluded that the Civil Code continued to be applicable for Chinese-Indonesians. Therefore he found it requisite to consider a ground for divorce in light of legal pluralism where Chinese-Indonesians and indigenous-Indonesians were respectively subject to the Civil Code and adat law.[90]

The district court held that Chinese nationals living in Indonesia would be subject to the same public order as Chinese-Indonesians. Subsequently it turned to the Civil Code for a ground for divorce.[91] Since mutual consent or a husband's wishes was not included as one of the grounds, the district court opined that article 17 of the Chinese Marriage Law violated public order that was applicable for Chinese-Indonesians. Consequently the district court rejected the request for divorce.

3.4.1.3 *Commentaries*

Chief Justice Wirjono Prodjodikoro was critical of the court's analysis.[92] He emphasized the fact that the Civil Code was a carbon copy of the Netherlands' *Burgerlijke Wetboek*, and that its application was imposed on Chinese-Indonesians. Taking this perspective, he found it odd that after independence the Civil Code remained applicable for Chinese-Indonesians. Consequently Prodjodikoro questioned whether the court had hastily jumped to a conclusion in

[89] *Lie Kwien Hien* took place during the interregnum period of the 1945 Constitution. The said article was a transitory provision that ensured all laws prior to August 17, 1950 would continue to have effect. In turn article 192:1-2 of the 1949 Federal Constitution was to carryover all laws applicable before its promulgation. Like their predecessors, Article II of the Transitory Provisions of the (original) 1945 Constitution these articles piggybacked colonial laws and, provided they were compatible, justified their continuance as positive law.

[90] Marriage Act would later rescind provisions of the Civil Code that it has covered.

[91] The reasons were adultery, willful abandonment, a sentence to imprisonment of at least five years; or severe injuries or physical abuse. *See* CIV. CODE art. 209.

[92] Prodjodikoro wrote his commentary on the case in H 7-8 (1958): 54-55.

invoking public order and applying the Civil Code for Chinese nationals. He asserted that the problem of discrepancies with regard to public order. On the one hand the meaning of public order was determined by feelings, but on the other hand the yardstick was a product of intellectual mind.[93]

Unlike Prodjodikoro, Gautama applauded both the analysis and decision of the court.[94] Praising Lie as a well-respected jurist who had keen interest in conflict of laws,[95] Gautama pointed out the complexities of Indonesian public order. It involved the interplay between PIL and intergentiel law,[96] which was an internal conflict of laws flourished in the Netherlands Indies as a result of population groups. By applying domestic public order to a PIL case, the court subscribed to the views of Wertheim who suggested that the population group was not only applicable to the Netherlands-Indies (read: Indonesia) subjects but also to inhabitants of foreign origins.[97] Henceforth Gautama used the case to exemplify that public order was not static but dynamic. Longdong agreed with Gautama that the public order of intergentiel law should also be applicable for PIL cases.[98]

3.4.1.4 *Rationale of Chinese Marriage Law*

In his request the petitioner only pointed out that the Chinese Marriage Law recognized mutual consent as a ground for divorce. He did not, however, submit the rationale behind that

[93] *See* Wirjono Prodjodikoro, *Asas-asas Hukum Perdata Internasional* (Bandung: Sumur, 1979), 29-30 (hereinafter Prodjodikoro, *HPI*).
[94] *See* Gautama, *Book IV*, *supra* note 11 at ch. 2, at 24-34; *See also* Gautama, *Pengantar*, *supra* note 1 at ch. 2, at 137-140.
[95] *See* G 1 (1992): 57.
[96] *See* Gautama, *Book IV*, *supra* note 11 at ch. 2, at 32-33; *see also* Gautama, *Pengantar*, *supra* note 1 at ch. 2, at, 140.
[97] *See* Sudargo Gautama, *Hukum Antar Golongan: Suatu Pengantar* (Jakarta: Ichtiar Baru, 1980), 32.
[98] *See* Longdong, *supra note* 135 at ch. 2, at 110.

provision. The court did not make inquiry either. Both Prodjodikoro and Gautama relied for their comments merely on facts revealed before the court.[99]

Investigating the Chinese Marriage Law is important to understand its rationale. The Law aimed at abolishing the feudal marriage system and introducing a new one based on the New Democracy.[100] Its rules on divorce contained a mixture of Kiangsi, Chin-Ch'a-Chi, and Border Area legislation, and some new ideas.[101] Like its predecessors, the Marriage Law established freedom of divorce.[102] The distinction between divorce by mutual consent and *ex parte* application was derived from the Border Area legislation.[103] Freedom of divorce was deemed advantageous to both urban and rural women especially in areas where land reform had been completed.[104] The Land Reform Law,[105] the Marriage Law and number of other consequences of the new social policy created stresses and strains within the family.[106]

While China set its new social policy, Indonesia, at least its scholars, came to an agreement that the then positive law could not be unified. Family law was, and has been, classified sensitive legal issue.[107] By applying provision of the civil code, the court endorsed a consensus of opinion among legal scholars on the trajectory of national law.

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[99] *See* notes 92 and 94.
[100] Chang Chih-Jang, "A Much Needed Marriage Law," PEOPLE'S DAILY, April 17, 1950 as compiled in FLP, 11. *Cf*. *Id*. at 101.
[101] *See* Meijer, *supra* note 86, at 74.
[102] *See* Marriage Regulations of the Chinese Soviet Republic, Dec. 1, 1931, art. 9 and Marriage Law of the Chinese Soviet Republic, Apr. 8, 1934, art. 10. English translation of these laws is available at Meijer, *supra* note 86, at 281 and 283 consecutively.
[103] *See* Marriage Regulations of the Shensi, Kansu, Ninghsia Border Area, promulgated Apr. 4, 1939, arts. 10-11 available at Meijer, *supra* note 86, at 286.
[104] Teng Ying-Chao, "On the Marriage Law of the People's Republic of China," speech delivered on May 14, 1950 at a meeting of cadres and students of Chahar Province as compiled in FLP, 26. *Cf*. Meijer, *supra* note 86, at 101.
[105] Promulgated on June 2, 1950,
[106] *See* Meijer, *supra* note 86, at 102-3.
[107] *See supra* pp. 36-37.

3.4.1.5 *Pluralism Facet of Public Order*

Despite Indonesia's attempt to develop a national legal system, *Lie Kwien Hien* showed the pluralism facet of public order. On the one hand independence jettisoned discriminating institutes of colonial society. The pluralism of Indonesian society, on the other hand, demanded the status quo. The case showed that when it concerned with sensitive legal issues like family law, Indonesia had public order pertinent to segments of the society. Here personal status of PIL, nationality, ran across its domestic counterpart, population group in the limited sense of different applicable laws. By rejecting the petitioner's contention, the court held that legal pluralism in the sense of coexistence of Western law (the Civil Code) and Muslim law was instructive to public order. *Lie Kwien Hien* showed that legal pluralism, not legal unity, instructed public order.

3.4.2 *ED & F (Man) Sugar*

3.4.2.1 *Case Summary*

The Indonesian courts, beginning with the Central Jakarta District Court, were to decide the validity of contracts for sugar importation. *ED & F (Man) Sugar* almost simultaneously took place with a request for exequatur to enforce the award rendered by the Council of the Refined Sugar Association. ED & F (Man) Sugar Ltd. submitted the request, which practically became the first application under Regulation No. 1/1990. On March 1, 1991 the Supreme Court issued the exequatur against Yani Haryanto.[108]

Yani Haryanto and ED & F Man (Sugar) Ltd. signed two contracts for importation of white sugar into Indonesia consecutively on February 12, 1982 and March 23, 1982. They chose English law as the governing law of the contracts. As time elapsed, Haryanto, the buyer, failed

[108] Penetapan Mahkamah Agung [Order of the Supreme Court] No. 1 Pen.Ex'r/Arb.Int/Pdt/1991.

to provide necessary letters of credits. Based on article 14 of the contracts, ED & F Man (Sugar) Ltd. initiated an arbitration proceeding before the Council of the Refined Sugar Association in London where it claimed compensation of US$ 146,300,000.

The buyer then filed a suit in the High Court of London seeking a declaration that the contracts were null and void. It reasoned that such was the case because the State Logistics Agency (*Badan Urusan Logistik* hereinafter BULOG), had not issued the necessary import permits. The English court held that the contracts were valid according and subject to English law. It also held that all disputes had to be settled before the Refined Sugar Association.[109]

The parties then reached a settlement agreement whereby Haryanto was to pay ED & F Man (Sugar) Ltd. a reduced compensation in installments. The settlement also called for arbitration in London for any dispute arising thereinafter.

However Haryanto later brought an action before the Central Jakarta District Court. He sought for annulment of the contracts, again, on the basis that they were null and void *ab initio*. He argued that Presidential Decree No. 43/1971 regulated the procurement, distribution and marketing of granulated sugar.[110] Furthermore he contended that Presidential Decree No. 39/1978 had pronounced granulated sugar a tightly controlled commodity.[111] In light of this BULOG was established to import sugar and control market price in accordance with the

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[109] G 6 (1993): 56.
[110] Keppres No. 43/1971, Penyelenggaraan Koordinasi and Pengawasan atas Pelaksanaan Kebijaksanaan dalam Bidang Pengadaaan Penyaluran dan Pemasaran Gula Pasir [Presidential Decree No. 43/1971, Implementation of Coordination and Supervision over the Executing of Policy on the Procurement, Distribution and Marketing of Granulated Sugar] June 14, 1971.
[111] Keppres No. 39/1978, Badan Urusan Logistik [Presidential Decree. No. 39/1978, State Logistics Agency], Nov. 8, 1978.

government general policy.[112] Therefore he concluded that the contracts had no admissible "cause" (*causa*).

Article 1320 of the Civil Code stipulated that in order to be valid an agreement *inter alia* had to have an admissible cause. Article 1337 elaborated that a cause was inadmissible if it was prohibited by law, or it violated good conduct, or public order. As one of the material conditions for validity, the absence of admissible cause would make a contract null and void *ab initio*.

ED & F Man (Sugar) Ltd. argued that the lawsuit was *ne bis in idem*, double trial, and should be rejected.[113] It pointed out that Haryanto had no obligation to import the sugar to Indonesia. He could choose either to resell them to BULOG as the authorized importer or any non-Indonesian third party. Therefore his claim that the contracts had inadmissible cause was irrelevant.

The Central Jakarta District Court *prima facie* inquired whether a foreign court decision was admissible in the Indonesian legal system.[114] It found the answer depended on whether the judgment or the ground for that judgment violated Indonesian public order or legal order. Despite the parties' choice of English law, the court held that according to Indonesian law the contracts had inadmissible cause that could not be set aside by freedom of contract.[115] The Jakarta High Court affirmed the district court's holding and decision in its entirety.[116]

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[112] Presidential Decree, art. 3 stipulated that, "The principal task of BULOG is to control the prices of rice, grain, sugar, wheat and other commodities to maintain price stability both for producers and consumers in accordance to the Government general policy."

[113] *Ne bis in idem* happens when the parties and the disputed issue are the same. *See* Sup. Ct. Decision No. 154 K/Sip/1967, Dec. 6, 1967, available at *Hukum Acara Perdata dalam Jurisprudensi Mahkamah Agung 1968-1976*, comp. I. Rubini, R. Roechimat and M. Chidir Ali (Bandung: Alumni, 1977): 314.

[114] Central Jakarta Dist. Ct. No. 499/Pdt/G/VI/1988/PN.JKT.PST, June 29, 1989 (Yani Haryanto/ED & F Man (Sugar)), available at G 6 (1993): 51-73.

[115] The French branch of civil law, which the Civil Code originates from, requires "cause" (*causa*) for formation of valid contract. *Cf*. Wied v. TRCM, LLC, 698 So. 2d 685 (1997).

[116] Jakarta High Ct No. 486/Pdt/G/VI/1989/PT.JKT, Oct. 14, 1989 (ED & F Man (Sugar)/Yani Haryanto), available at G 6 (1993): 74-81.

In its motion for cassation ED & F Man (Sugar) Ltd. argued that the lower courts had erred in considering the contracts because they had been canceled after the parties signed the settlement agreement. Like the contracts, in this agreement the parties agreed to settle all disputes before the Council of the Refined Sugar Association. The Supreme Court rejected this motion, because it found the lower courts made no error in applying the law.

3.4.2.2 *Public Order Issue*

The courts considered the government's economic policy pivotal for Indonesia. The district court held that the Presidential Decrees gave BULOG exclusive authority to import sugar in order to safeguard public interest. During the New Order, sugar was one of the so-called "Sembako" (portmanteau for *sembilan bahan pokok*, nine basic commodities) that were tightly regulated by the state. One of BULOG's objectives was to ensure inexpensive price of white sugar. The district court held that any attempt by private individuals to import sugar would violate public interest and therefore the positive law. Consequently it held the contracts had no admissible cause as required by articles 1320 and 1337 of the Civil Code.

Although according to article 100 Rv, foreign court decision was unenforceable in Indonesia, the district court considered the English court decision first and foremost with respect to Indonesian public order. It found that the grounds for the judgments, i.e. the contracts, violated Indonesian public order. Therefore it rejected ED & F (Man) Sugar Ltd.'s *ne bis in idem* argument.

The exequatur was considered in the *obiter dictum* of *ED & F (Man) Sugar*. Since in *ED & F (Man) Sugar* the Supreme Court found the lower courts were not in error, it mentioned that

the exequatur was "irrelevant".[117] Despite having obtained the exequatur, *ED & F (Man) Sugar* made the award unenforceable.

3.4.2.3 *Commentaries*

ED & F (Man) Sugar aroused comments from Indonesians and foreigners alike. The Supreme Court decision was published in law journals.[118] Indonesian scholars of older generation mostly condoned the decision. In his commentary Rajagukguk agreed with the court that the *causa* of the contract violated Indonesian law.[119] Panggabean, commenting much later, accepted the Court's ruling as a legal principle.[120]

Tineke Longdong regretted that the Supreme Court did not consider the parties' settlement agreement. Based on this fact, she concluded that the Court adhered to the inseparability theory of arbitration clause.[121] In contrast to this view, Indonesian scholars were leaning toward the independent theory. Subekti, former Chief Justice and President of the Indonesian National Arbitration Board, opined that arbitration clause was independent of the main contract.[122] Gautama the jurist admitted that the courts had the power to determine the validity of the main contract. Like Subekti he opined that arbitration agreement would not

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[117] *See* ED & F (Man) Sugar in G 6 (1993): 32.
[118] *See Putusan Reg. No. 1205 K/Pdt/1990* [Decision No. 1205 K/Pdt/1990], *Hukum dan Pembangunan* 6 (1994): 541.
[119] Erman Rajagukguk, "Pelaksanaan Keputusan Arbitrase Luar Negeri dan Penafsiran 'Ketertiban Umum'," *Hukum dan Pembangunan* 6 (1994): 555. However instead of examining the decision, his commentary shifts to enforcement of arbitral awards with regards to interpretations of public order in foreign countries.
[120] H. P. Panggabean, "Efektivitas Eksekusi Putusan Arbitrase dalam Sistem Hukum Indonesia," *Jurnal Hukum Bisnis* 21 (2002): 78-79.
[121] *See* Longdong, *supra* note 135 at ch. 2, at 248.
[122] Subekti, *Arbitrase Perdagangan* (Bandung: Bina Cipta, 1981), 20.

automatically invalid upon court decision declaring the contract void.[123] Later the Arbitration Act adopted the scholars' view by stipulating the severability of arbitration clause.[124]

However, as the advocate for Yani Haryanto, instead of building his argument in rejecting enforcement of the arbitral award rendered by the settlement agreement, Gautama the lawyer attacked the validity of the contracts.[125] If the contracts were null and void in its entirety, he argued, then they could have no legal consequences at all.[126] Gautama the jurist then used *ED & F (Man) Sugar* as the case on point that foreign arbitral awards were unenforceable in Indonesia when they violated public order.[127]

It should be noted that in *ED & F (Man) Sugar* the district court held the contracts violated Presidential Decrees, and consequently had inadmissible cause. Differently put the district court interpreted article 1337 of the Civil Code[128] so that it treated "prohibited by law" as violation of "public order". By declaring the contracts null and void the district court made no distinction between domestic and international public order. Writing in advance of the case, Prodjodikoro opined that the article contained domestic public order. Pointing to the fact that it mentioned "public order" in addition to "law" and "good conduct", he argued that "public order" should be other than what was regulated by law.[129]

Foreign commentators found *ED & F (Man) Sugar* egregious. Adhering to the severability of arbitration clause, Karen Mills, for instance, criticized that the settlement

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[123] Sudargo Gautama, "Indonesia," in *International Handbook on Commercial Arbitration*, vol. 10, edited by Albert Jan van den Berg (1986) as quoted by Londong, *supra* note 134, at 204. Due to the editor's instruction to discard previous report once the new one is at hand, the University of Washington library has no collection of Gautama's report.
[124] *See* Arb. Act, art. 10.
[125] It should be noted that the Supreme Court had issued exequatur for the award in a different, but related to this, case.
[126] *Cf.* G 6 (1993): 3.
[127] *Id.* at 17.
[128] "A cause is inadmissible if it is prohibited by law, or if it violates good conduct, or public order."
[129] *See* Prodjodikoro, *HPI*, *supra* note 93, at 31-32.

agreement was not contrary to public order and that the award rendered thereunder should have been enforced.[130] Mills then concluded that the decision was either a product of undue influence or lack of understanding of the court on the concept of arbitration.

Younger Indonesian scholars tended to agree with foreign commentators. Tin Zuraida called the exequatur controversial, because it was finally canceled as a consequence of *ED & F (Man) Sugar*.[131] Another scholar found *ED & F (Man) Sugar* was based on an ambiguous concept of public order.[132]

3.4.2.4 *Public Order and Politics of Law*

The district court found the government economic policy – manifested in tightly controlled sugar price – as the perimeter for admissible cause. It held that public order was to sustain the policy. During the New Order, the government was to execute economic plans as mandated in the GBHN. The district court construed economic plan inviolable and delimited freedom to contract as a matter of course.[133] More obvious than *Lie Kwie Hien*, *ED & F Man (Sugar)* pointed to the direction of politics of law in investigating public order.

3.4.2.5 *Admissible Cause and Politics of Law as Public Order*

ED & F (Man) Sugar showed that admissible cause together with government economic policy constituted public order. Both the cause and the policy were expressed in written law – the Civil Code and the Presidential Decrees. Although it ranks lower in the hierarchy of law, the

[130] *See* Karen Mills, "Enforcement of Arbitral Awards in Indonesia: Issues relating to Arbitration and the Judiciary," *Jurnal Hukum Bisnis* 21 (2002): 59-60.
[131] *See* E D & F (Man) Sugar in G 6 (1993): 32.
[132] *See* Fifi Junita, "Experience of Practical Problems of Foreign Arbitral Awards Enforcement in Indonesia," *Macquarie Journal of Business Law* 5 (2008): 379.
[133] *Cf.* G 6 (1993): 70-71.

latter was decisive because it was actually an implementation of the GBHN. Instead of citing the GBHN in the decision, the district court called "the government's economic policy." The district court therefore interpreted the admissibility of the cause based on the constitutional structure. Both the Jakarta High Court and the Supreme Court did not correct or add to it. I find it interesting that one of the district court judges, Paulus Effendi Lotulung, would later try *Karaha Bodas (2004)*.

3.4.3 *Karaha Bodas (2004)*

3.4.3.1 *Case Summary*

The issue of *Karaha Bodas (2004)* before Indonesian court was annulment of arbitral award rendered in Geneva, Switzerland.[134] Pertamina brought about a lawsuit before the Central Jakarta District Court. It argued that the award violated the New York Convention and the Arbitration Act. The district court accepted Pertamina's lawsuit.[135] Subsequently KBC appealed to the Supreme Court.[136] The Court held that the district court had no jurisdiction on the annulment. It then revoked the lower court's decision.

The origins of the dispute lay in two contracts. Pertamina and KBC signed the Joint Operation Contract (JOC) on November 28, 1994. KBC was responsible to build two geothermal power plants in Bukit Karaha and Telaga Bodas, both in West Java, within five years. The total project, using build, operate and transfer scheme, was US$ 380 million. Once the plants erected, Pertamina would be responsible to manage them. On the same date, the

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[134] Lawsuits involving the parties were also brought about several states of the U.S. and Canada, Hongkong and Singapore to enforce the award against assets of Pertamina and/or the Indonesian government. The issues before these courts, however, are irrelevant for this study.

[135] Central Jakarta Dist. Ct. No. 86 /Pdt.G/2002/PN.JKT.PST, Sept. 9, 2008 (PT Pertamina Persero/KBC LLC), available at Gautama, *Arbitrase*, *supra* note 20 at ch. 2, at 263-339. The abridged version was also available at *Varia Peradilan* 233 (2004): 16. Here I rely on the publication of Gautama.

[136] With regard to civil procedure confection *see infra* pp. 136-137.

parties and the State Electricity Company (*Perusahaan Listrik Negara* hereinafter PLN) also signed the Energy Sales Contract (ESC). According to the ESC Pertamina was to supply electricity from the plants, KBC to deliver and sell on behalf of Pertamina up to 400 MW of electricity to PLN, and the latter to purchase electricity at the rate between US$ .056 -.084/KWh for 30 years from 1998 to 2028. The parties chose Indonesian law as the governing law.

Figure 3.1: Exchange Rate Fluctuation[137]

From July to December 1997, rupiah depreciated against US dollar by approximately thirty percent. The depreciation would severely harm PLN that had to sell electricity to the public at a fixed price in rupiah. On September 20, 1997, President Suharto issued Presidential Decree No. 39/1997, which suspended major infrastructure projects, including geothermal plants.[138] It was issued as part of the preparation to secure financial assistance from the International

[137] Source: Bank Indonesia.

[138] *See* Keppres No. 39/1997, Penangguhan/Pengkajian Kembali Proyek Pemerintah, Badan Usaha Milik Negara, dan Swasta yang Berkaitan dengan Pemerintah/Badan Usaha Milik Negara [Presidential Decree No. 39/1977, Suspension/Reassessment of Government, State-Owned Enterprises, and Private Parties related to Government/State-Owned Enterprises Projects, Sep. 20, 1997, Attachment V.

Monetary Fund to cope with the crisis.[139] However, the suspension was short-lived. Presidential Decree No. 47/1997 later allowed the projects to continue.[140] Aghast at the Indonesian government's indecision, the IMF put more pressure on the conditions of its stand-by loan. On January 10, 1998 as the crisis worsened. Presidential Decree No. 5/1998 suspended the project for the second time.[141] Five days later Indonesia and the IMF signed the Memorandum of Economic and Financial Policies, which confirmed that Indonesia had canceled major infrastructure projects.[142]

Tabel 3.3: Exchange Rate Fluctuation and Price Increase

Price/KWh	Exchange Rate USD/IDR		
	1994 (± 2,000)	**Oct 1997 (± 3,500)**	**Jan 1998 (±14,000)**
US$ .0056	IDR 112	IDR 196	IDR 784
US$ .0084	IDR 168	IDR 294	IDR 1,176

A month later, KBC declared *force majeure* and discontinued both the JOC and the ESC. Referring to the arbitration clauses of the JOC and the ESC, it initiated a single arbitration proceeding against Pertamina and PLN in Geneva. The arbitration panel released its preliminary award on September 30, 1999, and the final award on December 19, 2000. It ruled Pertamina

[139] *See* "Letter of Intent," Republic of Indonesia to International Monetary Fund, Oct. 31, 1997 available at https://www.imf.org/external/np/loi/103197.htm (last visited on Apr. 8, 2015).
[140] *See* Keppres No. 47/1997, Perubahan Status Pelaksanaan Beberapa Proyek Pemerintah, Badan Usaha Milik Negara, dan Swasta yang Berkaitan dengan Pemerintah/Badan Usaha Milik Negara yang Semula Ditangguhkan atau Dikali Kembali [Presidential Decree No. 47/1997, Change of Status of Government, State-Owned Enterprises, and Private Parties Projects related to Government/State-Owned Enterprises Projects that were Suspended or Reassessed], Nov. 1, 1997, point 1.B.10.
[141] *See* Keppres No. 5/1998, Pencabutan Keppres No. 47/1997 tentang Perubahan Status Pelaksanaan Beberapa Proyek Pemerintah, Badan Usaha Milik Negara dan Swasta yang Berkaitan dengna Pemerintah/Badan Usaha Miliki Negara yang Semula Ditangguhkan atau Dikaji Kembali, [Presidential Decree No. 5/1998, the Revocation of Presidential Decree No. 47/1997 on the Change of Status of Government, State-Owned Enterprises, and Private Parties related to Government/State-Owned Enterprises Projects that were Suspended or Reassessed], Jan. 10, 1998, point 2.B.10.
[142] *See* Memorandum of Economic and Financial Policies, Republic of Indonesia & International Monetary Fund, point 13, available at https://www.imf.org/external/np/loi/011598.htm (last visited on Apr. 8, 2015).

had breached both the JOC and the ESC, and PLN the ESC. The final award ordered Pertamina and PLN to jointly and severally pay a total amount of $266,166,654 plus four percent interest per annum to KBC for compensation.[143]

3.4.3.2. *Public Order Issue*

Pertamina contended to the district court that, according to article 66 of the Arbitration Act,[144] enforcement of foreign arbitral awards could not violate public order.[145] It argued that the Presidential Decree was to ride Indonesia out the crisis. The arbitration panel had made manifest error in its application of Indonesian law by holding Pertamina in breach and awarding KBC the compensation. The award was unenforceable due to violation of Indonesian public order.

Furthermore Pertamina averred that as a state-owned company it had to comply with the Presidential Decree. Pertamina identified the Presidential Decree as "the government policy".[146] Referring to articles 1320 and 1337 or the Civil Code, it argued that the case of the JOC and the ESC had become prohibited by law and violated public order. Therefore the cause of the contracts became inadmissible. Similar to *ED & F (Man) Sugar*, this was a public order argument.

In its counterclaim KBC made no response to Pertamina's public order argument. Instead it emphasized that the lawsuit had no legal ground. It pointed out, among other things,

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[143] *See* Karaha Bodas (2008), at 2.
[144] Arb. Act, art. 66 stipulates, "International Arbitration Awards will only be recognized and may be enforced in the jurisdiction of the Republic of Indonesia if they fulfill the following criteria … (c) the International Arbitration Awards … are limited to those which do not conflict with public order …."
[145] *See* Gautama, *Arbitrase*, *supra* note 20 at ch. 2, at 269-270. Although this provision was in compliance with N.Y. Convention, art. V: 2(b), Pertamina submitted its argument solely based on national legislation.
[146] *Id*. at 268.

the severability of arbitration clause as provided by article 10 of the Arbitration Act upon the cancellation of the main contract.[147]

PLN also put forward an argument on public order.[148] It pointed out to the district court that the final award violated public order and state's sovereignty. Like Pertamina, it argued that it was under obligation to comply with the Presidential Decree. If the award was to be enforced, the enforcement would violate Indonesia's sovereignty. Therefore it concluded that article 66 point c of the Arbitration Act was applicable.[149]

The district court held that Pertamina's suit was acceptable because Indonesian law was the governing law of the contracts.[150] Pointing to the fact that Indonesia was a contracting party to the New York Convention, it asserted that the provisions of the Convention and the Arbitration Act were applicable to the dispute. The district court conflated annulment of arbitration award, as provided in article 70 of the Act, and refusal of enforcement of the award based on article V of the Convention.

The district court investigated whether the arbitration panel had exceeded its authority, and therefore violated Indonesian public order. The parties, as evident in articles 8.2 of the ESC and 13 of the JOC, agreed to settle disputes arising of contracts in arbitration based on the rules of the United Nations Commission on International Trade Law. Articles 12 of the ESC and 20 of the JOC then stipulated that the governing law was Indonesian law. The district court accepted Pertamina's submission that the arbitration panel did not apply Indonesian law. Therefore it found the panel had exceeded its authority.[151]

[147] Arb. Act, art. 10(h) reads "An arbitration agreement will not be canceled because one of the following conditions: … (h) the main agreement is expired or canceled."
[148] *See* Gautama, *Arbitrase*, *supra* note 20 at ch. 2, at 309-310.
[149] Like Pertamina, PLN did not refer to article V:2(b) N.Y. Convention.
[150] *See* Gautama, *Arbitrase*, *supra* note 20 at ch. 2, at 329.
[151] *Id*. at 331.

Next the district court examined whether enforcement of the award would violate public order. Here it quantified the facts to article V: 2(b) of the Convention. Before it examined the issue the court turned to opinion of Erman Rajagukguk for operating framework. Public order was to be understood as order, welfare and security; "legal order"; or "justice".[152] The district court then considered that the Presidential Decree was to satisfy conditions set by the IMF, and its economic rationale. The district court held that, according to Indonesian law, public order should take precedence.[153] The fact that the panel ignored the Presidential Decree and it rationale in granting the award constituted a violation of Indonesian law. The ignorance justified the district court to try the lawsuit. It opined that enforcement of the award had to be refused not only because it violated public order, but also the bedrock principles of the Indonesian nation.[154]

The district court recognized that the grounds for annulment of arbitral awards were provided by article 70 of the Arbitration Act. Nevertheless it held that the employment of "*antara lain*" (among others) in its elucidation made the grounds non-exhaustive.[155] The district court then turned to the Convention for additional grounds. In addition to the parties' choice of Indonesian law, the court maintained that it had jurisdiction over annulment of the awards based on articles V: 1(e) and VI of the Convention.[156] Subsequently it ruled the awards canceled and had no legal consequences.[157]

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[152] The district court obviously referred to Erman Rajagukguk, *Arbitrase dalam Putusan Pengadilan*, 77 (2000). Although Rajagukguk did not provide citation, he was actually restating what Gautama identified in his treatise. *See supra* pp. 66-67.
[153] *See* Gautama, *Arbitrase*, *supra* note 20 at ch. 2, at 334-335.
[154] *Id*. at 331.
[155] *See supra* note 135, at 336.
[156] *See* Gautama, *Arbitrase*, *supra* note 20 at ch. 2, at 331 & 336.
[157] *See supra* note 135, at 338. Later in *Comarindo*, Sup. Ct. No. 03/Arb/Btl/2005, May 17, 2006 (PT Comarindo Express Tama Tour & Travel/Yemen Airways), available at http://putusan.mahkamahagung.go.id/putusan/5f6245be2220b502349830698a5c05d9, the Supreme Court would assert that grounds for annulment in article 70 were not exhaustive. *See infra* pp. 159-161.

In its appeal to the Supreme Court, KBC made no argument on public order, but challenged the district court's jurisdiction over annulment of foreign arbitral award. By deciding the case, the district court had acted beyond its power, and therefore erred in applying the law.

The Supreme Court held that the Arbitration Act only had provisions on recognition and enforcement of *foreign* arbitral awards. Citing article V: 1(e) the 1958 New York Convention, it opined that the power to set aside the awards was vested in the Swiss court. The Court also considered the fact that Pertamina had tried to pursue this attempt.[158] It ruled, without considering any issue of public order, that the district court had no jurisdiction to examine and decide a lawsuit concerning annulment of foreign arbitral award.

3.4.3.3 *Commentaries*

Karaha Bodas (2004) was a controversial case.[159] KBC had never proceeded from exploration stage to development stage. Nonetheless it successfully capitalized on the Presidential Decree and the severability of arbitration clause to attain *lucrum cessans* (recovery of lost profit) and *damnum emergens* (loss of future profit) based on *force majeure* from the arbitration panel.

Like *ED & F (Man) Sugar*, Gautama was professionally involved in *Karaha Bodas (2004)*. Gautama the jurist provided an expert declaration on Indonesian law.[160] In the declaration he asserted his expertise as the author of the Indonesian National Report for the

[158] Pertamina made several unsuccessful attempts to Swiss courts to set aside the awards. The courts, however, dismissed Pertamina's lawsuit for its failure to made CHF 100,000 deposit on time.
[159] In her preliminary comments on the awards Mills pointed out that the international legal press only presented one-sided accounts against Pertamina. Her efforts to publish a balancing comment were rejected for publication by leading journals. *See* Mills, *supra* note 130, at 66 footnote 31.
[160] *See* "Declaration of Prof. Mr. Dr. Sudargo Gautama of March 25, 2002," available at Gautama, *Arbitrase*, *supra* note 20 at ch. 2, at 341-352.

International Handbook on Commercial Arbitration[161] as well as the academic draft that served as the basis for the Arbitration Act.[162] Gautama the lawyer, through his law office, represented Pertamina before Indonesian courts.

Gautama celebrated the district court's decision with publishing a book.[163] Here he condemned the arbitrators for their lack of knowledge on and lip-service application of Indonesian law. Enforcement of the awards, he affirmed, had to be rejected because it violated Indonesian public order law.[164] The ground for refusal of foreign arbitral awards of article 66 of the Arbitration Act, he added, could be related to public interest (*kepentingan umum*).[165]

Unlike Gautama, Hikmahanto Juwana, a younger scholar, criticized this decision.[166] His criticism was directed toward the court's lack of jurisdiction. He concluded that national courts could not be set aside foreign arbitral awards. Juwana, however, made no attempt to discuss violation of Indonesian public order that the court used as its ground for intervention.

Tin Zuraida, Juwana's contemporary, also opined that annulment of foreign arbitral awards using the Arbitration Act was a mistake.[167] Pointing out to the fact that the request for annulment had dubious motive, Zuraida argued that the court would end up protecting a bad faith party if it granted Pertamina's petition. For Zuraida the court could not interfere with arbitration process. This perspective put forward the primacy of civil procedure over substantive law.

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[161] Published by the International Council for Commercial Arbitration.
[162] *See* Gautama, *Arbitrase*, *supra* note 20 at ch. 2, at 341.
[163] Gautama, *Arbitrase* was published two years after the district court decision. Although it was published in the same year of the Supreme Court decision, its discussion is entirely on the district court decision. Its appendices include the arbitral awards, the decision of the Central Jakarta District Court, and Gautama's declaration.
[164] *See* Gautama, *Arbitrase*, *supra* note 20 at ch. 2, at 24.
[165] *Id*. at 24-25.
[166] Hikmahanto Juwana, "Pembatalan Putusan Arbitrase International oleh Pengadilan Indonesia," *Jurnal Hukum Bisinis* 21 (2002): 67-74.
[167] Tin Zuraida, *Prinsip Eksekusi Putusan Arbitrase Internasional di Indonesia* (Surabaya: Wastu Lanas Grafika, 2009), 94-104.

Karen Mills expected controversy from the international community on the district court's decision.[168] She predicted the decision would further damage Indonesia's reputation with regard to arbitration caused by the notorious *ED & F (Man) Sugar*. Her warning was mostly based on the annulment itself and not on the public order ground used by the court.

As expected the decision received condemnation.[169] The annulment, according to this criticism, was flaw for two reasons. First, Indonesia was not a "primary jurisdiction" under the New York Convention. Second, the annulment departed from the provision of the Arbitration Act. The premise of this argument was foreign arbitral award was final and binding, and national court could refuse enforcement only when it violated public order.

It should be noted that there were inconsistencies with regard to the Supreme Court decision (*Karaha Bodas (2004)*). The docket showed that the Supreme Court acted as court of appeal. However the decision also employed technical terms indicating KBC's motion was a request for cassation. The inconsistencies, I suspect, were either a result of careless typewriting on part of the Court or confusion over Pertamina's motion in the first place. The latter was due to the fact that Arbitration Act had no provision on annulment of foreign arbitral award.

The critics narrowly interpreted the Arbitration Act. Since the provision for annulment in the Arbitration Act did not explicitly include foreign arbitral awards, national court could only refuse their enforcement. Therefore they maintained that Pertamina had no recourse to annul the awards before Indonesian court. It seemed the fact that KBC did not even start developing the plants was immaterial. For them the awards and the whole process of arbitration were

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[168] *See* Mills, *supra* note 130, at 65.

[169] *See e.g*. Noah Rubins, "The Enforcement and Annulment of International Arbitration Awards in Indonesia," *American University International Law Review* 20 (2005): 359-402. The author's view however could not be regarded impartial due to his involvement as part of the legal team spearheading global enforcement of the awards.

sacrosanct. Anything beyond that, including the rationale of the Presidential Decree, was irrelevant.

The Supreme Court seemed to follow this train of thought. It sustained to KBC's motion that the district court had no jurisdiction over Pertamina's petition. The Court neither discussed the Presidential Decree and its rationale, nor similar cases like *ED & F (Man) Sugar*. This was surprising especially because one of the justices, Paulus Effendi Lotulung, was a member of the bench in the latter.

It seemed the Supreme Court aimed to tone down international community's criticism than to resolve the dispute. Disturbingly *Karaha Bodas (2004)* was at odds with *ED & F (Man) Sugar* with regard to public order. It was unclear whether *Karaha Bodas (2004)* reversed *ED & F (Man) Sugar*. It was also unclear whether the Supreme Court considered the socio-economic implication of *Karaha Bodas (2004)* in light of its judicial duty to "uphold law and justice based on Pancasila for the sake of Indonesian rule of law"[170] and to what extent the Justices "explored, followed, and understood the living legal values of the society".[171]

The Presidential Decree had different consequences in *Karaha Bodas (2004)* than *ED & F (Man) Sugar*. In the latter, it made sugar contracts null and void *ab initio*. In the former, it made the JOC and the ESC's cause inadmissible. Prior to the Presidential Decree the contracts were valid. As a result of the Presidential Decree issued, they became invalid.

In civil law all agreements were concluded with the implied condition that they were binding only as long as there are no major changes in the circumstances. This principle, known as *rebus sic stantibus*, attributed different roles to the judge based on the relationship between the

[170] *See* the 2004 Judicature Act, art. 1:1 *cf*. the 2009 Judicature Act, 1:1.
[171] *See* the 2004 Judicature Act, art. 28:1 *cf*. the 2009 Judicature Act, art. 5:1.

judge and statutory law on the one hand, and the judge and the contract on the other hand.[172] Given the judicial power, in the former the court was required to uphold the law.[173] Therefore the Supreme Court was under obligation, at least, to consider the Presidential Decree. In the latter the Justices were confronted to the fact that the Presidential Decree had made all parties impossible to perform the contracts. Because the Court was obliged to "delve, abide, and understand the living legal norms of the society",[174] it had the power to interfere with the contracts.

The Court, however, did not consider any of these relationships. It decided to contain itself within the ambit of the Arbitration Act. Although the principle of *pacta sunt servanda* stipulated that all legally concluded agreements were bound the parties like law,[175] it was doubtful whether the detrimental effect of their executions was justifiable as the case with *Karaha Bodas (2004)*.

3.4.3.4 *Inviolability of Foreign Arbitration Process*

Despite questions surrounding it, *Karaha Bodas (2004)* showed that choice of forum, at least for that time, was inviolable. Indonesian court would not interfere with the process and result of arbitration. If it did, the court would further tarnish Indonesia's reputation in the international community.

Similar to *ED & F Man (Sugar),* in *Karaha Bodas (2004)* the Supreme Court equated public order with the positive law, which in this case the Arbitration Act. Unlike *ED & F Man (Sugar)*, the Supreme Court upheld the sanctity of contract and made no attempt to investigate

[172] *See e.g*. Pascal Pichonnaz, "From *Clausula Rebus Sic Stantibus* to Hardship: Aspects of the Evolution of the Judge's Role," *Fundamina* 17 (2011): 125.
[173] *See* the 2004 Judicature Act, art. 1:1; *cf*. the 2009 Judicature Act, art. 1:1.
[174] *See* the 2004 Judicature Act, art. 28:1; *cf*. the 2009 Judicature Act, art. 5:1.
[175] *See* CIV. CODE, art. 1338.

the economic rationale behind the suspension. When Pertamina filed the lawsuit in 2002, politics of law in the form of decree of the MPR was still in existence.[176] One of the policy directions for law was to "establish a judiciary that was independent and free from the executive (*penguasa*) or any party's influence".[177] From this angle, I conclude that as an independent judiciary the Supreme Court found freedom of contract and choice of forum of paramount importance. At the expense of the government's economic policy, the Court held that Indoneian court could not interfere with foreign arbitration process. Put it differently, the Court treated the inviolability of foreign arbitral award as public order.

3.4.4 *Karaha Bodas (2008)*

3.4.4.1 *Case Summary*

In *Karaha Bodas (2008)* Pertamina lodged a motion for reconsideration. It argued that in *Karaha Bodas (2004)* the Supreme Court had erred in examining KBC's appeal and applying the law.[178] The Supreme Court opined there was no ground to alter its previous stance, and upheld its previous decision.[179]

3.4.4.2. *Public Order Issue*

In its request for reconsideration Pertamina argued that the Justices of *Karaha Bodas (2004)*, among others, had erred in the law and were at fault. It emphasized that in *Karaha Bodas (2004)* instead of lodging an appeal, KBC was filing a motion of cassation to the Supreme

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[176] Tap MPR No. IV/MPR/1999, Garis-garis Besar Haluan Negara 1999-2004 [MPR DECREE NO. IV/MPR/1999, THE 1999-2004 MAIN OUTLINES OF STATE'S POLICY] Oct. 19, 1999.
[177] *See id*. ch. IV.A:6. The fact that the MPR employed the word "*penguasa*" is interesting. Here I translated the word as "the executive". However the English word with symmetrical meaning is "the ruler". *See infra* pp. 172 and 177.
[178] *See* Karaha Bodas (2008), at 29-33.
[179] *Id*. at 33-34.

Court. This motion could not fall under article 72:4 of the Arbitration Act, because the Act did not have provision on cassation. Therefore Pertamina contended that by accepting KBC's cassation and retrying the case the Justices had violated the Arbitration Act.[180]

Pertamina did not submit any issue of public order. This omission was perchance because it would only reiterate Pertamina's argument in *Karaha Bodas (2004)*. Procedurally speaking the reiteration would not be an acceptable ground for reconsideration. However later in *Lirik Petroleum (2011)* Pertamina would reiterate public order argument in its motion for cassation.

3.4.4.3 *Commentaries*

The Supreme Court upheld *Karaha Bodas (2004)* when it opined that the judges of law did not err in applying the law. The Court, without explicitly referring to article V:1(e) of the New York Convention, confirmed *Karaha Bodas (2004)* that the competent authority to annul the award was the Swiss court.[181] Therefore Indonesian courts had no jurisdiction.

In *Karaha Bodas (2008)* the Court also affirmed that the Arbitration Act only recognized appeal, and not reconsideration. Consequently it stated that the request for reconsideration was a violation of article 72:4 of the Arbitration Act. The Court therefore refused to recognize reconsideration as the last resort of civil procedure as provided by the Supreme Court Law.[182] It would later take the same stance in *Lirik Petroleum (2011)*.

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[180] *Id*. at 29-30.
[181] *Id*. at 33-34.
[182] *See* Sup. Ct. Act, art. 67.

3.4.4.4 *Affirmation: Inviolability of Foreign Arbitral Process*

Because *Karaha Bodas (2008)* upheld *Karaha Bodas (2004)*, therefore it affirmed the Supreme Court's stance on the whole issues of public order.

3.4.5 *Astro Nusantara International*

3.4.5.1 *Case Summary*

Astro Group Malaysia, through its Astro All Asia Networks Plc, and PT Ayunda Primamitra established PT Direct Vision as their joint venture company. The latter would provide digital television service in Indonesia with the exclusive broadcasting of English Premier League soccer matches as its crown jewel. For the joint venture on March 11, 2005 the companies signed a Subscription and Shareholders Agreement.

The dispute originated from the agreement that went awry. Astro group executed an article in the agreement by bringing the dispute to the Singapore International Arbitration Chamber (SIAC). While the arbitration was in session, Ayunda Primamitra *et al* filed a lawsuit against ANI *et al* before the South Jakarta District Court. The latter sought a preliminary award from SIAC to bring the lawsuit to an end. SIAC granted the award,[183] and ANI applied a request for exequatur to the Central Jakarta District Court.

Pointing to its lawsuit before the South Jakarta District Court, Ayunda Primamitra asked the Central Jakarta District Court to reject the request by declaring non-exequatur. The court accepted this argument and issued an order of non-exequatur.[184]

[183] The article reads, "Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority of the country where the recognition and enforcement is sought, proof that: … (e) The awards has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made."
[184] Central Jakarta Dist. Ct. No 05/PPdt.Arb.Int/2009, Oct. 28, 2009.

ANI brought the order to the Supreme Court for cassation. Instead of examining whether the request should be rejected based on article 66 of the Arbitration Act, the district court took the lawsuit into consideration. This, claimed ANI, was an error in applying the Act. The Court, presided by the Chief Justice Harifin Tumpa, rejected the cassation and affirmed the district court's decision.

3.4.5.2 *Public Order Issue*

Ayunda Primamitra contended that according to Indonesian law it reserved the right to defend itself before the court. This right was circumscribed by the preliminary award. The award therefore violated Indonesian public order and subsequently Indonesian law.

ANI went into detail arguing that the public order ground could only be invoked within the ambit of article 66 and article V of the 1958 New York Convention. Citing article 23 of the General Provisions of Legislation for Indonesia [AB], ANI argued that public order was a violation of good morals. It reminded the Supreme Court that, according to Gautama and other scholars, public order was a reserve or escape clause that had to be used exceptionally.[185] If public order was to be understood as the bedrock principle of a state, therefore the award had to be examined using this standard.[186] Since the award was in compliance with Indonesian law, therefore it argued that there was no violation of public order.[187] In case the Supreme Court shared the district court's opinion that the award violated Indonesian public order in relation to

[185] *See* Astro Nusantara International, at 20-21.
[186] *Id*. at 25.
[187] *Id*. at 26.

the South Jakarta District Court's provisional decision of May 13, 2009,[188] it showed that the award had been rendered first.[189]

In proving its case ANI sought the opinion of retired Justice M. Yahya Harahap. According to Harahap's testimony the award would not violate Indonesian public order, and therefore it was executable.[190] Harahap equated public order with things or condition that violated the legal system's bedrock principles and national interest.[191]

ANI reminded the court that the award was rendered based on the parties' agreement to arbitrate. Since both the agreement and the award were in full compliance with Indonesian law, it claimed no bedrock principles were violated. Therefore it concluded that there was no violation of Indonesian public order.[192]

The district court held that the award by ordering Ayunda Primamitra to stop commencing the lawsuit was an intervention to the legal order (*tertib hukum*) of civil procedure.[193]

Despite article 66 of the Arbitration Act, the Supreme Court opined that Indonesian civil procedure recognized the principle of *point de interest point de action* – one's action has to be based on interest.[194] According to the Court this principle granted any interested party to challenge arbitral award that had detrimental effect on him from execution. It found the award violated Indonesia's sovereignty. Consequently it held that the award violated Indonesian public

[188] *See* South Jakarta Dist. Ct. No. 1100/Pdt.G/2008/PN.JKT.Sel., May 13, 2009 (Interlocutory).
[189] *See* Astro Nusantara International, at 26-27.
[190] *Id*. at 13-14.
[191] *Id*. at 20.
[192] *Id*. at 25-30.
[193] *Id*. at 10.
[194] *Id*. at 36. *See* Supomo, *Acara*, *supra* note 102 at ch. 1, at 108.

order. The Court also made a statement that the substance of the award was not of commercial law, but civil procedure.[195]

3.4.5.3 *Commentaries*

Contrary to *Karaha Bodas (2004)* and *Karaha Bodas (2008)*, the Supreme Court was in favor of right to seek legal remedy. Although these decisions were jurisprudence, the Court did not include them in the consideration of *Astro Nusantara International*. It was therefore unclear what was the basis for reversing its stance with respect to public order. Therefore *Astro Nusantara International* was at odds with *Karaha Bodas (2004)* and *Karaha Bodas (2008)*.

The Court's *ratio decidendi* that the award was of civil procedure was short and plain. It neither mentioned the New York Convention nor the Arbitration Act. Apparently it was aimed at dismissing ANI's argument that the award fell under the scope of commercial law under Indonesian law. The Convention left to national law what was regarded as "commercial".[196] When Indonesia acceded to the Convention it declared that the convention would apply only to differences arising out of legal relationships, which were considered as commercial law under Indonesian law.[197] Article 66 point b of the Arbitration Act later stipulated that foreign arbitral awards could only be recognized and enforced if they were classified commercial under Indonesian law. The elucidation to this article provided a non-exhaustive list of "the scope of commercial law", which included investment. The Court's statement was to support its holding that the award violated Indonesian public order.

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[195] *See* Astro Nusantara International, at 36-37.
[196] *See* N.Y. Convention, art. I:3.
[197] For the declaration, *see* https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-1&chapter=22&lang=en#EndDec (last visited on Apr. 8, 2015).

3.4.5.4 *Right to Seek Legal Remedy as Public Order*

In *Astro Nusantara International* the Supreme Court introduced a new criterion for public order. By ordering Ayunda Primamitra to stop commencing legal proceedings before Indonesian court the award violated Indonesian sovereignty and therefore Indonesian public order.[198] This case showed that right to seek legal remedy was Indonesian public order. Lack of consideration, unfortunately, made it unclear how *Astro Nusantara International* stood vis-à-vis *Karaha Bodas (2004)* and *Karaha Bodas (2008)*.

3.4.6 *Bungo Raya Nusantara*

3.4.6.1 *Case Summary*

Like most of the cases *Bungo Raya Nusantara* concerned with enforcement of foreign arbitral award. PT Bungo Raya Nusantara (hereinafter BRN) argued that an arbitral award rendered by SIAC[199] violated article 66 point c of the Arbitration Act. It requested the Central Jakarta District Court to annul the award based on article 70 of the Arbitration Act. The district court disagreed with BRN and held that the award did not violate public order. Consequently BRN lodged an appeal to the Supreme Court.[200] The Court found that it was a foreign arbitral award, and held that the grounds to annul arbitral award as provided by article 70 were not applicable to foreign arbitral award. Therefore it rejected BRN's appeal.

The origins of the disputes lay in three contracts. The first was the Coal Contract of Work signed by PT Nusantara Thermal Coal (hereinafter NTC) and the Indonesian Government in February 19, 1998. The contract granted NTC the right to mine coal with strict requirement. Its article 3 allowed NTC to appoint a qualified subcontractor registered in the Ministry of

[198] *See* Astro Nusantara International, at 37.
[199] Award No. 25, Aug. 6, 2009.
[200] Central Jakarta Dist. Ct. No. 089/2009.Eks, Sept. 17, 2009 (Order).

Mining. Later NTC concluded the Second Contract with BRN on July 28, 2006. In this contract BRN acted as NTC's subcontractor. On the same date BRN concluded the Third Contract with PT Jambi Resources Limited (hereinafter JRL). Here JRL acted as BRN's subcontractor. All these contracts were subject to Indonesian law.

BRN claimed that the Second and Third Contracts violated mandatory law. It pointed out that at the conclusion of the contracts it was not a qualified and registered subcontractor.[201] Therefore the contracts violated the requirement of the Coal Contract of Work. According to the Mining Law, the noncompliance was a criminal offense punishable by up to six years in jail and/or fine.[202]

Later BRN canceled the Third Contract. The cancellation provoked JRL to bring about the dispute before SIAC. As evident in its preliminary award, the arbitration panel disregarded the noncompliance of the contracts to the Mining Law and proceeded with the trial. Consequently BRC chose to withdraw from the arbitration process.[203]

3.4.6.2 *Public Order Issue*

BRN argued that Indonesian public order was violated in many instances. First the drafting of the Second and Third Contract was biased, and their substance was one-sided. BRN pointed to the fact that the drafters were paid by JRL and that it could not negotiate the terms.[204] Therefore it argued that the contracts were not executed on good faith as provided by article

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[201] *See* Bungo Raya Nusantara, at 10-11.
[202] *See* UU No. 11/1967, Ketentuan-ketentuan Pokok Pertambangan [Act No. 11/1967, Basic Regulations for Mining], Dec. 2, 1967, arts. 14-15 and 31.The Mining Act was the positive law when all contracts were signed until it was revoked by UU No. 4/2009, Pertambangan Mineral dan Batubara [Act No. 4/2009, Mineral and Coal Mining], Jan. 12, 2009.
[203] *See* Bungo Raya Nusantara, at 23-24.
[204] *Id*. at 8.

1338:3 of the Civil Code. Pointing to the noncompliance fact, it argued that at the time of conclusion the contracts had no admissible cause.

Second, it argued that the Coal Contract of Work, and subsequently the Second and Third Contract, was a concession to mine in the context of article 33:3 of the 1945 Constitution.[205] The Mining Law was to elaborate the public order of article 33:3. Therefore the mining had to be of benefit to the Indonesian people. The noncompliance fact showed that the contracts violated not only mandatory law, but also public order.

Third, the award itself violated Indonesian public order.[206] The basis of the award was an invalid agreement that had no admissible cause according to Indonesian law. Consequently enforcement of the award would violate public order as stipulated by article 66 point c of the Arbitration Act.

JRL did not directly respond to BRN's public order argument. It built its argument on sanctity of contract. It then pointed out that Indonesian court could not annul foreign arbitral award.[207] Citing *Karaha Bodas (2004)* and *Karaha Bodas (2008)* as jurisprudence, it argued that the power to set aside was vested in the court of the country of origin, which in this case Singapore.[208]

The district court was in favor of JRL's counterclaim. It completely ignored BRN's argument and used the counterclaim as the ground for declaring that the award did not violate public order.[209]

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[205] *Id*. at 8-12. The 1945 Const., article 33:3 reads, "The land, the waters, and the natural resources therein are controlled by the state and shall be used for the greatest prosperity of the people".
[206] *See* Bungo Raya Nusantara, at 20-24.
[207] *Id*. at 29.
[208] *Id*. at 31.
[209] *Id*. at 38-39.

The Supreme Court did not find the district court was at fault. Unlike most cases it affirmed its stance on *Karaha Bodas (2004)* and considered it as jurisprudence.[210]

3.4.6.3 *Commentaries*

The courts did not find public order as a relevant issue in the first place. Following the path of *Karaha Bodas (2004)* and *Karaha Bodas (2008)*, the courts felt impelled to stop at accepting sanctity of contract. Here the Supreme Court was consistent *Karaha Bodas (2004)* and *Karaha Bodas (2008)* in declaring that Indonesian court had no jurisdiction to annul the award.[211] Yet this stance was at odds with *Asto Nusantara International*.

Despite BRN's argument that the arbitral panel violated article 33 of the 1945 Constitution, the Court was unresponsive. One might argue that this was an issue of judicial review. Therefore the Court was correct because the issue fell under the Constitutional Court's authority. But BRN was not challenging the validity of any act to the 1945 Constitution. There was no law prohibiting the Supreme Court to examine BRN's contention. On the contrary the Court was obliged to deal with the parties claims or defenses.[212]

The Court was also unresponsive to BRN's calling for attention to execute its judicial power.[213] BRN pointed out that the Court was obliged to investigate the case not only based on written law, but also on the living law.[214] As pointed out by Supomo this characteristic belongs to adat law. In doing so BRN appealed to the court to the pluralism facet of Indonesian law. It seemed the Court chose to ignore this characteristic in pursuit of legal certainty.

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[210] *Id*. at 43.
[211] *Id*. Although the Court did not explicitly mention the article, it was obvious that it referred to article V:1(e) of the Convention.
[212] *See* Sup. Ct. Act, art. 67.
[213] *See* Bungo Raya Nusantara, at 40.
[214] *See* the 2004 Judicature Act, art. 28:1 *cf*. the 2009 Judicature Act, art. 5:1.

3.4.6.4. *Affirmation: Inviolability of Foreign Arbitration Process*

Bungo Raya Nusantara was consistent with *Karaha Bodas (2004)* and *Karaha Bodas (2008)*. It affirmed a combination of sanctity of contract and choice of forum that made foreign arbitral awards inviolable was some sort public order.

3.4.7 *Lirik Petroleum (2010)*

3.4.7.1 *Case Summary*

The origins of the dispute lay on the Enhanced Oil Recovery Contract. The contract was one of the forms recognized by the Oil and Gas Mining Act.[215] According to the Act, the Minister of Mining could appoint a third party as contractor for Pertamina. The latter was the holder of mining authority representing the Indonesian State.[216] Included in the authority was Pertamina's right to declare the area of work commercially viable.[217] The contract accommodated this right on its article 5.2.[218] The contract also regulated that Lirik Petroleum had the right to ask Pertamina to declare the commercial status of Molek, South Pulai, North Pulai, and Lirik areas.[219] Despite having technical advice on the commerciality of these areas, Pertamina found that such declaration would not meet the objective of public order as stipulated in article 33:2-3 of the 1945 Constitution.[220] Accordingly it rejected Lirik Petroleum's request.[221]

[215] *See* Perpu No. 44/1960, Pertambangan Minyak dan Gas Bumi [Government Regulation in Lieu of Act No. 44/1960, Oil and Gas Mining], art. 6:1. The Perpu rescinded by UU No. 22/2001, Pertambangan Minyak dan Gas Bumi [Act No. 22/2001, Oil and Natural Gas], Nov. 23, 2001.

[216] *See* UU No. 22/2001, Minyak dan Gas Bumi [Act No. 22/2001, Oil and Gas], Nov. 23, 2001, Consideration points b and c, and Gen. Elucidation, point 1 para. 2 and UU No. 8/1971, Pertamina, Gen. Elucidation, points a and c, and para. 2.

[217] *See* PP No. 35/1994, Syarat-syarat dan Pedoman Kerjasama Kontrak Bagi Hasil Minyak dan Gas Bumi [Government Regulation No. 35/1994, Provision and Guideline for Production Sharing Contract in Oil and Natural Gas], Nov. 16, 1994, elucidation to art. 13:2.

[218] *See* Lirik Petroleum (2010), at 23.

[219] *Id*. at 21.

[220] The 1945 Const., article 33:2 reads "Sectors of production that are vital to the state and that are controlling the livelihood of the people are controlled by the state."

[221] *See* Lirik Petroleum (2010), at 22-23.

Lirik Petroleum disputed Pertamina rejection. It activated the arbitration clause of the contract, which stipulated that the panel would follow the rules of the International Chamber of Commerce.[222] The arbitration panel rendered partial and final award.[223] It decided that Pertamina and its subsidiary, PT Pertamina EP, breached the contract, and awarded Lirik Petroleum with compensation totaling US$ 34,495,428.

Pertamina and Pertamina EP filed a lawsuit to annul the awards. But the Central Jakarta District Court rejected their lawsuit.[224] Their appeal to the Supreme Court was not successful either.

3.4.7.2 *Public Order Issue*

Public order became Pertamina's main grounds for annulment of the award.[225] It contended that article 33:2-3 of the 1945 Constitution laid down the public order of Indonesian economy and social welfare.[226] With regard to article 33:3 Pertamina cited that the Constitutional Court had elaborated that the phrase *"dikuasai oleh negara*" ("are controlled by the state") covered five kinds of mandate: policy setting, administrative, regulating actions, management, and supervision.[227]

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[222] *Id*. at 6 and 35.
[223] ICC International Court of Arbitration Case No. 14387/JB/JEM of September 22, 2008 and of February 27, 2009 consecutively.
[224] Central Jakarta Dist. Ct. No. 01/Pembatalan Arbitrase/2009/PN.JKT/PST, Mar. 9, 2009.
[225] In addition to this Pertamina and Pertamina EP argued that because the seat of arbitration was in Jakarta, the award had no international character. Therefore instead of being foreign arbitral awards, they were domestic or national arbitral awards. *See* Lirik Petroleum (2010), at 6-7.
[226] *Id*. at 17.
[227] *Id*. at 17-18 *cf*. Const. Ct. No. 002/PUU-I/2003, Dec. 21, 2004, (Dorma Sinaga), 1, 208-209 available at http://www.mahkamahkonstitusi.go.id/putusan/Putusan002PUUI2003.pdf. The case was a judicial review on Act No. 22/2001.

It contended that the act had explicitly laid down a principle of public order for the oil and gas sector.[228] Furthermore Pertamina submitted that the sector was important to national defense and security.[229] Therefore it argued that it could not be in an equal position in the contract. It pointed to article XVII.2 of the contract that stated the Republic of Indonesia reserved its inalienable rights to support its superior position in the contract.[230] Consequently Pertamina concluded that the award violated public order because it considered the parties were in equal position on the contract.[231]

Lirik Petroleum, on the other hand, submitted to the district court that public order should be confined to enforcement of foreign arbitral award. If the enforcement was contrary to public order as stipulated in article 66 of the Arbitration Act, the court could refuse to issue exequatur. Since it had not filed for exequatur Pertamina's request for annulment was premature.[232]

The Central Jakarta District Court refused all of Pertamina's claims. Oddly enough in finding that the award did not violate public order it cited article 643 Rv.[233] According to this article, there were ten grounds for cancelling an arbitral award: (1) when the decision was made beyond the limits of compromise; (2) when the decision was based on worthless compromise or already annulled; (3) when the decision was made by several arbitrators who had no authority to make a decision outside the presence of other arbitrators; (4) when it was decided concerning something which was not charged, or the decision it gave more than what was charged; (5) when the decision contained provisions which contradicted each other; (6) when the arbitrators neglected to decide one or several matters which should be decided, according to the provision

[228] *See* Lirik Petroleum (2010), at 20-22.
[229] *Id*. at 19. *See also* Act No. 8/1971, Consideration, point a.
[230] *See* Lirik Petroleum (2010), at 21.
[231] *Id*. at 23.
[232] *Id*. at 39-40 & 42.
[233] *Id*. at 48-49.

taken in the compromise; (7) when it violated the form of procedure which had been stipulated threatened by annulment; but this only in the case when the compromise which was agreed upon clearly stated, that the arbitrators were obliged to fulfill the rules of ordinary process; (8) when it was decided based on the documents, it was acknowledged after the decision by the arbitrators as false or declared false; (9) when after the decision, it was found decisive documents which were hidden by one of the party; or (10) when the decision was based on deceit or sly tactics which was known later in the investigation process." However the Arbitration Act had revoked all provisions of the Rv with regard to arbitration.[234]

In its petition for appeal to the Supreme Court, Pertamina EP submitted four reasons in relation to public order. First, it pointed out that the district court had erred in declaring that there was no violation of public order based on article 643 Rv, which was no longer a positive law.[235] Second, it drew the Court's attention to the fact that the district court did not consider all facts and evidence, which in this case whether the dispute was commercial in nature and therefore could be settled by arbitration,[236] in accordance with jurisprudence.[237] Third, it claimed the district court had also erred in "controversy defect" – inconsistency in consideration due to conflating application for exequatur of domestic and foreign arbitral awards – to public order and *ultra petita* while there was no such relevance.[238] Finally, it argued that in addition to compensate Lirik Petroleum for damages, the award ordered Pertamina EP to pay interest for late payment. This interest constituted penalty payment,[239] which according to a permanent

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[234] *See* Arb. Act, art. 81.
[235] *See* Lirik Petroleum (2010), at 48.
[236] *See* Arb. Act, arts. 4-5.
[237] Sup. Ct. No. 3388 K/PDT/1985, Jan. 8, 1992. *See* Lirik Petroleum (2010), at 49 and 55.
[238] *See* Lirik Petroleum (2010), at 58-59.
[239] *See* Rv, article 606a that reads, "As far as the sentence contains a conviction to something other than the payment of a sum of money, it may be determined, that, if, as long or as often as the convicted person shall not have complied with that conviction, he shall have forfeited a by that sentence determined sum of money, named coercive payment."

jurisprudence could not be added to payment for damages,[240] and therefore it violated the law and public order.[241]

In addition to Pertamina EP's objections, Pertamina argued that the district court had erred in ignoring its superior position in the contract.[242] Lirik Petroleum provided no counterargument for the appellants' attack on the decision.

The Supreme Court opined that public order argument was pointless because the appellants were responsible for breaching the contract.[243] Therefore it affirmed the district court's decision.[244]

Justice Rehngena Purba dissented to the majority opinion.[245] He opined that Pertamina by rejecting request for commercial status was executing its authority to avoid losses that might disturb stability of the State or public order. This authority constituted public policy[246] exclusively held by Pertamina and was in accordance with the 1945 Constitution. Since Pertamina had correctly made decision within its discretionary power, he found the award violated public order.

3.4.7.3 *Commentaries*

Pertamina singled out article 33:2-3 of the 1945 Constitution as the public order for exploiting natural resources. It then showed that all acts were promulgated as elaboration to the principle. Like BRN in *Bungo Raya Nusantara*, Pertamina put emphasized on the role of the government in promoting social welfare. The courts, however, did not respond to this motion.

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[240] *See* Sup. Ct. No. 791 K/Sip/1972, Feb. 26, 1973.
[241] *See* Lirik Petroleum (2010), at 72-73.
[242] *Id*. at 78-84.
[243] *Id*. at 96.
[244] *Id*. at 99.
[245] *Id*. at 98.
[246] Justice Purba used English words "public policy".

It should be noted that in building its case against the respondent Pertamina also submitted a decision of the Constitutional Court. As the court vested with the authority to review all acts to the 1945 Constitution, it broke down the meaning of “are controlled by the state” of article 33. However both the district court and the Supreme Court neither responded nor took into account that decision.

There was no law specifically instructed all courts to follow, or at least pay attention to, the Constitutional Court’s decision. What the institutional position of the Supreme Court to the Constitutional Court’s decision was not clear. However *Bungo Raya Nusantara* showed that the Supreme Court was unresponsive to claim made under article 33.

3.4.7.4 *Any Notion of Public Order is Secondary to Freedom of Contract*

Lirik Petroleum (2010) showed public order was secondary to freedom of contract. If the parties had agreed to be bound to a contract, they would be obliged to execute it accordingly. The courts tended to opine that public order could not be invoked to dismiss *pact sunt servanda*. Although this stance was obviously contradicted *ED & F (Man) Sugar*, it found precedence in *Karaha Bodas (2004)*, *Karaha Bodas (2008)*, and *Bungo Raya Nusantara*.

3.4.8 *Bank America National Trust*

3.4.8.1 *Case Summary*

APP International Finance Company BV (hereinafter APP) claimed its establishment was solely for tax abuse purposes. It was established to make use the tax treaty between the Republic of Indonesia and the Netherlands, which set the withholding tax rate for interest earned by a

Dutch company at ten percent. In the absence of the treaty, the rate would be double.[247] Being a Dutch company it issued three global notes totaling US$ 550,000,000 as a strategic financial engineering based on the advise it received from Bank America National Trust Company, Morgan Stanley & Co Incorporation, PT Bank Mizuho Indonesia (previously PT Fuji International), and US Bank National Association.[248]

As part of the financial engineering, the parties concluded a series of collateral agreement, among others the Indenture Agreement. The parties chose New York law for the agreements. The financial structure required the establishment of PT Lontar Papyrus Pulp & Paper, which together with Asia Pulp & Paper Papyrus would become bond guarantors.[249]

APP later argued that it was not engaged in commercial or investment activity. It claimed that the abovementioned parties orchestrated tax abuse where the Indonesian government lost US$ 6,312,500 annually.[250] It contended that the Indenture Agreement had no admissible cause under Indonesian law, and therefore null and void.[251] It also admitted that the agreements and the establishments of Lontar Papyrus and Asia Pulp & Paper Papyrus were designed so that they would evade the Capital Market Act[252] and the Stock Exchange regulations. Therefore APP requested the Kuala Tungkal District Court, among others, to declare that the agreements were null and void.

The district court granted its request. Accordingly Morgan Stanley *et al* appealed the decision to the Jambi High Court. But the high court upheld that decision. Finally Bank

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[247] *See* Bank America National Trust, at 14-16.
[248] Respectively the first, fourth, fifth and sixteenth defendant in the first instance.
[249] These companies were respectively the thirteenth and nineteenth defendant in the first instance.
[250] *See* Bank America National Trust, at 15.
[251] CIV. CODE arts. 1320 and 1337. *Id*. at 18.
[252] UU No. 8/1995, Pasar Modal [Act No. 8/1995, Capital Market].

America National Trust filed for cassation as a matter of course. The Supreme Court did not find the judges of facts err in applying the law, and rejected the cassation.

3.4.8.2 *Public Order Issue*

APP presented its case based on the argument that the agreements violated Indonesian law. APP argued because the agreements were slyly designed to evade positive laws, they did not have admissible cause in the first place. Consequently the agreements did not meet the conditions of article 1320 of the Civil Code, which required admissible cause for validity. In addition to violation of Indonesian law, APP also argued that the issuance of the notes also violated Indonesian public order.[253] However APP did not elaborate what it considered as public order and what constituted its violation.

The fifth defendant before the district court, Bank Mizuho, among others, countered APP's argument on the application of Indonesian law and public order. It pointed out that the parties had chosen New York law for the agreements. Citing Indonesian scholars, including Gautama, it submitted that the choice of law was in full compliance with Indonesian PIL. In addition to the choice of law counterargument, Bank Mizuho submitted legal opinions from APP's lawyers. The opinions, presented prior to conclusion of the agreements, asserted that the would-be choice of law was to be recognized by Indonesian court because there was no condition that would provoke public order.[254]

The seventeenth defendant, Credit Suisse First Boston, also submitted to the court the legal opinions of APP's lawyers. One lawyer stated that the choice of law would be recognized

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[253] *See* Bank America National Trust, at 24.
[254] *Id*. at 121-122.

by Indonesian court.[255] The other lawyer affirmed that there was no consideration of public order that would cause Indonesian court not to recognize the choice of New York law for the agreement.[256]

The district court ignored the choice of law. In trying the case it applied Indonesian law, and held that the agreements had no admissible cause. Consequently it declared them null and void.[257] The court did not discuss public order.[258]

As usual the Supreme Court's holding was laconic. Since it found the applicants were not explicit enough in lodging their motion for cassation, lack of procedural basis prevented the Supreme Court from examining their arguments on substantive law.[259]

The presiding judge, Justice Imron Anwari had dissenting opinion. He opined that the lower court had correctly applied the law and agreed that the cause was lawful. Therefore he concluded that the agreements were null and void.[260] Despite the majority opinion, I concluded that unlawful cause might be a ground for invoking public order.

3.4.8.3 *Commentaries*

Like *ED & F Man (Sugar)*, *Bank America National Trust* concerned with agreements governed by foreign law. The court took the same stance with *ED & F (Man) Sugar* in stating that the cause was inadmissible, and therefore declared the agreements null and void.

In *ED & F (Man) Sugar* the sugar contracts were null and void because they were considered violating Presidential Decrees and government's economic policy. Violation of

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[255] *Id*. at 238-239.
[256] *Id*. at 241.
[257] *Id*. at 323.
[258] I have to admit that my assessment on *Bank America National Trust* is entirely based on the Supreme Court's Decisions. Since I have no copy of the district and high court's decisions, I rely entirely on facts revealed in the Supreme Court's decision.
[259] *See* Bank America National Trust, at 353.
[260] *Id*. at 352-353.

positive law was also the issue in *Bank America National Trust*. However in this case it was not clear whether the court reached the same conclusion with *ED & F (Man) Sugar* with regard to public order.

Like Yani Haryanto, APP considered it important to combine inadmissible cause and public order in its submission to the court. It seemed public order argument would support inadmissible cause in case the court was somehow hesitant to state the agreements null and void.

It should be noted that Bank Mizuho drew the district court's attention to Indonesia's reputation in the international community.[261] It submitted an article in the *Asian Wall Street Journal* reporting Indonesian court's "frankly insane" judgments in favor of local companies to evade debt payments to foreign creditors. Given the multitude of financial engineering agreements involving Indonesian companies, the effect of *Bank America National Trust* was indeed worrisome.

3.4.9 *Lirik Petroleum (2011)*

3.4.9.1 *Case Summary*

In this case Pertamina EP and Pertamina petitioned the Supreme Court to annul the award at reconsideration level.[262] As grounds for reconsideration they reasoned that the justices of *Lirik Petroleum (2010)* had erred in their ruling or at fault.[263] The Court rejected to reconsider, and it affirmed *Lirik Petroleum (2010)*.

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[261] *Id*. at 156-157.
[262] *See* Lirik Petroleum (2011) at 2.
[263] *Id*. at 58 *et seq*.

3.4.9.2 *Public Order Issues*

The petitioners put forward *Comarindo* to support their request for annulment of the award.[264] They argued that *Comarindo* had interpreted that the phrase "*antara lain*" (*inter alia*) with regard to grounds for annulment of arbitral award as non-exhaustive.[265] Chapter VII of the Arbitration Act concerned annulment of arbitral awards. As part of this chapter, article 70 provided three reasons for application of annulment.[266] The General Elucidation to the Act restated the conditions for annulment, but added the words "*antara lain*".[267] Consequently it made the chapeau of article 70 ambiguous. In *Comarindo* the Supreme Court opined that besides what were stipulated in article 70 there could be other conditions for annulment.[268]

The petitioners submitted violation of public order as a condition for annulment. The core of their position was that the arbitral award had expunged their authorities to rectify and straighten violation of public order. They reiterated that the award violated article 33:2-3 of the 1945 Constitution.[269] They insisted that article 33 of the 1945 Constitution could not be altered by freedom of contract as stipulated in article 1338 of the Civil Code, and therefore *Lirik Petroleum (2010)* violated public order.

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[264] According to the Supreme Court's website, the case is jurisprudence. *See* http://putusan.mahkamahagung.go.id/putusan/5f6245be2220b502349830698a5c05d9 (last visited on Apr. 2, 2015).

[265] *See* Lirik Petroleum (2011) at 77.

[266] The said article reads, "An application … may be made if any of the following conditions are alleged to exist: (a) letters or documents submitted in the hearings are acknowledged to be false or forged or are declared to be forgeries after the award has been rendered; (b) after the award has been rendered documents are found which are decisive in nature and which were deliberately concealed by the opposing party; or (c) the award was rendered as a result of fraud committed by one of the parties to the dispute."

[267] *See* Arb. Act, Gen. Elucidation, para.11.

[268] *Comarindo*, at 20.

[269] *See* Lirik Petroleum (2011), at 78.

They also argued that article 178:3 HIR embodied the notion of public order. Granting more than requested therefore was a breach of this notion. Since the award granted monetary compensation more than requested by Lirik Petroleum, it violated public order.[270]

The Supreme Court did not reconsider public order argument. Citing article 70, it affirmed that an appeal could be brought to the Supreme Court. However it pointed to article 72:4 that the Court's decision on the appeal was a decision on the first and final stage.[271] Therefore it concluded that the Arbitration Act did not recognize an extraordinary method of review. Consequently it felt impelled to reject the request for reconsideration.

3.4.9.3 *Commentaries*

Lirik Petroleum (2010) was decided entirely based on two articles of the Arbitration Act. Like most cases the Court made no response to the petitioners' argument of jurisprudence. In doing so, on the one hand, the Court was consistent in restricting itself to the stipulations of the Act. However, on the other hand, the Court was inconsistent with its previous stance with regard to *Comarindo*. Because the Court did not discuss *Comarindo*, it would not accept any other grounds for annulment.

Confining itself to the civil procedure of the Arbitration Act, the Court shunned the petitioners' public order argument. This was an irony. On the one hand the Court referred to the Supreme Court Act for its judgment, but on the other hand it ignored the grounds for reconsideration the Act provided. The Act stipulated that reconsideration could be submitted

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[270] *Id*.
[271] *Id*. at 84.

based on erred in ruling.[272] It seemed the Court was determined to impose on finality of arbitral award.

3.4.9.4 *Affirmation: Inviolability of Foreign Arbitration Process*

Lirik Petroleum (2011) should be understood not only as an affirmation to *Lirik Petroleum (2010)*, but also *Karaha Bodas (2008)*. Once again the Supreme Court contained itself within the ambit of Arbitration Act. It would only consider any argument of public order if it fell under the provision of article 66.

3.4.10 *Direct Vision*

3.4.10.1 *Case Summary*

Direct Vision was closely related to *Astro Nusantara International*. All defendants in the former were applicants in the latter. The dispute was also originated from the same subscription and shareholders agreement. While *Astro Nusantara International* concerned with request for exequatur for the preliminary award, *Direct Vision* concerned with the final awards also rendered by SIAC.[273]

In its attempt to prevent ANI *et al* from obtaining exequatur, Direct Vision filed a lawsuit to the Central Jakarta District Court. This time the court rejected the lawsuit.[274] It subsequently lodged an appeal to the Supreme Court. The Court did not find the district court was in erred, and rejected Direct Vision's appeal.

[272] *See* Sup. Ct. Act, art. 67.
[273] Award No. 06/2010, Feb. 10, 2010 and Award No. 07/2010, Feb. 18, 2010.
[274] Central Jakarta Dist. Ct. No. 301/Pdt.G/2010/PN.JKT.PST, Aug. 25, 2011 (PT Direct Vision/Astro Nusantara International BV et al).

3.4.10.2 *Public Order Issue*

Direct Vision claimed that the awards violated Indonesian public order. The awards, it argued, were closely related to and a continuation of arbitration proceedings that had rendered the preliminary award. The latter was resolved in *Astro Nusantara International*, which the Court had declared the preliminary award a violation of Indonesian public order.[275]

Direct Vision submitted that *Astro Nusantara International* had become *res judicata*. It contended that such decision constituted Indonesian public order. Pointing to article 66 point c of the Arbitration Act, it argued that the awards violated public order. This was in compliance with article V:2 of the 1958 New York Convention[276] that gave contrary to the public order as a ground for refusing enforcement and recognition of foreign arbitral award.

Direct Vision reminded the Court that the Chief Justice himself presided *Astro Nusantara International* to have a bearing on the case. Given their close connection, as a consequence of *Astro Nusantara International*, *Direct Vision* would also violate Indonesian public order. Therefore the Court had to reject issuing exequatur for the latter too.

Unlike *Astro Nusantara International* the district court found the request for exequatur as an administrative issue. It rejected Direct Vision's public order argument.

The Supreme Court did not find the district court's decision contradict any law. Unlike *Astro Nusantara International* this time the Court considered the fact that the parties signed the subscription and shareholders agreement that contained an arbitration clause.[277] Based on article 1338 of the Civil Code, the Court found the parties were bound by the agreement. Consequently

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[275] *See* Direct Vision, at 36-49.
[276] The article reads, "Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: (a) the subject matter of the difference is not capable of settlement by arbitration under the law of that country; or (b) the recognition or enforcement of the award would be contrary to the public policy of that country."
[277] *See id*. at 49-50.

the parties had to respect their chosen forum, i.e. SIAC, and its awards. Given these grounds apparently the Court found responding to Direct Vision's public order argument irrelevant.

3.4.10.3 *Commentaries*

Direct Vision was in conflict with *Astro Nusantara International*. The fact that the Court turned a deaf ear to Direct Vision's case created ambiguity about public order. On the one hand the Court opined that the right to seek legal remedy was public order, on the other hand it dismissed any notion of public order due to the principle of *pacta sunt servanda*. In *Astro Nusantara International* the Court opined that the award was not commercial, and therefore neither the New York Convention nor Arbitration Act applied. On the contrary in *Direct Vision* it found the awards were commercial, and therefore the Convention and the Act applied.

3.4.10.4 Affirmation: *Inviolability of Foreign Arbitral Process*

Like most of the cases concerning foreign arbitral awards, *Direct Vision* confirmed that foreign arbitral award was inviolable.

3.5 SECTION D: CONCLUSION OF THE PRACTICE OF LAW

The selected cases demonstrate how the court has inconsistently treated public order. Sometimes the court responded to public order argument. However many times the court chose to ignore it. Sometimes the court invoked public order. But most of the time the court rejected it. In many cases the court even consider it irrelevant.

Using the perspective of the Supreme Court for all cases except *Lie Kwien Hien*, I summarize how it reacted to the argument of public order. As shown in Table 3.4, I classify the

argument vis-à-vis five categories: legal pluralism, positive law, sanctity of contract, civil procedure, and admissible cause.

In *Lie Kwien Hien* the district court put public order in the context of legal pluralism. By calling the Supreme Court's to consider the living law, *Bungo Raya Nusantara* was brought public order to the light of legal pluralism. In the former the district court invoked public order due to Indonesia's legal pluralism, while in the latter the Supreme Court completely ignored it.

Except in *Karaha Bodas (2008)*, public order has always been related to the positive law. *Lie Kwien Hien* put the district court in the intersection of Islamic law and the Civil Code. *ED & F (Man) Sugar* shows that public order was invoked because the sugar contracts violated the Presidential Decrees. Although the same violation *mutatis mutandis* happened in *Karaha Bodas (2004)*, the court chose to uphold the JOC and the ESC based on article V:1 of the New York Convention and the Arbitration Act. The Court was consistent with this stance in *Bungo Raya Nusantara*, *Lirik Petroleum (2010)*, and *Direct Vision*. However in *Astro Nusantara International* it diverged from this stance. Yet the Court cited the Arbitration Act in asserting its invocation of public order. In *Bank America National Trust* the Court used the Civil Code in declaring the agreements null and void. Finally in *Lirik Petroleum (2011)*, the court rejected the request for reconsideration, and therefore all public order arguments, because the Arbitration Act does not recognize such recourse.

Application of the positive law in some of the cases, however, begs the question of legal hierarchy. The parties in *Karaha Bodas (2004)*, *Bungo Raya Nusantara*, *Lirik Petroleum (2010)*, and *Lirik Petroleum (2011)* pointed out to mandatory law and/or the 1945 Constitution. Putting public order issue aside, the court's unresponsiveness created ambiguity on what is the controlling law. The Court's inconsistency only makes the matter worst.

Sanctity of contract almost always overrides public order argument. The Supreme Court only examined to freedom of contract in *ED & F (Man) Sugar* after it found that the contracts might interfere with government's economic policy. *Astro Nusantara International* and *Bank America National Trust*, however, lack such higher purpose. The Court did not provide justification other than positive law for interfering with freedom of contract.

Civil procedure, whether in the form of accepting a motion for reconsideration or taking active role in adjudication, is closely related to sanctity of contract. Despite the settlement agreement rendered by the arbitration panel, in *ED & F (Man) Sugar* the Court tried the lawsuit because it found the sugar contracts might violate public order. *Karaha Bodas (2004)* followed the same path until the Supreme Court reversed the district court's decision. The Supreme Court rejected to reconsider *Karaha Bodas (2008)* and *Lirik Petroleum (2011)* by pointing out that the Arbitration Act does not contain such provisions. The Court has upheld the finality of foreign arbitral awards in *Bungo Raya Nusantara*, *Lirik Petroleum (2010)*, and *Direct Vision*. However *Astro Nusantara International* is an exception. In this case the Court was assertive so that the right to seek legal remedy itself constitutes public order.

Table 3.4: Summaries of Decisions on Public Order

Year	Case	Legal Pluralism	Positive Law	Sanctity of Contract	Civil Procedure	Admissible Cause
1953	*Lie Kwie Hien*	Y	Y	–	–	–
1991	*ED & F Man (Sugar)*	–	Y	N	Y	Y
2004	*Karaha Bodas (2004)*	–	Y	Y	N	N
2008	*Karaha Bodas (2008)*	–	–	Y	N	–
2010	*Astro Nusantara Internasional*	–	Y	N	Y	–
2010	*Bungo Raya Nusantara*	N	Y	Y	N	N
2010	*Lirik Petroleum (2010)*	–	Y	Y	N	N
2011	*Bank America National Trust*	–	Y	N	Y	Y
2011	*Lirik Petroleum (2011)*	–	N	–	N	–
2012	*Direct Vision*	–	Y	Y	N	–

Y = considered; N = rejected; - = irrelevant/not discussed

Admissible cause might be a standalone issue from sanctity of contract. In *ED & F (Man) Sugar* admissible cause was considered as public order with relation to government's economic policy. *Karaha Bodas (2004)*, *Bungo Raya Nusantara*, and *Lirik Petroleum (2010)* take the opposite view. *Bank America National Trust* found the cause impermissible despite the parties' choice of New York law.

When I relate the issue of public order with the stages of legal development, I found the Court was less inconsistent. *Lie Kwien Hien* was examined when the trajectory of Indonesian law where at the crossing of harmonization and unification of law. *ED & F (Man) Sugar* is consistent with the primacy of the government over the judiciary. The inconsistency started after the *Reformasi*. Having its newfound judicial independence, the Court ignored any argument based on the 1945 Constitution or the Constitutional Court's decision.

3.6 CONCLUSION

This chapter has shown that public order is a controversial issue. The controversy lies on the fact that the courts' decisions are inconsistent. Such inconsistency however cannot be fully explained inasmuch as the courts rarely fully disclosed the reasons or motivations for their stance.

The discussion above has partly demonstrated that reference to Indonesian history and legal culture may mitigate the controversy (Proposition 1). Stages of legal development give insight that politics of law and (in)dependent judiciary may contribute to why and how the court made its decisions.

This chapter also highlights that the inconsistency was also a consequence of legal pluralism (Proposition 2). In many of the cases the parties the court to judicial activism. The

court’s reaction to this and its lack of elaboration demonstrated that legal pluralism was mostly ignored. The inconsistency shows that the court has definite framework in responding to public order argument (Proposition 4). These factors, legal pluralism and a definite framework, therefore call for the broader context of Indonesian law for public order.

Chapter 4 will further discuss the possibility of less inconsistent application of public order.

Chapter 4

THE DOCTRINE AS COHESION DEVICE

"[T]he legal inventory of [Indonesia] … when explored by one whose desire for knowledge and explanation of the living law … becomes an inexhaustible source of instruction."[1]

4.1 OVERVIEW

This chapter cuts through previous discussions. Here I correlate the stages of legal development with the need to have a cohesion device, the doctrine with the inconsistency of the practice of law. My aim is to demonstrate that the doctrine is an operable framework for Indonesia.

In analyzing the doctrine as a cohesion device, I follow the path stated by Cornelis van Vollenhoven above. The practice of law alone shows no strict interpretation of public order. However with the desire for knowledge to understand the law, I find that relating the practice with the stages of legal development makes more sense. From a different point of origin the doctrine also takes the law as a source of instruction. In this chapter I will demonstrate that the doctrine embedded in the Indonesian legal system can become an operable framework for interpretation of public order.

This chapter is divided into three sections. Section A picks up chapter 3 by presenting five telling facts about Indonesian law. Although these facts are revealed in relation to public order, they are also instructive for Indonesian law in general. The facts are: the role of the courts, confusion in legal thinking, the tension between rule of law and rule of *kebijaksanaan*

[1] Van Vollenhoven, *supra* note 78 at ch. 1, at 1-2.

(wisdom), politics of law, and professorial law. These facts intertwine with one another and shape up Indonesian law. They create systemic and practical problems. But at the same time they offer opportunity for tiptoeing around Indonesian law and its legal pluralism.

Section B explains why Indonesia needs a cohesion device. The urge for a cohesion device runs parallel to Indonesian history. As discussed in chapter 1 the inception of Indonesia as a state owes to the Netherlands Indies having a unified legal system. After independence the nation has continued to rally under a banner of legal unity – Pancasila and the 1945 Constitution. If public order is to protect the interest of the legal system, therefore its operation must have coherence.

Section C demonstrates how the doctrine fulfills the criteria. In the course of time the doctrine has proven itself apropos to the development of law and politics in Indonesia. Its strong side however has not attracted the courts to use it as a framework to interpret public order. Consequently I discuss its weak side.

The discussions of this chapter are complement to my proving of three propositions. Proposition 1 – Indonesian legal system should be analyzed with reference to Indonesian history and culture – has been dealt with chapters 1 and 3. The former has shown Indonesia's road to nationhood; and how Pancasila and the 1945 Constitution have held the nation together despite its layers of pluralism. The latter partakes in proving that the pluralisms create systemic and practical challenges, and that the courts have roles in shaping Indonesian law. This chapter complements the demonstration by showing that the doctrine falls in line with the history and pursuit of oneness with regard to the legal system.

Proposition 4 – Gautama doctrine provides a uniquely valuable framework which can be operable within the context of Indonesian law – has also been demonstrated in chapters 2 and 3.

The development of the doctrine and its theoretical perspective are dealt with chapter 2. Chapter 3 has shown, somewhat indirectly, that lack of framework result in inconsistent application, or non-application, of public order. This chapter will show that a less inconsistent application of public order is possible. Here I will show that the doctrine is readily available by combining its genius and the courts' lack of framework.

Furthermore I will conclude that consistent implementation of the notion of 'public order' in judicial decisions is only possible if the broader context of legal pluralism is considered together with the text of legislation (Proposition 5). Chapter 2 has shown that in developing his doctrine Gautama took legal pluralism into account. Chapter 3 has its share in showing that public order is a controversial issue. While Gautama anticipated that legal pluralism was a crucial factor that would always come into play in the legal system, the courts have mostly disregarded it. This chapter will finish the discussion by showing that the doctrine is not just a framework to interpret public order, but also a cohesion device for the legal system to flourish.

4.2 Section A: Telling Facts about Indonesian Law

A foreign lawyer, commenting on *ED & F Man (Sugar)*, suggests that the Indonesian courts' performance was not satisfactory as a result of either undue influence or lack of understanding of arbitration concept.[2] "Undue influence", apparently, is euphemism for courts' performance that did not meet expectation. One of the reasons for the ill-performance is corruption.[3] The so-called "court mafia" has given the Indonesian courts its notoriety.[4] A well-respected Indonesianist, Daniel Lev, suggested a radical approach in dealing with rampant

[2] *See* Mills, *supra* note 130 at ch. 3, at 60.
[3] Another foreign lawyer openly accuses the courts have problem of rampant corruption. *See* Rubins, *supra* note 168 at ch. 3, at 368.
[4] *See e.g.* Todung Mulya Lubis, *In Search of Human Rights: Legal-Political Dilemmas of Indonesia's New Order 1966-1990*, (Jakarta: Gramedia Pustaka Utama, 1993), 109.

corruption by replacing all justices of the Supreme Court with new ones.[5] The existence of court mafia was officially acknowledged when President Susilo Bambang Yudhoyono established a special task force to combat it.[6]

In this study I do not deny any accusation of corrupt practices. As a matter fact one of the justices who sat on the bench of *Bank America National Trust* is allegedly involved in document forgery.[7] However since there is no hard evidence of corruption relating to the selected cases, I consider the accusation unsubstantiated.

The politico-legal structure may also cause the courts' ill-performance. At the height of the New Order Himawan identified the judiciary as the Achilles' heel in Indonesia's continuous attempt to abide by the principle of rule of law.[8] He argued that the judiciary had executive bias because the Minister of Justice had the final decision for judges' appointment and promotion.[9] The courts could not be held independent especially in disputes involving state-owned enterprises.

Establishing independent judiciary, therefore, was an important agenda item of the *Reformasi*.[10] The Third Amendment to the 1945 Constitution has ensured the judiciary's independence.[11] The Supreme Court Act and the 2009 Judicature Act have articulated this

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[5] Daniel Lev, "Ceramah Prof. Lev di FH Untar," *Jurnal Hukum dan Pembangunan* 2 (2000): 204-205.
[6] *See* Keppres No. 37/2009, Satuan Tugas Pemberantasan Mafia Hukum [Presidential Decree No. 37/2009, the Task Force for Eradication of Court Mafia], Dec. 30, 2009.
[7] The bench consisted of Justices Imron Anwari, Achmad Yamamie and Nyak Pha also examined a cassation requested by a drug lord. It reduced the punishment from death penalty to fifteen years imprisonment. Yamamie is allegedly involved in changing the ruling to twelve years when the verdict was uploaded to the Supreme Court's website. *See* "First Time ever, Supreme Court Judge Resigns," *The Jakarta Post*, Nov. 16, 2012, available at http://www.thejakartapost.com/news/2012/11/16/first-time-ever-supreme-court-judge-resigns.html (last visited on Apr. 20, 2015.)
[8] *See* Himawan, *supra* note 10 at ch. 1, at 71-76.
[9] *See also* Lubis, *supra* note 4, at 102-105.
[10] *See* Tap MPR No. IV/MPR/199, chapter IV.A:6.
[11] The (original) 1945 Const., art. 24:1 reads, "The Judicial Power shall be executed by a Supreme Court and other judiciary bodies according to law." As a result of the Third Amendment the said article now reads, "The Judicial Power is an *independent* power that administers the judicature to uphold law and justice." Italic is mine.

independence.[12] Legal scholars put forward action plan for judicial reform.[13] Despite its newfound independence, judges still cannot manage expectations.

I argue its nonfulfillment can be explained by pointing out telling facts about Indonesian law that the courts have to deal with. These facts are evident in the selected cases.

4.2.1 *Fact 1: The Role of the Courts*

The role of the courts can be viewed from the perspectives of civil procedural law and the politico-legal structure. These perspectives will show a discrepancy between the parties' expectations and the courts' perception of their roles.

4.2.1.1 *Based on Positive Law for Civil Procedure*

Most of the selected cases show that the Indonesian parties sought intervention from the courts. In *ED & F Man (Sugar)* Yani Haryanto asked the courts to declare the sugar contracts null and void. Despite the parties' choice of English law and choice of forum to settle disputes, i.e. the Council of the Refined Sugar Association, the courts granted Haryanto's request and intervened by declaring the contracts null and void.[14] This was also the case in *Bank America National Trust*. Ayunda Primamitra, in *Astro Nusantara International*, also sought the courts to intervene with its commercial disputes, which at that time was in session before SIAC. The courts granted its request and ruled that despite the parties' arbitration agreement Ayunda Primamitra reserved the right to challenge arbitral award that had detrimental effect on it.[15]

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[12] *See* the 2009 Judicature Act, art. 1 point 1 *cf*. the 2004 Judicature Act, art. 1 point 1.
[13] *See e.g*. Mardjono Reksodiputro, "Menegakkan Kembali Citra Kekuasaan Kehakiman: Peranan Pengadilan dalam Negara Indonesia Baru (Sebuah Saran kepada Ketua Mahkamah Agung RI)," *Hukum dan Pembangunan* 3 (2001): 201-205; Hartono, *supra* note 182 at ch. 2, at 75-79.
[14] *See supra* pp. 119-126.
[15] *See supra* pp. 139-142.

Unlike the previous cases, the courts rejected to intervene in *Karaha Bodas (2004)*, *Karaha Bodas (2008)*, *Bungo Raya Nusantara*, *Lirik Petroleum (2010)*, *Lirik Petroleum (2011)* and *Direct Vision*.

The reason for courts' intervention was best formulated by Bungo Raya Nusantara (BRN). It urged the Supreme Court to deliberate a decision that would reflect the living law as a result of its investigation on the law and the society's sense of justice.[16] However the Court did not respond to this request. The fact that the Court was unresponsive raises question, especially since the submission was based on the 2004 Judicature Act.[17]

This role of the court has been established since at least the Guided Democracy (1959-1966). The 1964 Judicature Act required judges "as a tool of Revolution" to investigate the living law and therefore eventuated the function of law as safeguard (*pengayoman*).[18] The New Order (1966-1998) rescinded it with the 1970 Judicature Act, but maintained the same responsibility of judges to investigate the society's living legal values.[19] The two judicature acts of the *Reformasi* have maintained the provision *verbatim*.

The selected cases show a discrepancy between the parties' expectation, on the one hand, and how the courts see their roles, on the other hand. This discrepancy, in my opinion, is one of the results of having dispersed positive law for civil procedure.[20] It may create confusion and opening for inconsistency. At this point suffice it to say that the courts may turn to the principles of civil litigation to contain themselves from being an active court.

Two of the underpinning principles for civil litigation are *nemo iudex sine actore* (no

[16] *See* Bungo Raya Nusantara, at 40.
[17] BRN cited article 28:1 of the 2004 Judicature Act. It seems BRN was citing an outdated law. By the time BRN submitted its request for appeal the 2009 Judicature Act already revoked it. The former maintains the provision *verbatim*, but rearranges it as article 5:1.
[18] *See* the 1964 Judicature Act, art. 20:1.
[19] *See* the 1970 Judicature Act, art. 27:1.
[20] *See supra* pp. 103-104

judgment without actor) and *iudex ne procedat ex officio* (judges shall not proceed on their own).[21] The former puts emphasis on a petitioner's initiative on legal action. The latter requires judges to respond to the disputants' motion. It is concluded from these principles that judges or the courts will be passive.

The Rv was written on the premise that judges would be passive in civil litigation.[22] Prior to the Japanese occupation, it was the positive law for the Court of Justice to adjudicate disputes arising from contractual relationship mostly based on the Civil Code. As a result of the Japanese-initiated court reform, the Court of Justice was dissolved and its jurisdiction was transferred to the Country Court, which was renamed District Court (*Pengadilan Negeri*).

District Court was, and is, using a different civil procedural law. For courts in the islands of Java and Madura, HIR applies. Others are to apply RBg. These regulations are arguably mixing the active and passive roles of the courts. If one takes into account that they were drafted on the premise that native Indonesians (of the Netherland Indies) were functionally illiterate to deal with legal action, one will find the reason why judges are active. This conclusion is supported by the fact that judges are allowed even to give advice to disputants' preparation in initiating legal action.[23] However, since these regulations also contain the above principle of *iudex ne procedat ex officio*,[24] one may reach a different conclusion.

Caught between the opposites roles, Supomo asserts the characters of adat judges.[25] In his opinion, adat judges are obliged by the society to maintain social harmony. To that extent they are not restricted to investigate only formal aspects of disputes, but are free to inquire its material aspects. This freedom is not stated in HIR or RBg, but the judicature acts.

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[21] *Cf*. Mertokusumo, *Acara*, *supra* note 17 at ch. 3, at 8-9.
[22] *See* Supomo, *Acara*, *supra* note 102 at ch. 1, at 17.
[23] *See* HIR, art. 132 and RBG, art. 156.
[24] *See* HIR, art. 118 and RBG, art. 142.
[25] *See* Supomo, *Acara*, *supra* note 102 at ch. 1, at 14-15.

4.2.1.2 *Based on Politico-Legal Structure*

The roles of the courts can also be viewed from the existing politico-legal structure. The selected cases took place under different sets of politico-legal structure and were dispersed among three inconsecutive stages of legal development.

Lie Kwien Hien took place when Indonesia had the 1950 Provisional Constitution. Its stage of legal development was the struggle for independence and the pretext for Guided Democracy (1945-1959). The courts, under the constitutional structure at the time, were free from external intervention except for statutorily specified conditions.[26] This freedom was consistent with the 1948 Judicature Act.[27]

The freedom was also applicable towards internal intervention. It should be noted that the Chief Justice himself criticized *Lie Kwien Hien* in public.[28] Prodjodikoro wrote his criticism in a law magazine widely read by legal practitioners and academics. From a statutory perspective the criticism was indeed unfounded. However from an organizational perspective it was harsh.[29] There is another perspective to take the criticism. I am told that open criticism was the style of Indonesian literati of that time. Hence I conclude that the sole judge of the case had his independence to the full and he executed it.

ED & F Man (Sugar) happened in Suharto's New Order (1966-1998). Under the banner of "pristinely and consistently executing Pancasila and the 1945 Constitution" the New Order maintained a legalistic view of the constitutional structure. The President was appointed by and received mandates from the MPR. Included in the mandates was the politics of law. Suharto

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[26] *See* the 1950 Provisional Const., art. 103.
[27] *See* UU No. 19/1948, Susunan dan Kekuasaan Badan-badan Kehakiman [Act No. 19/1948, the Organization and Power of Judicial Bodies], June 8, 1948, art. 3:2-3 This Act was promulgated under the (original) 1945 Constitution. Its status as positive law continued based on articles 192:1-2 of the 1949 Federal Constitution and 142 of the 1950 Provisional Constitution.
[28] *See supra* pp. 118-119.
[29] *Id*.

made use of the succinct provisions of the (original) 1945 Constitution and outsmarted the constitutional structure to support his power.[30]

From this perspective it can be understood that the courts would not contradict the government. Although on paper the same kind of independence enjoyed by *Lie Kwien Hien* was in place,[31] the courts had to observe the reality of politico-legal structure. First, the President received the mandate in the form of MPR Decree. According to the hierarchy of law, the decree took precedence over acts. Second, the administration aspects of the judiciary were at the hands of the Minister of Justice. Delivering a judgment contrary to government policy might result in disciplinary action. Therefore I conclude that the courts saw their function was to support the government.

This perception, as evident in the rest of the cases, has been abandoned in the *Reformasi* (1998-present). Amendments to the 1945 Constitution have ensured the judiciary's independence. The Supreme Court has had the full control over all courts under its supervision, including the administrative aspects. Parallel to this the Indonesian people directly appoint the President. Although the MPR maintains the power of producing legal instrument, it can no longer impose its decree on the President. Consequently the government has lost legal and administrative means of intervention to the courts. I find the courts in this stage of development share the independence of *Lie Kwien Hien*.

It should be noted, however, that the courts' roles and independence between *Lie Kwien Hien* and cases after the *Reformasi* are not entirely comparable. Although the courts of these periods may perceive their roles as an independent agency of justice, the public order issues that they had to deal with are different. The former was mostly dealing with the question of legal

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[30] *See supra* pp. 88-89.
[31] *Id*.

trajectory in the newly independent Indonesia. The latter had to tackle with issues with far-reaching repercussions like salvaging national economy (*Karaha Bodas (2004)*) and regulation authority based on the Constitution (*Lirik Petroleum (2010)*).

4.2.2 *Fact 2: Confusion in Legal Thinking*

Alisjahbana described the efforts to develop law for the Indonesian archipelago as "confusion in legal thinking.[32] Pointing to van Vollenhoven's personal ideas and sentiments, he considered the law of the Netherlands Indies had paradoxical quality of colonial society.[33] After independence the development of Indonesian law and legal thinking, in his opinion, was hopelessly confused and tangled impasse. He argued this happened because nationalist sentiment and ideals of Indonesian progress created an incompatible synthesis to cope with any rational understanding of legal problems.[34]

Here I maintain his use of "confusion" but apply it to a different context of Indonesian law. Confusion in legal thinking occurs when the courts fail to address petitioners' claims based on legal pluralism. Here legal pluralism may take the forms of legal syncretism or the co-existence of legal principles originated from Western law and adat law. In addition to the confusion made by the courts in the selected cases, I will also show that the confusion is not monopoly of the courts.

4.2.2.1 *Unsettled Roles of the Courts*

From Fact 1 there is a hint of confusion on the roles of courts. The discrepancy between the parties' expectation and the perception of courts show that the roles are unsettled.

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[32] *See* Alisjahbana, *supra* note 88 at ch. 1, at 70-77.
[33] *Id*. at 72.
[34] *Id*. at 74.

Amendments to the 1945 Constitution have ensured the courts' independence, but their accountability has been left unchecked.[35] As occurred in many of the selected cases, the courts were not responsive to the parties' contention of public order and they were unable to protest. Meanwhile the courts are obliged to respond to the parties' claim[36] and provide grounds of judgment.[37] Here I find the confusion lies on the perception of their role between active and passive courts.

4.2.2.2 *Setting Priorities of Legal Principles*

Another cogent evidence of the confusion is how the courts upheld *pacta sunt servanda vis-à-vis* the notion of familial principle. Freedom of contract of the Civil Code is the brainchild of French Revolution that promotes individualism. This ideal is in contradistinction to the familial values of Indonesian society. From time immemorial Indonesians have cherished teamwork under the tenet of join bearing of burdens (*gotong-royong*).[38] Although the founding fathers also examined the ideals of French Revolution, familial principle was the main tenet that they built the Indonesian state as an organization that would bring about social justice and welfare.[39] Supomo, the chief architect of the 1945 Constitution, articulated this tenet by designing a constitutional structure based on the theory of distribution of powers.[40] Furthermore

[35] It should be noted that the newly-established *Komisi Yudisial* [Judicial Commission] has the authority to propose candidates for justices of the Supreme Court and oversee judges' behavior. *See* the 1945 Const. (3rd Amend., art. 24B:1. Once the candidates have been appointed, there is no political as well as legal mechanism to hold justices accountable for their decisions unless they commit crime.
[36] *See* Sup. Ct. Act, art. 67. Failure to deal with this is a ground for reconsideration.
[37] *See* the 2009 Judicature Act, art. 50:1.
[38] *See e.g.* Clifford Geertz, "Local Knowledge: Fact and Law in Comparative Perspective," *Local Knowledge: Further Essays in Interpretive Anthropology*, ed. Clifford Geertz (New York: Basic Books, 1983), 167-234.
[39] *See e.g.* Mohammad Hatta, "Lampau dan Datang" [speech upon receiving doctor honoris causa, Gadjah Mada University, Yogyakarta, November 27, 1956], 43-46.
[40] Kusuma, *supra* note 38 at ch. 1, at 390.

article 33:1 of the 1945 Constitution explicitly states Indonesian economy must be based on the familial principle.

The landscape of legal development is filled with the rivalry between Western law and adat law. The first generations of legal scholars noted that the individualism of the Civil Code would not be compatible with Indonesian society. However they were also conscious that adat law was not compatible to international transactions. In the course of time contract law has been driven more by commercial needs than scholarly or government-led initiative. It was practical need that augmented the application of Civil Code by Indonesians. As long as the nature of the transaction is private and commercial, the issue of legal pluralism is minimal.

Legal pluralism presents itself when *pacta sunt servanda* runs against familial principle. This was the case in *ED & F Man (Sugar)*, *Karaha Bodas (2004), Karaha Bodas (2008)*, *Bungo Raya Nusantara*, *Lirik Petroleum (2010)*, and *Lirik Petroleum (2011)*. In all these cases freedom of contract was in conflict with familial principle, which took the form either of government economic policy or article 33 of the 1945 Constitution. Except *ED & F Man (Sugar)*, the courts did not respond to the petitioners' claim of conflicting values. The fact that the courts upheld *pacta sunt servanda* without taking into consideration conflicting values in light of legal pluralism, I argue, shows the confusion.

4.2.2.3 *Upholding Hierarchy of Law*

The above confusion entails another. It has been firmly established that a valid contract binds the parties as if it is a statute for them.[41] If I apply this to the hierarchy of law, valid contracts will sit at the rank of statutory law below the 1945 Constitution and decrees of the MPR. Consequently valid contracts must not, and cannot, be in conflict with higher law. This

[41] *See* CIV. CODE, art. 1338 para. 1.

was what the petitioner in *Bungo Raya Nusantara*, *Lirik Petroleum (2010)*, and *Lirik Petroleum (2011)* argued. However the courts did not address this claim.

There are two possible conclusions. First, the courts considered *pacta sunt servanda* unchallengeable. Second, the courts did not think they had the power of judicial review to examine statute (read: *pacta sunt servanda*) against the 1945 Constitution. If the former is the case, then the courts have failed to deliver proper judgment.

4.2.2.4 *Reluctance to Judicial Review*

It is true the power of judicial review is vested in the Constitutional Court.[42] Two conditions have to be fulfilled before the Constitutional Court can execute is power. First a petitioner has to bring about a request to its attention. Second the request is concerned with an act (*undang-undang*), which he claims contrary to provisions of the 1945 Constitution. The power of judicial review for laws below the rank of act is vested in the Supreme Court.[43]

The Constitution is silent on the question whether the Supreme Court, and courts under its supervision, can be engaged in judicial review when it examines a dispute. Likewise, the Constitution does not prohibit the Supreme Court from interpreting its provisions. In answering the second possibility above – the courts did not think they had the power of judicial review to examine statute – I turn to the nature of legal norms.

From its substance, legal norms can be classified into three kinds.[44] The first is norms that contain command (*gebod*). The second is norms that contain prohibition (*verbod*). The third is norms that contain permission (*mogen*). Based on these classifications, the 1945 Constitution gives restrictive power of judicial review to the Constitutional Court. Since none of

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[42] *See* the 1945 Const. 3rd Amend., art. 24C:1.
[43] *See* the 1945 Const. 3rd Amend., art. 24A:1.
[44] *See* Purnadi Purbacaraka and Soerjono Soekanto, *Perihal Kaedah Hukum* (Bandung: Alumni, 1978), 47-51.

its provision prohibits the Supreme Court to engage in judicial review, it may be concluded that the 1945 Constitution permits such activity, while adjudicating legal disputes. This power is not judicial review in proper sense. In essence it is interpreting the Constitution and testing contracts in that light.

The selected cases reveal that the courts did not live up to expectations due its reluctance to engage in interpreting the 1945 Constitution.

4.2.2.5 *Assessment of Politico-Legal Structure*

Another proof of confusion in legal thinking is shown in the assessment of the New Order's politics of law. In setting the politics of law for the *Reformasi* the MPR emphasized that independent judiciary had to be free from external intervention.[45] Instead of employing a proper legal term – the executive or government (*pemerintah*) – the MPR chose activist jargon of "the ruler" (*penguasa*).[46]

The proponents of amending the 1945 Constitution pointed to its succinctness as the roots of problem.[47] It tended to be "executive-heavy", which astute politicians like Sukarno and Suharto manipulated to establish authoritarian government. The political reality of the time was indeed unchecked because the (original) 1945 Constitution adopted the theory of distribution of power based on the notion of power in adat law.[48] The Amendments were aimed at creating a system of checks-and-balances.

Equating the executive with "the ruler", however, was a wrong assessment of the politico-legal structure. This assessment was made by applying the perspective of Western law,

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[45] *See* chapter IV.A:6 of Tap NO. IV/MPR/1999.
[46] *Id*.
[47] *See* the (original) 1945 Const., Gen. Elucidation, para. IV.
[48] *See supra* pp. 82-83.

in this case Montesquieu's doctrine of *trias politica*, and ignored the fact that Indonesia's legal system was, and is, syncretic. The same kind of misjudgment also happens in other analytical levels.

4.2.3 *Fact 3: Rule of Law v. Rule of Kebijaksanaan*

"Indonesia is a state based on law (*Rechtsstaat*), not merely based on power (*Machtsstaat*)."[49] The use of *Rechtsstaat* and *Machtsstaat* show the influence of Dutch jurisprudence on Supomo and his contemporaries. The meaning or definition of these terms, however, would only available later.

4.2.3.1 *Rule of Law, Rechtsstaat, and Negara Hukum*

Rechtsstaat is used interchangeably with "Rule of Law", and translated to Indonesian as *Negara Hukum* (a literal translation from the Dutch word) or law-state.[50] One interpretation of *Negara Hukum* suggests that law is the primary infrastructure (*sarana utama*) rather than the supplementary infrastructure (*sarana penunjang*) in the governing of the state.[51] In the initial years of the New Order a Presidential Decree stated that the principle of rule of law embodied three main elements: (1) recognition and protection of basic human rights, (2) independent and impartial judicial process, and (3) legality in its formal and material sense.[52]

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[49] *See* Elucidation to the (original) 1945 Constitution concerning the system of government.

[50] These terms represent different concepts, and therefore not synonymous. *Rechtsstaat* implies a continental European model; rule of law a common law model, and *negara hukum* its Indonesian counterpart. For comparative notes on these concepts *see e.g.* Marjanne Termorshuizen-Artz, "The Concept Rule of Law," *Jentera* 3 (2004): 92-108.

[51] *See* Himawan, *supra* note 10 at ch. 1, at 21. For a more elaborated and indigenized concept of *Negara Hukum*, *see* Wahyono, *supra* note 3 at ch. 1, at 7-32.

[52] Keppres No. 319/1968, Rencana Pembangunan Lima Tahun (1969-1974) [Presidential Decree NO. 319/1968, the Five-Year Development Plan (1969-1974)]. Probably because the first two elements echo Dicey's two of three meanings of the rule of law, the terms are used interchangeably. *See* Tom Bingham, *The Rule of Law* (New York: Allen Lane, 2011), 3-4. Wahjono adds a fourth element: a legal order. *See* Wahjono, *supra* note 3 at ch. 1, at 13-14.

Throughout the New Order, and also as the experience in Sukarno's Guided Democracy, rule of law was to keep the government on a leash. Ideally this function was to be carried out by the judiciary.[53] It led to the promulgation of the 1970 Judicature Act. However in practice the New Order circumscribed recognition and protection of basic human rights and independent judiciary.[54] As it became authoritarian the New Order ran the state with rule *by* law.

Law, in the sense of rule by law, almost always meant written law. On the one hand this created legal certainty. On the other hand it denied pluralities of the forms of law.[55]

The problem with this interpretation of rule of law, for the purpose of this study, was written law was neither comprehensive nor complete. The Indonesian society was, and is, too pluralistic to be regulated with written and uniform law. Furthermore judges are required to understand the society's sense of justice and the living law. Promulgation of law, the democratic process aside, has not been fast enough to cope with practical demands. Therefore gap-filling law, either by asserting unwritten law or judge-made law, remains significance.

In the initial years of the *Reformasi*, the MPR was determined to rectify the New Order's rule by law. In consequent of the aspiration for democracy, rule of law has been emphasized on upholding the supremacy of law, recognizing human rights, and establishing independent judiciary.[56] This emphasis has called for comprehensive consolidation on law enforcement agencies to restore public trust.[57] Law, in the *Reformasi*'s rule of law, is supposed to be a product of transparent and democratic political process that will be upheld by independent judiciary.

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[53] *See e.g.* Sunarjati Hartono, *Apakah the Rule of Law itu?* (Bandung: Alumni, 1976), 67-109.
[54] *See e.g.* Lubis, *supra* note 4, at 86-126.
[55] Even the General Elucidation to the (original) 1945 Constitution acknowledged that there was other unwritten fundamental law in the form of state conventions.
[56] *See* MPR Decree No. IV/MPR/1999, Chapter IV, points A:3 and A:6.
[57] *See e.g.* Partnership for Governance Reform in Indonesia, *Consolidating of the Rule of Law in Indonesia: Restoring Public Trust through Institutional Reform* (Jakarta: Partnership Secretariat, 2004).

4.2.3.2 *Kebijaksanaan and Rule of Kebijaksanaan*

By default Indonesian law always has an opening for *kebijaksanaan*, i.e. judicial innovation or discretion to uphold justice based on the living law. This quality of judgment is in demand not only to interpret colonial laws to Indonesian context,[58] but also to fill in legal vacuum.[59]

This has always been the case with public order. What is Indonesian public order is never defined. It has to be construed by judges – persons of great wisdom – based on the interests of the nation and the legal system. Therefore with regard to public order *kebijaksanaan* or wisdom plays decisive role.

It has been pointed out that *kebijaksanaan* exacerbates Indonesia's legal pluralism.[60] Sunaryati Hartono opines that *kebijaksanaan* is a decision (*beslissing*) made by authorized officials to resolve a dispute based on law and according to the system of values that are sustained by the society.[61] She identifies two elements of *kebijaksanaan*. The first is a statement from authorized officials on disputes settlement or *a posteriori* regulation on affairs that have happened. Second the statement is addressed to that specific dispute or affairs. From this perspective Hartono concludes that established practice (*kebiasaan*) is a prerequisite for *kebijaksanaan*. At the judicial level the established practice will become jurisprudence or case law.[62]

Soemarmo Wirjanto suggests a different analysis on *kebijaksanaan*.[63] For him *kebijaksanaan* is policy (*beleid*) made for the sake of public interest, the people, or the

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[58] *See supra* pp. 37-40.
[59] *See supra* pp. 91-94.
[60] *See* Hartono, *supra* note 53, at 78-81.
[61] *Id*. at 115-116. Hartono cites J. H. Logemann, professor of law in the *Rechthogeschool* in Jakarta before the Japanese occupation, to support her opinion.
[62] *Id*. at 117.
[63] *See* Wirjanto, *supra* note 43 at ch. 3.

government. Unlike Hartono's decision, Wirjanto's policy is made rather arbitrarily. It is not based on established practice, but more on discretion. Its objective is to satisfy the public or the people. However, he points out that *kebijaksanaan* is susceptible to hierarchic order, and may be robbed of its good objective.

This perspective is useful to understand, for instance, Supreme Court's decisions on *ultra petita*.[64] Initially the court held granting more than what was requested was a violation of law. Later it reversed its stance and allowed such judgment.

Wirjanto argues that rule of law coexists with rule of *kebijaksanaan*. The coexistence, however, is always in the state of war. The above reversal, which was rule of *kebijaksanaan* contradicted provision of positive law, which was the rule of law. In his opinion, rule of *kebijaksanaan* is a stumbling block for rule of law proper. Hartono, taking a more optimistic view, deems *rule of kebijaksaan* as a temporary reality that will be replaced by the ideal rule of law.[65]

4.2.3.3 *Rule of Law v. Rule of Kebijaksanaan in Selected Cases*

The selected cases show inconsistent application of statutory law. Violation of public order invalidated *pacta sunt servanda* as shown in *ED & F Man (Sugar)* and *Astro Nusantara International*. Contrary to this, *Lirik Petroleum (2010)* and *Direct Vision* show that the court did not launch its investigation on public order due to *pacta sunt servanda*. In most cases the courts upheld that the Arbitration Act considered arbitration process and foreign arbitral awards inviolable. This happened in *Karaha Bodas (2004)*, *Karaha Bodas (2008)*, *Bungo Raya Nusantara*, *Lirik Petroleum (2011)*, and *Direct Vision*. However *Astro Nusantara International*

[64] *See supra* pp. 109-111.
[65] *See* Hartono, *supra* note 53, at 133-135.

shows opposing application of the Act. It joins *ED & F Man (Sugar)*, which took place prior to the Act, in showing that the courts can intervene with arbitration process. The selected cases therefore show that there is no legal certainty with regard to *pacta sunt servanda* and application of the Arbitration Act.

The selected cases refute the suggestion that *kebijaksanaan* is established practice that creates jurisprudence. Courts' practice shows that jurisprudence – in the sense of previous decisions that have binding precedent – is not always cited or referred in later cases. Instead the practice shows that the citing of jurisprudence was made arbitrarily.

The practice therefore supports Wirjanto's opinion of *kebijaksanaan* and the existence of rule of *kebijaksanaan*. In the selected cases *kebijaksanaan*, to name what the petitioners called upon the courts in contrast to mere application of statutory laws, was required in examining the argument of public order violation. Regardless their reaction, either positive or negative, the courts adopted a certain policy of public order through the decisions. Lack of consistency in the manner of citing jurisprudence and responding to the petitioners' argument of public order, unfortunately, brings into existence rule of *kebijaksanaan*.

The cases therefore reveal the fact that the courts are caught in the tug-of-war between rule of law and rule of *kebijaksanaan*.

4.2.4 *Fact 4: Politics of Law*

4.2.4.1 *Politics of Law: Policy for Legal Development*

It is commonly accepted that Indonesia must develop its law for further progress.[66] The status quo of colonial legislation, like the Civil Code, was supposedly temporary until Indonesia promulgated its own version. Furthermore the legislation is mostly outdated not only to the

[66] Simorangkir, *supra* note 85 at ch. 1, at 15-19.

aspiration of independence but also to modern-day. The need for legal development has been escalating since the proponents of law as a tool of social engineering became influential in the government. The trajectory of legal development is called politics of law (*politik hukum*).

Historically the development of Indonesian law is orchestrated either by government agency or the MPR. The LPHN was established to assist the government in bringing about a national legal system.[67] Its members consisted of academics, politicians, and practitioners.[68] Later the LPHN was transferred to the Minister of Justice, and its task was refined so that it was to deliver development of law that complied with MPR Decree.[69] The Decree laid out the outlines for national development covering among others research priorities, social welfare, government, production, distribution and finance.[70]

The transformation of the LPHN into the BPHN had significant effect.[71] The BPHN no longer has members. Its main task has been legal research, which is assigned to individual, or a group of, scholars, and organizing law seminars.[72]

Through its decree – the GBHN – the MPR stated the key points of legal development to be executed by the President. With this in mind the BPHN assigned legal research and

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[67] *See* "Task" in Keppres No. 107/1958.
[68] *See* Keppres No. 376/1961, May 6, 1961 and Keppres No. 184/1965, June 23, 1965.
[69] *See* Keppres No. 194/1961, July 1, 1961, point II.
[70] *See* Tap MPRS No. II/MPRS/1960, Garis-garis Besar Pola Pembangunan Nasional Semesta Berencana Tahapan Pertama 1961-1969 [MPRS Decree No. II/MPRS/1960, the Main Outlines for the Comprehensive Development Plan of the First Phase 1961-1969].
[71] The transformation was part of departmental reorganization of the time based on Keppres No. 44/1974, Pokok-pokok Organization Departemen [Presidential Decree No. 44/1974, Basic Organization of Department], Aug. 26, 1974 & Keppres No. 45/1974, Susunan Organisasi Departmen [Presidential Decree No. 45/1974, Organization Structure of Department] Aug. 26, 1974. *See* Simorangkir, *supra* note 85 at ch. 1, at 25-27; *see also* Badan Pembinaan Hukum Nasional, *Sejarah Badan Pembinaan Hukum Nasional* (Jakarta: Badan Pembinaan Hukum Nasional, 2005), 20-22.
[72] The Bill, led by Gautama, was part of this legal research. *See* Badan Pembinaan Hukum Nasional, *supra* note 71, at 702.

conducted law seminars.[73] However since the Amendments to the 1945 Constitution the MPR has lost its power to set the trajectory of legal development.

Since the beginning of the twenty-first century state-led legal development has been taken over by the DPR.[74] It does this mainly by setting the *Prolegnas*, which is a list of bills prioritized for promulgation in the coming years. *Prolegnas* becomes the *de facto* agenda for legal development because the DPR now has the power to legislate.[75]

4.2.4.2 *Courts and Politics of Law*

The orchestrated legal development has mainly been a government-led attempt. Although justices and judges, either in their individual or official capacities, were involved as members of the LPHN,[76] the judiciary as an institution was left out. Therefore the courts have not participated in the setting of politics of law.

However this is not to say that the courts are not involved in shaping Indonesian law. Through its jurisprudence, binding precedent aside, Indonesian courts have construed colonial legislation to independence context and created gap-filling law. As shown in *Lie Kwien Hien*, the Jakarta District Court also confirmed the status quo of Indonesian legal pluralism.

During the New Order, being susceptible to the politico-legal structure, the courts upheld the politics of law. *ED & F Man (Sugar)* shows that the main determinant of the judgment was government economic policy on the prince of *Sembako*. The compliance to economic policy also shows the New Order's development plan – economy first, others to supplement the

[73] *Id*. 121 *passim*.
[74] This is not to say that the BPHN does not carry out research or seminar on its own initiative. *Id*. 340-368.
[75] *See* the 1945 Const. 1st Amend., art. 20:1. Previously the DPR had power to consent to bills proposed by the government.
[76] Associate Justice Satochid Kartanegara was one of the first members of the LPHN. *See* Keppres No. 376/1961. In 1965 President Sukarno appointed Justice Soerjadi in his capacity as a representative of *Partai Nasional Indonesia* [the Indonesian National Party], Asikin Kusumah Atmadja, Made Labde and Widojati – all of the Jakarta High Court – as members of the LPHN. *See* Keppres No.184/1965.

economy. The judiciary became susceptible to the government, and law was the supplementary infrastructure.

The *Reformasi* and Amendments to the 1945 Constitution have changed this landscape. The judiciary is no longer susceptible to the government. It has to uphold rule of law. Law, though not completely detached from the economy, no longer acts as the supplementary infrastructure.

Karaha Bodas (2004) shows the alteration. As the first case in the *Reformasi* era, it shows that the courts dismissed argument on government economic policy. The courts upheld rule of law – in the limited sense of Arbitration Act – so that legal certainty could be attained. With the exception of *Astro Nusantara International*, this stance has been reiterated in *Bungo Raya Nusantara*, *Lirik Petroleum (2010)*, and *Lirik Petroleum (2011)*. It seems the courts are more concerned with establishing their reputation internationally than upholding politics of law, if any.

Hence, depending on the politico-legal structure, the cases show that politics of law and international pressure get hold of the courts.

4.2.5 *Fact 5: Professorial Law*

In chapter 2 I have pointed out that the first generations of legal scholars were the intellectual bridge between colonial law and national legal development.[77] Their intellectual role resulted in professorial law. Their writings were, and to a large extent are, authoritative for the legal circle in understanding and interpreting the law. Below I will demonstrate how professorial law continues to be influential, and expands to include opinions of legal practitioners.

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[77] *See supra* pp. 54-57.

4.2.5.1 *Cited Scholars*

Parties in the selected cases found it important to cite opinions of legal scholars and practitioners to support their argument. There are five ways of doing this. The first and most usual method of support is citing the works of legal scholars. The respondent in *ED & F Man (Sugar)* cited works of previous chief justices Wirjono Prodjodikoro[78] and Subekti,[79] both concurrently chaired professorships while holding the office, and Sudikno Mertokusumo,[80] a retired judge turned academic, to support its argument. It also cited the work of its opponent's counsel, Gautama.[81] The petitioners in *Bank America National Trust*[82] and *Astro Nusantara International*[83] also referred to Gautama. Mathilde Sumampouw, Gautama's former student and teaching assistant, was also quoted in the latter.[84] The works of Erman Rajaguguk, junior to Gautama, was referred to in *Direct Vision*.[85]

Second, besides the works of legal scholars, the petitioners also cited scholarly work. Tin Zuraida, who wrote a dissertation on arbitration in Indonesia, was heavily quoted in *Astro Nusantara International*,[86] *Direct Vision*,[87] *Bungo Raya Nusantara*.[88]

Third, another way to have legal scholars to support a case is by having them provide expert's testimony. In *Lirik Petroleum (2010)* Pertamina EP had Hikmahanto Juwana[89] and Huala Adolf[90] testified for its sake.

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[78] *See* G 6 (1993): 60. Prodjodikoro was a professor of law in the Military School of Law and the National Police Institute, and later dean of the Faculty of Law of Parahyangan Catholic University.
[79] *Id*. at 58. Subekti was a professor of law and dean of the Faculty of Law of the University of Indonesia.
[80] *Id*. at 57 (1993). Mertokusumo was a professor of law in Gadjah Mada University in Yogyakarta.
[81] *Id*. at 59-60 and 63.
[82] *See* Bank America National Trust, at 311-312.
[83] *See* Astro Nusantara International, at 21-22.
[84] *See* Astro Nusantara International, at 29. Sumampouw left the University of Indonesia to join T. M. C. Asser Institute in the Netherlands.
[85] *See* Direct Vision, at 30-31. Rajaguguk is a professor of law in the University of Indonesia.
[86] *See* Astro Nusantara International, at 21-22.
[87] *See* Direct Vision, at 11.
[88] *See* Bungo Raya Nusantara, at 30.

Fourth, opinion of retired justice is also of some assistance. M. Yahya Harahap's books were quoted in *Astro Nusantara International*,[91] *Direct Vision*,[92] and *Lirik Petroleum (2010)*.[93] In the first case Harahap also gave expert's testimony for Astro Nusantara International *et al*.

Finally, opinion of legal practitioner having peer group recognition is also importance. This was the case in *Bank America National Trust*, where the opinion of Fred Tumbuan, a counsel for APP, was used by one of petitioners to build its case.[94]

Sometimes it was the courts that cited the works of legal scholars. The *ratio decidendi* of *Lie Kwien Hien* was built on the opinions of Kollewijn, Lemaire, and Wertheim.[95] In construing public order for *Karaha Bodas (2004)* the Central Jakarta District Court relied on the opinion of Rajagukguk.[96]

4.2.5.2 *Rationale for Citations*

Opinions of legal scholars and practitioners above can be classified into four categories. The first is to identify what is the positive law. In *Lie Kwien Hien* the Jakarta District Court formed an opinion on the law applicable for Chinese nationals based on works of Lemaire because Indonesian law was not explicit on that matter.

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[89] *See* Lirik Petroleum (2010), at 59 *passim*. Juwana is a professor of law and former dean of the Faculty of Law of the University of Indonesia.
[90] *See* Lirik Petroleum (2010), at 59 and 68. Adolf is a professor of law at Padjadjaran University in Bandung, West Java.
[91] *See* Astro Nusantara International, at 13-14, 20 and 31.
[92] *See* Direct Vision, at 10-11.
[93] *See* Lirik Petroleum (2010), at 77 and 87.
[94] *See* Bank America National Trust, at 121 and 238-239. Tumbuan is also a registered arbitration in the Indonesian National Board of Arbitration. He was one of the arbitrators in *Lirik Petroleum (2010*).
[95] *See* G 1 (1992): 64-66. All of these scholars were professors of law at the *Rechtshogeschool* in Jakarta.
[96] *See supra* note 135 at ch. 3.

It is true that article 16 AB only deals with laws applicable to Indonesian nationals while abroad.[97] Although the article is not clear-cut, based on analogy it can be concluded that foreigners in Indonesia are subject to their national laws. However the Jakarta District Court found it important to have scholar's opinion before arriving to conclusion.

The second is to interpret the positive law. In *Lirik Petroleum (2010)*, legal scholars explained to the courts what constituted "international arbitral awards".[98] Apparently the petitioner found it important to have the backing of scholars' opinion in explaining to the courts that territorial aspect is determinant for the qualification of "international arbitral awards".

The third is to explain judicial decisions pertinent to a case. This category may go hand in hand with the second. For instance in *Lie Kwien Hien*, the court placed reliance on Wertheim's comments on how the Medan Court of Justice (*Raad van Justitie*) applied provisions of the Civil Code on divorce to determine potential violation of public order.

Finally it is to construe the Indonesian public order. This category is commonsensical. Oftentimes the law is not explicit. But since the problem may have repercussions, it is understandable why the petitioner or the court seeks scholars' opinion.

Putting a tendency to cite legal scholars into the perspective of Indonesia's legal pluralism reveals a salient feature of Indonesian law. It is professorial because the writings of professors are authoritative for the understanding and interpreting the law. The tendency partly shows that the parties and the courts are conscious of complexities of Indonesian law. Although written positive law is available, pluralism of sources of law requires them to also it not only in

[97] "The laws relating to the status and capacity of a person are binding upon [Indonesian] subject when residing abroad."
[98] *See* Arb. Act, art 1.9 reads, "International Arbitral Award is an award granted by an arbitration institution or individual arbitrator outside the jurisdiction of the Republic of Indonesia, or an award granted by an arbitration institution or individual arbitrator based on the laws of the Republic of Indonesia is considered as an international arbitral award."

light of Indonesian legal history but also competing unwritten law. Scholars' opinion may serve as a useful guide or give a direct bearing on the outcome of a case.

4.3 SECTION B: WHY INDONESIA NEEDS COHESION DEVICE

The national motto, *Bhinneka Tunggal Ika*, epigrammatically states that Indonesia is built on the ideas of oneness and pluralism. The legal system made major contribution to the building up of these ideas. The legal system of the Netherlands Indies was enabler of unity for the people of the archipelago. Its successor, the Indonesian legal system, took up the baton and tolerated pluralism. Although there is legal unity, it cannot be said coherent.

The practice of the law, as I have discussed in chapter 3, demonstrates the incoherence. The courts have treated public order issues inconsistently. Courts' practice reveal five telling facts useful to cast light on the inconsistency. All in all they show that inconsistency in the practice has its roots in the incoherence. The legal system, though unified, is pluralistic. The unified legal system is also syncretic. It takes notions of law from Western and adat law. When these notions or principles are in conflict the courts have been inconsistent.

It brings me back to the discussion in chapter 1. Indonesia has been trying to fabricate its legal system. The six stages of development show that internal and external pressures have influenced the attempt. At all times legal development is to attain unity while maintaining ample room for pluralism.

Public order issues necessitate correct treatment. It must be proper, so that the interests of the legal system will be protected. It must also be consistent, so that the outcome can be predictable. Therefore incoherent legal unity, inconsistent practice and legal development are the reasons for a cohesion device.

4.3.1 *Incoherent Legal Unity*

In chapter 1 I have demonstrated that the history of Indonesian state and legal system runs parallel. The inception of Indonesian state owed to the Netherlands Indies having a unified legal system. The status quo of colonial legislation was needed initially to refrain from legal vacuum and maintain the unity. The touchstone of status quo was its conformity with the 1945 Constitution.

From almost every perspective Indonesia is pluralistic. Its society is anthropologically diverse. Its law is a hodgepodge, and to some extent syncretic, of notions of law from adat, Islamic, civil as well as common law. The pluralisms have been conserved politically by the national motto, *Bhinneka Tunggal Ika*, ideologically by *Pancasila*, and legally by the 1945 Constitution.

The same chapter has shown that a combination of Pancasila and the 1945 Constitution has stood the test of time. They were pivotal for Indonesia's independence. They became the rallying points for the nation during the Cold War and its aftermath. They have survived three stages of legal development – Guided Democracy, New Order, and the *Reformasi*. They have come in handy for authoritarian as well as democratic government. Thus Pancasila and the 1945 Constitution are the unifying instruments that have upheld the nation together.

Despite having Pancasila as the source of all sources of law and a hierarchy of law with the 1945 Constitution sits on its apex, Indonesia's legal unity remains incoherent. It is true that the restatement of the whole Pancasila in the Preamble to the 1945 Constitution creates a linear legal narrative between the ideology and the constitution. The legal narrative also exists between the 1945 Constitution and acts promulgated after independence. The hierarchy up to this point is coherent. However colonial legislation is on the outside.

Although theoretically the continuance effect of colonial legislation is subject to its conformity with the 1945 Constitution, as I have shown in chapter 1, in practice the test is complicated. It involves internal and external pressure, such as the prevailing political ideas of the time and international trade. Although the number of colonial legislation has greatly been reduced, the surviving ones such as the Civil Code remain of importance. As shown in chapter 3, the test may become philosophical in nature when the courts are to decide to what extent freedom of contract based on individualism can be tolerated in light of the nation's familial principle. The fact that the Civil Code remains a positive law for contractual obligation indicates an exception to the legal coherence.

The legal unity becomes more incoherent with respect to unwritten law. This source of law is acknowledged, for instance, by the judicature acts. The acts require judges to investigate the living legal values and society's sense of justice. Their logical consistency with Pancasila and the 1945 Constitution can only be presumed. Unlike the written law they may have limited territorial scope.

Unwritten law can transform to written law through legislation. This method will codify living legal values and society's sense of justice and have a nationwide territorial scope. Once codified they cease to exist as "the living" law of the former sense.

Another way of transforming the unwritten law is through court decisions. They will remain unidentified if judges do not launch investigation. Through court decisions judges assert them and simultaneously change their form to written law. Maintaining the coherence of legal unity requires judges to elaborate their investigation and findings in light of the 1945 Constitution. Even if this is the case, the transformed written law will remain on the outside of the hierarchy.

Court decisions, however, cannot maintain the coherence. One of the reasons is because the hierarchy does not recognize jurisprudence as a source of law. Another reason is because Indonesian does not recognize the principle of binding precedent.

4.3.2 *Inconsistent Practice*

Chapter 3 provides evidence of inconsistent practice of law. Although the legal system recognizes the importance of jurisprudence, the selected cases show that the courts made reference to it arbitrary. Moreover the Supreme Court may reverse its stance from previous jurisprudence without providing any explanation. It may also completely disregard jurisprudence put forward by petitioners without explanation either.

Such practice reveals three of the telling facts above. The courts have not consistently taken up their roles. This fact is, at least, supported by the decisions' lack of explanation. The court seems to get into confusion in determining whether freedom of contract took precedence over familial principle. Thus *Karaha Bodas (2004)* is not consistent with *ED & F Man (Sugar)*. The inconsistency reveals the coexistence of rule of law and rule of *kebijaksanaan*. Section A above also reveals systemic and practical challenges faced by the courts.

Systemic challenge that comes from the legal system itself calls upon the courts to step in. This study shows how the courts reacted to the problem is determined by the politico-legal structure. If the structure does not support independent judiciary, the courts will be susceptible to government policy. However if the structure supports independent judiciary, the courts may pursue its own agenda. It may correspond with national agenda, like *Lie Kwien Hien* and the pursuit of national law, or it may distance itself from government policy, like *Karaha Bodas (2004)* and coping with economic crisis.

Legal pluralism *per se* creates systemic challenges. What is the positive law, for instance, is debatable. On the one hand Indonesia has a written hierarchy of law. On the other hand judges are required to investigate the society's living legal values – or practically unwritten law. The pluralism of sources of law may be solved if the judges step in.

When the courts are faced with public order issue that has no clear-cut provision of law, the line between written and written law is blurred. At this junction the courts must overcome the systemic challenge before construing public order. When the issue is subject to written law, such as article 33 of the 1945 Constitution, the cases show, the challenge shifts to be practical.

This type of challenge, centered mainly in judges as operators and interpreters of the law, is more pressing. In *Bungo Raya Nusantara* and *Lirik Petroleum (2008)* the courts were called upon to consider public order in light of article 33 of the 1945 Constitution. The courts, however, were unresponsive. As discussed above the motion was not asking the courts to engage in judicial review, but merely interpreting the Constitution. I have shown that Indonesian law does not deny the Supreme Courts, and courts under its supervision, such power. Yet the courts were reluctant to execute the power.

If the courts deemed the power to interpret the Constitution was part and parcel of judicial review, they should have considered decisions of the Constitutional Court. However as evident in *Lirik Petroleum (2010)* the courts ignored a decision of the Constitutional Court pertinent to the interpretation of article 33 of the 1945 Constitution. It is unclear why the courts turned a blind eye on the interpretation. What is clear is that the courts have the law and the interpretation at their disposal.

Inconsistent decisions are also needed for external purpose. Consistent decisions on public order will give predictability to international world.

4.3.3 *Legal Development*

Chapter 1 demonstrates Indonesia's attempt to develop coherence out of pluralism. Law has been one of its tools. It tries to pick up the unity left by the Netherlands Indies, and makes necessary adjustment to the ideals of independence. This approach was carried out based on Article II of the Transitory Provisions of the 1945 constitutions. Indonesian history shows that legal development has been heavily influenced by the political ideas of the time. Based on this relation I divide legal development into six stages.

All of these stages share a common thread. The objective has been to develop a national law. How to execute this and what is the main substance of law have not been constant. In the fifties scholars reached a compromise on how to pursuit legal development. Legal issues were classified into sensitive and neutral. Legal pluralism was deemed practicable for the former, while unification could be pursued for the latter. In general this approach has been consistently carried out.

Promulgations of laws after independence have greatly added the number of written law. Consequently "national law" has been synonymous with written acts. Prior to the Amendments of the 1945 Constitution the President or the government had the initiative to legislate. Usually before the government submitted a bill to the DPR, it had assigned a group of scholars to prepare an academic draft analyzing related issues. Therefore it can be said that before it became a product of political compromise between the President and the DPR, an act was a scholarly product.[99] Despite promulgations of law the legal system continues to acknowledge unwritten law. However the so-called living legal values and society's sense of justice have to be identify.

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[99] This is the reason why Gautama claimed why his academic draft was basis for the Arbitration Act. *See supra* p. 136.

The unwritten law may have limited territorial scope at first. However once it is codified into a written form, its scope becomes nationwide.

The two-pronged development continues in the *Reformasi*. In addition to the above, the enactment of Act No. 11/2006 has shaped a new facet of Indonesia's legal pluralism. Based on the Act Islamic law applies in Aceh province under the framework of unitary state and the 1945 Constitution.[100] Since the *Reformasi* the number of banks and insurance companies adopting sharia system continues to proliferate. It can be concluded that in these sectors Indonesia has a dual-system each subject to different kind of law.

All of the six stages of legal development are happening under the framework of the 1945 Constitution. Throughout the stages there has been a shift in the trajectory of legal development. Nevertheless the objective remains the same, creating a national legal system. The means and substance, however, are altered due to the tolerance of pluralism.

4.3.4 *A Cohesion Device*

A cohesion devise needs to address all of the reasons above. It has to promote legal unity within the constitutional framework. This can be done internally within the hierarchy of law. Unfortunately this approach will involve a lot of time and has to go through a certain political process. It requires political will from both the government and the DPR. Even the authoritarian New Order did not choose, or perhaps opted out of, this option. The required political will is harder to get in the *Reformasi* where political aspirations are more diverse. The alternative is to have the device planted at the operating table: the court.

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[100] *See supra* pp. 47-48.

This approach is to capitalize on a tendency of professorial law. The courts have formed their opinion based on scholars' opinion. The parties have also used their opinions to build their arguments and persuade the courts.

The device is to mitigate inconsistent practice. Therefore it must be able to tackle the systemic problem. The main sources of this problem are the politico-legal structure and the salient feature of legal pluralism. Another problem, though not occurs consequentially, is practical. The selected cases show that inconsistency for the most part is a result of this problem.

The courts have been mostly reluctant to take its active roles. Their opinions have been short and unelaborated. The current fashion, obviously, does not conform to the 2009 Judicature Act. However this is something the courts, as an institution, have to deal with. For the purpose of mitigating inconsistency suffice it to say that the courts should be technically empowered.

4.4 Section C: How the Doctrine Serves as Cohesion Device

Gautama doctrine suggests that public order should be understood as "in compliance with Pancasila and the 1945 Constitution". The doctrine as such fulfills the criteria for a cohesion device. It has stood the test of time. Embedded in the legal system enables the doctrine to properly respond to the systemic challenge. However it may not do the same with the practical challenge.

4.4.1 *Doctrine Fulfills Cohesion Device Criteria*

Compliance with Pancasila and the 1945 Constitution brings about coherence to the legal unity. Externally it becomes the framework for the courts in examining the application of foreign law and enforcement of foreign award in Indonesia. It is also effective internally. For

instance, in the event of a conflict between legal principle of Western law and adat law, the compliance standard will set priority. Due to the nature of public order the priority has exceptional application, which therefore will not have effect on other issues in general.

The compliance standard will bring the courts in parallel position to legislator. In promulgating written law the legislator must provide a logical relation between an act and the Constitution. The relation expounds that the act is to implement the Constitution. The doctrine therefore converges judicial decisions and written law.

The compliance standard should also lessen inconsistency in decisions. It equips the courts with an operable framework to examine public order. It also provides a hint for disputants on the outcome of their disputes.

The doctrine does not make Indonesian court chauvinist. As I have explained in chapter 2 Gautama developed his doctrine after investigating the German and Japanese provision on public order. At international level the doctrine is consistent at least with the German and Japanese conception. Its national characteristic – i.e. the compliance standard – will not make the doctrine less consistent with internationally acknowledged practice, because the function of public order is to protect domestic interest.

Application of the doctrine will not create a nuisance to legal development. Assuming no shift in trajectory, legal development will continue to create unity while maintaining ample room for pluralism. The compliance standard has the same basis for legal development, i.e. Pancasila and the 1945 Constitution. Whether legal development is orchestrated by the government or takes the form of *Prolegnas,* the courts share its main rationale in examining public order issues.

4.4.2 *Selected Cases in Light of Doctrine*

Chapter 3 has displayed how the courts have interpreted public order without a framework. The results are a striking contrast between *ED & F Man (Sugar)* and *Karaha Bodas (2004)*; *Astro Nusantara International* and *Direct Vision*.

In *ED & F Man (Sugar)* the court considered and examined government economic policy. It found the policy was of vital importance to the nation and declared the sugar contracts void. The urgency of government economic policy was more compelling in *Karaha Bodas (2004)*. It was aimed not only for mitigating economic crisis but also convincing the IMF. However the Supreme Court turned a blind eye on rationale for the policy. Like the sugars contracts in *ED & F Man (Sugar)*, the JOC and the ESC had arbitration clause. Both arbitration panels had granted their awards. In *Karaha Bodas (2004)* the court opted out of intervention, which it made in *ED & F Man (Sugar)*.

If the courts applied the doctrine, the decisions would have been consistent. Because public order was to protect national interest, *Karaha Bodas (2004)* should at least have taken government policy into account. Although the Supreme Court might not be able to annul the foreign arbitral award, it could at least declare the award unenforceable due to violation of Indonesian public order. Such decision would give consistency to admissible cause in light of protection of national economy.

This decision would be coherent to article 33:1 of the 1945 Constitution. It states that the economy must be based on the familial principle. For the purpose of national economy it would be consequential to put aside freedom of contract. In other words arbitration clause and arbitral awards would be canceled.

The striking contrast between *Astro Nusantara International* and *Direct Vision* could have been avoided, if the courts applied the doctrine. They would immediately dismiss any argument of public order because the parties' contractual relationship was purely commercial. In light of the 1945 Constitution public order was a non-issue. Ayunda Primamitra *et al* were private entities and their contract was fully subject to freedom of contract. Thus *Astro Nusantara International* should have reached the same judgment with *Direct Vision* – the dispute had to be settled by arbitration as per their contract.

Pertamina EP and Pertamina initiated *Lirik Petroleum (2011)* because the Supreme Court was unresponsive to their public order argument based on article 33:2-3 of the 1945 Constitution in *Lirik Petroleum (2010)*. The Court ignored the same argument in *Bungo Raya Nusantara*. Application of the doctrine would compel the courts to respond to any argument based on the 1945 Constitution. By responding to the argument the Court would be consistent with the compliance standard. If in its response the Supreme Court referred to a decision of the Constitutional Court pertinent to the article, it would assert consistent interpretation. Even if the Court decided to interpret the article itself, it would not be less consistent.

4.4.3 *Effective Balance*

The doctrine has proven itself politically correct and legally consistent. The compliance standard – Pancasila and the 1945 Constitution – have survived political turbulence. The change of government from Sukarno to Suharto, and from the authoritarian New Order to democratic of the *Reformasi* had no entail upon the ideology. Instead Pancasila became the rallying point for political change.

The MPR has made four amendments to the 1945 Constitution. The reason, it was argued, was to have a system of checks-and-balances. However the Amendments have no effect on the doctrine as a framework for determining public order. Instead independent judiciary should be more encouraged to apply the doctrine. The Amendments have kept article 33:1-3 that is of vital importance to the doctrine intact.

The genius of the doctrine lies in the fact that it has sailed through political turbulence, but remained relevant to the legal system. In other words the doctrine in using compliance standard has struck an effective balance between political aspect and legal development in Indonesia to stay operable.

4.4.4 *Practical Challenge Remains*

The doctrine however is not perfect. Although it may have tacked most of the systemic challenge, it remains a device to be operated by judges. Therefore it is susceptible to the practical challenges. If judges reluctant to apply the doctrine, court decisions involving public order issue will remain inconsistent.

One of the assumptions of the doctrine is high level of judicial discretion. Since independent judiciary is already in place, judges should not have obstacle to exercise judicial discretion. The execution however is a general issue of decision-making. Court practice, selected cases aside, shows evident that rule of *kebijaksanaan* eclipses rule of law.

Rule of *kebijaksanaan* may also triumph over rule of law in another assumption. Public order is very much concerned with public opinion. Here it will take the form either the living law or the society's sense of justice. While rule of *kebijaksanaan* creates policy for the sake of

public interest, rule of law aims at upholding supremacy of law. As long as judges do not exercise *kebijaksanaan* arbitrarily, court decisions will have consistent outcomes.

4.5 Conclusion

This chapter begins with identifying five facts evident in the selected cases. The facts are useful to understand why the courts have treated public order arguments inconsistently. The facts explain that the courts had to deal with systemic and practical challenges. If public order is to protect the interest of the legal system, then it must have coherence. The discussion continues with answering a question why Indonesia needs a cohesion device. The answer to the question is related to Indonesian legal history and the pursuit of national legal system. Subsequently I demonstrate that the doctrine fulfills all criteria for a cohesion device. However its application is entirely on the hands of Indonesian judges.

The five telling facts complement my demonstration that Indonesian legal system should be analyzed with reference to Indonesian history and culture. This chapter adds explanation on the role of the courts and the existence of rule of *kebijaksanaan*. The pursuit of national law has made Indonesian law pluralistic and syncretic. Unsettled roles of the courts and rule of *kebijaksanaan* in this context are inevitable.

I have also demonstrated that Gautama doctrine is operable for Indonesian private international. This chapter makes clear that the doctrine keeps public order at exceptional level. Its compliance standard keeps the bar high for examining public order. As a cohesion device it also restricts public order issues. The doctrine is also effective internationally because it develops from German and Japanese conceptions.

Finally I have finished up proving Proposition 5. Chapter 2 has shown that development and assumptions of the doctrine. Chapter 3 has shown that lack of framework leads to inconsistent treatment on public order. In this chapter I discuss the selected cases using the doctrine and show more consistent outcomes.

Chapter 5

CONCLUSION

"Geordend denken en geordend doordenken."[1]

Law as a set of ideas embodied in legal system is to support ideals cherished by a society. An investigation on Indonesian law requires one to think orderly within the context of Indonesian society. From this point of departure, this study investigates the public order of Indonesian private international law. This study demonstrates that the Indonesian society holds dear the *sine qua non* of oneness and diversity. Given the ideals of Indonesian society, it requires one to make a breakthrough in orderly manner as well. Consequently for public order to protect the interests of the legal system, its meaning and substance must be put into the context of Indonesian society.

This dissertation begins with a historical exposition about the road to nationhood. The concept of "Indonesia" is a twentieth century invention that has its origin in the colonial society of its predecessor, the Netherlands Indies. The study explains that there was a close connection between political ideal – a nation-state – and law – the Netherlands Indies as a legal unit. Legal unity, however loose, was an enabler for the rise of nationhood. This had made Indonesian legal system in many respects a carryover from the Netherlands Indies legal system. The study then shows that the close connection between politics and law continues to this date.

[1] "Orderly thinking and orderly breakthrough thinking." Statement made by Djokosoetono to his students as the University of Indonesia. *See* Abdulkadir Besar, "Negara Persatuan" Citanegara Integralistik Anutan UUD 1945", ed. Soemardjan, *supra* note 141 at ch. 1, at 105.

The Indonesian state has strived to eliminate most of its inherited aspects of colonial society. Ideologically, this is made by having a *Weltanschauung*. As an ideology Pancasila unifies the peoples of the archipelago in a nation-state. It also positions Indonesia on the world and international society. The ideology is restated in the Preamble to the 1945 Constitution. Legally speaking, it becomes a logical narrative that creates the hierarchy of law.

The existence of Pancasila as a worldview unfolds an interesting fact about Indonesia. It shows that Indonesia tries to put its domestic as well as international affairs on balance. The study points out that the archipelago's geographical position is instructive. The peoples, though sharing cultural similitude, are distinctive societies with their own traits. Located in the crossroad of international commerce, they have received foreign culture and influence from the four corners of the earth. As a result, the Indonesian society maintains its indigenous traits, while to some extent has syncretic culture.

The Indonesian society adopts this dual approach in all respects. The national motto speaks clearly on the pursuit of oneness while cherishing diversity. The legal system is no difference. It is built upon notions of law from various origins – adat law, Islamic law, civil law, and common law. Regardless the reason for this dual approach, this study shows that oneness and diversity are inevitable for the society.

The development of national law is a battleground for conflicting ideas or forces. Initially, Indonesia had to choose whether it would unify or harmonize the law. Later, it had to decide whether adat law or Western would be the basis for national law. Sometimes pragmatism trumps idealism. A case in point is the augmentation of the Civil Code, which was originally applicable for a small part of the colonial society, due to the demands of international trade. For the most part, Indonesia is always in pursuit of idealism. This is the case for example with the

coexistence of rule of law and rule of *kebijaksanaan*. The former is to refine the latter. Another form of response to conflicting ideas is syncretism. The study indicates that active judges that are responsible to maintain social harmony have its origin in adat law. Their passive role is attributed to civil law. Subsequently Indonesian judges have syncretic traits as stipulated in various laws on civil procedure.

Balance becomes the keyword for executing the dual, but conflicting, approach. The legal system was, and is, a unifying force for the peoples of the archipelago. In the meantime, it makes ample room for pluralism. Indonesia has struck a balance between centrifugal and centripetal forces using Pancasila and the 1945 Constitution. On the one hand, it allows the status quo of colonial legislation. On the other hand, the legislation becomes obsolete when it is in conflict with the spirit of independence. This method avoids legal vacuum while outsmarting impediment to promulgating national legislation.

Based on the politics and law relation, the study divides national law development into six stages. The stages show the wax and wane of (in)dependent judiciary, the rise and fall of authoritarian governments, the adoption of different kinds of democracy, and a series of amendments to the Constitution. Despite different emphasis in the development, the stages share a common thread – Pancasila and the 1945 Constitution. The legal system has continued its function as a unifying instrument for the nation. However, as the study shows, it lack of coherence.

The coherence should take the form of statutory compliance with Pancasila and the 1945 Constitution. This is not only a consequence of the idea of Indonesia, but also the hierarchy of law. Gautama had this in mind when he prescribed his doctrine on public order of Indonesian private international law.

The doctrine developed from a comparative study to align Indonesia to the world. Gautama looked to the practice in Germany and Japan for developing his proposal. These countries use public order as a defensive mechanism to protect the interests of their legal system. The emphasis is on whether application of foreign law has repercussion on national interests. Internally, the doctrine tries to support the development of Indonesian law. It tries to maintain unity and create coherence for the legal system.

The courts, however, did not apply the doctrine in the selected cases. It is unclear why the courts chose to be ignorant. What was clear is courts' treatment of public order argument has been inconsistent and incoherent. Without a clear framework, it is unclear what was considered as public order. The condition worsened by the courts being unresponsive most of the time. A *prima facie* observation may conclude that the practice is unintelligible.

If public order is to protect the interests of the legal system, it must be carefully construed. The practice of the courts, obviously, will lead to uncertainty about the public order of Indonesian law, not only with respect to PIL but also law in general. Consistent and predictable application of public order is needed for development of national law as well as international trade.

This study tries to examine the legal surrounds of the cases. In order to understand the courts' reaction to public order argument, the study correlates the stages of legal development with the politico-legal structure. This, among other things, reveals the role of the courts – a result of legal syncretism. The relationship between politics and law and legal pluralism create confusion in legal thinking. Democracy has supported judicial independence. However, it so far fails to create judicial accountability. This is evident in the discrepancy between the parties' expectation for courts' intervention and the courts' perception of their role. Some of the cases

show the courts upheld rule of law – at least in the sense of asserting provisions of statutory law. Other cases show that the courts used discretion, and therefore they exercised rule of *kebijaksanaan*.

Close examination on the courts' practice and Indonesian legal system finds two types of challenge with respect to inconsistent application of public order. The first type is systemic challenge posed by intrinsic impediment of the legal system. On the one hand what constitutes public order calls for legal coherence. Protecting public order on the other hand requires ample room for judicial maneuver. The second type is practical challenge centered mainly in judges. As the steward of public order they must be able to juggle their legal knowledge with the ideal of socio-economic trajectory of the society. In practice they are caught in confusion due to the pluralistic characters of the legal system.

Coherence has been the legal system affairs. An examination on public order has partly shown that the legal system lack of coherence aside from Pancasila and the 1945 Constitution. The most amenable way to outsmart Indonesia's layers of pluralism – political, anthropological, and legal – is to let public order gravitates to Pancasila and the 1945 Constitution. Here public order will support whatever coherence the legal system can attain either evolutionary or revolutionary.

If public order is closely attached to Pancasila and the 1945 Constitution, it will be predictable. In the future the courts will have to examine any public order argument in light of Pancasila and the 1945 Constitution. The use of Pancasila and the 1945 Constitution as points of reference of public order will not alienate Indonesia from the rest of the world. The study has shown that by doing so Indonesia joins up with Germany and Japan in using fundamental law as

the touchstone of public order. Thus it also handles well external, foreign or centripetal force that has shaped the development of Indonesian law.

Internally, Pancasila and the 1945 Constitution are the focal points for legal development. The use of them with regard to public order will at least provide status quo on the trajectory of national law. Although the legal system in general is striving for coherence, at least its foundation remains solid. From this perspective public order will encourage further development of national law.

Coherence, consistency, and legal development are the keywords for Indonesian law. These are the criteria for cohesion device that the legal system needs as a unifying instrument. As the study has shown the doctrine fulfills all of the criteria. Furthermore the doctrine suits well with the criterion for orderly breakthrough demanded by legal science as stated in the above quotation.

APPENDIX: IMPORTANT ARTICLES OF LAW

The 1945 Constitution

Art 33:1 The economy shall be organized as a common endeavor based upon familial principle.

Art 33:2 Sectors of production that are vital to the state and that are controlling the livelihood of the people are controlled by the state.

Art 33:3 The land, the waters, and the natural resources therein are controlled by the state and shall be used for the greatest prosperity of the people.

AB

Art 16 The laws relating to the status and capacity of a person are binding upon [Indonesian] subject when residing abroad. [deleted: obsolete after independence.]

Art 17 Immovable property is governed by the law of the country or the place where such property is situated.

Art 18 The form of all juridical acts is determined by the laws of the country or the place where such acts have been performed.

In applying this article and articles above, attention should be given to differences made by laws for Europeans and Indonesians.

Art 23 Law concerning public order or good morals cannot lose its binding effect by means of action or contract.

Civil Code

Art 208 Divorce may never take place by mutual consent.

Art 1320 In order to be valid, an agreement must satisfy the following four conditions: 1. there must be consent of the individuals who are bound thereby; 2. there must be capacity to conclude an agreement; 3. there must be a specific subject; 4. there must be an admissible cause.

Art 1337 A cause is not permissible if it is prohibited by law, or if it violates good conduct, or public order.

Art 1338 All legally executed agreements shall bind the individuals who have concluded them by law.

They cannot be revoked otherwise than by mutual agreement, or pursuant to reasons which are legally declared to be sufficient.

They shall be executed in good faith.

Arbitration Act

Art 66 International Arbitration Awards will only be recognized and may only be enforced within the jurisdiction of the Republic of Indonesia if they fulfill the following requirements:

(a) The International Arbitration Award must have been rendered by an arbitrator or arbitration tribunal in a country which, together with the Republic of Indonesia, is a party to a bilateral or multilateral treaty on the recognition and enforcement of International Arbitration Awards.
(b) International Arbitration Awards, as contemplated in item (a) above, are limited to awards which, under the provisions of Indonesian law, fall within the scope of commercial law.
(c) International Arbitration Awards, as contemplated in item (a), above, may only be enforced in Indonesia if they do not violate public order.
(d) An International Arbitration Award may be enforced in Indonesia only after obtaining an order of exequatur from the President of the Central Jakarta District Court.
(e) An International Arbitration Award, as contemplated in item (a), in which the Republic of Indonesia is one of the parties to the dispute, may only be enforced after obtaining an order of exequatur from the Supreme Court of the Republic of Indonesia, which order is then delegated to the Central Jakarta District Court.

Art 70 An application to annul an arbitration award may be made if any of the following conditions are alleged to exist:

(a) letters or documents submitted in the hearings are acknowledged to be false or forged or are declared to be forgeries after the award has been rendered;
(b) after the award has been rendered documents are found which are decisive in nature and which were deliberately concealed by the opposing party; or
(c) the award was rendered as a result of fraud committed by one of the parties to the dispute.

N.Y. Convention

Art V:1 Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement refereed to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid

under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

Art V:2 Recognition and enforcement of arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

Art VI If an application for the setting aside or suspension of the award has been made to a competent authority refereed to in article V (1) (e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

BIBLIOGRAPHY

Books

Abdulgani, Ruslan. *Hukum dalam Revolusi dan Revolusi dalam Hukum*. Djakarta: Prapantja, 1964.

Adams, Cindy. *Sukarno: An Autobiography*. Kansas City: Bobbs-Merrill, 1965.

Ali, Mohammad Daud. *Kedudukan Hukum Islam dalam Sistem Hukum Indonesia*. Jakarta: Yayasan Risalah, 1984.

Alisjahbana, St. Takdir. *Indonesia: Social and Cultural Revolution*. Kuala Lumpur: Oxford University Press, 1966.

Allen, Carleton Kemp. *Law in the Making*. Oxford: Clarendon Press, 1939.

American Society of International Law, and Nederlandse Vereniging voor Internationaal Recht. *Contemporary International Law Issues: New Forms, New Applications, proceedings of the Fourth Hague Joint Conference, The Hague, July 2-5, 1997*. The Hague: T.M.C. Asser Instituut, 1998.

Anderson, Benedict R. O'G. *Imagined Communities: Reflections on the Origin and Spread of Nationalism*. New York: Verso, 2006.

Andreae, S. J. Fockema, Nikolaas Egbert Algra, and H. R. W. Gokkel. *Kamus Istilah Hukum Fockema Andreae: Belanda-Indonesia*. Jakarta: Bina Cipta, 1983.

Antons, Christoph. *Intellectual Property Law in Indonesia*. Boston: Kluwer Law International, 2000.

ASEAN Law Association. *ASEAN Legal Systems*. Singapore: Butterworths Asian, 1995.

Asshiddiqie, Jimly. *The Constitutional Law of Indonesia*. Petaling Jaya: Sweet & Maxwell Asia, 2009.

Badan Pembinaan Hukum Nasional. *Lokakarya Hukum Perdata Internasional*. Jakarta: Badan Pembinaan Hukum Nasional, 1984.

–––. *Kamus Hukum Umum*. Jakarta: BPHN, 2004.

–––. *Sejarah Badan Pembinaan Hukum Nasional*. Jakarta: Badan Pembinaan Hukum Nasional, 2005.

Badan Pusat Statistik. *Sensus Penduduk Indonesia, 2000*. Jakarta: Badan Pusat Statistik, 2005.

Ball, John. *Indonesian Legal History 1602-1848*. Sydney: Oughtershaw Press, 1982.

Besar, Abdulkadir. "Negara Persatuan" Citanegara Integralistik Anutan UUD 1945." In *Guru Pinandita, Sumbangsih untuk Prof. Djokosoetono, S.H.*, edited by Selo Soemardjan, 101-152. Jakarta: Penerbit Fakultas Ekonomi Universitas Indonesia, 2006.

Bingham, Tom. *The Rule of Law*. New York: Allen Lane, 2010.

Braake, Alex ter. *Mining in the Netherlands East Indies*. New York: Institute of Pacific Relations, 1944.

Bousquet, G. H. *A French View of the Netherlands Indies*. Translated by Philip E. Lilienthal. London: Oxford University Press, 1940.

Budidjaja, Tony. "Arbitration in Indonesia." In *International Commercial Arbitration in Asia*, edited by Shahla F. Ali and Tom Ginsburg, 187-222. Huntington, NY: Juris, 2013.

Burns, Peter. *Concepts of Law in Indonesia*. Leiden: KILTV Press, 2004.

Colijn, H. *Koloniale Vraagstukken van Heden en Morgen*. Amsterdam: NV Dagblad & Drukkerij de Standaard, 1928.

David, René, and Henry P. de Vries. *The French Legal System: An Introduction to Civil Law Systems*. New York: Oceana Publications, 1958.

David, René, and John E. C. Brierley. *Major Legal Systems in the World Today*. 3rd ed. London: Stevens, 1985.

Dicey, A. V., J. H. C. Morris, and L. A. Collins. *Dicey and Morris on the Conflict of Laws*. London: Sweet & Maxwell, 2000.

Dawson, John P. *The Oracles of the Law*. Ann Arbor: University of Michigan Law School, 1968.

Department of Economics Affairs, Central Bureau of Statistics of the Netherlands Indies. *Statistical Pocketbook of Indonesia 1941*. Batavia, Java: Koninklijke Boekhandel en Drukkerijen G. Kolff & Co., 1947.

Department of Information of the Republic of Indonesia. *The Bremen Tobacco Case*. Jakarta: Department of Information of the Republic of Indonesia, 1960.

Dolinger, Jacob. "In Defense of the "General Part" Principles." In *International Conflict of Laws for the Third Millennium: Essays in Honor of Friedrich K. Juenger*, edited by Patrick J. Borchers and Joachim Zekoll. New York: Transnational Publishers, 2001.

Ehrenzweig, Albert A., and Erik Jayme, *Private International Law: A Comparative on American International Conflicts Law, including the Law of Admiralty, Vol. 3, special part: obligations (contracts, torts)*. New York: Oceana, 1977.

Elson, R. E. *The Idea of Indonesia: A History*. Cambridge: Cambridge University Press, 2008.

Fasseur, C. "Colonial Dilemma: Van Vollenhoven and the Struggle between Adat Law and Western Law." In *European Expansion and Law: The Encounter and Indigenous Law in 19th- and 20th-Century Africa and Asia*, edited by W. J. Mommsen and J. A. de Moor, 237-256. New York: Berg, 1992.

Fletcher, George P., and Steve Sheppard. *American Law in a Global Context*. New York: Oxford University Press, 2005.

Gandasubrata, Purwoto. "Tugas Hakim Indonesia." In *Guru Pinandita, Sumbangsih untuk Prof. Djokosoetono, S.H.*, edited by Selo Soemardjan, 591-609. Jakarta: Penerbit Fakultas Ekonomi Universitas Indonesia, 2006.

Gautama, Sudargo. *Pembaharuan Hukum di Indonesia*. Bandung: Alumni, 1973.

—–. *Hukum Antar Tata Hukum: Kumpulan Karangan*. Bandung: Alumni, 1977.

—–. *Hukum Antargolongan: Suatu Pengantar*. Jakarta: Ichtiar Baru, 1980.

—–. *Masalah-masalah Baru Hukum Perdata Internasional*. Bandung: Alumni, 1984.

—–. *Pengantar Hukum Perdata Internasional Indonesia*. Jakarta: Bina Cipta, 1987.

—–. "Indonesia." In *International Business Series: Legal Aspects of Doing Business in Asia and the Pacific*, vol. 3, edited by Dennis Campbell, 193-226. Deventer: Kluwer Law and Taxation Publishers, 1984.

—–. *Hukum Perdata Internasional Indonesia*, vol. 2 part 3, bk. 4, *Ketertiban Umum* and *Penyelundupan Hukum*. Bandung: Citra Aditya Bakti, 1989.

—–. *Indonesian Business Law*. Bandung: Citra Aditya Bakti, 1995.

—–. *Warga Negara dan Orang Asing*. Bandung: Alumni, 1997.

—–. *Arbitrase Luar Negeri dan Pemakaian Hukum Indonesia*. Bandung: Citra Aditya Bakti, 2004.

Gautama, Sudargo, and Robert N. Hornick. *An Introduction to Indonesian Law: Unity in Diversity*. Bandung: Alumni, 1983.

Geertz, Clifford. "Local Knowledge: Fact and Law in Comparative Perspective." In *Local Knowledge: Further Essays in Interpretive Anthropology*, edited by Clifford Geertz, 167-234. New York: Basic Books, 1983.

Gould, James W. *Americans in Sumatra*. The Hague: Martinus Nijhoff, 1961.
Gouw, Giok Siong. *Segi-segi Hukum Internasional pada Nasionalisasi di Indonesia*. Djakarta: Universitas, 1960.
Grotius, Hugo. *Hugo Grotius Freedom of the Seas or the Right Which to the Dutch to Take Part in the East Indian Trade*, vol. 1. Translated by Ralph Van Deman Magoffin. Edited by James Brown Scott. New York: Oxford University Press, 1916.
Guarnieri, Carlo, and Patrizia Pederzoli. *The Power of Judges: A Comparative Study of Courts and Democracy*. English edited by C. A. Thomas. Oxford: Oxford University Press, 2002.
Haar, Barend Ter. "Western Influence on the Law for the Native Population." In *The Effect of Western Influence on Native Civilization in the Malay Archipelago*, edited by Schrieke, B., 158-170. Batavia, Java: G. Kolff & Co., 1929.
——. *Adat Law in Indonesia*. Edited with introduction by E. Adamson Hoebel and A. Arthur Schiller. New York: Institute of Pacific Relations, 1948.
Hardjowahono, Bayu Seto. *Dasar-dasar Hukum Perdata Internasional*. Bandung: Citra Aditya Bakti, 2006.
Hartono, C. F. G. Sunaryati. *Peranan Peradilan dalam Rangka Pembinaan dan Pembaharuan Hukum Nasional*. Jakarta: Bina Cipta, 1975.
——. *Apakah Rule of Law Itu?* Bandung: Alumni, 1976.
——. *Bhinneka Tunggal Ika sebagai Asas Hukum bagi Pembangunan Hukum Nasional*. Bandung: Citra Aditya Bakti, 2006.
Hartono, Sunaryati C. F. G., Astrid S. Susanto, and R. M. Surachman. *Political Change and Legal Reform towards Democracy and Supremacy of Law in Indonesia*. Chiba-shi: Institute of Developing Economies, 2002.
Hatta, Mohammad. "Lampau dan Datang." Speech upon receiving doctor honoris causa, Gadjah Mada University, Yogyakarta, November 27, 1956.
——. *Memoir*. Jakarta: Yayasan Hatta, 2002.
Herzog, Peter, and Martha Weser. *Civil Procedure in France*. The Hague: Martinus Nijhoff, 1967.
Holmes, Jr., Oliver Wendell. *The Common Law*. With a new introduction by Sheldon M. Novick. New York: Dover, 1991.
Himawan, Charles. *The Foreign Investment Process in Indonesia*. Singapore: Gunung Agung, 1980.
Hurgronje, Christiaan Snouck. *The Acehnese (De Atjehers)*. Translated by A. W. S. O'Sullivan. Leiden: E. J. Brill, 1893.
Ittersum, Martine Julia van. *Profit and Principle: Hugo Grotius, Natural Rights Theories and the Rise of Dutch Power in the East Indies 1595-1615*. Leiden: Brill, 2006.
Java (Japanese Military Administration, 1942-1945), Komisi Bahasa Indonesia, S. Alisjahbana. *Kamoes Istilah I Asing-Indonesia*. Batavia, Java: [Japanese Military Administration?], 1945.
Kahin. George McTurnan. *Nationalism and Revolution in Indonesia*. Ithaca, NY: Cornell University Press, 2003.
Kartohadiprodjo, Soediman. *Pancasila sebagai Pandangan Hidup Bangsa Indonesia*. Edited by Achmad Suhardi Kartohadiprodjo et al. Jakarta: Gatra Pustaka, 2010.
Kennedy, R. *The Ageless Indies*. New York: John Day Co., 1942.
Kliken, Gerry van. *Minorities, Modernity and the Emerging Nation: Christians in Indonesian a Biographical Approach*. Leiden: KILTV Press, 2003.
Klerck, E. S. de. *History of the Netherlands East Indies*, vol. 1. Rotterdam: WL & J Brusse, 1938.

Ko, Swan Sik, and Teuku Moh. Rhadie. “Nationality and International Law in Indonesian Perspective.” In *Nationality and International Law in Asian Perspective*, edited by Ko Swan Sik. Dordrecht: Martinus Nijhoff, 1990.

Kollewijn, R. D. “Interracial Private Law (The Colonial Conflict of Laws).” In *The Effect of Western Influence on Native Civilization in the Malay Archipelago*, edited by Schrieke, B., 204-236. Batavia, Java: G. Kolff & Co., 1929.

——. *American-Dutch Private International Law*. New York: Oceana, 1961.

Kroef, Justus M. van der. *Indonesia after Sukarno*. Vancouver: University of British Columbia Press, 1971.

Kusuma, A. B. *Lahirnya Undang-Undang Dasar 1945*. Depok: Penerbit Fakultas Hukum Universitas Indonesia, 2004.

Kusumaatmadja, Mochtar. “The Role of Law in Development: The Need for Reform of Legal Education in Developing Countries.” In *The Role of Law in Asian Society*, ed. Special Congress Session of the 28th International Congress of Orientalists. N.p.: International Congress of Orientalists[?], 1973.

——. *Pembinaan Hukum dalam Rangka Pembangunan Nasional*. Jakarta: Bina Cipta, 1975.

Lagarde, Paul. “Public Policy.” In *International Encyclopedia of Comparative Law*, vol. 3, part 1, *Private International Law*, ch. 11, edited by Kurt Lipstein, 3-61. Leiden: Martinus Nijhoff, 2011.

Lasser, Mitchel de S.-O.-L’E. *Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy*. Oxford: Oxford University Press, 2004.

Leur, J. C. van. *Indonesia Trade and Society: Essays in Asian Social and Economic History*. The Hague: W. van Hoeve, 1955.

Lie, Oen Hock. *Yurisprudensi sebagai Sumber Hukum*. Djakarta: Fakultas Hukum Universitas Indonesia, 1959.

——. “Hakim dan Hukum Tidak Tertulis.” In *Cinerama Hukum di Indonesia Himpunan Karangan di Beberapa Bidang Hukum in Memoriam Prof. R. Djokosutono*. Bandung: Eresco, 1971.

Linnan, David K. “Indonesian Law Reform or Once More unto the Breach: A Brief Institutional History.” In *Indonesia After Suharto: Reformasi and Reaction*, edited by Drew Duncan and Timothy Lindsey, 107-136. Victoria, BC: Center for Asia-Pacific Initiatives, 1999.

Lev, Daniel S. *The Transition to Guided Democracy: Indonesian Politics, 1957-1959*. Ithaca, NY: Cornell University, 1966.

——. “Law and State in Indonesia.” In *Law Reform in Developing and Transitional States*, edited by Tim Lindsey. New York: Routledge, 2007.

——. “A Tale of Two Legal Professions: Lawyers and State in Malaysia and Indonesia.” In *Raising the Bar: The Emerging Legal Profession in East Asia*, edited with an introduction by William P. Alford, 383-414. Cambridge, MA: East Asian Legal Studies, Harvard Law School, 2007. Distributed by Harvard University Press.

Lith, P. A. van der, A. J. Spaam, and F. Fokkens. *Encyclopaedië van Nederlandsch-Indië,* vol. 1. Leiden: Martinus Nijhoff, 1894.

Lith, P. A. van der. *Encyclopaedië van Nederlandsch-Indië,* vol. 2. Leiden: Martinus Nijhoff, 1897.

Lockhart, R. H. Bruce. *Return to Malaya*. New York: GP Putnam's Sons, 1936.

Longdong, Tineke Louise Tuegeh. *Asas Ketertiban Umum dan Konvensi New York 1958: Sebuah Tinjauan atas Pelaksanaan Konvensi New York 1958 pada Putusan-putusan Mahkamah Agung RI dan Pengadilan Asing*. Bandung: Citra Aditya Bakti, 1998.

Llyod, Dennis. *Public Policy: A Comparative Study in English and French Law*. London: University of London, 1953.

Lubis, Todung Mulya. *In Search of Human Rights: Legal-Political Dilemmas of Indonesia's New Order, 1966-1990*. Jakarta: Gramedia Pustaka Utama, 1993.

Maddison, Angus. *Contours of the World Economy, I-2030 AD*. Oxford: Oxford University Press, 2007.

Mahkamah Agung Republik Indonesia. *Naskah Akademis tentang Pembentukan Hukum Melalui Yurisprudensi*. Jakarta: Mahkamah Agung Republik Indonesia, 2005.

Marsden, William. *The History of Sumatra*. 3rd ed. Oxford: Oxford University Press, 1966.

Martin, Richard C., ed. *Encyclopedia of Islam and the Muslim World*, vol. 2. New York: Macmillan, 2004.

Masselman, George. The Cradle of Colonialism. New Haven, CT: Yale University Press, 1963.

Massier, A. W. H. *Beknopt Juridisch Woordenboek Indonesisch-Nederlands*. Leiden: Centrum voor Niet-Westerse Studies, Rijksuniversiteit Leiden, 1992.

Massier, Ab. *The Voice of the Law in Transition: Indonesian Jurists and Their Languages, 1915-2000*. Leiden: KILTV Press.

Meijer, M. J. *Marriage Law and Policy in the Chinese People's Republic*. Hong Kong: Hong Kong University Press, 1971.

Melalatoa, M. Junus. *Ensiklopedi Suku Bangsa di Indonesia*, vol. 1. Jakarta: Departemen Pendidikan dan Kebudayaan Republik Indonesia, 1995.

Merryman, John, and Rogelio Pérez-Perdomo. *The Civil Law Tradition*. Stanford, CA: Stanford University Press, 2007.

Mertokusumo, Sudikno. *Sedjarah Peradilan dan Perundang-undangannja di Indonesia Sedjak 1942 dan Apakah Kemanfaatannja bagi Kita Bangsa Indonesia*. Yogyakarta: Liberty, 1983.

——. *Hukum Acara Perdata Indonesia*. Yogyakarta: Liberty, 1981.

Nasution, Adnan Buyung. *The Aspiration for Constitutional Government in Indonesia: A Socio-legal Study of the Indonesian Konstituante, 1956-1959*. Jakarta: Pustaka Sinar Harapan, 1992.

Nasution, A. H. *Ketetapan-ketetapan MPRS Tonggak Konstitusional Orde Baru*. Djakarta: Pantjuran Tujuh, 1966.

North, Sir Peter, and J. J. Fawcett. *Cheshire and North's Private International Law*. 13th ed. London: Butterworths, 1999.

Oey, Hong Lee. *The Sukarno-Controversies of 1980/81*. Hull: University of Hull, Centre for South-East Asian Studies, 1982.

Oey, Pek Hong. *Peranan Kodifikasi, Jurisprudensi dan Ilmu Pengetahuan Hukum dalam Perkembangan Hukum Perdata*. Surabaya: Fakultas Hukum Universitas Airlangga, 1959.

Oppusunggu, Yu Un. "Gautama, Sudargo." In *A Biographical Dictionary of Chinese Descent in Southeast Asia*, edited by Leo Suryadinata, 273-276. Singapore: Institute of Southeast Asian Studies, 2012.

Parry, J. H. *Trade and Dominion: the European Overseas Empires in the Eighteenth Century*. London: Weidenfeld and Nicolson, 1971.

Partnership for Governance Reform in Indonesia. *Consolidating of the Rule of Law in Indonesia: Restoring Public Trust through Institutional Reform*. Jakarta: Partnership Secretariat, 2004.

Paulus, B. P. *Garis Besar Hukum Tata Negara Hindia Belanda*. Bandung: Alumni, 1979.

Pompe, Sebastiaan. *The Indonesian Supreme Court: A Study of Institutional Collapse*. Ithaca, NY: Cornell University Press, 2005.

Pound, Roscoe. *An Introduction to the Philosophy of Law*. New Haven, CT: Yale University Press, 1954.
Prodjodikoro, Wirjono. *Kenang-kenangan sebagai Hakim Selama 40 Tahun Mengalami Tiga Zaman*. Jakarta: Ichtiar Baru, 1974.
—–. *Hukum Acara Perdata di Indonesia*. Bandung: Sumur, 1978.
—–. *Asas-asas Hukum Perdata Internasional*. Bandung: Sumur, 1979.
Pudjosewojo, Kusumadi. *Pedoman Pelajaran Tata Hukum Indonesia*. Jakarta: Aksara Baru, 1976.
Purbacaraka, Purnadi, and Soerjono Soekanto. *Perihal Kaedah Hukum*. Bandung: Alumni, 1978.
—–. *Perundang-undangan dan Yurisprudensi*. Bandung: Alumni, 1979.
Rajagukguk, Erman. *Arbitrase dalam Putusan Pengadilan*. Jakarta: Chandra Pratama, 2000.
Resink, G. J. "The Significance of the History of International law in Indonesia." In *An Introduction to Indonesian Historiography*, edited by Soedjatmoko, Mohammad Ali, G. J. Resink, and G. McT. Kahin, 359-379. Ithaca, NY: Cornell University Press, 1965.
Safioedin, Asis. *Daftar Kata Sederhana tentang Hukum*. Bandung: Alumni, 1978.
Saleh, K. Wantjik. *Kehakiman dan Peradilan*. Jakarta: Ghalia Indonesia, 1977.
Salim, Arskal. *Challenging the Secular State: The Islamization of Law in Modern Indonesia*. Honolulu: University of Hawaii Press, 2008.
Sekretariat Negara Republik Indonesia. *Gerakan 30 September Pemberontakan Partai Komunis Indonesia*. Jakarta: Sekretariat Negara Republik Indonesia, 1994.
—–. *Risalah Sidang Badan Persiapan Usaha-usaha Persiapan Kemerdekaan Indonesia (BPUPKI) – Panitia Persiapan Kemerdekaan Indonesia (PPKI)*. Jakarta: Sekretariat Negara Republik Indonesia, 1998.
Sekretariat Umum Konperensi Medja Bundar. *Hasil-Hasil Konperensi Medja Bundar sebagaimana diterima pada Persidangan Umum yang kedua Terlangsung Tanggal 2 Nopember 1949 di Ridderzaal di Kota 'S-Gravenhage*. Djakarta: Kolff, 1950.
Simatupang, T. B. *Membuktikan Ketidakbenaran Suatu Mitos*. Jakarta: Penerbit Sinar Harapan, 1991.
Simorangkir, J. C. T. *Pembinaan Hukum Nasional bagi Masyarakat Indonesia*. Jakarta: Badan Pembinaan Hukum Nasional, 1980.
Sjah, St. Moh. "Pengumpulan Istilah Hukum: Beberapa Sumbangan Pikiran kepada Usaha Pembinaan Istilah Hukum Indonesia." In *Simposium Bahasa dan Hukum*, edited by Badan Pembinaan Hukum Nasional. Jakarta: Badan Pembinaan Hukum Nasional, 1976.
Slametmuljana. *Perundang-undangan Madjapahit*. Djakarta: Bhratara, 1967.
Soedirjo. *Mahkamah Agung*. Jakarta: Media Sarana Press, 1987.
Soekanto, Soerjono. *Hukum Adat Indonesia*. Jakarta: Rajawali, 2003.
Soemadiningrat, Otje Salman. *Rekonseptualisasi Hukum Adat Kontemporer*. Bandung: Citra Aditya Bakti, 2002.
Soemantri, Sri. *Hak Menguji Material di Indonesia*. Bandung: Alumni, 1977.
—–. "Pandangan Nasional Mengenai Kekuasaan Kehakiman." In *Mochtar Kusumaatmadja: Pendidik dan Negarawan*, edited by Mike Komar, Etty R. Agoes and Eddy Damian, 110-130. Bandung: Alumni, 1999.
Soemardjan, Selo. "Mengenang Profesor Djokosoetono, S.H." In *Guru Pinandita, Sumbangsih untuk Prof. Djokosoetono, S.H.*, edited by Selo Soemardjan, vii-xiv. Jakarta: Penerbit Fakultas Ekonomi Universitas Indonesia, 2006.

Soetjipto, Adi Andjojo. "Legal Reform and Challenges in Indonesia." In *Indonesia in Transition: Social Aspects of Reformasi and Crisis*, edited by Chris Manning and Peter van Diermen, 269-277. London: Zed Books, 2000.

Subekti. *Yurisprudensi, Hukum Tidak Tertulis dan Hukum Adat dalam Pola Perencanaan Hukum dan Perundang-undangan Nasional*. Denpasar, Bali: Biro Dokumentasi dan Publikasi Hukum, Fakultas Hukum dan Pengetahuan Masyarakat, Universitas Udayana, 1978.

—–. *Arbitrase Perdagangan*. Jakarta: Bina Cipta, 1981.

—–. *Pembinaan Hukum Nasional*. Bandung: Alumni, 1981.

—–. "Pembinaan Hukum Perdata Nasional oleh Yurisprudensi Indonesia." In *Guru Pinandita, Sumbangsih untuk Prof. Djokosoetono, S.H.*, edited by Selo Soemardjan, 229-245. Jakarta: Penerbit Fakultas Ekonomi Universitas Indonesia, 2006.

Sukarno. *Indonesia Menggugat*. Djakarta: S K Seno, 1951.

Sukarno, H. *Perkembangan Catatan Sipil di Indonesia*. Jakarta: n.p., 1985.

Sumampouw, M. "Pilihan Hukum sebagai Titik Pertalian dalam Hukum Perdjandjian Internasional." PhD diss., University of Indonesia, 1968.

Supomo. "The Future of Adat Law in the Reconstruction of Indonesia." In *Southeast Asia in the Coming World*, edited by Philip W. Thayer, 217-235. Baltimore: Johns Hopkins Press, 1953.

—–. *Hukum Atjara Perdata Pengadilan Negeri*. Jakarta: Pradnya Paramita, 1972.

—–. *Undang-Undang Dasar Sementara Republik Indonesia*. Jakarta: Pradnya Paramita, 1974.

—–. *Hubungan Individu dan Masyarakat dalam Hukum Adat*. Jakarta: Pradnya Paramita, 1978.

Supomo, and Djokosoetono. *Sedjarah Politik Hukum Adat*, vol. 2. Djakarta: Djambatan, 1954.

Suryadinata, Leo, Evi Nurvidya Arifin, and Aris Ananta. *Indonesia's Population: Ethnicity and Religion in a Changing Political Landscape*. Singapore: Institute of Southeast Asian Studies, 2003.

Soepomo. *Kedudukan Hukum Adat Dikemudian Hari*. Djakarta: Pustaka Rakjat, 1951.

Stockman, Petra. *Indonesia Reformasi as Reflected in Law*. Münster: Lit, 2004.

Suraputra, D. Sidik. *Revolusi Indonesia dan Hukum Internasional*. Jakarta: UI Press, 1991.

Szászy, István. *International Civil Procedure: A Comparative Study*. Leiden: AW Sijthoff, 1967.

Taji-Farouki, Suha. "Islamic State Theories and Contemporary Realities." In *Islamic Fundamentalism* edited by Abdel Salam Sidahmed, and Anoushiravan Ehteshami, 35-50. Boulder, CO: Westview Press, 1996.

Termorshuizen, Marjanne, Caroline Supriyanto-Breur, and Hilli Djohan-Lapian. *Nederlands-Indonesisch Juridisch Woordenboek*. Leiden: KILTV Press, 1999.

Tetley, William. *International Conflict of Laws*. Montreal: International Shipping Publications, 1994.

Utrecht, E. *Pengantar dalam Hukum Indonesia*. Jakarta: Djambatan, 1962.

Van Vollenhoven, Cornelis. *Van Vollenhoven on Indonesian Adat Law (Selections from Het Adatrecht van Nederlandsch-Indie (Volume I, 1918; Volume II, 1931)*, edited by J. F. Holleman. The Hague: Martinus Nijhoff, 1981.

Visman, Frans H. *The Provisional Government of the Netherlands East Indies*. New York: Pacific Affairs, 1945.

Vlekke, Bernard H. M. *The Story of the Dutch East Indies*. Cambridge, MA: Harvard University Press, 1945.

—–. *Nusantara, A History of Indonesia*. Chicago: Quadrangle Books, 1960.

Wahyono, Padmo. *Indonesia Negara Berdasarkan atas Hukum*. Jakarta: Ghalia Indonesia, 1983.

Westlake, John. *A Treatise on Private International Law, with Principal Reference to Its Practice in England*. 7th ed. London: Sweet & Maxwell, 1925.

Wignjosoebroto, Soetandyo. *Dari Hukum Kolonial ke Hukum Nasional: Suatu Kajian tentang Dinamika Sosial-politik dalam Perkembangan Hukum Selama Satu Setengah Abad di Indonesia, 1840-1990*. Jakarta: RajaGrafindo Persada, 1994.

Wolff, Martin. *Private International Law*. 2nd ed. Oxford: Clarendon Press, 1962.

Yamin, Muhammad. *Naskah Persiapan Undang-Undang Dasar 1945*, vol. 1. Djakarta: Jajasan Prapantja, 1959.

Yergin, Daniel. *The Prize: The Epic Quest for Oil, Money, and Power*. New York: Simon & Schuster, 1991.

Zuraida, Tin. *Prinsip Eksekusi Putusan Arbitrase Internasional di Indonesia*. Surabaya: Wastu Lanas Grafika, 2009.

Zwaan, J. P. Kleiweg de. "The Anthropology of the Indian Archipelago and Its Problems." In *Science in the Netherlands East Indies*, edited by L. M. R. Rutten, 192-206. Amsterdam: De Bussy, 1929.

Articles

Alisjahbana, Takdir. "The Indonesian Language-By-product of Nationalism" *Pacific Affairs* 22, no. 4 (1949): 388-392.

Baade, Hans W. "Indonesian Nationalization Measures before Foreign Courts – A Reply." *The American Journal of International Law* 54, no. 4 (1960): 801-835.

Blom, Joost. "Public Policy in Private International Law and Its Evolution Time." *Netherlands International Law Review* 50 (2003): 373-399.

Boele-Woelki, K., and D. van Iterson. "The Dutch Private International Law Codification: Principles, Objectives and Opportunities." *Electronic Journal of Comparative Law* 14, no. 3 (2010): 1-31.

Bonomi, Andrea. "Mandatory Rules in Private International Law – The Quest for Uniformity of Decisions in a Global Environment." *Yearbook of Private International Law* 1 (1999): 215-247.

Dogauchi, Masato. "New Private International Law of Japan: An Overview." *The Japanese Annual of International Law* 50 (2007): 3-14.

Domke, Martin. "Indonesian Nationalization Measures before Foreign Courts." *The American Journal of International Law* 54, no. 2 (1960): 305-323.

Earl, G. Windsor. "On the Leading Characteristics of the Papuan, Australian, and Malayu-Polynesian Nations." *The Journal of the Indian Archipelago and Eastern Asia* 4, no. 11 (1850): 66-74.

Gandasubrata, Purwoto S. "Derap-langkah IKAHI dari Masa ke Masa." *Varia Peradilan* 118 (1995): 145-149.

——. "Pembinaan Yurisprudensi Tetap dalam PJP II." *Majalah Hukum Nasional* 2 (1996): 124-135.

——. "Seputar Suksesi Ketua Mahkamah Agung." *Varia Peradilan* 137 (1997): 136-138.

Gautama, Sudargo. "Diperlukan Undang-Undang Hukum Perdata Internasional untuk Indonesia" *Hukum dan Pembangunan* 4 (1983): 289-296.

——. "International Civil Procedure in Indonesia." *Asian Yearbook of International Law* 6 (1996): 87-103.

Gautama, Sudargo, and Sri Hanifa Wiknjosastro. "Some Aspects of Indonesian Private International Law." *Malaya Law Review* 32 (1990): 417-432.

Himawan, Charles. "Menerapkan Temuan Ilmiah untuk Mengikis Peran Hukum dalam Pembangunan Ekonomi." *Hukum dan Pembangunan* 5 (1995): 385-411.

Husserl, Gerhart. “Public Policy and Ordre Public.” *Virginia Law Review* 25 (1938): 37-67.

Junita, Fifi. “Experience of Practical Problems of Foreign Arbitral Awards Enforcement in Indonesia.” *Macquarie Journal of Business Law* 5 (2008): 369-392.

Juwana, Hikmahanto. “Pembatalan Putusan Arbitrase International oleh Pengadilan Indonesia.” *Jurnal Hukum Bisnis* 21 (2002): 67-74.

Koebandono, R. *et al*. “Kesimpulan Panel Diskusi tentang Kebebasan Hakim dalam Negara Republik Indonesia yang Berdasarkan atas Hukum.” *Varia Peradilan* 118 (1995): 140-144.

Koesnoe, Mohammad. “Kedudukan dan Fungsi Kekuasaan Kehakiman Menurut Undang-Undang Dasar 1945.” *Varia Peradilan* 129 (1996).

——. “Dasar-dasar Ketidakpastian Hukum dalam Tata Hukum Kita Dewasa ini.” *Varia Peradilan* 133 (1996).

Lev, Daniel S. “The Lady and the Banyan Tree: Civil-Law Change in Indonesia.” *American Journal of Comparative Law* 14 (1965-1966): 282-307.

——. “Colonial Law and the Genesis of the Indonesian State.” *Indonesia* 40 (1985): 57-74.

——. “Ceramah Prof. Lev di FH Untar.” *Jurnal Hukum dan Pembangunan* 2 (2000): 204-205.

——. “A Tale of Two Legal Professions: Lawyers and State in Malaysia and Indonesia.” *Jentera* 2 (2004): 107-145.

Liddle, R. William. “The Islamic Turn in Indonesia: A Political Explanation.” *The Journal of Asian Studies* 55 (1996): 613-634.

Logan, J. R. “The Ethnology of the Indian Archipelago: embracing enquiries into the continental relations of the Indo-Pacific Islanders.” *The Journal of the Indian Archipelago and Eastern Asia* 4, no. 5-6 (1850): 252-347.

Lorenzen, Ernest G. “Territoriality, Public Policy and the Conflict of Law.” *Yale Law Journal* 33 (1923-1924): 736-751.

Mankowski, Peter. “New Japanese Private International Law Act from a European Perspective.” *Japanese Yearbook of International Law* 51 (2008): 241-297.

Mattei, Ugo. “Three Patterns of Law: Taxonomy and Change in the World’s Legal System.” *American Journal of Comparative Law* 45 (1997): 5-44.

Mills, Karen. “Enforcement of Arbitral Awards in Indonesia: Issues relating to Arbitration and the Judiciary.” *Jurnal Hukum Bisnis* 21 (2002): 55-66.

Mrázek, Rudolf, and Gertrudes Johan Resink. “Coughing Heavily: Two Interviews with Professor Resink in His Home at Gondangdia Lama 48 A Jakarta, on July 17 and July 25, 1997.” *Indonesia* 74 (2002): 137-164.

Murphy, Kent. “The Traditional View of Public Policy and *Ordre Public* in Private International Law.” *Georgia Journal of International and Comparaptive Law* 11 (1981): 591-616.

Oppusunggu, Yu Un. “In Memoriam Prof. Mr. Dr. Sudargo Gautama.” *Jurnal Hukum dan Pembangunan* 4 (2008): 439-448.

Panggabean, H. P. “Efektivitas Eksekusi Putusan Arbitrase dalam Sistem Hukum Indonesia.” *Jurnal Hukum Bisnis* 21 (2002): 75-79.

Pichonnaz, Pascal. “From *Clausula Rebus Sic Stantibus* to Hardship: Aspects of the Evolution of the Judge’s Role,” *Fundamina* 17, no. 1 (2011): 125-143.

Prins, Jan. “Adatlaw and Muslim Religious Law in Modern Indonesia: An Introduction.” *in Die Welt des Islams* 1, no. 4 (1951): 283-300.

Prodjodikoro, Wirjono. “Angkatan Pengadilan dalam Ketatanegaraan Kita.” *Hukum* 3-4 (1956): 9-14.

Purbacaraka, Purnadi, and Soerjono Soekanto. “Pendidikan Hukum dan Bahasa Hukum” *Hukum dan Pembangunan* 3 (1983): 233-239.
Rajagukguk, Erman. “Pelaksanaan Keputusan Arbitrase Luar Negeri dan Penafsiran “Ketertiban Umum”.” *Hukum dan Pembangunan* 6 (1994): 553-563.
Reksodiputro, Mardjono. “Menegakkan Kembali Citra Kekuasaan Kehakiman: Peranan Pengadilan dalam Negara Indonesia Baru (Sebuah Saran kepada Ketua Mahkamah Agung RI).” *Hukum dan Pembangunan* 3 (2001): 201-206.
Resink, G. J. “In Memoriam Supomo sebagai Sardjana.” *Padjadjaran* 1 (1958): 6-10.
Rubins, Noah. “The Enforcement and Annulment of International Arbitration Awards in Indonesia.” *American University International Law Review* 20 (2005): 359-402.
Soepomo, R. “Hukum Adat Dikemudian Hari Berhubung dengan Pembinaan Negara Indonesia.” *Hukum* 4-5 (1952): 4-18.
Symeonides, Symeon. “The New Swiss Conflicts Codification.” *American Journal of Comparative Law* 37 (1989): 187-246.
Study Group of the New Legislation of Private International Law. “Draft Articles on the Law Applicable to Contractual and Non-Contractual Obligations (1).” *The Japanese Annual of International Law* 39 (1996): 185-216.
——. “Draft Articles on the Law Applicable to Contractual and Non-Contractual Obligations (2).” *The Japanese Annual of International Law* 40 (1997): 57-79.
Torii, Junko. “Revision of Private International Law in Japan.” *The Japanese Annual of International Law* 33 (1990): 54-71.
Termorshuizen-Artz, Marjanne. “The Concept Rule of Law.” *Jentera* 3 (2004): 77-119.
Wirjanto, Soemarno P. “’Perang’ Antara Rule of Law dan Rule of Kebidjaksanaan.” *Kompas Daily*, March 3, 1969.
——. “’Perang’ Antara Rule of Law dan Rule of Kebidjaksanaan.” *Kompas Daily*, March 4, 1969.
Waaij-Voster, C. De, ”Doctoral Theses on the Netherlands-Indies Accepted at the Faculty of Law of Leiden University in Period 1850-1940.” *Indonesia* 56 (1993): 89-98.
Wolde, Mathijs H. ten. “Codification and Consolidation of Dutch Private International Law: The Book 10 Civil Code of the Netherlands.” *Yearbook of Private International Law* 13 (2011): 389-411.
Ying-Chao, Teng. “On the Marriage Law of the People’s Republic of China,” speech delivered on May 14, 1950 at a meeting of cadres and students of Chahar Province. In *The Marriage Law of the People’s Republic of China*, compiled by Foreign Languages Press. Beijing: Foreign Languages Press, 1959.

Legislation

Netherlands Indies

S. 1847-52 as amended by S. 1849-63. Reglement op de Rechtvordering.
S. 1847-23. Wetboek van Koophandel voor Indonesië. (Kitab Undang-Undang Hukum Dagang)
S. 1915-732 as amended by S. 1917-497 and 1917-645. Wetboek van Strafrecht voor Indonesië [Criminal Code for Indonesia].
S. 1916-47 as amended by S. 1917-765. Toelatingsbesluit (Penetapan Izin Masuk) [Entry Permit].

S. 1917-129. Bepalingen voor geheel Indonesië betreffende het burgerlijk en handelrecht van de Chineezen (Ketentuan–ketentuan untuk Seluruh Indonesia tentang Hukum Perdata dan Dagang untuk Golongan Tionghoa).

S. 1925-415. Wet op de Staatsinrichting van Nederland-Indië (Peraturan Ketatanegaraan Hindia Belanda). June 26, 1926.

S. 1927-227. Reglement tot Regeling van het Rechtswezen in de Gewsten Buiten Java en Madura.

S. 1941-44. Herziene Indonesisch Reglement (Reglemen Indonesia yang Diperbaharui).

Japanese Occupation

Kan Po, Japanese publication, October 10, 1942 and December 25, 1942.

Indonesia

The 1945 Constitution.

The 1949 Federal Constitution.

The 1950 Provisional Constitution.

Berita Negara No. 1/1946.

Ketatapan MPRS No. II/MPRS/1960, Garis-garis Besar Pola Pembangunan Nasional Semesta Berencana Tahapan Pertama 1961-1969

Ketetapan MPRS No. XIX/MPRS/1966 tentang Peninjauan Kembali Produk-produk Legislatif Negara di Luar Produk MPRS yang Tidak Sesuai dengan Undang-Undang Dasar 1945.

Ketetapan MPRS No. XX/MPRS/1966 tentang Memorandum Dewan Perwakilan Rakyat Sementara Gotong Royong tentang Sumber Hukum Republik Indonesian dan Tata Urutan Peraturan Perundang-undangan Republik Indonesia.

Ketetapan MPR No. IV/MPR/1973 tentang Garis-garis Besar Haluan Negara.

Ketetapan MPR No. III/1978 tentang Kedudukan dan Hubungan Tata-Kerja Lembaga Tertinggi Negara dengan/atau antar Lembaga-lembaga Tinggi Negara.

Ketetapan MPR No. IV/MPR/1978 tentang Garis-garis Besar Haluan Negara.

Ketetapan MPR No. II/MPR/1983 tentang Garis-garis Besar Haluan Negara.

Ketetapan MPR No. II/MPR/1988 tentang Garis-garis Besar Haluan Negara.

Ketetapan MPR No. IV/MPR/1999 tentang Garis-garis Besar Haluan Negara 1999-2004.

Undang-Undang Republik Indonesia No. 3 Tahun 1946 tentang Warga Negara dan Penduduk Negara Indonesia.

Undang-Undang Republik Indonesia No. 19 Tahun 1948, Susunan dan Kekuasaan Badan-badan Kehakiman.

Undang-Undang Republik Indonesia No. 1 Tahun 1950 tentang Susunan, Kekuasaan dan Jalan-Pengadilan Mahkamah Agung Indonesia. LNRI 1950-30.

Undang-Undang Republik Indonesia No. 13 Tahun 1956 tentang Pembatalan Hubungan Indonesia-Nederland berdasarkan Perjanjian Konferensi Meja Bundar. LNRI 1956-27.

Undang-Undang Republik Indonesia No. 86 Tahun 1958 tentang Nasionalisasi Perusahaan-perusahaan Belanda. LNRI 1958-162, TLNRI No. 1690.

Peraturan Pemerintah Pengganti Undang-Undang No. 44/1960 Pertambangan Minyak dan gas Bumi. LNRI 1960-133, TLNRI No. 2070.

Undang-Undang Republik Indonesia No. 1 Tahun 1967 tentang Penanaman Modal Asing. LNRI 1967-1, TLNRI No. 2818.

Undang-Undang Republik Indonesia No. 11 Tahun 1967 tentang Ketentuan-ketentuan Pokok Pertambangan. LNRI 1967-22.

Undang-Undang Republik Indonesia No. 14 Tahun 1970 tentang Pokok-pokok Kekuasaan Kehakiman. LNRI 1970-74, TLNRI No. 2951.

Undang-Undang Republik Indonesia No. 8 Tahun 1971 tentang Perusahaan Pertambangan dan Minyak Negara. LNRI 1971-76, TLNRI No. 2971.

Undang-Undang Republik Indonesia No. 1 Tahun 1974 tentang Perkawinan, LNRI 1974-1, TLNRI No. 3050. LNRI 1971-1, TLNRI No. 3019.

Undang-Undang Republik Indonesia No. 14 Tahun 1985 tentang Mahkamah Agung, LNRI 1985-73, TLNRI No. 3316. LNRI 1985-73, TLNRI No. 3316.

Undang-Undang Republik Indonesia No. 8 Tahun 1995 Pasar Modal. LNRI 1995-64, TLNRI No. 3608.

Undang-Undang Republik Indonesia No. 19 Tahun 2003 tentang Badan Usaha Milik Negara. LNRI 2003-70, TLNRI No. 4297.

Undang-Undang Republik Indonesia No. 24 Tahun 2003 tentang Mahkamah Konstitusi. LNRI 2003-98, TLNRI No. 4316.

Undang-Undang Republik Indonesia No. 4 Tahun 2004 tentang Kekuasaan Kehakiman. LNRI 2004 No. 8, TLNRI No. 4358.

Undang-Undang Republik Indonesia No. 5 Tahun 2004 tentang Perubahan Undang-Undang No. 15 Tahun 1985 tentang Mahkamah Agung. LNRI 2004-9, TLNRI No. 4359.

Undang-Undang Republik Indonesia No. 10 Tahun 2004 tentang Pembentukan Peraturan Perundang-undangan. LNRI 2004 No. 53, TLNRI No. 4389.

Undang-Undang Republik Indonesia No. 11 Tahun 2006 tentang Pemerintahan Aceh. LNRI 2006 No. 62, TLNRI No. 4633.

Undang-Undang Republik Indonesia No. 40 Tahun 2007 tentang Perseroan Terbatas. LNRI 2007-106, TLNRI No. 4756.

Undang-Undang Republik Indonesia No. 4 Tahun 2009 tentang Pertambangan Mineral dan Batubara. LNRI 2009-4, TLNRI No. 4959.

Undang-Undang Republik Indonesia No. 22 Tahun 2001 tentang Minyak dan Gas Bumi. LNRI 2001-136, TLNRI No. 4152.

Undang-Undang Republik Indonesia No. 3 Tahun 2009 tentang Perubahan Kedua atas Undang-Undang No. 14 Tahun 1985 tentang Mahkamah Agung. LNRI 2009-3, TLNRI No. 4958.

Undang-Undang Republik Indonesia No. 48 Tahun 2009 tentang Kekuasaan Kehakiman. LNRI 2009-157, TLNRI No. 5076.

Undang-Undang Republik Indonesia No. 2 Tahun 2011 tentang Perubahan atas Undang-Undang Nomor 2 Tahun 2008 tentang Partai Politik. LNRI 2011-8, TLNRI No. 5189.

Undang-Undang Republik Indonesia No. 8 Tahun 2011 tentang Perubahan Undang-Undang No 8 Tahun 2003 tentang Mahkamah Konstitusi. LNRI 2011-70, TLNRI No. 5226.

Undang-Undang Republik Indonesia No. 12 Tahun 2011 tentang Pembentukan Peraturan Perundang-undangan. LNRI 2011 No. 82, TLNRI No. 5234.

Instruksi Presidium Kabinet No. 31/U/IN/12/1966, Dec. 27, 1966.

Peraturan Pemerintah Republik Indonesia No. 2 Tahun 1959 tentang Pokok-pokok Pelaksanaan Undang-Undang Nasionalisasi Perusahaan Belanda. LNRI 1959-5.

Peraturan Pemerintah Republik Indonesia No. 35 Tahun 1994 tentang Ketentuan dan Pedoman bagi Kontrak Bagi Hasil di Bidang Pertambangan Minyak dan Gas Bumi. LNRI 1994-64, TLNRI No. 3571.

Keputusan Presiden Republik Indonesia No. 376/1961, May 6, 1961.

Keputusan Presiden Republik Indonesia No. 194/1961, July 1, 1961.

Keputusan Presiden Republik Indonesia No. 184/1965, June 23, 1965.

Keputusan Presiden Republik Indonesia No. 319 Tahun 1968 tentang Rencana Pembangunan Lima Tahun (1969-1974).

Keputusan Presiden Republik Indonesia No. 43 Tahun 1971 tentang Penyelenggaraan dan Pengawasan Pelaksanaan Kebijkasanaan dalam Bidang Penyaluran dan Pemasaran Gula Pasir.

Keputusan Presiden Republik Indonesia No. 38/1978 tentang Badan Urusan Logistik.

Keputusan Presiden Republik Indonesia No. 39 Tahun 1997, Penangguhan/Pengkajian Kembali Proyek Pemerintah, Badan Usaha Milik Negara, dan Swasta yang Berkaitan dengan Pemerintah/Badan Usaha Milik Negara.

Keputusan Presiden Republik Indonesia No. 47 Tahun 1997, Perubahan Status Pelaksanaan Beberapa Proyek Pemerintah, Badan Usaha Milik Negara, dan Swasta yang Berkaitan dengan Pemerintah/Badan Usaha Milik Negara yang Semula Ditangguhkan atau Dikaji Kembali.

Keputusan Presiden Republik Indonesia No. 5 Tahun 1998, Pencabutan Keppres No. 47/1997 tentang Perubahan Status Pelaksanaan Beberapa Proyek Pemerintah, Badan Usaha Milik Negara dan Swasta yang Berkaitan dengan Pemerintah/Badan Usaha Miliki Negara yang Semula Ditangguhkan atau Dikaji Kembali.

Mahkamah Agung Republik Indonesia. *Surat Edaran Mahkamah Agung Republik Indonesia No. 3 Tahun 1963.*

Mahkamah Agung Republik Indonesia. *Peraturan Mahkamah Agung Republik Indonesia No. 1 Tahun 1990 tentang Tata Cara Pelaksanaan Putusan Arbitrase Asing.*

Foreign Legislation

France. *French Civil Code.*

Germany. *Einführunsgesetz zum Bürgerlichen Gesetzbuch* [The Conflict of Laws Rules in the Introductory Law to the Civil Code]. Translated by Ulrich Drobnig. Available at Ulrich Drobnig. *American-German Private International Law*, 2nd ed. Dobbs Ferry, NY: Oceana Publications, 1972.

Netherlands. *Dutch Constitution (Grondwet)* (1922).

Japan. *Act No. 10 of 1898 concerning Application of Laws in General* [Horei]. Translated by J. E. de Becker. *International Private Law of Japan*. London: Butterworth & Co., 1919.

——. *Act No. 10 of 1898 concerning Application of Laws in General* [Horei]. Translated by Albert A. Ehrenzweig, Sueo Ikehara, and Norman Jensen. *American-Japanese Private International Law*. Dobbs Ferry, NY: Oceana Publications, 1964.

——. *Law No. 78 of 2006 on General Rules of Application of Law* [Hō no Tekiyō ni Kansuru Tsūsokuhō]. Available at *The Japanese Annual of International Law* 50 (2007): 87.

——. *Law No. 78 of 2006 on General Rules of Application of Law* [Hō no Tekiyō ni Kansuru Tsūsokuhō]. Translated by Kent Anderson and Yasuhiro Okuda, *Asian-Pacific Law and Policy Journal* 8 (2006): 138 and *Yearbook of Private International Law* 8 (2006): 427.

People's Republic of China. *Marriage Regulations of the Chinese Soviet Republic (1931)*. English translation available at M. J. Meijer, *Marriage Law and Policy in the Chinese People's Republic*, 281. Hong Kong: Hong Kong University Press, 1971.

——. *Marriage Law of the Chinese Soviet Republic* (1934). English translation available at M. J. Meijer, *Marriage Law and Policy in the Chinese People's Republic*, 283. Hong Kong: Hong Kong University Press, 1971.

——. *Marriage Regulations of the Shensi, Kansu, Ninghsia Border Area*, (1939). English translation available at M. J. Meijer, *Marriage Law and Policy in the Chinese People's Republic*, 300-302. Hong Kong: Hong Kong University Press, 1971.

——. *The Marriage Law of the People's Republic of China*. English translation by Foreign Language Press. Beijing: Foreign Language Press, 1959.

Swiss. *Private International Law Code*.

International Agreements

Convention on the Recognition and Enforcement of Foreign Arbitral Awards. June 10, 1958, 330 UNTS 3.

Republic of Indonesia. *Letter of Intent*, Oct. 31, 1997 available at https://www.imf.org/external/np/loi/103197.htm (last visited on Apr. 8, 2015).

Republic of Indonesia and International Monetary Fund. *Memorandum of Economic and Financial Policies*, available at https://www.imf.org/external/np/loi/011598.htm (last visited on April 8, 2015).

Republic of Indonesia and the Kingdom of the Netherlands. *Statute of the Netherlands-Indonesia Union, signed at the Round Table Conference, the Hague, November 2, 1949*, 4 Int' Organization 177 (1950).

Sekretariat Umum Konperensi Medja Bundar. *Hasil-Hasil Konperensi Medja Bundar sebagaimana diterima pada Persidangan Umum yang kedua Terlangsung Tanggal 2 Nopember 1949 di Ridderzaal di Kota 'S-Gravenhage [Results of the Round Table Conference as Accepted at the Plenary Session on 2 November 1949 at the Knight's Hall [Parliament Building] in the Hague] (1949)*.

Judicial Decisions

Indonesian courts

Central Jakarta District Court. Decision No. 499/Pdt/G/VI/1988/PN.JKT.PST, June 29, 1989.

——. Decision No. 86 /Pdt.G/2002/PN.JKT.PST, Sep. 9, 2004. *PT Pertamina Persero/KBC LLC*. Published in Sudargo Gautama, *Arbitrase Luar Negeri dan Pemakaian Hukum Indonesia*, 263-339. Bandung: Citra Aditya Bakti, 2004.

——. Decision No. 01/Pembatalan Arbitrase/2009/PN.JKT/PST, March 9, 2009.

——. Decision No. 86 /Pdt.G/2002/PN.JKT.PST, Sep. 9, 2008.

——. Decision No. 301/Pdt.G/2010/PN.JKT.PST, Aug. 25, 2011.

——. Order No 05/PPdt.Arb.Int/2009, Oct. 28, 2009.
——. Order No. 089/2009.Eks, Sep. 17, 2009.
Constitutional Court. Decision, No. 002/PUU-I/2003, Dec. 21, 2004.
——. Decision, No. 100/PUU-XI/2013, Mar. 18, 2014. *Basuki Agus Suparno et al*, available at http://www.mahkamahkonstitusi.go.id/putusan/putusan_sidang_1668_20140403093814_100%20PUU%202013_telahucap-3april2014_FINAL%20-%20Header%20ok.pdf.
Jakarta District Court. Decision No. 373/1952 G, Dec. 5, 1953. *Lie Kwie Hien v. Tjin Tjheuw Jie*. Published in H 7-8 (1958): 45, also published in G 1 (1992): 57.
Jakarta High Court. Decision No. 486/Pdt/G/VI/1989/PT.JKT, Oct. 14, 1989.
South Jakarta District Court. Interlocutory Decision No. 1100/Pdt.G/2008/PN.JKT.Sel, May 13, 2009.
Supreme Court. Decision. Jan. 18, 1951. Published in H 1 (1951): 25.
——. Decision No. 98 K/Sip./1952, Feb. 5, 1953. *Oey Tjay Nio/Li A Poeng*. Published in H 2-3 (1953): 77.
——. Decision No. 154 K/Sip/1967, Dec. 6, 1967. Available at *Hukum Acara Perdata dalam Jurisprudensi Mahkamah Agung 1968-1976* Compiled by I. Rubini, R. Roechimat and M. Chidir Ali, 314. Bandung: Alumni, 1977.
——. Decision No. 339 K/Sip/1969, Feb. 21, 1970. *Sih Kanti v. Pak Trimo and Bok Sutoikromo*. Published in *Jurisprudensi Indonesia* 1 (1970): 13.
——. Decision No. 499 K/Sip/1970, March 17, 1971. *Haji Kosim v. Atjep Masduki cs*. Published in *Yurisprudensi Hukum Acara Perdata Indonesia* 1, compiled by Chidir Ali, 156. Yogyakarta: Nur Cahaya, 1985.
——. Decision No. 46 K/Sip/1969, June 19, 1971. *Adelan et al v. Soekri et al*. Published in *Jurisprudensi Indonesia* 3 (1971): 54.
——. Decision No. 791 K/Sip/1972, Feb. 26, 1973.
——. Decision No. 1399 K/Sip/1975, Aug. 10, 1977. *Anthon Hutubessy v. Ny. Agustina Hutubessy/Tetelepta*. Published in *Yurisprudensi Hukum Acara Perdata Indonesia* 1, complied by Chidir Ali, 289. Bandung: Armico, 1983.
——. Decision No. 2944 K/Pdt/1983, Aug. 20, 1984. *Navigation Maritime Bulgare (Bulgaria) v. PT Nizwar (Indonesia)*. Published in *Varia Peradilan* 18 (1987).
——. Decision No. 1203 K/Pdt/1990, Dec. 14, 1991. Published in G 6 (1993): 1.
——. Decision No. 3388 K/PDT/1985, Jan. 8, 1992.
——. Decision No. 01/Banding/Wasit.Int/2002, March 8, 2004. Published in *Varia Peradilan* 223 (2008): 29.
——. Decision No. 03/Arb/Btl/2005, May 17, 2006. *PT Comarindo Express Tama Tour & Travel v. Yemen Airways*.
——. Decision No. 444 PK/Pdt/2007, Sep. 9, 2008, available at http://putusan.mahkamahagung.go.id/putusan/53470896b4ed5c05212ca1aa874fc609 (last visited on March 3, 2015).
——. Decision No. 01 K/Pdt.Sus/2010, Feb. 24, 2010, available at http://putusan.mahkamahagung.go.id/putusan/0c04cf6239c146bd6c7e22820b4f6c19 (last visited on March 3, 2015). PT stands for *Perseroan Terbatas* (limited liability company).
——. Decision No. 1538 K/Pdt/2009, Apr. 20, 2011, available at http://putusan.mahkamahagung.go.id/putusan/8024ff9cb343b9c91b3a8ca69ee21b95 (last visited on March 3, 2015).

——. Decision No. 64 K/PDT.SUS/2010, Apr. 26, 2010, available at http://putusan.mahkamahagung.go.id/putusan/8024ff9cb343b9c91b3a8ca69ee21b95 (last visited on March 3, 2015).

——. Decision No. 904 K/PDT.SUS/2009, June 9, 2010, available at http://putusan.mahkamahagung.go.id/putusan/90a6f95426c5cf1c154de3dff523d846 (last visited on March 3, 2015).

——. Decision No. 56 PK/PDT.SUS/2011, Aug. 23, 2011, available at http://putusan.mahkamahagung.go.id/putusan/7305f26fe6b3d84f5e89d303c8e9c3cd (last visited on March 3, 2015).

——. Decision No. 808 K/Pdt.Sus/2011, June 28, 2012, available at http://putusan.mahkamahagung.go.id/putusan/a27a2be012e0338278320679b8f9fdf0 (last visited on March 3, 2015).

——. Order, No. 1 Pen.Ex'r/Arb.Int/Pdt/1991.

Surabaya District Court. No. 290/1950 Pdt, Aug. 6, 1953. *Liem Gwan Soe/Oei Joe Lie*. Published in H 1 (1954): 58.

Tanjung Pinang District Court. Decision No. 205/Pdt.P/1989/PN.TPI, May 20, 1989. *Louis Philipe & Yvonne Barbeau*. Published in G 5 (1993): 64.

Foreign courts

731 F. 2d 909 (D.C.Cir.1984).

Amco Asia Corporation v. The Republic of Indonesia, 1 ICSID Reports 377.

Hilton v. Guyot, 159 U.S. 113, 163-164 (1895).

Judgment of the Bremen Court of Appeal relating to Sale of Indonesia Tobacco at Bremen, August 21, 1959. Translated from official copy by [Department of Information of the Republic of Indonesia?]

Society of Lloyd's v. Mullin, 255 F. Supp. 2d 468, 474 (E. D. Pa., 2003).

Vladi v. Vladi (1987), 39 *DLR* (4th) 562 (NSSSC).

Wied v. TRCM, LLC, 698 So. 2d 685 (1997).

Newspaper Articles

Chang, Chih-Jang. "A Much Needed Marriage Law." *People's Daily*, April 17, 1950. In *The Marriage Law of the People's Republic of China*, Foreign Languages Press, 11. Beijing: Foreign Languages Press, 1959.

Jakarta Post. *First Time ever, Supreme Court Judge Resigns*, *The Jakarta Post*. Nov. 16, 2012, Available at http://www.thejakartapost.com/news/2012/11/16/first-time-ever-supreme-court-judge-resigns.html (last visited on Apr. 20, 2015.)

Saleh, Ismail. "Eksistensi Hukum Islam dan Sumbangannya terhadap Hukum Nasional." *Kompas Daily*, June 3, 1989.

Internet

Badan Pusat Statistik. "Population by Region and Religion." In *Sensus Penduduk 2010*. available at http://sp2010.bps.go.id/index.php/site/tabelprint?wid=0000000000&tid=321&lang=en&fi1=58&fi2=3 (last visited Oct. 16, 2014, 1:00 PM).

Central Intelligence Agency. *Indonesia 2002 CIA Map*. Washington DC: Central Intelligence Agencym 2002. Available at http://commons.wikimedia.org/wiki/File:Indonesia_2002_CIA_map.png. (last visited June 1, 2015, 1:00 PM).

Kartapranata, Gunawan. "Ethnic Groups in Indonesia." Wikipedia, available at http://en.wikipedia.org/wiki/Ethnic_groups_in_Indonesia#mediaviewer/File:Indonesia_Ethnic_Groups_Map_English.svg (last visited May 14, 2015, 1:20 PM).

JuriGlobe – World Legal Systems, http://www.juriglobe.ca/eng/index.php. (last visited Oct. 16, 2014, 4:00 PM).

Others

Departemen Kehakiman, Republik Indonesia. *Rancangan Undang-Undang Hukum Perdata Internasional (1997/1998)*. Jakarta: Departemen Kehakiman Republik Indonesia, [1998?]

Hukum dan Pembangunan. *Putusan Reg. No. 1205 K/Pdt/1990*. Hukum dan Pembangunan 6 (1994): 541.

Ikatan Hakim Indonesia. "Memorandum Ikatan Hakim Indonesia tentang Perbaikan terhadap Kedudukan Kekuasaan Kehakiman yang Sesuai dengan UUD 1945 Menurut Tafsiran Orde Baru (Tap MPRS No. XX/1966)." *Varia Peradilan* (Supplement) 136, (1997: [3-4].

Gautama, Sudargo. "Declaration of Prof. Mr. Dr. Sudargo Gautama of March 25, 2002." In Sudargo Gautama. *Arbitrase Luar Negeri dan Pemakaian Hukum Indonesia*, 341-352. Bandung: Citra Aditya Bakti, 2004.

Prodjodikoro, Wirjono. "Komentar atas *Oey Tjay Nio*, Sup. Ct. No. 98 K/Sip./1952, Feb. 5, 1953 (Oey Tjay Nio/Li A Poeng)." In H: 2-3 (1953): 83-84.

Oppusunggu, Yu Un, and Ab Massier. Email correspondence with Ab Massier (July 18, 2013).