# SOME ASPECTS OF INDONESIAN PRIVATE INTERNATIONAL LAW

This article gives a short outline on some aspects of the present status of Indonesian conflict of laws, and the extent to which the Dutch colonial regulations are still valid, or have been revised since independence. Following a general discussion on the basis for the validity of the old regulations and the present views on law revision, we shall examine some topics to illustrate the remaining influence of Dutch legal scholars on Indonesian case law and jurisprudence. We have chosen to focus on three areas in particular, the shift from the nationality to the domicile principle in the field of personal status, the problem of *renvoi,* and the law of contract.

## I. VALIDITY OF OLD DUTCH REGULATIONS

SECTION II of the Transitional Provisions of the 1945 Constitution preserves the Dutch colonial regulations in Indonesia where no new regulations have been enacted by the Indonesian legislature to replace them, and where they are not in conflict with the 1945 Constitution. The relevant provision reads:

> "With reference to Section II of the Transitional Provisions of the 1945 Constitution...: All State institutions and all regulations in force on August 17, 1945 (the birth date of the Republic of Indonesia), shall continue in force until they have been replaced by new institutions and laws in conformity with the Constitution *provided they are not contrary to the Constitution itself."*

Thus, in the field of conflict of laws, the old provisions of the *Algemene Bepalingen van Wetgeving*[1] are still in force. As a result, current legal scholarship and court decisions involving foreign elements still refer to the provisions of the *A.B.* where applicable.[2]

One question which has emerged relates to the meaning of "being contrary to the spirit of the 1945 Constitution". This issue was considered in one case[3] which questioned the status of article 1682 of the Civil Code,[4]

1 Hereafter *A.B.*; or General Provisions Act, hereafter *G.P.A., S.G.* 1847 no.23, arts. 16-18.
2 See Sudargo Gautama, *Hukum Perdata International Indonesia* [*Indonesian Private International Law*] Vol. III (1), Book 7 (2nd printing, Bandung 1981), p.619 *et. seq.*
3 *Pengadilan Tinggi,* Jakarta, judgment of Asikin Kusuma Atmadja in appeal, 15 March, 1967 no. 25/1967, *Juncto Pengadilan Negeri* Jarkarta 11 August 1966, no.52/1966G and 178/1966G.
4 This is similar to an article in the 1719 Dutch Civil Code.

requiring the use of a notarial deed to effectuate a gift. This article was declared invalid by the Supreme Court in its Circular Letter No.3 of 1963. In this circular, eight Civil Code articles were mentioned as being no longer valid.

The facts of this case relate to a claim by an Indonesian husband who made a gift, to his wife in Jakarta, of his share of the joint marital properties while he was living in Tokyo. The gift consisted of shares in a construction company in Indonesia, and was made by means of a letter. Upon his return to Jakarta, he revoked the gift. He claimed that the gift was not valid under article 1682 of the Civil Code as it was made by means of a letter from a husband to his wife. However, the Court of First Instance, relying on the Supreme Court's 1963 Circular Letter, declared that article 1682 was no longer in force. The gift was therefore regarded as valid.

The husband argued on appeal that the Civil Code provisions could not be declared invalid by a mere circular. He argued that according to Section II of the Transitional Provisions of the Constitution, colonial legislation remained valid since article 1682 of the Civil Code had never been repealed by any legislation. However, the Jakarta Appeal Court rejected this argument and upheld the lower court's decision. The reasoning was, however, different. The Circular Letter of the Supreme Court could not be regarded as an appropriate instrument for invalidating codes and legislation. It was not the 1963 circular which made article 1682 invalid, but rather article 1682 was unconstitutional. The Court thus impliedly upheld the general validity of the Codes as law, even though it found a particular provision invalid. The Codes are regarded as more than commentaries or guidebooks.[5] This view was advanced by the late Dr. Suhardjo, a former Minister of Justice.[6]

Colonial legislation should, however, be evaluated. It is the duty of the Courts to examine the constitutionality of colonial legislation. In principle, colonial legislation remains in force. It is the duty of the courts to test the constitutionality of colonial legislation. In our opinion, the view expressed here in respect of the Dutch colonial provisions is akin to the test of public policy (*openbare orde, ketertiban umum*) in conflict of laws. In the Draft New Private International Law (P.I.L.) Code for Indonesia, this principle of public policy is stated in article 3 which reads:

> "Foreign law which should be applied according to Indonesian Private International Law will not be used if those provisions are contrary to public policy, good morals, the 1945 Constitution and the *Pancha sila*".[7]

In a recent paper, the Indonesian Minister of Justice, Mr. Ismail Saleh S.H., suggested that there is a present trend towards reform of laws which

5 Comparable to the "Restatements" in the United States.
6 Suhardjo's address in 1962 to the National Institute for Legal Development.
7 *Kampas,* June 3 1989.

have been drawn from the other legal systems, as well as local and customary laws *(hukum adat).* In essence, an evaluation of imported laws contained in the Civil and Commercial Code, and of modern legal concepts such as leasing, hire-purchase, trusts and factoring, should be made to see if the Code is contrary to the 1945 Constitution and the basic principles of the Indonesian state philosophy, the *Pancasila.*

> "Setiap pengaruh tersebut kita ukur dengan Pancasila dan Undang-Undang Dasar 1945. Kalau tidak bertentangan kita pakai dan kalau bertentangan kita cegah atau kita buang. Dalam hubungan ini tidak ada salahnya kalau kita mengutip *George Santayana* yang menyatakan bahwa. *A man's feet must be planted at home, but his eyes must survey the world".*[8]
>
> [Every influence mentioned should be evaluated against the *Pancasila* and 1945 Constitution. If they are in accordance, then we will use them, but if they are contrary, we will avoid them and throw them away. In this connection it would be meaningful to quote George Santanaya's saying that: *"A man's feet must be planted at home, but his eyes must survey the world".* (Translation.)]

The late Minister of Justice, Dr Sahardjo, famous for his revolutionary views, had expressed the opinion that the Dutch Codes in *toto* should no longer be regarded as legal codes, but as commentaries which contain rules of unwritten law, somewhat similar to the Restatements in the United States. Sahardjo's views had influenced legal practice during the Sukarno regime. It is not surprising that case law development has followed the views of the Executive. It was an era in which the General Basic Law on Judicative Powers (*Undang2 Pokok Kekuasaan Kehakiman*)[9] clearly stated that the Judicature was to follow the instructions of the Supreme Command. In this climate, the role of lawyers had been minimised.[10]

By the middle of the 1960s, the Codes were rarely cited in judicial decisions. When they were cited, the particular articles mentioned were usually preceded by such qualifying words as "by analogy with" or "compared with" (*Bandingkan*).

However, at present, the Indonesian Courts, are once again regularly quoting the relevant provisions of the Codes (Civil, Commercial Codes, Bankruptcy Ordinance etc.) and other pre-independence regulations. It may be said that, in general, all written provisions of the colonial period are, with some exceptions, to be regarded as valid.

8 Law no. 10 of 1964, now replaced by Law no. 14 of 1970, S.G. 1970 no. 74.

9 Sukarno was known for quoting, on many occasions, the saying: *"Met juristen kan je geen revolutie maken"* [You cannot make revolution with lawyers].

10 "The decay of the nationality principle in modern PIL". This speech has often been quoted by foreign PIL scholars. See, for example, Rabel, E., *The Conflict of Laws: A Comparative Study,* Vol.1 p. 167, which refers to this lecture as an example of how many continental writers are quite set on restoring the principle of domicile.

The writings of Dutch legal scholars, in particular, Kollewijn, Lemaire and de Winter, have influenced the growth of conflict of laws in Indonesia. We will illustrate this influence with respect to the development in three major areas which are of importance in Indonesian conflict of laws today, *i.e.*, the erosion of the nationality principle in international family law (the shift from nationality to domicile), *renvoi* and international contracts.

## II. INTERNATIONAL FAMILY LAW: SHIFT FROM NATIONALITY TO DOMICILE

The present tendency in Dutch conflict of laws to shift from the nationality principle to the domicile principle in family law is clearly observable in Indonesia. Under the domicile principle, stress is laid, with regard to personal status or family law, on the principle of territoriality as opposed to the principle of personalty. This principle of territoriality is based on the facts of his residence in daily life, *i.e.*, where the respective person lives and works, permanently resides, maintains his home and earns his living. This is similar to the concept of social domicile or habitual residence *(residence habituelle)* found in the modern Hague Private International Law Conventions.

This is not the same as the Anglo-Saxon notion of domicile as applied in conflict of laws. The Anglo-Saxon concept is highly influenced by the doctrine of revival, and is therefore to be regarded more as a "pseudo nationality". The late Professor R.D. Kollewijn, then a Professor at the Rechtshogeschool in Jakarta, had in 1929 masterly illustrated this shift from the nationality principle to the domicile principle in his famous Dies speech, *"De ontaarding van het Nationaliteitsbeginsel in het moderne international privaatrecht"*.[11]

Pleading for a re-introduction of the domicile principle which had, since the last century been the law in the Netherlands Indies, Kollewijn showed the difficulties which resulted from limping decisions. This is due to a rigid application of the nationality principle; an illustration of which may be found in the divorce procedure of Mrs. de Ferrari, a Frenchwoman who became an Italian by marriage. The divorce was obtained several years after the proceedings started. This was, however, a limping decision as it was only recognised in France, unlike in Italy where divorce was not legally recognised at that time.[12]

In Indonesia the nationality principle applies although it is preferable to adopt the domicile principle. The nationality principle was introduced in State Gazette 1915 no. 299, after the *Wet op hetNederlands Onderdaanschap* (Law on Dutch subjects) came into force by State Gazette 1910 no.296. The State Gazette 1915 no.299 replaced the term *"ingezetenen"* in article 16 of the Indies General Provisions Act (G.P.A.), State Gazette 1847 no.23

11 *Com de Cassation 6* July 1922, Revue Darras-Lapradelle, 1922-1923, p.488; 14 March 1928, id., 1928 p.651, Clunet 1928, p.382.

12 The legal basis for the principle of concordancy was art. 131 para. 2 of the *Indische Staatsregeling,* hereafter *I.S.*

with *Nederlandse Onderdanen.* The purpose of this change was to have in this article, the same principle as that appearing in article 6 of the Netherlands G.P.A., *i.e.*, the issue of personal status will be decided under the nationality principle and not under the domicile principle.

Based on the principle of concordancy,[13] the Indies G.P.A. in article 16 follows article 6 of the Dutch G.P.A. Article 16 reads as follows:

> "The laws concerning the rights, status and capacity of persons are binding on Dutch subjects *(Nederlandse Onderdanen),* (and are) now to be read as:
>
> "Indonesian Nationals", even when they reside abroad".[14]

This is a one-sided choice of law rule. If we consider the text carefully, no reference is made to foreigners residing in Indonesia. In practice, however, with the support of jurists and case law, it would appear that it applies indiscriminately to Dutch subjects (now Indonesian nationals) as well as to foreigners. The argument is *a contrario.* Not only is the personal status of a Dutch subject (Indonesian national) governed by his Dutch (Indonesian) law, the personal status of a foreigner in Indonesia is also governed by the law of his foreign nationality.[15]

However, although case law is, in general, based on the nationality principle in matters of personal status (or family law), there are a number of exceptions to the rule. These exceptions have been made by administrative organs such as the Civil Registrar for Marriages and Divorces *(Burgerlijke Stand)* and the *Weeskamer (Balai Harta Peninggalan).* These administrative organs continue to apply the domicile principle for many years despite the introduction of the nationality principle.[16] This fact demonstrates the general lack of acceptance of the nationality principle in its application in Indonesian law. The tendency is to use the Indonesian Civil Code for matters of personal status. This includes foreigners living in Indonesia.

13 The Supreme Court on 25 June 1936, in *Tijdschrift van het Recht* (hereafter *"T")* 144, at p.288 held that mainland China marital property law is applicable for Chinese couples married in China and not the Indonesian Civil Code. President *Raad van Justitie* (Hereafter *"Rvj."),* Jakarta 12 June 1927, *T.* 6, p.222; German BGB applicable for German couple's marital property in Indonesia; *Rvj.* Padang 5 October 1933, with Commentary by Kollewijn, *T.* 139 p.97; German BGB applied in guardianship case of German children born in Indonesia by German parents, Supreme Court (Civil Court Chamber), decision *T.*136 p.319. *Rvj.* Jakarta 9 September 1939, *T.*151 p.349 with commentary by Wertheim; Swiss Civil Code applied in guardianship case over Swiss children after the divorce of their Swiss parents, *Rvj.* Padang 26 October 1939, *T.* 151 p.351 with commentary by Wertheim; Supreme Court (Court Chamber) 29 September 1932, *T.* 137 p.25 Swiss Civil Code applied on marriage annulment case of Swiss couple; Supreme Court 10 January 1935,*T.*141 p.351; Japanese law for recognition of children born out of wedlock by a Japanese mother and a Chinese national father.

14 This article is a copy of art. 3, French Code Civil.

15 See J.J. de Flines, *Caveant Consules! Het op Chineezen vreemdelingen toe te passen recht,* (The law applicable for Chinese foreigners) *T.*141, p.343.

16 See S. Gautama, *Hukum Antara Tata Hukum* [Interlegal law] Bandung (1977) Chapters I and IV.

The *Pengadilan Negeri's* (the Court of First Instance), applied the Indonesian Civil Code to foreigners as well. This resulted partly from the tendency to treat them as cases of interpersonal law *(intergentiel rechtelijk)* rather than as cases involving conflict of laws.[17] This misconception arose because foreigners were regarded as Europeans. This was based on section 163 of *Indische Staatsregeling* (the former Constitution of the Netherlands Indies). Thus, all foreigners are subject to the Civil Code. The conflict of laws component was overlooked. The problem was seen as interpersonal (between different population groups), rather than as private international (between nationals of different countries) in nature.

### A. *Proposal for a New Code of Private International Law*

The Institute of National Legal Development was requested to submit proposals for a new conflict of laws code for Indonesia. Two possibilities were mooted by the Institute. One approach was to change radically from the nationality principle to the domicile principle. Another possibility was to introduce a compromise between the two principles; *i.e.*, maintain the nationality principle for a period of more than 5 years for Indonesians abroad and for foreigners residing in Indonesia.[18] During this period the Indonesian Courts would have to use the respective persons' foreign law in matters pertaining to the family. Thereafter, the Indonesian Civil Law, which accepts the domicile principle, would be applied even to foreigners. The Institute chose the second possibility.

#### 1. *Arguments in favour of domicile principle*

The choice of the domicile principle would assist Indonesian judges in deciding family law cases which involve issues of conflict of laws. It is undeniable that the Indonesian judge would feel more at ease if he is able to use a law which he knows best. The application of foreign law is difficult for Indonesian judges, particularly if these laws are different from Indonesian laws. They are as a rule not particularly trained for such a task. There is a paucity of literature and experts on foreign law in Indonesia for the moment.[19] The situation does not appear as if it will improve in the near future. Therefore, wherever possible, we should be inclined to support the application of Indonesian doctrines in matters relating to conflict of laws. With this in mind, the writers support the use of *renvoi,* as this will allow Indonesian laws to be applied. The *ordre*

[17] In the original version, a period of 2 years was suggested, based on the period required by the Immigration Office, to obtain *Kartu Izin Masuk* (Hereafter KIM) or *Kartu Izin Masuk Sementara* (Hereafter KIM-S). But the Interstate Commission redrafting the Draft New PIL has suggested a longer period of 5 years.

[18] We do not yet have a special branch at the Justice Department or Institution like the TMC Asser Institute in the Netherlands, or the Max-Planck-Institut in Hamburg rendering assistance in foreign law.

[19] Art.3 Draft New PIL Code.

*public* principle will also result in the application of Indonesian laws.[20] Further, where foreign laws could not be ascertained,[21] the logical outcome appears to be that Indonesian laws should be applied.[22]

The domicile principle is also more familiar to the judges as it has traditionally been a part of Indonesian legal doctrines. The change from the domicile principle to the nationality principle took place only after 1910.

As indicated in the foregoing, in most civil cases presently lodged before the daily courts in Indonesia, the Indonesian Civil and Commercial Codes are used if the parties are Europeans and foreign orientals, regardless of whether one of the parties is Indonesian. The reason for this attitude appears to be that, as a rule, the plaintiff in civil cases does not state the nationality of the parties[23] in his introductory request.[24] If the nationality is stated, the Court would be compelled to consider the case as one involving principles of conflict of laws.

Indonesia has a plural legal system. The diversity of laws comes from the different ethnic groups and the different *adat* laws.[25] Here, stress is laid on the application of *adat* or customary laws, based on territorial diversification. The relationship with territory, domicile or residence, is of importance. The Indonesian legal system is still plural in nature as a consequence of its past colonial system of laws. Thus, *adat* laws still play an important role among persons belonging to the native autochthonous ethnic group and to the non-Chinese foreign orientals.[26]

Factual domicile is a determining factor for the applicable law as is the case, for example, in the United States or the Soviet Republic. This is a point for consideration in deciding whether the domicile principle, instead of the nationality principle, applies as a determining and connecting factor.

Until recently, Indonesia might be regarded as an "immigration country". This means that there were more foreigners coming, than there were Indonesians leaving the country. When it was still a Dutch colony, the doors for importing foreigners to work as labourers or entrepreneurs in, say, agricultural plantation or, mining were widely opened. Since inde-

20 Art. 8 Draft New PIL Code. We are inclined to support the use of Indonesian internal law in PIL matters. Keeping this in mind, we have supported the acceptance of *renvoi* as this will result in internal Indonesian law being applied. The *ordre public* principle will also result in the application of internal Indonesian law and should be seen as being in line with this tendency.

21 Recently we have elaborated on the role of national law in the development of Indonesian PIL, in a paper presented before the Indonesian Institute of National Legal Development, *Badan Pembinaan Hukum Nasional* (1989).

22 Professor Lie Oen Hock, at that time Chairman of the Jakarta Special District Court (*Pengadilan Negeri Istimewa Jakarta*).

23 Based on Art. 118 HIR. This is the view of a well-known judge and scholar.

24 *Adat rechtskringen* according to Van Vollenhoven.

25 For example, Indians, Pakistanis and Malaysians.

26 S. Gautama, *Warganegara dan Orang Asing* [Citizens and Foreigners] (4th Reprint, Bandung 1987).

pendence, rising nationalism and the consequent limitation on foreign enterprises and investments changed the situation dramatically.

Nevertheless, it cannot be denied that in Indonesia today, there is still a large number of persons having foreign status. This number has been increasing as a result of political developments. A group of persons, formerly belonging to *Nederlandse Onderdonen* (Dutch subjects), have become foreigners. Former Dutch subjects of Chinese origin have made use of the right of repudiation under the Netherlands-Indonesian Round Table Conference Agreements. The number of persons obtaining foreign status among the former Dutch subjects of Chinese origin increased under the Indonesia - People's Republic of China Agreement on the Termination of Dual Nationality.[27] Between 20 January 1960 and 20 January 1962, those who chose not to make use of the opportunity to repudiate their Chinese nationality, under Law no.2 of 1958, became foreigners when they lost their Indonesian nationality.

If the nationality principle is maintained, these foreigners, in so far as family matters are concerned, will be governed by foreign laws. As such, unless the issue is firmly resolved, foreign laws rather than domestic laws will be used.

As a country with a large migrant population, Indonesia adopts a policy of quick assimilation of foreigners. During the colonial period, foreigners obtained the status of Dutch subjects if they were born in the colony. The *ius soli* principle was applied in the law on Dutch subjects (*Wet Op het Nederlands Onderdasnschap*)(State Gazette 1910 no.296). Children of foreigners became Dutch subjects even if they were recent arrivals.[28] This contributed to the assimilation process. It is obvious that the domicile principle in relation to personal status will also help to establish the policy of assimilation of foreigners in Indonesia. They need no longer be subject to their national laws. The law of their domicile would be applicable as a determining factor.

With the coming into force of the new Indonesian Law on Citizenship (1958 no.62) on 1 August 1958, the *ius sonquinis* principle replaced the former *ius soli* principle. Consequently, more people living in Indonesia had foreign status. Children of foreign parents living in Indonesia remained as foreigners and did not obtain Indonesian citizenship. If the nationality principle is upheld, there will be a greater application of foreign laws, particularly in cases where personal matters are involved.

Another important factor which is in favour of the domicile principle is the reality that Indonesia is surrounded by countries which adhere to

27 Being born of parents who are *gevestigd* in the Netherlands Indies is enough to obtain Dutch subject status. The term *gevestigd* is understood in a broad sense as having main residence (*hoofdverblijf hebbend*) within the Civil Code for Indonesia. See on this interpretation Logemann, J.H.A., *Nederlands Onderdoonschap en het Hooggerechtshof* (Dutch subject and the Supreme Court) in T.136 p.500.

28 See on this subject, Gouw Giok Siong (S. Gautama) *Tafsiran Undang2 Kewarganegaraan R.I., i.e., Commentary on the Indonesian Nationality Law* (4th printing, Bandung 1986).

this principle. All former colonies of Great Britain, such as Australia, India, Pakistan, Singapore and Malaysia, are inclined to use the domicile principle for personal status.

2. *Arguments in favour of nationality principle*

On the other hand, some arguments may be canvassed in favour of the nationality principle. Independent Indonesia is a relatively young country. Nationalist sentiments tend to be strong, and nationalism plays an important role in nation building. As a result, there is an apparent inclination towards the nationality principle, especially in respect of Indonesians. Indonesians overseas are still subject to Indonesian laws where the issue relates to the family, and is disputed in an Indonesian court. Equally there are case laws which suggest that the nationality principle is still being applied locally to non-Indonesian nationals.

In a recent civil law divorce suit involving two Germans, this principle was applied by a judge of the Jakarta West District Court. The judge was initially surprised that the attorney for the German plaintiff had argued that the German Civil Code was the applicable law since both parties were Germans and were living in Jakarta. The judge did not accept the argument and sought to apply the Indonesian law on marriage and divorce (Law of 1974 no. 1). She thought it strange that the plaintiff could plead the applicability of a foreign law in an Indonesian court. However, following further arguments, the judge was convinced that, based on the doctrines of conflict of laws as applied in Indonesia, and with respect to the nationality principle, in particular Article 16 of the *AB,* the use of German laws on divorce was proper.

Taking into consideration the factors in favour of and against the nationality principle, it is our opinion that the new Code on private international law for Indonesia should either adopt the domicile principle or, if the nationality principle is principally maintained, it should be combined with the principle of domicile. After a period of 5 years[29] in Indonesia, the foreigner will no longer be subject to his own national law, but to Indonesian law, as the law of his domicile. Indonesian nationals who are abroad will in principle, for family matters, be placed under Indonesian law.

The late Professor L.I. de Winter, in his Hague Academy lectures,[30] indicated the tendency in Dutch conflict of laws to return to the domicile principle. This argument supports the views expressed by Kollewijn in his Jakarta lecture.[31] This tendency to favour the domicile principle is beyond doubt observable in Dutch conflict of laws. Van Rosy and Polak have recently in 1987 correctly stated that "De Winter's views on nationality and domicile have exercised (sic)considerable influence on Dutch private

29 de Winter, L.I., *Nationality or domicile? The Present State ofAffairs,* 128 Rec.347 (1969, III).
30 See also Kollewijn's opinion regarding the Child Boll case, *Het Haagsevoogdijverdrag voor liet Inter-nationale Hof van Justitie,* VI NTIR (1959) p.311 *et. seq.* especially p.322.
31 R. van Rooij & M.V. Polak, *Private International Law in the Netherlands* (1987), p.9.

international law".[32] It seems clear that the domicile principle is presently gaining ground in the family area. The above writers have also expressed that "since the 1960s a remarkable regression of the nationality principle has become manifest".[33]

It should be remembered that the notion of domicile as used in this context is that of habitual residence as it appears in the modern Hague Private International Law Convention.[34] It is more to be regarded as a social domicile or *maatschappelijke woonplaats*.[35] This refers to the country in which a person's life is factually connected. This means that the person as a rule, lives and works, and maintains his permanent home in the country of his habitual residence. The connection is of such a nature that there is reason enough to apply the law of this country in respect of family matters. The notion of domicile as used in common law, which according to some writers is no more than a "pseudo nationality",[36] is not followed here.

## B. *Renvoi*

*Renvoi* is accepted in Indonesia. *Renvoi* problems only occur in personal status or family matters, *i.e.*, marriage and divorce, status and capacity, matrimonial property, and matters which are related to family law. It is not applicable in contract law.

With regard to the doctrine of *renvoi,* there is a difference between the Dutch and the Indonesian approaches. Most Dutch scholars do not agree with *renvoi,* which in their opinion is illogical.[37] A recent study on Dutch conflict of laws doctrines in 1987 expressly stated that "the general view in the Netherlands regarding *renvoi* is that, in principle, a Dutch choice of law rule only refers to substantive foreign law, (and) not to foreign choice of law rules". If a Dutch choice of law rule refers to the law of a particular state, and the choice of law rule of that state

32 *Op. cit*., 178. This crumbling away process of the nationality principle is caused according to those writers by:
(1) The birth of a new body of Hague Conventions in which domicile - or rather *habitual residence* — is the predominant connecting factor.
(2) The denunciation by the Netherlands of the 1902 and 1905 (old) Hague Conventions.
(3) The influence of learned authors, in particular those belonging to the *Amsterdam School,* such as de Winter, upon the law of the courts.
(4) The introduction of new legislation which reduced the scope of Art. 6 *GPA* (same as art. 16 *A.B.* Indonesia).

33 Starting with the 1956 Hague Convention on the law applicable to maintenance obligations towards children (art.1).

34 See de Winter's Amsterdam inaugural speech on *De maatschappelijke Woonplats.*

35 See E.M. Meijers, *below* note 36. Countries accepting the principle of domicile have only two ways of escape: public policy or the introduction of a domicile of origin. But a domicile of origin (*Heimatsort*) is nothing but a substitute for nationality. See The Benel Convention on P.I.L. in *Verzamelde Privaatrechtelijke opstellen,* II (1955), p.401.

36 E.M. Meijers: *Men kon niet een conflictenrecht voor conflictregels opstelien: het zou een internationaal privaatrecht in de tweede macht zijn,* in *Verzomelde Privaatrechtelijke Opstellen,* 11 (1955) p.392; also in WPNR 1938 nos. 3555, 3556, 3557, 3558: *Het vraagstuk der herverwijzing.* (The *renvoi* problem.)

37 Van Rooij & Polak, *op. cit*., p.240.

refers the issue in question to Dutch law or to the law of a third state, the legal system referred to by the Dutch choice of law rules applies, irrespective of further references by the choice of law rules of that legal system.[38]

This is in contrast with the legal theory and case law presently adopted in the former Dutch colonies and the Republic of Indonesia. In respect of the doctrine of *renvoi,* Indonesia follows the opinion of Professor Lemaire.[39] According to this learned scholar, the topic should not be approached from a point of pure logic. The approach should be a positive legal one (*positief rechtelijk*). Legal problems cannot always be solved by using pure logic. *Renvoi* in Indonesia is more a problem of legal interpretation, or *"rechtsverfijning"* (*pelembutan hukum*). In reality the *renvoi* principle has been adopted in Indonesia.

The doctrine of *renvoi* has generally been accepted by the Courts. Reference has been made to the practice of Civil Marriage Registrars, where a distinction is made, in some cases, between marriages of persons having the English[40] nationality (also Americans[41] and Danish),[42] and thus have the domicile principle applied to them, and the Germans and French who come under the nationality principle.

In the case of foreigners living in Indonesia, the Indonesian Civil Code is to be applied if their mother country adopts the domicile principle. This is a clear indication of the acceptance of *renvoi.* On the other hand, in the case of foreigners whose mother country adopted the nationality principle, their own national requirements regarding marriage are to be observed. This policy has been laid down by a Circular Letter from the Prosecutor General in 9 March 1922 to the Civil Registrars of Marriages. The Justice Department of the Netherlands Indies concurred with the acceptance of *renvoi* in its administrative practice.[43]

The Courts have also adhered to the *renvoi* doctrine. In a case concerning divorce and matrimonial property, a Persian Armenian plaintiff opposed a marital attachment by his wife in the course of divorce proceedings. The husband contested the attachment by stating that his national law, Persian law, did not recognise the community of property of the spouses.

Islamic law applied in Persia and the law did not recognise the community of property between a husband and his wife. The President of the Semarang Court referred in his decision to the old Hague Convention of 17 July 1905 on marital property. However, it was not clear to the

38 *Lemaire,W.L.G.,Deterugverwijzing in het Nederlandsch Indische Internationaal Privaatrecht* (*Renvoi* in Dutch East Indies P.I.L.), *T.*148 p.1. *et seq.*
39 Formerly Professor in the Conflict of Laws in Jakarta.
40 Case of J.W. and G.B., Government Decree 16 April 1923 no.2.
41 Case of A.N.H., Government Decree 18 April 1933 no.7. See for these cases Nauta H.A., *Eenige regeeringsbeslissingen en aan de regering uitgebrachte adviezen betreffende onderwerpen van burgerlijk recht* (Some governmental decisions and advice submitted to the Government on Civil law matters), *T.*143 p.617 *et. seq.* and at p.630.
42 Published in *T.* 115, p.302.
43 See Nauta, *op. cit.*, p.629, note 24.

Judge whether Persia had joined this Convention. Nevertheless, he was of the opinion that most of the countries throughout the world at that time adhered to the nationality principle, with the consequence that Persian law was to be applied in this case. But what was the content of Persian law? He was of the opinion that Persian law in this instance, referred back to the laws of Indonesia. The reference by Indonesian conflict of laws to Persian law is regarded as a *Gesamtverweisung,* while the reference back to Indonesian law is treated as a *Sachnormverweisung.* In this connection, the Indonesian Civil Code recognises community of property. As a result, the plaintiff's opposition to his wife's marital attachment did not succeed.

For us, the Court's consideration is important. The outcome of the above decision is that a Persian-Armenian, who is going to live abroad, does not take with him *statutum personale*. He should strictly obey the laws prevailing in the country of his new home.[44] This means that according to the Court, the term Persian national law also includes choice of law rules.

In another case, a person, originally from British India, requested for bankruptcy proceedings although he was only 16 years old. He was not regarded as a minor. In the opinion of the Medan Court, the applicant appeared to be at least 17 or 18 years old. As such, he was treated as having come of age.[45] For us, the important consideration is that the law of British India, as English law, adhered to the principle that British Indian subjects who are abroad, in respect of their status and competency, come under the law of their domicile, *i.e*., the Dutch East Indies Law applies.[46] Thus it would appear that the Court clearly was in favour of accepting the *renvoi* doctrine.

In a divorce case between an English husband and his Indonesian wife who acquired British nationality through marriage, the Jakarta South District Court in 1987 applied the Indonesian Marriage Law of 1974 no. 1 by way of acceptance of the *renvoi* doctrine.[47] The persons in the case were British and according to English doctrines, personal status is based on the principle of domicile. The Indonesian judge referred the matter back to the law of the parties' domicile, *i.e*., Indonesian law concerning divorce.

In another case concerning an American couple married in San Jose, California in 1978[48] and presently domiciled in Indonesia, the Jakarta Central District Court rendered its decision based on the Indonesian Marriage Law of 1974 no.1, and granted the divorce based on irreconcilable

44 *T.* 127 p.353, case *A.A. Galstoun* v. *Mrs. A.A. van Stralendorf,* President Raad van Justitie, in 1928 said: *"Overwegende dat de slotsom hiervan, deze is, dat de Pers-Armenier, die zich elders gaat vestigen, aan statutum personale niets in den mars medeneemt dan de mailing zich te gedragen naar het ter plaatse heerschend recht".*

45 Based on State Gazette 1924 no.556 concerning the age of majority for persons belonging to the population group of Foreign Orientals.

46 Raad van Justitie, 4 December 1925, *T.*124, p.242.

47 Case no.l 12/Pdt.G/l987 (not published).

48 Case no.334/1978G (not published).

incompatibility. *Renvoi* was accepted as the case concerns parties of foreign origin, *i.e.*, American nationality, where the respective jurisdiction adhered to the domicile principle in matters of personal status. The judge therefore referred the divorce requirements back to the country of domicile, *i.e.*, Indonesian Marriage Law 1974 no.l.

We are of the opinion that acceptance of the *renvoi* principle is beneficial to Indonesia. It will result in the application of Indonesian internal law and, consequently, when Indonesian laws are applied, there is greater assurance that the correct law will be applied than when foreign laws are applied. Although we uphold the equality of Indonesian and foreign laws, the Indonesian Courts will be more at ease if they can apply their own internal law.

In conclusion, it would be worthwhile to note that in the Draft New Private International Law Code for Indonesia, we have favoured the acceptance of *renvoi.* The article should read as follows: "Whenever the national law of a person is declared applicable, and if this law refers to Indonesian law as the law to be applied for him, then Indonesian law is to be the applicable law."[49]

## III. INTERNATIONAL CONTRACTS

Since the introduction of the Foreign Investment Law 1967 no.l[50] and the Domestic Investment Law 1968 no.6,[51] contracts between Indonesian nationals and foreign entrepreneurs have become more frequent. Joint venture agreements, technical assistance contracts and licensing agreements for instance are concluded daily.

The first determinant connecting factor for international contracts is the law chosen by the parties.[52] The choice of law by the parties is honoured. Party autonomy is decisive for the law to be applied. The basis for accepting the law which has been chosen by the parties has long since been established in case law of internal conflict matters (interpersonal law disputes). The intention of the parties, *edoeling van parftijen,* is decisive for the law

49 Art. 2 Draft New PIL Code: *Apabila hukum nasional dari seseorang yang dinyatakan berlaku dan apahila hukum tersebut menunjuk kepada hukum Indonesia sehagai hukum intern Indonesia-lah yang berlaku.* Here the text of art.29 of the Japanese PIL Law of 15 June 1898 is followed (similar to the old German EBGB, art.27). It should be noted that even if our recommendation to accept the domicile principle instead of the now prevailing nationality principle in matters of personal status is accepted, *renvoi* is still of importance, as there are still many other countries, whose nationals come and live in Indonesia, adhering to the nationality principle. As long as there are countries adhering to the nationality principle and countries subscribing to the domicile principle, problems of *renvoi* will still prevail.

50 S.G. 1967 no.l revised by Law no.l 1/1970, no.7/1983.

51 S.G. 1968 no.33, revised by Law no. 12 of 1970 no.47, no.7 of 1983, S.G. 1983 no.50.

52 This is accepted also in Indonesian internal conflict of laws. The intention of the parties *(bedoeling van parijen)* is a determinant connecting factor. See S. Gautama, *Interpersonal Law, An Introduction (Hukum Antar Golongan Suatu Pengantar),* (6th ed., 1985), p.50 *et. seq.*

to be applied.[53] In the Draft PIL Code for Indonesia (art. 14) we have also proposed that the law chosen by the parties will in the first place be the law applicable to international contracts.

Concerning how free the parties can be in choosing the law to be applied, we have followed the theory of the late Professor de Winter of the *Amsterdam School.* Strict social and economic regulations issued by the State cannot be amended by the parties choosing another legal system.[54] In Indonesian practice, parties in international contracts often choose another law as the applicable one.

For example, parties (a Singapore Financial Institution and an Indonesian Bank) in a loan agreement may choose as applicable law, the law of England. Sometimes a problem of choosing more than one law to govern the contract arises. We have stated in several legal opinions that choosing more that one law would be permissible. For example, in the agreement just mentioned, if the case is brought before the Courts in England, then English law will be applicable. However, if the case is brought before an Indonesian Court, then Indonesian law will apply.

Parties could also split up their contracts, so that certain parts would be under the law of country X, while other parts would fall under the law of country Y. For example, matters regarding the conclusion or validity of the contract may fall under X law, while for the execution of the contract, the law of Y may be applicable. As a further illustration, for inspection of the goods sold, the law of the place of its arrival may be applied, while for other matters of the contract, another law may be used.

Another example is to be found in bill of ladings or charterparties. In general, the law of the ship's flag is to be applied; whereas for general average English law will be applicable.

The problem of choice of law by the parties is in practice closely related to the choice of forum (choice of jurisdiction) issue. We are of

[53] For case law, see, *e.g.*, *Residentiegerecht Padang, 9* May 1930, Read van Justitie Padang 11 August 1930, *T.*132 p.417; *Landraad Malang* 16 February 1938, *T.*148 p.764, in Gouw Giok Siong (S. Gautama), *Himpunan Keputusan Antargolongan* [*A Collection of cases on Interpersonal Law*], hereafter *H.K.* no. 1; *Pengadilan Negeri Jakarta* 21 November 1956, Law Journal *Hukum,* hereafter *H*, 1957 no. 1-2, p.137; also Landraad Padang 31 May 1930, T.132 p.431; Raad van Justitie Padang, 31 March 1932, *T.*137 p.197, *H.K.* no.3; *Landraad Penyahungan* 3 October 1933, Raad van Justitie Padang 16 November 1933, *T.* 139 p.285, *H.K.* no.72; Landraad Klaten 22 October 1938, Read van Justitie Jakarta 12 May 1939, *T.* 151 p.595, *H.K.* no.7; Landraad Magelang 5 October 1939, *T.*151 p.615, *H.K.* no.5; Landraad Indramayu 22 Febuary 1933, *T.* 142 p.155, *H.K.* no.2; Raad van Justitie Batavia (Jakarta) 20 March 1940, *T.*153 p.145, *H.K.* no.6; *Pengadilan Negeri Jakarta* 1 December 1951, *H.* vol 1957 no.3-4, p.73, approved by *Pengadilan Tinggi Jakarta* 27 January 1954, *Mahkamah Agung* 19 September 1956.
For legislation confirming the intention of the parties as determinant connecting factor for the law to be applied; see also art. 2 *Aanvullende Plantersregeling* (Regulation on cultural estates) S.G. 1938 no.98, and art. 1603X of the Indonesian Civil Code on labour contracts. See further *Landraad Makassar* 10 October 1925, *T.*131, p.194.

[54] de Winter L.I., *Dwingend recht bij Internationale overeenkomsten [Compulsory Law in International Contracts],* 3.1 NTIR (1964), p.329 *et. seq.*

the opinion that, in principle, parties are free to decide on the forum they wish. A non-exclusive choice of jurisdiction is also permitted. Where a notarial loan agreement is signed before a notary in Jakarta, if a stipulation is made that requires a foreign lender to file a suit against the Indonesian borrower in a foreign court, then the laws of that foreign court are to be applied. On the other hand, if the suit is lodged before the Jakarta District Court as the legal seat of the Indonesian borrower, then Indonesian law is applicable. We have stated in legal opinions that such a choice of jurisdiction and of law is valid. However, the view has not been tested by Indonesian Courts so far.

What has been decided by the Jakarta District Court is that when parties choose the law of Singapore, the Indonesian Courts will have no jurisdiction to try the matter. This is a wrong decision which, fortunately, has not been upheld on appeal by the Jakarta High Court.[55] Certainly, the correct view is that choice of law clauses are to be distinguished from choice of forum clauses. The choice of a foreign court should as a rule not be interpreted as implying the choice of foreign substantive law.

The Jakarta District Court in 1982[56] correctly stated that if the parties, the plaintiff being a Jakarta branch of a foreign bank and the defendant, being a local limited liability *Perseroaon Terbatas* in Jakarta, had chosen Japanese law, then Japanese law should be applied. The defendant's argument that the Japanese Court should sit in this case since the parties had chosen Japanese law to govern the contract was rejected.

In another case[57] involving Singapore citizens as plaintiffs and a Jakarta branch of a foreign bank as defendant, the Central Jakarta District Court also correctly refused the defendant's contention that as Singapore law was chosen, the Singapore Court should have jurisdiction in the matter. The Jakarta District Court held itself competent. According to the Court, since there was no difference between Singapore and Indonesian law in respect of the matter, the Court chose to apply the Indonesian Civil Code.

When no choice of law has been made by the parties, we have, following the late Professor de Winter, opted for the theory of "the most characteristic connection" as the determinant factor for international contracts. (Article 14, Draft New PIL for Indonesia.)[58]

Another closely related problem is the choice of jurisdiction appearing in bills of lading issued by Indonesian steamship companies. To illustrate, the Jakarta Lloyd Bill of Lading stipulates that the *Pengadilan Negeri Jakarta Pusat* (District Court of Central Jakarta) will have exclusive jurisdiction to try all disputes arising out of the respective bills

[55] The case of a foreign bank's branch and a local limited liability company is still pending before the Supreme Court.
[56] Case no.560/1982 G
[57] No.325/1982G.
[58] The proposed text follows closely art. 27 of the Polish PIL Law of 12 November 1964.

of lading.[59] The High Court in Singapore set aside the exclusive jurisdiction clause.[60]

On the other hand, the English Courts have declared themselves not competent to try a case where the same exclusive jurisdiction clause as that in the Jakarta Lloyd Bill of Lading has been contested.[61]

The above cases are mentioned as examples of how choice of law and choice of jurisdiction clauses have appeared in legal practice. Both choice of law and choice of jurisdiction often take place in important international contracts presently concluded in Indonesia.

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59 Art.32 *Law of Application* states: "Insofar as anything has not been dealt with by the provisions of this Bill of Lading, the Law of Indonesia shall apply. Art.33 *Jurisdiction:* All actions under this contract of carriage shall be brought before the Court of Jakarta and no other Court shall have jurisdiction with regard to any other actions unless the carrier appeals to another jurisdiction or voluntarily submits himself thereto."

60 Singapore High Court, 13 June 1989, Lloyds Maritime Newsletter (L.M.L.N. 122 of 5 July 1984). Kulasekaram J. regarded the Singapore High Court as having competence, although the Pelayaran Nasional Indonesia's vessel "EPAR" Bill of Lading contained in art. 17 that "Any claim for ... damage ... arising out of this B/L shall be dealt with, at the option of Pelayuaran Nasional Indonesia, *in the Court (Pengadilan Negeri) of Jakarta, to the exclusion of proceeding of any other Court"* and art. 16 stipulated that the Bill of Lading shall be governed by *"Indonesian Law"*.

61 London Court of Appeal 15 June 1984 (Lloyds Maritime Newsletter 21 June 1984, L.M.L.N. 121) *Re m.v. Benarty.* See concerning this issue, S. Gautama, chapter I, *Perkara2 kapal Indonesia dihadapan hakim luar negeri [Indonesian vessels cases before foreign Courts]* in *Aneka masalah Hukum Perdata Internasional* [*Some PIL Problems*], (Bandung 1985).