THE ROLE OF LAW IN THE DEVELOPMENT PROCESS AND THE ROLE OF THE LAWYER IN INDONESIA*

The role of law in the overall development of Indonesia is important. Without development in the field of law the economic development of the country is doomed to failure.

It is therefore understandable that in the official Five Year Development Plan introduced by the Government in 1969/1970 a special place is reserved for the problems of law in the context of the whole plan.[1] Chapter XIII of the Five Year Development Plan stresses the role of law in the overall development of the country.

In the introduction it is stated that the Republic of Indonesia is a so-called *"Negara Hukum"* (Rechtsstaat), a state based on the "Rule of Law". This seems to be a quotation from the preamble of the 1945 Constitution of the country which opens by saying that the Republic of Indonesia is by the grace of God a *"Negara Hukum"*.[2]

Elements of the Rule of Law

"The Republic of Indonesia is a state founded on Law and not merely on power" are the first words of the introduction of Chapter XIII. As a consequence of this statement the "Rule of Law" must be strongly upheld.

According to the draftsmen of the Five Year Development Plan the "Rule of Law" comprises three main elements, which are:

(i) the recognition and protection of basic human rights,

(ii) Justice which is independent and impartial,

(iii) Legality in the sense of formal and material law.

In recent publications of scholars and writers we see a clear tendency to accentuate the importance of protection of the basic human rights. A special Committee which bears the name of "League of Defenders of the Basic Human Rights" has been formed. The prominent leaders

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1. The first Five-year Development Plan (1969/70-1973/74). Volume 2c, 95ff, Department of Information Republic of Indonesia, without year.

2. See Gouw Giok Siong (Sudargo Gautama), *Pengertian tentang Negara Hukum* (The idea of the State based on the Rule of Law), Jakarta (1955).

of this movement now sit as newly appointed young Judges in the Indonesian Supreme Court. Whenever something regarded as detrimental to the principle of protection of basic human rights arises, the Committee raises its voice. One of the main aims of this movement is to make the Indonesian public more human rights-minded and not afraid to insist on the protection of its rights. The public must be educated in order to have a society where the "Rule of Law" really works.

The "Rule of Law" has to be implemented in every day social life. This is the aim, although in practice it is still not fully realized.

Deviations of the Rule of Law

The Five Year Development Plan frankly confessed that there are in practice still many deviations from the "Rule of Law" principle. Especially in the sphere of the so-called *"Old Order"* the "Rule of Law" has often been infringed, although on paper the preamble of the 1945 Constitution still proclaims the country to be a state founded on Law. Abuses of power often happen. There is misuse of authority and misuse of power. The deviations from law are apparent in the legislative or lawmaking field as well as in the law enforcement field.

The implementation of the 1945 Constitution is not as it ought to be. The Executive Head of State has all powers. His powers seem to be absolute. He may issue decrees which even can replace laws or have the same effect as laws enacted by Parliament. Presidential Decisions and Regulations were issued which were regarded as being of a higher standard than ordinary laws passed by the people's Representative body. Based on the slogan "Return to the Constitution of 1945" the well-known Presidential Decree of 5 July, 1959 was issued.[3] As a further implementation of this Decree many Presidential Decisions and Regulations were issued.

Review of "Old Order" regulations

In the sphere of the present *"New Order"* these Presidential Decisions and Regulations were reviewed. They have been reconsidered and revalued. A special Law No. 6 of 1969 has been enacted by Parliament stating which Presidential Decrees and Regulations are regarded as no longer valid.[4] New regulations have been issued to replace the former ones which are regarded as incompatible with the changed situation.

Among the Regulations which were repealed may be mentioned:

(i) the Act on Landreform Courts (No. 21 of 1964, S.G. 109/1964). The Landreform Courts, being special courts introduced to speed up the realisation of the Landreform as outlined in the Basic Agrarian Law of 1960, are regarded to be too much influenced by the leftist mass organisations.

3. S.G. nr 75/1959.

4. S.G. nr 37/1969.

(ii) the Basic Law on Judicial Powers (No. 19 of 1964, S.G. 107/ 1964) stating that the Head of State can interfere in cases pending before the courts. In accordance with the aim to free the Judiciary from interventions of the Executive a new Basic Law on Judicial Powers has been issued stating the principle of non-interference by the Executive or others in Court matters (Law No. 14 of 1970, article 4 paragraph 3).

Colonial law and Law Reform

As it is known, much of the law still valid in Indonesia is an inheritance of the colonial regime. This is a cause of further disturbance and insecurity. In the Development Plan it is aimed to move as soon as possible to a new national law system replacing the former colonial regulations. A special body, the Institute for National Legal Development *(Lembaga Pembinaan Hukum Nasional)* was created to give guidance in the field of overall law reform of the country.[5]

How is it possible that the old laws of colonial time are still valid today ? To what extent is the old law system still valid at this moment? We hope to give an answer to these questions in the course of our outline. The whole process of adapting old law to the changed situation after Independence clearly illustrates the important role of the lawyer in the field of legal development in Indonesia. In this connection we use the word "lawyer" in a wider sense than just the practising lawyer (advocate and solicitor). By the term "lawyer" we understand the jurist in general, including the judges of the courts. We will see that the legal development of Indonesia in the past years has been especially led by the judges of the courts and the men of the legal profession. The law-maker himself has a far more modest part compared with judges and practising lawyers. The changes have been a process through judge-made law with juridical interpretations more than law-making in the sense of issuing new laws or regulations.

A retrospective view of the past years and the changed opinion in this regard is necessary for a good understanding of the matter.

Validity of Colonial law

In order to avoid a legal vacuum the revolutionary Government of the Republic of Indonesia in the early days of its birth adopted the principle that as a rule all the laws of the former colonial ruler must be regarded as being still valid until they are replaced by new ones. However, according to a Transitory Regulation the old laws were regarded as no longer valid when they were contradictory to the spirit and the aims of the 1945 Constitution.

It is obvious that much of the legal system of the colonial period is not in accordance with the principles of the newly independent state,

5. The Institute for National Legal Development was founded in 1958 and later reconstituted in 1961 (Presidential Decision of 30-3-1958 nr 107 and 6-5-1961 nr 194).

which has achieved its freedom by using power in a revolutionary way. The legal system of the colonial period was primarily directed to maintaining peace and order with as chief goal the protection of the interests of the mother country. It is colonial in nature.

Nevertheless the Transitional Provision of the 1945 Constitution states in its article II that in order to avoid a legal vacuum all the existing institutions and regulations of the former ruler shall continue to function as long as no new ones have been enacted. Based on this provision it could be argued that the state of laws in Indonesia at the time the Republic was proclaimed in 1945 was in principal the same as it had been in prewar times. So, the old laws of the Netherlands Indies, in all fields of law, remained in force after the transfer of sovereignty by the Dutch.

The respective Section II of the Transitional Provisions of the 1945 Constitution reads as follows:

> "All the existing institutions and regulations of the State shall continue to function as long as no new ones have been enacted in conformity with the Constitution".

Change after the 1959 Decree "Return to the 1945 Constitution"

Even for a considerable period after the 1945 proclamation of Independence the law of the Republic of Indonesia was basically the same as in prewar times.

But after 1959, that is to say after the well-known Decree concerning the "Return to the Constitution of 1945" of 5 July, 1959 (S.G. no. 75/1959) mentioned above was issued, a change took place. However the change came out with the enactment of new laws. It was merely caused by adopting a new kind of interpretation on the validity of the old laws and regulations. Stress was now laid on Regulation No. 2 of 19 October, 1945. In that Regulation it is stated that:

> "the regulations and state organs, present at the moment of the birth of the Republic on August 17, 1945, remain in force, as long as no new ones are enacted, *provided that they are not contrary to the Constitution itself*".

According to the old interpretation mentioned above, the colonial law as a whole is regarded as still valid unless they are replaced by new laws or expressly revoked. But deviating from the former interpretation, it is now argued that the old laws are no longer to be regarded as valid in principle. They are only *tolerated* as far as they are *not contrary to the 1945 Constitution.*

This view is important, because if accepted in legal practice it would open the door for "revolutionary" interpretations. New ideas on law reform could be channelled through this basic idea concerning the value of old laws inherited from the Dutch. It would be possible for the legal profession to regard specific old laws as contradictory to the 1945 Constitution and therefore no longer valid.

Revolutionary approach brings uncertainty

It is evident that such an interpretation will not be a sound contribution to legal certainty. With this interpretation, one cannot be fully sure whether a specific regulation of the former ruler is to be regarded as still valid or not.

In a civil law suit pending before the Courts it could be argued by one party that a specific regulation of the former ruler must be regarded as no longer valid on grounds of contradiction with the 1945 Constitution. But the other party may equally argue that there is no contradiction with the 1945 Constitution and therefore the old regulations are still valid.

It is true that the new interpretation will pave the way for *actual law reform through legal practice*, even though legally speaking no new rules have been formulated yet to replace the old ones.

But it is also clear that this kind of interpretation will not bring legal certainty which in fact is regarded as being of the utmost importance.

That was the situation during the years after 1959, the years of the Old Order. Legal uncertainty as to the validity of regulations issued during the Dutch period was clearly observable.

Introduction of the revolutionary approach

The first time this standpoint was publicly introduced by the late Minister of Justice during that period, Dr. Sahardjo, in a speech in 1962 delivered at a special session of the Institute for National Legal Development *(Lembaga Pembinaan Hukum Nasional)*, the special body created by the Government to prepare and lead the law reform in Indonesia.

According to Sahardjo the Civil and Commercial Code of Indonesia, both enacted in 1847,[6] are no longer to be regarded as Codes. They have no longer the value of a codification, but must be regarded merely as *law books* or as *commentaries*.[7] In a way they are to be compared to the Restatement of the Laws in the United States of America.[8]

6. Publication of 30-4-1847, S.G. nr 23/1847, see Engelbrecht 395 and 898.

7. See also Sahardjo's speech in February 1963, III *"Varia Peradilan"* nr 2 (Judicial Miscellany), Law Magazine of the Indonesian Society of Judges (1963) 4.

8. Cp. the enlivened attention for the American Restatements recently, proposed to serve as a model for the law reform in African countries; see A.N. Allott and E. Cotran, A background paper on Restatement of laws in Africa — The need, value and methods of such Restatement, prepared for the Conference on Integration of Custtomary and Modern Legal Systems, Ibadan 24-29 August 1964, Institute of African Studies, University of Ife, Ibadan.

Opposition from the practising lawyers

When this idea was put forward for the first time it was opposed by the legal profession. The practising lawyers in the country feared that with this new interpretation the so badly needed legal certainty would become illusory. There is a strong point for this opinion. According to the former interpretation, the judge was bound to the old codifications(Civil Code, Commercial Code, Bankruptcy Ordinance etc.). Now this was no longer the case with the new approach. The old Codes will serve the Judge merely as guidelines. They are no longer regarded as codes but merely as law books or commentaries. He is therefore entirely free to use them or to set them aside. If he decides to disregard the old rules, he will just have to find sufficient reasoning in order to maintain that they are to be regarded as not in conformity with the 1945 Constitution. And it is easy enough to find such grounds.[9]

It is evident that for jurists trained in the conception of legal certainty as one of the fundamentals of law and order, this free and "revolutionary" interpretation was not a welcome change.

There was in the beginning a notable hostility to Sahardjo's view among judges and advocates and even among members of the Institute of National Development. The judges protested that with this interpretation they would have nothing to guide them in handling civil law cases.[10]

Sahardjo's proposal that the civil and commercial codes should be regarded as no longer valid was chiefly inspired by the wish to speed up the preparation of a new civil code by the Institute for National Legal Development, which so far has not made much progress with the fulfillment of its task. If the old Codes are no longer to be regarded as Codes, the judges may feel free to set them aside. They do not have to apply the rules contained in the old Code stipulations, with their own interpretation of rules which is more in line with the altered situation in the climate of Independence. In fact new rules are adopted and enforced, even when no such new written rules have been enacted by the Indonesian law-maker. The Judge is sitting on the chair of the law-giver. He is far from only "la bouche de la loi". On the contrary, with this revolutionary approach, he himself creates legal rules.

9. We will see that even the highest judicial body in the country, the Supreme Court, showed the same tendency. The Circular Letter of the Supreme Court of September 3, 1963 no. 3 *(Surat Edaran* nr 3/1963, nr 1115/F3292/H) containing examples of eight Code Articles which are according to the Supreme Court no longer valid, gives a clear picture of the fact that not only provisions really contrary to the spirit of the 1945 Constitution were regarded as inapplicable, but also issues which have nothing to do with the Constitution, e.g. the requirement of a notarial deed for bequests (s. 1682 C.C.), termination of rent (s. 1579 C.C.). writ of non-fulfilment (s. 1238 C.C.), devision of risk between buyer and seller (s. 1460 C.C.). See p. 269, below.

10. See Daniel S. Lev., "The Lady and the Banyan tree: Civil law change in Indonesia", XIV AJCL (1965) 282ff at 292.

Subsequent adoption of revolutionary approach by majority of lawyers

We will see that the majority of Indonesian jurists later came to agree with the ideas outlined by the late Minister of Justice. However, the adopted majority opinion is with some moderation and less radical than Sahardjo's view. That the majority of Indonesian lawyers finally came to agree with the so-called "revolutionary" approach, was to a great extent the result of strong and persuasive influence from above. On many occasions the then Chief of State, the late President Sukarno, branded the jurists as being unfit for revolutionary ideas and changes. "You cannot make a revolution with jurists"; *"Met juristen kun je geen revolutie maken"* were the famous words of Liebknecht, always quoted by Sukarno. In order not to be stamped as being "anti-revolutionary", a label which could be very detrimental to the person involved during that time, most of the jurists at last accepted Sahardjo's view with certain modifications or when they did not agree did not make publicly known their disagreements.[11]

Standpoint of the Supreme Court

The Chief Justice at that time, Dr. Wirjono Prodjodikoro, announced his approval of Sahardjo's view. His approval was later more elaborated in a special Circular Letter issued in 1963 by the Supreme Court.[12] The lower Courts have to observe and follow the stipulations set forth in the Circular Letter, although there is no compulsory obligation to do so. In practice the Circular Letters will be followed due to the fact that non-obedience will result in ultimate annulment of the lower Court's decisions when the case is tried in cassation before the Supreme Court.

One of the tasks of the Supreme Court is to give guidance in the administration of justice in the country.[13] In the fulfillment of its task the Supreme Court often make use of Circular Letters to the lower Courts in order to obtain uniformity of interpretation or of decision in certain controversial matters. The lower Courts as a rule will follow the stipulations set out by the highest judicial body. In practice such Circular Letters are more often followed than written regulations issued by the Government.

In the Circular Letter No. 3 of 1963, it is stated that as a matter of fact an important part of the Civil Code has been already eliminated by new statutes enacted as an implementation of the Basic Agrarian Law of 1960. As it is known, the Indonesian Civil Code of 1848 is largely a copy of the Dutch Civil Code published ten years earlier, due

11. See my speech before the Sydney Bar 1970, The Bar and legal practice in Indonesia, 1 *Hukum dan Keadilan* 34 (July/August 1970).

12. Circular Letter nr 3/1963, nr. 1115/F/3292/H of September 3, 1963. For the text see III *"Varia Peradilan"* (1963) 108 ff.

13. The task of the Supreme Court is outlined in the *"Undang*[2] *Mahkamah Agung"* (The Supreme Court Act) of 1950 nr. 1 (S.G. nr. 30/1950 Engelbrecht 292), revoked by the *"Undang*[2] *tentang Pengadilan dalam lingkungan peradilan umum dan Mahkamah Agung"* (Law on the general administration of justice and the Supreme Court) see Sect. 70.

to the so-called *principle of "concordancy"*. Based on this principle the law-maker for the Netherlands Indies copied the law for the Netherlands as closely as possible. Book II of the Civil Code was the Book on Real Property. With the introduction of the Basic Agrarian Law in 1960 almost the whole of Book II was explicitly abolished.[14] The rights in land based on the idea of property right and other rights of a material character with regard to property as outlined in the said Book II were regarded as no longer valid. All the land rights are now based on the adat or customary law of the land. This adat law has been the law which is valid for the majority of the indigenous population. With regard to rights in land there was formerly a dualistic system. There was land under European or Western imported law (i.e. the codified law, the Civil Code and other regulations) and for the larger part, land under adat law. With the introduction of the Basic Agrarian Law 1960 unification in the field of land rights has become a living reality. All the Western rights were abolished and converted into new rights based on adat law.

Next to the stipulations concerning real property as outlined in Book II of the Civil Code, the rules concerning evidence and the statute of limitations provided for in Book IV of the Civil Code, as far as they concern rights in land, were regarded as no longer valid too.

Uniformity of civil procedure

It was further elaborated that uniformity of civil procedure had been accomplished years before. This has been realised with the invasion of the Japanese Armed Forces during the occupation of the country in the years of the Pacific War. During prewar times there were separate Courts for the respective population groups. There were European courts *(Raden van Justitie)* for Europeans and Foreign Orientals while the native population were tried by Native Courts *(Landraden)*. The Japanese occupational Forces ended this dualism in the Courts. Unification was effected by abolishing the special courts for Europeans.[15] From that time on all persons in Indonesia, irrespective of their population group have to appear in all law suits before the same Court, namely the Courts for the natives, which later was named the *"Pengadilan Negeri"* (State Courts).

Uniformity of criminal law

Uniformity in the field of criminal law has been achieved since 1918. From that year on the Penal Code has been made applicable to all persons in the country irrespective of their population group.

14. Law nr. 5/1960, S.G. nr. 104/1960. The rules concerning mortgage were excepted and remain still valid. See my commentary on this law, *"Tafsiran Undang² Pokok Agraria"* (Interpretation of the Basic Agrarian Law) 3rd ed. Jakarta (1967).

15. For an outline of the administration of justice in Indonesia, see Adamson Hoebel and A. Arthur Schiller's "Introduction" to Ter Haar's *Adat law in Indonesia*, Jakarta edition (1962), 15 ff.

Civil law pluralism diminishing

Pluralism especially exists with regard to civil law. But of the four books of the Civil Code only Book I concerning family law and Book III concerning contracts are almost wholly intact as before.

European population diminishing

As for the quantity of the European population group for which the Civil Code was created in the first place, their number is diminishing if compared with the situation before the Second World War. Most of the Europeans, of which the Dutch formed the major part, left Indonesia after the transfer of sovereignty. Especially the exodus was accelerated since the relations between the former colony and its former motherland worsened due to the West Irian dispute. As it is known, this dispute resulted in the liquidation of Dutch financial and economic interests in the country by the end of 1957. In the sphere of the New Order, with the introduction of the new law on foreign capital investment in 1967 (Law No. 1/1967)[16] the situation changed and many Europeans are coming again to Indonesia.

Western Codes for Foreign Orientals

The Western Codes were also in force for the Foreign Oriental population group. The protection of the interests of the European businessmen was a main reason for this fact. In order to facilitate the conclusion of contracts by European businessmen with Foreign Oriental traders, it was deemed necessary to apply to them the Civil and Commercial Codes which were valid for the European group. The Foreign Oriental traders chiefly acted as middlemen between the group of Europeans and the native population. So, the Dutch policy was directed to have the Foreign Orientals subjected to the Western Codes for the sake of legal certainty.

Revolutionary approach in revolutionary climate

When we consider these circumstances it is understandable that the new "revolutionary" approach which was introduced by the late Minister of Justice, Sahardjo, was ultimately approved in legal practice, although seen from a strict legal angle such approach seems to be rather questionable.

The new way of thinking was also in line with the revolutionary climate prevailing at that time. After the Decree "Return to the Constitution of 1945",[17] revolutionary ideas and revolutionary deeds were in fashion. During that period the prevailing opinion was rather sceptical towards all things that were imported from abroad. The slogan was to return as much as possible to the "National identity". Preservation of the original native institutions, also in the field of law, was the aim.

16. S.G. nr. 1/1967.
17. Presidential Decree of July 5, 1959 nr. 150, S.G. nr. 75/1959.

But it must be added, that the idea of Sahardjo was not accepted in its pure form. The Civil and Commercial Codes were according to Sahardjo regarded no longer valid as codes. The Codes themselves were not invalidated or revoked. But they were interpreted as being only law books, stating the law of a particular group. However, according to the majority opinion the Codes as a whole do not cease to be used. Only parts of them were regarded as no longer valid as they were no longer in conformity with the prevailing changed conceptions of law.

Supreme Court Circular Letter

This standpoint was further elaborated in the Supreme Court's Circular Letter of 1963 mentioned above. The introduction of the Circular Letters opens with explaining that it seems to be rather peculiar for an independent state as Indonesia is, that the laws of the former colonial ruler remained valid. It is self-evident that the former ruler as a colonial power was influenced by the wish to satisfy mainly the interests of the ruling class. The Civil Code was drafted largely imitating the Dutch Civil Code. It was applied to Dutchmen only and to those persons assimilated to them.

Thus it is reasonable that in an independent Indonesia the question arose whether it was proper to regard the Civil Code as still valid. Therefore the idea to consider the Civil Code not as a codification but rather as a document prescribing the unwritten customary law of the respective population groups is understandable. The Judges will thus feel more free to reject the various articles of the Civil Code which are no longer in harmony with the situation in independent Indonesia.

However, it must be added, that according to this standpoint not the whole of the Civil Code is regarded as invalid. Only specific articles of the Civil Code are regarded as no longer applicable.

No-longer-valid, Articles of the Civil Code

The Circular Letter of the Supreme Court No. 3 of 1963 set out a list of specific articles as examples of invalid articles. The articles, eight in total, are:

(1) and (2) Articles 108 and 110 on the competence of a married woman to undertake legal actions and appear in Court without her husband's assistance.[18]

(3) Article 284 alinea 2 concerning the legitimation of a child born out of wedlock to an Indonesian woman, stipulating that legitimation by a European father results in breaking the legal connection between mother and child.

18. In Adat Law there is no such limitation of the capacity of a married woman. A wife is capable of making legal transactions and appearing in Court without assistance of her husband. With the elimination of arts. 108 and 110 of the Civil Code, there is no longer any difference regarding the capacity of all Indonesian citizens, irrespective of their population group.

This article was long regarded as being a humiliating article for the native population.[19]

(4) Article 1682, requiring that a bequest must be effected by a notarial act.
In fact the abolition of this requirement had nothing to do with the 1945 Constitution.

(5) Article 1579 stipulating that a lessor cannot terminate a lease agreement on grounds of intention to use the thing rented himself, unless specifically provided.
This also had nothing to do with the 1945 Constitution.

(6) Article 1238, which provides that a written demand for fulfillment must precede the action in Court for execution of a contract.
Again, this had nothing to do with the 1945 Constitution.

(7) Article 1960 providing that the buyer of a good assumes the risk even though it has not been transferred.
It is evident that this stipulation has nothing to do with the 1945 Constitution.

(8) Article 1603 x sub. 1 and 2, which discriminates between Europeans and non-Europeans with regard to labour contracts.
This stipulation may be regarded as contrary to the 1945 Constitution.

It is obvious from the above mentioned articles that only the first three mentioned (Nos. 1, 2, 3) and the last mentioned (No. 8) have anything to do with the Constitution of the country and the spirit of Independence.

The other articles are abolished only because they are regarded as contrary to the Supreme Court's conceptions of modern Indonesian private law.

Application in practice

We see then that in practice not all the articles of the Civil Code are regarded as no longer valid. Only specific articles are regarded contrary to the spirit of Independence or with modern conceptions of law and therefore disregarded. During that time, the Indonesian judges were rather careful with using the articles of the Civil Code in their decisions. If they made use of the Civil Code's articles they still quoted the respective articles, but with additional words "in analogy with" (analog pasal[2]) or "compare article so and so of the Civil Code" *(Bandingkan)*. Thus was the situation during the revolutionary period of the Old Order.

The present situation

How is the situation under the New Order ? Is the revolutionary approach mentioned above still upheld ? Are the Civil Code and Commercial Code regarded as no longer being Codes ? Or have they full force as codifications as they were interpreted before the revolutionary approach ?

19. Cp. Kollewijn, R.D., *"Het buiten echt geboren kind in het intergentiel recht* The child born out of wedlock and interpersonal law) in *"Verzamelde opstellen over Intergentiel Recht"* (Interpersonal Law, Selected Essays), 138 ff.

The situation now has changed again. But here, once more, the change was not a product of the legislator. Again it was the role of the lawyers which brought the reform. The Courts no longer maintain that the Civil and Commercial Codes of Indonesia are merely to be regarded as law books or commentaries. The Codes have regained their full force as being codifications.

Judges in their decisions no longer refer to Code articles with additional words quoted above. They quote the respective articles as articles of a Code, having full force and application as rules of law. The articles of the Code are directly applied again without qualifying interpretation as before.

In this respect, the legal uncertainty which was caused by the revolutionary approach makes place for certainty again.

Re-evaluation of Code articles

However, even now that in Indonesia's legal practice of today the Codes of the country have regained their full force as codifications, it could not be denied that there still exists a tendency to re-evaluate the articles of the old Codes. Now the judges as a rule make use again of he Code articles. But they do it not without sharply evaluating and reconsidering whether the respective articles may be applied in their pure form. Whenever the Judge is of opinion that certain articles are outmoded and no longer to be upheld or regarded as contrary to the spirit of Independence, the respective articles of the Codes are set aside and no longer used or only used in a re-shaped form.

Examples from case law

Let us illustrate with examples from the legal practice.

We may first choose as an example a case which came up in the sphere of the New Order, so that the standpoint of the Courts of Indonesia in today's practice may be clarified.

As mentioned above, according to the Supreme Court's Circular Letter No. 3 of 1963 the stipulation in article 1682 of the Civil Code, that bequests must be effected before a notary public on penalty of invalidity, is regarded as no longer valid. Is this standpoint of the Supreme Court still to be followed in the sphere of the New Order, where the "revolutionary" approach in general is no longer "in"? As it is known, after the abortive coup, in the climate of the "New Order", the aim is to strive for a pure implementation of the 1945 Constitution — democracy based on the State philosophy, the *Pancha Sila*. In this climate the judiciary wants to be completely freed from the executive power. The *trias politica* theory which had become discredited in the period before the coup,[20] in now regaining its popularity, although not

20. See speeches of President Sukarno before the *Dewan Perancang Negara (Depernas-National Planning Council)*, August 13, 1960 and during the installation of the members of the Provisional People's Congress on September 15, 1960. See E. Utrecht, *Pengantar dalam Hukum Indonesia* (Introduction to Indonesian Law) 8th printing, Jakarta (1964) 113.

in the sense originally submitted by Montesquieu. One is now inclined to accept that the judiciary is an independent body. The executive may not influence the judiciary by means of pressing its own will in the Court's decisions. The judiciary has also the right of testing the laws, not only in a formal way (testing whether the legal procedure in obtaining enactment of the respective law has been in order), but also that of material testing (testing of the constitutionality of the laws). The judge may investigate whether a certain law is in contradiction with the Constitution or not. If it is in contradiction, then the said law is regarded to be unconstitutional and therefore invalid.[21]

This issue came up during an appeal proceeding in the case decided by the Djakarta State Court in its decision of 11 August, 1966 (No. 52/1966G jo. 178/1966G). The Circular Letter of the Supreme Court No. 3/1963 was applied by the Court. During a divorce case an Indonesian husband was staying in Tokyo where he declared that he had given his share in the joint marital property, consisting of shares in a construction enterprise in Indonesia, to his wife.[22] His wife was living in Jakarta. On his return to Jakarta the husband revoked his declaration, calling it void. He said this was a gift and should therefore be governed by article 1682 of the Civil Code which requires a notorial deed for gifts. He only made the "gift" in a letter and not before a notary public, so that the "gift" was null and void according to Indonesian law.

At first instance the Jakarta State Court held that according to the Supreme Court's Circular Letter of Sepember 5, 1963 no. 3/1963, article 1682 of the Civil Code should no longer be considered valid. The Jakarta State Court clearly still adhered to the Supreme Court's Circular Letter. This standpoint is correct.

On appeal the Jakarta Court of Appeal affirmed the decision.[23]

The appellant maintained that this letter written in Tokyo must be classified as a bequest or gift and should therefore comply with the requirements set forth in article 1682 of the Indonesian Civil Code. The gift should, on penalty of invalidity, be made before a notary public. The Supreme Court Circular Letter of 1963 should not be taken into consideration. It was urged: we are now in the sphere of the New Order. We aim to return to normal conditions. We want to have a pure implementation of the 1945 Constitution, which does not allow the laws to be set aside by circulars, even if coming from the highest judicial body. This is against the principle that the judiciary should be independent.

21. The right of material testing of laws is however in Indonesian practice not yet so pronounced as in the United States.

22. The man was an Indonesian citizen and belonged to the group of Christian Indonesians but claimed to have belonged to the group of Europeans, the wife was also an Indonesian citizen *(warganegara Indonesia)*. She acquired her husband's status through her marriage.

23. Decision of March 15, 1967 nr. 25/1967 P.T. Perdata.

It was accordingly contended that the lower judge must not feel himself bound by a Circular of the Supreme Court. The Civil Code has, according to the appellant, been introduced by *law*. In accordance with article II Transitory Rules of the 1945 Constitution quoted above, the Civil Code must be considered still effective, as long as it has not been replaced by another Code or another law.

The allegations brought forward against the Circular Letter of the Supreme Court are severe enough. What is the standpoint of the Court of Appeal in this matter ? It is important to know the Appellate Court's standpoint, because it might be quite possible that the judiciary after 30 September 1965 coup, wants to free itself from the influence "from above". With this in mind we must be grateful that the Appellate Court deliberated quite extensively on this issue.

After citing the text of article II Transitory Rules of the 1945 Constitution, it quoted the full text of the Government Regulation No. 2 of 10 October, 1945. It is obvious that the Appellate Judge, at that time the Chairman of the Indonesian Judge's Association *(Ikatan Hakim Indonesia, IKAHI)* Asikin Koesoemah Atmadja, (now a Justice of the Supreme Court) wanted to use this opportunity to make public his view concerning the "abolition" of the Civil Code by the Circular Letter of the Supreme Court.

The elaborations of the Appellate Judge clarify how the situation is in 1967 and also at present with regard to the effectiveness of the Civil Code in general and the value of the Circular Letter of the Supreme Court in particular.

The Appellate Judge stressed the Government Regulation No. 2 of 10 October, 1945, which determined that, even after 17 August, 1945, the old rules must be considered to maintain their effect. However an additional requirement is set forth: they must *not be contrary to the 1945 Constitution*. The Judge is of the opinion that this Government Regulation is a legislative product which in degree is not lower than a law. Based on article IV Transitory Rules of the 1945 Constitution the President of the Republic of Indonesia assisted by the National Central Committee *(Komite Nasional Indonesia Pusat*, abbreviated KNIP) possessed legislative powers as long as the People's Congress (Majelis Permusyawaratan Rakyat, MPR), Parliament *(Dewan Perwakilan Rakyat*, DPR) and the Supreme Advisory Board *(Dewan Pertimbangan Agung*, DPA) have not been formed.

The Court of Appeal further reasoned that the judiciary must be independent of the executive. It is the judiciary which has been charged with the special task of delivering binding verdicts about the question whether a law has been in breach of the Constitution or not. Therefore the Courts should be considered as having the authority to test the laws which existed at the time of the Proclamation on 17 August, 1945. Are those laws not contrary to the 1945 Constitution ?

The appellant's assumption that the Civil Code had been made inoperative by a mere Circular Letter or Instruction of the Supreme Court,

must be considered as incorrect. The Civil Code has not been invalidated by the mentioned Circular. It is still effective when and if it is *not contrary to the 1945 Constitution*.

The Appellate Judge expressly pointed out that the judiciary had the authority to test the laws against the 1945 Constitution. This Constitution does not provide a rule such as article 124 sub. 2 of the Dutch Constitution or article 95 sub. 2 of the 1958 Provisional Constitution of the Indonesian Republic, according to which laws are inviolable.

It was further pointed out that the judge had the obligation to "dig up" the law *(menggali hukum)*. The law must as far as possible be in accordance with the legal conceptions existing in the changed society of today.[24]

This burden specially placed on the shoulders of the judiciary is a heavy one. It is regarded necessary as far as the legislature has as yet not succeeded in replacing the rules of the colonial legal system in order to comply with the legal conceptions of independent Indonesia.

The legislative products of the colonial ruler may be set aside whenever it is regarded as not in conformity with the 1945 Constitution in line with the changed needs of society today.

I think the decision of the Jakarta Court of Appeal in the above case should be considered as representative of the standpoint of the judiciary concerning the validity of the Codes in Indonesia today.

Other examples may illustrate this more clearly.

New ground for divorce

In a divorce case the Jakarta Court of First Instance used a ground for divorce that is in fact unknown for the respective persons involved.[25] A medical doctor being an Indonesian national of Chinese origin acting as plaintiff against his wife (also of the same population-group as her husband) sued for divorce using however a ground which is unknown in the law of the Civil Code. This Code is formally valid for them since the Netherlands Indies law-giver proclaimed it in 1917.[26]

24. The judges in Indonesia now are of the opinion, wherever necessary, to judge even *contra legem*. Compare in this respect the case law of the Supreme Court in connexion with the division of risks at the repayment of loans with *adat* fields as "pledge" *(jual sende atau gadai)*. According to State Gazette 1937 nr. 585 contract cannot be valued on the gold price. But in connection with the strong devaluation of the rupiah, the Supreme Court has justly thought that repayment has to be revaluated. Pre-war debts must be connected with the gold price. Each party must bear one-half of the risk of the increased gold price. See a.o. Supreme Court, May 11, 1955 *(Hukum* 1955, 3); April 27, 1955 *(Hukum* 1956, 1,2); May 22, 1957 *(Hukum* 1958, 9,10).

25. Pengadilan Negeri Jakarta, 5-9-1967 nr. 191/67 G., nr. 249/1967 P.T Perdata confirmed by the Supreme Court decision nr. 105 K/Sip/68, 12-6-1968 in I *"Jurisprudensi Indonesia"* (1969) 33.

26. S.G. nr. 129/1917.

The Civil Code knows only four grounds for divorce: (i) adultery; (ii) heavy ill-treatment causing loss of one of the sense organs; (iii) imprisonment for more than four years; (iv) desertion for more than five years (article 209 C.C.). As we can see, the grounds for divorce are not easy to obtain. However, for the population group of native Indonesians professing the Christian faith a far more lenient ground for divorce, i.e. unrepairable incompatibility *(onheelbare tweespalt; percidraan yang tak dapat diperbaiki)* is available.[27]

In the instant case, the plaintiff now uses the last mentioned divorce ground stating that the differentation into population-groups now no longer exists. It is interesting to observe the Judge's standpoint on this matter. According to the Court of First Instance the division into population-groups as provided for in sections 163 jo. 131 of the Indonesian Regulation *(Indische Staatsregeling* — to be regarded as the Constitution for the Netherlands Indies during that time) is at this moment no longer valid. The unpopularity of the mentioned sections 163 and 131 could be seen from the recent Instruction of the Presidium of the Cabinet (General Suharto) in 1966,[28] ordering the Offices of Civil Registration *(Catatan Sipil; Burgerlijke Stand)* to effectuate registrations of all inhabitants without regard to origin and to cease recording births, marriages and divorces based on the division into population-groups. Having this in mind, the Judge feels herself (a woman Judge) no longer bound by the respective Code article limiting the grounds for divorce. As the division into population groups is fading the Judge feels free to use also the ground for divorce which was originally reserved for native Christian Indonesians only, to the parties involved in the present divorce case (Foreign Orientals Chinese population-group). Thus we see that even without an explicit regulation issued by the law-maker, the Judge has reformed the law and uses a new, more modern ground for divorce than the four grounds available in the Civil Code.

It is interesting to note that the Appeal Court as well as the Supreme Court upheld the decision of the Court of First Instance. Now all the Courts in Indonesia follow granting divorce on the ground of unrepairable incompatibility even for persons living under the Civil Code.

The above is a clear example of the role of the Judge in today's legal development.

Simplifying divorce procedure

A third example is the recent decision of the Bandung Court of First Instance.[29] According to the civil procedure of the Civil Code annex Code on Civil Procedure, a divorce proceeding is to be divided

27. S.G. nr. 74/1933 art. 52 under nr. 6.

28. Instruction nr. 31/U/IN/12/1966.

29. Confirmed by the Supreme Court decision No. 991/K/S/1971, in III *"Jurisprudensi Indonesia"* (1971).

into two stages. At the first stage the Judge tries to reconcile the parties *(verzoeningscomparitie)*. If this does not succeed the Judge will grant leave to lodge a claim for divorce to the respective plaintiff. Then the second round begins where the plaintiff lodges his claim within a certain limited period in order to obtain a final divorce.

The Bandung Court of First Instance regards this procedure as too complicated and in fact unnecessary. The Marriage Ordinance for Christian Indonesians does not know this division of divorce proceedings into two stages. The claim for divorce is immediately filed and during the proceedings the Judge tries to reconcile the parties. The Bandung Court of First Instance now uses the divorce procedure as it is known in the Marriage Ordinance for Native Indonesians, even for persons belonging to the realm of the Civil Code (Foreign Orientals-Chinese).

The standpoint of the Bandung Court has been widely accepted and followed in divorce proceedings at the moment all over the country, although no legal provision was adopted by the law-maker.

This is another example of how the law reform in present Indonesia is conducted by lawyers, judges as well as practising lawyers, without new regulations enacted by the law-giver.

The above examples give a picture of the important role of the lawyer in the legal development of Indonesia today.[30]

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30. There are still other examples, such as the decision of Pengadilan Negeri Bandung (Penetapan no. 32/1970 of 26-2-1970, published in II *Hukum dan Keadilan* (1970) 53 concerning the possibility of *adoption* of *girls* by an *unmarried* woman belonging to the population group of Foreign Orientals Chinese, although Law nr. 129/1917 jis 81/1919, Nr. 557/1924, Nr. 92/1925 only opens the possibility for adoption by a *married man* of *boys* belonging to the group of Foreign Orientals Chinese.

For adoption of girls, see also Pengadilan Negeri Istimewa Jakarta, 20-5-1963 and Nr. 588/63G., of 17--10-1963. See also the Decision of Pengadilan Negeri Jakarta Timur — Utara Nr. 11/1972G., of 4-2-1972 concerning the interpretation of what is to be regarded as a "marriage" based on the obligation for the Court" to dig up the law from the living reality in society" as mentioned in Law nr. 14/1970 article 27 paragraph 1 (Basic Law on Judicial Powers).

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