ASPECTS OF ASEAN LAW

LAW AND DEVELOPMENT: THE LEGAL STATUS OF WOMEN IN INDONESIA, THEIR ROLE AND CHALLENGE IN CREATING A NEW NATIONAL LAW

INTRODUCTION

The written constitution of a state is only a part of the law which is the basis of that state. The constitution is that part of the fundamental law which is written down, while besides that constitution there also prevails fundamental law which is not written down, namely, the basic rules which arise and are maintained in the practice of running a state.

Certainly, in order to study the fundamental law *(droit constitutionel)* of a state, it is not enough only to study the articles of its written constitution *(loi constitutionel)* alone, but one must also study how it is applied and what is the spiritual background *(Geistlichen Hintergrund)* of that written constitution.

The constitution of any state whatsoever cannot be understood if merely its text is read alone. Truly to understand the meaning of the constitution of a state we must also study how that text came into being, we must know the explanations made of it, and we must also know under what conditions that text was made. In this way we shall be able to understand what is the meaning and purpose of the constitution we are studying, and what current of thought it was which became the foundation of that constitution.

The preamble of the 1945 constitution of the Republic of Indonesia contains fundamental ideals which are of great importance.[2] The fundamental ideals contained in the preamble provides: first, that the state shall protect the whole of the Indonesian people and their entire land of Indonesia based upon unity, while creating a condition of social justice for the whole of the people of Indonesia. Secondly, the current thought is accepted of the unitary state which protects and covers the whole of the people. Thus the state encompasses every kind of group opinion and all opinions of individuals. The state, in accordance with the concept of this preamble, seeks unity, and extends over the whole of the Indonesian people. Thirdly, the preamble contains that sovereignty of the people, based upon democracy and deliberation amongst representatives. Therefore the system of the state which is given form in the constitution must be based upon

[1] A paper presented at the Seminar on Comparative Jurisprudence, held at the University of California, School of Law in Berkeley, Winter 1972, revised and dedicated to Women's Year 1975.

[2] The preamble of the 1945 Constitution of the Republic of Indonesia.

deliberation amongst representatives. Indeed, this current of thought accords with the character of Indonesian society. Fourth, in the preamble, the state is based upon that belief in the One Supreme God, which conforms with the principle of just and civilized humanity.

The above fundamental ideals pervade the spiritual background of the constitution of the state of Indonesia. These fundamental ideas give rise to those ideals of law *(rechtsidee)* which dominate the fundamental law of the state — both written law (the constitution) and unwritten law. The constitution gives form to these fundamental ideas in its articles.

In connection with the present law in Indonesia, the second clause of the transitional provisions provided that all existing institutions and regulations of the state shall continue to function so long as new ones have not been set up in conformity with the constitution.[3] The general principle of continuity of existing law is therefore of great importance, because during the period of transition laws in force at the time of promulgation of the constitution would remain in force until revoked and amended. This provision stipulating the continued validity of law existing at the coming into force of the present constitution has to be linked with similar provisions in constitutions preceding the present one. The same principle is expressed in article 142 of the provisional constitution of 1950 and article 192 of the federal constitution of 1949.

Apart from constitutional provisions such as those mentioned above, the constitution contains with regard to most matters only general principles, and leaves their detailed elaboration to special enactments. In this way, the basis will become apparent for the continued validity of the bulk of the prewar Netherland-Indies legislation in many fields of law from an early period in the history of Dutch rule in Indonesia.

It was a matter of principle that there should be a system of law in Indonesia based on that in force in the Netherlands. However, this law was not applied to the indigenous Indonesians (the natives, *pribumi* — according to article 163 Indies State Regulation — *Indische Staatsregeling*[4] as they were referred to in the legislation, were to be left under their own law. The law based on the Dutch metropolitan model was to apply only or mainly to Europeans living in Indonesia. This principle of dualism, even pluralism, in the law operated not only in the substantive law, but also in the organization of courts and their procedure.

THE PLURALISM IN CIVIL LAW

In comparison with the criminal laws which had their unification in 1958 (the Law of the Republic of Indonesia of 1958 number

[3] Clause II of the transitional provisions of the 1945 Constitution of the Republic of Indonesia.

[4] Article 163, Indies State Regulation *(Indische Staatsregeling, S. 1925:415),* which classifies all persons living in Indonesia into one of three groups: (1) Europeans *(orang Eropa, Europeanen),* (2) Natives *(Bumiputera, Inlanders),* and (3) Foreign Orientals *(Timur Asing, Vreemde Ooslerlingen).*

73 — *Undang-undang Republik Indonesia tahun 1958 nomer 73),* the opposite is the case with the civil law. The civil law valid until recently is derived from 1920 when, according to article 163 of the Indies State Regulation, the population of Indonesia was divided into three groups based on racial origin, that is, Europeans, Natives and Foreign Orientals. This article indicates article 131 which regulates the material civil law valid for those groups of people referred to in article 163.

For the first group,[5] that is the "Europeans", codes modelled on those of the Netherlands had been introduced in the Netherlands Indies from the middle of the nineteenth century namely, the three important codes dealing with private law, the Civil Code, the Commercial Code and the Code of Civil Procedure dating from 1848 (which year was marked as the year of codification). The concordance principle was valid for this group, implying that the European in the Netherlands Indies basically followed the civil law patterned in the Netherlands. This basic principle could be varied by, first, particular conditions in Netherlands Indies, and second, in order to create a particular regulation valid for all groups, by what we call later on phantasy law *(fantasierecht).* The civil law for the second group, that is the Native or indigenous Indonesians, is governed by *adat* law. The third group, the Foreign Orientals was gradually made subject to European Civil and Commercial Codes, except in the fields of family law and the law on intestate succession.

The *adat* law, as the customary law of the communities concerned, was affected in part by special regulations. In the early part of this century, unification and codification of the *adat* law along European lines appeared to the Netherlands Indies government as the most appropriate means of adjusting Indonesian life to the conditions of the modern world. At that time a new criminal code and a police court and procedure code for all groups of the population were passed. However, a draft civil code presented in the early 1920's did not gain acceptance, and the defeat of this codification led to a reversal of government policy. As a result, the last fifteen years preceding the fall of the Indies to Japan (1927 -1942) were marked by a return to a policy of dualism (pluralism), as far as the indigenous Indonesian group was concerned: a dualism (pluralism) of an enlightened and positive kind.

In comparison with the criminal law (for which there was a unification since 1958) it did not happen in civil law. On September

[5] Article 131 Indies State Regulation *(Indische Staatsregeling, S. 1925:415),* which regulates the law in force for each group classified by article 163. With European includes:

a. Dutchmen;
b. All other persons whose "origins" (asal) are European. What is meant by "origin" — whether place of residence prior to arrival in Indonesia, place of birth, descent — is not explained, but in practice has come to mean "born in Europe or descended from European stock.";
c. The Japanese;
d. Other persons who in their native country are subject to family law similar in principle to Dutch law — for example, Australian and Americans;
e. Legitimate or properly recognized children of persons in groups b, c and d, and their descendants.

29, 1958, nearly nine years after the transfer of sovereignty, the Indonesian legislature has at least endeavoured to end a rather peculiar situation in the field of criminal law, namely, a state of territorial dualism in its codified part, in which it has all but succeeded. Since the law of 1958 number 73 which decided the law of 1946 number 1 of the criminal law code with changes and additions valid for the whole Indonesia, the substantive criminal law then was made the criminal law for the whole Indonesian territory. From that date on nominally one criminal code is binding throughout Indonesia, that is the "Wetboek van Strafrecht voor Nederlands Indie", which is also called the "Kitab Undang-undang Hukum Pidana Indonesia".

In civil law cases, members of both the native and the foreign Oriental groups were free to enter the European group by "voluntary submission" *(vrijwillige onderwerping)* to European law (*vide* article 131 sub 4 of the Indies State Regulation). The regulation (Netherlands Indies *Government Gazette* of 1917, number 12) concerned specified four types of such submission; these are total submission, partial submission, submission for a particular transaction and presumptive or implied submission. Total submission had the consequence that the person concerned and his family (that is his wife and children born during the marriage under the age of 21) were in all respects tied to the civil and commercial law applicable to the European group. This total submission had to be made by declaration before the local administrative authorities and publication in the government gazette and newspapers. It proved unpopular in practice. Partial submission of European law by native Indonesian placed him in the same category as a foreign Oriental with regard to the application of European law, he then becomes subject to the civil code (except family law and intestate succession law) and to the commercial code, as well as the Bankruptcy Ordinance. This is also called as the "ad hoc submission", which means formally submitting one's self to European private law only for those legal transactions specified by the party in his submission. This kind of submission makes many European commercial institutions available to native Indonesians.

Apart from the three types of voluntary submission of European law, the regulation mentioned a fourth type, which may be termed as an presumptive or implied submission. It occurred whenever a native Indonesian entered a legal transaction unknown to his *adat* law and regulated by European law only. By way of example may be mentioned the entering into a contract of insurance, or into a partnership under a firm name. It was common to all cases of presumptive or implied submission of European law that the person concerned did not thereby change his status in the field of public law; he remained a member of his population group and subject to the political rights and duties of that group. This fourth submission included also what is meant by the third type of submission or submission for a particular transaction.

While voluntary submission to European law thus enabled non-Europeans to become, in varying degrees, members of the European law group, prewar Netherlands Indies law provided basically two systems of law for the three population groups; that is the codes modelled on Dutch legislation for the European group, as well as

(apart from family and intestate succession law) the foreign Oriental group, while *adat* law was the system for the native Indonesia.

This dualism (pluralism) in the legal system affects not only the inter-relationship between the three groups, but also creates a dualistic (pluralistic) judicial organization. The prewar judicial organization for Indonesian law subjects consisted of a district court, a regent's court and a *landraad,* as the highest daily court for native Indonesians. The foreign Oriental group took benefits of this separation into three groups and their own courts, because in criminal cases they appeared in courts for the natives, and in civil cases they appeared in courts for the Europeans.

This dualistic system of administration of justice disappeared with the establishment of the Republic. Since the transfer of sovereignty to the Indonesian on December 1950, two status dealing with the organization of courts and procedure have been promulgated: those are the law on the new Supreme Court of Indonesia,[6] and the Emergency Law[7] on provisional measures for furthering the unity in the judicial organization, jurisdiction and procedure of the civil juridical organs.

On the basis of this legislation and on the principle of the general validity, unless specifically abrogated of prewar law, the following picture of the present organization of courts and procedure in Indonesia emerges. The normal court of first instance is now the *Pengadilan Negeri* for all the three groups. The second instance courts are the *Pengadilan Tinggi,* and the Supreme Court is the *Mahkamah Agung* which is established in Jakarta. Besides these three courts, there also exist what we called the Islamic Religious Courts which jurisdiction and procedure were fully regulated by statute. Matters coming before the Islamic Religious Courts are mainly in marriage and divorce, and had jurisdiction only when the parties are Moslems. The future of Islamic Religious Courts in Indonesia of today appears to be closely linked with the Republic's article four of the preamble of the constitution of the 1945 and the Jakarta Charter, that is that the state is based upon that belief in the One Supreme God which conforms with the principle of just and civilized humanity.

In order to deal with the legal status of women in Indonesia, my purpose in presenting this paper is to provide a very general description of the status of woman in marriage and all consequences dealing with that, which is now in force in Indonesia. In connection with the separation into three groups of people, there are more than three kinds of marriage regulations before the Law of 1974 number 1, which I will describe as follows according to each groups.

[6] Law number 3 of 1 July 1950, concerning the structure, power and procedure of the Supreme Court, L.N. 30/1950 as amended by L.N. 106/1958, I. Husin 297 *(Undang-undang tentang susunan, kekuasaan dan jalan pengadilan Mahkamah Agung).*

[7] Emergency Law number 1 of 13 January 1951, concerning temporary measures regarding the unification of structure, power and procedure of the civil courts, L.N. 9/1951 as amended by L.N. 36/1955, elucidation at T.L.N. 81 and T.L.N. 816, I. Husin 330 *(Undang-undang darurat tentang tindakan-tindakan sementara untuk menyelenggarakan kesatuan susunan, kekuasaan dan acara pengadilan-pengadilan sipil)* (converted into statute by Law number 1 of 1961, L.N. 3/1961).

For the Europeans and those who are similar to these group, the Code Civil were valid, and thus means that the monogamous principle in marriage was introduced to them. This kind of marriage law valid not only to the European, but also to the people who voluntarily submitted to the European law; these are the Foreign Orientals and native Christians. For the last one, the Law of 1933 *(Government Gazette* of 1933 number 74 jo. of 1936 number 607) of the Marriage Ordinance in Java, Minahasa and Amboina were implied. For the native group, the *adat* and Islamic Law were applied. There was a basic difference in principle between the two basic regulations in marriage, the one was based on the monogamous principle and the other on the polygamous principle (though with special restrictions).

The existence of Islamic Religious Courts does not mean that the law valid for the Indonesian people is the Islamic Law (because most of the people are Moslems), but the *adat* law. The Islamic Religious Courts jurisdiction is only in marriage and the determination of heirs, which only will be valid by the normal court's approval.

I mentioned above that the basic civil laws valid up until recently are the European Civil Code and the unwritten *adat* law, though there is a third possibility in what we called the "phantasy" law which is valid for the three groups of people. Dealing with that, I will divide the further explanation of the recent civil law valid in Indonesia into two parts, that is in the first part according to the European Civil Code which was written, and in the second part, according the unwritten *adat* law with Islamic influence, which Djojodiguno and Prins call the *geresipieerd adatrecht,* or penetrated adat law.

a. *The Written European Civil Law*

This law, known as the Netherlands Indies Civil Code *(Het Burgerlijk Wetboek voor Nederlands Indie),* or the *Kitab Undang-undang Hukum Perdata* which consists of 1993 articles were valid for: first, the Europeans; second, the Foreign Orientals Chinese, (with some exceptions and additions inserted in the *Government Gazette* of 1917, number 129, second enclosure); and third, Foreign Orientals other than Chinese (with exceptions and explanations inserted in the *Government Gazette* of 1924, number 556, first enclosure). This written law was also called the Western Law, due to the concordance principle, the Law basically followed the civil law of the Netherlands. According to article 26 of that law, a marriage is considered as a civil relationship (here is meant in comparison with religious marriage or church). It means that the code treated marriage as a contractual relationship performing primarily financial functions reflected in article 58 which regulates the financial compensation within an annulment on marriage promised. Second, article 139 concerning marriage property transactions, and third, article 155 concerning the union of profits, damages, income and earnings. Although the wife's legal position in this contractual relationship was designed to be considerably weaker than the husband's, the civil code showed some awareness of the wife's financial interests. While it treated her as dependent upon her husband as the provider, it also safeguards her right to be provided for. Marriage, then, appeared above all as an exchange

relationship in which the wife paid for her financial security by granting her husband the right to manage and use the property brought by her into marriage, though not compulsory matrimonial property rules.

The minimum age of marriage for boys is 18 and girls 15; persons under these ages cannot marry, except in cases of very important reasons by a dispensation of the President. This minimum age for marriage does not mean that boys and girls at that age are considered mature in the sense of responsible for acts done by them (see article 45 of the Indonesian Criminal Code, persons under the age of 16 are irresponsible for criminal acts), the law also defined in article 330 the immaturity of persons beneath the age of 21 and not married before. This does not mean that persons married and then separate before the age of 21 return to the status of immaturity again.

Married women in Indonesia use their husbands' names, though there are no rules about legal names. But it is recognized that upon marriage a woman receives her husband's name or surname, preserves to her right to add to it her maiden name at any time, or to continue to use her maiden name exclusively. The choice is entirely the woman's; she needs neither the consent of the husband nor of any public authority. In practice, however, it is very rare for an Indonesian woman to use her maiden name after marriage, and even combination names are used only by a very small percentage of women, mainly professional women (e.g. lawyers and doctors), who were well known in their professions before their marriage. At birth, a child receives the name of the father, and if the mother is not married the child bears the mother's family name unless the father acknowledges or adopts the child without marrying the mother. The child's first name is selected by the parents jointly, or if they are not married or associated in a reputed marriage, by the mother alone.

The husband's domicile is the wife's domicile, unless the two are living apart, which also becomes the domicile of children below the age of 21 and not married before; or when the parents are separated, the domicile of the one who is, according the law, has the right of parenthood (article 21 of the Netherlands Indies Code Civil).

A married woman should not have the full capacity to own both her own property and property owned by both of them after marriage, but the husband as the head of the family is obliged to take care of it, unless their marriage is based upon conditional transactions (see article 105 of the Netherlands Indies Civil Code). These relationship affects married women in that they are not capable to enter transactions without their husbands' written permission (see article 108 of the Netherlands Indies Civil Code). The law imposes on the mother as well as the father an obligation for the maintenance of their children and upon each other (see article 103 and 104 of the Netherlands Indies Civil Code).

The list of heirs according to the law are all descendants, and husband or wife who survives, and when all of them do not exist, the inheritance becomes the Government's. It is meant by heir not only to inherit the property, but also includes debts.

Because of the civil transactional characteristic of a marriage, the liquidation then could only happen by first, when one of the parties dies, second, when one of the spouses do not exist within ten years and followed by the marriage of one of them according to this regulation. Third, by a court decision, and fourth, by divorce in conformity with this law (see article 199 of the Netherlands Indies Civil Code). The first and second reason for liquidation of marriage are clear enough, but the third and fourth reason needs a more detailed explanation, though the practice as regards divorce as a consensual action of the parties rather than as the decision of a third party arbiter. Consistent with the concept of divorce as an act of the parties, if both clearly want it, the court will always authorize it. The vast majority of divorces nowadays are based on the parties' freely given consent; the rest constitute a small minority.

The third reason mentioned above is the court's decision for separation which according to article 200 of the Netherlands Indies Civil Code regulates that after separation for five years by court's decision, and is not followed by a recall during that period of time, could be followed automatically by a divorce on each of the spouse's proposal. In this case divorce is based on the parties's freely given consent. While divorce is regarded as a consensual act of the parties, penalties have been provided to the one who during that period of separation married another while they are still in the status of marriage. The Indonesian Penal Code regulates in article 279 for the one who make that as bigamy.

For divorce, the law mentioned in article 209 four grounds, among which there is no ground of insanity. For practical purposes, the only unsolved case is the one of the wife whose husband become insane, and therefore is legally incapable of granting a divorce. No legal rules regard insanity as a ground for divorce.

After a court's decision for divorce or separation, usually followed by a decision for guardianship and custody of children. The rule that both parents have guardianship is stated in article 299, which provides, *inter alia,* details on appointment and duties of a guardian. The law also stated that when the parents separated cannot agree on custody, the court will decide; but if the child is under six years of age, custody will be given to the mother unless special reasons exist for a different disposition. As in most systems with a similar mother preference for children of tender years, the basis is not the mother's right, but the assumption that a small child requires her care. Since the best interests of the child must be controlled, the parents' conduct is relevant only to the extent that it indicates possible jeopardy to the welfare of the child. There is a basic rule in the Civil Code that children born out of marriage could be given the same rights as children bora of marriage by acknowledgement or legalization.

b. *The Traditional Unwritten Adat Law*

The traditional *adat* law conception of marriage differs from the Western conception, in that *adat* law marriage normally serves as the means of assuring the perpetuation and expansion of as existing

family. Children born into a family *(la posterite)* are generally regarded as both the source and evidence of power and wealth. Though in Indonesia despite all the external influence, like the Moslem penetration and then the Dutch colonization, family law has remained relatively uncomplicated. The individual plays a muted role, and the family character marks all of its members. The meaning of "family" here is used to denote the extended family, in contradistinction to the conjugal family as conceived in the West.

A marriage between a man and a woman usually is a result of negotiations between the family of the young man and the family of the young woman. These kind of negotiations sometimes begin when the female is still a child, and often the young man chooses the young woman who pleases him and persuades his family to arrange to obtain her for him, or preferably, he obtains the agreement of the young woman herself. If so then there exist a kind of solemn convention through which a man and a woman mutually agree to marry.

The affianced young man than offers to his intended bride a first gift, the *peningset.* derived from the word *singset,* meaning tied, which signifies that no one else may court her. Then his parents or, if both dead, the older family must take courtesy visits accompanied by gifts. As the first gift or *peningset,* the young may offer usually a ring or other jewelry, and when the female breaks the engagement without reasonable cause she is obliged to return the gifts she has received. But if the break is attributable the young man, he may not reclaim the gifts he has bestowed. Though there is no fixed length for this betrothal, it ought not to be too long. The dowry which is provided by the family of the future husband is originally of the Islamic influence which is called the *mas kawin,* and is not always in the sense of material things, but it can also in the form of a Qur'an, that is the Islamic Holy Book.

The money dowry became an institution susceptible to abuse, particularly in urban communities. Moreover, some authors have claimed that it represents the purchase price for the woman. But if the purchase of an object or an individual confers upon the purchase a property right, the characterization is not apt; for the husband obtains no property right in the person of his wife, although the married state could hardly be described as a union between equals.

This principle affects the family life between husband and wife over their children. The father is responsible for the support of children born of a marriage, and the mother for their education, for education in a broader sense begins from the child's birth, not only at schools or classrooms. Education in this sense entails conveying to the child the sum of transmittable knowledge, customs and behaviour. It is this aspect of the wife's role that signifies the importance of her position in the family. On the other hand the obligations owed by children to their parents may be summarized by the maxim: respect your father and honor your mother.

The death of the husband occasions great disruption in the life of the family as one of the two principal causes of dissolutions

besides divorce. In this fact the Moslem influence was very strong, for example, a woman may not remarry until a three month and ten days waiting period *(iddah)* has passed. Or, if the husband's death occurs when the wife is pregnant, she remains in mourning until the delivery, which reason is strongly influenced by Islam to ensure as to the purity of the descendants.

The death of the husband also raises the question of succession to his wordly goods. The wife still possesses the whole goods earned by both husband and wife during the marriage (*barang gono-gini*) as long as she does not remarry and the immature children will need them until they have grown up. The principle involved here is that the wife must continue the late husband's status in the community as long as she still wears her husband's name. The family goods consists of goods earned by either the husband *or* wife before or during the marriage *(barang asal)* which will be returned to the family when each of them dies, and goods earned by both husband *and* wife during the marriage *(barang goni-gini),* which both the parties have equal rights to them. If the wife remarried, she receives one half share, and the rest is divided among the children. The male children usually get the goods like land and cattle meaning that it would be his basic capital to create a family when the time comes. The female children usually get the house, pots and pans and jewelry. Things like weapons *(pusaka)* which usually bears the character of the family must be inherited by male children, because of the principle of bearing always the family name or character through their descendants. Only the goods earned by both husband and wife may be divided among the one who survive and the children. Goods earned by either the husband or wife before or during the marriage and those which their family gives to them *(barang asal),* must go back to the family from where the goods came and could not be shared among the children. These equal rights between husband and wife upon goods earned during their marriage and shared equally after the death of one of them, or divorce, reflects the equal rights between man and woman in the *adat* law, though there is a kind of division of labour between husband and wife, that is that the father has the obligation and responsibility for the support of the children, and the mother for their education. This mutual understanding and division of labour between husband and wife express the main principle of the *adat* law that is, to treat man and woman equal in rights in the community. One more reflection in the daily life is by bearing the same name, that is the husband's after the marriage. For instance, where *Dadap* married *Waru,* it becomes just *Dadap,* but now after the marriage there is a male *Dadap* and a female *Dadap.* There the community only knows *Dadap* as their member, but this *Dadap* consists of a male and female *Dadap.* The difference between goods which might be earned by sons and daughters shows that the inequality between males and females is most evident, an inequality founded in the Moslem view. Despite the impact of Islamic culture, certain customs have not fallen under an encompassing patriarchal regime, especially as regards death succession.

Compared to the death of the husband, the death of the wife causes less disruption in the family, apart from the effect on the children. In view of the role the mother plays in the children's

education, the widower often remarries. The Moslem influence has rendered marriage sacred for the woman, because it is only the benedictions of the husband that open to her the portals of paradise (*suwarga nunut, neraka katut*). This belief explains the submission of the wife to the husband.

The bonds of marriage celebrated according to custom are very fragile, and superstition plays a certain role in divorce. Often the marriage is dissolved without judicial intervention, and sometimes the decision is pronounced by the *qadi* through the Islamic Religious Courts. Among the grounds for divorce are, for instance, serious bodily injury, abandonment of the conjugal home, impotence which are most influenced by the Islamic Law, and belongs to the Islamic Religious Courts jurisdiction. Upon divorce, custody of children reverts to the father, except children beneath the age of twelve reverts to the mother whom the father still obliged by giving the alimony. Having passed the age of twelve, a child may choose to go with the father or the mother, and if a child chooses the mother then the father must provide support for her until the child is mature *(baliq)* or married.

The influence of Islamic Law in divorce does not mean that it is an arbitrary act by the husband through which he dissolves the marriage by unilateral decision. It might come also from the wife paying the so-called *iwadl* payment, which is purely from Islamic influence, which divorce was called as divorce by *fasach.* The influence of Islamic Law both in divorce as well as in marriage is of great importance. The Islamic marriage, which is settled according to the prescriptions of the *Fiqh* (that is the Islamic Law), must be regarded as the signing of a contract by means of which the husband gains certain rights over his wife, while she, in exchange, claims proper treatment. On the other side, marriage according to the *adat* law is a ritual which symbolizes the passing from both the man's and the woman's state of celibacy to the marital one. From this interpretation arises, for example, the Javanese custom of changing the name on this occasion. The young man and the girl who marry take a name new to both of them as a symbol of unity (Djojodigoeno and Tirtawinata: *Het Adatprivaatrecht van Middel Java* p. 207).

Besides the *fasach,* as mentioned above, dissolution of a marriage by the *hakim* (that is, the Islamic judge) at the request of husband and wife (a form which the woman hardly ever uses because the Sjafi'ite School demands that she must prove that her charge — of impotency, mental illness, or veneral disease, for example — is well-founded). There is the *khulu,* that is an agreement between two married people stipulating that the *mas kawin* will be restored to the husband, after which he will divorce his wife. The right of repudiation is called *talaq* and is retractable twice *(ruju')* at definite intervals *(iddah)* is in the hands of the husband alone and become irrevocable after having been pronounced for the third time. The repudiated wife's prohibited period of remarrying is fixed at three months and ten days in Indonesia. When the husband pronounces the final *talaq* during the wife's pregnancy, she must wait until the

fortieth day after birth of the child before remarrying. Cases of abuse of the *talaq* without valid reasons are extremely frequent, and this problem appears regularly on the feminist program in Indonesia.

The Islamic Law as well as the *adat* law allows polygamy. There are several rules, some of them very strict to regulate this institution, and in order to take a second wife the husband has to submit to these rules. It often happens that he has to inform his first wife and even ask her permission. The Moslem prescription of limited polygamy which commands the husband to be just to his wives has been reinforced by *adat.*

As in the case of arbitary repudiation, the Indonesian feminist movement has never ceased to struggle against the wrongs of polygamy. According to the *adat* law inherited goods may remain undivided or partially divided for a long time. In *adat* law there is no uniform rule for the sharing of property, which in most cases is not individual property. The *adat* law recognizes the adoption of children who will inherit from their adoptive parents exactly as the others, while in Islam does not recognize the adopted child and excludes him from inheritance. In certain regions the sons and daughters succeed to equal parts of the estate, but most often, however, the daughter inherit less since the traditional conception is that the son bears greater responsibilities than the daughter.

After having mentioned the above, it may be said that in general, *adat* allowed the woman a position equal to that of the man. Though in public affairs just as in family affairs, the woman's influence was by no means inferior to that of the man. The Islamic influence in the *adat* regarding the woman's independence has at the same time been restricted and increased. While on the one hand, it is the *adat* that has favorably influenced the position of the Moslem woman on the other hand, it is Islam that has helped to develop her feeling of independence and has made her stand up to the grip of customs and old-fashioned ideas which belong as much to *adat* as to Islam. It is the *Fiqh* that has made it possible for her as well as the man to show a distinct individuality, to free themselves from the family group whose interests in *adat* are considered more important than those of the individual.

If the position of woman nevertheless deteriorated little by little so as to become plainly inferior to that of the man at the beginning of the twentieth century, the reason is as much the loosening of the traditional bonds resulting from social changes caused by the influence of modern ideas as it is ignorance of their rights according to the *Fiqh.* One of the aims of the Indonesian feminist movement is to supply women not only with education, which will help them to adapt themselves to the demands of modern life, but also with a more complete knowledge of the Islamic prescriptions.

THE DIFFERENCES BETWEEN THE LAWS VALID NOW, AND THE BENEFITS OF IT IN ORDER TO CREATE A NEW NATIONAL LAW

Despite the fact that agricultural systems are varied in type owing to the geophysical differences of the various islands, Indonesia shows

a unity of social structure that is due not solely to the existence of one and the same colonial administration or to that of one predominant religion. An announced purpose was to ensure that persons living in the archipelago — a diverse gathering of many nationalities, customs and religions — would be free to follow the special requirements of custom and religion in matters such as marriage and the family.

The position of the woman in the whole social life was regulated by tradition; her duties and her rights were in no way inferior to those of the man. This immemorial custom, which is still in force, has been attested to by many observers. In general, the position of Indonesian women is not Moslim in character. Official Islam has regarded women as socially inferior to men. But in Indonesia, even in the Moslem sphere of family law, the women retain a position of privileges above that of women in other Moslem lands. The *adat* has permitted the Indonesian women to appear freely in public, and to assume responsibilities equal to those of the man, though, on the other hand, it is true that according to the *adat* in an agricultural society the woman is often in an economically independent position which renders the Islamic *nafaqah* unnecessary. Also the *adat* has protected the woman against the abuse of repudiation by the institution of *takliq* (that is the divorce formula), an almost obligatory regulation.

Other factors contributed to the process in Indonesia, like the penetration of money economy and of Western education, widened the horizons while shaking to their depths the foundations of traditional societies, rendering uncertain the position of the individual, male and female alike, in relation to the community. Before the independence in 1945 the life of a girl of the upper classes was quite different from that of the girl from the peasant or working classes. The Javanese society was divided into four classes and gives the status of the woman in each.

First, the daughters of the poor villagers receive no schooling; they learn to do the hard work in the fields and to sell their products. Sometimes they learn to sew a little, they live a hard life but a relatively independent one. Most of these girls are married at a very young age.

Secondly, the daughters of the well-to-do villagers do not go to school either; but they learn to do the housework and are married at ages from twelve to fifteen years. Afterwards they work with their husbands in the ricefields or in trade; they are well treated by their husbands, since they can earn their own living.

Thirdly, the daughters of the *santri* who teach religious matters do not go to school, but receive religious instruction at home and learn to recite the Qur'an. They are married from the age of fifteen years, and they are treated with esteem by their husbands; generally speaking, they are not as capable of bringing up their children as their uneducated sisters.

Fourth, the daughters of the *priyayi* who are noble civil servants attend elementary school. From the age of twelve they are kept

at home where they have little to do as there are many servants. After marrying at fifteen or sixteen years, they continue to live their idle confined lives.

Today there is a new generation of girls, there are new arguments which were supported by Kartini, that women in order to become capable of being mothers of a new generation should start by improving themselves. Man receives from woman his very earliest nourishment, and I see more and more clearly that the very earliest education has had an influence which extends over one's whole life. Not only for women, but for the whole of Indonesian society, education for girls would be a blessing. As for the woman herself, we ardently want her to receive instruction and education, to teach them a trade so that they are no longer defenseless. The only way to escape from an unhappy life is to learn to be independent.

If education is demanded for girls it is not that we want them to compete with men, but to render them more capable of fulfilling the great task which was entrusted to them by nature. In Indonesia family the mother is the centre of the family, that the important taks falls of bringing up her children for this large family, of which they will one day be a part, which giant family is called society.

Article 31 of the 1945 Constitution of the Republic of Indonesia stated that every citizen shall have the right to obtain an education. In this sense the Government shall establish and conduct a national educational system which shall be regulated by statute. This second clause of article 31 means that the nation's culture is that culture which grows as the outcome of the endeavours expressing the personality and vitality of the entire people of Indonesia. The ancient and indigenous cultures which are to be found as cultural heights in all regions throughout Indonesia are part of the nation's culture. Cultural efforts should lead towards advances in civilization, culture and unity, without rejecting from foreign cultures new materials which can bring about the development of or enrich the nation's own culture, as well as to raise the height of humanity of the Indonesian nation.

In order to appreciate fully the position of the woman in traditional circles, it is necessary to remember that *adat* never protects individual interests but guarantees in the first place interests appertaining to the group. The settlement of a marriage should be regarded as an agreement between two families, which in practice, although the opinion of the young people themselves may not have been asked, their tastes and affinities are nevertheless taken into account. Marriage and issue do not exist to further happiness of the individual; they have a very different meaning: they are institutions which help to maintain the existence of the clan. For example, the connubium asymetric system in marriage in Batak could only be practiced where there are at least three clans. Marriages become a duty, and spinsters are looked upon with contempt. A woman proves her true worth and comes into her full rights only on becoming wife and mother.

From this point of view, it seems natural that sterility justifies divorce. The conception is in agreement with Islam where divorce is held in the husband's hand (except in divorce by *fasakh*). In Islam, marriage is in principle a contract between two individuals

who are obliged to give their consent, the woman represented by her mandatary *(wali).* But in practice, the group influences in the choice, and the settlement of marriages is the family's business and not that of the future husband and wife.

On the other hand, marriage in *adat* law is in varying degrees a matter of kinship group, family, community and personal concern. It is also a matter of social status. Marriage is the means by which the organized relationship groups, which forms autonomous communities, maintain their existence by the sub-clans, sub-tribes or extended families. But within the community, marriage is also the means by which the individual family extends its own line into the future, and this makes it a family matter. The communities are concerned in the matter of marriage, because they will bear the full burdens and privileges of responsibility for the spiritual and material welfare of the community. Therefore marriage become a legal event that is synchronized in the legal system and has to be *terang* (clear).

There is a general difference in the ways in which Islam and Christianity influence native marriage, the influence which affects also in divorce.

Because the Moslem marriage is concluded as a contract between the bridegroom and a representative (the *wali*) of the bride and in the presence of at least two witnesses, the offer and acceptance are concluded in sacramental words. The marriage portion *(mas kawin)* which consists of a small payment from the man to the woman is usually determined between the *wali* and the bridegroom where the bridegroom usually lays down the conditional terms of repudiation, which is called the *talaq* and can be revoked as far as the third one is not given. Then the *iddah* period will follow after mentioning the *talaq* which will take three months and ten days, the period which a woman may not remarry and still has the right for *nafaqah,* that is the maintenance given by her former husband. The reason for giving the *iddah* period is only to clarify whether a divorced woman is pregnant or not for the legitimation of the child, and therefore during that period if it is proved she is pregnant, she still has the right for maintenance from the former husband if in fact the child she bore is his.

Although a Moslem husband can throw off his wife in an unilateral action, this is not what the Islam religion meant. But in practice it happens thousands of times. However, there are still regions where the man consults with the kin group and chiefs before the exercises this privilege.

If the divorce data represents a high rate, it could be said there is a malpractice of Islamic law, because although Islam allows polygamy with some restrictions, it is still too hard to fulfil these restrictions.

It is different with the divorce in *adat* law, where marriage is a family affair with the purpose of making the regular growth of family communities into new generations. Here marriage is more a rite, which introduces something new into the sacred and inscrutable cosmic

process of life, and therefore usually this rite is marked by another name. The transition of the newly married couple to the new community status is ritualized. When marriage is considered as a family group affair on the one side, on the other side it could also be said that marriage is an extremely personal matter, which unites two human beings where they can promote the hoped-for fertility by magical endeavor. In general, the families and the community want a marriage to continue. However, there may conditions when the families and the community are interested in breaking up a marriage. The further into the background the community and family influence recede, the more will the other values and standards come to dominate the question of divorce. Although it happens sometimes that purely personal reasons may be accepted by the community. Divorce by mutual consent appears to be universally permitted by the *adat* law. However, the family elders will try to dissuade divorce when there are no social grounds, and based on these arguments, in practice, divorce by mutual consent is rare in some regions.

Further it is possible that joint deliberation as to financial arrangements and the disposition of property with respect to the children can always land to a divorce, and *adat* law gives no social recognition to that kind of behavior. There are many reasons for divorce according to *adat* law which differ from region to region.

We mentioned above the marriage and divorce regulations according to the Moslem and *adat* law, which are both unwritten — in Indonesia up until recently still exists the plurality in this field, among which is written in the statute law. This statute or written law is influenced by the Christian law, though in some cases it was created in order to apply the Western law with some considerations which was found in the Netherlands Indies at that time. This kind of law mentioned the last is what we called the "phantasy law" *(fantasierecht).* This written law has the influence of Christian law which is based on monogamy, and therefore divorce is possible on several grounds. The Netherlands Indies Civil Code *(Het Burgerlijk Wetboek voor Nederlands Indie),* the Mixed Marriage Regulation of 1899 number 189 *(De Gemengde Huwelijksregeling)* and the Marriage Ordinance in Java, Minahasa and Amboina *(Government Gazette* of 1933 number 74 jo. 1936 number 607)—*Het Huwelijksregeling voor Christen Indonesiers in Java, Minahasa en Amboina* — followed the monogamous principle in marriage. Incurable dissension in one of the six recognized grounds for divorce, but not barreness.

When the Moslem marriage law forbids a divorced woman to remarry until the *iddah* period is over, article 33 of the Netherlands Indies Civil Code *(Het Burgerlijk Wetboek voor Nederlands Indie)* which is only applicable for the European group and the Foreign Oriental Chinese, forbids a divorced woman to remarry before 300 days since the marriage is dissolved.

After having mentioned all of the above, in order to create a new national law which also included marriage law, we have to select the one that will fit with the philosophy and way of life of the Indonesian people. In a country like Indonesia, where the principal sources of revenue are the products of manual agriculture in which more than 80 per cent of the population is occupied, the peasant woman

plays an active role in the economic organization. Although the agricultural systems are varied in type owing the geophysical differences of the various islands, Indonesia shows a unity of social structure that is due not solely to the existence of one and the same colonial administration or to that of one predominant religion.

The position of woman in the whole social life was regulated by tradition; her duties and her rights were in no way inferior to those of the man. The immemorial custom, which is still in force, has been attested to by many observers. It is the wife's importance as an active element in rural economy that has determined her importance as a member of the community where every action is guided by tradition and where everyone fulfills a function fixed with regard to the economy of the group. Her other function, as wife and mother is essential to the survival of the group and correlative to the first, determines her position in public and private affairs.

All evidence supports the conclusion that the woman's position in traditional Indonesian communities has always been very elevated. Several writers have drawn attention to the fact that in Indonesia the woman has always had access to leading occupations, among which, for example, is Tribhuwana Tunggadewi who reigned over the Majapahit Empire in the fourteenth century. The most memorable one which was happened during the struggle with the Dutch government at the end of the nineteenth century in Aceh (North Sumatra) is Tjut Nya' Dien, widow of the Acehnese leader Teuku Umar who was killed in action. She is now therefore regarded as one of the heroines of the nationalist movements in Indonesia.

It is no small accomplishment for Islam to have contributed actively to the unification of the Indonesian people beyond a regionalism governed by *adat* (J.M. Pluvier: *Overzicht van de ontwikkeling der Nationalistische beweging in Indonesie in de jaren 1930 tot 1942* — "Outline of the development of the nationalist movement in Indonesia in the years 1930 to 1942", 1953 p. 14). Of the influence of Islam, Wertheim has written:

> In Indonesia Islam tried, as it had in ancient Arabia, to bridge the regional and tribal particularisms by means of a single Islamic unity. It threatened the position of the adat chiefs most of all. Their local patriotism was exposed to the criticism of the sternest Moslems who saw in the Faith a strong unifying force — a kind of prenationalism.[8]

A BRIEF HISTORY OF THE WOMEN'S MOVEMENTS IN CREATING THE MARRIAGE LAW, ITS CHALLENGE AND RESPONSE

The first women's movement was started during the colonial period with the Indonesian Women's Congress which was held in Jogjakarta on December 22, 1928. The position of women in customary law and marriage according to Islam was discussed at that time, the outcome of which was to improve the social position of

[8] (Wertheim W.F., *Indonesian Society in Transition, 1956,* p. 202. See also his *Effects of Western Civilization on Indonesian Society,* 1950, p. 69-70.).

women and family life as a whole, and was poured into a text of three approved motions which contained the following requests: (1) that the number of girls' schools be increased; (2) that an official explanation of the meaning of the *ta'lik* be given to the bride at the moment of the marriage settlement; and (3) that a regulation granting assistance to widows and orphans of Indonesian civil servants be established.

From that time on, December 22 was destined to remain a memorable date in the history of the Indonesian women's movement and was called as *Hari Ubu* (Mother's Day). It is the mother who raises and cares for the children, and who guards the welfare of the family and dedicates herself to the interests of society. It is the mother too who gives form and character to the community, for she is the one who prepares the children to become its worthy members. Since then the Indonesian women became fully aware of her lot, her duties, her position and her part in society.

In accordance with the desire expressed by the Indonesian Women's Congress held at Jogjakarta in 1928, the colonial government has instructed those who deal with matrimonial affairs to explain to the bride's *wali* at the conclusion of the marriage the meaning of conditional divorce (A.D.A. de Kat Angelino: *Les Indes Neerlandaises,* Vol. II of *Le probleme colonial, 1929,* p. 399 note 1). The first participation in an international women's movement was at the Congress of Asian Women wich took place in Lahore in January 1931, and a proclamation was drawn up which insisted that women be granted equality with men, and that to be an Indonesian woman is to be the mother of her country, or in other words, that Indonesia's future depends to a great extent on Indonesian women.

Following the passing of a resolution regarding marriage by the first women's congress held in 1928, the government revoked previous decrees and issued new ones for Java and Madura as well as for the outer islands.[9] The new decrees specified that, under penalty of a fine, Moslem marriages could not henceforth be contracted except in the presence of those chosen to perform this function by the government. The same held true in respect to the registration of the *talak* and the *rujuk.* The *penghulus* appointed by the government would henceforth keep a register of marriages, repudiations, and retractions of repudiations. Any person who gave his daughter in marriage according to the *hukum* without the supervision of the *penghulu* was liable to a fine.

Apart from this matrimonial legislation for Moslem subjects, the government promulgated several laws for Christian Indonesians, among which is for the Moluccas in 1861.[10] Persons who wish to marry were obliged to apply for the official documents given by the government. Further this regulation includes the Christians in Java, Minahasa and Amboina which led to the regulation of 1936 which mentions the valid grounds for divorce.[11]

[9] *Staatsblad 1932* number 482.
[10] *Staatsblad 1861* number 38.
[11] *Staatsblad 1933* number 74 jo. Staatsblad 1936 nos. 247 and 607.

The demands of Indonesian women concerning marriage legislation were formulated in various publications and in successive congresses. It was chiefly this question of marriage that divided the women against themselves. Since the first congress of Indonesian women in 1928, a divergence of opinion on this subject became noticeable. While the Islamic associations were in support of polygamy in so far as it was an institution allowed and tolerated by the Qur'an, other associations were abolishing it. Islam itself offers polygamy only as a variety of marriage permitted, but not obliged. The best way to contend polygamy lies in a more thorough study of Islam itself. According to Islam a girl cannot be married without giving her consent, and that at the marriage settlement the Moslem bride can lay down certain stipulations which will protect her from having to put up with a co-wife. In this way at least it was assured that the girl at her marriage could protest against the possibility of having to put up with a co-wife.

In the second congress of Indonesian women in 1935 it was decided to make thorough investigations into the position of women in society according to the Moslem law, with the important proposal to improve the status of woman without compromising religion. A commission was set to work and it was clear to one and all that as long as the problems of polygamy and arbritary repudiations were not solved, the emancipation of the Indonesian women would remain incomplete. As a result, the government had improved certain points in the matrimonial legislation and at the beginning of 1937 thought it a good thing to submit to the various associations a draft entitled "Ordinance Project for the Regulation of the Matrimonial Legislation of the Moslem population".[12] This marriage ordinance project was rejected by all the Islamic associations, because it prohibited the practice of polygamy to those whose marriage would be recorded in a registry office.

The period during the Dutch colonization in the Indonesian women's movement consisted of two phases, the first was dated with the 1928 congress. At that time the women's movement formed a part of the Indonesian nationalist movement, where women became conscious of the party they had to play as "mothers of their people" and fitted themselves for the task of educating the new generation. The second phase, which dates from the establishment of the sovereignty of the Indonesian republic, found the women's movement active in the building up and strengthening of the new independent state. Since then women had become fully responsible citizens, demanding that proper laws be enacted to enable them to shoulder this responsibility.

In 1950 the government appointed a commission to inquire into a new ruling on marriage, the commission which was called the *Panitya Penyelidik Peraturan Hukum Perkawinan, Talak dan Rujuk* (abbreviated to N.T.R., that is Nikah, Talak, Rujuk: marriage, repudiation, retraction). This commission was instructed to examine

[12] *Voorlopig Ontwerp ener Ordonantie tot regeling van het huwelijksrecht der Moslemse bevolking, genaamd Otwerp Huwelijks Ordonnantie* 1937.

all the marriage regulations in force and to work out a project Act suitable to the spirit of the new era. After having consulted the women's associations, the commission decided on a general Act valid for all Indonesians without exception and based on the *Pancasila.* To this general Marriage Act should be added special regulations which applied to the various groups, religious or neutral, and this would mean the introduction of codification as well as of unification of Indonesian marriage law. It is something which the colonial period had failed to produce. The important points included in this draft Act were: the consent of both parties; an age limit of fifteen years for girls and eighteen for men; equal rights for husband and wife in the event of divorce; certificates of health produced by both parties before the marriage; to those whose religion allowed polygamy, permission would be granted only after the first wife had given her consent only if the husband could guarantee that he was able to provide for more than one family.

This commission also failed, the objection raised against it is that it favored polygamy. So far as polygamy and unilateral repudiation are concerned, the same antitheses prevail today as have existed during the thirty years of the organized women's movement. The conflicting points of view have found expression in the two projects on matrimonial legislation that have formed the basis of parliamentary discussion, as well as in the third alternative recently drawn up, which seems to offer more tactical than actual differences. However, of more striking interest and importance is the continuing unanimity of conviction of the need to legislate a Marriage Act. There is a general recognition of the insecurity of the woman in social life and coupled with it, the growing disintegration of family life and neglect of children, resulting from the abuses of polygamy and arbitrary repudiation.

Family life, at present seen as a "unit" in itself and no longer as a dependent subdivision of a larger familial association, is the centre upon which the interest of Indonesian women are focussed.

The objective of marriage, its inner as well as its public bond is the family, that is the parents with the children, so marriage law is family law. Marriage is a holy bond, a noble alliance which must not be broken in any arbitrary way. Family unity is the foundation upon which marriage rests; it must be protected at all costs, and is the conviction of all women. The problems of economic as well as social and religious nature indicate the way in which the pattern of society is rapidly changing, and also with it the position of women.

CONCLUSION

To have a broaden view upon the principle in marriage law, is to need to understand the cultural and religious background in order to anticipate how a new law will work out. It is a matter of fact that among the women themselves this problem has been discussed many years ago, and every time has failed on a higher level discussion.

Because of the mixing of *adat,* religious (Islamic, Christian and Hindu) and codified law derived from the time of the Dutch, there is a need to codify, especially in light of the new Bill which is effective from now on.

We must confess that marriage law is family law, and the family law valid up until recently (the written one) is not based on the Indonesian philosophy and cultural backgrounds, even the law made in accordance with the situation and conditions specific in Indonesia known as "phantasy law".

It is a reality that it was not only among the nobility that woman held positions of great responsibility. On the village level, in many regions women played an open part in family councils and exercised a direct influence on the village councils. Nevertheless, by about 1900, the position of the Indonesian women had become anything but enviable. There is not much possibility that Indonesian women will carry out any of the more sensational tactics of some women's liberationists in the West. However, it is well to remember that, though favourable, the position of women in Indonesia is not without its negative aspects. The great majority of Indonesian marriages are monogamous, but polygamous marriages still occur.

Furthermore, though the principle of equal pay for equal work[13] is applied to those in the liberal professions and those who are in government service, this does not always hold true for women who work as labourers. There are certainly many more improvements to be made as to the status of the average Indonesian woman. Still, the Indonesian woman never believes that she is to replace or to compete with man, but to complement him on equal terms.

These basic principles which express the equal rights of men and women in society according to religious and traditional doctrines are more suitable in Indonesia since the concept of justice as a right of all nations is expressed in the preamble as well as the body of the 1945 constitution of the Republic of Indonesia as an independent country in this fast-moving world. If education is demanded for girls, it is not that we want them to compete with men, but to render them more capable of fulfilling the great task which was entrusted to them by nature. In Indonesia the mother is the centre of the family, that the important task falls of bringing up her children for the large family of which they will one day be a part, which giant family was calleed society.

One of the aims of the Indonesian feminist movement is to supply women not only with education — which will help them to adapt themselves to the demands of modern life — but also with a more complete knowledge of the Islamic and traditional prescriptions. If the position of women nevertheless deteriorated little by little so as to become plainly inferior to that of the men at the beginning of the

[13] Formerly it was expressed in the inheritance law as *"sagendong-sapikul"* (Djojodigoeno and Tirtawinata: *Het Adatprivaatrecht van Mideen Java,* p. 207).

twentieth century, the reason is as much the loosening of the traditional bonds resulting from social change caused by the influence of modern ideas as it is ignorance of their rights according to the Fiqh.

We must confess that it is not easy to create a law, particularly in family, but on the other hand it is not good to depend always on unwritten laws, or on codes which are created or borrowed from an entirely different country, with an entirely different conception of life.

HERMIEN HADIATI KOESWADJI *

* Senior Lecturer of Law, Airlangga University School of Law, Surabaya, Indonesia. This article was prepared at the University of California in Berkeley, where the author held an Asia Foundation grant in 1972-1973. The author is indebted to the late Prof. Albert A. Ehrenzweig and Prof. Herma Hill Kay, School of Law, University of California, for a critical review of the paper.