

REVITALIZE AND REPOSITION INDONESIAN PUBLIC ADMINISTRATION, THE LEGACY OF LAW

Mason C. Hoadley¹

Abstraksi :

Tulisan ini mencoba menggunakan pendekatan atau perspektif historis dalam upaya untuk mencari model yang asli untuk pelaksanaan otonomi daerah. Dengan pendekatan historis ditelusuri pelaksanaan administrasi publik yang bersumber dari adat istiadat Jawa, masa pemerintahan Hindia Belanda dan Masa Republik pada tahun 1945. Pendekatan administrasi yang digunakan dalam adat istiadat Jawa adalah konsensus dan dekrit. Dalam pemerintahan Hindia Belanda terjadi penggabungan antara adat-istiadat dengan berbagai ketentuan yang dikembangkan oleh Belanda. Dalam era Republik terjadi tarik menarik antara peraturan yang bersifat positivisme dan romantisme. Model yang diajukan adalah adanya kombinasi antara adat, peraturan yang berlaku dalam masa kolonial dan peraturan yang dihasilkan dari penguasa yang ada sekarang ini.

An important part of deciding where to go and how to get there is a realistic view of where one is and where one has been. In other words a critical review of past performance should be part of attempts at improvement. Administrative performance is not the sole criteria of the quality of governance. A good example of this myopia comes from the great amount of ink spilt on discussing insufficiencies in Indonesian public administration. It has become almost a tenant of faith that poor performance comes from various degrees of KKN (corruption, collusion, and nepotism) on the part of administrators. In some circles the problem is considered endemic to public life in the Republic of Indonesia. The approach, however, neglects an alternative explanation, namely the quality of what is being administered, namely the Law. While administrative performance can be measured by how well a given task is carried out, judgement on the appropriateness of those tasks or the rules and regulations under which they function is more difficult. The present attempt is done within the perspectives of *la longe dur* as the task of historians.

Last August I argued here in Bandung that the constitutions of the Dutch East Indies (Regeringsreglement of 1854) and the Republic of Indonesia a hundred years later had the effect of preserving local legal custom. The analogy used was that of an umbrella shielding custom/adat from the more pernicious effects stemming from international trade, exploitation within industrial and agricultural production, commercialism by foreign ethnic groups, and so on. It was further argued that the Otda (otonomi daerah) or decentralization acts provided by

¹ Professor, Southeast Asian History and Indonesian, Department of East Asian Languages, Lund University, Sweden

Governmental Regulations 22 and 25 of 1999 had the potential of collapsing that umbrella. Local traditions would thereby be exposed to the direct demands of globalized economic competition, binding political alliances, commitments to specific religious orientations, as well as demand for Western style human rights and rational administration, just to name a few. Given the fact that the theme of that conference was Sundanese culture, emphasis fell naturally on the continuation of the custom so protected at the provincial and local levels.

In Indonesia voices have been raised questioning the degree to which the umbrella has actually been collapsed. According to them the national government is not prepared to allow much leeway for provincial and local governments in such areas as international entrepreneurship, contracts with multinational companies for licenses and permission for exploitation of even local natural resources, or binding financial arrangements in order to accomplish them. My own research on the laws of greater Java - originally including Lampong in southern Sumatra, the island of Java, Bali, and possibly Lombok - question the effectiveness of that umbrella. Did it actually protect local traditions from outside forces? With all due respect the payong is full of holes! As a symbol it was shown respect; as function there was little substance. This is all the more understandable because those holding the payong - officials of the Dutch East Indies and subsequently of the Republic - were mostly interested in the hormat aspects in order to cover the more profitable results of legal changes allowing greater access to the archipelagos natural riches.

The theme of my presentation is thus a simple one. In the search for genuine models for the otda era, Indonesia cannot look to its own past. The court law of the islands kingdoms from Banten to Mataram was swept away by Dutch accession to a position as the dominate power during the latter eighteenth century; village law was undermined by a combination of these radical changes in court law and the working of the Dutch East Indies administration. A striking example of the changes taking place in court law is provided by ownership rights over the means of production which were dictated by the sovereign (after 1830 the Dutch) no matter what their adat origins. An equally good example of changes in the village sphere comes from the fact that all adat cases were ultimately subjected to rejection, modification, or approval by Europeans sitting on the various Indies courts. Appeal was possible, but to the Indies government or ultimately the Dutch Parliament. Neither counted Indonesians among their members. Moreover, regardless of the real achievements during the past fifty years of the Republic, the spread of the rule of law has not been one of them). The point is that while there is no lack of historical continuities they are false ones. They are neither historical nor

JAP, Tahun 1, Nomor 1, Agustus 2002, ISSN 1412-7040

continuous. During the past centuries legal developments in what would become Indonesia have been helplessly compromised by their employment in achieving short-term economic gains by foreign and indigenous elites. This has gone to the extent that the ultimate victim is a belief in the efficacy of Law itself.

In broaching the subject for this talk, I must ask the audiences indulgence on two accounts. First, as time is short the presentation is characterized more by directness than diplomacy. Second, much of it comes from my book-draft entitled *The Laws of Java, Dutch Colonial Regulations, and the Rule of Law in Indonesia*. As a result, many of the arguments are summarized rather than developed. In this respect it should be acknowledged that the section on *otda* is still in preparation. The opportunity of receiving invaluable feedback from this workshop gives me courage to present such a thesis. More specifically, the following is divided into three parts. First, the Laws of Java and their function in the period preceding the advent of Dutch power is presented. Second, the paper sketches how they were altered by the administrative activities of the Dutch East India Company down to 1799, that of the British 1811-16, and subsequently the Dutch East Indian government down to 1942. And finally the paper discusses what was taken over of these laws by the new Republic in 1945.

LAWS OF JAVA

Definitions

For the purposes of analysis two sets of complementary contrasts can be identified. The first of these is that obtaining within the society itself. This is between what Redfield has termed the greater and lesser traditions. On a fairly high level of generalization the traditions distinguish between the realms political and ritual center and its outlying parts. The usefulness lies in its relative rather than absolute categorization. It recognizes the superiority of the greater tradition in terms of physical power, social status, and ritual influence without negating the lesser traditions contribution to the manner in which these are expressed. Even more important in this context is the reciprocity existing between the two. The lesser tradition imitates by the greater tradition but is also looked upon as the source of tradition. Java-ness is not confined to the court (*kraton*) but also flows out of or is thought to flow out of the village (*desa*).

Figure 1

Greater Tradition	Lesser Tradition
Laws of Java = court law in greater Java	law of desa or what became adat
law giver: Jaya Lengcara, Surya Alam, etc.	informal, from usage or the ancestors
written texts, therefore fixed	oral and thus changeable
cosmopolitan	parochial/territorial
general	specific

Character of Javanese Substantive Law

What was this island-wide judicial system and how did it work? In essence the Laws of Java attempted to establish a hierarchical legal taxonomy. All actions or conditions, including legal response and relevant principles, were formally classified through assignment of a label. The terms and concepts applied for these labels are neither functional, descriptive, nor in most cases mnemonic. Some can be traced back to Old Javanese usage and may have originally derived from Sanskritic legal terminology, although not necessarily its contents. Many, as guilt by association, definitely do not refer to Indian models. Even though they may employ pseudo-Sanskrit terms, their contents reflect Indonesian rather than Indic concerns. By and large the bulk of these labels are purely local. One whose actions deviate from those expected by authorities becomes a slander of kings (*raja wisuna*); one who in all probability had full knowledge of a crime being committed but did nothing to hinder it becomes guilty of crime of silence (*mneng menung*), the equivalent of *sapatikah* or one knowing the actions of an evil doer (*durjana*) and so on. These sub-categories of individual, actions are in turn gathered into a higher order of legal categories as the *sadatayadi* (The Six Tyrants) or the *asthadustha* (Eight Thieves). Provisions for punishments are specified under the auspices of the legal authority as defined by the *aksara* here legal precepts defining crimes/punishment. Additional sanction is given through quotation of a *sloka* which further gathers diverse acts into more or less standardized legal pigeon holes. The act of classifying and labeling with the appropriate etiquette completed the task of the jurors. Assignment or application of specific punishments, supervision of the actual carrying out of decisions, entertaining possibilities of appeal, or even concern with the relationship existing between law, the legal apparatus, and society were foreign to them. These were duties falling to the lot of the executive authority.

This taxonomical way of thinking was by no means confined to actions or conditions of an obvious criminal or asocial nature, nor even ones directly touching the prerogatives of the

sovereign. In a like manner it also provides the context in which actions considered as solely between the involved individuals were resolved. The *andih-andihan* hierarchy of evidence and the *uger-uger* show functional similarities. They begin by classifying various acts and then go on to provide this classification with relative weight in determining the outcome of legal contests. In the case of the *uger-uger* and *hina saksi* (unacceptable witnesses) they further specify the conditions under which affairs are automatically lost. In addition the major source of evidence, *saksi* or witnesses, are classified as to their acceptability, and by implication show the way to the winning or losing of law suits.

Subjective v Adjective law

One practical question that arises in this connection is the relation existing between law and legal cases. How was the substantive law discussed above applied to litigation and at what level? On the practical side it appears that the purpose of book law was to minimize the number of legal cases officially recognized. Through classifying legal cases in general and key elements of their resolution in particular the intention was to settle disputes before they came to trial. If successful this would remove a source of potential social conflict. It also made formal decisions by a tribunal superfluous.

A number of techniques ensured that only a minimal number of cases would come before the jurors. Certain types of cases were simply not acceptable. Some of these were considered anti-social as disputes over debts from gambling, a woman's dowry, etc. Those falling under the *asta-dhusta*, *asta-corah*, and *sadatayatadi* presented no problem as punishment fell more or less automatically under sovereign executive authority. Others were declared invalid at an early state. Most common were technical difficulties within the suit as, for example, the two dozen listed by the Raffles text and to a lesser extent repeated in Add. 12303 (f. 6v-7v). Existence of any of the listed characteristics automatically invalidated the case. Another large category of some three dozen cases categorized as being of questionable validity, in that ..."it will be for the *jaksa* to consider and determine when a law-suit can, and when it cannot, be instituted." (Raffles, Appendix C). To these can be added a small number of law-suits which could be instituted with success, but under stringent circumstances. Yet when all is said and done the most common reason for mustering out cases from formal litigation came from the long lists of conditional *uger-uger* paragraphs. Were "any present the case was [automatically] lost." If this was not enough there were still stringent requirements on the validity of witnesses, much of this being based more on relative social

and/or official status than the presence or absence of presumed knowledge relevant to the case. The important point here is that the texts contents served to screen out the majority of possible points of dispute. One assumes that those cases which could not be considered by the legal tribunal would be resolved either by negotiating or at the last result appeal to the central authorities.

With these characteristics of substantive laws function, we are in a better position to understand a couple of observed phenomena within legal process on Java. The most striking is the extreme reluctance with which a case was brought to trial before jurors. In the documented cases of the Cirebon-Priangan region during the late seventeenth and early eighteenth centuries officials of the Dutch Company frequently, complained over the slowness with which Javanese jurors prepared cases. This was especially noticeable with regard to cases which the Dutch for various reasons particularly wished to see come to trial. On the one hand this could be explained in terms of local cultural conventions with their reluctance to open a formally decisive contests between opposing parties, the characteristic lack of urgency, or even, according to at least one Dutch observation, lack of feeling. Yet a more satisfactory answer lies in the nature of the Laws of Java. Given the large number of thresholds through which a case must pass before it was acceptable for legal handling, delays in processing potential cases is understandable. At least in retrospect, it would seem that many cases lacked formal grounds for their acceptance by the court system. In a 1695 case *Ki Aria Marta Ningrat* was clearly guilty of *raja wisuna*, one of the *sadatatayadi*; in the 1710 *Japura* case there were fatal flaws in the status of the witnesses, which upon study of the substantive law texts would fall under *hina saksi*; and the more spectacular 1717 case against *Suba Mangela*, son of the Regent of *Suka Pura* was obviously guilty of the *astadusta*. In these, albeit relatively small number of, examples the provisions of substantive law would have anticipated the solution long before the cases were considered for a formal hearing. They should have been declared invalid on the basis of substantive law criteria. They went to trial, so to speak, only due to Indonesian predilection to humor the powerful but uninformed Dutch. Both the aims and final resolution were skewed more to obtain Dutch political/commercial goals than fulfil Javanese legal ones.

Thus the paucity in number of recorded legal cases is a direct consequence of the nature of the Laws of Java. The latter's purpose was to circumvent rather than resolve legal contests which could upset social-political *tata tentrem* or the peace and tranquility so valued by local society. This was accomplished through anticipation of the alternatives and settling them in

advance. In terms of potential litigants the odds were small of getting their suit handled by the jurors. The majority of cases were sifted out, and thus eliminated, during the equivalent of a pre-trial investigation. They were shown to be incompatible with minimum requirements or that the chances of success were so low as to discourage going further with the process. As a worst possible case, they could be transferred from legal authority with its implication of an equitable moral world to the political one in which relative morality within a bargaining situation prevailed.

Administrative consequences

Historically Javanese law has developed two administrative approaches to the issue, consensus and decree. The collegial/consensus system, mainly employed at Cirebon in imitation of the Old Javanese courts of Majapahit, constituted an extension of the Laws of Java. Adjective law reinforced their contents by imitation. Only in extreme instances of cases not amenable to resolution by reference to the contents of law are the authorized officials forced to make a decision. Even then it is set within a context of the law by references to, quotations from those texts. In any event the actual enforcement was surrendered to the sovereign. The other approach is what has been termed the *abdi-Dalem* system employed at the Central Javanese courts. It rests on resolution by decree of royal might. A decision is taken by the sovereign or on his behalf by his counselors (*sosoyta ing negara*) on the basis of their view of the situation. This is a practical solution and may or may not be supported by moral force to enhance enforcement. Important corollaries here are that it is dependent upon the political power of the ruler at any given time and that adjective law stood outside the substantive law system.

The issue which has long exercised students of Javanese law is that of the relationship obtaining between substantive law and its application to practical questions of litigation. Closely related is the issue of how litigation and, more specifically, the results thereof in the form of precedent or new regulations affected the body of substantive law. A short answer is that it did not. The Laws of Java neither directed litigation in a specific manner nor were affected by the outcome. The two variations in the legal system either imitated the spirit of substantive law, as in the collegial-consensus apparatus, or stood completely outside it, as in the *abdi-Dalem* one. Neither applied the contents of the law in the manner of the body of positive law introduced by the colonial government on western models during the nineteenth and twentieth centuries; neither influenced the contents of substantive law by precedent or

exercise of the royal will. Although it stands to reason that there existed some mutual relation between developments in substantive and adjective law, the mechanisms connecting the two are not apparent. More to the point here, they do not seem recoverable at this stage in the study of Javanese law. In some respects the issue is "academic" in that the Laws of Java were subsequently replaced by Netherlands Indies colonial rules which were in turn incorporated into or replaced by laws of the nation state.

COLONIAL CHANGE

The Dutch East India Company

Within broad temporal perspectives the key issue is the transformation of the Laws of Java. From a statement of juridical/ moral principles aimed at avoiding litigation, the body of Java-wide substantive law became positive law which could be utilized by courts for resolving cases. Necessity for such a transformation arose from greater frequency of contacts between Dutch and Javanese in which the Dutch would not or could not subordinate itself to the islands prevailing system. Increasing Dutch economic and with it political involvement in the affairs of Java meant that the resultant economic-political interface became more intense. Greater frequency of Dutch-Java contacts with regard to a greater number of issues in turn led to a corresponding increase in the number of instances in need of regulation or, when they provoked real or potential conflict, resolution by formal bodies.

By the late eighteenth century a pattern of political relationships on the island had emerged whose major outlines would continue for the century and a half of remaining Dutch rule. In principle the Dutch Company had become primary in the islands politics. Its fiat was exercised in both direct and indirect terms. Directly ruled areas encompassed territories which had been seceded by successive Javanese rulers to the Dutch from the late seventeenth century onwards. The ultimate dismemberment of the Javanese realm took place via the Treaty of Giyanti of 1755 which further divided the rump state of Mataram into the principalities of Yogyakarta and Surakarta. At that time the territories constituted approximately one third of the islands geographical extent and most likely a similar proportion of its population. These were administered through the Comanys regional centers of power at Cirebon, Semarang, and Surabaya. As a result of the Java War which ended in 1830, the territory remaining under Javanese control, alternatively indirectly under that of the Dutch, was greatly reduced. These constituted approximately one tenth the islands territory with a like population, a position they retained during the following century. Although the

population counted for a relatively small proportion of the islands inhabitants, scholarly works have given a disproportion importance to developments in the Principalities to the detriment of deeper understanding of the more significant areas.

In both areas the Dutch on paper were commitment to preserving the local legal systems. However this was only "... in so far as they are tolerable to us..."Realities of Company economic priorities showed how little this tolerance extended. A detailed study of the situation of the West Javanese principality of Cirebon shows in some detail how seemingly minor modifications introduced by company servants had devastating results for the local systems continued function. Within less than three decades its authority had been defaulted to the Dutch Resident. Although less studied, a parallel situation developed at Semarang and undoubtedly at Surabaya at a later date. An indirect rule variant came about from the establishment of the two principalities of Yogyakarta and Surakarta as separate political entities in 1755. The Dutch choose to allow the existence of a separate legal system for each of the native states. As part of this variation the fact that Central Java tended to employ the *abdi-Dalem* system of officials in contrast to the more collegial pattern of West and ostensibly East Java. As a result substitution of one executive power - Dutch for Dutch-influenced Javanese rules - was outwardly less discernable than was the case with the collegial system prevailing in West Java.

Thus the input side would come from the mores of the Dutch Company, itself the product of a world-wide European economic system. Initiative for legal change came from Company provisions to ensure expansion of its commerce, protect movement of "its" subjects, and to resolve questions of a quasi-international nature arising over land and manpower resources. These issue frequently arose between subjects of the Company - foreigners, all Chinese, and others living in the territories ceded to the Dutch under various treaties - and those of Yogyakarta and Surakarta, to which came in the early nineteenth century subjects of the Mangkunagaran and Pakualam. Telling in this regard is a apparent conversion of the competence of the Central Javanese Bal Manggu court. This was one of the three Javanese courts, the other being the *pradata* court of the Susuhunan/Sultan and that of Surambi composed of *pengulu* or Islamic learned men who heard cases in marriage, divorce, and inheritance. The Bal Manggu which was chaired by the *patih* or prime minister originally had been empowered to settle agrarian issues such as those over land, irrigation, taxes, and the duties of the *bekel* - the local functionaries of the appanage holders residing at court. However sometime after 1755 and the Treaty of Gianti the Bal Manggu became the court for

"mixed" affairs. Reflecting the new situation that had come about towards the end of the eighteenth century, it now exclusively heard cases involving Europeans, other foreigners, and the Company's subjects, i.e. both Chinese and those living in Company territory, when they came into conflict with the Sultan's or Susuhunan's subjects or between subjects of the latter.

French and British Interregnum

Into this stage entered the figures of William Henrik Daendels (1808-11) and Thomas Stamford Raffles (1811-16), both of whom left their mark on administrative developments. For purposes here their reforms can be treated as one, particularly as the latter build upon the former. Among Daendels many accomplishments can be numbered the creation of the administrative village on Java, giving form to the taxation system, and direct modifications of the islands legal system. More importantly, within the directly administrated territories he transformed the local potentates, i.e. princes, *tumenggung*, *pangeran*, into governmental officials, termed Regents. After 1808 they were servants of the King of Holland, i.e. Napoleons brother. This meant that they were to serve the interests of the Dutch government and could be disciplined for breach of that duty. For this they received regular compensation. If this had been realized the island would then have had a corps of paid officials subordinated to the higher echelons of the Dutchs administration, an important step toward a rational bureaucracy. The measures were followed by the British after their occupation of the island in 1811. An even more important innovation was introduced by the British administration, namely the Raffles land-rent scheme. Crucial to it was that peasant tenants would pay a set land tax to the government which would replace all the nefarious and arbitrary extractions by the local rulers in partnership with the Dutch. In English eyes this were the cause of the direct producers poverty. Funds thus raised would cover the costs of the central governmental structural envisaged by both Daendels and Raffles. Motivation for this tax came from the principle that the sovereign was the ultimate owner of all land. Hence he must be compensated for allowing peasants to use it to produce eatables and commercial crops. Whether this is true in an absolute sense has consumed considerable scholarly time and effort. For present purposes it suffices to note that the concept was never used by the Dutch in their relations with local governments during the seventeenth and eighteenth centuries. Due to mostly economic reasons, the returning Dutch in 1816 found it convenient to accept and, more importantly apply systematically in the 1830s, i.e. the Cultivation System.

In the course of events totally outside of Java, the Dutch, now under a monarchy, received the island back as part of the attempt to restore the status quo in Europe. Moreover the advent of rule by the Dutch crown after 1816 clearly broke with what has been termed normal development. From then on the aim of government was to gain as much profit from what had become a Dutch colony as possible and as quickly as possible. Explanation for Dutch undue interest in exploiting the region is to be found in their own financial embarrassments. They were broke. The immediate cause was the enormous expenditures entailed in putting down the rebellion led by Pangeran Dipanagara. As a result, the end of the Java War of 1825-30 found the Dutch as masters of the island whose political and military hegemony would never again be challenged. All potential revolters were effectively silenced, exiled or under the threat thereof. Yet this was cold comfort to the Dutch crown. Not only were the Dutch unable to reap any profits from the island but also they had gone into debt in acquiring factual control over their possession restored by the Congress of Vienna. What they needed was a fool-proof scheme to recoup their losses. The key to their fortunes was supplied by the British, namely the just mentioned utilization of the concept that the sovereign is the direct and absolute master of all lands.

This "ownership" and the means to enforce it, the standing army amassed from the Java War, provided the instruments for the enormous prosperity of the colonys masters. With the argument that the sovereign owned all land, alienation to cultivators, speculators, plantations, etc. must be accompanied by some sort of reciprocity, i.e. taxes in cash, kind, or labor. In essence what the Dutch did in their own lands and encouraged in those of the "native princes" was to commute the cultivators debt for use of the sovereigns land into a work obligation. More specifically, the direct producer was obliged to cultivate crops specified by the landlord on his own fields and subsequently to assist in their processing. All proceeds went to the landlord, i.e. the Dutch crown. Most commonly this system was applied to sugar cane. In retrospect the scheme was a very lucrative ones. Within a few years not only did it repay earlier debts but also filled the coffers of the Dutch government at home. It also altered fundamentally the administrative process.

Cultivation System Administration

As one of the crucial policies in the history of Java, the Cultivation System has attracted considerable scholarly attention. This is both with respect to the macro perspectives of the background, introduction, and workings of the system, as well as studies of its effects upon the local population at a number of locales both on Java and the outer islands. Despite this,

evaluation of its effects upon the islands legal life is conspicuous by its absence. As van Niel put it, the system was a rule of men not law. An alternative description of the system from the point of view of legal certainty and consistency for the period 1816-54 is in Logemans terms a police state (van Niel). [O]ne looks in vain, for instance, for a statute creating and defining the famous Cultivation System though statutes will help in indicating what the government hoped to have happen at any given time (cf. Fasseur). More important here, there are no indications of how disputes between state and citizens and among citizens were to be settled or on what basis. This is a particularly striking oversight during a period in which enormous changes were taking place in the economy. Many of the aspects of the system could be expected to result in disagreements or contests with regard to the distribution of land and labor, all calling for judicial settlement rooted in the substantive law of Java, Holland, or some combination. Java was without a constitution for for first time in two centuries.

In preparing for a new constitution for the Indies (eventually the *Regeringsreglement* of 1854) there was much debate over whether to apply Dutch law to the colony as a whole. On the one side was administrative expedience on the parallel of the unification of law in the kingdom of the Netherlands. If the differing laws of a Gelderland, Zeeland, Overijssel, etc. could be amalgamated into a single body of civil law, one complemented by the Napoleonic code for criminal affairs, then in theory the same could done in the Indies. That is, the prevailing Javo-Dutch laws could be replaced by a Dutch constitution for all of its possessions in what would become Indonesia. This would be something along the lines of the situation in British India.

On the other side were ranged the economic interests of the Cultivation System which wished to continue the legal status quo. In administrative terms this was a continuation of the Company let be system. It was given a rational form by the duality principle confirmed in the laws of 1847; Europeans were to be under European law, natives under native law. A third group consisting of foreign orientals was officially recognized in 1920. In principle their position was equivalent to that of the Europeans plus their own set of personal laws in the areas of marriage, the family, and inheritance. The understanding was that each legal-ethnic group would be served by its own laws and customs. The exception was criminal law which applied to all inhabitants in the Indies. Moreover a number of high Dutch officials in the Indies argued that the alternative of applying Dutch law to the colony would require large administrative resources. As the existing Dutch administration was already overworked and understaffed and a miserly colonial office was unlikely to grant further funding, any extra

JAP, Tahun 1, Nomor 1, Agustus 2002, ISSN 1412-7040

demands would have had to be made at the expense of ensuring the proper functioning of the Cultivation System. This would bring about a risk of diminishing its returns which was in no one's interest. The state was not willing to forgo revenues, neither were the administrators, Dutch and Javanese alike, who received a percentage of the profits, the Cultivation Percents as a further incentive for seeing to it that the Cultivation System functioned profitably. However this was not the only reason for deciding not to extend Dutch law to the inhabitants of Java. There were a number of features of the Cultivation System that would not pass muster seen from the point of view of Dutch law. Among others the principle of sovereign domain, the assignment of tasks and rewards by village, and the quantity of work demanded for rent would be questioned in a European court of law. Natives with a knowledge of Dutch law could be a fly in the ointment of the smooth functioning of the money machine the Cultivation System had become. (Result was: Ball quote)

Constitution of 1854

The Constitution of 1854 marks a turning point in the development of Javanese/Indonesian substantive law. Marks rather than constitutes because it merely recognizes and gives sanction to the system which had de facto group up during the post-1816 period. Herein is found one of many inconsistencies in Dutch legislation with regard to Java. This is between the clause invalidating ...all laws, customs, regulations, and all written and unwritten law then in force, that is before 1854, and the clause that for ...natives or other persons equated with them... their religious laws, institutions, and customs are to remain in force. Developments here seem to be moving simultaneously in two directions.

With the ultimate elimination of Laws of Java and the Java-Dutch Statute law which had applied almost exclusively to the greater tradition, the Javanese legal component at the highest level of society was greatly reduced. Those members of Javanese society who represented the greater tradition, the *priyayi*, were re-feudalized (in fact feudalized) in such a manner as to render them most serviceable for supporting the Cultivation System. Specific examples are seen in Dutch guaranteeing them inheritable official positions, the *hormat* or excessive honors which had to be shown them on occasion of public gatherings, and their being allowed to extract personal services from the population at large as the natural native chiefs. Even in the area of customs to the extent that they applied to the greater tradition were made conditional. The as long as they are acceptable clause as the *sine qua non* of all local laws acted to further reduce this area by 1) rejection of all provisions not acceptable as

determined solely by Dutch legal sensibilities, 2) establishment of Dutch ideals to which upwardly mobile *priyayi* aspired and against which their level of civilization was measured, and 3) exemplary pressure as a result of socialization with Dutch-Indies contacts both within the official sphere and on the informal plan. Whatever was intended by the legislation of 1848, very little custom (*adat*) applied to the greater tradition of Javanese. They had become creations of the Cultivation System. The little which was applied outright remained within the area of marriage and the family, in so far as they did not touch upon their official duties.

More directly counterproductive via inconsistencies was the situation in the lesser tradition or what would become the village sphere. On the one hand, the scope of the tradition was reduced. Criminal law deriving from European models was universally applicable, Dutch law in civil and commercial affairs acted as instruments of Europeanization of justice, and external religious rules stemming from Islam, Christianity, and Hindu-Buddhism further reduced the scope of the lesser tradition. Simultaneously the scope of the lesser tradition was formally increased. Custom-*(adat)* was formally recognized as applying in all areas not specifically covered by the rules and regulations of the Netherlands East Indies. To put it the other way around, the *(adat)* = lesser tradition minus specific Dutch impositions. This calls for some explanation. In courts of the first instance as district courts, the Dutch or indigenous judge applied *(adat)* principles to specific cases. Moreover the course of appeal to higher courts which reviewed the cases - all presided over by Europeans - meant that *(adat)* became the *adat*, or a form of statutory *law*, an obvious conflict in terms. In this respect the discovery of *adat* by van Vollenhoven and his disciples was simultaneous with its statute-ization. To this came the influence of legal precedent. Although not automatically binding, as in the Anglo-Saxon system of England or the U.S.A., it was natural for especially Dutch judges to refer back to how similar cases has been settled. This not only facilitated their task but also fulfilled basic judicial demands of consistency and predictability. Thus the discovery plus formal utilization in judgments resulted in freezing *adat* into a precedent which tended to become (statute) law, thus complementing Dutch East Indies regulations.

Europeans ruling on (adat); Javanese on Dutch Law

Crucial to the main issue of the Laws authenticity is who was applying what. The three legal groups were represented by three sets of laws, European, Foreign Orientals, and Native, giving nine possible combinations. However from the outset Foreign Orientals can be eliminated as they tended to form an isolated case. They were not called upon to judge either

the European or Native group, nor were their laws applied outside their own group. In any even they constituted a numerically small group. More important were the categories of Europeans and Natives (translation of the Dutch *Inlander*) respectively. For clarity the range of possibilities is presented as a matrix of judicial personnel and substantive.

Figure 2

		Law	
		European	Native
Personnel	European	1.	2.
	Native	4 .	3.

1. European -European

The categories of European-European and Native-Native are expectable. Were it not for the special features of colonial society, they could be seen as a form of separate but equal. Yet built into the duality principle was the assumption that European law constituted a higher form. Natives were encouraged to voluntarily place themselves under European Law, temporarily or permanently. Moreover the framers of the laws of 1848, which resulted in the *Regeringsreglement* of 1854, had assumed that the natural drawing power of the superior European law would in the long run convert the duality principle to to a unified Dutch Indies legal system, possibly on the model of the Anglo-Indian one. In terms of the Greater and Lesser Tradition schema utilized here, there was a unique continuity in the European sector. Differences existed but only as minor variations due to the differences in legal-political requirements of the metropole and colony. This continuity facilitated business transactions which is the reason for having the colony in the first place.

3. Native-Native

While in the European-European category both laws and decisions are recorded, Native personnel judging according to Native (*adat*) law are not, or at best insufficiently so. Only long after the *adat* had been discovered, described, and incorporated into legal practice is there recorded evidence of its function, never of its contents in its entirety. As non-written evidence for non-written law is an oxymoron, explanation is called for. As argued above, the results of the 1848 legislation was to invalidate the Laws of Java/Javo-Dutch statute law and to give the (*adat*) to a place, albeit conditionally, in the formal legal hierarchy. One is tempted here to suggest that for sound practical reasons the Dutch institutionalized ignorance. The

duality principle can, in fact, be seen as a continuation of let be trends characterizing legal practice since Company times. Customs of the country were allowed or even encouraged to be continued by those who were masters of it, the local *mantri* acting as *jaksa*, Exemption from the principle was to be found in those areas of direct Company interest, namely profits. In principle the situation seems to have continued unabated thorough the period of French and English domination into that of the Dutch East Indies. There is no indication that the (*adat*) of the Cultivation System was any better known by those advising or deciding on formal recognition of the customs of the country in the legislative package of 1848. In essence these were in reality the (*adat*) first undermined by the Javo-Dutch Statute and subsequently reformed by the Cultivation System demands. (Note on *Angger-Agger*) How much this was altered by natural developments of time and social change and how much by the direct workings of Cultivation System demands is not known.

Within current discussion this leaves us with a fairly natural situation of natives applying native law to natives. What makes this more interesting is that fact of appeal and/or review of cases to a higher court. Somewhere on the way up they come under Dutch law. There was no formally recognized statute *adat*, which in the official view would be a conflict in terms. Dutch statute law was the ultimate arbiter in everything touching on law and order in the Netherlands East Indies. Thus it seems fair to observe that by the second half of the nineteenth century there would have been no areas of purely native-native legal affairs; this existed only as an ideal case. Towards the lesser tradition end of the scale substantive law would have been relatively more native/*adat*; towards the greater tradition side more Dutch Indies. The break separating them fell along legal-ethnic lines.

2. Europeans applying Native Law

As indicated above, the majority of the laws governing the Javanese were at very least supervised and reviewed by Dutch jurors trained in the law of the metropole. The fact that a fairly high percentage of the judges would have been *totok* Dutch fresh from legal studies in Holland would reinforce the Dutch character of the laws prevailing in the Indies. Here the question arises as to how did they know the (*adat*). They could not absorb it heuristically; they were not natives and thus had no opportunity of internalizing the law. As *adat* law studies had yet to be initiated at Leiden or subsequently at Utrecht, one can wonder if or to what extent these Dutch administrators were acquainted with Javanese substantive law which

was to be employed in judging or reviewing cases between subjects whose affairs were seen as falling under native law.

Here there are two possibilities. Both undermined the continued existence of whatever was left of the legal traditions of Java, (*adat*), the Laws of Java, or whatever. The first was a purely practical consideration. What else could they do? Short of allowing natives to sit in appeal on the highest courts in the Indies, which in any event would have to be confirmed, modified, or rejected in the last instance by the Dutch Parliament, someone had to pass judgment. As a necessary solution it seems reasonable. What is unreasonable is ignoring the changes this opened up in the contents of the law. The other alternative was a guiding via precedent. The rules of the game almost automatically brings out the legal and cultural values of those making them. Conforming to the rules in a case of, say, which of two contestants owns a specific piece of land is premised on assumptions which do not necessarily have to do with the strength or weakness of the respective claims. These are 1) that land can be owned by either party and 2) that they have legal capacity to do so. Logically speaking a court deciding that either A owned the land or that B owned that land turns these assumptions into facts. This is especially true when the results of such case become a model or precedent to be followed in the resolution of similar cases. Again as a practical expression, as making law which fits the times, there is no objection. The objection lies in that such challenges or even annuls Paragraph 67 of the *Regeringsregelement* ensuring that natives would remain under the supervision of their own chiefs, i.e. the cornerstone of the duality principle.

4. Natives applying European law

The fourth category of natives ruling on European law was a non-event. This was not due to educational constraints but ethnic exclusiveness. If a Dutchman could study and eventually become expert in *adat*, albeit first in the twentieth century, there there was no logical reason why a native could not study law in Holland and become qualified for a legal position in the Indies. This would be much like the position of the Indian barristers who having been called to the bar in England could practice law in India under Anglo-Indian statutes. In the Dutch East Indies the problem lay in the duality principle reinforced by the color line. European law applied only to Europeans and those so classed. Because of the flaws in character natives were not thought capable of becoming judges in European law, much less acceptable one to the European community. This was regardless of the amount of

formal competence obtained through legal training in Holland. While such a native might be accepted as practicing the law in the Netherlands, this was out of the question in the Indies.

Conflict of Laws

The build-up of a legal system based on individual laws for a number of specific ethnic/legal groups brought with it complications. In a nutshell this revolved about what happens when individuals from two ethnic groups suited one another. Which set of laws, the plaintiffs, defendants, or neithers - by default European as the tie-breaker - applied. On the practical side this also would tend to dictated the ethnicity of the judge as certain courts were more or less monopolies of either Europeans or natives. Again Europeans made up the court of last resort. The issue applied only to commercial and civil cases, which in any event were the most likely to lead to suits. Criminal law was common to all groups,. However should the respective substantive laws differ with regard to contents of specific legal paragraphs, as they not infrequently did, the litigants chances of winning would be increased or decreased according to the rules of the tribunal. Again the phenomenon has been observed already in legal developments during Company times. Early on local potentates choose to have their cases handled by Dutch-dominated or independent local courts depending on which gave priority to just the type of evidence upon which their particular case was based. Thus it was a case of selective judicial procedure.

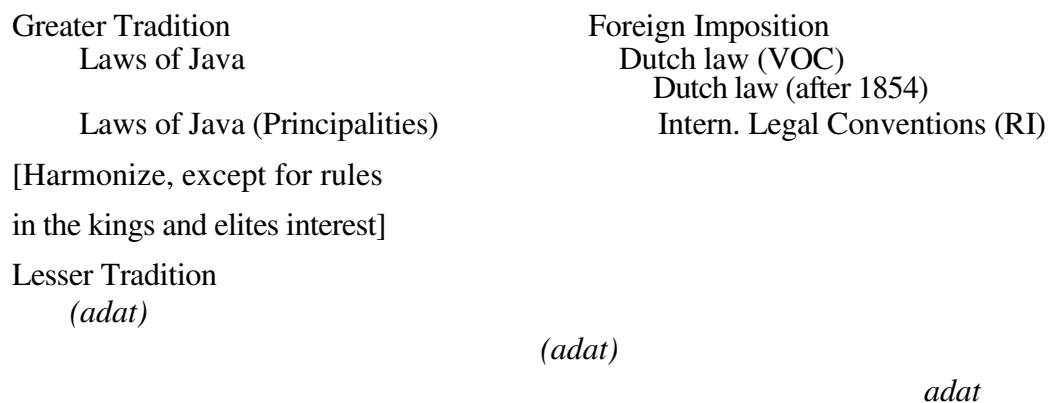
The issue tends to fall more into adjective than substantive law competence. The type of court tended not only to be dominated by one or the other legal/ethnic personnel but, possibly more important, had its own procedure which also contributed to the legal validity of respective suits. However for purposes here it should be observed that the plurality of substantive laws in the Dutch East Indies gave rise to a fourth branch of law, namely the regulation of the conflict of laws. This set of enactments and regulations made possible differentiation and hence a decision concerning which court was empowered to handle which case. By implication this also set the applicability of substantive law provisions. The recognition of multiple substantive laws had to be regulated by another set of laws. More important in long term perspectives was the fact that this principle was taken over by the Indonesian legal system even after the tripartite division between Europeans, Foreign Orientals, and Natives had been replaced by the egalitarian laws of the Republic.

By the end of the colonial period, then, the area which would encompass Indonesia was governed by mainly by Dutch East Indies law paralleling those of the metropole. Granted, the

validity of the *adat* had been recognized and some nineteenth *adat-law* circles distinguished which tended to be limited to the area of marriage and the family. Combination of voluntary submission to Dutch law, involuntary such with regard to commercial transactions involving Europeans and all criminal affairs, and the fact of European review of all *adat* cases meant in practice little was left in practice to indigenous legal concepts. Add to this is the fact that most ownership concepts - ironically one of the criteria of *adat-law* circles - had been shunted aside as irrelevant during the Cultivation System. What the legal system of the colonial period lacked in native-ness and thus internalization, it more than made up in terms of certainty, consistency, and predictability.

The situation at the end of the colonial period can be illustrated in the figure 3, which illustrate a couple of important points.

Figure 3: Greater v Lesser Tradition and Foreign Impositions



The first of these is that the meeting of foreign and indigenous legal principles took place within the greater tradition. This seems obvious. The Dutch chose to work through the local rulers as the most effective manner of achieving their objectives, often to the point of artificially supporting chosen potentates. As reward for such help the Dutch received usage of large tracts of Java, namely the Cirebon-Priangan region in 1685, part of Javas North Coast in 1705 and another part in 1740, etc. By the mid-eighteenth century Dutch controlled territory constituted the greatest part of the island and its population. This engagement also led to incorporation of Dutch governmental principles within the Javanese legal context. In a relatively short period this lead to subversion the Laws of Java to those of the Dutch East India Company. Any compromise of the Company had been willing to make was definitely stopped by the police-like state during the Cultivation System era. Here the artificial situation of the Principalities was allowed to continue in a small area of South Central Java until 1945 and its incorporation within the Republic of Indonesia.

With regard to the interrelationship obtaining between the greater and lesser traditions the table is equally illustrative. Under normal circumstances the two traditions influence one another. The reasonably normal exception exists in the fact that the interests of king and the ruling elite always take precedent over local one at the village level. This applied especially to matters concerning land and labor which automatically became questions for the central court. Control over the means of production was a court prerogative, hence all Intra-village issues by definition became intra-elite contests and were settled at the central level under the auspices of the greater tradition. Other than these type of issues and those of law and order for the realm as a whole, disputes at the level of the lesser tradition must have been settled locally in accordance with tradition.

In the table local custom or *adat* representing the situation prior to the twentieth century is given in parenthesis. This is done to indicate that this area of legal studies are an unknown area for modern scholarship. They will most likely remain so due lack of reliable sources. More problematic is the middle (*adat*). The parenthesis again marks our ignorance on the subject. The problematic side comes from the fact that in reformulating the laws that would apply in the Dutch East Indies after the middle of the nineteenth century, the Dutch government consciously chose to raise the (*adat*) to a part of the colonys formal laws by expressly recognizing their validity in areas not covered by the Constitution of 1854. This contrasted to the reverse situation in Holland. There in 1848 all the local, medieval, and city laws were abolished in favor of a unified code applicable throughout for the kingdom. Just to make things more complicated the *adat* referred to by scholars of Indonesia was discovered by van Vollenhoven almost a half century after the 1854 constitution. As we have no way of knowing whether the (*adat*) of the company period was the same or nearly so as that of the colony or that of the early twentieth century when it was studied, they have been put at different levels in the table. Whatever the case, the greater tradition lost considerable ground to the foreign rules brought in by the Dutch. This was almost undoubtedly also true for the (*adat*) or *adat* incorporated into the legal system of the Indies.

REPUBLIC OF INDONESIA

Comments here can be confined to developments in legal affairs. An article of David Bouchier Positivism and Romanticism in Indonesian Legal Thought provides a convenient point of departure. There it is argued that the founders of the Republic were split between those extolling the virtues of the customary village ideal in which life was ordered by the

immortal *_adat* and those who can be termed positivism in that they were orientated to formal legality. Moreover the early Indonesian leaders were inconsistent in their choice between them. This is nowhere better illustrated than in the contents of the *Undang-Undang Dasar* 1945. Certain paragraphs envisage the state in positivism terms as a hierarchy of laws (Governmental Order no. 2 of 10 October 1945². Others as Par. 33 argued for a more *teori integralistik* in which the communal principles underlying *adat* came to the fore. Still other paragraphs have both. For example Art. 2 specifies that MPR decisions are to be made on the basis of western-style voting, yet retains the expressed provision for *musyawarah* (deliberation) a la the village writ large. Soekarno himself tended to swing from one to the other depending upon his personal reading of the situation and his own experiences. Obviously detention by the Dutch, which was completely legal within the context of the Dutch East Indies, did not endear him to the ideas of the *rechtsstaat* with its binding rules. On the other hand experiences with the Japanese excesses following the (national) romantic ideals likewise cooled enthusiasm for the historical/romantic school. Similar swings can also be marked in the implementing of the new constitution on 1950 and the subsequent return to the UUD 45 in 1959 in concert with launching the ideals of Guided Democracy.

Law under the New Order was not a matter of swings between romanticism v. Positivism. It was an opportunistic mixture of both depending on the interests of the political and economic elite. Indonesias self-proclaimed *rechtsstaat* is belied by its proclaimed *Panca Sila* basis stemming from its Indonesian historical/romantic ideas. Elements of the *adat* were specifically allowed. Yet when they stood in the way of development, as in conflict with western-style ownership rights and unlimited access to natural resources, they must give way to the exigencies of the development state. Perhaps best known of these mixtures is again Par. 33. It seems to raise fundamental village principles, family-ness, co-operative economy, social equality, and community responsibility to the constitutional level. At the same time it places the countrys natural resources under the disposal of the state apparatus without reference to indigenous ownership rules (*adat*) or access to societys commonly held goods. Access to the means of production is governed by the positive rules of the *rechtsstaat*. To this can be added the observation that the New Order Indonesia was basically Orla minus communism/socialism plus the encouragement of capitalistic exploitation by direct foreign

² This held that... the regulations and state organs present at the moment of the birth of the Republic in 17 Aug. 1945, remain in forced, as long as no new ones are enacted, provided that they are not contrary to the Constitution itself.

investment and Sino-Indonesian capitalists. The ideals, particularly the ambivalence, to the positive *rechtsstaat* and the indigenous village ideal, are basically Bung Karnos.

Another way of looking at the present is in terms utilized by *The Laws of Java...* There the thesis is presented that social conditions are served by a system of exemplary regularities in behavior, usually written for consistency's sake, known as substantive law (the contents of the Law). Substantive law in turn calls forth or generates the appropriate legal practice, that is legal institutions as courts, judicial procedure, summons, and so on. The three elements stand in a dependent relationship with one another. Change in the social system, say the European ascension to power, precipitates a change in the substantive law serving that society, which alters adjective law forms and norms. *Selective Judicial Procedure* shows the effects on adjective law of changes in substantive law brought about by the realities of Dutch East India Company control over the Cirebon-Priangan region in the first half of the eighteenth century. Similarly the Cultivation System era of the Dutch East Indies on Java brought with it changes in the contents of the law to serve the alien exploitative system. This in turn led to the police-state situation where all efforts were geared to furthering the system because all officials, local and foreign alike, had a stake in its success.

But how does this apply to the Republic of Indonesia? Here I would see the swings between positivism and romanticism more as symptoms than causes. That is, for a number of reasons Bung Karnos attempts to build a new society were never fully realized. This had as much to do with external causes as Cold War politics, divergent ideas in development, unhelpful relationships with the former colonial power, etc. as with internal conflicts of an economic, political and social nature. During the New Order a new society was not created nor even attempted. It more grew like topsy, as it were, depending on the interests of the Suharto allies.

To the extent that this is true, then at least in historical perspectives some hard questions need to be addressed to the origins of the *Otda*. Do they constitute a conscious attempt to produce a desired social effect, as democracy, social justice, and welfare? Or are they substantial expressions of social forces giving pressure for change leading secondarily to laws and subsequently to regulations and ordinances? If it is the former then they can be seen as going against the grain of historical development; if the latter they are in keeping with the trends mapped out above. In any event, Indonesian cannot retreat into the past, at least cannot into a genuine past. Unlike most nations of Southeast Indonesia/Java cannot point to a great

tradition in the field of court law that still commands respect³. By want of candidates for court law the mantle passed to the *adat*. Again the above has pointed out its shortcomings in lack of authenticity. It is a hopeless mixture of real *adat*, colonial prescripts, and New Order regulations. The reason why it should be rejected as a model for the *Otda* era is that its very lack of authenticity means that there is no motivation for citizens to internalize the laws and thus obey them out of conviction rather than the force of the state.

At the same time Indonesia cannot remain standing still. At a recent CSIS seminar in Jakarta a Harvard professor put Indonesia on the list of some three dozen nations which are threatened by extinction as a unitary state should their political/administrative performance not improve.

It would, of course, be presumptuous of me to suggest policy for the Republic of Indonesia. Here I only offer an interpretation of the historical phenomena which might help in seeing from where one is coming. In that respect I would suggest that the present situation is not a *krismon* (monetary crisis) nor even a political crisis; it is a legal/administrative one.

³ This contrasts with the Vietnam L or Gia Long codes, Thailand's laws of Ayuthya and Chiang Mai, Burmese *Dhammastra*, or even Malaysia's *Undang-undang Malacca*. The obvious examples of the *Jaya Lengka*, the *Surya Alam*, or *Senopati Jimbun* named above are not exactly household words in Indonesia. Moreover they were judged wanting by European observers in contrast to the Hindu laws of Manu or the Islamic ones found in the Koran. Curiously enough for a publication on sources of Asian tradition the editor felt compelled to choose the Agama text (ed. Hoadley and Hooker), even though it has every bit a colonial past.