INDONESIAN LEGAL SYSTEM

Adat Law, Islamic Law, State Law

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- Indonesian legal system is developed by the richness of its legal pluralism, in which:
  - Various Adat / customary laws
  - Islamic law (the most important of the religious laws)
  - State law (mostly derived from colonial law)

ADAT LAW

- Adat is derived from an Arabic word: Adab: good manners, moral, etiquette.
- Adat law is adat with legal consequences.
  ➢ It is not only custom

- Adat law is also called as Indigenous Law (hukum asli) in both Indonesian laws and Dutch law literatures.
- This distinguishes Adat Law from religious law.
- Islamic law is not considered indigenous enough
  ➢ External law
• **For Adat scholars:**
  – To be considered indigenous law, Islamic law must be accepted into adat law
    • *(Theory Receptie, by Christian Snouck Hurgronje in 1893, supported by Cornelis van Vollenhoven and Betrand ter Haar)*

• For Indonesian founding fathers (nationalists):
  – Adat law represented indigenous culture, values and traditions.
  – Islamic law was supra-national (universal religion) and too narrow (did not include non believers)

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### ADAT LAW

#### IN INDONESIAN LEGAL SYSTEM

• **Dutch Colonial Era:**
  – *De facto:* recognized as Living Law (supported by Dutch Professors: Van Vollenhoven and Ter Haar)
    – *De jure:* Part of the Netherlands East Indies legal system (art. 131 IS and 163 IS)
      - Enforced by the Indigenous/Adat court *(Inheemsche rechtspraak)* with indigenous judges.

• **After Independence:**
  – Indonesian founding fathers recognized and protected the existence of Adat communities, that according to them had existed long before the colonialization, in Art. 18 of 1945 Constitution.

  – However, there is no more Indigenous/Adat court within the Indonesian legal system, as in the Unitary State of the Republic of Indonesia, the colonial citizen segregation (Indigenous, European, Foreign Oriental) is abolished.

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Soekarno and Soeharto Government

• The Indonesian government wished to develop a unified legal system for the unitary republic

• In an effort to create a unified legal system, the government’s approach to Adat Law was to recognize and implement the Adat Law as long as the law *was not in conflict* with the national interest and the state laws or regulations.

  • National interest mostly means the economic development, not social development
• Adat law was gradually side-lined in the development of Indonesian legal system.

• But, still existed and became Living Law in Indonesia
  ➢ Recognized in several laws and regulations, such as:
    – Agrarian Basic Law 1960
    – Forestry Law 1999
  ➢ Practiced by indigenous people who live in villages, as well as people in outer islands of Java
  ➢ Included in state court decisions

• Reform Era:
  – Part of protection of human rights is:
    • to protect the rights of adat communities, and
    • to respect their law
    (Art. 6, the Human Rights Law 1999)
  – Demand of revitalization of Adat Law

• The government’s respond is to implement the adat law, but only after the regional government where the adat community lives, recognized them in a local law.
   (Art. 67 (2) Forestry Act 1999 and the Local Governance Act 2014)

• The formalization of Adat law is in conflict with the nature of Adat law, which is mostly unwritten.

• Especially in remote areas in Indonesia, the indigenous people do not need the formal recognition from the government
  ➢ Create conflicts between the interests of government, migrants, and adat communities.
CHARACTERS OF ADAT LAW

• Independent from state law
• Mainly unwritten
• Dynamic, adapts to changes
• Enforced by the adat community

Characters of Adat Community

• Lives in a certain territory with clear borders (river, mountain, forest, sea, human-made border, etc.)
• The population comes from the same ancestor who lived in that territory
• Has adat leader (could be individual or a council appointed according to their adat law)

PRINCIPLES OF ADAT LAW

(at a glance)

• Aims to balance humans and the Cosmos surrounding them
• Communal interests prevails over individual interests

Property Right in Adat Law

• Adat law only recognizes right to land and right to other than land.
  ➢ Different from the Civil Law system that recognizes property right to movable goods, immovable goods, visible goods, and invisible goods.

• Property right in Adat law is more collective right, than individual right
Sanction for Breaking Adat Law

- Adat law does not make distinction between criminal law and private law.
- The sanction for breaking “criminal law” and “private law” is just the same.
- The sanction is imposed to restore the “balance” between the adat community and the cosmos.

Therefore, the sanction is not only in the form of compensation and is not always to provide justice for the victim.
- Eg. The damages awarded to people of the lower class, could be less than the one awarded to those of the higher class in society. The same for damages awarded to women, compared to the one awarded to men.

The consequences of violating the balance:
- Flood
- Crop failure
- Volcano eruption
- Plague
- Colonized or occupied by other communities

Who get the sanction:
- Individual who breaks the adat law, or
- The whole community, to “clean” the unlawful act
  - By holding certain ceremonial festivity
  - By paying compensation to the victim
ISLAMIC LAW IN
INDONESIAN LEGAL SYSTEM

- The spread of Islam in Indonesian archipelago occurred in between 13th – 16th century.

- The Dutch colonial government recognized the existence of Islamic law besides Indigenous/Adat Law.

Adat scholars argued that religious law did not replace indigenous law. It only influenced the indigenous law in limited personal matters, such as: marriage, family and inheritance laws. The degree of its influence also differed from community to community.

The Recepie in Complexu theory also denied the fact of Islam acculturation in indigenous culture.

Three theories represent the relations between Adat and Islamic Law:

a. Recepie in Complexu theory
   (Proposed by Lodewijk Willem Christiaan Den Van Berg in 1880’s)

   A religious law becomes Adat Law of the community because embracing a religion means to implement all rules of the religion. Deviation of religious rules is considered as an exception.

   This theory was criticized by adat scholars because it was too simplistic.

b. Recepie theory
   • To be considered indigenous law, Islamic law must be incorporated into adat law
     – (Christian Snouck Hurgronje in 1893, supported by Cornelis van Vollenhoven and Betrand ter Haar)

   After Independence, Indonesian Islamic scholars proposed the third theory:

c. Recepie a Contrario theory
   • Adat law must be based on Islamic law (sharia). Adat that is in contrary to Islamic law is not enforceable.
THE DEVELOPMENT OF INDONESIAN ISLAMIC LAW

• **Dutch Colonial Era**
  – Codification of Islamic Family Law, called Compendium Freijer in 1760
  – Dutch law Regeeringsreglement (RR) Stbl 1854 recognized Islamic law as well as indigenous law to settle private disputes among indigenous people
  – Court of Religious Affair (Godsdienstige Rechtspraak) to settle Islamic disputes

• **Other Islamic law which are not formalized by the state, is free for Indonesian Muslims to implement or not, e.g.:**
  – Performing prayers, fasting, almsgiving, hajj
  – Dress code

  ➢ In Islamic countries, such as, Middle Eastern countries, there is no formalization of Islamic Law by the state, as Islamic law is automatically the state law.

• **After Independence**
  – To be enforceable, Islamic Law in Indonesia shall be formalized in state laws, enacted by the government, e.g.:
    a. Presidential Instruction No 1/1999 of the Compilation of Islamic Law (on Marriage, Inheritance, Testament, Grant, Endowment)
    b. Law of Court for Religious Affairs 2006
    c. Law of Sharia Banking 2008
    d. Law of Hajj Management 2009
    e. Law of Almsgiving Management 2011

ISLAMIC LAW AS A LIVING LAW

• Some scholars such as, Franz and Keebet von Benda-Beckmann, consider Islamic law, as a living law in Indonesia. (not only Adat law)

  ➢ Centuries of acculturation of Islam into Indonesian culture may made Islamic Law in Indonesia different from the Sharia Law
  ➢ The Supreme court Judges have often softened the implementation of Sharia to make it fit with the cultural norms and social justice in Indonesia
The Supreme Court holds that non-Moslem children can inherit from their Moslem parents. They get the same amount of heritage as that received by their Moslem siblings.

- Sharia law prescribes that non Moslems cannot inherit from Moslems, and vice versa.

The Supreme Court holds that adopted children can inherit from their adoptive Moslem parents.

- Sharia law prescribes that adopted children do not have inheritance right from their adoptive parents.

What the Constitution says about the Indonesian national law?

- Recognition and respect of autonomous areas of indigenous community (Art. 18B)
  - Implicitly recognizes Adat law
- The state is based on the belief in the one true God (Art. 29)
  - Implicitly recognizes Islamic law
- All existing laws and regulations shall remain in effect (Transitional Provision Art. II)
  - Recognizes as well as enforces Colonial law

CONCLUSION

- All effort to develop Indonesian legal system must find some balance in the triangle of three laws: adat-Islam-state
- It is not easy