

## THE HISTORY OF INDONESIAN LAW

### 1. The Pre-independence Legal System

The Indonesian Law comes into being since the Proclamation of Independence, August 17, 1945. The significance of the Proclamation of Independence to Indonesian Law is that it discontinued colonial legal order set up by colonial ruler and at the same time established a national legal order. In fact, the text of Proclamation of Independence itself is not a legal document. Rather, it is a political document by which a state comes into existence.

A day after the Proclamation of Independence was pronounced, the Preparatory Committee for the Indonesian Independence set to adopt the 1945 Constitution and to elect President and Vice President of the Republic of Indonesia. The 1945 Constitution is a basic law, upon which every law and regulation should be based. Since the 1945 Constitution is supreme, all laws and regulations should be in accordance with it. Consequently, all laws and regulations produced by colonial rulers should not be in power because they contravened the constitution. In the very early days of independence, however, the Indonesian government did not enact laws covering any sector of daily life. It might create a legal vacuum.

The absence of laws and regulations could raise a social tension, which might lead to chaos. In order to avoid such a confusing situation, Transitory

Provision was incorporated into the 1945 Constitution. Article n of the Transitory Provision states that every law and regulation which were in power before the war, provided that they do not contradict the spirit of the 1945 Constitution, are applicable unless substitutes of the respective law and regulation have been passed by the Indonesian government.

It is obvious that Article n of the Transitory Provision is an avenue through which laws and regulations made by the Dutch colonial ruler revive. Despite the fact that these laws and regulations produced by colonial government, by virtue of Article n of the Transitory Provision, they are subject to Indonesian legal framework. The Dutch colonial ruler, however, established legal pluralism in the area of private law in Indonesia. The legal pluralism was established upon the discriminatory principle on racial basis. Article 27 of the 1945 Constitution, on the other hand, states that every Indonesia citizen is equal before the law and government. The article, nevertheless, does not necessarily eliminate legal pluralism in the area of private law created by the Dutch colonial ruler. Instead, the article abolishes discriminatory spirit of the legal pluralism. Practically, in the area of private law, legal pluralism remains in force without necessarily creating legal discrimination based on racial descent.

In fact, the modern law did not exist in Indonesia until the adoption of Reglement op de Rechterlijke Organisatie en Het Beleid der Justitie (Regulation of Judiciary and the Policy of justice), abbreviated as R.O. Algemene Bepalingen van Wetgeving (General Provisions of Legislation), commonly abbreviated as

A.B., Burgerlijk Wetboek (Civil Code), referred to as B. W., Wetboek van Koophandel (Commercial Code), commonly called W.v.K. and Bepalingen Betrekkelijk Onvermogen, Misdrijven, Begaan fer Gelegenheid van Faillissement en bij Kennelijk, Mitsgaders bij Surseance van Betaling (Provisions on Crimes Relating to Bankruptcy and , Insolvency). These laws passed by Royal Decree of May 16, 1847, which was officially placed at Netherlands-India State Gazette of 1847 No. 23. The laws preceded the colonial-made-constitution called Regeringsreglement, commonly abbreviated as R.R. was patterned on the 1848 Netherlands Constitution. The R.R. served to be a basic law made by the Dutch Crown and the Netherlands IParliament dealing with colonial administration of the Netherlands-India. Such law was based on article 59 paragraphs 2 and 4 of the then amended Netherlands Constitution. According 1 to the provisions, administration of the colony should be provided , by law made jointly by the Crown and the Parliament instead of being enacted solely by Royal Decree. The article indicated that the Dutch Parliament had prevailed upon its conflict over the King. The R.R. was enacted on January 1, 1854 and began effective in 1855. Though it is a reglement, which can be translated as regulation, it is not an administrative rule because it was adopted through law rather than through Royal Decree. It was a basic regulation for carrying out government in a colony. In hierarchy of law, it is ranked to be a law but in a colony it may be deemed more or less to be a constitution. The enactment of the R.R. needed Netherlands' parliament, especially Second Chamber's endorsement. The purpose of adopting

R.R. was to introduce the rule-of-law state in the colony. Such an idea was presupposed by liberal wing that dominated political power in the Netherlands parliament. The liberal power consciously had in mind to fundamentally change legal system in Netherlands-India. The policy is called *de bewuste rechtspolitiek* or "the intentionally legal policy". Under the policy, the royal and the executive power over the colony would be controlled, on the one hand, and on the other hand, legal protection and legal certainty for those who lived and those who conducted business in the colony would be created.

The idea was laid down in articles 79, 88, and 89 of the R.R. Article 79 dealt with separation of power, in which judicial power should be vested in the independent court. Article 88 prescribed due process of law in criminal procedure, while article 89 prohibited punishment whose consequence brings about deprivation of the convict's rights. In addition, it was thought that the idea of the rule-of-law state should be desirously implemented through codification of substantive laws regarding their respective areas and through reorganization of court system. The unitary principle dictated the idea. As the preparatory steps to realize the idea was about to initiate, it was found that it would raise cultural problems. In fact, prior to the passage of the R.R., colony inhabitants shared various laws based on race, religious, and culture. Moreover, there had been judiciary set up based on race, religion, and social level of the conflicting parties.

The A.B. enacted through Royal Decree of May 16, 1847 contained three essential articles for the Netherlands-India legal system. Article 5 prescribed that

the Netherlands-India inhabitants were differentiated into Europeans as well as those who were given equal status as Europeans and Indigenous Indonesians as well as those who were equalized to be Indigenous Indonesians. Article 9 stipulated that B. W. and W. v.K. applicable only for the Europeans and those who were given status as Europeans. Then, article 11 stated that for the Indigenous Indonesians, judge would apply religious law, elementary rules, and practices of Indigenous Indonesians unless they are in conflict with the principles of fair and justice generally accepted.<sup>2</sup> In fact, the term " Adat Law" had not been recognized until it was introduced by Snouck Hurgronje in his work "De Atjehers" and was popularized by Van Vollenhoven through academic and political debates. Since the enactment of the A.B. was through Royal Decree, from legal standpoint, it was not considered to be a law. The three articles of the AB, therefore, needed to be laid down into the R.R. to make them legal basis for administering substantive laws as well as judiciary in Netherlands-India. The three articles, then, were converted into article 75 of the R.R. The article paved the way to "voluntary submission" to European Law and to the "power of applicability declaration by Governor General".

In fact, articles 6 through 10 of the General Provisions of Legislations differentiated Netherlands-India inhabitants mainly 2 Id., at 54. into Europeans and Indigenous Indonesians. Those who neither ' belonged to the classification considered to be equalized either as European or Indigenous Indonesian. The sole test of categorizing whether one is considered to be either European or

Indigenous Indonesian was religion. Otristians were deemed to be Europeans. Even, Indigenous Indonesians who shared O1ristian classified into Europeans. Those who were other than Christians were considered to be Indigenous Indonesians. Article 10 of the A.B., however, prescribed that the Governor General is authorized to define rules of exception for the Otristian Indonesians.<sup>3</sup> Based on the article, the Governor General decided that the Christian Indonesians remained subject to their own laws, whether in the area of civil law or cririnallaw and they are still under their own court jurisdiction.<sup>4</sup> Consequently, they were considered to be Indigenous Indonesians rather than Europeans.

When the R.R was adopted, articles 6 through 10 of the A.B. were transferred into article 1~ of the R.R The article also made distinction between Europeans and Indigenous Indonesians as well as those who were equalized as either Europeans or Indigenous Indonesians. The RR is different from the A.B. in that it did not make religion as a criterion of classifying those who were neither really Europeans nor Indigenous Indonesians to each grouping. Rather, it seemed to rely on race as a test to place them into the groupings. Paragraph 4 of the article stated that the O1ristian Indonesians considered being Indigenous Indonesians. So were Chinese, Arabs, and Indians regardless of their religions. On the contrary, O1ristians who were not Chinese, Arabs, or , Indians classified into European grouping. Then, based on State Gazette of 1899 No. 202, Japanese were classified into European group. The inclusion of Japanese into European

group was because of business and economic relationship consideration. In fact, there had been a commercial and navigation agreement between the Netherlands and Japan.

Since January 1, 1926, the R.R. was replaced by the Indische Staatsregeling, which is commonly abbreviated as 1.5. Just as the R.R. designated to be the Netherlands-India constitution, the 1.5. was set up as a colonial-made-constitution. Unlike article 109 of the R.R. that classified Indonesian inhabitants into two groups i.e. the Europeans and the Indigenous Indonesians, article 163 of the 1.5. stipulated three groupings i.e. the Europeans, the Foreign Orientals, and the Indigenous Indonesians. Those who belonged to the Europeans were Dutch, European descents other than Dutch, Japanese, and people outside Netherlands-India and Europe whose family law were the same as that of the Dutch, and legitimate children or illegitimate children but then recognized by the Europeans as their children and their descents born in Netherlands-India. The Indigenous Indonesians were all native inhabitants of Netherlands-India who did not change their status into other group and those who were people of other group that have made self-absorption into the native Indonesian people. In this case, the term "indigenous" does not mean one who is born or grown up in Indonesia but it refers to ethnological notion in that one is of Indonesian ethnics. Those who were neither Europeans nor Indigenous Indonesians fell into the Foreign Orientals. This negative formulation was intentionally made by the Dutch ruler to prevent someone from being a person of neither grouping. Consequently, it

could have happened that nobody's child whose face resembled European deemed to be a Foreign Oriental.

Under the 1.5., it is possible for non-Europeans to change their status into Europeans. In the R.R. such a provision was laid down in Article paragraph 5. The provision was retained when the R.R. was replaced by the 1.5. Those who wanted to convert their status into European should file with the Governor General. Prior to 1894 only Christians were granted equal status as Europeans. Subsequently, the requirement was repealed and a new condition was set up, which is capability of behaving as a European. In 1913, the new condition was also canceled. In place of it, condition of being granted to be European was the need of law of the applicants. The Governor General with the endorsement of the Netherlands-India Council might grant the application and the name of one who was granted the equal status as European was published at the Netherlands-India State Gazette. Since the State-Gazette is called Staatsblad in Dutch, non-Europeans who were granted equal status as Europeans were called "Staatsblad for Europeans". Non-Europeans who changed their status into ~ Europeans were mostly Christian Indonesians and Chinese. Interestingly, there was no procedure for Europeans to integrate ~ themselves into Indigenous Indonesians. It signified the superiority [ complex of the colonial ruler. Dictated by such a mindset, they , might think that it was impossible for Europeans to degrade their status. Paragraph 3 of Article 163 of the 1.5., however, prescribed that the Europeans or the Foreign Orientals could integrate themselves into the



Indigenous Indonesians. Such an integration ~ was considered as to have occurred when a European or a Foreign r Oriental followed Islam, got along with the native Indonesian , society, imitated Indonesian way of life, copied the Indonesian f, customs or in short, the person behaved as if a native Indonesian , .and felt to be an Indoneslan.

If article 163 of the IS. specifies groupings in Netherlands- India, article 131 of the 1.5. provides laws applicable to each group. Paragraph 2 sub (a) of the article prescribed a guide for the Netherlands-India legislator to adopt private law for Europeans. The private law should be based on the concordance-principle, by which the Netherlands private law should be applicable to Europeans who lived in Netherlands-India. It should be noted that article 131 of the 1.5. did not order to write the Netherlands- India laws into codes. On the contrary, it designated written law. This implied that all laws in Netherlands-India should be in the form of ordinances.

Since January 1, 1920 when article 75 of the new RR., which was transferred into article 131 of the 1.5. began effective, applicable laws for the Europeans were mostly codified. The concordance-principle for them has been relied upon since the issuance of Royal Decree of May 16, 1847. When the Netherlands adopted new legislation on October 1, 1839, in 1839 the King of the Netherlands appointed a Committee chaired by Scholten van Oud-Haarlem in charged of fitting the codification to the situation in Netherlands-India. The Committee prepared Reglement op de 6 Id., at 16.

Rechterlijke Organsatie (Law of Judiciary), commonly referred as R.O., A.B., B. W., W. v.K. and Provisions on Crimes Relating to Bankruptcy and Insolvency. After the Committee was dissolved, H.L. Wichers, the President of the Netherlands-India Supreme Court was assigned to assist the Governor General to prepare some laws and regulations. Both laws prepared by the Committee and those of by H.L. Wichers through Governor General's announcement as put the State Gazette of December 3, 1847 No. 57 were declared effective since May 1, 1848. In 1872, under the State Gazette of 1872 No. 85, Penal Code was declared applicable for the Europeans. The code is a copy of Code Penal adopted in the Netherlands.

Historically, when the Netherlands was annexed to the French imperial, the Napoleonic Codes, Code Civil, Code Commerce, and Code Penal were applied in the country since 1810. The fall of Napoleon set the Netherlands free from the French imperial. The Napoleonic Codes, however, were not revoked. Thereafter, nevertheless, arose some ideas to prepare laws that reflect the Dutch legal thinking rather than that of French philosophy. In 1830, a Committee called the Kemper Committee accomplished preparing Codes except Penal Code to replace the Napoleonic Codes.<sup>7</sup> On July 5, 1830, Civil Code (Burgerlijk Wetboek), Commercial Code (Wetboek van Koophandel), Civil Process Code (Reglement op de Burgerlijke Rechtsvordering), and Criminal Process Code (Reglement op de StraftJOrdering) were enacted through a Royal Decree and declared effective in February 1, 1831. Because of rebellion occurred in Southern

Netherlands, however, the effective date of the laws was delayed. The representatives of southern provinces objected to the new laws. They stated that the new laws were dominated by the thought of Hollanders rather than by the entire people of the Netherlands. Due to the reason, they claimed that the new laws did not bear legal values and legal principles shared by the southern people. They asserted that the Napoleonic Codes were more acceptable than the new laws. Responding to the objection, the codes prepared by the Kemper Committee were declared effective in 1838 when the southern provinces seceded and proclaimed their own state under the name of Belgium. Until then, however, the Napoleonic Penal Code was still retained due to inability of the Kemper Committee to produce Dutch Penal Code.

Despite the adoption of laws bearing Dutch legal values, the Netherlands Civil Code was patterned on the French Code Civil. Principles underlying the Code Civil were transformed into the Dutch Civil Code. The features of the principles are: (1) the ownership right is based on individualism philosophy; (2) the adoption of freedom of contract; (3) law is secular; (4) in the area of family law it is applied matrimonial doctrine, in which a married woman considered to be incapable of doing legal act; (5) monogamous rule dictates marital law. 11 The Netherlands-India Civil Code began effective in 1848 adopted the same principles as that of the Dutch Civil Code. According to article 131 paragraph 2 (a) of the 1.5., the Dutch Civil Code, Commercial Code and other existing laws in the

Netherlands based on the concordance- principle were applicable to the Europeans.

Applicable law for the Indigenous Indonesians was provided in paragraph 2 (b) of article 131 of the 1.5. The provision gave a prescriptive guide to the Netherlands-India legislator concerning substantive private law for the Indigenous Indonesians. From the provision, it is implied that the substantive private law for the Indigenous Indonesians was desirously made in writing. Paragraph 6 of article 131 of the 1.5., however, stated that to the extent that the ordinance as ordered by paragraph 2 (b) of the article had not been made, the then existing private law governing the Indigenous Indonesians and Foreign Orientals in that customary law, unless it is not superseded by ordinance, deemed still applicable for them. In fact, article 131 of the 1.5. was a copy of article 75 of the new R.R., which began effective on January 1, 1920. The ordinance as mandated by paragraph 2 (b) of the article, however, had not been issued until that date. Since the 1.5., which substituted the R.R., was a colonial-made- constitution, it can be inferred, that since January 1, 1920 customary law is constitutionally declared applicable to the Indigenous Indonesians.

Article 131 of the I.S. prescribed that for the Foreign Orientals the same law, as that is applicable to the Indigenous Indonesians. This implies that their respective customary law was applicable to the group. The provision raised a problem concerning whom customary law that was applicable to them, their

customary law of their origins or customary law grown up in Netherlands- India. Referring to case law, it was customary law grown up in Netherlands-India applicable to the Foreign Orientals. For example, the applicable law for Chinese was customary law developed by Indonesian Chinese rather than that was of China. The same thing is also applied to Arab.

A significant breakthrough was made by the legislator to issue an ordinance placed at the State Gazette of 1855 No. 79. The ordinance specified that private law applicable for the Europeans except intestacy inheritance law was applied to all the Foreign Orientals in Java and Madura. Such a policy was based on political rather than juridical consideration. Initially, there was an idea to make European-styled law applicable to all groupings in Netherlands-India. The idea was inspired by the accomplishment of codification prepared by the Kemper Committee in the Netherlands. Scholten van Oud-Haarlem, who initiated the proposal of codification in the colony, was appointed to be Chairman of Commission for preparing codifications by Governor General De Erens' Decree No.1 dated October 31,1837. Royal Decree No. 102 of 1839 dated August 15, 1839 assigned him to do the same job.

In Netherlands-India, Scholten van Oud-Haarlem prepared draft codification in the areas of private and commercial laws. It was found that wide discrepancies occurred between laws prepared by Scholten van Oud-Haarlem and those were in force in the Netherlands. There were some peculiarities that had no concordance in Dutch Laws. The particular elements should be accommodated in

laws prepared by the commission. In December 15, 1845, the commission was dissolved by Royal Decree No. 67 of 1845. At that time Scholten van Oud-Haarlem almost completed his works. His successor H.L. Wimers took up the job but he only accomplished the finishing touch of the codification. Through State Gazette of 1847 No. 23, the B. W. and the W. v.K. for Netherlands- India, which were the works of Scholten van Oud-Haarlem and that taken over by H.L. Wichers, were adopted as private law and commercial law applied to all the Europeans.

H.L. Wichers was known as a proponent of legal unification in Netherlands-India based on European law. He desired to apply European law to all groups. He submitted a proposal concerning such an idea three times to Governor General. Referring to the then existing law, the Governor General is given a wide discretion to declare applicability of law to any group. Governor General Rochussen, however, turned down the proposal. According to the Governor General, the reform of and the breaking down of Javanese society is perilous and unwise unless a substitute of that is established firmly and it may be a wishful thinking to create such a new society as long as the Indigenous Indonesians are Muslims instead of Christians. It was another case for the Foreign Orientals. People of this group immigrated into Netherlands-India due to profit motive, the same reason why the Europeans traveled to the archipelago. They had nothing to do with emotional ties to land and culture. The executive of Netherlands-India took the fact into account to impose their legal policy. As a result, European

Property Law and Commercial Law were applied to the Foreign Orientals in Java and Madura. Since March 1, 1925 by ordinance placed at State Gazette of 1924 No. 556, the jurisdiction of European law over the Foreign Orientals was extended throughout Netherlands-India. Consequently, from the date only the Indigenous Indonesians who were governed by their own customary law

Relying upon article 131 paragraph (4) of IS, however, and Indigenous Indonesian as an individual was given option to supersede customary law in the areas of private and commercial laws by submitting voluntarily to European law. The voluntary submission rule was specified in Royal Decree of September 15, 1916, State Gazette of 1917 No. 12 amended by State Gazette of 1926 No. 360. The Royal Decree stipulated four types of voluntary submission to European law and private law. First, the comprehensively voluntary submission, by which all provisions of private law and commercial law are applicable to the submitter. This kind of voluntary submission was irrevocable and it was applied to his wife and minor children. This voluntary submission, however, does not necessarily shift a submitter to be a European. This one remained in the Indigenous Indonesians group. Submitting voluntarily to European law, the submitter might be tried by European court as a respondent in case of lawsuit. In criminal case, the submitter was still under the jurisdiction of court designated for the Indigenous Indonesians. Second, the partially voluntary submission, by which Indigenous Indonesian submits voluntarily to some provisions in the areas of private and commercial laws applicable to the non-Chinese Foreign Orientals.

Third, the voluntary submission for a specific legal act, upon which European law applies. Fourth, the presumptive submission in which an Indigenous Indonesian carried an act, which customary law does not recognize the act and the customary law did not prescribe it according to the Indigenous Indonesian was considered to be voluntarily submissive to European private law. The presumptive submission was designated to a specific legal act. The condition in which the presumptive submission was relied upon was that the customary law did not prescribe such an act. The colonial legislator referred to law on negotiable instruments, check and draft, which were not recognized by customary law. In fact, fact, the Indigenous Indonesians were frequently involved in such transactions.

Comprehensively and partially voluntary submissions were declared before the government official. His wife should approve either voluntary submission of those types in case a married man carries it out. Voluntary submission for a specific legal act should be made in either a deed authorizing the legal acts or in a separate deed. The purpose of colonial ruler to prescribe voluntary submission was to provide the Indigenous Indonesians to submit voluntarily to European law if the individual felt unhappy with customary law so governed. Voluntary submission or a specific legal act was provided for the sake of the Europeans to enter into contracts with people of other groups. In the colonial ruler's mindset, European law is more confidence in terms of legal certainty than any other law of the other groups. Consequently, to colonial government's thought, it did not



make sense if a. The History of Indonesian Law 13 "r European submits voluntarily to customary law. It was not necessary, therefore, to prescribe such a conduct.

Substantive legal pluralism in Netherlands-India based on the groupings, inevitably brought about legal issues on conflict of laws should there be any transaction involving people of different groups. Even, legal relation between people within the same group could also raise legal issues if it was conducted by those who were governed by different law due to either the voluntary submission or the equalization as European. Such a legal issue has hardly occurred between the Europeans and the Foreign Orientals because since January 1, 1925 almost all areas of European private law were declared applied to the Foreign Orientals. It was possible that an Indigenous Indonesian to avoid a legal conflict with a European if the Indigenous Indonesian submits voluntarily for a specific legal act governed by European law.

In case of conflict between European law and customary law, laws concerning inter-group transactions, from which conflict of law arising out, were referred to. In the absence of law to address a concrete case, judge was assigned to find law for the case. Laws concerning conflict of law arising out of inter-group transactions were Marital Law, Acknowledgement and Legitimation of illegitimate child, Land Law, and Labor Agreement.

According to article 6 of Royal Decree put at State Gazette I of 1898 No. 158 dated December 29, 1896 marriage should be held under husband's law but

agreed upon by the oncoming husband and wife. Article 3 of the ordinance specified that the marriage ceremony should be held before a marital official and a deed evidencing the marriage was issued for it even if it was not required by the husband's law. Article 7 of the ordinance stated that religion, nationality, or offspring differences could not prevent a couple from marrying. Finally, according to article 2 of the Royal Decree, a woman who entered into a mixed marriage should be under the husband's law both publicly and privately as long as the marriage is not dissolved.

About Acknowledgement and Legitimation of illegitimate child, article 284 of B. W. prescribes that if a European father acknowledges that his illegitimate child born by an Indigenous Indonesian woman is his child, the legal relationship in the area of private law between the biological mother and her child ceases. The purpose of this provision was to preserve European properties not to be transferred to the Indigenous Indonesian in case of the death of a European father who acknowledged the child. In article 275 of B. W., it is stated that an illegitimate child who was acknowledged by a European as his child and born by an Indigenous Indonesian mother, the child may be legitimated if the mother dies and the child's parents make no objection for it.

In the area of land law, transferring land governed by customary law and possessed by an Indigenous Indonesian to the non-Indigenous Indonesian leading to the land ungoverned by customary law was prohibited by ordinance put at State Gazette of 1875 No. 179 dated August 4, 1975. The purpose of the

ordinance was to protect the Indigenous Indonesian, who was economically weak, from manipulation by other groups who were stronger in terms of economic. The prohibition, then, was to avoid forfeiture of Indigenous Indonesians possession over land. In Netherlands-India, it was existed an undisputed unwritten rule that a premise was given a certain status and the status would remain disregarding the change in possession and whoever the possessor was. Such a rule implicated pluralism of legal regime over land. There was a land possessed under European law and that was subject to customary law. A land governed by European law became a European land; while that was under customary law was called customary land}6 Indigenous Indonesian might own European land and European law was applied over the land accordingly. It can be on the other way round. Another ordinance concerning law that should be importantly noted was Grondhuurordonantie (Land-rent Ordinance) put at State Gazette of 1918 No. 88 dated February 15, 1918. This ordinance is significant to cane plantation because sugar factories owned by Dutch businessmen were built on lands governed by customary law. Based on the ordinance, the sugar companies entered into transactions with Indigenous Indonesians who possessed the lands.

Lastly, an inter-group transaction that led to conflict of law was labor agreement made by and between European and non-European. Through State Gazette of 1879 No. 256, old articles 1601 through 1603 of BW on labor agreement were applied to non-European people. In 1926, however, it was

adopted a new law on labor agreement for European based on the concordance-principle. As a matter of fact that the new law was not suitable for Indigenous Indonesian and Chinese labors; for the people of the two groups, therefore, old articles 1601 through 1603 of B. W. remained applied. New article 1603 x, however, prescribed that European labors were subject to the new European law regardless of their employer. For non-European labors working to European employer, on the other hand, the new European labor law would be applied to them if they carried out jobs supposed to be done by European labors. Thus, the type of job determined which law should be applied. It cannot be contended that Indigenous Indonesian and Chinese labors' capability was improved as the time went by. As a corollary, the so-called "European job" to be done by the Indigenous Indonesians and Chinese increased. This implicated that such jobs became jobs that should not be carried out by European. Consequently European labor law no longer governs such jobs.

Other mix legal relationships that presumptively raised legal conflict were inheritance and agreement. There was no ordinance was made for the areas of law. The solution of a conflict as it might happen was left to the court. Judge was authorized to decide whose law would be applied in case of legal relationship .in those areas of law occurred between people of different groups. In 1865, it was a case law ruling that law of one whose properties ~ were inherited applied both to moveable and immovable goods. From this judicial decision, it can be deduced that immovable ~ goods governed by European law might become under

customary law if the goods were inherited from an Indigenous Indonesian. f  
The legal status of a land, nevertheless, never changed whoever : possessed it.  
Take an example; an Indigenous Indonesian ~ possessed a premise governed by  
European law. By virtue of judicial decision of 1865, if the Indigenous Indonesian  
deceased, the heirs would inherit the land based on customary law since the law  
is applied to the decease and consequently, the customary law would govern  
the inherited land. As a result, the status of the land changed from European  
land to customary land.

It was another case in the area of agreement. About this area, there had  
been three tests used by court to determine whose law should govern. First, it  
was the intention of the parties to choose which law to be applied to the  
agreement. It was not easy, however, to identify such an intention. If the first  
test failed to determine the applicable law, the second test was carried out. The  
second test was the nature of the agreement but if it was also unsuccessful to  
define which law applied to the agreement, the third test was used. The third  
test was the environment where the agreement was made. For instance, if a  
Chinese bought jackfruits from a villager in a village surrounded by rice farms,  
river, and mountains, customary law would be applicable to this transaction. On  
the contrary, if an Indigenous Indonesian entered into an agreement with a  
European transportation company on transporting goods in large scale, the  
applicable law would be European law.

Not only were the substantive laws classified into three different regimes, but judiciary was also distinguished in terms of the groupings. In fact, the R.R. was designated to eliminate the then legal pluralism in judiciary, which was prescribed in R.O. In a bid to enact the R.R., in 1854, there was a dialog held in the Netherlands' Parliament. In the dialog, Thorbecke, Professor of Law at the University of Leijden stated if to the Indigenous Indonesians judge applied law applicable for them, relying upon Article 75 paragraph (3) of R.R., court that applied religious law, elementary rules, and practices of Indigenous Indonesians, should be officiated with judges who were competent to try the Europeans.<sup>17</sup> The enactment of R.R., nevertheless, did not make the R.O. lack of validity. Even, it did not end pluralism in judiciary outside the R.O.

In the R.O. it was designed courts whose personal jurisdiction was over the Europeans as well as those are given similar status as Europeans and those whose jurisdiction was over the Indigenous Indonesians as well as those are treated alike to the Indigenous Indonesians. Courts prescribed in the R.O, were commonly called to be Government Court. In addition, there existed various types of courts that were competent to try legal conflicts between the Indigenous Indonesians. The courts were (a) courts established by the Indigenous Indonesians located in some areas of Netherlands-India, which were officiated with Indigenous judges who tried under the rules and procedures created by the Indigenous Indonesians. This kind of courts were outside Java and Madura, i.e. Aceh, Tapanuli, West Sumatra, Jambi, Palembang, Bengkulu, Riau, West

Kalimantan, South and East Kalimantan, Manado, Sulawesi, Maluku, Lombok, and Bali; (b) Royal courts established in the self-ruled Royal territories, except Paku Alaman and Pontianak, whose jurisdiction was mainly limited to disputes between Royal families; (c) religion courts existed in areas where

Government Court located or those are parts of courts established by the Indigenous Indonesians if such courts located in areas where the only Indigenous-Indonesians-established-courts existed or they become parts of Royal courts if they located in the self-ruled territories; (d) Rural Courts existed for rural communities. This kind of courts established in areas where Government Courts existed. In areas where Indigenous-Indonesians-established-courts existed, Rural Courts became parts of the courts. Similarly, in the self-ruled Royal territories, Rural Courts were parts of them. Government Court was split into courts designated for the Indigenous Indonesians and those reserved to the Europeans. Courts for the Indigenous Indonesians were Districtsgerecht, Regentschapsgerecht, Landraad, and Rechtspraak ter Politierol; while courts for the Europeans were Residentiegerecht, Raad van Justitie, and Hoogerechtshof were reserved to the Europeans.

Districtsgerecht was a court held and administered in districts where the chief of the district served to be a judge. According to Articles 79 and 80 RO, the court has jurisdiction over disputes between the Indigenous Indonesians concerning case at the value of less than 20,- (twenty guilders) or that over criminal case to be fined no more than 3 guilders. It, however, lacked jurisdiction over fiscal

offenses as well as over offenses that warrant complaint if the complainant was the European. Territorial jurisdiction of the court was the entire territory of the district.. Decision over civil cases entered into by this court could be appealed to the Regentschapgerecht. Judgment over criminal cases, however, was final and binding.

Regentschapgerecht was a court for the Indigenous Indonesians held and administered in regencies where the regent or his deputy acted as a judge. Regentschapgerecht's jurisdiction was over civil cases between the Indigenous Indonesians whose claim was 20 through 50 guilders and over criminal cases bearing at the longest six-day imprisonment or at the most 10 guilders fine unless the cases were not under the Districtsgerecht's jurisdiction. Similar to the Districtsgerecht, the Regentschapgerecht has no jurisdiction over fiscal cases. According to Article 84 of the R.O., the Regentschapgerecht was also an appellate court for cases settled by the Districtsgerecht. Decision over both civil and criminal cases entered into by this court could be appealed to the Landraad.

The following court for the Indigenous Indonesians was Landraad. This court is ordinary court. On the basis of Royal Decree No.3 dated March 5, 1869 placed at State Gazette of 1869 No. 47, Landraad was presided over by professionally law-educated judges}8 The Landraad located in every capital of regency. The territorial jurisdiction of this court was the regency territory. The Landraad was competent to try civil cases between the Indigenous Indonesians over the subject matter whose amount was no less than 50 guilders or less than 50



guilders if the petitioner was the European. In addition, the court also had jurisdiction over criminal cases that were not Districtsgerecht's, Regentschapperecht's and Politierol's jurisdiction. Hearing in Landraad was conducted by a panel of judges comprising professionally trained jurist as a chairman and government officials or former government officials as members. The panel was assisted by a clerk. A sitting in Landraad validly proceeded if a chairman, two members, and a clerk were present. In criminal cases, a public prosecutor or assistant to the public prosecutor<sup>19</sup> should appear. In summary criminal cases, however, a chairman as a sole judge might handle the trial. If a respondent or a defendant was a Muslim, there should be a religion official (penghulu) called to the trial as an advisor. If a respondent or a defendant was a Olineese or a non-Muslim Foreign Oriental other than Olineese, a capable person of the same nationality as the respondent or the defendant was required to be present as an advisor. If the respondent or the defendant was a Christian, it was necessary to call an advisor. The reason was when the R.O. r was adopted all chiefs of Landraad were Europeans who were r Christians as well. In summary criminal trial, religion advisors r were not required to call. Landraad's decision in civil cases might be appealed to the Raad van Justitie if it was proved that the sum of suit is more than 100 guilders. Unless a verdict that freed the defendant, Landraad's decision over criminal cases might be filed with the Raad van Justitie to be reviewed. Moreover, if the suit settled by the Landraad was about subject matter of more than 500 guilders or if the criminal case was fined to more than

500 guilders or other more severe punishment, the decision might be brought to the" Hoogerechtshof for the last resort of appeal. The Landraad itself was appellate court for the Regentschapperecht.

The last court for the Indigenous Indonesians was Rechtspraak fer Politierol or commonly called to be Politierol. This court was designated for summary cases that were under Landraad's jurisdictions. Trial at the Politierol was handled by the Governor's Assistant as a sole judge. Cases brought before this kind of court were petty offenses fined no more than 25 guilders. This court was dissolved in 1901 and for its substitution Landgerecht was established in 1914.

Government Court for the Europeans was organized less complicatedly than that of for the Indigenous Indonesians. Except the Hoogerechtshof that was designated to be court for the last resort of appeal, Government Court for the Europeans was designed in terms of subject matter jurisdiction. Residentiegerecht was really a trial court. Raad van Justitie, on the other hand, was an appellate court for the Residentiegerecht as well as a trial court for certain subject matter jurisdiction.

Residentiegerecht was a court for the Europeans established in all cities in Netherlands India where the Landraad located. Hearing in the Residentiegerecht was held by a sole judge assisted by a clerk. Chief and clerk of the Landraad served to be judge and clerk to the Residentiegerecht. The territorial jurisdiction of the Residentiegerecht was exactly the same as that of the Landraad. When it was established, the Residentiegerecht was designated to try the Europeans for

small claims, by which the case was settled as soon as possible at little cost because the judge who tried the case was well informed about the social 20 Peter Mahmud Marzuki environment of where he lived. According to Article 116 (f) of the RO, the Residentiegerecht was competent to try:

- a. Claims that did not exceed 500 guilders on
  - 1. Personal liabilities;
  - 2. Payment for right to cultivate;
  - 3. Obtaining possession of personal properties;
- b. Claims regardless of the amount on:
  - 1. Damages because of human or animal's conduct over land, underbrush, tree or garden fruits or tubers;
  - 2. Reparation and Damages for rented real properties, which were under tenant's account;
- c. Claims regardless of the amount on arbitrarily premeditated actions against land, trees, fence, creek, dam or waterways that resulted in damage to those who are rightful under Indigenous Indonesian's law;
- d. Claims over
  - 1. Rented real property to be unoccupied due to the expiry of rent term regardless of rent price, except that in the proceeding, the tenant with written evidence proved that the term of rent was renewed whose price exceeded 600 guilders annually;

2. Termination of rent contract and vacating the rented property thereof in case of tenant neglected to pay the rent unless it did not exceed 600 guilders.
- e. Petition of seeking declaratory judgment that the seizure of properties that had been done lawful if the seizure was done on the basis of a claim under the Residentiegerechts jurisdiction;
- f. Petitions of seeking declaratory judgment to vacate or to legalize an offer of payment or a bailment of goods deposited at court, if the offered price of goods or the amount of deposited money did not exceed 500 guilders;
- g. Counterclaims whose subject matter under Residentiegerecht's jurisdiction;
- h. Disputes over judgment executions if the respondent was the Indigenous Indonesian or non-Chinese Foreign Oriental, provided that the respondent was voluntarily submissive to European law.

In addition, the Residentiegerecht was competent in the first instance to hear labor disputes regardless of the price of claim and the grouping to which the disputing parties belonged. Not all decisions entered into by the Residentiegerecht might be appealed to Raad van Justitie. Only cases over certain subject matters were eligible to be appealed to Raad van Justitie as a high court.

In fact, Raad van Justitie was an appellate court and trial court as well for certain subject matters. Raad van Justitie was established in Jakarta, Surabaya, Semarang, Padang, Medan, and Makassar. The territorial jurisdiction of Jakarta

Raad van Justitie was West Java, Lampung, Palembang, Jambi, Bangka and Belitung as well as West Kalimantan. The territorial jurisdiction of Semarang Raad van Justitie was entire Central Java. The territorial jurisdiction of Surabaya Raad van Justitie was East Java and Madura, Bali, Lombok, South and East Kalimantan.. The territorial jurisdiction of Padang Raad van Justitie was West Sumatra, Tapanuli, and Bengkulu. The territorial jurisdiction of Medan Raad van Justitie was East Sumatra, Aceh and Riau. Lastly, the territorial jurisdiction of Makassar Raad van Justitie was Sulawesi, Timor, and Maluku.

Raad van Justitie was ordinary court for the Europeans both in civil and criminal cases. For the Chinese, however, it was a court for civil lawsuit.. In addition, this type of court was competent to try a civil claim against non-Chinese Foreign Oriental and Indigenous Indonesian as respondent whose subject matter of the claim under the European Law jurisdiction or the respondent was voluntarily submissive to European Law.. In other word, the Raad van Justitie could also try people of grouping other than European and Chinese as respondent based on either the subject matter jurisdiction, in which of the subject matter of the claim was under European Law or on personal jurisdiction, in which the respondent was voluntarily submissive to European Law. Furthermore, the court, irrespective of personal jurisdiction, was competent to hear civil case over goods discovered from sea and bay.

In criminal cases, without regarding to what grouping the defendant belonged, Raad van Justitie was competent to try slave trade, bankruptcy-related

crimes, piracy, robbery of goods while in transit at beach, robbery of goods in the river and crimes so concerned. The court was also a settlement institution for disputes between courts under its jurisdiction. . Then, it was an appellate court for Residentiegericht's and Landraad's decisions.

The Jakarta Raad van Justitie in its function as an appellate court had a special panel. According to Article 128 paragraph (1) RO, Jakarta Raad van Justitie was competent to handle appeals of decisions made by all Landraad in Java and Madura. By virtue of the Article, Raad van Justitie located in Semarang and Surabaya was not competent to handle appeals of decisions made by all Landraad in cities where the respective Raad van Justitie had territorial jurisdiction. Such a condition began since January 1,1938 when a special chamber called as the third chamber was established and added to Jakarta Raad van Justitie in charge of examining appealed cases from all Landraad of Java and Madura. The idea of establishing the third chamber officiated with a special panel was to create legal certainty. Disputing parties at the first instance under Landraad's jurisdiction, if they agreed, might directly appeal the decision to Jakarta Raad van Justitie. The decision of Jakarta Raad van Justitie over the appealed case was unappealable.

Judgments on civil cases entered into by Raad van Justitie as a trial court could only be appealed to Hooggerechtshof if the price of claim was not 500 guilders or less. Unless over a judgment declaring defendant not guilty, decisions on criminal cases entered into by Raad van Justitie as a trial court might

be appealed to Hoogerechtshof Hoogerechtshof was the Netherlands India Supreme Court. It was located in Jakarta. Chief Justice and all Justices to the

Hoogerechtshof were appointed by King and granted special status. The jurisdiction of Hoogerechtshof was the territory of Netherlands India. The Hoogerechtshof was a court for the last resort of appeal. It, however, was also a trial court for high-rank officials in judicial and administrative agencies as well as for members of Volksraad, the Netherlands-India House of Representatives, who commit crime. The decision rendered by this court over such cases was final and binding. The Hoogerechtshof had also a power to review judgment that becomes *res judicata*. In addition to its main function as a court, the Hoogerechtshof was also in charge of supervising the implementation of judicial power by lower courts.

Notwithstanding the complicated system, it can be determined that the rule for determining which case went to court designated for the Europeans or to that for the Indigenous Indonesians was the defendant or the respondent or the subject matter of claim regardless the petitioner. A lawsuit might be filed with by a European whose respondent was an Indigenous Indonesian. In such a case, the petition should be submitted to court designated for the Indigenous Indonesians and vice versa.

A breakthrough to the rule was made when a court designated for people of all grouping was established. The court was called Landgerecht. This court was officiated with a professional judge. The jurisdiction of this court was to try

misdemeanors whose actors were punishable by no more than 3- month imprisonment or no more than 500-guilder fine. The hearing in Landgerecht was conducted by a sole judge. Judgment rendered by Landgerecht was unappealable. As a matter of fact that the proceeding in Landgerecht was held indiscriminately; .rules for the proceeding, however, are different between those I are applicable for the Indigenous Indonesian and those for the , Europeans and the Foreign Orientals. If a crime committed I jointly by the Indigenous Indonesian and the European, r however, the rules of proceeding for Europeans will be applied.

Likewise, if two or more people of different groupings were joint respondents in civil suit or joint defendants in criminal case<sup>20</sup>, a higher-class court tried them jointly. Suppose an Indigenous Indonesian and a European committed a crime jointly, Raad van Justitie should try the case because the court was for the European, whose class was considered to be higher than that of Landraad, which court was designated for Indigenous Indonesian. If they were joint respondents in civil case, in contrast, they were tried by Residentiegerecht rather than to be tried by Landraad because Residentiegerecht class is higher than Landraad class. Since 1912 by State Gazette of 1912 No. 521, there was an exception to the rule. According to the State Gazette, in the case that the first debtor and his or her guarantor were sued jointly for the debt, they would be tried separately if the guarantor should go to a higher-class court. This rule was enacted to prevent manipulation by which a European pretended to be a



guarantor and an Indigenous Indonesian acted as a debtor and doing that way they could be tried jointly in court for the European.

There was also rule enabling Indigenous Indonesians of high-rank status to appear before European court if they were respondents or defendants. This kind of rule was called Forum Privilegiatum, which means "privilege forum". This rule was adopted by Royal Decree dated November 3, 1866, State Gazette of 1867 No. 10 as lastly amended by State Gazette of 1941 No. 31. According to the Decree:

1 All civil actions and prosecutions against Kings, High Administrators, and Regents who were in power, for the first instance, should be filed with Raad van Justitie. Moreover, for initiating such a suit or prosecution in Java and Madura, a license from the Governor General was needed or if the action was brought to court outside Java and Madura, such a license should be obtained from Governor's Assistant. By State Gazette of 1882 No. 19, Districts Chiefs in Manado and vicinity were declared to be Indigenous Indonesians of high-rank status.

2 European courts tried in the first instance civil actions and prosecutions against Districts Chiefs in South and East Kalimantan and vicinity and those in Ambon.

European courts tried in the first instance civil actions and prosecutions against:

- a. Kings, High Administrators, and Regents who were no longer in power;
- b. Wives, Consanguinities, Affinities up to quarter cousin of Kings, High Administrators, and Regents regardless of whether or not they were in power;

- c. Vice Regents, Districts Chiefs, and other Netherlands-India authorities, Chief Religion Officials (penghulu kepala), Prosecutors, members of LAandraad prosecuting team, Clerks to the LAandraad and the LAndgerecht;
- d. Indigenous Indonesians titled as "King" even if he did not reign;
- e. Non-European members of local councils, i.e. Indigenous Indonesians and Chinese, members of Custodian Institute, and Chiefs of Foreign Orientals;
- f. Non-European Netherlands-India Army and Navy officers notwithstanding honorable discharge in the case they were not tried in Military Tribunal.

The Japanese military authority, which began ruling Indonesia since they gained power from the Dutch colonial government who unconditionally surrendered to them on March 9, 1942, abolished the pluralism of judiciary<sup>21</sup>. Ever since, there has been no longer different treatment in administering justice. The Japanese military authority issued Law called Osamu Stirei to carry out their administration. Osamu Stirei contains general rules, in terms of the implementation of military administration in time of need and in the state of emergency. Article 3 of the Law stated that "every government agency and its respective jurisdiction, laws and regulations created by the previous government are, declared still in power provided that they are not in contravention with rules created by the military administration. The article, obviously served as a transitory provision by which it may prevent the occupied territory as well as the administration from a legal vacuum. Under no circumstances is every government's conduct valid without legal basis. No matter

whatever the law is it can be utilized to justify government's activities. The implication of the article, then, was the Dutch colonial regime remained intact. It can be justified, therefore, that despite differentiation of legal regimes of grouping as referred to articles 163 and 131 Indische. Staatsregeling, this does not contravene article 27 of the 1945 Constitution. Criminal and civil cases, regardless of the groupings involved in the controversies, are brought to District Court, a conversion of Landraad. Under the current Indonesian legal system, Indonesian courts are differentiated in terms of subject matter jurisdictions instead of personal jurisdiction.

The Indonesian legal system is a part of civil law system. It should be noted that there are two major legal systems in the world, common-law system and civil law system. Common-law system is shared by Great Britain and its former colonies; while civil law system is followed by European countries and their former colonies. Common-law system is often named as Anglo-American system; on the other hand, civil law system is also called continental system.

The marked distinction of the two systems is that the use of case law by the Anglo American system. The system applies the doctrine of stare decisis. Under the doctrine, it is compulsory for the subsequent judge to apply the previous judicial decision on the similar cases. The system leaves judges narrow discretion. The previous decisions may be distinguished if only the subsequent judge for the similar case asserts that there be some new factor should be taken into account. Otherwise, the court has to comply with the case law.

Applying the doctrine, it should be made distinction between ratio decidendi and dictum. It is ratio decidendi that plays a significant role in the case law, because it is a legal reasoning that leads the judge to reach a decision. If the ratio decidendi does not support the decision, the decision, which is the dictum, may be declared to be an obiter dictum. It is the ground to distinguish the decision.

Civil law system deriving its system from Roman strict law does not apply the doctrine of stare decisis. In this system, judge is given broad discretion to interpret laws. It is optional for the court whether or it will apply the case law. Nevertheless, there is a current trend that civil law judges prefer to apply the previous decisions for the similar cases, which are considered to be landmark decisions. It is likely that the judges copy their counterpart of the common law system. What the civil law judges have taken is understandable since the judge of the system is obliged to find law shared by the society, which may be unwritten law or customs, if he or she does not find what written law applies for the case at hand. Exploring the unwritten law and applying it to the case he or she handles, the judge makes a law for the unique case. If there is a similar case on the other day, the decision may be considered to be a law. This process is taken for achieving legal certainty.

Another factor, which is frequently regarded as a differentiation between common law and civil law system, is that all laws in civil law system are essentially codified, while common law system is based on common law.<sup>22</sup> The

factor of codified or unwritten law is no longer meaningful to signify the difference between civil law and common law system. In fact, Uniform Commercial Code, which is adopted by almost all states of the U.S., is one of codified laws; it can be inferred, therefore, that the U.S. develops codified laws in the level of both states' laws or Federal Laws.

Since Indonesia was a Dutch colony, the Indonesian legal system belongs to civil law system. Just as continental legal system, which does not apply the doctrine of stare decisis, the Indonesian judge is not bound to the case law. It is strongly recommended, however, that the judge apply landmark decision. Despite the fact that Indonesia belongs to civil law system, since 1967 the time when market economy began 'taking place, there have been substantive laws much influenced ; by the American laws. This, nevertheless, does not shift the I system from civil law to common law system.

The currently applicable constitution governing the Republic of Indonesia is the 1945 Constitution, which has been amended four times after the downfall of the New Order regime. The original constitution was prepared by the Japanese-established Body for Searching the Endeavors of Preparing Indonesian Independence. The establishment of the body was a concrete step ! taken by the Japanese Military Authority who promised to grant freedom to Indonesians when a proper time came. Since Japan was in war with the Allied at that time, the promise of granting Indonesian freedom was articulated to win support from Indonesian people. On July 17, 1945, due to the Japanese political and military

deterioration, it was agreed upon that (1) the territory of Indonesia after freedom being granted would be the former territory of the Netherlands-India and (2) the Preparatory Committee for the Indonesian Independence, whose members were also members of the Body, should be set up. On August 18, 1945, the committee, then, adopted the draft constitution prepared by the Body for Searching Endeavors of Preparing Indonesian Independence as the Constitution of the Republic of Indonesia.

In drafting the constitution, the Body was divided into two subdivisions: the Committee that was in charge with drafting basic law, which is embodied into the preamble to the constitution and the Committee whose function was to draft the main body of the constitution. At the time of adoption until being substituted by the Federal Constitution of 1949, therefore, the 1945 Constitution consisted of the Preamble to the Constitution and the main body of the Constitution. The elucidation of the Constitution was excluded from the 1945 Constitution since neither the Body for Searching Endeavors of Preparing Indonesian Independence nor did the Preparatory Committee for the Indonesian Independence prepare it. Originally, Soepomo, a member of the Committee, made the ~ elucidation. The incorporation of elucidation into the 1945 Constitution was made through the Presidential Order of July 5, 1959. Since then, the 1945 Constitution consists of the Preamble to the Constitution, the main body of the Constitution, and the elucidation of the Constitution. The fourth Amendment to the Constitution, however, excludes the elucidation. Article II of the Additional Provision of the

amended Constitution, which is adopted in the Plenary Session of Annual Meeting of the People's Consultative Assembly states that the adoption of this amendment to the Constitution, the 1945 Constitution consists of the Preamble and articles.

The adoption of the 1945 was made in time of struggle. Adopting a Constitution, Indonesia showed the world that the newborn state would not work without a basic law. Prescribing The History of Indonesian Law 1 29 the provision, the Indonesian Founding Fathers warranted that there should be a permanent Constitution for Indonesian Government after political stability has been reached. The establishment of the People's Consultative Assembly was an indicator of political stability since article 2 (1) of the 1945 Constitution provides that the Assembly comprises all members of the House of Representatives and delegates of local governments and representatives of various groups as designated by law. Article 19 of the 1945 Constitution, on the other hand, states that Composition of the House of Representatives shall be prescribed by law. Law concerning the agency's composition shall be the General Election Law. The People's Consultative Assembly, then, was supposedly to be established after general election was held and this event may only be made under political stability. Relying upon Article IV of Transitory Provision of the original version of 1945 Constitution, before the People's Consultative Assembly, the House of Representatives, and the Supreme Advisory Agency are established, all powers of

the Agencies shall be exerted by the President with the assistance of a National Committee.

Unfortunately, political stability was far from reach. Even more, ignoring Indonesian Independence, Dutch and the Allied Armed Force reoccupied Indonesia asserting that the Indonesian Independence was invalid because it was granted by the Japanese as a gift. Alleging to disarm Japanese soldiers, the former colonizer : using the Allied power arrived in Indonesia under the name Netherlands-India Civil Administration (NICA). Indonesian people ! prompted their arrival with great anger and they rejected the return of colonialism. They fought at all costs to maintain Indonesian sovereignty and integrity. In fact, the Dutch and the Allied won battles in some territories. The Allied, then, transferred the control over the invaded territories to the Dutch government. ~ The only territory that was still retained by the Republic of Indonesia was Yogyakarta.

March 25, 1947 the Republic of Indonesia whose territory was only Yogyakarta entered into agreement with the Netherlands in Linggarjati to cease their dispute, which agreement is called "Linggarjati Agreement". The subject matter of "Linggarjati Agreement" was the establishment of the United States of Indonesia under the auspice of Dutch-Indonesian Union head by the Queen of the Netherlands.<sup>23</sup> The agreement, unfortunately; was to no avail. The unenforceability of the agreement was due to the Dutch military action against Indonesian leaders. The action dubbed as "police measure" was aimed to police Indonesian leaders. From the Indonesian side, it was called "the First Aggression".



Indonesian people responded such an action with glorious fighting spirit against Dutch. Inevitably; the Dutch was forced to go back to negotiation table in January 1948. The Agreement was signed on "Renville" ship, because of which the agreement was called "Renville Agreement". In the agreement, it was laid down terms of disarmament "and security restoration"<sup>24</sup>. This agreement was also torn by Dutch second aggression that broke out on December 19, 1948.

Defending their Independence and Territorial Integrity, Indonesian people took up arms against the aggressor. Lack of weapons, the fighters for maintaining freedom made guerrilla raids to win battles. The tactic was proved effective. On the other hand, the Dutch should exhaust its force to defeat the patriots. In fact, the Dutch endurance deteriorated to cope with the guerrillas. Moreover, international community who held conference in New Delhi urged that the Netherlands end its ambition to reinstall colonialism in Indonesia. It should be noted that the Dutch made the invaded territories dummy states, such as East Indonesia State, East Java State, Pasundan State, etc., each of which was head by respective President. The dummy states established *Bijeenkomst voor Federaal Overleg* (Conference for Federal Consultation) commonly known as BFO.

Delegates of the Republic of Indonesia whose territory was Yogyakarta entered into a negotiation with representatives of BFO on establishment of the United Republic of Indonesia. Such a scheme was taken because nationalist leaders were convinced that it was a chance to reach *de jure* status of Independence. In addition, it was a way for the Dutch to save their face. The

Indonesian delegates and the BFO representatives arrived at an understanding to enter into a Roundtable Conference concerning the idea. The Roundtable Conference was held in The Hague witnessed by Commission of Three States as United Nations' representatives. In the midst of conference, some representatives of both parties organized a side conference to prepare a constitution for the United Republic of Indonesia. The side conference produced draft Constitution for the coming Federal State, which was ratified in Scheveningen seaport on October 29, 1949 by signing a Charter of Agreement.<sup>25</sup> The House of Representatives of the Republic of Indonesia and BFA representatives, then, approved the constitution.<sup>26</sup> The constitution was adopted to be Constitution of the United Republic of Indonesia, which is dubbed as Federal Constitution. Obviously, the Federal Constitution was not prepared at The Hague Roundtable Conference. After restoration of Indonesian sovereignty was carried out in Amsterdam and transfer of power was conducted in Jakarta on December 27, 1949, the United Republic of Indonesia was established under the constitution.<sup>27</sup> Under such the federation of state, the Republic of Indonesia whose territory was Yogyakarta and vicinity became one of states to the United Republic of Indonesia.<sup>28</sup> Despite Federal Constitution for the United Republic of Indonesia, the 1945 Constitution still governed the state of Republic of Indonesia.

The United Republic of Indonesia lasted only eight months. The spirit of unity dominated governments of states, which were autonomous under Federal

Constitution. The Federal State could not bear to bar impulses of establishing a Unitary State. The Republic of Indonesia and the United Republic of Indonesia, then, entered into a series of negotiations. A Joint Committee -- chaired by R. Soepomo of the United Republic of Indonesia and Abd. Halim of the Republic of Indonesia was set up to draft bill on Amendment to the Federal Constitution.<sup>29</sup> According to Article 190 of the Federal Constitution, a bill on Amendment to the Constitution should be submitted to Senate and the House of Representatives of the United Republic of Indonesia. On July 20, 1950, the Joint Committee produced a Joint Statement approving preparation of establishing Unitary State and that of designing draft Provisional Constitution. With minor revision, the House of Representatives and Senate endorsed the draft Provisional Constitution to be passed as law. On August 15, 1950, this law was enacted as Federal Law No.7 of 1950.

Substantively, Law No.7 of 1950 is a constitution commonly named as the 1950 Provisional Constitution, upon which the unitary state of the Republic of Indonesia to be based. Procedurally, it is a law. From this fact, an issue of constitutional law can be raised. In jurisprudence, it is recognized a hierarchy of norms where Constitution is considered to be the fundamental norm. Law should not contradict any provision of the Constitution. In this case, Federal Law No.7 of 1950 supersedes Federal Constitution. It seems to be an anomaly. But if it is carefully studied, it was Article 190 of Federal Constitution that paves the way to such an "anomaly". It was the constitution itself that provides Amendment

thereto through law instead of through special procedure as prescribed in Article V of the US Constitution or Article 37 of the 1945 Constitution.

According to R. Soepomo, the 1950 Provisional Constitution bears the essence of the original 1945 Constitution (complemented with appropriate provisions of Federal Constitution). The Provisional Constitution was prepared under procedure specified in Charter of Joint Approval entered into by the United Republic of Indonesia and the Republic of Indonesia.

The constitution was intentionally designed to be provisional constitution. Article 134 of the constitution provides that the Constituent Council along with the Government in due time adopt Constitution of the Republic of Indonesia substituting the Provisional Constitution. Pursuant to Article 135 of the constitution, members of the Constituent Council shall be elected through General Election by Indonesian citizens. Then, Article 137 of the constitution specifies a procedure of adopting a new constitution. Paragraph (1) of the Article states that unless at least two thirds of its members attend the session, the Constituent Council was unqualified to reach a decision about a new draft constitution. Paragraph (2) of the same Article sets forth that the new Constitution will be in force if the draft of it is approved by at least two thirds of those who are present and ratified by the President accordingly.

The first general election was held in 1955. Members of the Constituent Council were inaugurated on November 10, 1956, which date is the Hero Day. From the inception, sessions of the Constituent Council were attended less than

two thirds of its members. Consequently, the Council failed to meet qualification specified in Article 137 of the 1950 Provisional Constitution in adopting a new constitution. Under no circumstances could a new constitution be adopted since no single party controlled two thirds of the number of seats reserved in the Constituent Council. Then, the Council was unsuccessful to accomplish its task. Such a condition brought about constitutionally ungoverned political life. Preventing the crisis leading to chaos, President Soekarno issued Presidential Order of July 5, 1959 on reinstatement of the 1945 Constitution and the revocation of the Provisional Constitution simultaneously, the dissolution of the Constituent Council, and the establishment of the Provisional People's Consultative Assembly and Provisional Supreme Advisory Board. Since then, the original version of the 1945 Constitution plus its elucidation, which was incorporated through the Presidential Order, became prevailing constitution intact until the emergence of reform era.

The reform era brought about amendment to the 1945 Constitution, which was previously considered as a sacred book. The sanctity of the constitution was reinforced by the People's Consultative Assembly that issued Decree 0 Number IV of 1983 on the Referendum. The Decree requiring that the amendment to the 1945 Constitution be made unequivocally, by the People's Consultative Assembly, which was implemented further in Act No.5 of 1985. In fact, both the Decree and the Act substantially amended article 37 of the 1945 Constitution, which provides a special procedure for amending the constitution. People's

Consultative Assembly Decree No. VIII of 1998, which was adopted in a controversial Special Session in November 1998, has revoked the Decree. So has Law No.5 of 1985.

Article 7 of the original version of 1945. Constitution was a point of entry for amending the no longer considered sacred book. The article prescribes that the Indonesian President holds an office for a-5-year tenure and may be reelected for the consecutive term. In the original version of the constitution, however, there is no single provision specifying presidential term limitation.

The absence of such a provision in the original version of the 1945 Constitution led to constitution manipulation by those who held the power. Despite delicate performance in terms of not violating article 7 of the 1945 Constitution, new order administration under Soeharto has practiced political engineering. Assuming power following a purportedly abortive coup by the so called the Movement Of September 30 or Gerakan 30 September dubbed as G-30-S, the general orchestrated and arranged a pseudo democratic government. His handpicked members of the People's Consultative Assembly had Installed him as a President for seven consecutive terms. There had been dirty tricks played in general elections held during the new order regime, by which Funtional Group (Golkar) as a government-sanctined party was designed to be a permanently grand champion. Since Soeharto was an active General in the Indonesian Army when he embarked into presidency at his first tenure, general elections of general. Student who staged rallies every day since mid-1997

demanding political, economic, and law reform, then, forced Soeharto to step down.

Due to such a manipulation, it was agreed upon by the post Soeharto People's Consultative Assembly that the Constitution needs to be amended. The first amendment to the 1945 Constitution was made at the Plenary Session of the 12th General Meeting of the People's Consultative Assembly on October 19, 1999. The fourth amendment to the 1945 Constitution was adopted at the Annual Meeting of the People's Consultative Assembly of 2002.

**Source:** An Introduction to Indonesian Law (by: Peter Mahmud Marzuki)