

Rule of Law and Human Rights Challenges in South East Asia: A Case Study of Legal Pluralism in Indonesia

Saldi Isra¹, Ferdi², Hilaire Tegnan³

¹ Faculty of Law, Andalas University, Indonesia. E-mail: saldiisra@yahoo.com

² Faculty of Law, Andalas University, Indonesia. E-mail: ferdi_sahmah@yahoo.com

³ Faculty of Law, Andalas University, Indonesia. E-mail: tegnan1@yahoo.fr

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ABSTRACT

It has been over 72 years since Indonesia proclaimed her independence on 17 August 1945. However, the 350 years of the Dutch colonization is still impacting the lives of the Indonesian people. The difficulties faced by the Indonesian legal system as the government tries to accommodate adat (custom) and religion principles within the national law and the extent to which this legal mechanism affects the everyday life of the Indonesian people. In a nation where customs and religion are so preeminent, setting up an all-inclusive document meant to be the foundation of the state's legal system at the dawn of independence was no easy task. This paper discusses the practice of legal pluralism in Indonesia and its struggle to implement rule of law and human rights principles after a half-century of authoritarian regimes. The study involves socio-legal research drawing on empirical data. Survey research was conducted between September 2014 and February 2015 at Utrecht University, the Netherlands, as well as in 5 cities in Indonesia (Aceh, Bali, Batam, Medan, and Padang) to collect data. The research reveals that legal pluralism is not helping to strengthen the Indonesian legal system, and that the foreignness of the Western law along with the neglect of the Indonesian customary and Islamic laws, totalitarianism and military involvement in politics, corruption within the state apparatus and unsynchronized laws weaken the legal system in Indonesia and hinder its effort to implement rule of law and human rights principles.

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1. Introduction

The Indonesian legal system did not change very much after independence was proclaimed in August 1945 since the newly born republic operated on the same legal and political logic as its colonial predecessors, handing out titles as it deemed fit.¹

¹ See Franz von Benda-Beckmann. (2001). "Legal Pluralism and Social Justice in Economic and Political Development," *IDS Bulletin*, 32 (1).

Before the arrival of Dutch traders and colonizers in the late 16th century and early 17th century, indigenous kingdoms prevailed and applied a system of *adat* on the archipelago.²

In contemporary Indonesia, three strands of law prevail: Dutch civil law,³ chthonic (or indigenous) law,⁴ and religious laws as the government struggles to accommodate the rights of community members. However, the recognition of these rights is rather ambiguous and subject to the state's regulatory control".⁵ Ever since their independence, many postcolonial nations are caught in between weak and sometimes contradicting legal systems as they try to introduce a rather strange Western legal tradition into a social field dominated by either tradition or religion or sometimes both at the same time as the case of Indonesia. This seems not to be working out, and therefore a new approach has to be considered. As argued at the outset of this paper, building a legal system in a country made up of more than seventeen islands and home to one thousand ethnic groups⁶ such as Indonesia at the dawn of independence was a delicate task. And although the Indonesian 'founding fathers' have succeeded in preserving the unity and territorial integrity of the vast nation under one flag, one anthem, and one language, the legal system remains undermined by a number of problems.

The first part of this paper presents an overview historical development of the Indonesian legal system while part two discusses the practice of legal pluralism in Indonesia by presenting role of *adat* law and Islamic law within the Indonesian legal system. Part three on the other hand investigates some of main difficulties faced by Indonesia in her effort to build an all-inclusive efficient legal system that champions the principles of democracy, human rights and the rule of law.

2. Reviewing the Indonesian Legal System

2.1. The pre-independence legal system

The Indonesian legal system came into existence after the proclamation of independence on August 17, 1945. Needless to say, that this was critical to Indonesia as legal institution along with judiciary matters would be handed over to the Indonesian people. The Indonesian Constitution, the 1945 Constitution (*Undang Undang Dasar 1945* or UUD' 1945) is the basic law upon which every law and regulation is based. All laws enacted by the Dutch administration during colonization were to be repealed because they "contravened the constitution".⁷ In fact, before establishing the Indonesian 1945

² See Marzuki, P.M. (2011), *An Introduction to Indonesian Law*, Chap. I. Malang: Setara, p.2

³ See Lukito, R. (2013), *Legal pluralism in Indonesia: bridging the unbridgeable*. Routledge. p. 5-6

⁴ Patrick Glenn's book *Legal Traditions of the World* offers a major new means of conceptualizing law and legal relations across the world. In Chapter 3 he argues that National laws are placed in the broader context of major legal traditions, those of chthonic (or indigenous) law, talmudic law, civil law, Islamic law, common law, Hindu law, and Confucian law. He claims that Chthonic law is inextricably interwoven with all the beliefs of chthonic and indigenous peoples and is inevitably, and profoundly, infused with all those other beliefs. See: Glenn, H.P. (2004). *Legal Traditions of the World, Second Edition*. New York, Oxford: Oxford University Press, 2004. Pp. 432

⁵ See Benda-Beckmann, F. von and K. von Benda-Beckmann (2001), *Recreating the nagari: Decentralisation in West Sumatra*. Working Paper No. 31. Halle: Max Planck Institute for Social Anthropology.

⁶ This figure is based on the 2010 census provided by the *Badan Pusat Statistik* (Central Bureau of Statistics).

⁷ Marzuki, P.M. *Op.Cit.*, p.2

constitution, “only Dutch rules and regulations were applied throughout the archipelago to the detriment of the indigenous” as Marzuki asserts. He also argues that no modern law existed until the adoption of the *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 Provision 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 ter Gelegenheid van Faillissement en bij Kennelijk, Mitsgaders bij Surseance van Betaling* (Provision on Crimes related to Bankruptcy and Insolvency). These laws have been enacted by Royal Decree of May 16, 1847 and officially promulgated in the Netherlands-India Gazette of 1847 No. 23. It was not until 2004 that most of these laws were amended.⁸

The law preceding the colonial-made constitution called *Regeringsreglement*, commonly abbreviated as R.R. was patterned on the 1848 Netherlands Constitution as Marzuki observes. The R.R. was used as basic law made by Dutch Crown and the Netherlands Parliament in charge of controlling the colony. Such law was based on the article 59 paragraphs 2 and 4 of the then amended Dutch Constitution. The R.R. was enacted on January 1, 1848 and became effective in 1885. In the Netherlands, this was just a basic regulation to carry out government power, but in occupied Indonesia, it was deemed as a constitution, argues Marzuki. In January 1, 1942, the R.R., was replaced by the *Indische Straatsregeling* commonly abbreviated as I.S,⁹ which was also deemed as a constitution to indigenous but considered by the colonizer as a mere law just like the R.R. It was the I.S., the so called constitution that really brought distinction between ruler and indigenous Marzuki argues. In a view similar to Marzuki’s view, Robert R. Strang,¹⁰ observes:

Like many other former colonies of Continental Europe, Indonesia generally follows the civil law tradition. During the colonial period, the Dutch maintained a dual criminal justice system within Indonesia-one court system for the Dutch and other foreigners living in the colony and a second court system for indigenous Indonesians, the pribumi.

Although the Dutch to some extent allowed the Indonesian people to use *adat* law for their local affairs such as matters related to land and family, they did not really encourage a strong legal pluralism as *adat* law was not even considered as a law in their eyes. Legal pluralism could not flourish during colonialism for it would have challenged the hegemony of the colonists by granting equal status to both *adat* and colonial laws. A strong legal pluralism under the colonial administration would have enhanced the rights of the Indonesian people, thus leading to freedom and prosperity, which are concepts the Dutch did not want to hear. As argued above, on 17 August 1945 independence was proclaimed and a new state was born. The new rulers promised transformation as they embarked on social and legal reforms. But has anything really changed ever since?

⁸ See Ali Budiardjo, Nugroho, Reksodiputro. (2005), *Guide to doing Business in Indonesia*. Available online at: http://www.abnr.com/download/document/Doing_Business_in_Indonesia_-_ABNR_-_2017.pdf

⁹ Read Soetandyo Wignjosoebroto, *Negara Hukum dan Permasalahan Akses Keadilan di Negeri-Negeri Berkembang Pasca- Kolonial*, Konferensi dan Dialog Nasional Jakarta, 9-10 Oktober 2012

¹⁰ See R. Strang (2008), *More Adversarial, but not Completely Adversarial: Reformasi of the Indonesian Criminal Procedure Code*. Fordham International Law Journal Vol. 32 Issue 1.

2.2. The post-independence legal system

The Indonesian legal system is partially based on Roman-Dutch law, customary law and Islamic law. Given to the fact that most of the Indonesian archipelago was under Dutch rule for about three and half centuries (1602 – 1945). Prior to the first appearance of Dutch traders and colonists in the late 16th century and early 17th century, indigenous kingdoms prevailed and applied a system of *adat* (customary) law. The Dutch presence and subsequent colonization during the next 350 years until the end of World War II left a legacy of Dutch colonial law. A number of such colonial legislations continue to apply today. Subsequently, after Indonesia declared independence on 17 August 1945, the Indonesian authorities began creating a national legal system based on Indonesian precepts of law and justice.

These three strands of law: *adat* law, Dutch colonial law and Islamic law co-exist in modern Indonesia. For example, commercial law is grounded upon the Commercial Code 1847 (*Kitab Undang-Undang Hukum Dagang or Wetboek van Koophandel*), a relic of the colonial period. However, commercial law is also supplemented by a large number of new laws enacted since independence. They include the Banking Law 1992 (amended in 1998), Company Law 1995, Capital Market Law 1995, Antimonopoly Law 1999, and the Oil & Natural Gas Law 2001. *Adat* law is less conspicuous.¹¹ However, some *adat* principles such as “consensus through decision making” (*musyawarah untuk mufakat*) appear in modern Indonesian legislation. Islamic laws came up and have greatly influenced Indonesian National Marriage Law (Act No. 1/1974), Islamic Court Law (Act No. 7/1989), Zakat/ Alms law, *Wakaf* law, Islamic banking law, and so forth.¹² Islamic law in Indonesia applies only in civil matters, however in Aceh province, the northernmost province of Indonesia, Islamic law also applies for certain offenses such as adultery, gambling, *khalwat* (intimacy without marriage bound), and selling and drinking alcohol. The legal bases of such laws are local regulations (*Qanun*).

A part from the statutes, political concepts played significant role in post-independence Indonesia. From 1945 to 1965 Indonesia was ruled by Sukarno, Indonesia first president whose entire regime revolved around a concept known as *Orde Lama* (Old Order) whereby all government powers were in the hands of the ruler. Shortly after seizing power, President Sukarno took a presidential decree to create *Pancasila*, a constitution-like concept that quickly became the driving force of the law in Indonesia. In 1965, a new political concept known as *Orde Baru* was brought in by Suharto, Indonesia’s second president who vowed to boost the economy but did very little to put a stop to authoritarianism and dictatorship. Both the political and legal fields were regulated by Suharto’s idea of *Demokrasi Terpimpin* (Guided-Democracy) that did not allow political and legal freedoms as shall be showed later on.

Despite a few reforms however, the post-independence legal system did not really break from its predecessor as many laws are still patterned on colonial laws. It was not until the advent of the *Era Reformasi* in 1998 that major positive changes were made to the Indonesian legal system.

¹¹ Marzuki, P.M. (2011), *Op.Cit.*, p.2

¹² See Omara, A. (2011). “Does the Current Regional Autonomy Support Legal Pluralism in Indonesia?”, *Jurnal Mimbar Hukum*, Vol 23, No 2.

2.3. The era reformasi legal system

The political concept known as *Era Reformasi* (Reformation Era) ensuing the fall of the Suharto's regime in May 1998 is regarded as the Indonesian government's attempt to bring about political, legal and social changes in response to the people's demand for greater individual freedom, democracy and human rights. But more importantly, it was a call for more regional autonomy and a greater recognition of *adat* rights to village resources. It is the political era considered by many if not all Indonesians including foreign observers as the era that brought about significant changes to Indonesia. This passage discusses some of these changes. From colonial time to Sukarno's *Orde Lama* followed by Suharto's *Orde Baru*, the Indonesian people have been in search for democracy, political and economic freedom. However, change did not really occur until 21 May 1998 when President Suharto yielding to public pressure and growing civil disorder in the wake of a continuing economic crisis, resigned and ceded power to his Vice President Bacharuddin Jusuf Habibie who, though very close to Suharto,¹³ vowed to turn Indonesia away from the path it had taken under his predecessors. Habibie's began reforming by immediately releasing political prisoners¹⁴ such as Sri Bintang Pamungkas, Muchtar Pakpahan, and Xanana Gusmão. Provinces were given greater control over their finances through regional Autonomy (*Otonomi Daerah*).¹⁵ President Habibie revoked some of the economic privileges given to the former president Suharto's family, though both were close. Although Habibie did not last in office for his bit to prolong his term failed to meet MPR's approval, he did accomplish a few crucial reforms worth mentioning:

- a) Enacting human rights provisions;
- b) Allowing the establishment of new political parties and unions;
- c) Releasing political prisoners; and
- d) Limiting the presidency to two terms of five years.

The advent of *Era Reformasi* has allowed Indonesia to hold its first direct presidential election in July 2004 that was won by a retired army general and former security minister Susilo Bambang Yudhoyono who vowed to fix the economy and to eradicate corruption. In fact, it was under president Yudhoyono's administration that the Corruption Eradication Commission or *Komisi Pemberantasan Korupsi* (KPK)¹⁶ established in 2002 began to operate. After two terms, President Susilo Bambang left office and was replaced by Joko Widodo who won the 2014 election.

In less than two decades, Indonesia has known five presidents: Habibie period (1998-October 1999), Abdurahman Wahid (1999-July 2001), Megawati Soekarnoputri (2001-October 2004), and Susilo Bambang Yudhoyono period (2004 - 2014) and Joko Widodo

¹³ It is assumed that Suharto is the father figure to Habibie. Two situations could justify this assumption: first the fact that Habibie was a key player in Suharto's administration, and second, Habibie's refusal to order a thorough investigation into Suharto's accumulated wealth after he was removed from office in May 1998.

¹⁴ Read Jajat Burhanudin, Kees van Dijk. (2013), *Islam in Indonesia: Contrasting Images and Interpretations*. Amsterdam University Press. p. 9

¹⁵ See Law No. 22/1999 on Regional autonomy.

¹⁶ The Komisi Pemberantasan Korupsi (KPK) is the Indonesian Corruption Eradication Commission, which was formed after special consideration on the extraordinary nature of corruption in Indonesia, which has become systemic and widespread, and has violated the human rights of the Indonesian people. The KPK was formed under Act No. 30 of 2002 on the Corruption Eradication Commission.

(October 2014-present). This could be interpreted as the Indonesian people's aspiration to democracy and freedom.

Last but not the least, *Era Reformasi* paved the way for implementing the rule of law and democracy through a series of amendments to the Indonesian 1945 Constitution. This was done in four stages at sessions of the People's Consultative Assembly in 1999, 2000, 2001, and 2002. As a result, the original Constitution has grown from 37 articles to 73, of which only 11% remain unchanged from the original constitution.¹⁷ The following are some of the major amendments made to the Indonesian 1945 Constitution:¹⁸

- a) Limiting presidents to two terms of office;
- b) Establishing a Regional Representative Council (DPD), which together with the People's Representative Council (DPR) makes up an entirely elected People's Consultative Assembly;
- c) Purifying and empowering a presidential system of government, instead of a semi presidential one;
- d) Stipulating democratic, direct elections for the president, instead of the president being elected by the People's Consultative Assembly;
- e) Reorganizing the mechanism of horizontal relation among state organs, instead of giving the highest constitutional position to the People's Assembly;
- f) Abolishing the Supreme Advisory Council;
- g) Mandating direct, general, free, secret, honest, and fair elections for the House of Representatives and regional legislatures;
- h) Establishing a Constitutional Court for guarding and defending the constitutional system as set forth in the constitution;
- i) Establishing a Judicial Commission.

These reforms, if implemented sincerely, could boost the Indonesian legal system. *Era reformasi* has helped revitalize the dormant *adat* law along with customary institutions through the decentralization Law as discussed above. However, the extent to which *adat* has been revitalized and its position within the Indonesian legal system is worth discussing.

2.4. The role of adat law

When Indonesia achieved independence in 1945, it inherited a justice system combining *adat* law, Islamic law, and Dutch civil law.¹⁹ The Dutch administration had dealt with the plurality of customary norms and institutions by establishing a rather weak hybrid legal system that applied different laws to different racial groups. In simple terms, Europeans were subject to Dutch law while Indonesians to traditional customary or *adat* law. But the notion 'adat law' was not recognized by the Dutch administration still it was brought up by Snouck Hurgronje in his work 'De Atjehers'.²⁰ However, the position of *adat* law changed in 1999 when Indonesia instituted a broad process of regional autonomy. Law No. 22/1999 on Regional Governance authorized district governments to reconfigure village governance structures – including dispute

¹⁷ See Indrayana, D. (2008), *Indonesian Constitutional Reform, 1999-2002: An Evaluation of Constitution*. Jakarta: KOMPAS Book Publishing, p.331

¹⁸ See Asshiddiqie, J. (2009), *The Constitutional Law of Indonesia*, Maxwell Asia, Singapore.

¹⁹ Lukito, R. (2013), *Op.Cit.* p. 6

²⁰ Marzuki, P.M. (2011), *Op.Cit.* p.4

resolution mechanisms – along inclusive and democratic lines.²¹ In accordance with regional autonomy, the law established democratically elected village parliaments and devolved a greater degree of executive authority. On the “judicial” side, article 101(e) gave binding authority to village heads to resolve disputes.

Customary justice systems in Indonesia have contributed immensely in the dispensation of justice services to poor and vulnerable people. *Adat* law is a law is well understood since it originates with the people in the most direct sense. Customary law tribunals are popular as they are accessible and familiar to the local populace. Generally, every actor involved in the customary legal system such as neighborhood heads, village heads, and religious leaders are based in the village, known to community members and are accessible. By contrast, state legal institutions are often located in distant district capitals. Even though customary law prevails in almost every aspect of people’s life, it is still under the domination of state law.

2.5. The role of the Islamic law

The existence of first Islamic courts in Indonesia remains poorly documented,²² thus leaving the subject matter to divers interpretations. However some Islamic scholars argue that Islam was brought into Indonesia by Islamic traders from India during the 13th century.²³ By the end of the 16th century, Islam was ahead of Hinduism and Buddhism as the leading religion of the peoples of Java and Sumatra with the exception of Bali that retained a Hindu-practicing majority, while the eastern islands remained largely animist until the 17th and 18th centuries when Christianity became predominant in those areas.²⁴ From what precedes, it is clear that the existence of Islamic court in Indonesia was prior to the arrival of the Dutch. The *resolutie der indische Regeling* enacted by the Dutch on 25 May 1760 was only a set of rules of on marriage and inheritance according to Islamic law.²⁵ Based on this ordinance, the Dutch created collegial courts in which a district-level religious official called the *penghulu* acted as chair and was assisted by member judges chosen from the local religious elite. The courts were vested with power to decide family disputes, but execution of the courts’ decisions required an executory decree from the civil court. The system was expanded to south Kalimantan in the 1930s, but at the same time the jurisdiction over inheritance was transferred to the civil courts. The Dutch did not seek to regulate the administration of Islamic law beyond the territory of Java, Madura, and parts of Borneo. In other parts of the colony, the matter remained under the control of local authorities as observed by Cammack and R. Michael Feener.²⁶

At independence, the Islamic judiciary was placed under the authority of the Ministry of Religion, which used executive powers to expand the system to other parts of the country. On 29 December 1989, Law No. 7 of 1989 on the Religious Court (*Pengadilan*

²¹ See Law No. 32/2004 on Regional Government, which repealed Law No. 22/1999 on Regional Government.

²² See Daniel S. Lev. (1972), *Islamic Courts in Indonesia: A Study in the Political Bases of Legal Institutions*. The Preface. University of California Press.

²³ *Ibid.* p. 4-5

²⁴ Burhanudin, J., & van Dijk, K. (2013). *Islam in Indonesia: Contrasting Images and Interpretations*. Amsterdam University Press. p. 109

²⁵ See Asep Saepudin, *Resume Sejarah Peradilan Agama di Indonesia*. Fakultas Syari’ah Institut Agama Islam Negeri Raden Intan Bandar Lampung 2009-2010

²⁶ Burhanudin, J., & van Dijk, K. *Op.Cit.*, p. 109

Agama) was passed by the People's House of Representatives or *Dewan Perwakilan Rakyat (DPR)*. This law is indicative of the important role that the Religious Court plays in Indonesian law and the community generally. Islamic law contributed in the development of legal language. The word '*hukum*' which is the Indonesian for 'law' originated from Arabic.²⁷ Many other words such as *hak* (right), *adil* (just) from which stem the terms *keadilan* (justice) and *pengadilan* (court), *hakim* (judge), *adat* (custom) derive also from Arabic. Islamic law also impacted on the Indonesian legal philosophy. Concepts such as *musyawarah* (consultation) and *mufakat* (concensus) are Arabic words and are always heard in dispute resolution.

In 2004, the administrative supervision of the Islamic judiciary was transferred from the Ministry of Religion to the Supreme Court. However, earlier in 1999, the province of Aceh was granted special autonomy status that included the authority to enforce Islamic law in areas beyond the established jurisdictions of Sharia courts in the rest of the country. Other areas, including Aceh, Jambi, Sambas, Pontianak, the East coast of Borneo, South Sulawesi, Ternate, and Ambon had separate Islamic tribunals staffed by judges called "qadi" (sometimes written "kadi" or "kali") or "hakim".²⁸ Finally, in West Sumatra, religious issues were decided by an assemblage of customary or *adat* leaders and religious officials that was called the "Friday Council".²⁹

It is important to note that even though Islamic law seems to have strong power in many areas, the Religious Judicature Act declares the Supreme Court to be the highest judicial authority on matters of Islamic law.³⁰ The Indonesian Islamic Courts have jurisdiction over marriage and divorce. The Marriage Act deals with the substantive law of marriage and divorce.³¹ However, when new courts were created in other parts of the country after independence, the jurisdiction of these new tribunals was defined more broadly to include both matrimonial causes and inheritance. Many discrepancies in the jurisdiction of Islamic Courts in different areas remained until the passage of the Religion Law in 1989, which, for the first time, established a uniform jurisdiction for all Islamic tribunals nationwide. The Act provides for the existence of first instance courts, called *Peradilan Agama* in every district (*kabupaten*) and municipality (*kotamadya*), and for an Islamic appeals court, called *Peradilan Tinggi Agama* in every province.³²

Unlike *adat* law, enough room has been given to Islamic law within the Indonesian legal system. Islamic law has contributed not only into bringing notions like morality, ethics, and decency within the political arena, but it also helped maintaining public order. Leaders have used the powers granted them through the decentralization laws to implement regulations relating to the wearing of Islamic dresses, proscribe conduct such as prostitution, gambling, and sale or consumption of alcohol, the insertion of Arabic programs at school, the prohibition of sexual intercourse before marriage

²⁷ See Lev, D.S. (1972), *Islamic Courts in Indonesia: A Study in the Political Bases of Legal Institutions*. University of California Press. p. 5

²⁸ Examples of decisions made by Islamic tribunals from south Sulawesi and Ternate can be found in 29 *Adat Rechtsbundels: Bezorgd Door de Commissie Voor Het Adat Recht* 37-201 (1928).

²⁹ See Supomo (1987), *Bab-bab Tentang Hukum Adat*, Pradnya Paramita, Jakarta.

³⁰ See Religious Judicature Act, Act No. 7/ 1989, and article. 3-5(1).

³¹ See Salim, A. (2007), *Dynamic Legal Pluralism in Indonesia: The Shift in Plural Legal Orders of Contemporary Aceh*. A Paper presented at the First International Conference on Aceh and Indian Ocean Studies, Banda Aceh 24-26 February 2007

³² See Cammack, M.E., & Feener, R.M. (2012), *The Islamic Legal System in Indonesia*, Pacific Rim Law & Policy Journal Vol. 21 No. 1.

(*khalwat*) and the administration of the Islamic Tax (*Zakat*).³³ However, despite the fact that the majority of the Indonesian population is Muslim, the post-independence governments did not opt for the implementation of Islamic Law in Indonesia, the world largest Islamic State. Studies suggest that this was mainly due to political reasons as well as the divergence among the world Islamic Schools as noticed by Francois Borella (2008). In fact, Borella argues that between 750 and 850 AD, four Islamic Schools of Law gradually gained power as the orthodox interpretation of the Sharia giving birth to fiqh or legal science. Named after their author, these four schools of law spread today throughout every major Islamic State or *dar al Islam* (House or Country of Islam): North Africa and Sub-Saharan is *maliki* (founded by Malik ibn Anas),³⁴ Egypt, the Middle East, and Central Asia are *hanafi* (founded by Abu Hanifa an-Nu'man),³⁵ Saudi Arabia and Qatar are *hanbali* (founded by Ahmad ibn Hanbal), Eastern Africa and Asia are *chafi'I* (founded by Muhammad ibn Idris ash-Shafi'i).³⁶

These schools have different views on technical matters.³⁷ Islam clearly could not be the foundation of the Indonesian legal system in that the Indonesian population, contrary to many Islamic States is not homogenous. The Indonesian "founding fathers" understood this when Sukarno declared that Indonesia should be on nothing but the doctrine of *Pancasila* (Sanskrit for "five principles"), defined in the constitution as ["] where does this quote end a belief in the one supreme god; just and civilized humanity; the unity of Indonesia; democracy guided by the inner wisdom of deliberations among representatives; social justice for all the Indonesian people. Proclaiming Indonesia as an Islamic state at the dawn of independence was too controversial to be realistic, the minority Christians would have objected and those in Eastern Indonesia might have been tempted to secede as Robert Cribb puts it.³⁸ Cammack and R. Michael Feener made the same remark when they argue that the Indonesian founding fathers were divided on the issue of Islamic law and Islamic courts, and the status and survival of a separate system of Islamic tribunals was for many years uncertain.³⁹

3. The Problems within the Indonesian Legal

3.1. Foreignness of the colonial law and the neglect of adat law

A law that governs the life of a free people should be of they own making, and so should be their legal system and legal institutions. Unfortunately, this was not the case in many postcolonial countries, including Indonesia. Wignjosoebroto,⁴⁰ an Indonesian scholar argues that the concept of *Rechtsstaat* is foreign to Indonesian civilization. He observes that the legal system in the developing world is alien to the people for it does

³³ Salim, A. (2007), *Op.Cit.*

³⁴ See Ramadan, H.M. (2006), *Understanding Islamic Law: From Classical to Contemporary*, Rowman Altamira, p. 26-27

³⁵ *Ibid.* p. 24-29

³⁶ Saeed, A. (2008). *Op.Cit.*, p. 17

³⁷ Borella, F. (2008). *Elements de droit constitutionnel*. Paris Presses de Sciences Po, p. 344

³⁸ Read Emmerson, D.K. (1999). *Indonesia Beyond Suharto, Polity, Economy, Society, and Transition*. M. E. Sharpe, Inc. Armonk, New York. Chap. I, p. 21

³⁹ Cammack, M.E., & Feener, R.M. (2012), *Op.Cit.*

⁴⁰ See Wignjosoebroto, S. *Masalah Pluralisme Dalam Pemikiran Dan Kebijakan Perkembangan Hukum Nasional*. Seminar Nasional Pluralisme Hukum: Perkembangan di Beberapa Negara, Sejarah Pemikirannya di Indonesia dan Pergulatannya Dalam Gerakan Pembaharuan Hukum, 21 November 2006 di Universitas Al Azhar, Jakarta.

not really reflect their cultures and way of life. He refers to this situation as “the law of non-transferable law” and he claims that the shaping of the legal systems in the West was a populist revolution in Western civilization whereas in postcolonial countries it was imposed upon indigenous people. He believes that written law does not always reflect the law of the people who live and abide by local law in their daily lives. He goes on to say that the Western law is not understood by the people it is meant for due to not only unconsciousness but also unwillingness. Much like many other Indonesian legal scholars, Wignjosoebroto concludes that the legal system inherited from the Dutch is divisive.

Another negative impact of the colonial legal system is the neglect of *adat* law. As mentioned at the outset of this paper, when the Dutch occupied Indonesia, *adat* law did not preoccupy them as they saw it as no law at all. Dutch courts to which the Europeans and, to some extent, the Chinese were subject, overruled their *adat* counterparts. The occupation of West Sumatra by the Dutch may serve as an example of *adat* oblivion. In fact, while Article 2 of the West Sumatran colonial Decree known as *Plakat Panjang*⁴¹ stipulates that the Dutch colonial government shall not interfere with nagari government (village government), as well as the authority of *adat* leaders (*penhulu*) and their appointment, Article 3 immediately follows up with the sentence: the government will appoint some of the leaders as representatives of the colonial government who shall be paid and shall act as representatives of the government and the people. These two articles not only contradict one another as the former promising that the government will not interfere in *adat* affairs, and the latter which actually does the interference. Not only does this prove the subordination of *adat* law to the colonial law but it also shows the Dutch’s disrespect for *adat*. Rusli Amran,⁴² discussing the relationship between the Dutch colonizers and the *Minangkabau* people in West Sumatra, argues that the intention of the Dutch was to create a parallel government in order to compete and ultimately destroy traditional government system that has been running for centuries and replacing it with aristocratic government like in Java. Rusli argues that not only did the Dutch destroy *adat* but they also put in place systems and practices he believes were deemed repugnant and ridiculous in the eyes of the *Minangkabau* people. He observes:

*What disgusted the people and became a mockery were the titles handed out by the Dutch colonial administration as they were all created to mimic the conditions in other places, in Java, for example. But all of these titles or ranks have nothing to do with adat. They have no connection with the living law (adat) as they were only forced upon the people. Those titles are: regent, head of village, chief penghulu, clan penghulu, etc.*⁴³

Rusli claims that approximately 40 years following the promulgation of *Plakat Panjang* in West Sumatra, there still was a discrepancy between colonizers and the *Minangkabau*

⁴¹ *Plakat Panjang* is a colonial document containing the then colonial Commissary General Van den Bosch’s 7 point commitment to the *Minangkabau*. Ten days after Van den Bosch left West Sumatra, the announcement known to the *Minangkabau* as *Plakat Panjang* was made on October 25, 1833. This announcement was issued by the two Government Commissioners on behalf of the Commissioner-General (Van den Bosch). This is an official document containing the solemn promise of the Dutch government to the *Minangkabau* people who had protested prior to Van den Bosch’s visit. Many of such documents were released by the Dutch throughout occupied Indonesia. For more on *Plakat Panjang* see Amran, R. (1981), *Sumatra Barat. Hingga Plakat Panjang*, Sinar Harapan, Jakarta.

⁴² *Ibid*, p.187

⁴³ *Ibid*. p. 189

people regarding the law: it was written on paper that the judiciary shall be run "according to the custom, traditional indigenous ways" but in practice, only Western applies.⁴⁴ He concludes by making the sad remark that the Dutch succeeded in influencing or changing the customary court system, thanks to their officials such as heads of village and chief *penghulu* whom they paid. Rusli believes that this is the reason why pure *adat* court system is no longer able to survive.⁴⁵

In Western Europe, a small part of the world whose civilization has dominated nearly the rest of the world, customary laws were at the epicenter of the legal systems. The term Common Law which means law developed as a result of custom and judicial decisions suffices to prove this reality. ⁴⁶ Clarence Darrow,⁴⁷ agrees that custom is the true driving force of the law. During the pre-revolutionary period in America, the thirteen colonies developed their own judicial systems despite the enormous influence of the England common law legal system each had its own local variations and customs to which strong attachment developed. The importance of customs in shaping the legal system is demonstrated by Darrow when he argues that men from the earliest time arranged themselves into groups; they traveled in a certain way; they established habits and customs and ways of life. These "folk-ways" were born long before human laws and were enforced more rigidly than the statutes of a later age. Slowly men embodied their "taboos," their incantations, their habits and customs into religions and statutes. He emphasizes that a law was only a codification of a habit or custom that long ago was a part of the life of a people, and that the legislator never really makes the law; he simply writes in the books what has already become the rule of action by force of custom or opinion, or at least what he thinks has become a law. However, Darrow goes on to say that neither conscience nor religion (though it is higher and more binding on man than human law) is the foundation of the law.

In fact, Darrow believes that religion is controversial as it rests on interpretation, and even the things that seem the plainest have ever been subject to manifold and sometimes conflicting construction. He therefore concludes that religious doctrines do not and clearly cannot be adopted as the criminal code of a state.⁴⁸ As for conscience, Darrow argues that it is purely a matter of environment, education, and temperament, and is no more infallible than any habit or belief. None of the generally accepted theories of the basis of right and wrong has ever been the foundation of law or morals Darrow observes.⁴⁹ He claims that the true driving force of the law is custom—the folkway. These customs and folk-ways must be so important in the opinion of the community as to make their violation a serious affair. Such violation is considered evil regardless of whether the motives are selfish or unselfish, good or bad.⁵⁰ Darrow concludes that laws which interfere with the habits, customs, and beliefs of a large number of people never receive the assent of so large a percentage as to make people

⁴⁴ *Ibid.* p. 222

⁴⁵ *Ibid.* p. 227

⁴⁶ Read Sandra Day O'Connor (2003), *The Majesty of the Law, reflection of the Supreme Court Justice*. Chap 22

⁴⁷ Read Darrow, C, (1922) *Crime: Its Cause and Treatment*, the Pennsylvania State University *Electronic Classics Series* 2004. p. 9, 78

⁴⁸ *Ibid.* p. 7

⁴⁹ *Ibid.* p. 7-8

⁵⁰ *Ibid.* p. 8-9

conscious of any wrong in violating them, and therefore people break them when they can.⁵¹

However, it has been 72 years that independence was proclaimed. But surprisingly, the so-called new legal system still displays the same landscape as its colonial predecessor. Evidence of this could be found in the Article 7 section (1) of Law No. 12 / 2012 which sets the following as the hierarchy of laws in Indonesia:

1. The 1945 Constitution (Undang-Undang Dasar 1945);
2. The Provision of People's Consultative Assembly (MPR);
3. Statutes (Undang-undang) / Interim Emergency Laws (PERPU);
4. Government Regulation (Peraturan Pemerintah);
5. Presidential Regulation (Peraturan Presidenor PP);
6. Provincial Regulation (Peraturan Daerah or Perda);
7. District Regulation (Peraturan Kota).

Much like the 1945 Constitution whereby *adat* law is not mentioned in plain legal language, the above law is ignorant of *adat* law. Who is to blame for this neglect? The Parliament? Or *adat* leaders? The research revealed that a great part of the responsibility is to be attributed to the inefficiency of some some *adat* leaders who have renounced their duty of holding the Parliament accountable for failing to apply *adat*. Most *adat* leaders seem to lack any interest in the law-making process and would rather handle petty crimes while living off government handouts.⁵²

3.2. Half-century of military and totalitarian regimes

The first Indonesian organization of armed forces was established on 22 August 1945 and was called the *Badan Keamanan Rakyat* (BKR/People's Security Board) aimed at 'maintaining security together with the people and related state bodies'. However, when President Sukarno took power, he changed the name of BKR to *Tentara Keamanan Rakyat* (People's Security Army/TKR) on 5 October 1945 marking the birth of the Indonesian military.⁵³ This date is considered the anniversary of the Indonesian Armed forces. From this moment on, the Indonesian military has continued to interfere in both political and legal affairs.⁵⁴ The involvement of the army in political arena after Indonesia proclaimed independence is due to the fact that the very soldiers who fought for independence and later reorganized themselves to form the military base of the nation had a prior history of being members of political organizations and the militia wings of political parties during the Dutch colonial era. Two events explain the Army's involvement in politics:⁵⁵

- a. The declaration of martial law in 1957 allowing the military to get involved in politics as they ran the state of emergency; and

⁵¹ *Ibid.* p. 79

⁵² During an interview at his office on December 18, 2014, Dr. Risnaldi, a DPRD Member told me that *adat* leaders do not make use of the procedure given to them for having a say in legislations in West Sumatra. He explained that not making use provided means signifies that *adat* leaders simply do not submit reports of their concerns to the local DPRD.

⁵³ See Ikrar Nusa Bhakti et al., *Military Politics, Ethnicity and Conflict in Indonesia*. Crise working paper No. 62 January 2009. p. 6

⁵⁴ See Herbert Feith, *Suharto's Search For a Political Format*, Australia's Neighbours, May-June 1968.

⁵⁵ *Ibid.* p. 7

- b. The introduction of the ‘middle way’ concept in 1958 by the then Army Chief of Staff A.H. Nasution.

The middle way basically provided the opportunity for TNI (the new Indonesian Military) to become involved in the government on the basis of the “*asas kekeluargaan*” principle (the Family Principle). These ideas were later developed by the New Order under Suharto who took power following the political violence of 1 October 1965 as the representative of the military then referred to as *Angkatan Bersenjata Republik Indonesia* (ABRI)- Indonesian Armed Forces, ABRI). Suharto swore in as president in 1968. Elections⁵⁶ were held in 1971, but they were tightly controlled by the government. The government-backed Golkar (*Golongan Karya*) party secured most of the seats in the Parliament, as it would in each of the elections held at five-year intervals thereafter. Similarly, the People’s Consultative Assembly or *Majelis Permusyawaratan Rakyat* (MPR) routinely returned Suharto to the presidency, unopposed, at five-year intervals. He then used the military to build personal power and a dictatorship. To support his efforts, Suharto established a pyramid base whereby he controlled all resources of power.⁵⁷ Similarly, the military was not only involved in politics but in the legislative. In fact, during *Orde Baru* the military held a certain number of seats in the House of Representatives and the People’s Consultative Assembly.⁵⁸

During Suharto’s administration, the demand of military group that one-fifth of the members of provincial district assemblies, approximately one-fourth of the members of Parliament, and one-third of the members of the People’s Congress be appointed by President Suharto’s military establishment was agreed to in late 1969 with nearly no major opposition from the political parties. However, the 360 members of Parliament, not appointed by the military were to be elected on the basis of party preference rather than individually.⁵⁹ The following table presents the number of seats held by the military during Suharto’s presidency:

Table 1. Number of ABRI seats in DPR from 1967 to 1999

Year	Number of Seats	Total Seats
1967	43	350
1968	75	414
1969	75	460
1985	100	550
1992	100	550
1997	75	550
1999	35	550

Source: Ikrar Nusa Bhakti, Sri Yanuarti and Mochamad Nurhasim, *Military Politics, Ethnicity and Conflict in Indonesia*. Crise Working Paper No. 62, January 2009.

⁵⁶ Under both Sukarno and Suharto’ regimes no direct free and democratic elections were held. Their terms were extended only through votes in unrepresentative parliaments. The Parliament during that time period was unrepresentative because a vast majority of the seats was held by military officers chosen by the president since all the political parties were banned back then (see table 5).

⁵⁷ Read Ikrar Nusa Bhakti et al., *Military Politics, Ethnicity, and Conflict in Indonesia*. Crise Working Paper No. 62 January 2009. p. 6

⁵⁸ See Schwarz, A., & Paris, J. (1999), *The Politics of Post- Suharto Indonesia*. Council on Foreign Relations Press, New York. p. 3-15

⁵⁹ Emmerson, D.K. (1999), *Op.Cit.* p. 44-45

Bhakti's analysis is confirmed by Herbert Feith when he argues that on January 30 the acting president disclosed the terms of parliament's "redressing." Its membership would be raised from 347 to 414. The representation of the armed services would be raised from 43 to 75.⁶⁰

Vital to the New Order and how it worked were Indonesia's army forces. They maintained the domination of the state over society. They justified their intervention in civilian politics under the doctrine known as *dwifungsi*,⁶¹ the dual function. According to this idea, the armed forces has two closely related roles; to defend the country not only from conventional military threats originating abroad, but also from domestic dangers of any kind, military, politics, socioeconomic, cultural, or ideological. The armed forces implemented the interventionist dual-function doctrine by placing active and retired military personnel in the assembly, parliament, and provincial and district legislatures; in executive and staff positions in central, provincial, and district administration; in positions of formal and informal authority over Golkar; and by keeping the population under surveillance through territorial command that covered the country from Jakarta to the outermost islands and down to every village. Serving officers occupied roughly one-fifth of the seats in every regional legislature, where they reported to their local commanders, and in national parliament and assembly. Serving and retired officers were appointed to post in civilian government for reasons of patronage and control. Nearly half of the provincial governorship and district headship, by far the most important civilian government positions in the regions, were also in military hands.⁶² However, since the advent of *Era Reformasi*, the Indonesian Military has given up its *duafungsi* and has returned to its primary duty that is to defend the integrity of Indonesia and its people against possible attacks both from within and outside.⁶³ The unprecedented example of the non-involvement in politics is the role it played during the impeachment process of President Abdurrahman Wahid in July 2001. The military refused to back him up when he attempted to hold onto power by issuing an emergency decree to dissolve the Parliament that filed two separate censures of MPR against Wahid alleging corruption and incompetence.

3.3. Corruption within state apparatus

Corruption has long been one of the most critical problems that undermine the Indonesian administration. The symptoms of this social disease were felt as early as during President Sukarno's regime. In no way this means that corruption did not exist under the Dutch colonial administration. The period ensuing independence is relevant as it marks the birth of a new State capable of running its own affairs. After independence was gained, two political regimes, i.e. the Sukarno and the Suharto regimes considered by most Indonesian as well as foreign scholars as the most totalitarian and the most corrupt regimes Indonesia has ever had, contributed into plundering the vast majority of the wealth the country has. Although some of Suharto's policies are deemed to have brought about considerable economic growth, many of his actions worked towards the very opposite direction of the alleged

⁶⁰ See Herbert Feith, *Suharto's Search For a Political Format*, Australia's Neighbours, May-June 1968.

⁶¹ Under Suharto's regime, the dual function (*dwifungsi*) of the military as both a defence force and a participant in civilian politics and governance was legitimised by Law No. 20/1982 on State Defence Regulations.

⁶² Read Donald K. Emmerson (1999), *Op.Cit.* p. 44-48

⁶³ Read Adam Schwarz and Jonathan Paris (1999), *Op.Cit.* p. 11-15

achievement. A large share of Indonesia's wealth was concentrated in the hands of the president's family and their associates.⁶⁴ Writing at the dawn of Indonesia's independence, Feith, denounces the corruption under both Sukarno and Suharto's administrations when he argues:

*"...Suharto must hesitate before he introduces measures which will add to the pressure which the government exerts on the great mass of the population, for he knows that most such measures are likely to be implemented in distorted fashion at the local level and to be used as warrants for more regulatory activity hampering the flow of trade. Government has borne down quite heavily on this great mass of lower-class people, and it has done so in fairly arbitrary fashion – witness the many illegal tolls, the often very high cost of bribes for formally free government services, and the not infrequent demands by local officials for unpaid labor. This was the situation in the Soekarno period; it is much the same now, and is aggravated inasmuch as increased numbers of villagers and lower-class townsmen now live under political arrest or in its shadow."*⁶⁵

Corruption under Suharto's administration is also known and criticized by many Indonesian scholars including Bhakti who argues that Suharto's regime created a lot of problems to Indonesians, including human suffering, corruption, collusion, nepotism, economic dependency on foreign debt, and economic collapse. Apart from that, during the Suharto period, there was no political freedom at all.⁶⁶ Since its advent, *Era reformasi* (the political era that came into being after the collapse of Suharto and his *Orde Baru*) vowed to rid the sociopolitical and legal fields of corruption by embarking on massive reforms; hence its name. Today however, though these reforms sound beautiful, they seem unable to eradicate corruption.⁶⁷ Not only has corruption taken roots within the central government, but it has also spread throughout nearly every Indonesian province. President Bambang Yudoyono, having realized the escalation of corruption decided to go to war with it by empowering the Corruption Courts along with Commission for Corruption Eradication or *Komisi Pemberantasan Korupsi* (KPK).

Corruption Court was established by Law No. 30/2002 on Corruption Eradication Commission. Under this Act, there was only one corruption Court located at Central Jakarta District Court. However, with the enactment of Law No. 46/2009 on Corruption Court, more corruption Courts may be found in every capital city/district whose jurisdiction covers an area of law of the concerned Court.⁶⁸ KPK is a state agency which, in the course of performing its duties and authority, is independent and free from any influences.⁶⁹ Since modern corruption in Indonesia is catalogued as an extraordinary crime, the creation of KPK is based on the need for its systematic eradication.⁷⁰ According to Law No. 30 of 2002, KPK is vested with the authority to:

- a) Coordinate with other institutions authorized to eradicate corruption;
- b) Perform pre-investigations, investigations, and prosecutions against corrupt acts;
- c) Perform preventive actions against corruptions; acts and;
- d) Monitor state governance.

⁶⁴ *Ibid.*, p. 5-15

⁶⁵ See Herbert Feith, *Suharto's Search For a Political Format*, Australia's Neighbours, May-June 1968.

⁶⁶ See Ikrar Nusa Bhakti, *The Transition to Democracy in Indonesia: Some Outstanding Problems*.

⁶⁷ See KPK's Annual Reports from 2004 to 2014.

⁶⁸ See Supreme Court's Annual Report 2010.

⁶⁹ See the Openings of KPK's Annual Reports.

⁷⁰ See the Openings of KPK's Annual Reports.

KPK investigates acts of corruption committed by Government officials (The trial of former Minister for Religious Affairs (2005) along with his former Secretary General and the arresting of former Chief of BKPM (Investment Coordinating Board), Governor, Regent, Mayor, Members of Parliament, Board of Directors of State-Owned Enterprises, National Police, and Civil Servants. It basically holds everyone having public authority accountable for their actions before the Indonesian people. Today, KPK regards itself as a “catalyst of corruption eradication and governance reform”.⁷¹ The battle to eradicate corruption in Indonesia is not a recent initiative. In fact, several institutions aiming at the eradication of corruption had existed before the creation of KPK. Those institutions are: the Military Operation (1957), the Corruption Eradication Team (1967), the Commission for the Appraisal of the Wealth of Government Executives (KPKPN), and the Joint Commission for Corruption Eradication (2000). But according to KPK’s Commissioners, those previous institutions were not focused on prevention efforts.⁷² There is no better institution to look for data on corruption than KPK. The following diagrams show the number of corruption cases prosecuted by KPK from 2004 up to 2014.

Table 2. Corruption cases prosecuted by KPK from 2004 to 2012

No	Occupation	2004	2005	2006	2007	2008	2009	2010	2011	2012
1	Parliament Member				02	07	08	27	05	16
2	Head of State Institutions		01	01		01	01	02		01
3	Ambassador				02	01		01		
4	Commissioner		03	02	01	01				
5	Governor	01		02		02	02	01		
6	Mayor/Regent			03	07	05	05	04	04	04
7	Echelon I, II & III	02	09	15	10	22	14	12	15	08
8	Judge							01	02	02
9	Private	01	04	05	03	12	11	08	10	16
10	Others		06	01	02	04	04	09	03	03
Total		04	23	29	27	55	45	65	39	50

Source: KPK’s Annual Report.

In addition to KPK’s data, 815 corruption cases were prosecuted by the Supreme Court or *Mahkamah Agung* (MA) in the year 2007.⁷³ Within the following year, 2008, the Supreme Court handled 1.545 cases of corruption.⁷⁴ In 2009 however, only 64 cases were brought before the Supreme Court.⁷⁵ In the year 2010, only 44 cases raised.⁷⁶ 2011 seemed to be a very busy year for the Supreme Court for it dealt with 963 corruption cases plus 06 other cases perpetrated by the Army.⁷⁷ No clear data on the number of corruption cases handled in the year 2012 is provided by the Supreme Court,⁷⁸ which, from 2007 up to 2012, has prosecuted over 3437 cases of corruption. While from 2004 to 2012 KPK has handled a total number of 337 corruption cases from the Indonesian

⁷¹ See KPK’s Annual Report 2005

⁷² Ibid.

⁷³ See Supreme Court’s Annual Report 2007, p. 23-24

⁷⁴ See Supreme Court’s Annual Report 2008, p. 19

⁷⁵ See Supreme Court’s Annual Report 2009, p. 37

⁷⁶ See Supreme Court’s Annual Report 2010, p. 60.

⁷⁷ See Supreme Court’s Annual Report 2011, p. 35-37

⁷⁸ See Supreme Court’s Annual Report 2012

most trusted Individuals and Institutions. Of all these corruption cases, the three government branches account for 128.

Table 3. Corruption cases prosecuted by KPK in 2013

No	Occupation	2013
1	Parliament Member	08
2	Head of State Institutions	04
3	Ambassador	-
4	Commissioner	-
5	Governor	02
6	Mayor/Regent	03
7	Echelon I, II & III	07
8	Judge	04
9	Private	24
10	Others	07
Total		59

Source: KPK's Annual Report.

Table 4. Corruption cases prosecuted by KPK in 2014

No	Occupation	2014
1	Parliament Member	04
2	Head of State Institutions	09
3	Ambassador	-
4	Commissioner	-
5	Governor	02
6	Mayor/Regent	12
7	Echelon I, II & III	02
8	Judge	02
9	Private	15
10	Others	08
Total		54

Source: KPK's Annual Report.

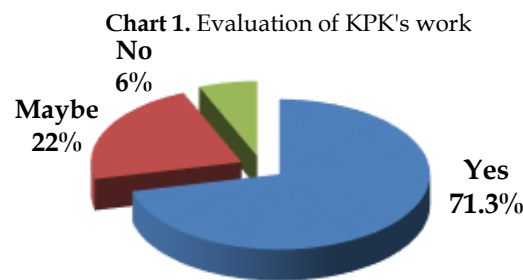
In the same year 2014, 689 corruption cases were handled by the Indonesian Supreme Court.⁷⁹ From 2004 to 2014, KPK has investigated and repressed 450 corruption cases not to mention those dropped due to lack of sufficient evidence. Of these 450 cases, 77 were perpetrated by parliament members. All these figures prove that corruption runs at the highest level of the government which most certainly destroys the trust of the public in government officials. Everything is lost when the public loses faith and trust in the people who represent them. Legal system and institutions that support it would lose all credit in the eyes of the people as they no longer rely on them. No wonder why 60% do not trust the police (see Table 6). At this point people would start to rely more and more on customary law and customary courts. Corruption is a serious threat to the development of legal system and the reliability of legal institutions. The Indonesian people hate corruption as much as they welcome any effort to fight it. This can be proved through the following survey conducted on KPK during the research.

⁷⁹ See Supreme Court's Annual Report 2014, p. 40

Table 5. Evaluation of KPK's work

Age	Type of Answer, Gender & number of Respondent					
	Yes		Maybe		No Idea	
	Male	Female	Male	Female	Male	Female
18-28	77	50	19	26	5	7
29-39	22	19	3	8	2	1
40-50	15	8	1	9		2
51-61	15	3	1		2	
62-72	5					
Total	134	80	24	43	9	10
% M/F	81	60	15	32	5	7
Combined %	71.3		22.3		6.3	

Source: Primary data collected from 5 different research fields (Aceh, Bali, Batam, Medan and West Sumatera).



Source: Same as the above

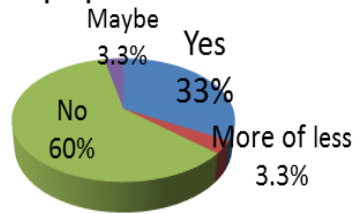
It can be inferred from the above data that the work of KPK is appreciated by a vast majority of the Indonesian people. Consequently, this shows that KPK has the support of the majority of Indonesians in its struggle to build a corruption-free Indonesia.

Besides the legislative, corruption also prevails within the judiciary. It spreads from the locale Police to the Lower Courts before making its way to State's Higher Courts (the arrest of the Constitutional Chief Justice by KPK in 2013 is sadly one example). Under the 1945 Constitution, the Indonesian Police force or *Polisi Republik Indonesia* (POLRI) is vested with power to enforce the law. In fact, Article 30 section 4 of the Indonesian Constitution stipulates that POLRI, as an instrument of the state that maintains public order and security, has the duty to protect, guard, and serve the people, and to uphold the law. This makes the police the very first guardian of the law. Unfortunately, however, the police seem to have lost credibility in the eyes of the population. During research, respondents were asked whether or not they trust their local police. The following table and chart provide answers to this question:

Table 6. The people's trust in the police

Age	Type of answer, gender & number of respondent							
	Yes		Maybe		No		More or Less	
	Male	Female	Male	Female	Male	Female	Male	Female
18-28	32	24	2	3	63	54	4	2
29-39	12	4	1		13	23	1	1
40-50	7	3		4	8	12	1	1
51-61	11	1			6	2		
62-72	5							
Total	67	32	3	7	90	91	6	4
% M/F	40	24	2	5	54	68	4	3
Combined %	33		3.3		60		3.3	

Chart 2: the people's trust in the Police



Source: data collected from 5 different research fields (Aceh, Bali, Batam, Medan and West Sumatera).

The research reveals that 60% do not have trust in the police. When asked the reason why, most of the respondents pointed at corruption. The police are not the only ones to blame, the system of recruitment, too, has a great part of responsibility. In fact, although there is no official data, it is repeatedly heard that a significant sum of money needs to be paid to whoever has power within the police hierarchy if one wants to join the forces. Should this be true, a police officer might want to get back all the money he paid by unjustly and illegally taxing the population. There is a lack of data because the subject matter is corruption, which is always underground, thus elusive. It can also be inferred from the above data that a vast majority of the Indonesian population thinks that the police does not or cannot provide justice. This really is detrimental to the rule of law whose purpose is to strengthen institutions of the state by increasing the people's trust in them. The people's mistrust in the police contributes into weakening the justice system. Another major factor that contributes into weakening the Indonesian justice system is the corruption of the judges.

The corruption within the judiciary has been exposed to the public by KPK ever since its creation in 2000. As showed above, from 2004 to 2014, KPK has investigated and repressed 450 corruption cases excluding those dropped due to lack of sufficient evidence. Of these 450 cases, 77 were perpetrated by parliament members and 11 were committed by High Court judges. The arrest of the Constitutional Chief Justice in 2013 is the most critical of all the corruption cases prosecuted by KPK. In fact, on the night of 02 October, 2013, Constitutional Chief Justice, Akil Mochtar, one of the highest officials of the country and therefore head of one of the highest institutions of law enforcement in Indonesia (the Constitutional Court or *Makahmah Konstitusi* (MK)) was arrested by KPK. He was suspected of accepting bribes related to the election dispute case of two heads of the region, namely in *Gunung Mas*, Central Kalimantan and *Lebak, Banten*. The alleged corruption involved evidence of money around Rp. 3 billion in foreign currency and Rupiah. KPK stepped in this corruption case after receiving a report from the public since the beginning of September that year. Such a scandal not only ruins the reputation of the Indonesian Constitutional Court, but more importantly, it does help reinforce the skepticism of the Indonesian people toward their institutions.

The 1945 Constitution recognizes five courts: Public Courts, Religious Affairs courts, Military Tribunals, State Administrative Courts, and Constitutional Court. When asking the Indonesian people what in their opinion all these courts suffer most, they mostly point at corruption. It is very common to hear people say that the Indonesian justice system only works for the affluent people, that '*all you need to win is money*', says a respondent during the research. As mentioned above, in the year 2007 alone, the

Supreme Court handled 815 cases of corruption, 18.467 cases of narcotic, and 2.213 cases of illegal logging. The prosecution of these three criminal cases by the Supreme Court has helped the state recover Rp. 142.692.724.942 as either fine or reparation.⁸⁰ In 2008, the Supreme Court handled 1.545 corruption cases, 22.649 cases of narcotic, and 2.446 cases of illegal logging. Consequently, Rp. 382.300.098.604 was returned to the state.⁸¹

3.4. Unsynchronized Laws

As enumerated previously, the Indonesian Legislative order is set forth in Article 7 paragraph (1) of Law No. 12 of 2012 as follow:

1- The 1945 Constitution (*Undang-Undang Dasar 1945*); 2- The Provision of People's Consultative Assembly (MPR); 3- Statutes (*Undang-undang*)/Interim Emergency Laws (PERPU); 4- Government Regulation (*Peraturan Pemerintah*); 4- Presidential Regulation (*Peraturan Presiden*); 5- Provincial Regulation; 6- District Regulation.

For the legal system to make sense there should be a vertical synchronization between the above laws/regulations (though no room is made for customary law as discussed earlier). This means that each type of law must not conflict with any law higher than its own type in the hierarchy; and a law can amend or repeal a law lower than its own type in the hierarchy. Simply speaking, a Provincial Regulation or *Peraturan Daerah* (Perda) is legally valid, only if/when it does not contradict a law higher on the hierarchy; and, once passed, a Perda may be canceled by any statute higher on the hierarchy. A case of such conditions between higher and lower laws is pointed out by Tjondronegoro (2003) when he argues that although the Regional Autonomy Act no.22/1999 confers greater competency of land use to the Regent (*Bupati*), there is a subsequent Presidential Decree No.10/2001 (made in April 2001) that seems to overrule this provision. This decree mandates that local government cannot enact law regulations on land. Legally speaking, Presidential Decrees are considered to be subordinate to Laws enacted by parliament, such as the Agrarian Reform and Natural Resource Management Act. Yet district administrators are expected to obey the decrees. This causes confusion as to which law should apply.⁸²

There are several cases of contradicting laws within the Indonesian Legislation, which unfortunately, help prove that conformity in laws is yet to be achieved.⁸³ The inconsistency within the Indonesian legal system is not recent; in fact, it dates as far back as during colonialism. The best example to illustrate this assumption is the West Sumatran colonial Decree known as *Plakat Panjang* issued on October 25, 1833 by the then Commissioner General Van den Bosch.⁸⁴ The document contains mostly the 7 commitments Bosch made to the *Minangkabau* people after severe riots broke up.⁸⁵ Article 2 of this document stipulates that the Dutch colonial government shall not interfere with *nagari* government (village government), as well as the authority of *adat*

⁸⁰ See Supreme Court's Annual Report 2007, p. 23

⁸¹ See Supreme Court's Annual Report 2008, p. 19

⁸² See Sediono M.P. Tjondronegoro, *Land Policies in Indonesia*. World Bank Working Paper No. 37435, June 19, 2003

⁸³ *Ibid.*

⁸⁴ Van den Bosch was the commissioner General in Charge of Dutch colonial administrations in several Indonesian provinces, including West Sumatra.

⁸⁵ See Amran, Rusli (1981), *Sumatra Barat. Hingga Plakat Panjang*, p.10

leaders (*penghulu*) and their appointments. Article 3 immediately follows up with the sentence: the government will appoint some of the leaders as representatives of the colonial government who shall be paid and shall act as representatives of the government and the people. Needless to say that these two articles are contradictory as one promises one thing and the other disregards the very same thing.⁸⁶

The followings are other cases of contradicting laws between central and local governments:

Case 1:

*Provincial Government Regulation No. 9/2000, nagari government is vested with authority over tanah ulayat for the benefit of all community members, yet there is a Presidential Decree (Decree No. 10/ 2001) promulgated in 2001 that says land administration throughout Indonesia should be centralized. This Provincial Regulation not only contradicts the Presidential Decree, but it is also in contradiction with Article 33 section 3 of the Constitution which stipulates that land, the waters and the natural resources within shall be under the powers of the state and shall be used to the greatest benefit of the people.*⁸⁷

Case 2:

*Madiun District Perda No 4 of 2001 on the Establishment of the Village Representative Body. This Perda aims to provide greater representation to women and youth. However, this Local Regulation was met with discontent from the village leaders on the ground that it contradicts Ministry of Home Affairs' (MOHA) Decision No 64 of 1999, which does not provide for this greater representation.*⁸⁸

Case 3:

Tangerang City Perda No 8/2005 on Prostitution. This Regional Regulation forbids anyone whose attitude or behavior is 'suspicious, making him or her appear to be a prostitute' from being on a road, hotel, or 'other places' in the city (art 4(1)). It also prohibits persons from working as prostitutes or running brothels (art 2(1) and (2)). This Perda violates some of the fundamental rights enshrined Indonesian Constitution such as equality before the law, and non-discrimination. By targeting certain individuals, the Perda breaks with one of the core principles of the law i.e. the generality of the law. This also contradicts the Indonesian Criminal Code (KUHP) as it does not guarantee the presumption of innocence. Finally, this Perda contradicts many sections of the Article 28 of the Indonesian 1945 Constitution. It also contradicts Law No. 39/ 1999 on Human Rights. There are numerous other cases but I have enumerated here just a few. In no way, I argue that Indonesian legislative bodies are at war with each other as many of their laws contradict one another. Instead, I suggest that there should be more synergy with regard to the law-making process for a more comprehensible and efficient legal system.

Case 4:

The discrepancy between the Aceh Islamic Law and the Indonesian national law as pointed out by Arskal Salim. He argues that many proponents of the sharia in Aceh were already predisposed toward viewing the central government's offer to re-establish an independent Mahkamah Syar'iyah in Aceh with considerable skepticism. This was mainly due to the

⁸⁶ Ibid.

⁸⁷ See Tegnan, H. (2015). "Legal Pluralism and Land Administration in West Sumatra: The Implementation of Local and Nagari Governments' Regulations on Communal Land Tenure." *The Journal of Legal Pluralism and Unofficial Law*. p. 5-9

⁸⁸ See Supreme Court Decision No 03 G/HUM/2002.

ambiguous jurisdiction granted to the Mahkamah Syar'iyah. Article 25 (2) of Law 18/2001 mentioned that the Mahkamah Syar'iyah's jurisdiction was subordinated to the prevalent national legal system. The text of Article 25 (2) stated: "The jurisdiction of the Mahkamah Syar'iyah (...) is based on the Islamic shari'a within the national legal system, which will be further arranged through the Qanun of the Province of Aceh . Salim claims that two phrases contradict each other within the above statute.

A number of studies suggest that Indonesia has known two legal systems i.e., the pre-independence and the after independence legal systems, and that legal pluralism in Indonesia is the consequence of colonialism. It is important to note that during the last two decades, Indonesian legal system underwent a series of crucial reforms to the extent that it is no longer scholarly to assume that these two periods helped shape the Indonesian legal system. A third period known as *Era Reformasi* as discussed earlier, constitutes a major turning point within the Indonesian legal system in that it broke up radically with colonial legal tradition put in place before and after independence was obtained. It is also false to believe that legal pluralism is the product of colonialism in that the Indonesian people have been practicing legal pluralism long before colonialism. Though vital, the reforms brought up by *Era Reformasi* did not suppress *adat* and Islamic laws that make up the Indonesian legal system besides the National Law. Instead, it contributed to promoting them through decentralization process. The revival of *nagari* government after the fall of President Suharto, is an example. However, the changes brought about by *Era Reformasi* did not truly provide room for *adat* law within the Indonesian legal system as discussed above. Acknowledging this is Safitri who argues that the state law has adopted both *adat* and Islamic law. Yet, in many fields, people continue to struggle to get their *adat* laws respected and recognized by the state.⁸⁹

4. Conclusion

The Indonesian culture has been shaped by long interaction between original indigenous customs and multiple foreign religions, including Hinduism, Buddhism, Confucianism, Islam, and Christianity which has resulted in the birth of a complex national legal system.⁹⁰ The complexity of the Indonesian legal system led its 'founding fathers' to wisely opt for the rule of law, not the rule of Islam or customs as the driving force of the law in Indonesia. As many postcolonial civil law countries, the Indonesian legal system was first customary and Islamic before the arrival of the Dutch with their Western Civil Law. It is important to know that not only did Indonesia inherited a distorted version of the Dutch legal system as the same colonial law did not apply back in Holland, but she also received an inaccurate account of her own customary laws as they were translated and recorded based on the colonizers' interests. It therefore makes little sense to claim that the Indonesian legal system takes its roots in the Indonesian customary law.

Surprisingly, however, when independence was gained, the 'founding fathers' chose to uphold the very same discriminatory, divisive, and misleading colonial legal system, instead of building one that truly reflects their own people's way of life. Both President

⁸⁹ See Safitri, M.A. (2011), *Legal pluralism in Indonesia's land and natural resource tenure*, Forest Peoples Programme (FPP) and Asia Indigenous Peoples Pact (AIPP).

⁹⁰ Daniel S. Lev (1972), *Op.Cit.*

Sukarno and his successor President Suharto failed to reverse this tendency as their respective regimes were deemed authoritarian. Neither *Orde Lama* nor *Orde Baru* did succeed in establishing an environment whereby the rule of law, democracy, and human rights would thrive. Shortly after the collapse of *Orde Baru*, *Era Reformasi* was brought in and promised hope and happiness to the Indonesian people through reforms. It is under this political concept that the Indonesian legal system began to break away not only from its colonial legacy but also from the path it had been taking four decades after independence. Some of the changes brought about by *Era Reformasi* include freedom, regional autonomy, the establishment of a corruption eradication commission, government accountability, free democratic elections, and the constitutionalizing of human rights principles. Despite the ongoing efforts to improve the Indonesian legal system, several issues need to be addressed such as the hegemony of Western legal tradition, the neglect of *adat* and Islamic laws, corruption and nepotism, and unsynchronized and confusing laws/regulations. Although there are no perfect legal systems, the need to minimize confusion and uncertainty within the law is more than crucial. Laws that contradict one another or confuse the mind of individuals are no laws at all for law is order and harmony.

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