Introduction

INTRODUCTION

Some time in August 2000 I was asked by Dr. Naoyuki Sakumoto to do a study and write a book on Indonesian Contract Law for the Institute of Developing Economies – Japan External Trade Organization (or IDE-JETRO).

Since for the last 30 years, after I finished my doctoral thesis in 1972 on "Transnational Problems of Foreign Investments in Indonesia", I was convinced that the first thing to promote and improve our investment climate is to establish an Indonesian National Contract Law in order to improve legal certainty in our country, I gladly accepted the offer.

This study was meant to become an additional study towards establishing a unified Contract Law for all groups and people living in the Republic of Indonesia. Numerous studies and drafts for the codification of our Contract law have been conducted since our Independence on August 17, 1945. Unfortunately, even after 55 years of our independence we still live in a pluralistic legal environment, first created by the Dutch.

What is more, after so many decades of attempts to unify our legal system, now at the start of the 21st century and because of the Reformation Movement towards Democratization, Decentralization, protection of Human Rights and the Rule of Law which started in 1998 with the downfall of ex-President Soeharto and his New Order, it seems that the trend is back again towards more plurality and specialization.

Therefore, contrary to my own former concept and intentions, which I propagated both to my students and as the head of the National Law Reform Agency (1988 – 1996) of the (at that time) Department of Justice, at present the trend towards more unification of law during the first half century of our independence, as also voiced by our founding fathers and our eminent lawyers

and judges, Prof. Subekti[1]. Prof. R. Wijono Prodjodikoro, Prof. Sutan Malikul Adil, Prof. Soetan Mohamad Sjah and many others, who even advocated that those unified laws, equally applicable to all citizens of Indonesia should be codified, seems to be unrealistic, in view of the very strong demands of the regions outside Java, such as Aceh, Riau, Kalimantan., Moluccas, East Nusa Tenggara, Irian, etc. who are threatening to secede from Indonesia, whenever their own laws and customs, and social needs are not respected by the Central Government.

In such a strong environment towards more democratization, decentralization and recognition of the local laws and customs as a form of maintaining social justice, unification and codification would only result in more opposition, more conflicts and disintegration of the state and of the nation.

Therefore, in this age of globalization, we need to find a new pattern for our national legal system which (a) on the one hand recognizes the demands of the 300 regions or autonomous areas or so, but (b) at the same time forms a common basis for the Indonesian country as a whole, thereby (c) also adhering and upholding the universal legal principles recognized by the majority of legal systems in the world.

It is with this in mind, that we have divided this study in 7 (seven) chapters, encompassing :

Chapter 1. A brief history of Contract Law in Indonesia, including some features of our Adat Law and the basic difference between "European" Contract Law (as commonly practiced in today's business and investment circles) and Adat Contract Law.

Chapter 2. A description of the "European" Contract Law as contained in the 1848 Civil Code and as interpreted and/or applied by our Courts, Government Officials and Businessmen.

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[1] Prof. R. Subekti, S.H. : Bunga Rampai Ilmu Hukum, Alumni, Bandung, 1977, p. 58 – 62.

Chapter 3. The development of new (customary) Contract Law since 1967.

Chapter 4. Principles of Contract Law according to the UNIDROIT Model Law, for International Commercial Contracts, which to my mind could serve as a model, or at least as a yardstick for our national law of contracts, including the Bill on the Law of Obligations.

Chapter 5. The Academic Draft for a Bill of the Law of Obligations.

Chapter 6. The future of what according to what the researchers think will have to become or will most likely become (part of) the Indonesian Law on Contracts.

Chapter 7. Conclusions.

The Role of Judge-Made Law in Indonesia

In Indonesia the *stare decisis* rule was never applied, although in the Netherlands and in the Netherlands-Indies (before Independence) the judgements of the judges were always compiled and commented on by the experts.

Since Independence, though, no regular compilations of judgements were published and the principle of independence of the judge was very strictly adhered to. As a consequence, the judges did not think they were obliged to follow previously made considerations of previous judges or of judges of a higher court.

This was the reason why judge-made law or case law did not become a source of law in the true sense of the word, like in other countries, including the Netherlands and the former Netherlands-Indies, because :

(1) there was no obligation for judges to follow the legal reasoning of higher judges or of previous judges;

(2) up till the present time no continuous digest exists of court judgements, although one can find a number of publications prepared by the Supreme Court (*Yurisprudensi Mahkamah Agung, Varia Peradilan*) or by private persons or organizations (like Chidir Ali's series on court cases and the compilation of judgements on bankruptcy).

More important as a source of law than judge-made-law – in particular with respect to contracts – are the business contracts practices and customs which have developed in the last 50 years of our Independence.

International treaties and conventions, practices and customs have also grown in importance as in-direct sources of Indonesian law, since many of those norms have found their way in Indonesian Public and Administrative regulations.

In addition, many of our judges, government lawyers and attorneys not only view legislation as our most important source of law, but there is a tendency that they also interpret the law and regulations in a very strict and formal legalistic way.

That is why such Model Laws as developed by UNIDROIT and UNCITRAL are very helpful in the drafting of new laws, and in the interpretations of contracts and of old laws in order that the application and implementation of the law will become fairer and more in accordance with present day demands of justice and of legal certainty.

All this forms the background of why legal reform and judicial reforms is of utmost importance in support of economic development which requires a safe and orderly environment, where contracts and legal obligations are respected and enforceable through the courts, and administration, without thereby

neglecting the paramount importance of balance, equilibrium, fairness and justice.

Law and Economic Development

During the last 30 years of accelerated economic development, economists who were the main decision makers in the country, looked upon law as obstacles in the process of economic development.

Lawyers were regarded as backward, every time they posed that a governmental policy or public law was against the principles of the Constitution or contrary to paramount principles of fairness, balance and social justice.

Usually it was said that law would hamper progress and development. Nevertheless, they used the form of public (administrative) law to change the law, especially in the field of foreign investment for the sake of economic progress and development.

Hence we find numerous lower regulations, such as government regulations (*peraturan pemerintah*), presidential decrees (*keputusan presiden*) and even ministerial decisions (*keputusan menteri*), including those issued by the Chairman of the (Foreign) Investment Board (*Ketua Badan Koordinasi Penanaman Modal*) overriding the Parliamentary Acts (*Undang-undang*), which is completely against all principles of the rule of law.

The Reformation Movement is therefore determined to correct and reverse this illegal practice. But in the process these attempts in turn meet with a lot of opposition of the financial -, economic – and political sectors.

Whilst on the one hand the Reformation Movement has the ideals of Supremacy of Just Law, Social Justice and Democracy as its ultimate goal, thereby also trying to improve certainty of law in support of economic development, in this

transition period, however, all the wrong-doings of the past, such as corruption and nepotism for the sake of economic development (both conducted by government officials and by businessmen and "entrepreneurs") come in the open, giving the impression, as if law enforcement becomes, once again, an obstacle to economic development.

Even the legal profession is divided in those lawyers, who for the sake of money and high fees defend the old (illegal and corrupt) ways of governance and doing business, and others, who despite of all difficulties keep struggling towards the Rule of Law, Social Justice, Clean Business and Good Governance.

The struggle is a very fierce and difficult one. Nevertheless, those of us, who really want to uphold the banners of Truth, Justice and Fairness, Good and Democratic Governance and Clean Business, this struggle has to be fought in all its fierceness.

Indeed, this study, albeit only a very small contribution, is dedicated to those ideals.