Chapter I

INTRODUCTION: PRESENT POSITION OF THE UNIFICATION OF LAWS IN INDONESIA

PROLOG

Let us begin, with a statement of "The Father" of law & Development Studies in U.S.A, **Robert B. Seidman (in Law and Society Review, 1972: 311),** that:

> "... everyone talks about law and development, but nobody does much about it. How does law set off, monitor, or otherwise regulate the fact or pace of social change? ...Atomistic studies' relating specific norms of law to specific sorts of social change are plentiful. Holistic studies purporting to explicate general propositions relating rules and behaviour can hardly be found. The few that do exist do hardly more than assure us, most sincerely, that yes, there really is a relationship between law and social change."

The above mentioned opinion suggested by Robert B. Seidman is accurate, indeed. The topic of the "Law and Development" study is no other than what are "the relationships between law and social change." Or in other words, the study of the Law and Development emphasizes "law as a **tool of social engineering"** or law as a framework for policy making. And we must know, that the use of law as a tool of development is widespread in all contemporary societies whether underdeveloped or developed countries.

On the following, I will put forward some definitions of law and legal system.

There are many ways, in reality, to look at the law or the legal system. For the purpose of the topic of this essay, I will use the definition of law proposed by Roscoe Pound (Curzon,1979:26), that:

> "... Law in the sense of the legal order has for its subject relations of individual human beings with each other and the conduct of individuals so far as they affect others or affect the social or economic order. Law in the sense of the body authoritative grounds of... judicial decisions and administrative action has for its subject matter the expectations or claims or wants held or asserted by individual human beings or groups of human beings which affect their relations or determine their conduct."

However, it is necessary to know that, at least, there are three ways to define law:

a. **Institutional definition of law,** typically looks for the nature of law in its **public** character. Law is bound up with government. See, Donald Black (1976: 2) defined law as: "Law is governmental social control. It is, in other words, law is the normative life of a state and its citizens, such as legislation and litigation. Or, see, Oliver Wendell Holmes, Jr. (1897: 457, 461), defined law as "the prophecies of what the courts will do in fact." The great legal philosopher John Austin (1832) defined law as the command of the sovereign.
b. The second definition, as we have mentioned, equates law with a set of rules. The law is the body of sacred norms and nothing more (see, "Lawrence M. Friedman, 1975: 8).
c. The last type of definition looks at law not as function or functions nor as institutions or rules, but as some special kind of **process or order** (see also, Lawrence M. Friedman, 1975: 10). Lon Fuller (1964: 106) speaks of law as "the enterprise of subjecting human conduct to the governance of rules."

Therefore, of course, no "true" definition of law. Definitions of law derive from the aim or function of the definer. In this article, we want to examine how legal institutions in Indonesia relate to development, including **law as an instrument of economic policy.** With reference to this function, Terence Daintith (1988: 3-4) said:

> "... Law is a powerful social guidance mechanism: those governments enjoy, at the least, a highly privileged position in their

> State's law-making process, and may often have independent if constitutionally circumscribed law-making powers of their own. It would be surprising, therefore, if such governments did not deliberately set out to use law as a means to the achievement of their ends in the economic policy field – and indeed, in all other policy fields. And in fact, ever since governments have had "policies" in the modem sense, they have supported them with laws."

We know that law and legal process are extremely important in our society, which seems to be very obvious. But, as I said above, defining exactly what is meant by law, legal process and legal system can be difficult.

According to Lawrence M. Friedman (1998: 17), law is an everyday word, part of the basic vocabulary. But it is a word of many meanings, as slippery as glass, as exclusive as a soap bubble. And, as we said, law is a concept, an abstraction, a social construct; it is not some concrete object in the world around us - something we could feel or smell like a chair or a dog.

The next question is what is **a legal system**? In modern Indonesian society, the legal system is everywhere with us and around us.

It is plain that the legal system has more in it than codes of rules, dos and don'ts, regulations and orders. It takes a lot more than that to make a legal system. There are, to begin with, rules about rules. There are rules of procedure, and rules that tell us how to tell a rule from a non-rule. To be more concrete, these are rules about jurisdiction, pleadings, judges, courts, voting in legislatures, and the like. Or, according to Rosemary Hunter et al. (1995); there is more to law than rules, robes, and precedents. Rather, law is an integral part of social practices and policies, as diverse and complex as society itself.

There are three components of the legal system (see Lawrence M. Friedman, 1975: 14-16):

1. The **structure** of a system is its skeletal framework; it is the permanent shape,the institutional body of the system, the tough, rigid bones that keep the process flowing within bounds. We describe the **structure** of a judicial system when we talk about the number of judges, the jurisdiction of courts, how higher courts are stacked on top of lower courts, what persons are attached to various courts, and what their roles

are consisted.

2. The **substance** is composed of substantive rules and rules about how institutions should behave.... A legal system is the union of "primary rules" and "secondary rules." Primary rules are norms of behavior; secondary rules are norms **about** those norms - how to decide whether they are valid, how to enforce them, etc. Both primary and secondary rules, of course, are outputs of a legal system. They are the ways of describing the behavior of the legal system seen in cross-section. Litigants behave on the basis of substance; it creates expectations to which they react.
3. The **legal culture** refers, then, to those parts of general culture: customs, opinions, ways of doing and thinking - that bend social forces toward or away from the law.

When we study the topic of "law and development," then the three components of the "legal system" mentioned above should be examined in balance. One of the weaknesses on many studies of "law and development" has been their overemphasis merely on the **substance component,** especially the legislation, despite the fact that, in reality, the other two components, the **structure** and the **legal culture,** are equally important and equally relevant to various issues of "law and development."

As an example, when we examine the functions of courts by merely using a**"technical approach,"** many aspects of the topic may not be explained. In addition to the adoption of the **"technical approach"** that merely considers enacted law sources, the **sociological or social approach,** that considers "legal culture aspect." This is in accordance with what Donald Black (1989: 31) states that:

> "Lawyers who cannot distinguish cases sociologically as well as technically have a serious handicap. They must forever work in darkness, never understanding why some precedents are upheld while others are ignored ... Court decisions are the greatest mystery to those who would understand them with legal doctrine alone...."

I agree with the opinion of Lawrence M. Friedman (1969: 29) that the issue of "law and development" has to do with the following questions:

> "Does the type of legal system and legal institutions that a society uses help or hinder that society in its march toward modernization? How does law influence the rate of economic growth? How does law brighten or darken the road to political wisdom or stability? How can a society improve its system of justice? What happens when laws are borrowed from more advanced countries?"

The significance of relationship between law and development was epitomized on the first page of Oliver Wendell Holmes' **The Common Law**. The often-quoted passage reads:

> "The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained otaly the axioms and corollaries of a book of mathematics."

Therefore, for better use of "law as a tool of social engineering," it is essential in each case to examine the interdependencies between the various components of the relevant legal systems, the interrelations between these components and the legal and social phenomena. Consideration of the whole relevant legal system is an essential requisite for effective and efficient use for "law as a tool of social engineering," but an inadequate one. We must know that, the legal system being a subsystem of society, therefore, consideration of legal policy instruments in abstraction from other social policy instruments is misleading. Instead, the uses of "law as a tool of social engineering" must be considered within a broader series of possible policy instruments such as politic, economic, educational and technological ones.

In this case, Yehezkel Dror (in Stuart S . Nagel (Ed) 1970: 75-81) suggests that:

> "A broad approach to the use of law as one policy instrument in combination with many others requires not only a new perspective

> on the relations between law, other legal system policy instruments, and social policy instruments; it requires also a new methodology for designing and identifying preferable combinations of a multiplicity of policy instrument settings. This task is in all respects beyond the present and potential capacities of both jurisprudence and social sciences. Rather, it belongs to the emerging policy sciences (see, Lasswell and McDougal, 1966) and especially to policy sciences analysis which focuses on the stimulation of policy designs and identification of preferable policy alternatives."

Therefore, in my opinion, our findings emphasize the necessity to base the practice of the use of "law as a tool of social engineering" on a broad perspective of law as one of many policy instruments which must be used in combination, and policy analysis as the methodology for identifying preferable combinations of such policy instruments. Thus, prescriptive study on the use of "law as a tool of social engineering" must be based on both a broad view of policy instruments and policy analysis methodology.

As we know, there are three main functions of law mentioned by Roscoe Pound (1954: 25-47) applicable to developing countries, namely:

1. the function of maintaining order and security in society;
2. to function as a tool of social control;
3. to uphold justice for each and all the state's citizens.

Much of the function as a tool of social engineering is and will be done by the government.

Roscoe Pound (1959: 350-8) has provided a general description about "law as a tool of social engineering," that:

> "... with the use of ‘law as a tool of social engineering,’ sociological jurists seek to enable and to compel law making, whether legislative or judicial or administrative, and also the development, interpretation, and application of legal precepts, to take more complete and intelligent account of the social facts upon which law must proceed and to which it is to be applied. In different parts of the world they are insisting upon some or all of eight points:

(1) Study of the actual social effects of legal institutions, of legal precepts, and of legal doctrines.
(2) Sociological study in preparation for law making.
(3) Study of the means of making legal precepts effective in action.
(4) Study of juridical method: psychological study of the judicial, administrative, legislative and juristic process as well as philosophical study of the ideals.
(5) A sociological legal history: that is, study not merely of how doctrines have evolved, considered solely as legal materials, but study also of what social effect the doctrines of the law have produced in the past, and how they have produced them.
(6) Recognition of the importance of individualized application of legal precepts-of reasonable and just solution of individual cases."

I am of the opinion that before adopting law as "a tool of social engineering,"various non-legal aspects should be taken into account, so that, in the future, the created legal rules may achieve the intended goals. Otherwise, the opposite may occur rather than what has served as the original goals.

For that purpose, Podgorecki (1971: 54) suggests four important principles on the use of "law as a tool of social engineering" which are so needed to make the resulting regulations be effective and maximal. That is:

1. Well mastering the situation in hands
2. Making an analysis of the evaluations and put them on a hierarchy. In this case, the analysis involves assumptions whether the method to be adopted will not have effects possible of aggravating the situations.
3. Verifying such hypotheses, as whether the method considered to use, will, indeed, lead to the goals as desired, eventually.
4. Measuring the effects of the legislation.

I. UNIFICATION OF LAW IN INDONESIA

A. THE BACKGROUND OF THE INDONESIAN LEGAL SYSTEM

It is true, indeed, that the questions about the issue of "law and development," are impossible to be separated from the characteristics of the legal system in each country. Therefore, to understand the legal system of "the Republic of Indonesia," a person first must be aware of the history of that country's legal system and what the citizens of that country think concerning their laws.

People commonly believe that history and tradition are very strong in Indonesian legal system. Some parts of the law of Indonesia can be traced back very far to the days of the Dutch colonization.

Prior to the advance of foreign colonist to the Nusantara (Indonesia) land, peoples of Indonesian had its own "native law" known as "Hukum Adat" ("adat law"). The form of "adat law" is **"unwritten adat rules, "** though referred to as a single entity. It is not really one uniform system of law, but many separate systems; according to the Dutch scholar, Mr. Van Vollenhoven, the nineteen adat system are quite different from European regulations. However, there are similarities in their "legal culture." "Indonesian legal cultures" are predominated by the "general culture of Indonesia," such as "compromise culture," as opposed to the "Western culture" that is characterized as "conflict culture."

To explain slightly about the legal situation in Indonesia during the Dutch colonization, I quote what Sudargo Gautama & Robert N. Hoick (1983: 1) suggest:

> "From the earliest days of Dutch colonization, inhabitants of the Indonesian archipelago have been divided for legal purposes into various "population groups" (golongan rakyat, bevolkingsgroupen), based primarily on racial origin. Although other group distinctions were also made - for example, between Dutch subjects and foreigners, between residents and non-residents, between Dutchmen and several categories of non-Dutchmen - no distinction was more important or more pervasive than the division into population groups. What kinds of contracts one might enter into and in what form, whether one could own land and where, from whom one could inherit wealth and in what ways - matters such as these depended almost entirely on which

> population group one belonged to. This was so because distinct rules of contract law, of property law, of inheritance law existed for each group. Each group, that is to say, had what amounted to its own legal system - separate regulations administered by separate government officials and enforced in separate courts of law. Although transactions between members of regulations were sometimes made, the basic division was never overcome. Distinct, and very different, systems of law have thrived side by side in Indonesian for centuries."

However, I need to assert that what has been suggested above is only in the field of private law. In the case of **criminal** law, there were two Criminal Codes, one applicable to Europeans and the other applicable to the "natives" as well as those treated in the same way as the "natives." But, since January 1, 1918, all habitants of Indonesia regardless of their population group have been subject to a uniform Criminal Code, **(Wethboek van Strafrecht voor Indonesie** or Kitab Undang-widang Hukum Pidana). Nevertheless, due to the fact that some regions outside Java still had native Courts, "Wetboek van Strafrecht" did not apply in these regions with the exception of a series of articles that had been declared to be applicable there in Law Number 80 enacted in 1932.

Furthermore, Sudargo Gautama & Robert N. Hoick (1983:1) write that:

> "The precise motive for this division has been disputed. An announced purpose was to ensure that persons living in the archipelago - a diverse gathering of many nationalities, customs and religions - would be free to follow the special requirements of custom and religion in matters such as marriage and the family. In retrospect, however, the motive seems also to have been the division of Indonesian society into three distinct levels, with Europeans at the top and Indonesians at the bottom, in order to ensure the continuing domination of the ruling class. Thus, for example, Christian Indonesians were always grouped with the indigenous population despite the Islamic orientation of indigenous law, while Chinese traders, who often served as middlemen between Dutch firms and the local population, were made subject to European regulations to facilitate their role as middlemen, even though European rules were not always in keeping with Chinese customary law."

A law policy of the Dutch Colonial Government began to take shape in 1848, when the Dutch Colonial Government started to make a codification of law in Indonesia (formerly "Hindia Belanda") by enacting a Civil Code (Burgerlijk Wetboek) and a Commercial Code (Wetboek van Koophandel) for Europeans in Indonesia. These were in fact nothing more than a duplicate of "Burgerlijk Wetboek" and "Wetboek van Koophandel" that had been enacted 10 years previously (in 1838) in the Netherlands.

How is of policy of the Dutch Colonial Government to the Indonesian original customary law **(hukum adat**)? In actual fact, the Dutch Colonial Government had every inaccurate picture of Indonesian Customary Law (hukum adat) at that time. Nor did the Dutch Colonial Government have any interest vested in the laws of the Indonesians. It was only after contacts with the "natives" (or **"inlander"**) began to increase, following the establishment of tea, coffee, rubber, and sugar-estate companies which were engaged in the production of cash crops to be sold in the world market, that the problem of how best to cater for the interests of these Dutch Companies arose, and the Dutch Colonial Government began to formulate a policy regarding the laws of these natives. Not long afterward, the church became interested too, in connection with their efforts to spread christianity in Indonesia (see also, R. Subekti, 1976:9). It was at this time that the Dutch got the idea of drawing up written law for the natives in order to ensure **"legal certainty,"** but by this was meant certainty for the Dutch).

I still need to assert that the differentiation of "population classifications" was formally regulated under the provisions of positive law enforced by the Dutch Colonial Government, that is:

a. **Article 163 of the Indische Staatsregeling**: which defines who belongs to what group.
b. **Article 131 of the indische Staatsregeling**: which regulates the law in force for each group.

The classification of all persons living in Indonesia into one of three groups, is:

1. **Europeans** include:
    a. Dutchmen;
    b. all other persons whose 'origins' are European;
    c. Japanese;
    d. other persons who, in their native country, are subject to family laws similar to Dutch law, for example, Australians and

Americans.

e. legitimate or properly recognized children of persons in group b, c, and d, and their descendants.

2. **Natives**: the indigenous population of the "Nusantara" archipelago, except for those Indonesians who have legally transferred to one of the other groups and have not subsequently re-entered the native one.
3. **Foreign Orientals:** all the persons not included in the European or native groups. In reality, this means Chinese, Arab, Indian, and Pakistan inhabitants.

Different applications of private law in Indonesia were as follows:

1. Customary laws were applied to all native Indonesians.
2. Such laws as the law on Authorship Rights, the Law on Industrial Property and Patents, and several others were applid to all inhabitants.
3. Islamic law was applied to all native Indonesians of the Muslim religion regulating certain aspects of their live, that is, the Marriage Law and the Inheritance Law and the Law of Will (a written statement about how a person wants his property to be distributed after his death).
4. Laws which had been specially created for native Indonesians such as for instance The Law on Indonesian stock companies, the Marriage Law (ordinance) for Christian Indonesians, and other Laws.
5. The Civil Code ("Burgerlijk Wetboek") and the commercial Code (the Wetboek Van Koophandel), which had been originally applied only to Europeans and which had subsequently been extended to apply to the Chinese, and certain parts, particularly of the Commercial Code ("Wetboek van Koophandel"), had also been declared to apply to native Indonesian.

So, as a result of law policy of the Dutch Colonial Government, there are four kinds of marriage law in force in Indonesia:

1. the Civil Code regulating the marriage among persons who are subject to European Law, i.e. the Europeans and the Chinese.
2. the Islamic marriage-law applying to all native Indonesians of the Muslims religion.
3. the law for marriages of Christian Indonesians.

4. the native customary law **(hukum adat**) for marriages of persons who are neither Muslims nor Christians that differs from area to area.

Because of the fact that different laws were in force for different groups of the population of Indonesia, then a problem arose over the question of which law would apply to "mixed" relationships, that is to say, relationships involving various different legal groupings each with their own laws in Indonesia. This problem gave birth to what became known as **"hukum antar golongan" or "inter-group law"** ("intergentiel recht") which was also referred to as the law between different groups.

Some of this "inter-group law" is laid down in written regulations such as in the Ordinance on Mixed Marriages (S.1898 Number 158), the Marriage Ordinance for Christian Indonesians (S.1933 Number 74) which deals in the last articles with the question of differences of religions, conversions in marriages. Article 1603 X of the Civil Code, which regulates labor relations between persons subject to different laws, and elsewhere. But the main bulk of inter-group-law has been created and developed by "precedent" or "case law," that is to say by Justices of the Supreme Court ("Mahkamah Agung"), by judges and courts when passing decision in various cases. How about the influence of the Japanese occupation government in Indonesia (1942- 1945)? The only positive contribution made by the Japanese occupation government was the elimination of the dualism in the composition of the law courts in Indonesia. It abolished the special law courts for Europeans known as the Raad van Justitie and the Hoog Gerechtshof.

B. THE INDONESIAN LEGAL SYSTEM

Through colonization period by the Dutch Government, a "concordance principle'" was applied by the Dutch Colonial Government in Indonesia as its colony. The Indonesian legal system belongs to the Dutch legal system. This means that in terms of methodology, style of legal thought and reasoning the structure of legal institutions, doctrines of legal classification and procedure, the Indonesian legal system bears a close resemblance to the Dutch legal system. A newcomer to Southeast Asia might well wonder how it came about that Indonesia and Thailand belonged to the Civil Law family when other countries in the same region (Singapore, Malaysia, and Brunei) are part of the Common Law family. The short answer, of course, is colonization or influence by different western powers during the colonial era. British colonization was

responsible for bringing Singapore, Malaysia, and Brunei into the common law fold, whereas Dutch colonization explains how Indonesia came to be part of the civil law family.

As a kind of civil law, the Indonesian legal system is predominated by "enacted law." The statutes, because of the rigors of drafting involved, appear to be the best means of enunciating the rules needed at a time when the complexity of social relations demands that precision and clarity be paramount.

C. SOURCES OF LAW IN THE INDONESIAN LEGAL SYSTEM

The rules that make up Indonesia's laws emanate from a variety of sources which carry different degrees of legal authority. Sources of law may be generally classified as written or unwritten law, or consisted of "official sources'" or "unofficial sources." In the event of conflict, written law generally prevails over unwritten law.

The hierarchy of Indonesian sources of law is consisted of:

a. Official Sources or Formal Sources

1. Statutory Law
2. Customs
3. Treaties or the International Conventions
4. Decided Cases or Precedents
5. Legal Scholar Opinion or Doctrines.

b. Unofficial Sources or Non-formal Sources

That is **legal consciousness** of members of some public: attitudes, values, beliefs, and expectations about law and the legal system. The law is an image and incentive in the minds of the people.

The former refers to 'enacted law' i.e., any law enacted by body possessing legislative powers. In descending order of legal authority, Indonesia's written law comprises of the Constitution, legislation, and other regulations.

In accordance with the principle of **lex superior derogat legi inferiori,** the inferior statute should not defy the superior one. It is necessary that every circle of society knows the statute hierarchy taking effect in Indonesia.

1. Statutory Law

The General statutes is the whole body of enacted laws, or all positive laws in a written form. Then, any positive enactment to which the state gives the forces of a law is a "statute," whether it has gone through the usual stages of legislative proceedings, or has been adopted in other modes of expressing the will of the people or other sovereign power of the state. In an absolute monarchy, an edict of the ruling sovereign is statutory law. Constitution being direct legislation by the people must be included in the statutory law, and indeed they are examples of the highest form that the statute law can assume.

(a) Constitution

The Constitution lies at the apex of the hierarchy of Indonesia law. It lays down the fundamental principles and the basic framework of state organizations as well as enshrines the fundamental rights of the individual vis-à-vis the country. The Constitution of Indonesia, **Undang-Undang Dasar 1945,** is the supreme law of the land. This means that the law-making powers of the Indonesia's Parliament (that is, the House of Representatives of the People, or DPR-RI) are limited by the Constitution, and any Act of the Parliament (the House of Representatives of the People or DPR-RI) which is inconsistent with the Constitution will be void to the extent of such inconsistency.

(b) Decree of the People's Consultative Assembly of the Republic of Indonesia (TAP MPR-RI)

As we know, the Republic of Indonesia is a unitary state, not a federal state like United States of America, and the sovereignty of the state is in the hands of the people, fully performed by the People's Consultative Assembly of the Republic of Indonesia (Majelis Permusyawaratan Rakyat Republik Indonesia). The Majelis Permusyawaratan Rakyat (MPR-RI) consists of all members of the House of Representatives of the People (DPR-RI) plus the representatives of various provinces ("Utusan Daerah") and functional groups ("Utusan Golongan") to be regulated by Statute.

The function of the People's Consultative Assembly of the Republic of Indonesia ("MPR-RI") are: to draw up the Constitution and, if necessary, to make amendments on the Constitution for which 2/3 of all MPR-RI members ought to be present and 2/3 (two-third) of the Members present have voted in favor of the amendment, and also to nominate the President and the Vice President, and to point out the general guidelines of the State's policy.

"Decree of the People's Consultative Assembly of the Republic of Indonesia"("Ketetapan MPR-RT') is next in the hierarchy of laws in Indonesia.

(c) Legislation: Codifying & Statute

The next source of law in Indonesia is the statute or legislation ("Undang-Undang") namely:

(1) Codifying statute or code:

A law that purports to be exhaustive in restating the whole of the law on particular topic, including prior case law as well as legislative provisions. Courts generally presume that a codifying statute supersedes prior caselaw.

(2) Statute

Legislation gains its "the binding power" since its promulgation in the "State Gazette." Although the Constitution is supreme, statutes are the main source of law in Indonesia except where these laws explicitly provide for incorporations from other sources such as custom or principles of equity.

In general, legislation consists of:

(1) **Preamble** or considerant , containing considerations why the legislation has been made.

(2) **Dictum** containing the contents or articles of the legislation.

In addition to the consideration and dictum, there is another critical part, namely, the **transitional rules.**

Any legislation is assigned an ordinal number and the year of its issuance. The ordinal numbers are returned back to the number one (1) every year. For example, the Act Number I of 1974 on the Marriage in Indonesia, and in 1975, the Act firstly issued is the Act Number of 1975, and so on.

Statutes can only be effective if enacted by DPR-RI in cooperation with the President. Thus, the main function of the House of Representatives of the People (DPR-RI) is to legislate in cooperation with the President.

The other functions of the DPR-RI are as follows:

(1) in cooperation with the President to ascertain and decide upon the State's Budget.

(2) in cooperation with the President, and without deviating from the rules of law, to strive for the realization of the Guidelines of the State's Policy.
(3) to advice the President on the National Development Plans in his position as the keeper of the MPR's mandate, which advises ought to be seriously considered by the President.
(4) to control and supervise on the operation of the law, the adherence of the State's budget by the government and on the handling of the State's finance in general, and also, the government's policy, which ought to be in accordance with the Constitution and decisions of the MPR, including the control on the President's acts in realizing the State's Principle Guidelines which includes the control on his Minister's policy.
(5) Suggests the MPR-RI for an extra-ordinary meeting to be held, whenever the DPR RI is of the opinion that the President has seriously deviated from the State's Principle Guidelines, that is laid down by the MPR-RI.
(6) Discuss the declaration of war, peace and truce or other treaties with other countries, which have been or will be made by the President.
(7) Discuss the verification and account of the State's finance, as acknowledged by the Body for the State Finance Control (Badan Pemeriksa Keuangan).

How a Bill becomes an Act? An act may come into existence, either by way of a bill submitted by the President to the DPR-RI for its agreement and approval, or on the initiative of at least 30 (thirty) members.

There are five major codes in Indonesia. The five codes are the following:

(1) Civil Code (Kitab Undang-Undang Hukum Perdata).
(2) Code of Civil Procedure (**Het Herziene Indonesisch Reglement,** for Java and Madura, and **Rechtsreglement Buitengewesten,** for the other parts of Indonesia).
(3) Commercial Code (Kitab Undang-Undang Hukum Dagang).
(4) Criminal Code (Kitab Undang-Undang Hukum Pidana).
(5) Code of Criminal Procedure (Kitab Undang-Undang Hukum Acara Pidana).

2. Custom

The oldest sources of law are custom or tradition. In the old time, custom served as the only source of communities law; they were smaller and more visible than those of the present communities, not based on "enacted law," but on oral bequeathed rules.

Presently, in Indonesia, custom is mainly relevant to the practice of business law. The use of "credit cards," for example, does not have any legislation in Indonesia, despite their ever-expanding use among Indonesian citizens.

Customs has governed Indonesian conduct for some time and are still commonly referred to by jurists. According to Levy-Bruhl (in Curzon, 1979), custom plays a preponderant role in all legal systems. Defining custom is not easy. The term "custom" is used in several senses. The following should be noted:

(1) "The practice of a particular place is called a custom. A general immemorial practice through the realm is the common law**": per Best J. In Blundell v. Catterall (1821).**

(2) Blackstone writes of "general and immemorial custom ... from time to time declared in the decisions of courts of justice." He distinguishes three kinds of custom as forming an important historical source of the common law (Curzon, 1979:237).

   i. **General custom** (the universal law of the realm, forming the common law in its strict sense).
   ii. **Particular custom** (affecting only parts of the realm).
   iii. **Certain particular laws** (by custom adapted and used by particular courts).

(3) Mention by Joseph W.S. Davis (1996: 50):

> "... it usually means that the two parties in a dispute have either explicitly or by implication acted upon an understanding of a condition or situation which was acceptable to both of them, because it is the normal method of accomplishing a task or meeting an obligation. For instance, a seller and a buyer enter a transaction where one party will provide the other with a certain product. Both parties expect the goods to be used in a specific fashion. It is a custom of the trade. If the product fails to perform as anticipated, the seller may be liable even

though he made no representation concerning the use to which the goods must be placed. A custom must be proven by the claimant for it to have the force of law. If the custom in question eventually becomes so well established that the parties regard it as ipso facto binding upon them, it is called "customary law." This type of law need not to be proven by the plaintiff since the court must apply it on its own initiative because of its extensive use in similar situation. Custom also helps fill the gaps between new laws acquired from foreign countries and social reality."

(4) Customary law is law consisting of customs that are accepted as legal requirements of obligatory rules of conduct, practices and beliefs that are so vital and intrinsic to a social and economic system that they are treated as if they were laws - Also termed **consuetudinary law** (see. Black's Law Dictionary, Seventh Edition, 1999: 391).

In Indonesia, like in other countries, in developing or applying the law, judges, legislators and legal scholars, as a matter of fact, are, more or less, consciously guided by the opinion and custom of the community. In accordance with this notion, then, according to Rene David and John E.G. Brierley (1985: 130):

"... the role of custom as a source of law is analogous to that attributed by Marxist thinking to the material conditions of production; they are both an infrastructure upon which the law is built. The positivist school, on the contrary, has attempted to dismiss the role of custom altogether; according to this view, custom now occupies only a minimal place in a codified system in which the law is to be exclusively identified with the will of the legislators. While this position is not realistic, that of the sociological school, which gives the expression "source of law" an unusual sense, exaggerates the role of custom in the other direction. Custom is not the fundamental and primal element of law that the sociological school would like it to be; it is but one of the elements involved in establishing acceptable solutions. In modem societies, this element is far from having the

primordial importance of legislation. But it is also far from being as insignificant as the doctrine of legislative positivism would have it."

In my own opinion, despite the fact that it does not serve as important source of law in Indonesia, usage is still frequently treated as a source of law in legal practices, especially in the field of business law. Usage, too, has a critical position in Indonesian judicial practices. Article 27 of the Basic Law on Judicial Powers, the Act Number 14 of 1970 (Undang-Undang Pokok Kekuasaan Kehakiman Republik Indonesia) provides that "judges as legal and justice agent are under obligation to dig, to observe and to understand **the values of living law of the peoples** in their society."

In the Elucidation of the Article 27, it is suggested that within a society who is acquainted with "unwritten law" and under the period of revolution and transition, judges serve as formulators and diggers of the values of living law of the peoples. Accordingly, a judge can make a decision that is in accordance with the law of people and their sense of justice

Some legal-scholars interpret the term of "unwritten law" attached on the Article 27 mentioned above as identical with **"Adat Law**." However, in my opinion, it is not true. For the present Indonesian community, "unwritten law" or "customary law" is not necessarily identical with "Adat Law." The Article 27 also implies the newly emerging usage and the term of "unwritten law". It does not rely on the indigenous Indonesian custom anymore as its source; examples of such emerging custom are the use of a credit card in business relations between peoples, etc. Suppose what is meant by such a term is merely "Adat Law,"' it should be sure that the drafters of the act would explicitly formulate it with the name of "Adat Law"; it is a clear-cut fact that the drafters of the act did not use the term of "Adat Law," but merely "living law."

In my opinion, "Adat Law" in business law and in other legal fields of national and international scales should be left behind. The legal field in which "Adat Law" may be maintained, for the time being, is family law, even though such preservation, actually, does not suitably serve the idea of legal unification in Indonesia.

We should realize that "Adat Law" has specific characteristics in opposite to those of modern law as well as the climate of mode society. For example, "Adat Law" has such characteristics as being:

1 concrete

2. magic-religious

3. in cash
4. local

How can we apply the concrete style of "Adat Law" to such a modern business as in case when, for example, a carabao should be bartered with three goats? In the same manner, it is impossible to use the power of a magic mantra in an arrangement of a business deal mounting billions of rupiahs. Similarly, how can we formulate a national legal system (meaning not local) on the basis of "varied local law"? If there are some among jurists stating that such "modern adat law" does not have the above-mentioned characteristics, then, it is sensible to argue that "adat law" essentially has no existence anymore, because the disappearance of characteristics they have determined as the characteristics of "adat law" means, logically, the disappearance of "adat law" itself. Indeed, we should have a great spirit to acknowledge that now it is the time for Indonesian law to nationalize itself by eliminating its local elements.

I am in favor of such a doubt as that of Sunaryati Hartono, a former Head of the National Agency for Legal Development (abreviated as "BPHN") about the identification of "customary law" with "adat law". She stated in her article in Result of Research Presentation on the Role of Customary Law in National Law, 1992:3 as the following:

> "Is the habit of some of our present legal scholars to simply identify Customary law with adat law right and proper? Or, have, in our modern state, customary law, in its broader meaning, been actually developed such as one that has been developed among executives (or state administration), one that has been developed by courts, and one that has been developed by legal professionals (notaries public and lawyers), especially in the field of contracts, and generally in business law and economic law?"

My opinion is nearly the same with that of Satjipto Rahardjo (1992) that:

> "Regulations or laws in the field of business law occupied the first rank in the number of the enacted law produced from 1947 until 1987, more than those in the field of land law. However, observed from the emergence of customary law in both fields, it seems that there has been an imbalance, that is, an inverse ratio. From twenty

eight laws in the field of commercial law, there are just two regulations attaching customary law."

If we follow the division of society models suggested by H.L.A Hart (1986), there are two models, namely:

1. societies with an order of primary rules of obligation
2. societies with an order of secondary rules of obligation.

It is in a society with primary rules of obligation that the roles of customs are visible, because norms within such a community model are very close to everyday real life of law.

Before involving ourselves too deeply into the polemic about customary law and adat law, we should, at first, ask a question. What is a custom?

The term of "custom" generally implies habitual practice or course of action that is characteristically repeated in like circumstances. "Usage" is a repetition of acts, and differs from a "custom" in that the latter is the general rule which arises from such repetition; while there may be usage without a custom, there cannot be a custom without usage accompanying or preceding it; this is in agreement with the teaching of Jellinek that a repeated act, eventually, will obtain its "the normative power" (**die normative karft factishen).**

Then, Customary law is law consisting of customs that are accepted as legal requirements or obligatory rules of conduct. A custom is only changed into Customary Law when it results in awareness that such a custom should be done. Especially for Indonesia, once again, we should make a distinction between Adat Law and Customary Law.

According to Satjipto Rahardjo (1985:96):

"There are three components or conditions for a custom to be accepted in a society. The three conditions are:

(1) Worthiness or sensibility or appropriateness. **Malus usus abolendus est** or "a bad or invalid custom is (ought) to be abolished. An unqualified custom is to be abolished. It means that the authority of usage is not absolute, but conditional, depends on its suitability to the standard of justice and public benefits.

(2) The avowal of its validity. It means that a custom should be observed openly within the society , should not based on any helping power behind it, and without the approval from and is not desired by, those whose interests are known through the practice of the custom. This condition reflects on the form of norms that by its user should be adopted ***nec vi nec clam nec precarie***, without force, without tacitness, without desire.

(3) Having a historical background the beginning of which may not be known anymore. Custom is neither a practice newly growing the day before yesterday nor a few years ago, but they become established because they have been molded by such a long period. In this case, people make a distinction between a modern custom and a custom in the sense we are talking about it, here. We do not take modern custom into account. Within British tradition, people do not necessarily pose a premise that some customs have existed since men can memorize them, they just believe in it.

I myself do not agree with the point 3 of Satjipto Rahardjo's opinion mentioned above, because it is the mode custom that is most relevant to the source of formal law nowadays. Even, much traditional customs have been changed due to the impacts of modern custom.

What is suggested by Sunaryati Hartono (1992: 6) is pretty interesting:

> "While among Balinese it is a pride that one's finding or design is imitated by others, however, with the advance of Copyrights and Patent Rights Acts, one, even prevents his work from the imitation by others. The changing values and awareness, as a result of globalized information and technology, both directly and indirectly affect the content and the pattern of our national legal system. As a result, it is impossible for us to maintain our ambition to continually defend the purity of the application of the rules of our "adat law" to become national law; what is possible is that the rules of "adat law"

should be adapted in advance, resulting in rules that are very different from those before, such as **the contract of profit sharing in the field of petroleum**. Even in certain instances, the rules of "adat law" are bound to be set aside for the sake of the truly new rules of national law, such as **the rights to fell trees in the forest** presently prohibited by national criminal law."

What is important presently in connection with the Indonesian legal system that basically follows the "codification system" is to answer the question "What is the position of custom within the Indonesian legal system?"

For me, with the acceptance of "the statutory law system" as the predominant system, then, the entrance of a custom into the legal system should be under the "cognizance" of "the written law." Such a "cognizance" occurs, for example, through a regulation saying that practices that have been persistently accepted as things subjects to agreement shall be tacitly considered to be included in the contract, despite the fact that they are not included explicitly in the contract. In my opinion, the development of such a situation actually brings about a fourth condition for the validity and the acceptance of a custom, namely, it should not defy **statutory law.**

The legal basis of the validity of a custom in Indonesia is found in various regulations, both those originated in the Dutch colonial government and those created after the independence of Republic of Indonesia. Such regulations are among others:

(1) Article of 15 A.B. (Algemeene Bepalingen van Wetgeving voor Indonesie)

Other than promulgated exceptions about indigenous Indonesians and those who are made equal to Indonesians, custom shall not become "a law," unless otherwise legislation has decided.

(2) Article 27 of The Basic Law on Judicial Powers (the Act Number 14 of 1970)

Judges, as legal and justice officials, are under obligation to dig (to discover), to observe, and to understand the values of living law of the peoples.

(3) Appendix of Article 27 of the Basic Law on Judicial Powers (14 of 1970) (Item number 1)

Within societies acquainted with unwritten law and under the period of turbulence and transition, judges serve as formulators and diggers of "the values of living law" of the peoples. Accordingly, they should go down among peoples to know, to feel, and to be able to fathom the sense of law and the sense of justice of the peoples.

From the above-mentioned articles, we know that in Indonesia, it is not merely legislation or enacted law that serves as the legal source of the validity of custom, but also the custom itself, provided that we do not identify custom with "adat law." It is the custom itself that serves as the legal sources, as long as they do not defy the law or the enacted law. Therefore, even though certain enacted law does not refer a custom as valid, the custom may be enacted by the judge as long as it does not defy the provision of enacted law.

In my opinion, there are three conditions for a custom to become customary law:

(1) The material requirement

The existence of the persistent or repeated custom or behavior, that constitutes a series of the same act going on within some long period qf time. The existence of the act should be able to demonstrate; there must be what is called as **longa et inveterate consnetudo.**

(2) The conviction requirement

The custom should bring about **opinio** necessitatis (public conviction) that the act constitutes a legal obligation. The conviction is not merely a conviction that the act is so, but it should be so. The conviction is called **opinio necessitatis**, an opinion that it should be so. The custom should be performed due to the conviction that the custom is objectively appropriate to perform, that to perform it is believed to mean to perform a legal obligation.

(3) The legal consequence requirement

The existence of a legal consequence when customary law is violated.

Sunaryati Hartono (1992:13) demonstrates the roles of customary law in Indonesia by describing the following result of research:

> "From as many as 157 regulations in form of legislation created during a forty year period, 25 from them provide places for customary law (15,92%). Regardless of their distribution within each

regulation, such a number can relatively express that our legislation drafters have, indeed, paid attention to the rules of customary law in Indonesian National Legal System, especially in its statutory law system."

Further more, Sunaryati (1992:23) states:

"So far, we do not have any legislation yet on politics of regulation making, and, therefore, legally, it can not be known yet, precisely (exactly), what are the intentions of our legislative politics especially in its relation to the role of customary law."

I suggest that the roles of customary law in Indonesia, as in other countries formerly of colonized status, provide several alternatives of choice:

(1) validating traditional law; traditional law exists as rules in social institutions , becoming law only when enforced by legal institutions.
(2) turning over the law of the state;
(3) imitating the law of the state by the traditional law;
(4) developing a separate system.

3. Treaties or the International Conventions

Treaty or an International Convention also constitutes a kind of formal legal sources because it should meet certain formal requirements to be accepted as treaty or the International Conventions.

Treaty is a compact made between two or more independent nations with a view to the public welfare. A treaty is not only a law, but also a contract between two nations and must, if possible, be so construed as to give full force and effects to all its parts.

For us in Indonesia, the ultimate legal basis of treaties or international conventions is included in the Article 11 of the 1945 Constitution, providing:

"The president, in concurrence with the House of Representatives, shall declare war, make peace and conclude treaties with other countries."

In general, we can distinguish "international conventions" into two kinds:

(1) **Treaty**: conventions that should be conveyed to the House of Representatives of the People (DPR-RI) to obtain their approval prior to the ratification by the president.

(2) **Agreement;** convention that is conveyed to the House of Representatives of the People (DPR-RI) merely to be know after the ratification by the president.

4. Decided Cases or Precedents

The term of jurisprudence in Anglo-Saxon (United States of America, United Kingdom, etc) means "a legal science" or "a legal theory." On the contrary, in Indonesia, the term of **jurisprudence** means **decided cases** or **precedents.**

Judges in Common Law countries are bound to **precedents**, in accordance with the principle of **the binding force of the precedent** principle they follow, that is, whereby a judge is bound generally to apply principles and rules contained in earlier decisions, rests on the doctrine of **stare decisis et non quieta movere** ("let is stand as decided and what is fixed should not be moved"). Some legal scholars prefer the phrase **stare rationibus decidendis** ("keep to the **rationes decidendi** of past cases"). The development of the doctrine in common law countries has involved the ability of superior courts to overrule decisions of inferior courts, and on occasions, to overrule earlier decisions of their own, and the recognition of Parliamentary capacity to change rules of law by statute.

In Indonesia judicial system, which gives higher priority to enacted law or statutory law, gives highest authority to written law. The role of precedents is mostly intended as a material to develop the doctrine of law. In Indonesian legal system, written legislation is not necessarily complete and final and even frequently left behind, which requires constant development to make it actual and up to date.

In Indonesia, the Constitution and the Basic Law on Judicial Powers (the Act Number 14 of 1970) provide that judges should fulfil their duties independently and shall be bound only by the Constitution and the laws. But, nevertheless, lower courts usually follow the decisions of higher courts. Courts at all levels follow their own prior decisions and are reluctant to overrule prior precedent. Notwithstanding, one will hardly ever see prior decisions cited, other than some Supreme Court decisions being cited in written opinions by lower court judges.

The second reason why lower courts usually follow the decisions of higher courts is because supporting the use of precedents is the practice of legal scholars of studying various decisions and then making conclusions on how law should be interpreted based on those precedents. Such comments by famous legal scholars are regularly published and may influence judges at all court levels.

The third reason why lower court judges are prone to adopt higher courts' decisions is because of the career judge system in Indonesia. If judges do not follow the opinion of their superiors, especially the justices of the Supreme Court, it may affect their next assignment or possibly their entire judicial career.

In addition to its function as a kind of the formal law sources, ajudicial decision is also law. A judicial decision is law - relating to the maxim **judge made law.** Judicial decisions in Indonesia have only the binding force to parties in question. This is regulated in Article 1917 of the Civil Code. Each judicial decision always binds on the basis of the principle of **res judicata proveri tate habetur.**

In other word, in Indonesia, the binding force as law is not merely possessed by legislation, but also owned by judicial decisions, despite the distinction between the two, namely:

(1) The binding force of the law or legislation applies generally, because legislation contains regulations that are abstract and not designed for certain peoples.

(2) The binding force of a judicial decision only binds the concerned parties, and not another judge, for example, who will decide another similar case or event.

I am of the opinion that during the globalization era, we, in Indonesia, can no longer distinguish rigidly the **stare decisis** system and our own judicial system the basis of which is Article 1917 of the Civil Code. In reality, within each of both systems, there are combined elements. Even in Britain, judges frequently set themselves free from the binding force of the former decisions when the needs of community demand some others.

Thus, the reality in Indonesia demonstrates that in field application the civil law system and the common law system can harmoniously intertwine. It particularly occurs to legal constructions relating to business or commercial law, economic law, international trade law, and others relevant to the need of the current modernization and globalization era.

In Indonesian legal system, precedents or decided cases constitute a fundamental need to complement the application process of various legislation. However, as a source of law, the binding force of a precedent for judges in Indonesian judicial system is not the same as that in the common law judicial system.

5. Legal Scholar Opinions or Doctrines or Juristic Writings

As one kind of the sources of law, legal scholar opinions or doctrines, mostly on their own initiative, are continually increasing their significance in all aspects of law. The legal scholar opinions or juristic writings have played a part in legal evolution that can not be ignored. Legal scholar opinions have attempted to universalize, to reduce to an ordered unity, and to discover deeper principles that underlie particular decisions. In the Indonesian Civil Law System, legal scholar opinions or doctrines occupied a much higher position. If there is a question whether persuasive precedents should be followed, a court may be swayed by the opinion of the profession concerning the correctness of that decision, by the "press" which it has received in the law reviews, or by the views expressed in a leading legal text-book, especially in Indonesia, consider, for example, the use of such opinions like the opinion of Professor Mulyatno (the late), a professor of law school of Gadjah Mada University, Yogyakarta, came into existence in 1950 - 1965 in the Criminal Law field. By now, as judicial precedent is relied upon more in Indonesia, there is less need for scholar opinions. However, even today, academic theory is studied by lawyers and judges when new laws are passed or the judicial decisions do not cover a specific subject. I presume that many judges in Indonesia today do not read these commentaries. They rarely, if ever, cite them in their opinions.

In the application of Islamic Law in Indonesia, especially in divorce cases and inheritance cases, doctrines are the primary source of law, that is, the opinions of Syafii, Hambali, Malik, etc.

D. UNIFICATION OF LAWS IN INDONESIA

The State of the Republic of Indonesia, whose independence was proclaimed on 17th August, 1945 by the Couple ("dwi-tunggal") Soekarno-Hatta in the name of the Indonesian nation. Since that proclamation, the Indonesian state has existed as an independent and sovereign state. She already fulfilled the requirements generally followed in legal and state theories on the emergence of a state.

In order to prevent any vacuum in law in Indonesia at the time of the Proclamation of Independence of Republic Indonesia, the 1945 Constitution stipulated the following in Article II of the Transitional Provision: "All existing institutions and regulations of the state shall continue to function so long as new ones have not been set up in conformity with this Constitution." It means that, as long as still required, the Dutch colonial government regulations remain effective.

As a result, Article 131 Indische Staatsregeling continues to be valid.

An instruction of the Cabinet (Instruction of the Cabinet Presidium No. 31/U/IN/12/1966 issued in 1966 directs the Office of Civil Registration (the Bureau of Statistics), for the first time to open its registers to all inhabitants of the country without regard to origin, and cease recording distinctions based on population groups. But, in the fact, the different population groups continue to be subject, as before, to a large number of separate regulations. And, there is also an executive order issued in 1945 (Government Regulation Number 2 of October 10, 1945) which interprets the Constitution to mean that pre-independence regulations continue to be valid only to the extent that they are not contrary to the Constitution. Based on this order, it has been argued from time to time that articles 163 and 131 I.S. are no longer valid. However, they continue to be applied in practice.

Until entering the independent era of the Republic of Indonesia, to a certain extent, all Codes, Statutes, Acts and Regulations implemented in Indonesia were still the Dutch Codes, Acts and Regulations, namely, among others:

1. The Criminal Law Code **(Wetboek van strafrecht voor Indoncsie,** S. 1915 Number 732 or Kitab Undang-undang Hukum Pidana); It continues to be applied until nowadays.
2. The Civil Code **(Burgerlijk Wetboek voor Indonesie,** S.1847 Number 23 or Kitab Undang-undang Hukum Perdata); It continues to be applied until nowadays only to the extent that it is not contrary to all new Acts and Regulations in this field.
3. The Commercial Code **(Wetboek van Koophandel,** S.1847 Number 23 or Kitab Undang-undang Hukum Dagang). It also goes on to be valid until nowadays, only to the extent it is not contrary to all new Acts and Regulations in this field.
4. The Code of Civil Procedure (**Het Herziene Indonesisch Reglement,** S. 1941 Number 44 for Java and Madura, and Rechtsreglement

Buitengewesten, S.I 927 Number 227 for the other parts of that country.

5. And so on.

Indeed, the codification and unification efforts of law in Indonesia have been very progressive. Almost in all legal areas, the unification of law through codification efforts of law is indeed in accordance with the concepts of "modern state" and "modern law" as stated by Marc Galanter (in Lawrence M. Friedman & Stewart Macaulay, 1969: 989-999). Characteristics of modern law are:

1. modern law consists of rules that are uniform and unvarying in their application. The incidence of these rules is territorial rather than 'personal'; that is, the same rules are applicable to members of all religions, tribes, classes, castes, and localities and to both sexes. The differences among persons that are recognized by the law are not differences in intrinsic kind or quality, such as differences between nobles and serfs or between Brahmans and lower castes, but differences in function, condition, and achievement in mundane pursuits.
2. modern law is transactional. Rights and obligations are apportioned as they result from transactions (contractual, tortuous, criminal, and so on) between parties rather than aggregated in unchanging clusters that attach to persons because of determinants outside the particular transactions. That is, legal rights and duties are not determined by factors such as age, class, religion, sex, which are unrelated to the particular transaction or encounter. Such status clusters of rights and obligations as do exist are based on mundane function or condition (for example, employer, a business enterprise, wife) rather than on differences in inherent worth or sacramental honor.
3. modern legal norms are universalistic. Particular instances of regulating are devised to exemplify a valid standard of general applicability, rather than to express that which is unique and intuited. Thus the application of law is reproducible and predictable. "Khadi" justice is replaced by Kant's Categorical Imperative. Now let us consider the kind of institutional arrangements an techniques for administering these rules.
4. the system is hierarchical. There is a regular network of courts of first instance to apply this law and a regular structure of layers of appeal and

review to ensure that local action conforms to national standards. This enables the system to be uniform and predictable. This kind of hierarchy, with active supervision of subordinates, is to be distinguished from hierarchic systems in which there is a delegation of functions to subordinates who enjoy complete discretion within their jurisdictions. Independent legal freedoms are transformed into provinces.

5. the system is organized bureaucratically. In order to achieve uniformity, the system must operate impersonally, following prescribed procedure in each case and deciding each case in accordance with written rules. In order to permit review, written records in prescribed form must be kept in each case.
6. the system is rational . Its procedures are ascertainable from written sources by techniques that can be learned and transmitted without special nonrational gifts. Rules are valued for their instrumental utility in producing consciously chosen ends, rather than for their formal qualities. Theological and formalistic techniques, for example, in the field of evidence are replaced by functional ones.
7. the system is run by professionals. It is staffed by persons chosen in accordance with testable mundane qualifications for this work. They are full-time professionals, not persons who engage in it sporadically or avocationally. Their qualifications come from mastery of the techniques of the legal system itself, not from possession of special gifts or talents or from eminence in some other area of life. The lord of the manor and religious dignitaries are replaced by trained professional jurists, by police, examiners, and other enforcement specialists.
8. as the system becomes more technical and complex, there appear specialized professional intermediaries between the courts and the persons who must deal with them. Lawyers replace mere general agents.
9. the system is amendable. There is no sacred fixity to the system. It contains regular and avowed methods for explicitly revising rules and procedures to meet changing needs or to express changing preferences. Thus it is possible to have deliberate and measured innovation for the achievement of specific objectives. Legislation replaces the slow reworking of customary law.

10. finally, let us consider the relation of law to political authority. The system is political. Law is so connected to the state that the state enjoys a monopoly over disputes within its cognizance. Other tribunals for settling disputes, such as ecclesiastical courts and trade associations, operate only by the state's sifferance or in its interstices and are liable to supervision by it.
11. the task of finding law and applying it to concrete cases is differentiated in personnel and technique from other governmental functions. Legislative judicial, and executive are separate and distinct.

Conclusion we may draw from what has been suggested by Marc Galanter mentioned above, then, is that mode law should have unification and codification characteristics. From 1828 until the Proclamation of Independence of the Republic of Indonesia on August 17, 1945, there were **96 (ninety six)** laws put into effect by the Dutch Colonial Government in Indonesia, many of which are still put into effect until recently.

The hierarchy of regulative laws in Indonesia is as follows:

a. **The Constitution of 1945** (Undang-Undang Dasar 1945 or abbreviated UUD 1945).
b. **Decree of the People's Consultative Assembly of the Republic of Indonesia** (Ketetapan MPR or abbreviated TAP MPR).
c. **Legislation** ("Undang-Undang" or abbreviated as UU).
d. **Government Regulations in lieu of Acts** (Peraturan Pemerintah Pengganti Undang-Undang or abbriviated PERPU).
e. **Government Regulation of the Republic of Indonesia** (Peraturan Pemerintah or abbreviated PP).
f. **Presidental Decision of the Republic of Indonesia** (Keputusan President or abbreviated Keppres).
g. **Presidental Decree** (Instruksi Presiden or abbreviated Inpres).
h. **Cabinet Minister Decision** (Keputusan Menteri or abbreviated Kepmen).
i. **Cabinet Minister Decree** (Instruksi Menteri or abbreviated lmnen).
j. **The Local Regulation** (Peraturan Daerah or abbreviated Perda).

Despite its beginning in the era of Suharto regime, the excessive enthusiasm in drafting legislation and other regulation was especially visible during Habibie's transitional government, in which the main priority of the "legal policy" of Indonesian Government was to produce as many laws as possible. I frequently refer to Habibie's era as "the rain of laws" that, ironically, was not able of freeing this nation from the condition of deep "immersion of law."

The development of legislation in Indonesia may be divided according to eras of regimes that have ever been in power in Indonesia since the shutting down of the Dutch Colonial era, namely:

a. The era of the Old Order regime government, under the leadership of President Sukarno.
b. The era of the New Order regime government of section I, under the leadership of President Suharto.
c. The era of the transitional government of the New Order regime of Section 2, under the leadership of President B.J.Habibie.

a. NEW LEGISLATION DURING THE OLD ORDER ERA (1945-1965)

From the independence of the Republic of Indonesia until the outburst of the G.30.S/PKI

Affair in 1965, Indonesia was under the rule of Sukarno regime commonly called as the "Old Order Regime" ("rerim Order Lama"). Various new legislation and regulations were produced during this era: however, in my opinion, the most important event was the birth of **“the Basic Agrarian Act (the Act Number 5 of 1960)."**

The content of this law has been regarded by some legal experts as having a strong "Marxist flavor" molded under the influence of the landreform theory adopted by communist countries. This may be seen, among others, from a sentence stated by the drafter of "the Basic Agrarian Act (the Act Number 5 of 1960)":

"This Act was drafted to reconcile the rights to land and the Indonesian Socialism."

Therefore, this act suggested a regulation on the rights to land that was nearer to Marxism. This is more visible in the reading of its articles, among others:

Article 10:

"An obligation to a landowner to work on and to cultivate his own land by himself."

Article 7:

"A landowner is not permitted to posses land larger than the determined size. In case that his possession is indigenous, namely prior to the enactment of the Basic Agrarian Act, the excess land shall be seized."

In my opinion, such a limitation on land possession is not in agreement with the **sense of justice** of the traditional Indonesian society, so that a review is necessary to some articles of this Act. Limitation on land possession has a rationale and may be accounted for in an area with land shortage, in which the population is disproportionately larger than the lands, leaving peasantry with reduced lands for paddy fields and plantations. However, in an area with excessive lands and very limited size of population, in this case Indonesia, the limitation on land possession is unreasonable and even inflicting loss to the people of Indonesia.

Another sentence obviously indicative of the Marxist ideology appears in a sentence of the Act:

"Revolution does not end yet, and it ends only when the world community is not divided into two groups, the capitalist and the proletariat."

In the field of politics, a regulation of the Old Order era having strong "**paranoid**" and "authoritarian" favour was the Law of the Republic of Indonesia Number II/PNPS of 1963 on the Elimination Subversion Activities (Undang-undang tentang Pemberantasan Kegiatan Subversi).

By using the law, the Old Order Government had an authority to arrest and to detain, for unlimited times, anybody it considered to be conducting subversive activities. The formulation of what meant by a "subversive activity" was very abstract and "robbery," so that the ruler of the Old Order was easy to use it with unlimited and arbitrary authority.

The use of this law was continued by the Suharto regime, and it cost many victims who were detained on the ground of this law. Such a law constitutes a great violation to Human Rights, as firmly attached in the Universal Declaration of Human

Rights (adopted and proclaimed by the General Assembly resolution 217A (HI) of 10 December 1948):

Article 3:

"Everyone has the right to life, liberty and security of person."

Article 5:

"No one shall be subjected to torture or to cruel, inhuman or degrading treatment of punishment."

Article 9:

"No one shall be subjected to arbitrary arrest, detention or exile."

The effectiveness of this law was revoked only since the reverberation of the Reform era ("era Reformasi") in Indonesia, namely after the coming down of Suharto from power. Worth noting is that during the 20 years in power, the Old Order regime (1945-1965), produced:

a. **legislation** as many as 85 (eighty five)
b. **government regulation** as many as 35 (thirty five)

b. NEW LEGISLATION DURING THE NEW ORDER ERA OF SECTION 1 (1966-1998)

The new and worth noting legislation produced by Suharto regime was **"The Basic Law on Judicial Powers (the Act Number 14 of 1970).** This act constitutes the first law in Indonesia endeavoring to realize the unification in the field of the judicial system in Indonesia; this may be seen from article 3 (1)

"All courts in the whole territory of the Republic of Indonesia are state courts and are determined by the law."

As we know, laws are meant to provide us with guidance in our own conduct and to protect us from tile inappropriate actions of others, but laws only have value if they are enforced. The judicial system, by the law enforcement, and then by courts, applies the law, and if it's decided the law's been broken, the judges impose fines or penalties. Together, the law and the judicial system make up our legal system.

As we know that, most modern legal systems can trace their ancestry back to either the Civil Law Tradition or the Common Law Tradition, traditions reflecting

different legal philosophies, cultural approaches to law, and also the kind of its **judicial system**. Understanding these traditions is basic to understand the differences that exist among national legal systems and to appreciate the difficulties inherent in creating a universal legal concept.

What is the purpose of judicial system? According to many legal scholars, disputes are an inevitable consequence of social interactions in every society. As an alternative to violence, governments have established judicial systems for the purpose of dispute resolution.. Before resolving conflicts, courts must first determine what the law is. This role is especially important in a constitutional democracy where laws are made by popularly elected representatives who are required to express the will of the majority while at the same time respecting the rights of the minority (see, also Susan Sullivan Lagon, in Freedom Papers, Number 4). Impartiality is certainly one of the major goals of courts. Most democratic governments try to maintain their judicial system's objectivity by deliberately insulating courts from external influences, either from other governmental sources, such as executive and the other administrative authorities, legislative, or from private interests attempting to exert economic, social, ethnic, religious or regional pressures on the judges. Thus, judicial independence is essential to the courts' integrity and credibility within a political system. The motto of the Universal Judicial Legal System, "**Equal Justice under Law**" embodies the objectives of the judiciary in a democratic society (in the Basic Law on Judicial Powers, regulated in **article 5 paragraph (1).**

The Basic Law on judicial Powers absorbs "some universal principles" in judicial systems, among others are:

a. **Articles 1:**

"The judicial power is a state power that is free in organizing trials to enforce law and justice based on Pancasila, for the sake of running the Law State of the Republic of Indonesia."

b. **Articles:**

"In accordance with the law, any Court organizes trials, indiscriminately."

One of the key aspects of the Indonesian judicial system is that citizens have no role, other than as described below, in determining who is right or wrong in a dispute. **There is no jury system in Indonesia.** The judge is the only one as a decision-maker in

Indonesian Judicial System. See, **article 15 paragraph (1) of The Basic Law of Judicial Powers:**

> "Any court makes investigation and decisions, the implementation of which is carried out by, at least, three judges, unless the law determines differently."

In the Judicial System in Indonesia, there are basically two types of courts with which citizens come into contact:

(1) General courts of justice.
(2) Specific courts of justice.

There are two levels of general courts of justice, namely:

a. District courts as the lowest courts **("Pengadilan Negeri");**
b. Appellate or high courts **("Pengadilan Tinggi")**

In addition to these general types, there may also be numerous other courts that perform a specialized role, such as government administrative courts of justice, military courts, the juvenile courts and religious (Islamic) courts of justice (see, **article 10 paragraph (1)** of the **Basic Law of Judicial Powers**).

Article 24 of the Indonesia Constitution, stipulates that:

Sect. 1 Judicial power shall be vested in the Supreme Court and such subordinate courts as may be established by law.

Sect 2 The organization and competence of those courts shall be provided by law.

The official explanation of the Article clearly shows that the purpose of the article is to create the foundation for an independent judicature as one of the pillars of a democratic state based on "the rule of law."

The Supreme Court of Indonesia **("Mahkamah Agung Republik Indonesia"),** as "Court of Last Resort," stands at the apex of this independent complex of state organs which consists of the judicial system in Indonesia, or all courts of justice throughout the country.

The Supreme Court or **"Mahkamah Agung"** of the Republic of Indonesia is located in Jakarta. Its territorial jurisdiction covers all Indonesia. The Supreme Court of Indonesia may only decides questions of law: it is bound by the establishment of the facts by the lower court and the high court (both is called: the **judex facti).** The Supreme Court only reviews questions of law. Although the distinction between law and facts has often been judged arbitrarily by part of Indonesian legal scholars, it clearly is a workable distinction which does not confer too many practical problems and which anyway serves to limit the appeals in cassation. Such appeals lie from all decisions in final instance of all lower courts (both general courts and special courts).

The Supreme Court of Indonesia must either dismiss the appeal or annul the decision of the lower court and the high court. In case of annulment, the Supreme Court must either remit the case to a lower court and a high court or render the final judgment. This latter possibility is a major deviation from the original Dutch system of **cassation.** Apart from the case of annulment, a Supreme Court decision establishes no binding precedent for the lower and the high courts. It has a persuasive effect only.

The Basic Law of the Judicial System also regulates several stipulations on **General Courts of Justice.** Courts falling within the **"general courts of Justice"** try all civil cases and all criminal cases in which any person within the territory of the Republic of Indonesia is involved.

The structure of any general courts consists of a Chairman, Associate Judges, a Court Clerk, and a Secretary.

All judges of the Indonesia General Court System is appointed and discharged by the President acting as the Head of the State upon the proposal of the Minister of Justice and based on the approval of the Chief Justice of the Supreme Court.

Chief and Deputy Chief of the court are appointed and discharged by the Minister of Justice upon the approval of the Chief Justice of the Supreme Court.

When judges sit on a division, no separate opinions are delivered. Decisions are made by the whole panel **(per curiam).**

In a civil case, an individual, corporation, partnership or some other legal entity brings a suit **("gugatan")** against another individual or legal entity. Normally, each party in a civil case is represented by a lawyer (in Indonesia is called: "**kuasa**"). The party who initiates a civil case is the "plaintiff" **("penggugat")** and the party against whom the case is brought is called the "defendant" ("**tergugat**"). Although an actual civil trial is very similar to a criminal trial, the events prior to both trials are different.

Different from a civil case, then, when a crime is committed, not only is the victim harmed, but the community is harmed. Therefore, in criminal cases, the government brings the charge against the accused, and an attorney **("jaksa penuntut umum**"), representing the government, prosecutes the case. In Indonesia, the prosecutor is a member of the Local District Attorney's office **("Kejaksaan Negeri**") or of the Higher Attorney's office **("Kejaksaan Tinggi").** A private citizen may be involved in a criminal case in a number of ways, as the victim of a crime, in which case he/she will play a key part in the prosecution; or as a witness **("saksi")** called by either the defense or the prosecution to testify during a criminal trial.

Defendants **("tersangka**" or **"terdakwa**") in criminal case have many important rights guaranteed by the law. Article 27 of the Indonesia Constitution, stipulates that:

> "**Sect. 1.** All citizens shall have the same status in law and in the government and shall, without exception, respect the law and the government."

Furthermore, many rights of defendants also guaranteed by the Code of Criminal Procedure **("Kitab Undang-undang Hukum Acara Pidana**"); the Code Number 8 of 1981. This code was introduced in 1981. Not least of these rights is the presumption that they are innocent until their guilt is either admitted or proven in a court of law. In a criminal case, the defendant also has the legal right to be represented by an attorney. Defendants may retain their own private attorney or, if a defendant lacks the financial ability to hire a private attorney, the judge will appoint one.

The District Courts are located in municipalities or in the capital or regencies which jurisdiction covers the municipalities or regencies.

The High Court or the Court of Appeals are located in the capitals of provinces, which jurisdiction covers the provinces.

The Basic Laws of Judicial System also regulates **Specific Courts of Justice**. As we know, there are several kinds of specific courts of justice in Indonesia, who perform a specialized role, such as administrative courts of justice **("Pengadilan Tata Usaha Negara**"), military courts **("Pengadilan Militer**"), religious (Islamic) courts of justice **("Pengadilan Agama").**

The Courts falling within the Religious Judicial System or Islamic Court **("Pengadilan Agama")** try civil cases in which the disputing parties are persons of the Islam faith and which, according to the living reality in the field of law, concern matters

that should bejudged according to the tenets of the law of the Islam Religion (Marital and Divorce affairs, and Inheritance affairs). To complete the provisions of The Basic Law of the Judicial System, then, in 1989, still during the era of the Soeharto regime, was born The **"legal instrument**" of this Islamic Court, namely, **"Law of the Republic of Indonesia Number 7 of 1989 on The Religious Judicial System**". The judicial power within the Religious Judicial System is exercised by:

(1) The Religious Court ("Pengadilan Agama")

(2) The Religious Court of Appeals ("Pengadilan Tinggi Agama").

The Religious Courts are located in municipalities or ifa the capital or regencies which jurisdiction covers the municipalities or regencies.

The Religious Court of Appeals are located in the capitals of provinces which jurisdiction covers the provinces.

The next, the courts falling within the military judicial system **("Mahkamah Militer**") try criminal cases where the accused is a member of the Armed Forces. The judicial power within the Military Judicial is exercised by:

(1) The Military Court ("MahkamahMiliter")

(2) The Military Court of Appeals ("Mahkamah Tmggi Militer").

Still during the era of Suharto regime, was born **Law of the Republic of Indonesia Number 5 of 1986 on the Administrative Judicial System**, the article 4 of it stipulates that:

"The Administrative Judicial System is one the administrators of the judicial power of the people to resolve administrative disputes".

The judicial power within the administrative Judicial System is exercised by:

(1) The Administrative Court.

(2) The Administrative Court of Appeals.

The Administrative Courts are located in municipalities or in the capital or regencies which jurisdiction covers the municipalities or regencies.

The Administrative Court of Appeals are located in the capitals of provinces which jurisdiction covers the provinces.

The technical-judicial supervision of all courts is exercised by the Supreme Court.

The last is the juvenile court. **"The legal instrument**" of the juvenile court in Indonesia is **"Law of the Republic of Indonesia Number 3 of 1997 on Juvenile Courts**".

The definition of "juvenile" is any person under the age of 18 years and over the age of 8 years (see, article I sect. I Law Number 3 of 1997 on Juvenile Court.

Juvenile delinquency hearings are similar to adult criminal trials except that the proceedings are closed to the public (see, article 8 of Law Number 3 of 1997). Ajuvenile has many of the same rights in court as an adult: the right to a trial in court, the right to have any charges proved beyond a reasonable doubt, the right to exclude anything found during an illegal search of the juvenile's person or home, and the right to a lawyer.

During the era of the Suharto regime, it was also produced **"the codification of criminal justice procedure,"** namely, **the Code of Criminal Procedure (Kitab Undang-Undang Hukum Acara Pidana); the Act Number 8 of 1981,** in place of the earlier codification, namely H.I.R (Het Herziiene Indonesisch Reglement, S.I 941 Nurnter 44 for Java and Madura), a product of the Dutch colonial government.

Despite the sufficient number of legislation on the field of the judicial system, in fact, some of the provisions are not implemented in judicial practices, so that when the Suharto regime was in power, the contents of these laws were merely a "lip service" that was immersed by the authoritarian political power of that era.

The second important legislation produced by Suharto regime was **"the Act of Marriage" (the Act Number I of 1974)** on matters relating to marriage and divorce in Indonesia. This act is the first unification of law in Indonesia in the field relating to marriage and divorce. Prior to **the Act of Marriage (the Act Number I of 1974),** there were some laws of marriage in Indonesia.

In addition, we need to know that we could state that the following marriage and divorce laws are to be found in Indonesia:

(1) The law for Europeans is The Civil Code (Burgerlijk Wetboek voor Indonesia or abbreviated as BW).

(2) The law for Arabs and other Foreign Orientals non-Chinese is their respective customary law.

(3) The law for Foreign Orientals-Chinese is The Civil Code with slight

alteration and some exceptions with regard to the registration and formal prerequisites of a marriage.

(4) The law for Native Indonesians ("Pribumi") is their respective Adat Laws, which differ from area to area.

(5) The law concerning mixed marriages is the Act Number 158 of 1898.

Other than those in the judicial field, the law no less important that was produced by Suharto regime was **Act of Basic Provisions for the Management of the Living Environment (the Act Number 4 of 1982).**

In the General Part of Elucidation of the Act of the Republic of Indonesia No. 4 of 1982, relates between the management of the living environment with the development of the Republic Indonesia. This may be seen at point 4, the reading of which is:

> "Development is a conscious effort to manage and utilize resources for the purpose of improving the quality of life of the people. At the same time natural resources are not unlimited either in quantity or in quality, while the demands for the resources increase, as a result of the increase in the total population and the increase in their needs. Along the same line, the carrying capacity of the environment may be disturbed and the quality of the living environment may decline."

The implementation of development as an effort at increasing rates brings with it the risk of polluting and damaging the environment in such a way that the basic structure and function of the ecosystem as a life support could also be impaired. Conditions of the type are burden on society, since ultimately it is the people and the government who will have to bear the burden of restoring the environment.

The maintenance of a good and healthy ecosystem is a responsibility which requires the participation of each member of the community in improving the carrying capacity of the environment. Therefore, a wise development must be based upon environmental considerations as a means of achieving continuity and the well-being of present and future generations.

It was also during Suharto's government that, despite the fact of "being forced," some products of legislation in the field of business law came into existence, namely, among others:

1. Act of Copyright (the Act Number 6 of 1982).
2. Act of Industry (the Act Number 5 of 1984).
3. Act of Patent (the Act Number 6 of 1989).
4. Act of Trademark (the Act Number 19 of 1992).
5. Act of Limited Liability Companies (the Act Number I of 1995).

c. NEW LEGISLATION DURING THE NEW ORDER ERA OF SECTION 2 (HABIBIE'S GOVERNMENT)

Despite the fact that Habibie, who replaced Suharto as the president of the Republic of Indonesia, was in power for merely one *year* and five months, perhaps, it was the government in the world who has broken the record in producing the highest number of legislation. We may call Habibie's era as the era of **"the rain of laws."** However, qualitatively, of course, most of laws given birth during Habibie's era were may be classified as merely **"the sweep legislation**" in Gunnar Myrdal's terminology. About seventy legislation or acts, more than eighty Government Regulations of the Republic of Indonesia ("Peratuian Pemerintah") and more than ninety Presidential Decisions of the Republic of Indonesia ("Keputusan Presiden" or abbriviated Keppres) were produced.

The most important laws made by the Habibie regime were:

1. Act of Antimonopoly and Unfair Competition Practice (the Act Number 5 of 1999).
2. Act of the Protection of Consumer (the Act Number 8 of 1999).
3. Act of Local Government (the Act Number 22 Of 1999).
4. Act of Proportional Financing between the Central and Local Governments (the Act Number 25 of 1999)
5. Act of clean governance of the state, free from corruption, collusion, and nepotism (the Act Number 28 of 1999).
6. Act Number 31 1999 on the Elimination of Corruption Activitiy.

I will discuss the nuance of "**Law Reform"** in the six acts mentioned above in the following sub-discussions, along with the discussions about legal condition going on since the era of Sukarno, the era of Suharto, the era Habibie, until the era Gus Dur (since October 20, 1999).

II. LEGAL REFORM IN INDONESIA

As we know, that developing countries and also those whose economy is in transition from one political system to another "political system", or from one "regime" to another "regime," from socialistic to market oriented, are very aware of their legal system and law enforcement weaknesses.

I am of the opinion that law reform in Indonesia should embrace three components of the legal system I have suggested in a previous discussion, namely:

a. the substance component;
b. the structure component;
c. the legal culture component.

A. LAW REFORM IN THE SUBSTANCE COMPONENT

There are two kinds of the "Substance component," namely:

a. the Enacted Law (Codes, Acts, Govenmient Regulations, Presidential Decisions), and other subsidiary regulations.
b. the decisions of courts, especially the decisions of the Supreme Court of Indonesia.

a. LAW REFORM IN ACCORDING WITH REGULATION (THE ENACTED LAW)

There are four common notions about how to change the legal order.

(1) One argues that good law in one place is good law in anyplace else. It advises the lawmaker to copy the legal order of development countries in order to achieve development *(see* Robert B. Seidman, 1978: 29). This notion follows the opinion of David Trubek that it is sufficient that legal reforms in developing countries merely adopt directly the formal legal provisions of the United States that have been proven to be effective.

(2) The second advises that laws make little difference in people's behavior. Good men, not good laws, make good government (see again, Robert B. Seidman, 1978: 29). This notion follows Robert B. Seidman's "way of thinking" in his well-known concept of: **the law of non-transferability of law.** In Seidman's opinion,

therefore, the law that is effective in its home country is not necessarily effective when it is transferred to or adopted by a community of another country, because the effectiveness of the law is not merely determined by the law itself, but is also heavily determined by various nonlegal factors existing in any society.

(3) The third notion follows Donald J. Black's way of thinking about the idea of "the Delegalization of Society" to obtain the condition of "legal minimalism." Donald Black argues that the elimination of legal discrimination may not be achieved through the multiplication of the available laws, but through the reduction of the existing law. Black's idea supports the increased use of Alternative Dispute Resolution, such as mediation and arbitration. Below, I quote some of Black's suggestion (1989 : 74):

> "Now we relax our assumptions and consider a final technique by which legal discrimination might be reduced: the reduction of law itself."

Next, Black (1989: 78) writes that:

> "... and, in everyday life, people resort to law more willingly when other modes of conflict management are scarce or absent. The fewer the alternatives, the more the law. And the more people resort to law, the more they come to rely on it. They develop a condition of legal dependency. In this sense, law is like an addictive drug."

Donald Black (1989: 79) then, suggests:

> "Modern populations are enormously dependent on specialists and sometimes helpless without them, possibly with harmful consequences. A sick or injured person might die because no physicians are available, or a fire might burn out of control because there are no fire-fighters. When helplessness without specialists results in a worsening of problems, people are no longer merely dependent, but overdependent. This has happened to some extent in the handling of crimes and conflicts."

(4) The fourth notion is the traditional one that persistently maintains the effective implementation of **"hukum adat"** (the traditional customary law in Indonesia) in the "National Legal System" in Indonesia.

I am of the opinion that, its true that a part of formal legal weaknesses can likely be replaced by the existing customary law, however, the informal law will soon reach its limits. Especially in modern business relationship, the informal law will not likely be able to accommodate requirements to compose or to formalize long term contracts. It may not be able to provide protection to intellectual property rights or to create a fair competitive climate of the business world. From this view, it adversely affects the economy, for instance, in form of hindrance to the emergence of any new ideas or entrepreneurships, efforts for transfer of technology, non-confidence of investors, until the flourishing corruptive actions, and organized criminal activities (see. Business Law Journal, Volume 6, 1999). Therefore, I tend to suggest that all four notions mentioned above may be combined and used proportionally in order to make law reform in Indonesia.

I agree, the fact is necessary to have a formal legal system which can function properly to encourage economic interaction, which is clearly and transparently capable of indicating the limit of the individual right and responsibility relevant to economic needs which are in favor of the market mechanism (see. Business Law Journal, Volume 6, 1999).

I think, in this formal legal reform, there are two possible methods to design and to complete the Indonesia Legal System in this Twenty First Century.

(1) generating various new formal law that meets the demands of the recent time, by combining the three possible legal sources, i.e.
   a. "home grown" sources,
   b. "transplanted outcome" sources, entirely or partly constituting an adapted outcome of the legislation of the countries with advanced market economy,
   c. "borrowing general idea" of the best practice of other countries for further adaptation and internalization through political debates and careful "nationalization" in the legal drafting phase.

(2) socializing and promoting, more intensively, the use of "alternative disputes resolution" especially over business, labor, and family disputes. This method already follows a part of Donald J. Black's idea to employ '**the Delegalization of Society**' by making step-by step efforts of '**Legal Minimalism**'.

Repeating my personal opinion I have stated, except in the field of family law, the norms of "adat law" are not relevant anymore to put into effect, especially in their relation to the efforts at developing national and modern law. The local characteristic of "adat law" is clearly contradictory to the aspiration of national law, while the magic-religious, in-cash, and concrete characteristics of it are obviously contradictory to the nature of modern law that has been also mentioned before.

In the International Conference, Current Issues & Future Directions for Bankruptcy Reform in Indonesia, in Jakarta, April 29, 1999, Daniel S. Lev expressed an obvious pessimism about the effort of "law reform" in Indonesia:

> "A conference on commercial law reform is a perfectly good place to reflect on the history of legal reform in modern Indonesia. It has not been a stellar history. In fact, it is a history largely of non-reform or the failure of reform. My concern is try to understand two or three facets of the problem: what set off efforts at reform, why they occasionally succeeded on the surface but almost always failed in fact, and what conditions are likely to promote reform. My analysis will please no one hoping for an optimistic perspective. It is in fact quite pessimistic, except on one note: that reform of some sort is actually likely now primarily because there is no alternative to it, but it will not be easy."

It seems that I am of the same opinion with Daniel S. Lev. For me, the "law reform" in the field of legislation - in the sense of the production of laws - still shows a sufficiently good condition. Despite the fact that any generation of the law in Indonesia, including that of Suharto's and Habibie's eras, was a result of the sovereignty's "forced being" both by an "external pressure" (of I.M.F., for example) and an "internal pressure," at least, there seems to be some "law reform" in the field of legislation. However, it is not the case with other aspects of law like in the field of "Law Enforcement" and "Legal Education." Therefore, when people are talking about **"the immersion of law**" in Indonesia, the most possible reference is legal enforcement, the judicial system, and legal education, all of which result from the factor of "legal **culture"** of the "legal actors" (policemen, lawyers, attorneys, and judges).

Therefore, relating to the issue of law reform in Indonesia, I will use Lawrence M. Friedman's paradigm (1975). I have mentioned before about three components of the legal system, namely:

a. Substance;
b. Structure;
c. Legal culture;

In the discussion of law reform relating to the substance component, I will discuss law reform in accordance with regulation and law reform in judicial decisions. In the discussion about law reform relating to the structure component I will address the structure and the authority of legal institutions like: the police organization, law firms, attorneyship, and courts, including the Supreme Court of the Republic of Indonesia. And, finally, law reform relating to the element of legal culture will also discuss legal education in Indonesia, because the resources of “legal actors” are given birth by law schools. Therefore, the efforts at reform in legal culture also affected strongly by "the way of thinking" as a result of the process of the system and the curriculum of the legal education in Indonesia. And, of course, "the way of thinking" of the legal actors extremely affects their way of doing.

In according with regulation, as I have mentioned above, indeed, sufficient reforms have taken place, as may be seen from so many laws and other regulations produced by the Suharto Government and more that were produced by the Habibie Government.

In the field of business law, Act Number 31 of 1999 on Anti Corruption has been given birth replacing the same sort of the old laws, Act Number 3 of 1971 on Anti Corruption.

One of the leading progresses of the New Act is that in the Act such a formulation has been made to cover **any act of enriching one's self or another or a corporate in such a way that is "formally and substantively unlawfulness".** Under such a formulation, the term of **unlawfulness** in corruption crimes can also cover **blameworthiness** in the sense of justice of society that must be charged and convicted.

Under this Act, corruption is explicitly formulated as a formal criminal act. Such a formal formulation is absolutely important for the probation. With such a formal formulation, that is adhered by the Act, then, despite the return of the result of a

corruption act to the State, the actor of the corruption crime still should be taken before the court and to be punished.

One of other provisions of this Act that has not been determined by the old Act is **the role of society**. The Article 41 establishes, in detail, that society can participate in the efforts of preventing and eradicating corruption crimes. The intended public participation may be realized in forms of:

a. The right to find, to obtain, and to share information about a suspicion that a corruption crime occurs.
b. The right to access to the service to find, to obtain, and to distribute information about the suspicion.

However, in reality, the Act Number 31 of 1999 on Anti Corruption has not been invoked optimally by the Attorney General Office of the Republic of Indonesia against corruption crimes. **As I always say in various mass media, Indonesia is the most peculiar country in the world that, despite being suspected as the third most corrupt country in the world, there has been no single corruption criminal convicted. In most cases, corruption criminals were declared by the courts as with "no evidence" and the suspects were granted "acquittal".**

The birth of Act of Antimonopoly and Unfair Competition Practice (the Act Number 5 of 1999) also constituted a sufficiently meaningful step of law reform in the field of business law. One of factors leading to the birth of this Act was the economic crisis overwhelming Indonesia during the first quarter of 1997. The economic crisis encouraged the House of Representatives (DPR-RI) to propose this Act. This Act is expected to be able to regulate the business competition in Indonesia, so that any citizen and "business actor" may obtain equal rights and opportunities in running undertaking. Thus, under this Act, there would be no more business actors obtaining a special treatment and privilege not possessed by other citizens or business actors. Formerly, monopoly was mostly practiced by the "Cendana Family" (Suharto's family) along with Suharto's cronies. As has been known, there are three powers of economic sectors in Indonesia, namely, **private, government (state-owned companies, BUMN)** and **cooperative** sectors. In fact, the days of the Suharto regime indicated that 70% of Indonesian economy was ruled by a mere number of businessmen who had a special access to facilities of those in power, and that 86% of national outputs was under the control of mighty business actors; meanwhile, small enterprises amounting 94% of the

whole manufacturing sectors, that provided sustenance for 80% of the people of Indonesia, produced merely 3% of the outputs. According to Rino A Sa'danoer (Undang-undang Antimonopoli dan Nasib Pengusaha Kecil dan Menengah, published in the Republika daily, February, 1999), 38 million units of small undertakings in Indonesia constitute 99,85% of total units of undertakings in Indonesia in providing employment. For actors of private business and state- owned companies, capital, technologies and manpower do not become the major problem, so the competition does not constitute the big obstacle for actors of these undertakings.

The existence of this Act is expected to provide an alternative answer to serve as a tool to create a "level playing field" relatively equal for all business actors.

Moreover, according to Rino A Sa'danoer **("Undang-Undang Antimonopoli dan Nasib Pengusaha Kecil dan Menengah, also published in the Republika daily, February, 1999**), with the enactment of the Act Number 5 of 1999, a changing market structure would take place, and later, when this Act is put into effect, there would be possibilities for business actors, then, the changed market structure will occur, and:

a. Strong business actors, namely those who can maintain their effectiveness, may survive in the market, and could compete properly.
b. There would be concentrated strength of business actors who, after their involvement in the competition, in fact, are weak in anticipating the market.
c. There would be changing business sectors; business actors who are unable of competition would be forced to find other opportunities to remain exist in the market.
d. There would be business actors who lose in the competition.

Therefore, business actors should provide themselves to face the reality of competition. And accordingly, in addition to the provision of equal opportunities provided by the regulation, business actors would and should try to increase efficiency and to make new breakthroughs to survive in the market.

Article 3 of this Act lists four objectives of the compilation of the Act, namely:

1. to maintain public interests and to promote national economic efficiency as an effort to increase public welfare;
2. to materialize a conducive business climate through regulation of sound business opportunities for actors of large, medium and small

enterprises;

3. to prevent monopolistic practices and/or unsound business competition raised by business actors, and;
4. to create effectiveness and efficiency in business activities.

Finally, it is worth noting that the most important law reform is the Amendment to the 1945 Constitution. In the Amendment II to the 1945 Constitution, total numbers of Chapters and Articles are increased. Addition of chapters concerns with the General Election, Human Rights, and Local Houses of Representatives. The Issue of local autonomy becomes one of the concerns of this Amendment.

b. LAW REFORM IN JUDICIAL DECISIONS

Legal reform existing injudicial decisions, including the decisions of the Supreme Court of the Republic of Indonesia, has been far left behind thaa that occurring in the field of enacted law, as has been mentioned above. Not so many judicial decisions may be regarded as having made **"legal break-throughs".**

In my opinion, the "first break-through" made by the Supreme Court of the Republic of Indonesia is not through decisions, but merely through **the Circular of the Supreme Court of the Republic of Indonesia** or Surat Edaran Mahkamah Agung (abbreviated SEMA) No. 3 of 1963, the content of which invalidated some articles of the Civil Code (Kitab Undang-Undang Hukum Perdata, abbreviated KUH Perdata or BW), namely, among others: the Article 108 and 110 on the unauthoritativeness of wives to initiate a "legal action" (see, Achmad Ali, 1996: 238-239).

It should be known that in the field of private law, there has been some legal subsystems formerly put into effect by the Dutch Colonial Administration. One of them was a subsystem for those who were subject to the BW (The Civil Code for Europeans and for Foreign Orientals-Chinese). Under the Chapter 110 of the BW, wives who are subject to the Civil Code (BW) are assumed to be incapable of initialing "legal actions" **("personae miserabile")** in the field of "property law," and they should be represented by their husbands.

Next, in the opposite, the SEMA No. 3 of 1963 assumed that wives who are subject to the BW **have had an authority to initiate her own legal actions and need not to be represented by their husbands.**

If we merely take a glimpse through ajuridical-dogmatic optic perspective, the emerging problem relates to the hierarchy of laws, because formally, the rank of the codification such as that of the BW is far above that of the SEMA. Therefore, juridical-formally, it is impossible for a SEMA to invalidate the validity of the articles of the BW that itself is codification.

However, in reality, eventually, it is the content of the SEMA No. 3 of 1963 that is effective as **the milestone of law reform in the field of judicial** system, despite the fact that the SEMA itself is not ajudicial decision, but merely a "circular."

While in the United States there is the **O.J. Simpson Case** regarded as one of "famous trials," during the Era of the Habibie Government there was an "Indonesian famous trial" that among legal circles in Indonesia is regarded as "the greatest criminal case" in Indonesia during the twentieth century. The case was the assumed corruption of Rp 115 billion by the suspect Nurdin Halid in his capacity as the Managing Director of the PUSKUD Hasanuddin (an organization of cooperatives). Although occurring in Makassar, the capital of South Sulawesi, the case became the concern of national public and press. Nurdin Halid was also well known as a figure of GOLKAR (during Suharto's era, it was the biggest political organization).

For months, the trial of Nurdin Halid case attracted tens series of demonstrations by thousands Makassar students coming from various universities and institutions of tertiary education ,including, among others, Hasanuddin University (the biggest university in Makassar), Moslem University of Indonesia, 45 University, Atmajaya University, Satria Makassar University, Paulus Christian University of Indonesia. Even, it was the first time in the judicial history in Indonesia that tens professors of law and other lecturers of law from different law schools in Makassar "went down to the street" to participate in demonstrations criticizing **"the acquittal decision**" by the judges of the District Court of Makassar, that the suspect Nurdin Halid was "not guilty." Various legal circles, especially PERSAHI SULSEL, the membership of which is open to all graduates from law schools in South Sulawesi (legal practitioners, company in-house lawyers, government lawyers, law teachers, judges, and public prosecutors) vehemently criticized various "special treatments" to the suspect Nurdin Halid and also various peculiarities during the trial.

Demonstrations involving masses of thousands criticizing **the acquittal decision** were not only staged in Makassar, but also in some metropolises in Indonesia, including Jakarta.

The Nurdin Halid case is regarded as a "judicial accident" becoming an established legend in the judicial history in Indonesia, because "public opinion", especially of thousand student demonstrators that time, suggested confidently that Nurdin Halid should have been decided as "guilty" and to be punished severely enough. Nufdin Halid was "not guilty," but "not actually innocence." Legal scholars in Indonesia regard the judge decision for that case as an "Anti law-reform," talking place, ironically, amidst the reform era.

There are sufficiently a large number of decisions of the Supreme Court of the Republic of Indonesia, in the field of business law. Sudargo Gautama, a professor of law in Indonesia, has published teens volumes of books constituting "Jurisprudence" ("Precedent") of the Supreme Court of the Republic of Indonesia in the field of business law. Especially in the field of Trade Mark, big cases that have been decided by the Supreme Court of the Republic of Indonesia, (see, Sudargo Gautama, 1987) are, among others:

1. "TANCHO" Trade Mark Case
Decision of the Supreme Court of the Republic of Indonesia
No. 67 K/sip/1972 date: 13 December 1972.
2. "YYK" Trade Mark Case
Decision of the Supreme Court of the Republic of Indonesia
No. 217 K/Sip/1972 date: 30 October 1972.
3. "KAMPAK" Trade Mark versus "RAJA KAMPAK" Trade Mark Case
Decision of the Supreme Court of the Republic Indonesia
No. 178 K/Sip/1973 date: 9 April 1973.
4. "ACE A" Trade Mark versus "A.C.E.A" Trade Mark Case
Decision of the Supreme Court of the Republic of Indonesia
No. 439 K/Sip/1972 date: 17 January 1973
5. "NITTO TIRE" Trade Mark Case
Decision of the Supreme Court of the Republic of Indonesia
No. 2956 K/Sip/1981 date: 19 May 1982
6. "BATA" Trade Mark Case
Decision of the Supreme Court of the Republic of Indonesia
No. 3042 K/Sip/1981 date: 25 March 1982
7. "EVEREADY" Trade Mark versus "EVERLAST' Trade Mark
Decision of the Supreme Court of the Republic of Indonesia

No. 1676 K/Sip/1974 date: 18 January 1978

8. "SUGUS" Trade Mark Case

Decision of the Supreme Court of the Republic of Indonesia

No. 3043 K/Sip/1981 date: 29 March 1982

9. "SEVEN UP" Trade Mark Case

Decision of the Supreme Court of the Republic of Indonesia

No. 3027 K/Sip/1981 date: 2 December 1982

10. "YAMAHA" Trade Mark Case

Decision of the Supreme Court of the Republic of Indonesia

Number 2854 K/Sip/191981 date: 19 April 1982

11. "AJINOMOTO" Trade Mark

Decision of the Supreme Court of the Republic of Indonesia

No. 352 K/Sip/1975 date: 2 January 1982

12. "COLUMBUS LOGO" Trade Mark Case

Decision of the Supreme Court of the Republic of Indonesia

No. 1237 K/Sip/1982 date: 8 January 1983

13. "CAP 5000" Trade Mark Case

Decision of the Supreme Court of the Republic of Indonesia

No. 99 K/Sip/1976 date: 26 October 1970

14. "CANGKIR" Trade Mark Case

Decision of the Supreme Court of the Republic of Indonesia

No. 100 K/Sip/1976 date: 3 February 1982

15. "THREE STARS" Trade Mark Case

Decision of the Supreme Court of the Republic of Indonesia

No. 1798 K/Sip/1976 date: 15 July 1982

B. LAW REFORM IN THE STRUCTURE COMPONENT

In the discussion about Law Reform in the Structure Component, in a brief, I will discuss the recent essential chants in the four components of law enforcement in that is:

a. Law Reform in the Lawyers Organization;
b. Law Reform in the National police Organization;
c. Law Reform in the Attorney General's Office;

d. Law Reform in the Judicial Organization, including the Supreme Court;

a. LAW REFORM IN THE LEGAL PROFESSIONAL ORGANIZATION

Universally, the right to a lawyer is regulated in **the Eight United Nations Congress on the Prevention of Crime and the Treatment of Offenders in Section B No. 3: Other Instruments Adopted by the Congress; Basic Principles on the Role of Lawyers about: Access to Lawyers and Legal Services:**

1. All persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings.
2. Governments shall ensure that efficient procedures and responsive mechanism for effective and equal access to lawyers are provided for all persons within their territory and subject to their jurisdictions, without distinction of any kind, such as discrimination based on race , color, ethnic, color origin, *sex,* language, religion, political or other opinion, national or social origin, property, birth, economic or other status.

The legal professional organizations in Indonesia have a long history, that is with the non-official BAR of the Advocates in Indonesia (abbreviated PERADIN) where they provided free legal services to the courts for criminal cases against indigent citizens, by anointing one of their members to represent the client in the court.

Next, in Indonesia, the right to a lawyer is regulated in the article 54 Act No. 8 of 1981 on the Code of Criminal Procedure:

> "For the sake of the defense interest, consequently, the suspect or the accused has the right to legal aids from one or more legal advisors during and at each stage of proceedings, in accordance with procedures provided by this Act."

Accordingly, as a project of PERADIN that was established in 1963, **Lembaga Bantuan Hukum** (Legal Aid Institute, abbreviated LBH) was found in 1971, in Jakarta, as an organization of legal aid with its mission to defend the poor. The LBH, later, changed its name into Yayasan Lembaga Bantuan Hukum Indonesia (abbreviated

YLBHI). According to Frans Hendra Winarta (2000: 86), the Jakarta Branch LBH received approximately 25.000 cases during the 1971-1986 period and the YLBHI 60.000 cases for the same period. During its initial activities, the LBH was involved in 54,4 % of private cases, 10,2 % of land cases, and 14,9 % labor cases, and also 20,5 % criminal cases.

Next, Frans Hendra Winarta (2000: 86) writes that:

> "The composition of case handling altered during the decade of 1990 which civil and political rights became the core of LBH. This because of the introduction of structural legal aids that was followed by its program. Since 1984, LBH has constructed its jobs on four basic issues, namely civil and political rights, rights to land, and rights to environment. As the result, in 1994, YLBHI, through its 12 offices throughout Indonesia, handled 677 cases (40,3 %) of the rights to environment. Presently, the YLBHI has 13 LBH offices in Jakarta, Bandung, Semarang, Yogyakarta, Surabaya, Makassar, Jayapura, Manado, Padang, Palembang, Medan, Lampung, dan Bali."

Beside those of YLBHI, there are many other LBHs, such as the LBH Kosgoro, LBH Nusantara, LBH MKGR, LBH Golkar, LBH FKPPI, LBH Mualimin, LBH PPM, LBH AMPI, LBH GP-ANSOR, LBH PP Muhammadiyah, LBH GMNI, LBH GMKRI, LBH Super Semar, LBH Gema Nusantara, LBH-LPH, LBH/BKBH/LKBH/LKH, LBH Dharma Nusantara.

According to Frans Hendra Winarta (2000: 2001), only YLBHI, LBH Nusantara, LBH APIK and PHBI perform the task **of pro bono publico (pro deo)** for the poor.

Beside these LBHs, there are still many "Law Firms" in different metropolises in Indonesia, and there is no working coordination between several professional organizations. professional organization. There is also no unity in working towards a program for legal aid and legal development. I agree with the results of a research study undertaken for the World Bank, that each professional organization is self-centered and the interest among its members to harmonize relationship between organizations and among members of different legal professional organizations is lacking.

The last progress in law reform in the field of lawyers and advocates profession is the legislation of the Advocate Act that presently (2000) is still in process.

b. LAW REFORM IN THE NATIONAL POLICE ORGANIZATION

The initial law reform within the body of the police organization (henceforth we write with abbreviated "**POLRI**) was on April 1, 1999 when the POLRI was separated from the Armed Forces of the Republic of Indonesia (abbreviated as "**ABRI**") after tens years it had been integrated in Armed Forces. Formerly, the POLRI was regulated by the Act No. 28 of 1997 on the State Police of the Republic of Indonesia. In Dutch Colonial times, the police corps had the Status of civil service under the Ministry of Justice. As we know, when the Indonesian National Police Force was born on July 1, 1946, it was afforded an independent and autonomous status and was headed by the Chief of Police of the Republic of Indonesia directly under the command of the Prime Minister's office. However, in 1968, the police was brought under the wing of the Armed and Police Forces under the Commander of the Armed Forces.

The next step of the reform was the issuance of the Presidential Decision (KEPPRES) No. 89 of 2000 on the Status of the State Police of the Republic of Indonesia. The Article 2 of this KEPPRES provides:

(1) The State Police of the Republic of Indonesia is directly under the direction of the President.

(2) The State Police of the Republic of Indonesia is lead by the Head of the State Police of the Republic of Indonesia who in performing his tasks is responsible directly to the President.

(3) The State Police of the Republic of Indonesia coordinates with the Attorney General in the judicial matters and with the Ministry of Home affairs in matters of public peaceful and order.

Therefore, the POLRI has its own autonomy that the only superior of 'the KAPOLRI (the Head of the POLRI) is the President of the Republic of Indonesia. Such a step is obviously positive to prevent the intervention of interests by too many parties within the POLRI.

It is the result of criticism that has been given by a number of groups in society, who recommend that the police organization structure should be removed from the

Armed Forces. The idea is that the police can be an independent institution to serve the community.

In line with this, the role and function of the police is basically to safeguard law and order in society, by bringing criminals to justice. As we know, the main duty of the police is enforcement of the criminal law with due regard to the law of criminal procedure. Repressive measures should be taken through the criminal justice system, while preventive measures should be given through public guidance programs. Also, the most prominent task is to protect society and to conduct police investigation. Therefore, the police personnel is expected to work professionally in accordance with the present criminal policy and in line with scientific criminal investigation methods.

c. LAW REFORM IN THE ATTORNEY ORGANIZATION

Law enforcement agencies hardly touched by the flow of law reform yet are the Attorney Organizations, both within the body of the office of the Attorney General of the Republic of Indonesia in Jakarta and within lower local attorney offices.

As we know, according to stipulation in the Decree No. 5 of 1991, Chapter I article I:

> "An attorney is an official given the authority to act as a Public Prosecutor, as well as to implement court verdicts obtained through the permanent power of the law."

Then, the Attorney General is one of legal institutions meant as an upholder of the law. The Attorney General, as a state representative, prosecutes criminal cases in the court in accordance with the State Criminal Code. So, the Attorney General's officers coordinate with the National Police acting as investigators.

One of the targets of critical demonstrations launched by students and other community members presently is the Circular Building ("Gedung Bundar") or the Attorney General Office of the Republic of Indonesia in Jakarta. Until now, the Attorney General Office has been (and is) regarded to be unchanged from its former condition before the reformation era. Legal scholar circles consider that "the Attorney General's" policies are predominated by political than juridical considerations, especially policies involving **"kasas-kasus kelas kakap"** or **“big-time cases”** (note: "kakap" is the name given to many kinds of large fish) or the "large-scale corruption cases."

d. LAW REFORM IN THE JUDICIAL ORGANIZATION, INCLUDING THE SUPREME COURT

I agree the present opinion of the public in Indonesia society that, the Indonesia public is very much disappointed with court service. It considers the courts or judges as having failed to fulfill their hope as **the last resort** or **the last bastion** against injustice. In the fact, court cases are conducted inefficiently, and adjudication procedures are not transparent. This results in disrespect towards the judicial system and the accusation that many of judges are politicized and corrupt.

A very important breakthrough was made recently in the selection of Justices. Although the "legal basis'" of the organization of the Supreme Court of the Republic of Indonesia is still Act No. 14 of 1985, the Article 7 item I of which requiring that to be appointed Justice a candidate should meet requirements of, among others: having at least five-year experience as the head of an appellate court or ten-year experience as a judge at an appellate court, however, the Act has been obviously penetrated by the "reform spirit" that sweeps Indonesia. Such requirements are not observed one hundred percent; it has been replaced by the Article 7 verse 2 so far ineffective. The Article 7 verse 2 of the Act Number 14 of 1985 reads as follows:

> "In certain circumstances a possibility is open to appoint a Justice without basing the appointment on the career system provided that the person in question is fifteen-year experienced in the field of law."

Therefore, it is permitted for one with no experience as a career-judge to be appointed Justice, in this case, for a Justice candidate who is not a career-judge.

Most of the seventeen Justice candidates who passed from the **fit and proper test** arranged by the House of Representatives of the People (abbreviated as "DPR-RI") were not career-judges, but coming from the circles of "professors of law", "legal scholars," and "senior lawyers."

C. LAW REFORM IN THE LEGAL CULTURE COMPONENT

As I have mentioned in the initial discussion, legal culture is one of the three components of the legal system, having equal importance as the other two components.

In my opinion, a component of the legal system most difficult to be reformed in the short term is the fegal culture itself. And for a more detailed discussion about the obstacles of reforming the legal culture, I will leave it for **the Chapter V: Towards Modernizations of Laws in Indonesia**.

However, as an introduction, I notice that one very important sector to reform the legal culture in Indonesia is law faculties (law schools) tliroughout Indonesia. What I mean is **the curricula of faculties of law** adopted in Indonesia, the content of which, in my opinion, (toes not already fully support the process of renovating the legal paradigm into a reformist paradigm.

My opinion is similar to Satjipto Rahardjo's opinion (in Law & Society Review, Vol. 28, No. 3. 1994: 500-501):

> "Education has not played an important role in legal development in Indonesia. By legal development I also mean the transformation and making of a new state. The legal education system is still set up to train people for the job market. People generally want law schools to continue to educate people to be judges, attorneys, and advocates. Keeping the orientation to the job market means that legal education is dominated by the modem sector - by business, banking, and bureaucracy. The recent move to reform the curriculum reflects this view; the idea is to increase the practical knowledge imparted in a legal education. This kind of legal education might be appropriate in a nation that was not in transition, for there would be no need to re-examine existing legal concepts and doctrines. But such is not the situation in a nation like Indonesia that is transforming itself and establishing its individuality. Most Southeast Asian countries are undergoing this process; in the United States it happened during the years in which a unique American legal system was formed - the time that an American writer. Grant Gilmore (1997), has called the Age of Discovery. He reports how the making of a distinct American legal practice bewildered those accustomed to the dominant legal tradition (p. 35)."

Furthermore, Satjipto Rahardjo (1994: 501) writes:

"Indonesia, being a society in transition, does not differ much from other nations struggling with modernization and industrialization. At the same time, unlike Singapore, for instance, Indonesia has developed a policy for maintaining the old tradition of statecraft - what we have called reverse development. If legal education is to contribute to the design of a modem Indonesian legal system while helping to preserve the old pattern of social life, then legal educators and others should articulate the kind of educational reform that are needed to archive this unique goal. For nearly half a century no such voice has been raised -or if it has, not loudly or persuasively enough."

Finally, Satjipto Rahardjo (1994: 501) states that:

"If the age-old traditional value and indigenous pattern of life are to be maintained, the structure and concepts of the postcolonial legal system, which is based on different assumptions and social values, must be reviewed. The curricula of the law schools of today are not tailored to accommodate the basic reform of the legal system after independence. This does not mean that no effort has been made to make such a reform; rather, the reforms are not comprehensive and systematic enough to match the great change in the legal system..."

In Chapter V: Towards Modernization of Laws in Indonesia, I will discuss this issue further.

III. DECENTRALIZATION OF POWERS AND THE ROLE OF LAW IN INDONESIA

Since Suharto was overthrown in May 1998 and the rolling of the reformation spirit, one of reformation ideas in political fields is the emerging strong will to do "decentralization of powers" by giving freedom to the regions to implement local autonomy.

In my opinion, the local autonomy era should be viewed as a new era of "school of democratization." It implies that local autonomy is a long process and demands a considerable transformation. This should be widely understood not only by local governments, but also by society from all layers and institutions.

Therefore, in order to implement local autonomy, then, it is regarded need to emphasize more on democratic principles, participation of people, even distribution and justice, and consideration to local potency and diversity.

In facing the development of situation either in or out of country, and challenge of global completion, it is regarded need to implement local autonomy by giving the broad, real, and implemented by regulating, distributing, and using of national resources, and balancing of central and local finance, based on democracy principles, participation of peoples, even distribution and justice, and local potency and diversity which are implemented in frame of "the Unitary State of Republic of Indonesia" ("Negara Kesatuan Republik Indonesia").

It should be realized that over the years of development, activities and program have been carried out in such a way that they have undermined the independence and initiative of the local people. This is believed as a result of the tight control and strong guidance from the higher level of government in its attempt to enhance national economic growth. Now is the time for local governments to take convincing measures in developing local initiatives as a guideline in the future local development.

Therefore, in conducting program and development activities, we should consider the future need of the people, because the development's output, moreover its outcome, are not in the short run interests only. The development progress should not bring about a structural condition that will eliminate the interaction between people and their guardian, between people and their local values, nor alienate people from the development progress.

So, development should strengthen local values not adversely. Actually, a set of local independent values and wisdom exist in our society. This should be developed and revitalized, as they may become the essence of local autonomy.

There are three newest acts related to the "decentralization of power" policy in Indonesia, namely:

1. Act No. 22 of 1999 on Local Government.
2. Act No. 25 of 1999 on the Financial Balance between Central and Local Governments.

3. Act No. 28 of 1999 the Implementation of Cleaning State and Free from Corruption, Collusion and Nepotism (abbreviated as KKN)

In addition to those acts, in the Chapter on Local Government of the Second Amendment to the 1945 Constitution, also regulated provisions of "decentralization of powers."

Regarding the definition of **"decentralization,"** I would like to quote Roger Scruton, Ed (1982: 113) as follows:

> "The process whereby centralization is reversed, so that power is shifted from central political and administrative bodies, answerable to a single executive, to a multitude of quasi-autonomous bodies, concerned with the formulation and application of policy in particular regions in answer to local and variable requirements. Decentralization has often been put forward as a remedy against the concentration of power, and as a means of ensuring that the needs and expectations of the common citizen are respected. It is not clear that its need have either effect, since, 'sovereignty' requires that the original concentration of power be conserved, even if mediated by new local institutions. Decentralization seems to occupy a midway point between mere 'deconcentration' (the 'delegation' of power to local officers) and 'federation' (the division of internal sovereignty),"

Furthermore, Roger Scruton, Ed (1982:274) explains about "local government" as:

> "... a public organization authorized to decide and administer a limited range of public policies pertaining to a circumscribed 'territory within a larger and sovereign' jurisdictions."

For understanding the regulating of decentralization in Indonesia, firstly must be understood the definition of various terms regarding **decentralization of powers.** Article I of Act No. 22 of 1999 on Local Government has given several basic definitions:

a. Central Government, furthermore called Government, is apparatus of

the Unitary State of Republic of Indonesia that consists of President with all ministers.

b. Local Government is the Head of Local Government with the other apparatus of autonomous region as a local executive body.
c. Local House of People's Representative, furthermore called DPRD, is Local Legislation Body.
d. Local Governance is the implementing of Autonomous Region governance by Local Government and Local House of People's Representative (abbreviated DPRD) based on decentralization principle.
e. Decentralization is the transfers of governance authority by Government to Autonomous Region in frame the Unitary State of Republic of Indonesia.
f. Deconcentration is delegating of authority from Government to Governor as a representative of Government and/of central apparatus in regions.
g. Assistance Task is assignment from Government to regions and village and from the regions to village to implement certain task accompanied with financing, means and infrastructue as well as human resources with obligation to report its implementation and to be responsible to whom giving assignment.
h. Local Autonomy is authority of the autonomous regions to administer and manage the interest of local people according to self initiative based on people aspiration that comply with the legislation.
i. Autonomous Region, furthermore called Region, is the unity of legal community, which have certain border of region, have authority to administer and manage the interest of local people according to self-initiative, based on people aspiration in frame the Unitary State of Republic of Indonesia.
j. Administration Territory is the working territory of Governor as a representative of Government.
k. Vertical Instance is the apparatus of department and/or non-department government institution in region.
l. The Authoritative Official is Government official in central level and/or Government official in province territory, which have authority to build

and supervise the implementation of Local Government.

m. "Kecamatan" ("district") is the working territory of the "Camat" ("Head of district") as the apparatus of regency territory and municipalities' territory.

n. "Kelurahan" ("sub-district") is the working territory of the "Lurah" as the apparatus of regency territory and/or municipalities territory under district.

o. "Desa" ("village") or Called another name, furthermore called "desa", is the unity of legal community which have authority to administer and manage the interest of local community based on the origin and local custom which is recognized in National Government system and to be in regency territory.

p. Rural territory is territory which has main activity in agriculture, included the managing of natural resources with structure of the function of territorial as place of village settlement, servicing of government service, social servicing and economic activity.

q. Urban territorial is territories which have main activity is not agriculture, with structure of the function of territorial as place of urban settlement, centralization and distribution of servicing of government service, social servicing and economic activity.

For Indonesia, the policy of "decentralization of powers" is very determined by the existence of the three acts as I described above.

"Decentralization of powers" in the finance field is stipulated in the article 78-86 of the Act No. 22 of 1999 on The Local Government.

The Implementation of Local Government and Local House of People's Representatives (abbreviated "DPRD") are financed from and burden of the Local Income and Expenses Budget (abbreviated as "APBN," Article 78 paragraph 1). Whereas the implementation of the local government task is financed from and burden of the State Income and Expense Budget (abbreviated "APBN," Article 78 paragraph 2).

Sources of the local income consist of*:*

a. Original income of local, namely:
    1) Income of local tax,
    2) Income of local retribution,

3) Income of company owned by local, income of the managing of local wealth that separated, and
4) Another original income of local that legal.

b. The balance fund,
c. The local loan,
d. The others local income that legal.

(Article 79).

Regarding cooperation and dispute settlement stipulated in Chapter IX. In article 87,

(1) Several regions could make cooperation inter-region that regulated by join decree.
(2) Region could establish Cooperation Body inter-region.
(3) Region could make cooperation with another body that regulated by joint-decree.
(4) Joint decree and/or cooperation body, as meant in items (1), (2), and (3), in which to burden community and region, must get approval from each Local House of People's Representative.

For the international circle, the most important is article 88, which stipulated that:

(1) Region could make cooperation that benefit each other with institution/body in overseas, which is regulated by joint decree, except involving the authority of government as mentioned article 7.
(2) Customs and manners as meant at paragraph (I) stipulated by government.

Article 7 regulated that:

(1) Local Authority encompass authority in all fields of government, except authority in foreign political field, defense-security, judiciary, monetary, and fiscal, religion, and the authority of another field.
(2) Authority in another field, as meant at paragraph (1), encompass policy concerning national planning and national restraint of development in macro context, fund offinance balance, state administration system and

state economy institution, building and empowering of human resources, efficiency of natural resources and high-technology, conservation and national standardization.

How does local government in Indonesia take position on Act No. 22 of 1999? I can give example through position taken by majors and regents around South Sulawesi in the In Country Training Programmed on: Development Planning and Implementation under the Decentralization in Makassar, 17-19 and 24-26 February 2000, where the Hasanuddin

University and also JICA (the Japan International Cooperation Agency) involved in that program. Their mains thought we could deem as the existing perception in bureaucrat circle of local government in Indonesia about "local autonomy idea" which rolling nowadays. I quote main thought of **The results of the In-country Training of Development Planning and Implementation Under the Decentralization** (Abdul Madjid Sallatu & Agussalim, editor, 2000: 12-44) as follows:

A. THE IMPLEMENTATION OF LAW NO. 22 /1999

a. THE FUTURE PERSPECTIVE

In principle, districts and municipalities are ready to implement law No. 22 of 1999. It is already widely known that that real autonomy has been and obsession of local governments over years. The law envisages a number of progressive and courageous measures in delegating authorities to districts and municipalities. We can not deny that such an opportunity also provides the enormity of challenge and the complexity of tasks right from the preparation and anticipation period to the implementation of it in local government administration. But basically the essence of local autonomy for Indonesian community has reached the point of no return.

Law No. 22 of 1999 should be implemented in accordance and consistent with Law No. 25 of 1999. It should however been noted that law No. 18 of 1997 on the Tax and User Charges could be a main obstacle in implementing the both law as it will reduce the local financial capacity. The imposition of Law No. 18 of 1997 can be understood in the economic development perspective but in the eyes of local governments it has restricted the room for them to implement autonomy. It is important

to acknowledge that each district/municipality has also its own interest in accelerating its economic development.

Central government should not see autonomy only from transfer of authority perspective. More broadly, all the government agencies in the national level should have a better apprehension about the essence of the autonomy that stipulated in Law No. 22 of 1999. Local autonomy is a logical consequence and demand of the need to bring economy and political system closer to local community. It is in this regard that autonomy should be an inherent feature in the independence of local government.

The preparedness to undergo decentralization should not be seen only from the government official side but more important is the community's readiness in each autonomous region especially the private sectors. The perception that only government must take responsibility in the local autonomy development should be disappeared. In contrast, it is the responsibility and in interest of the government and the whole community in respective district and municipality to make autonomy smooth in its implementation.

Local autonomy, as Law 22 of 1999 stipulated, demands a considerable and essential changes. But on the other side we have to be aware that in carrying out structural and complete restructuring almost all the districts and municipalities have inherited a great deal of significant unfavorable condition from former centralized system. A corollary to this condition is that, from the preparation period of autonomy or the transition period like now the responsibility and support from central and provincial government is still needed but should avoid taking prescriptive approach that can undermine adaptability to local needs.

One of the important dimension in strengthening and developing the capacity of local government in implementing autonomy is the enforcement of laws and their supporting regulations. Therefore, local government should possess an autonomous authority in enforcing laws and local regulations. One of the essential tools for this task is the authority in delivering police protection.

Central and provincial government should be sincere and resolute in their attempts not to intervene in the local government's authorities as regulated in Law no. 22 of 1999. It must be understood that the law envisages a great deal of new paradigms about the roles of government.

The success of implementing local autonomy should not been measured merely from the administrative setting. It will vary depending on circumstances and institutions.

Up to now we do not know enough empirically to make good comparison about the autonomy performance of each region. It shows in some respects the autonomy is a long process.

The term of user charges (retribution receipts) should be reviewed. Up to now user charges have been only partially tapped, with potential sizeable increases in local government revenues from more effective utilization of it. In this autonomy era, user charges could be one of the important sources of revenue for local governments. On the other hand, caution should be exercised not to be trapped into ineffective practices of user charges as that may adversely affect the authority of the local government. Alongside this problem, the taxation system in its relation with local autonomy implementation should be carefully and thoroughly determined from now on.

b. THE CURRENT CHALLENGE

It is hoped that the understanding of the essence and implication of the Law No. 22 of 1999 and the Law No. 25 of 1999 can soon reach community in general. This is important in the effort to gain widespread understanding in the following matters:

- Government regulation to implement these laws is fundamental to sound autonomy policies and, indeed, public policies in general. It is high time now to formulate a process and mechanism of local government administration regarding transparency and accountability.
- Involvement of universities, NGOs, and other institutions as the catalyst in socializing autonomy is essential.

Government, especially sectoral departments, should be sincere to acknowledge that they still maintain strong interest in transferring authority and have been showing slow response in decentralizing some authorities. In this connection, efforts need to be undertaken to achieve potential benefits offerer by local autonomy. On the other hand, in order to strengthen the unity of the provincial region in the process of autonomy implementetion, the provincial govemtoent is demanded to assume coordination responsibility.

In order to create an equal partnership between local government an and the local legislature, it is essential for them to reach a single agreed interpretation on the

several dimensions inherent in autonomy practices like the basic framework of autonomy implementation, its policies and its technical operation.

Actually, the Law No. 22 of 1999 and the Law No. 25 of 1999 will facilitate the role of the regents and majors. This can be reached if:

- There is clarity in delegation of authorities and division of responsibilities and kinds of intervention and guidance can be relinquished.
- There is an effective supporting system to the autonomous institutions.- There is an optimum managerial function in governing development activities and community's life.
- Basically, local administrations are well aware of the national interest and unity. This would be a major contribution to the unity of this country and nation. For this reason, decentralization to support the Law No. 22 of 1999 and Law No. 25 of 1999 must occur and similarly there must be a set of government regulations on delegated authorities because it will provide an umbrella legal framework for local governments in administering their regions, managing the development, and empowering the community.

B. THE INDICATORS OF FUTURE DEVELOPMENT

a. THE FUTURE PERSPECTIVE

In the future perspective, local development and its indicators should not only be the responsibility of the local government, thus, it must be soon socialized to the people that the government is not anymore the main stakeholder in development activities. Within this framework, the role of the local government will shift to director, controller, or coordinator. Universities are expected to function as the facilitator and catalyst in local development.

The pride and satisfaction of the people are far more important than their per capita income. Therefore, the development's output should be the sources of the people's satisfaction and its outcome should become people's pride. It can only be reached if we put people in the front line of community development.

b. THE CURRENT CHALLENGE

Each autonomous region should formulate the development planning mechanism, which could be also understood by the legislature. The guidelines for regional development planning and controlling (P5D) does not suit anymore to the people's needs and cannot accommodate the stakeholders' participation.

Basically, globalization links directly to local autonomy, but regions will realize a maximum access to and advantage from globalization only if they are able foster cooperation among them. This purpose can be supported through three components:

- Identification of global market network for commodities.
- The accumulation of investment advantage.
- A network of donor agencies cooperation.

The central government should review the indicators used in earmarking the general allocation fund. It is necessary for the central government to provide opportunity change for local governments to allow them greater discretion in the use of general allocation fund in line with local priorities. Similarly, eradication of KKN practice is fundamental.

Until now, the process of arranging local budgets are not transparent and difficult to be accessed by people in general. A growing awareness of this problem has resulted in a need for a comprehensive reform. From this perspective, each autonomous region should set up its parameter in arranging local budgets.

Small islands should be considered as a special case in development planning. Within this perspective, some fields, e.g., marine resources needs particular delegated authority and resources management. To this end, it is essential to establish an integrated regional cooperation among small islands in order to define comprehensively and clearly special roles assigned to them and to prepare adequate government regulations to foster a more sustainable pattern of development.

National development planning process should focus only on strategic matters meanwhile provincial government is responsible for interdistricts and municipal cooperation and cooperation. Such kind of planning process should be standardized.

Central and provincial governments need to identify all planning processes, budget assistance, program, and project that are not in line with local autonomy. Most of development activities should be done in districts and municipalities. In this way, a

policy dialogue and program design should be encouraged in each region although they have no regular schedule and no fixed format.

C. LOCAL ORGANIZATION AND INSTITUTION

a. THE FUTURE PERSPECTIVES

In the future perspective, in restructuring local government organization in the first instance there must be a determination and clarification on the delegated authorities based on Law No. 22 of 1999 and Law No. 25 of 1999. This is important especially in an attempt to make operational formulation suitable to the objective condition of each region.

There must be a review on the existence of a number of institutions. On the other side we should also establish some indispensable institutions required by the autonomy process like Local Financial Management Board. The guidance and the strengthening of the institutions in autonomous region are important in an effort to address a learning organization' perspective.

Autonomous region should have institutional authority to manage and control over the local resources including land management.

In addition to a technical matters, we should put a mature and far-seeing thinking in handling. The restructuring of the autonomous institutions. The institution restructuring should be directly linked with a vision and mission of respective region. In other words it needs a kind of strategic planning.

The development of the autonomous institutions should not be uniform and similar. It will much depend either on the need and capability of the each region or its institutional prospect.

Each autonomous region should conduct institutional need assessment and identification of its institutional capability.

On the first step of the autonomy implementation, we should not be too rigid about the inefficiency or the streamline of older institutions. We should think that we are in a transition period and the existing institutions could become an initiation of the new institutions which suit best needs.

Institutional reform effort should adequately cover issues relating to local government personnel. This interconnection matter has some inherently problems ranging from structural and functional officials problem, mutation, recruitment, career

development to mobile of the staffs. To support efficient operation and proper response, government, at least provincial governments, should allow much more flexibility for districts and municipality in making some adjustments in these problems.

In carrying out institutional restructuring we should think of the efficient, effective and timely institutions. Basically, district and municipalities are aware of their own objective conditions and challenge but advocacy and input from various bodies are still needed.

b. THE FUTURE CHALLENGES

Village Representative Board (BPD) should be soon empowered and strengthened. Local governments should take real measures to socialize, facilitate and encourage its development.

The condition and development prospect of other autonomous institutions will much depend on the capability and capacity of the Secretariat of the Local Administration (Sekda), therefore it needs strengthening it. Until now, there has been quite a lot of weaknesses within the Sekda, including the technical office matters. The existence and development of it on one hand will depend on the capability of the officials of the local government.

In an attempt to support effectively the delegated authorities, each region should have a comprehensive, clear and far-seeing civil service policies. The existing civil service regulations need reviewing, so that they can suit to the local needs and be in line with the delegated authorities. The following are several problems that will need adjustment: the recruitment system, career development system, job qualification requirement, placement, mobility, and promotion.

The government should consider to undertake a nationally designed policy regarding "premature pension." Considering it as a significant and essential factor therefore it must come into effect before the implementation of Law No. 22/1999. This policy still rests with the central government to decide. A complementary need is local governments should conduct self-assessment studies in order to find a clear sense of priorities in restructuring their personnel.

A close attention must be paid regarding structural job and echelon promotion in the development of autonomous institutions. These two problems should be solved carefully in order to avoid a far-reaching burden and problem cancellation. In facing these problems, the establishment of functional character institution could be an answer.

Therefore an institutional capacity need assessment that should be carried out in order to identify institutional framework and functional description best suitable to the region's interest. The idea to eliminate the echelon job in local administrations comes from perception that it has been hindered the career development of civil servants. But on the other side, the local government may still need it. Therefore, care must be taken in deciding whether to reduce or maintain the echelon position.

D. COMMUNITY EMPOWERMENT

The capability and capacity of government officials are limited, but community empowerment is not only important but is a must. Therefore in implementing of community empowerment we should prepare the following matters as necessary conditions: the awareness of community, the support of community's institutions and the support of facilities from other bodies, including those of donor agencies.

We should listen to people's voice and give them choice. Otherwise, people are conditioned to be disguised rebels. From this perspective, the accumulation of government and people's capability and capacity in empowering community is an important determinant of the effectiveness of these efforts.

In the long run community empowerment is still a problem of great complexity especially when we take the present objective condition into account. A number of aspirations and interest are still distorted by vested interest.

The community needs encouraging to express their need and ideas in a real and realistic way.

Even though there are many optimists of the local autonomy idea, some experts, including myself, are pessimists. It is possible that through the implementation of local autonomy, "KKN" (Corruption, Collusion, and Nepotism) will move from the central to regions.

I am pessimist because it seems to me that the quality of human resources of some bureaucrats and members of the House of People's Representative are not sufficient yet. Therefore, all possibilities above also should be anticipated in implementing local autonomy.