Chapter V

TOWARDS MODERNIZATIONS OF LAWS IN INDONESIA

I. HARMONIZATION WITH TRADITIONAL (COMMUNAL) VALUES

In this Chapter V, I will adopt "the sociological approach to law" more. As we know, there are three approaches to law : (1) a moral approach to law, (2) an approach from the standpoint of jurisprudence, and (3) a sociological approach to law. Each of these approaches has a distinct focus on the relations among law and society and the ways in which law should be studied.

The sociological approach to law, is concerned with relationship of law to morality and the internal logic of law. The primary focus of the sociological approach, however, is on the effects that law has on social action, on beliefs that people have about the social world, on the organization and development of social and legal institutions, on how law is created, and on the social conditions that give rise to law.

Conventionally, legal systems throughout the world are, commonly, differentiated into two legal systems, namely: ***the Continental European Legal System*** and ***the Anglo- Saxon Legal System:*** and the Indonesian Legal System is commonly classified into the family of the Continental European Legal System as a consequence of the implementation of ***the concordance principle*** by the Dutch colonial administration (whose legal system belongs to the family of the Continental European Legal System). However, in fact, it is not exactly correct that the Indonesian legal system is classified into the family of the Continental European Legal System, because, as has been suggested in Chapter I of this volume, in Indonesia there are three legal subsystems in force with their respective characteristics, namely: the Western legal system, the ***adat***

legal system ("the indigenous law" or the customary law of Indonesia), and the Islamic legal system.

For me, too, ***"the Style of Legal Families"*** of K. Zweigert & H. Kotz (1998) distinguishes "legal families" throughout the world into :

a. The Romanistic Legal Family;
b. The Germanic Legal Family;
c. The Anglo-American Legal Family;
d. The Nordic Legal Family;
e. Law in the Far East;
f. Religious Legal Systems.

The Classification of K. Zweigert & H. Kortz, has not correctly positioned the Indonesian legal system into one of the "legal families".

In my own opinion, the Indonesian legal system constitutes "a combination of several legal systems or legal families" and does not consistently belong to the Continental European legal system.

It is far more correct if we use the term of Satjipto Rahardjo, namely: **"*Between Two Worlds: Modern State and Traditional Society in Indonesia*"** (in Law and Society Review, Vol.28 Number 3, 1994).

Satjipto Rahardjo, a professor of **sociology of law,** explains the meaning of his expression above, that:

> " Indonesian political leaders in the mid 20th century attended to create a new state founded both on the rule of law and on their understandings of traditional Indonesian communal life. They sought simultaneously to 'advance' toward modernization and industrialization and to preserve older, village-level norms and values which they projected onto the national legal and political screen. This article examines the inconsistencies inherent in these twin aspirations and the continuing tensions, during a period of rapid growth and economic development, between rights based conceptions and those based on an ideology of harmony and communal village life."

Thus, we have to realize that, law plays only one regulates and influences human behaviour. Moral and social rules, though less explicit and less formal in their nature and content, also play a significant role in society's efforts to control behaviour. Law arises not from the actions of governors of a state, but from the facts of life within a community. The rules of law (reflecting economic and moral norms) are based on the community's recognition of their significance for social cohesion (see also, Anwarul Yaqin 1996:1, Curzon 1979:86).

Different from the legal life in such countries as Singapore where there are not contradictions between law put into effect by the government, on the one hand, and the legal culture of the society, on the other, the legal life in Indonesia has an uniqueness, because, essentially, formal law put into effect by government is frequently in conflict with the indigenous culture of Indonesian peoples. Law in Indonesia lives "between two worlds: the modern state and traditional society in Indonesia." Such a situation has the origin in the history of the implementation of the provisions of Dutch colonial law during the colonization, formerly, that, based on the Article II of the Transitional Provision, were (are) continued to be effective, partially even until now, as I have stated in Chapter I.

For Indonesian society, we cannot apply the classical theories of legal development such as suggested by both Max Weber (1954) and Emile Durkheim (1964). As has been known, classical theories on law and society, in this case, on the development of the modern legal sytem, proffer stages of development, from archaic to traditional to rational.

These theories suggest that certain stages should be accomplished before the next to achieve a further developed state. Weber, for one, propounded the classical matrix of authorities divided into three stages of development ; the traditional authority, the charismatic authority, and the rational legal authority. Weber's thesis was that legal systems develop through a process of rationalization. For me, Max Weber's theory of development is only proper to apply to societies know no revolutions and cultural and legal diversities within their communities. For the Indonesian case, the development of formal law, on the one hand, and the development of the society, on the other hand, do not go as steady as Weber's thought. There is disharmony between the development of formal law and that of the society.

Such disharmony sharpens during the contemporary modem era, as suggested by Satjipto Rahardjo (1994):

> "The mechanical and linear development exemplified by Weber's old thesis, among others, cannot match the complexity of development experienced by new nation-states in the second half of the 20th century - the 'latecomers in modernization' –The latecomers—Indonesia is a case in point are experiencing simultaneous waves of development".

Actually, the root of the appearance of the disharmony in the legal life in Indonesia was initiated during the early days of the making of the State of the Republic of Indonesia, namely when Indonesia was in its conceptual state early 1945.

At the time, Supomo, a professor of "traditional customary law of Indonesia" or "hukum adat", was an ardent advocate of basing the state on original Indonesian conceptions of the individual and society.

Supomo, in 1937, stated that, the concept of ***aku*** (I, the self) in the Indonesian world embraces the whole community of which the individual forms a part, while in the West the personal pronoun represents just the individual. Within the Indonesian framework, conflicts is alien, because conceptually there is no opposition between oneself and the group to which one belongs; rather, there is a deep feeling of identity. The relationship between the individual and society, between the individual and the state, is quite the contrary in the West, where it is felt that provisions must be made to protect the individual from the state. In the West, legal system are designed around this dichotomous view (see, Satjipto Rahardjo, 1994 and Poggi, 1978).

How the disharmony between the Western concept and the indigenous one may be explained? By Satjipto Rahardjo (1994) it is explained as follows :

> " In a society with a hierarchy, however rudimentary, the Indonesian view of the individual and society can have profound implications, especially when observed from a Western perspective. One could, for instance, ask questions about how to start organizing a modern rational-bureaucratic society, of which the modern state is an important example, without a clear distinction between the individual and society. The Indonesian archipelago includes thousands of islands and hundreds of ethnic groups, and although no absolute uniformity in

social life exists, still there was thought to be commonality. The distinct character of social life in Indonesia was thought to reside in the sense of a shared communal life, a sense of oneness, togetherness, and harmony."

Furthermore, Satjipto Rahardjo (1994) writes:

"In making a state based on the indigenous mode of organization, the founders used desa (village) republic as a model. They conceived of the desa republic as an organic construction that embodies the traditional view of the individual and society. Some basic characteristics of their theory of the state are:

1. The state exists to protect and serve the interests not of an individual or group but of society as a whole.
2. The union between the government and the people should be strong—to use the Javanese expression, ***"manunggaling kawula lan gusti"*** *(* the oneness of authority and people). The government should embody the people's sorrows and wishes and all other mental states and aspirations.
3. Individualism is frowned on. The Indonesian state is a joint venture of the people based on the principle *of* ***gotong-royong*** **-** "all works should be accomplished in a spirit of togetherness".
4. Opposition between the state and the people is inconceivable. Opposition and conflict are inconsistent with the ideal of ***negara kekeluargaan*** *"* a state based on the familial concept."

To make the Republic of Indonesia a modern state along the lines of the desa republic, all the apparatus and institutions of the old republic were given new forms. The kepala desa (head of the desa) was transformed into the president, and the rapat desa into the modern Majelis Permusyawaratan Rakyat, the highest representative council in the republic. However, the power and authority of the kepala desa are

in fact without legal limitation; the power of the president, in contrast, is expressly stated in the Constitution of 1945 to be 'not unlimited'."

Although not precisely the same, actually, the tendency of dispute settlement of indigenous Indonesian traditions has more in common with the indigenous legal culture of the Japanese that tends to be "non-litigious". As has been known, one of the differentiation of models of societies is distinguishing them into :

(1) the model of non-litigious society and,
(2) the model of litigious society (despite the shift recently occuring among the Japanese society).

Differentiation of societies is very important for us to understand law effective in reality within the society. In general, a conviction is held that different social structures indicate the different legal forms and the different legal roles.

About the non-litigious tendency of the Japanese society, ***Takeyoshi Kawashima***, a professor of sociology of law in Japan, in his work entitled "Dispute Resolution in Contemporary Japan" (in Arthur Taylor von Mehren (ed) 1964:41-52) writes:

"There is probably no society in which litigation is the normal means of resolving disputes. Rarely will both parties press their claims so far as to require resort to a court; instead, one of the disputants will probably offer a satisfactory settlement or propose the use of some extrajudicial, informal procedure. Although direct evidence of this tendency is difficult to obtain, the phenomena described below offer indirect support for the existence of these attitudes among the Japanese people."

Although Japanese people in general do not like to litigate (to be involved in the judicial process), it does not mean that Japanese peoples are law-breakers. This opinion is suggested by Joseph W.S. Davis (in Arthur Taylor von Mehren, 1964 : 35-37) that :

"When attempting to reach conclusions on how the Japanese relate to their legal system and what their attitude is with regard to

> respect for and compliance with that system, one must start with the premise that the Japanese are generally much more law-abiding than citizens of most other countries. This condition is the result of their Confucian heritage duty. For centuries these people have been used to being told by lords, warriors, and administrators what to do and when to do it, this is also true of other oriental countries. It is a way of life. They did not challenge orders. By and large, the Japanese people are not rebels, revolutionaries or even reactionaries. Therefore, they accept whatever exists, including their legal system and if laws change over time they adjust to them."

Indigenous culture of Indonesian people has also a similar tendency. For the indigenous Indonesia thought, the function and goal are confined to peace conservation; these frequently appear in such expressions as: " justice of the peace," "to preserve the peace" appear in such sayings as "to establish harmonious atmosphere and the peace in the universe.

Actually, indigenous Indonesian culture holds a "consensus culture" while formal law put into effect formally by government is tinted with a nuance of conflict emanating from Western culture.

In indigenous Indonesian culture, a society is basically a real combination and balance, the integrity of which is safeguarded by wide consensus between individuals and groups composing it, based on societal values, ideas and functions. As has been known, the term "concensus" refers to a commonly agreed position, conclusion, or set of values, and is normally used with reference either to 'group dynamics or to broad agreement in' public opinion.

With the consensus type of society as Indonesian, an opinion is commonly held that despite the existence of different classes and groups as well as "conflict of interests," a sort of unity and harmony still exist in the society. Serving as the basis of the society are cooperation, consenses, common good, peace, social change and balance.

Indigenous Indonesian culture considers that law should grow up from consensus and serve wide various interests and their functions in the society. Law should work as a "mechanism of integration" assuming the role to support and develop social integration.

Society should be regulated by such basis ideas as equality, freedom, opportunities for every people to make achievements, sanctity of poverty, freedom of contracts, honesty, and moralistic accountability.

According to the indigenous Indonesian paradigm, the above mentioned thoughts are accepted by individuals living as inhabitants of the society. The consensus perspective of society considers that society is basically an order and integrated thoroughly. Such an integrity builds on the basis of cooperation and consensus.

In this consensus type of society, inhabitants of society are brought together by shared culture, norms, beliefs, and expectations. They constitute an integrated stable society and function organizations as social integrators. In such indigenous Indonesian society, law is expected to ensure social harmony and the change of social order through balancing various conflict interests.

In contrast, formal law put into effect since the Dutch colonial administration up to now is loaded with nuances of a "conflict society" of the Western hemisphere. As has been known, the conflict type of society looks at society as comprises of individuals and groups with diverse and conflict interests. Inhabitants of its community protrude as individuals, each of whom selfishly chases after his own goals. Law is composed from values and acts of different groups using their economic, social, and political powers that are adopted as a violent mechanism.

Therefore, for me, ***harmonization of laws*** to do should consist of:

a. harmonization between formal law and the living values within Indonesian society, especially in the legal field closely relating to such indigenous traditions as family law, marriage and divorce law, as well as inheritance law.
b. harmonization between Indonesian Law and global law, especially in the field of business law.
c. harmonization between one effective act and another, throughout legal fields, so that there are no overlaps or conflicts one another.

For me, in this connection, Government, the House of Representative (DPR-RI) and the judiciary (especially the Supreme Court of the Republic of Indonesia) should be aware that serious problems facing the legal development in Indonesia are, many of the existing laws are out of date or left-over from the Dutch colonial time. Also, many laws and regulations give rise to injustice as well as interpretation by judges and

prosecutors in their effort to deal with the more sophisticated transactions in a global market. Therefore, it is felt to be extremely necessary to draft new legislation more appropriate to the living values of Indonesian society without ignoring the global needs facing the whole nations in this present world. Thus, the imperative priority should be updating and harmonizing laws. In this case, updating and harmonizing laws to support the growth of the economy. In this respect, it is necessary to conduct comparative studies on foreign legislation, e.g. ASEAN countries and Japan, to improve and harmonize national laws.

In connection with the effort of drafting new legislation, it should be remembered not to give birth to legislation termed by Gunnar Myrdal (1971) as "sweeping legislation" or legislation drafted in haste. Laws falling into "sweep legislation," despite their intention to modernize society promptly, in fact, face the bequeathed societal realities, namely authoritarianism, paternalism, particularism, and many other irregularities.

The hastiness in drafting legislation, according to Gunnar Myrdal, is characteristic of states or notions falling into "Soft States". In Myrdal's (1970: 211) opinion, all developing countries, in various degrees, are "soft states". Myrdal's term intends to encompass all sorts of social indisciplines the manifestations of which are defects in laws and mainly in performing and enforcing laws, wide spreading disobedience among all level civil servants to rules addressed to them or groups in power that actually should be regulated by the laws.

Laws falling into "sweep legislation" despite its intention to protect the interests of miserable peoples at large, in their implementation fail to meet their goals.

Accordingly, for laws, created by Government in cooperation with the House of Representatives, to be effective, I am of the same opinion with Adam Podgorecki (1962:178):

> "... the following capabilities are needed;
>
> a. proper description about situations in hand,
> b. making analysis of evaluations and put the evaluations in a hierarchie order. In this way, a yardstick or guidance can be found, whether the use of a means produce a positive thing or not. In the sense, whether the healing agent is worse than the disease or not.

c. verification of the proposed hypotheses. In the sense, whether the selected means righteously ensures the fulfillment of the desired goals or not.
d. measurement of the effects of the regulations in force.
e. identification of factors neutralizing the aggravating effects of the regulations in force.
f. institution of regulations into the society, so that the goals of reform can be successfully achieved."

In the framework to materialize the updating and harmonization of laws, the role of the Law Reform Agency, with the assistance of the National Agency for Legal Development (BPHN), is badly important. As we know, the function and duties of the BPHN, which is at a directorate general's level, are to support the duties of the Ministry of Justice towards the Guiding of National Law, by such means as :

a. Rejuvenating the law, and,
b. Unifying the law in certain fields by observing public awareness of the law.

According to Decree of the Minister of Justice No. M.02-PR.07.10, the function and the tasks of BPHN has been restated, it can be summarized as follows :

a. to develop a national legal system including its legal institutions;
b. to conduct planning for law development;
c. to develop a system for legal documentation.

Up till now, BPHN has conducted a series of activities, of which the main programs are :

a. designing a national legislation program,
b. designing a long term law development plan,
c. formulating the basic ideas that will become the foundation of the national legal system,
d. developing a framework to support the national legal system, and the last,
e. making an inventory of the colonial laws which are still valid in Indonesia together with comments and restatements to bring them up-

to-date with present conditions.

According to "Law Reform in Indonesia : Results of a research study undertaken for the World Bank (2000: 93-95):

> "BPHN's activities culminated in a national seminar in July 1994 which topic of discourse was: "Development of the National Legal System in the Second Long Term National Development Plan" (Seminar Hukum Nasional ke VI bertemakan "Pembangunan Sistem Hukum Nasional dalam PJP Kedua"). And, in 1995, in celebration of Indonesia's 50" anniversary of independence, BPHN again conducted another successful seminar, under the theme: " 50 years of Law Development: An Asset for National Law Development in the Second Long Term National Development Plan".

Program that were selected for the next twenty-five years of law development were:

(1) law planning and drafting;
(2) national law research and development;
(3) development of the judicial system;
(4) law enforcement;
(5) legal service and legal aid;
(6) legal literacy;
(7) legal education and training;
(8) legal supervision; and
(9) legal means and infrastructure.”

Furthermore, in "Law Reform in Indonesia : Results of a research study undertaken for the World Bank (2000 : 93-95):

> "In the drafting of statutes, BPHN has initiated a "national legislation program" or program legislasi nasional (PROLEGNAS). It is a list of new legislations that need to be drafted and ranked by order

> or priority ("daftar urut-urutan perancangan peraturan perundang-undangan"). The list was prepared by BPHN in coordination with the legal bureaux and as such reflects a consensus of the statutes and government regulations needed within a certain time frame ("Rencana Legislatif Nasional" abbreviated RELEGNAS). That list should have developed into the work program of the legal bureaux together with BPHN. Once RELEGNAS had received approval from the President (”izin prakarsa”), it should have become the set national work program of legislation (PROLEGNAS). In practice, however, many legal bureaux were not consistent in implementing their list of proposed new legislations; they submitted a different list of legislations for the annual programs of their respective departments. The problem seems to be that there is no coordination within their own ministries as to which legislation should be given priority. Another problem is that the legal bureaux have to defer their annual work plan to other work plans or priorities submitted by the other divisions within the ministry (e.g. the secretariats general or the directorate generals). This inconsistency has been elaborated in our report on legal bureaux... In the drafting of new legislation, it was agreed in the meetings between the legal bureaux and BPHN that at the initial stage an "academic draft" of the respective proposed legislation should be drafted (designed). The academic draft should reflect the fundamental parts of the proposed legislation. Academic drafts can be designed by the legal bureaux or by BPHN. At present, there are about twelve academic drafts ready with BPHN, inter alia on new legislation in the field of insurance, contract, shipping, lease, bankruptcy, etc".

Despite many things that have been carried out and planned to do by the National Agency for Legal Development, in my opinion, with the radical political change from the authoritarian era of Suharto's regime to the reform era laden with openness spirit recently, the National Agency for Legal Development (BPHN) should adapt itself to the sufficiently drastic change. The old paradigm adopted by the National Agency for Legal Development should be changed into a new paradigm righteously

aiming to generate a **responsive type of law** and not a series of autonomous law anymore, or even repressive law.

II. EFFECTS OF THE DEMOCRATIZATION AND THE DECENTRALIZATION MOVEMENT

Democracy is indeed a "new game" for Indonesia, because for thousand years Indonesia was been under the rule of kingdoms scattering in the whole of Nusantara archipelago. Again, after that, Indonesia was under the domination of the Dutch colonial government. After the Independence of the Republic of Indonesia, the Old Order and the New Order regimes still did not already practice the true democratic living. As the result, since the independence revolution up to the early years of the rule of the Old Order regime, there was not much time for profound thinking about legal reform. For the most part the existing corpus of colonial law was maintained with minor editing here and there, particularly in the criminal code. In Indonesia, "democracy" has not been a stellar history. In fact, it is a history largely of non-democratic .

As we know, **"democracy"**, literally. Government by the 'people as a whole' (Greek: ***demos)*** rather than by any section, class or interest within.

Furthermore, in the following I quote what suggested by Roger Scruton (1996: 130) that:

> "…The theory of democracy is immensely complicated, partly because of difficulties in understanding that the people are, and which acts of government are truly 'theirs' rather than those of some dominant group or interest... The first distinction to be made is that between direct and representative democracy: in the first all citizens participate in decision-making, say by voting and accepting a majority verdict. In the second case, the people choose (say by voting) representatives who are then answerable to them, but at the same time directly involved, and usually without further consultation, in the practice of government..."

After more than 30 years of the authoritarian rule of Suharto regime, on May 1998, with the pressure of ten thousands Indonesian student, Suharto was successfully overthrown, succeeded by a person of the same regime, in this case Ex Vice President B.J. Habibie. However, the B.J.Habibie's power merely endured for about 18 months, and through an election (**Pemilu),** a new government was generated under the duet of President Abdurrahman Wahid and Vice President Megawati Soekarnoputri (a daughter of the first President of the Republic of Indonesia, Sukarno).

Nevertheless, the new government was not a genuinely new government, but a combination of New Order figures, a type of government, Samuel P. Huntington (in Kritz 1995:66) calls ***"transplacement".*** Within society under the "transplacement", the democratic processes are a result of the combination between the previous regime movement and the opposition movement. The logical consequence of such situation is that part of the old regime, both personnel and institutions, still resides within the new government, including the legal institutions.

With such "transplacement" condition, the lofty expectation of the realization of "democratization" in the new government era of Gus Dur-Mega, in reality, up to now, turns to become a phenomenon of the burst of "over excessive" behavior that from the normative spectacles is branded as **"to exercise unlawful actions toward someone else guilty of something " ("eigenrichting" or "tindakan main hakim sendiri")**. The "over excessiveness" phenomenon emerges as the result of Indonesian peoples' misunderstanding with the meaning of democracy interpreted as "unlimited liberty" despite a legal maxim's suggestion that : **Libertas est potestas faciendi id quod jure licet**: "liberty is potency to act things licensed by law." The border between "democratic freedom" and "anarchical freedom" solely lies within legal norms. Freedom that neglects the valid legal norms is anarchical.

For the time being, a negative effect resulting from the ***"era keterbukaan"*** ("openness era") is exactly the eruption of ***"kerusuhan"*** ("riots") in different regions costing a sufficient number of lives and properties and the unimpeded occurrence of ***"tindakan main hakim sendiri"*** (to exercise unlawful actions toward someone else guilty of something).

Similarly, the present magnitude of "the decentralization movement" in Indonesia has generated anxiety among some regions that their local potency is not fully capable of performing decentralization wholly. Therefore, Government is now

considering of delaying the implementation of decentralization until reaching an adequate readiness of the entire regions.

Such unreadiness to implement decentralization ftilly, especially in form of "autonomy" has been expressed by, among others, the TEMPO magazine (November 13,2000:26):

> "In 2001, should there be no obstacles, regional government organizations may alter their features. Such changes will be made with the enactment of Law No.22 of 1999 concerning Regional Autonomy. One of the consequences arising from the implementation is the delegation of civil servants in district offices—previously the responsibility of the central government—-to their respective regions. 'There are around 2.6 million employees, including teachers, who shall be transferred to the regions,' said former expert with the Minister of Regional Autonomy, Andi A. Mallarangeng. East Java, the second largest province after the Special Capital District of Jakarta, is also subject to changes. The delegation of authority from the main government to the regions, such as the law dictates, will result in the dispersal of 16 department's district offices in the region. The Regional Secretariat of the East Java Regional Government, currently consisting of 13 bureaus, shall be reduced to become 11. On the other hand, the number of agencies will increase from the original 14 agencies to become 21. It is hoped that the new agencies can accommodate 350,000 civil servants from the main district who formerly worked at district offices. These numbers, among others, come from the numbers of employees from liquidated departments—namely, the Ministry of Social Affairs."

Furthermore, to quote the Tempo (November 13,2000:26) :

> "The first issue is that the structural changes may result in the deletion of several positions in the First Echelon through the Fourth Echelon. ‘There are at least 172 officers within the Regional Secretariat and agencies who have lost their positions,’ explained

> Organizational Bureau Chief of the East Java Regional Government, Endro Siswantoro. The delections will mainly occur in the newly formed agenda in order to combine two serve to accommodate former employees of the District Office of Communication and the Land Transportation Agency. ....Needless to say, this worries the employees. Last week, when TEMPO visited the Public Relations bureau for the East Java Regional Government, the atmosphere in the office seemed to be one of apathy. Almost all of the employees looked unmotivated. 'We do not know what department we will work at later,' said Sunarwan in relation to the plan to disperse the bureau on the January I next year... Another matter is the minimum fund held by the East Java Regional Government to pay their wages. In the past, the central government has backed up civil servants' salaries. The transfer of human resources assets has clearly posed an additional burden: Although a Rp.75-trillion fund has been computed under the state budget for 2001 to balance the region's finances, its distribution has not been regulated."

The East Java issue is merely a small example from numerous problems that may come to surface as the impacts of the implementation of local autonomy.

III. DIRECTION OF THE FUTURE LEGAL REFORM

In fact, Indonesia is not alone experiencing the process of "transplacement" and the condition resulting from it; there have been many countries in the world undergoing the same process. These nations have encountered various dilemmas in law enforcement when they shift from an authoritarian regime to a democratic government. It is the experience of these nations that contribute knowledge that in the treasure of the human rights literature has been known, then, as ***transitional justice*** (see Chapter III-III.).

The booklet of the Annual National Workshop of the National Commission of Human Rights on November 21-23,2000, the theme of which was : **Transitional Justice menentukan Kualitas Demokrasi Indonesia di Masa Depan** ("Transitional Justice determines the quality of Indonesia's Democracy in the Future") explains that:

> “Transitional justice consists of specific knowledge, structures, and techniques needed by a country to shift from authoritarianism to a democratic system. This process is necessary to understand because:
>
> - Moving from the pamful past requires a space of the truth, reconciliation, and justice, for crimes committed by the previous regime without trying the past regime arbitrary.
> - A swift and comprehensive transition into a legal, social, and political system is required without leading to social and political upheaval.”

Transitional justice is an extremely important thing, because an direct effort towards the process of forgiving and reconciliation without preparing justice forms in advance bears with it multi hazards, namely people's despairs and legitimization of the actors’ crimes.

In correlation with what has been mentioned above it is clear that "abnormal situations" that sweep Indonesia are impossible to be treated with "normal" ways. "The immersion of law and order" sweeping Indonesia at present needs "ways that are also abnormal", or what Kritz terms as "transitional ways".

The positive paradigm still tightly shackles our legal thinking and practice in Indonesia currently. This paradigm needs to be changed into a more sociologic and realistic one. It is only with such a solution that Indonesian peoples will be able of freeing themselves from the "immersion".

Our legal situation is indeed **"desperate but not hopeless"** (to quote the view of Professor Dr. Mochtar Kusumaatmadja). Our legal situation can be likened to the economic situation we were facing at the beginning of the New Order period. It is to be hoped that the political will and commitment to bring prosperity to the Indonesian people can be success.

I am in support of the idea of establishing an organization having full authority to inclement legal-reform. This organization, called for example Badan Pengkajian dan Pembaharuan Hukum Nasional, abbreviated BPPHN or the **"Law Reform Agency"** would be directly responsible to the President and would be given authority through a

government regulation. This organization would cooperate with BAPPENAS in drawing up a plan of action and a budget for legal development and reform in Indonesia. Reform would then be carried out in the fields of : human resources, legal institutions and the judicial system (including methods of alternative dispute resolution). Reform of the judicial system in Indonesia must constitute the core of the said legal development.

Beside those that have been mentioned above, in my opinion, in the framework of legal reform, the legal education sector is an extremely important factor. It should be conceded that the curricula of our high legal education in the faculties of law in Indonesia nowadays are still bestowed from the philosophy of high legal education of the Dutch colonial era, namely what was named "Rechts Hoge School". The graduates of such education have (and are) prepared to become "legal craftsman" rather than "legal thinker".

It is obvious that such an high legal education system should be replaced. Another critism is that many of the materials used by the law teachers are obsolete or at least not really relevant to the study of law in the present stage of social, politic and economic development in Indonesia. It is the right time that legal educators and law professors in Indonesia should address certain problems arising from the challenge of increasing global economy in most facets of economic activity.

It is therefore recommended that the law curriculum should be able to answer the new issues in the globalization era, for example the existence of "trade in services". Although trade in services is to some extent different from trade in goods, the fact is that in both cases, the domestic markets will, in the near future, evolve into an international market. In the increasingly internationalized domestic market for services, Indonesian lawyers will have to compete against legal services offered in the country by foreign lawyers or offered outside the country. Ideally, Indonesian lawyers should also consider offering their own services to parties outside the country. It will therefore be necessary for the Indonesian schools of law to adopt an aggressive strategy to improve the international competitiveness of their respective graduates (see Ali Budiardjo et.al, 2000 : 62).

IV. LEGAL DEVELOPMENT AND THE ROLE OF FOREIGN ASSISTANCE IN THE AREAS OF LAW

In the framework of "legal development" in Indonesia, supports extremely required from foreign parties are in form of funds to carry out various activities in the field of national legal development, including the development of substance, structure and legal culture elements. A concrete example is, to promote human resources, "law practice" is needed, and of course, funds should be made available to finance a proper law practice.

So far, sufficient amounts of international cooperation in the sector of law. As an example, the most successful international cooperation in the sector of law education has been the Indonesia-Netherlands Legal Cooperation. Another example is a form of international cooperation still continues, namely the Economic Law Improved and Procurement System (abbreviated ELIPS) project.

The Indonesia-Netherlands Legal Cooperation (abbreviated KSHIB) commenced in 1987 and was terminated in 1991. Cooperation programs implemented at the time were amongst others: scientific upgrading courses and meetings, sending lecturers to the Netherlands in the framework of the 'sandwich program' for candidates of doctor in legal sciences, and also the provision of text books on laws. While by ELIPS, this cooperation is mainly focused on the economic law sector. ELIPS is a cooperation project between the government of Indonesia and the Government of the United States of America, namely. United States Agency for International Development (abbreviated USAID). Activities implemented under the ELIPS project are, amongst others, the sending of junior lectures to faculties of law in America.

Still in the field of legal education, international cooperation is also needed to invite visiting lecturers, because for the interest of developing the advanced law education, the presence of a guest lecturer is extremely important. By a guest lecturer or a guest professor, will be able to give inputs to the curriculum of the faculty of law concerned and the said faculty of law will in turn be able to identify the developing needs of the legal practitioners. The presence of extraordinary law professors can enrich the nuance of the teaching of a subject of study with the most up to date development in the related sector.

The foreign involvement in legal development in Indonesia are obviously not merely in the legal education sector, but also in all sectors relating to law, for example, training of both legal officials and legal practitioners (police officers, lawyers, judges) and various legal elucidation to community at large.

One example of foreign supports to the legal development sector in Indonesia, which has ever been carried out, was a study about "Traditional Alternative Dispute Resolution" (abbreviated ADR) made in 1996 by PT. Qipra Galang Kualita, sponsored by The Asia Foundation and BAPPENAS, has, among others, concluded the following:

- ADR should be developed in Indonesia as an option for resolving disputes outside of the court system.
- It suggested that the Government issue necessary regulations or guidelines and create a policy and institutional climate in which private labor mediators and arbiters can thrive and operate, and also recommended the following:
- The design and implementation of a Social Marketing Program, aimed at creating an understanding among the Indonesian population on the advantage of using ADR, and to offer more extensive social marketing of mediation and arbitration services for the business sector through workshops, seminars and inclusion in management training courses.
- The design an implementation of an Education and Development Program, intended to create curricula and training programs, train trainers, etc,
- The creation of a professional ADR 'service industry' as a way to institutionalize ADR in Indonesia, and the formation of a Professional Association of mediators/arbiters.

In a brief, I could suggest that the legal sector in Indonesia is in need of aids, in form of firnds or others, for the implementation of such legal development programs as the following:

a. law planning and drafting;
b. national law research and development;
c. development of the judicial system;
d. law enforcement;

e. legal service and legal aid;
f. legal literacy;
g. legal education and training;
h. legal supervision;
i. legal means and infrastructure.

V. FRICTION OF THE SYSTEM PROVIDED BY LEGAL TECHNICAL ASSISTANCE WITH THE EXISTING LEGAL SYSTEM IN INDONESIA

I want to begin this sub-chapter by quoting Time magazine (December 18, 2000 Vol.156 No.24,) under the title **"The Best (and worst) of 2000"**, in which one of "the worst scandal" in the world is, according to "Time", "Tommy Suharto, The Fugitive Case". For the complete account, I quote from "Time":

> "**ALL IN THE FAMILY**. Indonesian millionaire playboy Tommy Suharto—son of ousted President Suharto—now has a new role: fugitive. Still in hiding to evade an 18-month prison sentence after a conviction on a $11 million land scam, Tommy is the latest in a long line of fall guys for his disgraced father's regime".

A leading magazine in Indonesia, TEMPO (November, 14-20,2000) launched the news of Tommy Suharto's fugitive as its headline. Under the rubric " Opinion" entitled "National Fugitive" it was written, among others:

> " Indonesia's legal system has once again shown its inability to bring about justice with regards to Hutomo 'Tommy' Mandala Putra. Regardless of this failure, society still needs a system of order. This is why a different type of legal system is beginning to emerge to fill the vacuum. Last week, posters containing the words 'catch Tommy, dead or alive,' were circulated in various cities in Indonesia. This dangerous trend illustrates the public desire to make its own laws, as a substitute to state laws, which are increasingly regarded as being incapable of bringing about justice."

The case of Tommy Suharto's fugitive proves the weak of "law enforcement" in Indonesia, despite our knowledge that "law enforcement" constitutes one of the three elements of any legal system (see, Lawrence M. Friedman, 1975). I think, it is true that: "The Law not only missed the boat, but was also left floundering in the wake of Tommy Suharto's getaway. The poor condition of Indonesian "legal system" may be made even clearer from various statements I have ever expressed in the most prominent newspaper in Indonesia, the KOMPAS, as follows:

1. In connection with the poor performance of the Supreme Court of the Republic of Indonesia so far, the Kompas (Saturday, 11 March 2000) quoted:

> "Achmad Ali underlined that the Supreme Court post should be occupied by a highly intellectual person, he should be a man of integrity and own an outstanding track record, quick on the uptake of public aspirations, and able to come up with breakthroughs. With so many changes going on around us, it seems rather odd if a choice from mere career judges will be made, like the 24 names recommended by the Supreme Court… Referring to the list proffered by the Supreme Court, Achmad Ali clearly observes that the highest institute has not come down from its ivory tower, that it is still isolated from the spirit of change and the growing aspirations of the community… We hope to witness Gus Dur's adroitness in tricky situations like this, and show the highest institute that other people beside career judges are just as capable to lead the Supreme Court."

2. In connection with the poor performance of the Supreme Court of the Republic of Indonesia so far, the Kompas (Friday, 25 August 2000) quoted:

> "Professor of Law at the Hasanuddin University, Prof. Dr. Achmad Ali admitted that he was pessimistic about the Attorney General position which is still held by Marzuki Darusman. In his opinion, the present AG is not clearly committed in enforcing law supreme. Legal steps taken by Marzuki Darusman carry strong political colours instead of serious intentions to enforce supreme

law…Achmad Ali hopes that the AG would genuinely do his job with supreme law foremost in mind."

3. Still in connection with the poor performance of the Supreme Court of the Republic of Indonesia, the Kompas (Wednesday, 13 December 2000) quoted:

> "A similar view was conveyed by Legal Faculty professor Hasanuddin University Makassar, Prof. Dr. Achmad Ali. He hopes that a middle road can be walked to reach a compromise… Maybe, one of the middle roads is for the Attorney General to speed up the completion process of the East Timor Human Rights case without involvement of UNTAET. The Advocacy Team should not use nationalism as a front to cover themselves, Achmad Ali emphasized. The Attorney General Office and the Advocacy Team should get together to reach a compromise, or find that middle road."

4. The behaviour of a (great?) part of lawyers as one element of the legal system was worrisome enough. The Kompas (Thursday, 2 March 2000) quoted:

> "Kompas drew these conclusions from a separate discussion with four professors at law and state administration on Wednesday (1/3), they were Prof. Dr. Satjipto Rahardjo (Undip), Prof.Dr. Achmad Ali (Unhas), Prof. R. Priyatna Abdurrasyid (UI) and Prof. Soetandyo Wignjosoebroto MPA (Unair). The four stressed that lawyers should be actively involved in the fight against corruption and not act as 'guns for hire'. Although the prevailing system leaves generous space to move, a defending lawyer should not clearly define that he is defending his client… Achmad Ali and Priyatna admitted, several corruption cases which drew wide public attention were nearly always defended by the same lawyers. This in itself is not wrong, as it concerns trust of a client…Achmad also stressed that some lawyers at present deployed in corruption cases, appear to find cover behind the 'presumed innocent' code. At the same time they manoeuvre their objective in a different course. Meanwhile, they resort to the

> ‘presumed innocent’ code which does not mask their defensive tactics to free a criminal who should rightly be imprisoned. Ideally, a lawyer should assist the judge in finding evidence of a criminal case, his job should not end with defending somebody who might be guilty. A genuine advocate shall never manipulate facts in a criminal case. They should assist the judge in solving a crime, if only to strengthen a sense of justice among the community. ‘Because of that, defence lawyers should not handle corruption cases on the grounds of practical reasoning, they should listen to the voice within their hearts,’ Achmad said again.”

5. Government lack understanding about peoples’ aspirations in drafting laws; for example the peoples’ refusal of the Draft for State Safety and Security Laws. In this connection, the Kompas (Saturday, 4 September 1999) quoted:

> “Prof. DR. Achmad Ali, legal expert of the Hasanuddin University said at a separate location, the respective State Security and Safety Laws are ‘Paranoic’ Laws. Persons who like to apply these Laws do not fail to give the impression that they are suffering from extreme fears, hence a bill was drafted for their purpose. These laws, according to Ali, will be implemented under force. Parliament members appear to lack ears as they missed hearing the call for rejection of these laws. Ali refused to comment on the contents of the draft when he was questioned about it. Discussing the idea is a mistake in itself. Everything regresses towards the legal pattern of ‘repression’ which is causing doubt among the public. The state should have entered the legal state of ‘autonomy’ and later raise to the highly ideal ‘responsive’ stage.”

From all examples, I have suggested above, it appears that **the existing legal system in Indonesia** has its own characteristics, at least up to now, namely the immersed condition of the three elements of the legal system, the **“substance**”, **“structure**”, as well as “**legal culture**”.

It is clear that the “legal technical assistance” that does not consider the existing concrete condition in its relation to the three elements of the legal system in Indonesia will result in a “friction” of the system provided by legal technical assistance with the existing legal system in Indonesia.

Legal technical assistance by foreign countries as well as financial supports from foreign institutions for legal development in Indonesia, that aim to only support the drafting of various legislation and do not take into account other legal factors such as those I have explained previously, will clearly unable of improving the legal condition in Indonesia; even it is highly probable that such financial assistance will be merely enjoyed by few people in law enforcement institutions and other relevant agencies. As the result, the foreign assistance will only create new “KKN” (Corruption, Collusion, and Nepotism).

VI. HOW EFFECTIVE IS LEGAL TECHNICAL ASSISTANCE BY FOREIGN COUNTRIES AND INTERNATIONAL FINANCIAL ORGANIZATIONS TO BRING ABOUT THE ECONOMIC AND SOCIAL DEVELOPMENT IN INDONESIA?

Accordingly, in order that legal technical assistance by foreign countries and international financial organizations can be effective to bring about the economic and social development in Indonesia, the development of the whole elements of the legal system in Indonesia (substance, structure and legal culture) should obtain a balance portion, and give priority, in terms of quantity and speed, to subsectors with larger weakness such as those I have stated in the discussion of previous chapters. Therefore, I propose several recommendations as the following:

1. The essential thing should be performed by the government of the Republic of Indonesia to be able free the nation from the condition of law immersion it suffers is the existence of a strong “political will” from the government to restore the
2. Confidence of Indonesian people. The assistance from foreign parties should be accompanied with strict and concrete requirements, the promise of the Indonesian government to be thoroughly serious to use

the assistance to improve the legal, economic, and social condition of the nation, and not merely to be embezzled and made use by a small number of Indonesian legal officers and authorities. In this respect, too, the assistance from donor countries as well as from International Financial Organizations should not be intended to physical development such as during the era of Suharto's regime, but, instead, should be aimed to optimal efforts " to restore public's trust" to "law enforcement". These efforts are, among others, addressed to :

a. Legal professionals and law enforcers in form of the improvement of their professional quality in performing their duties, and
b. Society in form of the improvement of their legal awareness and legal obedience.

3. More concretely, I could recommend that supports would then be carried out in the fields of human resources, legal educations, legal institutions and the judicial system (including methods of Alternative Dispute Resolution). Therefore, the professional quality of all upholders of the law (polices, lawyers, attorneys, judges), need to be continuously upgraded by updating skill, insight and knowledge on "the need and the sense of justice of people" and also on various legal aspects concerning relations between nations and international commercial relations, because it can be presumed that with the progressively more intensive economic and cultural interaction, the field of law will have to handle and resolve an increasing number of cases because of clashes in the process. I want to emphasize that, if Indonesia legal system, and the quality of its human resources, is not ready to face up to those challenges, this means that it will hamper the progress expected to be able to be obtained from the increasing economic and other social activities.
4. Legal technical assistance by foreign countries and International Financial Organizations should not only support **Short Term Technical Reforms** but should also support **Long Term Policy Reforms**.
5. To avoid the deliverance to the due addressee, the distributive

mechanism of the financial aids should be supervised thoroughly both by the donor countries and International Financial Organizations. As to assistance relevant to the activities of certain NGOs, funds distribution through such NGOs can also be carried out. Assistance provided through both official government agencies and NGOs should be subject to constant surveillance from parties who provide the aids.