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Civil Law Reforms in Post-Colonial Asia

Beyond Western Capitalism



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Chapter 4

The Pathway of Civil Law Development in Indonesia: Laws on Land



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4.1 Introduction

The Indonesian legal system is inherited mostly from the Netherland legal system, while Netherland had been inherited the legal system mostly from French. The Indonesian Civil Code, as a concordant edition of Netherlands Civil Code, is a part of legal system that follows the Civil Law countries. Civil Code of Indonesia itself consists of four books namely Book I of Person, Book II of Property, Book III of Agreement, and Book IV of Statue Limitation. The discussion of civil law development can't be separated from the discussion of the civil code applicability and its changes.

The development of laws after independence has brought implication on the applicability of the civil code. The demand of institutionalization of Islamic law had pushed the Indonesian government to enact legislations in the foundation of Islam, such as Law No. 1 of 1974 on the Marriage and Law No. 7 of 1989 on Religious Court. By the enactment of those laws, Book I of Civil Code is only applied for non-Muslim in Indonesia. In its next development, the Law of Person regulated in the Indonesian Civil Code has been regulated specifically in the Population Administration Law and other related law.

In the other side, Book II on Properties of the Indonesian Civil Code divides properties into movable and immovable properties. The manifestation of immovable property is the land as the result of the property interpretation according to Article 506 paragraph 1 of the Indonesian Civil Code, it is stated that immovable properties

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are yard and everything built on them. The development of property law as part of civil law system then very connected with the land law regulation in Indonesia. The Basic Agrarian Law in 1960 (here in after called BAL) had been annulled mostly by the applicability of the book II of Civil Code on property. BAL stipulated that all property rights except hypothec in the Book II of the Civil Code had been annulled and replaced by the land rights stipulated in BAL. By the enactment of BAL and various land law related such as the Security Law in late nineties, the development of law has gone to undirected direction.

In addition, Book III of the Civil Code, specifically regulate the contract, had less importance since the enactment of the 1967 Foreign investment law and other regulation on the specific contract. However, basic principles of contract in the civil code had been remained applicable such as freedom of contract and validity of contract (Sunaryati Hartono 2001). There was a draft of contract law prepared in 1960, but faded away as the result of regime changes during sixties (Lev 1965).

In sum, very few provision of civil code is applicable and civil law has been developed in many laws and regulation, enacted especially during the developmental state. Among the huge area of the civil law development above, this article focuses on the land law development as the main part of the property law. The discussion on the land law is very important especially after the independence. Post independence Indonesia saw huge developments, arising from internal and external influences. Beside the internal need for economic development and political stability, Indonesia is witnessing profound changes of the international legal system that imposes so-called international requirements to comply (Kadelbach 1999). Those internal and external dimensions are related with the land use and utilization for economic development.

To achieve the goal of discussion, the next section will trace back the development of law during the colonial period. It is important to see the root of civil law development in Indonesia and the problem during the first engagement between local and western law. After that, the Sect. 4.3 of this article will provide the analysis of the effort to construct unified legal system after independence and how the land law development was used as tools of economic development. The Sect. 4.4 of this article provides analysis of huge development after the democratization of Indonesia. The last section analyze the direction of law development especially development of land law.

4.2 Civil Law Construction in Colonial Period

Indonesia civil law development in colonial period may be staged into three periods of law development: VOC period; British period; and Netherland Indies period. This section will describe and analyze the development of civil law especially land law during the period.

4.2.1 VOC Period

VOC officially started the economic activity on 1602 in Indonesia (De Kat Angelino 1931). The VOC legal system was aimed mainly at the coastal towns and suburbs under its direct control and rarely reached the rural hinterland. Thus, the records of legal development of the Dutch East Indies only came from the travel records of the Governor General at the time. Legal needs were met by making special rules. Regulations had been in the form placards (Soepomo and Djokosutono 1955). In the field of land law, the placard dated 18 August 1620 required the registration of land within VOC occupation (Handoko 2014).

The compilation of placards and customary law had been started during the Governor General Van Diemen authority. He had instructed to collect and compile all placards of law. In 1642, in Batavia, the placards had been systematically compiled and published under the name "van Batavia Statuten" (Statute Batavia) and updated in 1766 with the name "Bataviase Nieuwe Statuten" (New Batavia statute) (Soepomo and Djokosutono 1955).

In 1747, VOC issue order to make a codification of Java criminal law for a new court in Semarang. The result of the command was Mogharrar Book, which was an overview of Islamic law. At the same time, Boschennar Jan Dirk van Clootwijk took the initiative to record customary law contained in the royal palace of Bone and Gowa. In 1760, DW Freijer made a short essay or a compendium of the laws of marriage and inheritance law of Islam. In 1768, on the initiative of resident Tjirebon, a book named "Tjerebons rechtboek" has been compiled (Soekanto 1958). At the end of the 18th century around the year 1783, there was book titled History of Sumatera that showed the reviews and inspection on customary law was published by Marsden. Marsden investigation centers are Redjang, Pasemah, Lampung, Korintji, Minangkabau, Siak, Batak, and Aceh (Soepomo and Djokosutono 1955).

The research of the old documents finds that the VOC was not eager to make huge development of the law in Indonesia. The activities of the law development were limited to the compilation of local law.

4.2.2 British Period 1811–1816

When the British came in 1811, their first concern was directed at the issue of how the treasury of the government may be filled up. After seeing varieties of natural resource and its potential, the British government was determined to improve the conditions as had been done in India. British Governor General, Lord Minto, had been ordered to perform all corrective measures as quickly and effectively as possible, starting with gathering information about the farmers, the land, and all related information, before they can make something new legal improvement (Raffles 2014). The result of the research was the policy of land rent of which the farmer may rent the land directly to government.

Land rent system was made as follow: First, elimination of feudal services, and provided freedom for the farmer planting. Second, the government must supervise all farms, including the process for collecting the crops and land rent. Third, land rent should be calculated based on the actual conditions and how big the land was, with a fair calculated time (Raffles 2014).

This article finds that the British Government didn't intend to make the comprehensive development of law. It is argued that land rent policy didn't give legal certainty of ownership of the local people and regarded as the quick way to collect the money from local people.

4.2.3 Netherland Indies Government Period

British government was giving back the East Indies in 1816 to Netherland Indies Government. The period of Netherland Indies Government saw the emergence of western law transplantation in East Indies or Indonesia. The transplantation during the period could be seen from the enactment of several law codifications in accordance with concordance principle such as Civil Code in the form of Burgerlijk Wetboek, Commercial Code or Wetboek van Kophandel, and Criminal Code or Wetboek van Strafrecht.

Those codes are specifically applied for Netherland people or European people in Indonesia. The enactment of Civil Code raises question on the applicability of the code for the Indonesian people. In this regard, the General Provisions of 1847 maintained the old principle of *corpus juris civilis*, that the natives of the archipelago would be permitted to live according to their own laws and traditional institutions (Vollenhoven, in Holleman 1981). Thus, unwritten adat law was applied to Indonesian people. This dualism policy was strengthened in the establishment of the court for Indonesian people, for example *Pradoto Court* to adjudicate based on the law of the king, *Surambi Court* to adjudicate based on religion, and *Padu Court* to adjudicate the case based on the customary law (Vollenhoven, in Holleman 1981).

In the field of land law development, this period marked the beginning of land law development in Indonesia by the enactment of 1870 Agrarische Wet (Agrarian Law). In fact, 1870 Agrarian Law was enacted to give the Netherland Indies Government the ability to lease the land to foreigners under Civil Code. What was important in this Agrarian Law was the creation of Domein Verklaring stating that all land without the evidence of civil law ownership of property rights shall belong to the state. Thus, land under communal property or other traditional forms were not acknowledged against the state since the communal rights never have the civil law ownership evidence.

4.2.4 Legal Dualism Legacy

The colonial policy on development of law has left the legacy of legal dualism. Legal dualism provides the dual application of the law for each category of the people. Western law had been constructed for the western people and the local law in the form of adat law had been preserved for Indonesian people. In the field of land law, the dualism made the problem of ownership rights since the application of adat rights for local people didn't lead to ownership security. The policy, in the other side, gave benefit for Western Corporation and western people for the strong ownership of right under Civil Code.

In this regard, the registration of the land ownership under Civil Code had become powerful document and had been acknowledged as the legal document for the land registration in the post independence. This led to more land conflict in the post independence since many Indonesian people didn't have the strong document of ownership under civil code.

4.3 Development of Land Law After Independence

This section discusses the effort to construct the national law after independence during the Old Order and New Order. The period saw the two contrasting development of radical effort to re-create the new civil code during the Old Order and steady movement of law development to support economic development during the New Order.

4.3.1 The Constructing of National Law and Its Implication to Civil Code

When Indonesia became independent, its founding father was trying to develop its own national law. The difficulty arises not only because of the diversity of the legal system, but also because of the legal system had been already created as a result of long time transplantation since colonial time. The other problem was the creation of national law could not be achieved in a quick and short way. Thus, to fill out the vacuum of law, 1945 Constitution stipulated that all laws and legislation existing under the Netherland Indies Government became the laws and legislation of the Republic of Indonesia, until repealed, revoked or amended or found to be contradictory to the Constitution. Therefore, the laws and regulations in Indonesia after independence remained the same as the legislation enacted in colonial times, such as Civil Code, the Commercial Code, Criminal Code, and the other colonial laws.

The effort to unify the legal system was continued with slow start. After more than 10 years from Independence, in 1958, National Legal Development Agency (LPHN), which main task was to seek the design of national legal system fit with Indonesia characteristic, was established. In this regard, there was debate on the applicability of the Civil Code inherited from the colonial government and the Agency started thinking on the drafting new civil code. In 1962, the idea of drafting new civil code got support from Minister of Justice and Chief of Justice. Minister of Justice at this point, made proposal on the abolishment of Civil Code and Commercial Code as the starting point for the new draft. In 1963, Circular Letter of Chief Justice voiced the same idea with the Minister of Justice and declared the Civil Code as no longer in force (Lev 1965).

The drafting idea for new civil code involved the abolishment of Commercial Code and integrated the substance of Commercial Code into Book III of Contract. Chief Justice itself had prepared the draft on Contract Law based adat law, national sense of justice, and western principle. The draft was general and short, consisting of sixteen parts divided into a total of 93 articles. Many scholars had attacked this draft at that time saying that it was not complete (Lev 1965).

Other important development for the unification of law was the creation of Basic Agrarian Law (BAL) in 1960. The 1960 BAL was the first national agrarian law that intended to replace Agrarian Law of 1870 and land rights under Civil Code. The enactment of BAL had been used as argument by the LPHN to focus on the drafting of contract law in 1963. This argument based on the legal fact that BAL enactment had abolished the most part of applicability of Book II on Property and paves the way of property law unification. The basic problem remained that even though the intention of BAL creation in the beginning was the abolishment of the colonial legal system, the drafter in the end could not use or find the legal argument for the Indonesia's land title based on adat law. Therefore, in the end, BAL drafter could not accommodate the communal rights based on adat law instead using the principle of western rights.

Indonesia experience show that drafting the civil code is very difficult, especially when the legal system is pluralistic. The debate on amendment of new civil code during sixties revolved around the kind of system shall be adopted among adat law system, Islamic law system, and western law system. It is different with French who found the way in integrating the old customary law of French society into the code since the beginning. This difficulty led to the enactment of separate laws during the period of developmental state or New Order.

4.3.2 Developmental State and the Fallen of Adat

With the advent of New Order authoritarian regime since 1968, a basic understanding of the law for economic development has found its place. The regime changes brought new perspective on the development of civil law. Thus, new regime had overthrown many works of old regime including the draft and idea of new civil code. New Order

put priorities on the foreign investor entry into Indonesia and all institutions and laws shall support this policy. This period saw the birth of Laws No. 1/1967 on Foreign Investment Law, Law No. 5/1967 on the Basic Forestry Law (hereinafter BFL) and Law No. 11/1967 on Mining, etc. For New Order, drafting the individual law would be convenient rather than drafting the new civil code that would take a long time.

Throughout the New Order, 1960 BAL Principle State Control had been used to achieve the developmental goals, coupled with formulation of other natural resources related laws. Authoritarian government took control of the nation's resources and directs them towards the benefit of economic development. Since the resources always related to the land, it brings tension to many people who have legal relation with those lands. The result of this tension is creation of many injustices to many people upon their property rights especially to people who only had the traditional title based on adat law against the legal document registered under Civil Code during the colonial period.

The unification the nation-state continued with the enactment of Law No. 5/1979 on Village. The Village Law had big impact on the fallen of adat community and law because the Law established uniform village structures in Indonesia with the model of Java Regions. Thus, they destroyed the structure of adat in all over the country. The fallen of adat structure was one of structure and systematic movement by authoritarian government to achieve unification and homogenization in Indonesia. While many land concessions were coming from adat property rights, the disappearance of adat system and structure had made the legal ground for claiming adat rights will be lost in front of the formal law. This condition is true in case of Indonesia where the adat community had been decreasing all over the time. In the late nineties, the new Land Registration Law was enacted but it failed on giving legal title on the traditional right.

In sum, laws, government regulation, president instruction, ministerial decrees, and local regulations related to land affairs and exploitation of other natural resources have been formulated to create a more conducive environment for foreign investment and market creation activities. Those legal instruments then ignore the existence of other systems that live in the community such as indigenous people have the right to land, which is called the land titles of indigenous peoples and the property rights of the people who inherited the land from the past. The period fit with Kennedy (2006) description on the instrumentalism of law as the agent of politic and economic agenda through legislation and administrative action during the second period of law and development agenda.

With the enactment of law and regulation covering the land, Book II of the Indonesian Civil Code was applied only for several provisions on movable property and security rights. The latter covers property and individual security. The property security covers the privileged debts, pawn and hypothec, while individual security covers personal guarantee. In their development, the Security Law has been standing on their own apart from Book II of Civil Code. By the enactment of Security Law, Book II of Civil Code had been abolished, leaving the principle of the movable property.

The period saw the diminishing of Civil Code application in Indonesia. Related to enforceability in Indonesia, there was consensus among the scholar in Indonesia to use the Civil Code rules and principle only but not as codification of law. It

is concluded that the codification system had been faded away in the mind of legal architect in Indonesia in the late nineties. The instant thinking for economic development pursue had made the Government of Indonesia prefer to leave the codification system.

4.4 Post Reform and New Development of Land Law

The end of 20th century marked the huge changing of legal political system especially in Indonesia. Thus, they have very huge implication on the development of law in Indonesia. The post reform for Indonesia could be illustrated, not only as the period of constitutional and democratic consolidation, but also the period of legal rush. In addition, Indonesia law development has been under pressured by legal standards commonly featured in democratic modern states thorough legal assistance and law transplantation, even though this assistance may not solve the problem.

4.4.1 *The Period of Legal Rush*

After New Order had fallen in 1998, there was a force to reform all aspects nation life including the law. This led to many formulations of new laws and the ratification of many international law instruments. The development of law during the post reform has been directed through the National Legislation Program in accordance to Law on Legislation Making. National Legislation Program is a list of future national legislation that should be formulated and enacted during the five years legislator period.

However, the absence of the grand design of legislation development makes the development of legislation is nowhere to go, instead of being an instrument of economic development and democratization. The condition is worsened through the effects of globalization, which has presented with of international obligation in the form of formulation of domestic law (Burke-White and Slaughter 2006). Indonesia in this case is required to observe its obligations in line with the international direction in order to prevent the risks of isolation from international order (Capaldo 2003).

Therefore, during a decade after reform, Government of Indonesia under the direction of IMF and World Bank enacted many economic laws related such as the Mortgage Law, the Company Law, the Capital Market Law, the Bankruptcy Law, the Fiduciary Transfer Law, and the Arbitration Law as well as several Intellectual Property laws including laws on Copyrights, Patents, Marks, Industrial Designs, Integrated Circuits, and Plant Varieties. All these law had been projected to support the economic activity and to find the international standard.

In addition, the post reform saw the proliferation of many legislations. During 1997–2017, more than 500 laws had been enacted. This number is far bigger than legislation enacted during New Order regime. The number shows that Indonesia

Table 4.1 Indonesia legislation enactment by years

No	Year	Number
1	1945–1950	140 Law and 30 Martial Law
2	1951–1960	133
4	1961–1965	10
5	1966–1970	85
6	1971–1977	43
7	1977–1982	55
8	1982–1987	45
9	1987–1992	55
10	1992–1997	45
11	1997–1999	75
12	2001–2005	151
13	2005–2010	192
14	2011–2015	127
15	2016	22

Source Compiled by author from many sources

which is in the path of legal rush stress on quantity of legislation. Number of legislation enacted since independence can be seen from Table 4.1.

In the field of civil law and economic law during 2000–2016, this article found more than 40 legislations had been enacted. In same period, this article also found that there are 23 land related legislations had been enacted.

The quantity of legislation enacted by the legislation maker is not followed by the quality of the legislation. The low quality of legislation evidenced by the many laws that were reviewed in the Constitutional Court. During the period 2003–2017, there were more than 500 laws were reviewed in the Constitutional Court, and most of them is related with land law. It proves that the legislation was not formulated in accordance to the constitutional provision. In fact, sectoral interests and ego of each ministry and political parties influence legislation development, led to disharmony of the provision among many laws.

4.4.2 Recent Development on Land Law

Many problems have occurred as the result of long time injustice upon the property rights in Indonesia. From the reports coming to parliament, land problems may be classified into several problems such as land ownership, wasteland problems, land grabbing, land management, spatial planning management, customary rights acknowledgement, land compensation, and the problem as the result of decentralization authority.

One of the sources of problems is the law and regulation on land itself. Within the field of land law, author research on Synchronization and Harmonization of Regulations on Land Registry led to the conclusion that there has been a massive development of legislation but not directed, it caused overlapping arrangement and substance. In addition, our research on spatial planning in several regions has a result in a similar conclusion.

The massive regulation and overlapping provision in the field of the land law are the result of the legal rush activities by legislation maker. While the 1960 BAL is still applicable, the period saw the enactment of Law on Forestry, Law on Water Resources, Law on Environment, Law on Oil and Gas, Law on Geothermal, Law on Coastal and Small Island Management, Law on Spatial Planning, and Law on Fishery. These laws have been regulating the same issue and have their own technical regulation for the enforcement. The technical regulations are in conflict or incomplete.

In addition, the law enacted above had been reviewed in front of the Constitutional Court and several laws such as Law on Water Resources, Law on Forestry, and Law on Oil and Gas had been regarded as unconstitutional. The judgment saw that the provision of unconstitutional laws has benefit not only for the corporation but also put the limitation of access upon property rights by the ordinary people in Indonesia.

The period also saw the emergence of customary rights. The Asian Crisis brought back the customary identity-giving rise to local rights including adat rights within decentralization policy. In addition, The Constitutional Court, in its decision No. 35/PUU-X/2012, acknowledged the customary forests that are located within the forest zone. The Court ruled that customary forests should not be classified as state forest zone. It constitutionally gives indigenous and local communities the right to manage their customary forest. A problem is that there is no legislation on adat communities yet in order to enable them to claim their forests as customary forests. Official from National Land Agency explained that technical regulations are needed to make Constitutional Judgment applicable.

In addition, BAL and its implementing regulations have set out clear form of land rights that are applied in Indonesia, as well as subjects of law to obtain rights to land. But there is no explicit provision in the law that set out the form of land rights can be granted to indigenous peoples that fit with customary land rights characteristic. In addition, customary community is not an individual or a legal entity incorporated under positive law in Indonesia. As a result, there is a difference of interpretation of legal experts and officials National Land Agency to the rules governing what kind of titled rights granted to indigenous people.

The General Assembly in this regard has passed a Decree IX/2001 on Agrarian Reform and Natural Resources Management to solve the problems. The Decree instructed following legal reforms such as reviewing relevant laws related to land and natural resource; providing the national budget for agrarian reform; and resolution of agrarian conflicts. The first thing to do is reviewing the law and regulation on land and make a reform on land and regulation on land.

4.5 Reconstruction of Legislation Development

The discussion on the recent development of the land law and land related law indicates the need of formulation and improvement on the reconstruction of land law and regulation. The reconstruction shall be directed to the harmonization of the law as the roots of land law problem.

In this regard, overlapping provision and disharmony are actually an anomaly for a country with Civil Law tradition that is very conscious on systematization of legislation in the form of codification. I argue that following our long tradition of codification may be fruitful for the future development of land law in Indonesia. We can learn from success of Netherland on revising the Civil Code after more than 100 years in 1992. Therefore, the codification of the land law shall be considered as the solution for the future development of land law.

This solution is may be effective because we are in the state of formulation of Law on Land, Law on the Land Rights, and Law on the Land Special Court, Law on Agrarian Conflict Resolution, Law on The Customary Rights Recognition in the same time. Those Laws had been listed in the National Legislation Program. It means that those Laws have been listed to formulated and enacted in near time by the parliament.

Thus, it will be best to integrate all the laws regulating the land in the form of codification. The author itself had suggested this solution during the hearing with Indonesia Parliament. The integrated codification maybe started with using the BAL principles in Book I of General Principles, followed by the Book II on Land Rights, Book III on Land Registration, Book IV on Dispute Resolution and Land Court. In the process, the careful attention should be directed to type of land rights covering the traditional rights and its registration.

We have been leaving the codification model for legislation development, but the movement is already started in other field. The codification model has been started within the field of election law this year, initiated by NGO and supported by International Donors and General Election Commission. Tripartite model of collaboration is truly working. This is evidenced by the Parliament positive respond on starting the discussion and formulation of Election Law Codification. The same strategy may be used in Land Law Codification initiative. The tripartite initiative from NGOs, International Donor, and Government may become a catalyst for the initiation of Land Law Codification in the Parliament.

4.6 Conclusion

The land as main part of property rights in Indonesia has long history of problems, created from the colonial time and accumulated through long period of time until present. In its path, civil code as the first source of property rights had been left behind if not forgotten, replaced by many national laws. The paper suggests that the

initiation of land law codification is able to integrate all the land law systematically as discussed above. It may take tremendous efforts and consistency, but it is worth to settle the legacy of land conflict in Indonesia.

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