THE NEED FOR OUR NATIONAL LEGAL SYSTEM TO BE COMPLETED BY THE YEAR 2045

By: Prof. Dr. C.F.G. Sunaryati Hartono

" ..... A new world view is already emerging, along with a new set of values, like sustainability, community, sufficiency and fairness.
These are new forms for the age-old pursuit of happiness".
Marjorie Kelly[1].

Abstract

This article discusses why and how we should accelerate the process of creating our National Legal System based on the Pancasila principles, which expresses our founding fathers' and mothers' visions and ideals, as the Grundnorm of our National Legal System from the first day of our Independence Declaration, throughout the existence of our beloved Indonesian State, which is the Unitary State of the Republic of Indonesia.
The application our existing law, both by Government officials, the Police and Military General Office, and even by our Judges and Parliament during the last 69 years of our Independence, shows us, that Indonesian Law, which before 1945 was more or less based on 19th Century Dutch legal thinking, since 1945 has become a rough mixture of Adat, Islamic, Dutch, German, English, American, and Australian legal thinking. Both because many of our foreign educated young lawyers came back with their knew knowledge of the law (s) in foreign countries, and because many countries have assisted our government with their funding and experts, even in ameding our 1945 constitution.
But most of all because many lawyers and high ranking government and judicial officials have no sufficient knowledge or disregarded the legal aspect of our colonial history. Which is why the very basic law regulating the Dutch Colony (called the Netherland East Indies) i.e. the "Indische Staats regeling" of 1925 (S. 1925 - 415 jo. 577) up till the present/almost 70 years after our Declaration of Independence, and many other colonial laws have not yet been repealed!
In almost 70 years our Parliament and Government were not able to even agree on a Criminal Code and a Criminal Procedure Code, so that basically the old Criminal Code, which mostly consists of the French legal thinking of the 19th Century, still applies in Indonesia!
Therefore it is imperative, that we accelerate the making of our National Legal System to become a system for the people's and nation's needs in this 21st Century.
Fortunately, other nations are also developing new and other ways of philosophical values, such as cooperation, sustainability, comunity, sufficiency, fairness, etc., which are more akin to the values our Pancasila.

Therefore, next to the realisation of our own National Legal System we should also play a bigger role in international fora in promoting new international legal principles, which are more in line, or akin with our Pancasila philosophy; as well as promoting new legal principles of International Law, towards a better, more peaceful and more prosperous world society.

Introduction

Ever since our founding fathers aspired and struggled for the creation of an independent, modern Indonesian nation, living in a modern state they envisaged the creation of a modern, just and efficient government under a modern legal system Therefore the first act after our Declaration of Independence on August 17 th, 1945 was the establishment of a written Constitution, by which a new independent state, the Republic of Indonesia was created, which laws shall be based on the ideology and legal philosophy of Pancasila, and which territory covers what before the Second World War was known as the Indonesian Archipelago, or the Nederland- East Indies Colony.

Our founding fathers took care, that the birth of our nation-state was not only morally and politically justified, but that it also was based and in accordance with Constitutional- as well as International legal principles. In particular with Prof. Struycken's theory, and the recognition, that a situation, which before could be regarded as contrary to the existing law, nevertheless may in certain circumstances be recognised as a lawful act. Or in the Dutch language: "Van onrecht tot Recht".

Such was the case of our Proclamation of Independence, which the Dutch at first regarded as "illegal", and therefore started their "Political Actions" against our freedom fighters and the Government of the Republic of Indonesia. But since Indonesia became recognized as a member of the United Nations the Government of the Netherlands was forced to recognize the Republic of Indonesia in 1949.

The fact that the Dutch government left our people and country to be occupied by the Japanese Army also supported Indonesia's rightful claim for our independence.

We should also remember, that our lawyers were fully aware that much of the law applicable in Indonesia was contrary to the principles of human rights, and that the Dutch Codes should be replaced by newly formulated Indonesian National Codes, which should be in accordance with the Constitution and the Pancasila Philosophy.

Apart from the Agrarian Law, another article in the Dutch Law on the Administration in Indonesia (article 131 of the "Wet op de Staats-inrichting van Indonesie"), which very discriminatory divided Indonesia's inhabitants in 3 (three) different groups, namely Europeans Foreign Orientals and Indonesians. Each group of inhabitants was respectively submitted to the law in Holland (for Europeans). Their own respective Family law, was applicable to Foreign Orientals; but for business acts they were submitted to the Private Law Codes for Europeans in the Netherlands East Indies; whereas Indonesians for all matters were submitted to their own Adat laws.

This regulation, which officially seemed to be based on cultural differences, in fact was the legal basis for the Dual Economy,[2] which formed the colonial economy of Indonesia.

This Dual Economy consisted of a modern Western Based Economy and an Indonesian Agrarian Economy, whereby Foreign Orientals (Chinese, Arab and other Asians) were the middlemen, buying and transporting/ selling the agricultural products from the Indonesians in the villages to the Europeans in the cities, who exported the agricultural products (like sugar, tobacco, etc) to Europe and imported the finished products back to Indonesia and other countries.

Now, up till the present day art 131 of the law mentioned above has not yet been repealed, which is the cause why Indonesians up to the present still face the many difficulties and obstacles is a vis Chinese, Indian or Arab businesses, living and operating in Indonesia.

Like art 131 (2) mentioned above, up till the present time (although we have been living in an independent state for almost 70 years), many more colonial laws and Codes, have not yet been repealed and replaced by Indonesian Codes and laws They therefore still apply, and are being applied by our lawyers, police officers, prosecutors, judges and government officials, as well as members of Parliament!

Little do we realize, that art 131 of this so-called "constitution" which applied during the colonial time, forms the very reason why foreigners and Indonesian business people (of foreign decent) and their companies still dominate our national economy and why our Government still has to upgrade the businesses owned and managed by Indigenous Indonesians, through the development plans of small scale and even micro businesses of young Indonesian entrepreneurs!

The research team on the "Analysis and Evaluation of existing Colonial Laws still applied in Indonesia", set up by the National Law Development Body (Badan Pembinaan Hukum Nasional) of the Ministry of Law and Human Rights, which I have the honour to chair, was indeed flabbergasted of the amount of Dutch Colonial rules and regulations, which are still being applied by the government, as well as by our courts; in spite of the thousands of Indonesian National laws promulgated since our Independence, almost 70 (seventy !) years ago.

Completing our National Legal System in this 21st Century, by the year 2045.

Therefore we would certainly deplore, if by the time we are to celebrate our first centennial in 2045, we have not been able to do away with all the Dutch (and Japanese) colonial laws,and have them replaced by our own National Laws and institutions, all of which reflecting our state's ideology and legal philosophy, which is our Pancasila.

However, in order to do it right, we still need a great number of lawyers, who can understand both the language, as well as the true meaning of the Old Dutch language, and political, historical and cultural situation of the last two centuries ago. But only a handful Indonesian lawyers of the 1920 generation are still alive, like for instance Prof. Mochtar Kusumaatmadja, Prof. Priatna Abdurrasyid, Prof. Sahetapi, and a few others. But not many people in the Government notice our frustration

about the way our law and legal system, including our national law reform by our Government and Parliament is handled, in developing and handling our everyday political-, economic – and legal problems.

We have, for instance, experienced that drafting a new Criminal Code and a Criminal Procedure Code has taken us more than half a century. So it would be ridiculous to start with the drafting of a National Civil Code and a new Civil Procedural Code, which would be much more difficult. What we could do is to start drafting so-called "Partial Codifications",[3] regulating only specific parts of Civil Law. Commercial Law, Administrative Law, and the like.

However, much more attention should be given to the contents of such Partial Codifications, both with respect to the meaning and definitions of the specific legal language used in the articles, as well as to each particular connection of this specific part of the law with other parts of the law (taking in consideration its systematical connection with other parts, which are regulated in other partial codifications).

As our research team discovered, not enough attention was given to this, resulting in many gaps and questions in our written National Law. More often than not, the gaps were filled by consulting the definitions in the Dutch Colonial Codifications. But since many Indonesian lawyers do not understand the Dutch language any more (let alone 19th Century Dutch!) their meanings are more often than not misunderstood, or only literally understood by disregarding the respective case-law which followed after its legislation.

One example is the understanding of article 1365 of the Civil Code on what constitute an "onrechtmatige daad", or tort.

Grammatically speaking it would mean an "illegal act". But since the 1920 s Prof. Molengraaff as the Chief Justice of the Supreme Court in the Netherlands in one of his cases decided, that an "onrechtmatige daad" does not only consist of an act done by somebody, but may also consist of an **omission or neglect** to act, whenever it was his legal duty to act or do something required.

But since many lawyers and judges do not understand or speak the Dutch language any more, they are merely translating the term "daad" as an act only, disregarding Dutch (and also Indonesian) case law and legal history, with all its negative consequences.

Our Marriage Law also has failed to regulate the rights and duties of the spouses on an equal level, as well as the possibility of mixed (religious) marriages, giving another meaning to what was legally meant with the term "Mixed Marriage". This resulted in the fact that thousands or perhaps even millions of couples are now "illegally married", because of their difference of religion.

All this resulted in the practice of marrying abroad ("international marriages) for those with enough money, or with living together, or "siri" marriages which are considered more or less "legal" by Islamic law, but not (yet) legal by Indonesian state law.

The need to correct and speed up our Indonesian law-making process and procedure.

With many gaps in our National Laws it seems now imperative to **speed up** our National Law-making and improve our techniques, processes and procedures, apart from

improving the intellectual and legal approaches in drafting and researching the many aspects of law making and legal drafting.

First, a pure legal approach proves to be very much out of date, because this dogmatic legal approach proved to reach results contrary to morality and Justice. Instead it has led to a lot of "lawyering", evidenced by the many opinions presented on TV One through the "Indonesian Lawyers Club" sessions.

Second, instead a more **interdisciplinary** approach in handling the cases before the court, as well as in the process of legal drafting, law making and in the legal debates within Government circles, as well as in the debates in Parliament (DPR) seems to be needed.

For instance, when we discuss a legal draft on Health Law, or Economic Law, or Computer Law, we should first consider the respective aspects of the Medical experts, resp. Economic experts and/or Computer experts, before the lawyers take a definite position.

This is what the late Prof. Satjipto Rahardjo meant with the term "Hukum Progresif", which is interdisciplinary, because according to him, law should also consider the social and economic aspects of the law.

Hence, lawyers should not base our decisions and law-making merely on our legal knowledge and theories only.

Third, because our National Law is meant for the Future our legal drafters in the Government should first consider and answer, the question: "Why do we need this specific new law"? This question answers the objective (s), of this new law. After that, our legal drafters should first consult the non-legal aspects expected in the future such as what Futurelogists predict of possible development of our social relations (Sociology, Culture, Economy, Health, Psychology, Technology, Environment) Many procedures and other considerations of law making, (such as the drafting of new law drafts) should also explain and base their recommendations on their extensive **researches about what will be the likely consequences & possibilities of the future**, as envisioned by a large number of Futurologists. (including of those Futurologist who tried to predict the Future of Law in our 21 Century Global World). This is best done by university professors when drafting their specific law drafts (Naskah Akademis). However, at the end of their research, as a conclusion, they should also be acquired to draft the **first draft of the new law,** which may be improved by the law-drafters of the Ministry of Justice and Human Rights.

This Governmental Draft should be discussed in the relevant interested groups of society, before it is sent to Parliament.

Fourth, For us Indonesians, who need to make a "big" and perhaps "giant jump"; not only because in 2016 we will have to live in an ASEAN Community,

but also because the Global World, and even the Northern European and American States are forced to change radically, because of climatic changes in our environment, as researched by Laurence C. Smith in his book, entitled "The World in 2050", (which is only 35 years from today, and coincides with the timespan towards Indonesia's Centennial in 2045), this preparation is very important.

Smith quoted Jared Diamond se findings on "Why civilizations fail"? But he reversed the question to become, "What causes new civilizations to grow?" And he found that the conditions for a country to grow are "..... First and foremost [will be] **economic incentive**, followed by **willing settlers**, **stable rule of law**, **viable trading partners**, **friendly neighbours and beneficial climate change**.[4]

Assuming that we, as an ASEAN nation have all six factors, we should be able to become a strong, and stable nation.

Fifth, To me, however, one prerequisite: that of **a stable rule of law**, is still far form satisfactory. Especially because the Indonesian legal system up till the very present has not yet become a unified and stable legal system, but still adheres to too many colonial rules, principles and laws, which were the basis of the Colonial Dutch Legal System.

Since our Independence, perhaps millions of new laws have been promulgated. But still, many basic principles, legal concepts and even legal definitions are very often differently applied and understood by government officials, judges and law-makers alike, depending whether the respective lawyer, legislator or bureaucrat is thinking along the lines of philosophy of Dutch law, Adat law, Islamic law, or the Pancasila philosophy and Ideology of the Indonesian nation and constitution.

Recently, even our respected President seemed not to know, whether and if so, how, he still could intervene with the results and decision reached by our Parliament, so that he felt necessary to call the Chief justice of our Constitutional Court for advise (!).

This evidenced, how uncertain our National law is and how little we trust our law makers in Parliament. Certainly this is proof that certainty of law (Kepastian hukum, or rechtszeherheid/Dutch) is still difficult to find, whereas even the highest official in the country proved to be uncertain of the existing or positive law of Indonesia!

Indeed, foreign ideas about "Law making" and "Democracy" and "Human Rights", as well as Islamic Philosophies and ways of thinking also adds to the confusion, so that at present we find ourselves at a dangerous crossroad to loose our original Indonesian national identity based on our original aspirations of our forefather and

freedom fighter of the 20th Century.

Sixth: whereas this "national identity" is most important for our survival in this 21st Century of Globalization, whereby it has become more and more difficult for new nation-states to keep up our own identity and aspirations in an ever-growing global society.

In fact one could already notice the trends to this global-world society, and the trends of declining sovereignty of national states.

Not only is our trade, investment-and banking system much designed and influenced by the World Bank. World trade Organization the International Monetery Fund, and International Trade and International Business is also regulated by International Conventions to be applied and respected by National States. So are our environmental law, Cyber laws, except for Family Laws and Inheritance in Law.

Seventh, On the one hand this makes law making easier, as we may be able to copy any modern foreign law, we like most (such as the American or English laws) and which are similar to our neighbor/ASEAN/ Neighbouring Countries. But first and foremost we should examine whether the application of such Common Law rules, is in line with the **objectives** of our independent nation, as expressed in the Preamble of our 1945 Constitution.

If not, we should modify such foreign law so as to make it in line with our Constitution.

This means, that **Comparative legal studies,** will be necessary, before we even formulate the articles of our new laws, which is best performed by our universities, esp Law Faculties.

Eighth, If we like a thorough comparative study of the New Dutch Civil Code (of 1992) could also be enlightening, to know how far this New Dutch Civil Code differs from the Old Civil Code which still applies in Indonesia.

I discovered many changes, such as the adoption of the Contract Law in Common Law countries in art. 127 (6.5.7.1). Also that Dutch Commercial Law is also regulated in the New Dutch Civil Code, which also includes Transportation law and regulations on Cooperatives, societies, companies and the like.

Since we have already separate laws on these matters, we should study and their systemic relationship in order that they show the real character of our Pancasila philosophy.

Ninth: According to in their book on "Business in the 21st Century The Fourth Wave", the trend in this century is a.o. that[5]

- a corporate's role should be to serve as global steward.
- its motivation should be to leave valuable legacy for the future
- stakeholders of a business shall be stockholders,

employees, families, supplier, customers, communities, government, ecosystem, Gaia (the whole world).

- the company's outlook should be unity, business as a means to actively promote economic and social justice.
- the corporate wealth consists of quality of life and alignment with the natural order.
- its assets consists of ideas, information, creativity vision.
- the company is owned by the community
- performance measures shall be on the basis of social and resource accounting; and **not based on** financial accounting only.
- Etc, This means that principles for the 21st Century, are very much different from those of the 19th and 20th Century.

Tenth: All what was said above indicates, that in order to create a genuine National Legal System, we have to use **all our funds and forces** (including our knowledge), not only in the legal field, but also in the management and procedure of our law-making process to modernize and upgrade, not only in the manner of selecting our law makers (members of Parliament, government lawyers and researchers in all sciences), but also in the way of discussing and debating all the intricate aspects which are part and parcel of the specific law to be drafted.

As it is no secret that in the past, up to the present time our Government and Parliament needed at least 10 (ten!) years to finalize a new act, it seems imperative that our lawmakers should also be able to predict what our social and legal needs would be at least 20 or 30 years in the future, lest the new law becomes out dated the moment it has been aproned by Parliament.

Eleventh, In that respect it teems necessary to change and upgrade the recruitment for selection of parliamentarians. For instance that 40% of them should have a university degree, whilst 40% of all parliamentarians should have a law degree, preferable with at least 20 years experience in the legal field.

Twelfth, Our experience and the condition of our National Law has shown, that – if we would like to have a strong and admirable legal system by the time we hope to celebrate our Centennial in 2045 – we really should put all our funds and forces to the renovation of our law-making process, as well as our judicial system, which at the moment has become a non – system, as it still consists of many ad hoc court, eventhough more than 10 years have gone by.

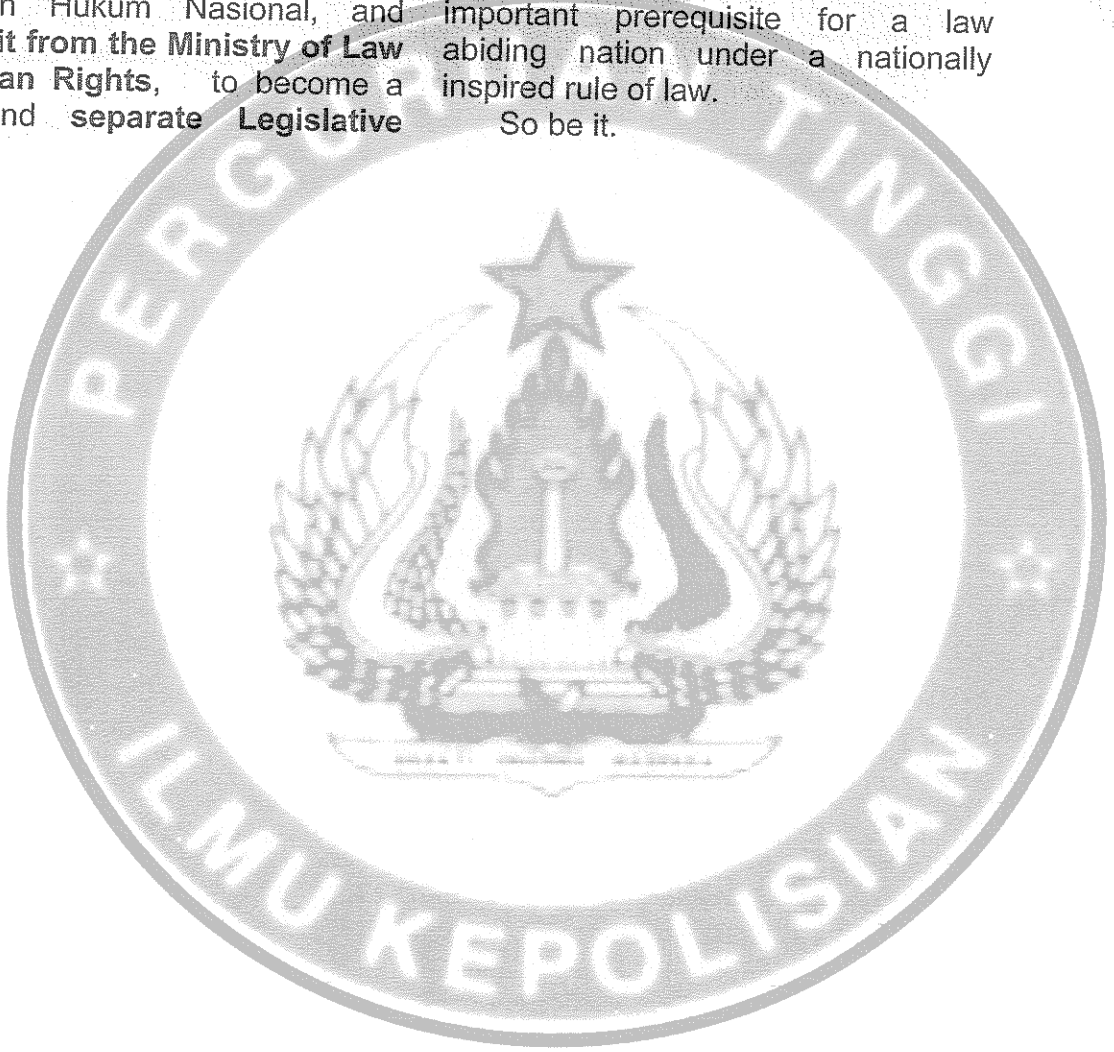
What is more, it is high time we start working on a collection of case – law as a source of law, which may be selected by our Judicial Commission, when they examine the decisions of the Supreme Court.

In Conclusion,

Finally it seems also to be high time to restore our Central Law drafting Body (i. l. the Badan Pembinaan Hukum Nasional) to its original position as the Lembaga Pembinaan Hukum Nasional, and **separate it from the Ministry of Law and Human Rights**, to become a central and **separate Legislative Planning and Legislative Drafting Body**, as it was before the New Order (Orde Baru) Government.

In so doing, this Body could more rapidly, centrally organized body could systematically be entrusted this most important prerequisite for a law abiding nation under a nationally inspired rule of law.

So be it.



1 Marjorie Kelly: "Owning our Future, The Emerging Ownership Revolution", Beret – Koehler Publisher, Inc San Francis, 2012, p, 217.

2 See Boeke : Dualitische Economie.

3 this method was suggested by Prof Mochtar Kusumaatmadja and followed when we drafted our Agrarian Law (1960) and our Marriage Law (1974) and Corporation Law and many others during the Reformation Period of Government.

4 Laurence C. Smith: "The World in 2050" Pleasure Book, Penguin, 2011, p. 255.

5 Hernian Bryant Maynard, Ir & Susan E. Mehrtens:
The Fourth Wave, Business in the 21st Century, Berret – Kochler Publishers, San Franscisco, 1993, p. 164.