

DOES THE CURRENT REGIONAL AUTONOMY SUPPORT LEGAL PLURALISM IN INDONESIA?*

Andy Omara**

Abstract

This article attempts to analyse Indonesia's legal system. We will discuss how the dynamics of constitutional arrangement affect regional authorities. The correlation between regional autonomy and legal pluralism, for instance the unique implementation of sharia law in Aceh province, will also be discussed.

Abstrak

Tulisan ini membahas sistem hukum Indonesia. Dalam tulisan ini akan dianalisis bagaimana dinamika aturan konstitusi mempengaruhi kewenangan daerah. Hubungan antara otonomi daerah dengan pluralisme sistem hukum, misalnya penerapan hukum syariah di provinsi Aceh, juga akan dibahas di sini.

Kata Kunci: *legal pluralism, regional autonomy, decentralization.*

A. Introduction

Besides gaining many benefits, the implementation of 'wide' regional autonomy in Indonesia, to a certain extent, raised questions such as: are laws and legal system in such circumstance also being decentralized? If so, how far they can be decentralized? Is it only the substance of law or also the judicial institution? In short we may ask does regional autonomy affect legal pluralism in Indonesia? This paper intends to answer the aforementioned questions. In doing so, the paper will first briefly describe the many meaning of legal pluralism. It will further briefly explain the history of legal pluralism in Indonesia. This is significant in order to gain better understanding regarding the current legal pluralism in Indonesia.

Secondly, the papers will discuss the dynamic of constitutional arrangement in relation to regional authorities in Indonesian legal system. The correlation between regional autonomy and legal pluralism will be furthered discussed. In order to provide more evidence regarding legal pluralism in Indonesia, the implementation of *syariah* law in Aceh will also be discussed. Lastly, the paper will provide some recommendation for the future reform of Indonesia.

B. The Many Meaning of Legal Pluralism

Legal pluralism is often contrasted with legal centralism where 'national/state law is the only law applied for everyone within

* The earlier version of this paper was presented in the 7th Asian Law Institute (ASLI) Conference, 25 and 26 May 2010, in International Islamic University of Malaysia, Kuala Lumpur, Malaysia.

** Lecturer at Faculty of Law Universitas Gadjah Mada Yogyakarta, Indonesia. (andyomara@yahoo.com or andy.omara@mail.ugm.ac.id).

the jurisdiction of a country.¹ The term legal pluralism can be determined into several ways. 'Some scholars define legal pluralism as plural legal nature of law or multilegalism whereas others believe that legal pluralism is a variety of interacting and competing normative orders, or a co-existence of different legal systems in the same situation within a society.'²

Determining the definition of legal pluralism very depends on the perspective that is used to define it. John Griffith categorizes legal pluralism into weak and strong legal pluralism.³ Weak legal pluralism is considered as legal arrangement where different groups of the population are defined in terms of their respective ethnicity, religion, nationality or geography.⁴

A 'strong legal pluralism' is described that neither all law is state law nor administered by state institutions. Instead, it is the co-existence of legal orders in a social setting which do not belong to a single system. These different legal orders exist together and do not necessarily have to recognize or negate each other.⁵

Charleston C. K. Wang categorizes legal pluralism into: Ideological-legal view

and social legal view of legal pluralism.⁶ In ideological legal perspective, legal pluralism is defined as 'the recognition by the state of the existence of multiple sources of law within its own jurisdiction.'⁷ Whereas in the view of socio-legal perspective, legal pluralism assumes that 'legislation has not and cannot have the authority that the government presumes it to have.'⁸ Instead, pre-existing or long time social institutions possess their own normative and regulatory spheres of influence and are capable of enforcing their will on their members separately from the government authority.⁹ As a result there is parallel existence of a variety of social norms that are produced by different and autonomous sources of authority within the boundaries of the state.

Both ideological-legal view and socio legal view of legal pluralism may also be reflected in some legal scholars view. Sally Engle Merry defined legal pluralism as 'a situation in which two or more legal systems co-exist in the same social field.'¹⁰ Further, Griffiths determines legal pluralism 'as that state of affairs for any social field in which behaviour pursuant to more than one legal order occurs.'¹¹ In other words legal pluralism

¹ John Griffiths, "What Is Legal Pluralism", *Journal of Legal Pluralism and Unofficial Law*, 1986, p. 1.

² Shidarta, "Legal Pluralism in the Indonesian Legal System", paper presented in the 5th Asian Law Institute Conference, 22 to 23 May 2008 in Singapore, p. 1.

³ John Griffith *Op. Cit.*, p. 5.

⁴ *Ibid.* p. 5, see also Arskal Salim, "Dynamic Legal Pluralism in Modern Indonesia: The State and the Sharia (Court) in the Changing Constellation of Aceh", paper presented in the First International Conference on Aceh and Indian Ocean Studies, 24 – 27 February 2007 in Banda Aceh, pp. 3-4.

⁵ Arskal Salim, *Ibid.*

⁶ Charleston C. K. Wang, 2001, *Legal Pluralism in Indonesia: Anachronism or An Idea Whose Time Has Come?* at p. 1.

⁷ *Ibid.*

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ Sally Engle Merry, "Legal Pluralism", *Law and Society Review*, 1988 p. 870.

¹¹ John Griffiths, *Op. Cit.*, p. 2.

is the existence and the implementation of two or more legal systems in one social field in the same period. For the purpose of this paper, the aforementioned definition will be used to describe the current legal situation in Indonesia.

C. Legal Pluralism In Indonesia: A Historical Perspective

Referring the work of Charleston C. K. Wang, in the history of Indonesia, the sources of legal pluralism can be described as follow: since prehistoric times, animism existed in the archipelago. First, prior to the 14th century Hinduism-Buddhism present in the archipelago, and then Islam afterwards, and Christianity as the latest arrival.¹² During that period, it is possible that *adat* law, the deep-rooted existence of indigenous jurisprudence, existed in the archipelago, especially in the rural areas (*desa/kampung*). *Adat* is mostly in the unwritten tradition and varies from locality and locality and from island to island.¹³

Second, the presence of the *syariah*, the theocratic Islamic law code and *hadith*, the Islamic legal traditions in the archipelago.¹⁴ Third, the existence of Dutch legislation and the discriminatory colonial legal practices that are based on race and national origin.¹⁵ This is followed by a short period of reform by the Japanese who occupied Indonesia

(1941-1945) and independence of Indonesia from Dutch rule.

From the above description, the influence of Dutch colonial is significant in creating legal pluralism in Indonesia. Through its policy, the Dutch colonial differentiated the community into three different groups: the Europeans, foreign oriental and the natives.¹⁶ The consequence of this policy is that each of these groups applied different legal systems. Within this classification, Chinese was considered as ‘foreign oriental’ which meant the Chinese has higher status rather than the natives. The Chinese tended to be identified as foreign oriental which was closer to the European Dutch rather than to the native Indonesians.¹⁷ Dutch legal system is applied for westerners and foreign oriental whereas the natives used *adat* law and religious law. In other words this policy divided the people who lived in Indonesia into three groups. For each group, there was a different law applicable respectively. As mentioned by Shidarta:

For westerners who lived in Indonesia during that time, Dutch law was a mandatory legal system to be applied. The strange part of it was the status for Japanese who stayed in Indonesia. Due to their economic prestige, Japanese were acknowledged having the same legal status as the westerners. Other than Japanese, all Asians and Africans

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ Charleston C. K. Wang, *Op Cit.*, p.2.

¹⁵ *Ibid.*

¹⁶ Tim Lindsey, “Reconstituting The Ethnic Chinese in Post-Soeharto Indonesia: Law Racial Discrimination, and Reform”, in Tim Lindsey and Helen Pausacker (eds), 2005, *Chinese Indonesians: Remembering, Distorting, Forgetting*, p. 42.

¹⁷ JAC Mackie, “Anti Chinese Outbreak in Indonesia 1959-68”, in JAC Mackie (ed) 1976, *The Chinese in Indonesia*, p. 130.

were classified as foreign easterners to whom their own traditional laws applied. Finally, for native Indonesians, their respective adat laws used to be enforced.¹⁸

He further pointed out that:

Native Indonesians or foreign easterners were allowed to comply with western law. It could happen when they thought their own laws were not suitable to be used in certain cases. The condition was different for western people if they wanted to use the laws for foreign easterners or native Indonesians. The government put western law in the highest place and the native Indonesian law in the lowest. It means, they might upgrade to the higher status of law, but not the other way.¹⁹

After independence, the recognition of *syariah* law, *adat* law and national law in the Indonesian legal systems is apparent at least in formal sense. Not only because historically Indonesian legal system is rooted from several sublegal systems such as Western is legal system, adat law, and Islamic law but it also because the Indonesian constitution guarantees such diversity. Legal pluralism to a certain extent is also influenced by the development of national law and international community.²⁰

In practice however, in Old Order Regime as well as in New Order Regime, the ideas to adopt Islamic laws and *adat* laws is not considered as the priority. This

can be seen that neither Islamic law nor *adat* law is included in the lawmaking process of national legislation.²¹ Especially during New Order era, all effort to develop national legal system should be placed in the context of national development in general. The doctrine of functioning law as a tool of social engineering was introduced and it seemed quite workable at first.

This does not mean that during this era, the government did not consider the above systems. There were at least two good examples where *Adat* law Islamic law are included in national legislation e.g. the recognition of *Adat* law in the 1960 Agrarian Law and the inclusion of Islamic law in the 1974 Marriage Law. The influence of Islamic law also is also touching banking system. The new Banking Law of 1992 implemented aspect of *Syariah* law.²² Before its promulgation, banking system based on *Syariah* law is not recognized within the national banking law system.

D. The Dynamic of Constitutional Arrangement Concerning Central and Regional Relation

In Indonesia, relation between central and regional government is considered as an important issue. This can be seen that such issue always comes up in the Indonesian constitution. In the first constitution, the 1945 Constitution (1945-1949), central regional relation is implicitly regulated in Article 18.

¹⁸ Shidarta *Op. Cit.*, p. 3.

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ *Ibid.*

²² Hasnil Basri Siregar, "Islamic Law in a National Legal System: A Study on the Implementation of *Shariah* in Aceh Indonesia", 2008 3 *Asian Journal of Comparative Law*, p. 86.

It stated that ‘the division of the territory of Indonesia into large and small regions shall be prescribed by law in consideration of and with regard to the principles of deliberation in the government system and the hereditary rights of special territories.’ Further explanation concerning regional authorities can be found in the elucidation of the constitution.

In the level of legislation, law concerning regional authorities was accommodated in Act No. 22 of 1948. Formally, Act 22/1948 provides wide regional autonomy for the regions.²³ However, it can be said that we could not see the full implementation of this law. This is because this law is ‘valid’ for one year period. In 1949 there was a constitutional shift from the 1945 Constitution to the 1949 Federal Constitution.

Unlike the 1945 Constitution, within the 1949 federal constitution, Indonesia was a federal state. As a federal state, Indonesia consisted of some *daerah bagian* (states). During this era, the role of the *daerah bagian* is significant. In formulating *undang-undang federal* (federal law), the *daerah bagian* were intensively involved. In the following year, another new constitution the 1950 Provisional Constitution (UUDS 1950) was stipulated. Within this constitution, Indonesia was a unitary state which consisted of central and regional government. Relation between central and regional government was explicitly regulated in Articles 131, 132 and 133 of the Constitution. Further regulation concerning regional authorities is accommodated in Act No. 1 of 1957.

Essentially this law provides wide autonomy to the regions. Unfortunately the political situation is uncertain. As a consequence of parliamentary system cabinet frequently changes.

Nine years after the enactment of the 1950 Provisional Constitution, the 1945 Constitution was re-enacted through the 1959 Presidential Decree. The re-enactment of the 1945 Constitution means that Article 18 concerning regional government was, again, applicable and in force. Further legislation concerning this matter is included in Act No. 5 of 1974 concerning regional autonomy. Within this law, the influence of central government is significant in controlling regional government. Thus, it can be said that central government controlled local government. As a consequence, the local regulation is also under the control of central government. This policy existed until the ruin of New Order regime in 1998.

E. The Implementation Regional Autonomy After the 1998 Reformasi

The 1998 *reformasi* has brought significant changes in Indonesian political life. These include amendment of the Constitution, the growth of political parties, developments of free press, successful elections, reforms of the judiciary and regional autonomy.

In the contexts of regional autonomy such changes includes the amendment of provisions concerning regional authorities in the Constitution. Relevant provision

²³ Syaukani, Afan Gaffar, M. Ryaas Rasyid, 2002, *Otonomi Daerah dalam Negara Kesatuan*, Penerbit Pustaka Pelajar, Yogyakarta, at p. 71.

concerning regional authorities is Article 18. Unlike the old constitution, Article 18 (as amended) is more elaborative and clearer in regulating regional authorities. It is more elaborative in the sense the substance that is covered in this provision is more comprehensive and more detail. This can be seen that in the new constitution Article 18 consists of three articles whereas in the old constitution it is only stated in one article.

In addition, this provision is also acknowledging the diversity of the regions and guaranteeing the traditional customary rights. As stated in Article 18 paragraph (2): “The state shall recognise and respect their traditional communities along with their traditional customary rights as long as these remain in existence and are in accordance with the societal development and the principles of the unitary state of the Republic of Indonesia, and shall be further regulated by law.”²⁴

The new provision also provide wide ranging autonomy for the regions as stated in Article 18 paragraph (5) of the 1945 Constitution: “the regional authorities shall exercise wide ranging autonomy, except in matter specified by law to be the affairs of the central government.”²⁵ In addition, paragraph (6) states that: “The regional authorities shall have the authority to adopt regional regulations and other regulation to implement autonomy and the duty of assistance.”²⁶

Concerning the acknowledgment of the government in regard to the speciality of the regions and their diversity, Article 18B paragraph (1) defines that: “The state shall recognise and respect units of regional authorities that are special and distinct, which shall be further by law.”²⁷ The above provisions essentially acknowledge and respect legal pluralism in the society so that such diversity is acknowledged by state.

Another significant change concerning regional autonomy is the enactment of Act No. 22 of 1999 on regional autonomy which replacing Act No. 5 of 1974. The issuance of this law is often considered as milestone in the context of regional autonomy. This is because, unlike its predecessor, the 1999 Regional Autonomy Act gives more opportunity and authorities to local governments in carrying out its tasks. As can be seen in Article 7, it explicitly limits the authorities of central government. The authorities of central government are: foreign policy, security and defence, judiciary, monetary and fiscal, religious affair and other authorities²⁸ whereas other authorities belong to regional government. By giving more authorities to local government, it is hoped that it may open flexibility for local government and may empower the local government in managing its region.

Act No. 22 gives the autonomy to each province and *kabupaten/kota* to develop its own model of village go-

²⁴ Article 18 para. (2) of the 1945 Constitution.

²⁵ Article 18 para. (5) of the 1945 Constitution.

²⁶ Article 18 para. (6) of the 1945 Constitution.

²⁷ Article 18B para. (1) of the 1945 Constitution.

²⁸ Article 7 Act 22/1999 on Regional Governance.

vernment that may be based on old village institutions and leadership. It is hoped that with this model these villages may resolve local issues in accordance with local custom. Further, this law gives some privileges to certain provinces such as Aceh and Papua. Based on this law, Papua gains Special Autonomous Region status and for Aceh, the privilege can be seen in the application of *syariah* to the Muslim inhabitants. As evidenced by Act No. 22, pluralism remains part of the Indonesian political tradition, integralism has not been able to overcome the unease situation that has been building up over the New Order decade.

This situation is supported by the authority of the regions to issue regional regulation. As can be seen in Act No. 10 of 2004 on Formulation of Legislation, in particular Article 12, the substance of regional regulation is all materials in regard to conduct regional autonomy and duty of assistance and accommodates the particularities of the regions, and further elaborates the higher legislation. In addition, Article 136 paragraph (3) provides that the substance of regional regulation is elaborating the higher legislation and acknowledge the particularities of the regions. Regional regulation should be in line with public interests and higher legislation.

F. Does the Current Regional Autonomy Leads to Legal Pluralism?

The following part will discuss the influence of current regional autonomy in relation to legal pluralism in Indonesia.

Two aspects will be discussed first; the implementation of religious law influenced Regional Regulations; and secondly the implementation of Islamic law in Aceh.

As mentioned before, one significant result of the 1998 *reformasi* is the implementation of wide ranging of regional autonomy through the issuance of the 1999 Regional Autonomy Act and its subsequent Law. This Act basically means that central government opens more flexibility to local government in managing its regions. This includes the authority of local government in determining the content of regional regulation. The ratio is that local government is the party who know and understand the situation, the characteristic and the condition of the region. This phenomenon seems to be linked to the decentralisation of legislative authority to the districts and provinces as part of the overall process of decentralization in Indonesia.

Considering huge diversity in Indonesia, most of the regional governments warmly welcome this new policy. In practice, there are some interesting phenomena. Some governors or *bupati* use this opportunity to stipulate regional regulation linked to religious law. The issuance of regional regulation linked to religious teachings appears to be an exception to the overall picture of reform.²⁹ The inclusion of religious law in national legislation may be can be defined as soft legal pluralism or 'weak legal pluralism' in Griffith words.³⁰ Even though using this term is probably not quite correct to descript this phenomenon. It is

²⁹ Robin Bush *Op. Cit.*, p. 3.

³⁰ John Griffith *Op. Cit.*, p. 5.

probably more make sense if I use the term formalisation of religious law into national law since the content of the legislation is somehow reflecting religious law.³¹ In order to gain better and understanding concerning these phenomena, I quote the work of Robin Bush:³²

While there is no comprehensive database concerning the *syariah* based regional regulation there are 78 regional regulations (*perda*) in 52 districts/municipalities (*kabupaten/kota*) – out of a total of 470 districts/municipalities in Indonesia. This does not include draft or proposed legislation (*raperda*) or *Bupati* edicts and implementing regulations, but it does include the implementing regulations, or *Qanun*, in Aceh.

Arskal Salim categorizes these regional regulations into: 1) regional regulations concerning ‘public order and social problems’ –prostitution, gambling, alcohol consumption, etc.; 2) regional regulation related to religious skills and obligations –reading the Qur’an, paying the *zakat*; and 3) regional regulation on religious symbolism –primarily the wearing of Muslim clothing.³³ He further explain that only the second and the third categories can be said to be directly linked to Islamic teachings. The first category relates to ‘morality issues’ reflect the moral teachings

of most religions and the majority of Indonesian society.³⁴ Robin Bush further explains that it is around 35 or nearly 45 % of the total (78 regional regulations), fall into the category of ‘morality’ regulations such as outlawing prostitution, gambling, sale of alcoholic beverages, etc. These include Regional Regulation 5/2004 restricts the consumption and sale of liquor in Tasikmalaya and Regional Regulation 21/2000 outlaws prostitution in Cianjur.³⁵ The problems with that label include the fact that one of the latest such draft regulations is in fact in the Christian area of Manokwari, Papua, and seeks to restrict the building of mosques and the wearing of Muslim headscarves.³

Another important issue, in regard to legal pluralism, is the implementation of *Sharia* Law in Aceh. It can be said that the implementation of *Sharia* in Aceh resulted of the acknowledgment and acceptance of the doctrine of legal pluralism in Indonesian legal system. Former Chief Justice of Indonesian Constitutional Court believes that such phenomenon is not in any way a form of legal deviant rather it is an actualization of regional autonomy policy.³⁶ He further explains that: regions may make their own regulations as long as they do so within the corridor of authority given to them.³⁷

³¹ Act No. 10 Year 2004 on Formulation of Legislation.

³² Robin Bush, “Sharia Regulation in Indonesia: Anomaly or Symptom?” P 3 2008 see also Arskal Salim, “Muslim Politics in Indonesia’s Democratisation” in R. McLeod and A.MacIntyre (eds), 2007, *Indonesia: Democracy and the Promise of Good Governance*, ISEAS, Singapore, p. 126.

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ Robin Bush, *Op. Cit.*, at p. 3.

³⁶ Jimly Asshiddiqie, “Eksistensi Hukum Islam dalam Reformasi Sistem Hukum Nasional”, *Paper*, Presented at BPHN, 2000, p. 9.

³⁷ *Ibid.*

From the above explanation, it can be said that the current regional autonomy open possibility for the local government to have more authorities in managing their regions. As a consequence each local government may have different type of regional regulation. Some local governments issue regional regulations that are closely linked to Islamic law. In addition the policy of regional autonomy also opens possibility for the government to implement 'sharia' in Aceh. Therefore it is probably fair to say that regional autonomy affect legal pluralism in Indonesia

G. Conclusion

Compared to the new order regime, the current situation is more conducive in delivering decentralisation in the regions. The current regional autonomy to a certain extent creates more flexibility and opportunity for the local governance to manage its regions. The wide authority owned by local governance leads to the wide authority of the local governance in creating local legislation. In addition, local autonomy also widen the possibility of the government to grant special status for certain regions. The special status includes the implementation of 'other' law (*Sharia* Law) than state law, or in other words legal pluralism.

BIBLIOGRAPHY

- Asshiddiqie, Jimly, "Eksistensi Hukum Islam dalam Reformasi Sistem Hukum Nasional", *Paper*, Presented at BPHN, 2000.
- Bush, Robin, 2008, "Sharia Regulation in Indonesia: Anomaly or Symptom?".
- Griffiths, John, "What Is Legal Pluralism", *Journal of Legal Pluralism and Unofficial Law*, 1986.
- Lindsey, Tim, 2005, "Reconstituting The Ethnic Chinese in Post-Soeharto Indonesia: Law Racial Discrimination, and Reform", in Tim Lindsey and Helen Pausacker (eds) *Chinese Indonesians: Remembering, Distorting, Forgetting*.
- Mackie, JAC, "Anti Chinese Outbreak in Indonesia 1959-68", in JAC Mackie (ed), 1976, *The Chinese in Indonesia*.
- Merry, Sally Engle, "Legal Pluralism", *Law and Society Review*, 1988.
- Salim, Arskal, "Muslim Politics in Indonesia's Democratisation" in R. McLeod and A. MacIntyre (eds), 2007, *Indonesia: Democracy and the Promise of Good Governance*, ISEAS, Singapore 126.
- _____, "Dynamic Legal Pluralism in Modern Indonesia: The State and the Sharia (Court) in the Changing Constellation of Aceh", paper presented in the First International Conference on Aceh and Indian Ocean Studies, 24 – 27 February 2007 in Banda Aceh.
- Shidarta, *Legal Pluralism in the Indonesian Legal System*, paper presented in the 5th Asian Law Institute Conference, 22 to 23 May 2008 in Singapore.
- Siregar, Hasnil Basri, "Islamic Law in a National Legal System: A study on the Implementation of *Shariah* in Aceh Indonesia.", 2008 3 *Asian Journal of*

Comparative Law, 86.

Syaukani, Afan Gaffar, M. Ryaas Rasyid, 2002, *Otonomi Daerah dalam Negara Kesatuan*, Penerbit Pustaka Pelajar, Yogyakarta.

Wang, Charleston C. K., 2001, *Legal Pluralism in Indonesia: Anachronism or An Idea Whose Time Has Come?*.

Legislation

The 1945 Constitution.

The 1949 Federal Constitution.

The 1950 Provisional Constitution.

Act No 22/1999 on Regional Autonomy.

Act No 5/1974 on Regional Autonomy.

The 1960 Agrarian Act.

The 1970 Marriage Act.