
**CONTRACTS LAW IN
ASIA
INDONESIAN CONTRACT
LAW: CIVIL LAW, LEGAL
PLURALISM &
CONTINUITY**

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LEGAL PLURALISM

CONCEPT OF COEXISTENT LEGAL SYSTEMS

See <http://www.lfip.org/lawe506/link1.htm>

In Indonesia:

1. Adat law (most important on real estate side)
2. Sharia (most important on family law side)
3. National (secular) law mostly the inherited colonial law, as accepted, civil law

LEGAL PLURALISM

WHY THREE SYSTEMS?

**WELL, WHY DO WE HAVE TWO IN
LAW & EQUITY?**

**History, but still distinctive courts
Current revival of adat & sharia for
political reasons, not total atavism**

LEGAL PLURALISM

Technically, at independence “temporary” determination that colonial laws to continue subject to consistency with new Indonesian beliefs (largely Dutch codes still in place)

But in 1960s and from time to time “clarification” that certain provisions had been dropped under the inconsistency interp (e.g., initially provision on children by mixed couples)

Problem of still issues on applicable law (Gautama giving old categories hidden of European, Pribumi & other orientals (ethnic Chinese in his reference to adat law and applicability of national law)

LEGAL PLURALISM

LOOK AT GORDLEY & GAUTAMA ON ADAT

What is a pre-commercial society?

Is adat really “law,” and colonial roots

**Is this law really from “pre-commercial”
society?**

LEGAL PLURALISM

*LOOK AT GORDLEY & GAUTAMA ON ADAT
CONT'D*

What of Gordley's view of personalized contract law versus Gautama on importance of broader social interests?

Are relational contracts peculiar to adat or pre-commercial law societies?

LEGAL PLURALISM

***LOOK AT GORDLEY & GAUTAMA ON ADAT
CONT'D***

No markets? What is a market, need it be depersonalized exchange (e.g., selling security)

What about adat law now surviving despite established modern markets (albeit mostly in real estate)

LEGAL PLURALISM

***LOOK AT GORDLEY & GAUTAMA ON ADAT
CONT'D***

Unfairness?

Reciprocity?

Unexpected events?

Executory contracts binding?



CIVIL LAW (FRENCH)

BASIC DOCTRINAL ORGANIZATION (NICHOLAS)

Part of broad law of obligation

Fault as part of contract law (duties of care, etc. tied back to concepts like patrimonie)

CIVIL LAW (FRENCH)

BASIC DOCTRINAL ORGANIZATION (NICHOLAS) CONT'D

**Basic concept of will as defining contract
Instead of consideration, “true” meeting of
minds & frustration versus impossibility
results (diff at fraud, coercion, mistake)**

**However, not necessarily same freedom of
contract results**

CIVIL LAW (FRENCH)

BASIC DOCTRINAL ORGANIZATION (NICHOLAS) CONT'D

**Basic character of model contracts in code
which are defaults to be altered rather
than full freedom**

**Doctrine at level of acte/fait juridique &
Rechtshandlung as German equivalent at
theory level of law of obligations**

CIVIL LAW (FRENCH)

BASIC DOCTRINAL ORGANIZATION (NICHOLAS) CONT'D

Diff at level of facts versus law, idea that standard contract terms not in the code are questions of “fact” not law with *pouvoir souverain* (Germans not so much, *allegemeine Geschäftsbedingungen*)

Drafting style (shorter)

Causa (specifically French)

Good faith performance

CIVIL LAW (INDON. NAT'L)

BASIC DOCTRINAL ORGANIZATION (GAUTAMA)

Legal Pluralism, then to National Law

Elements:

Consent (will)

Capacity

Certain subject

Lawful purpose (Causa, not German)



CIVIL LAW (INDON. NAT'L)

BASIC DOCTRINAL ORGANIZATION (GAUTAMA) CONT'D

What Gautama calls consent would be will or intention (Ger. Wille or Fr. Volunte, reflecting 19th century philosophy), and the Indonesians themselves refer to the law of agreement

CIVIL LAW (INDON. NAT'L)

BASIC DOCTRINAL ORGANIZATION (GAUTAMA) CONT'D

Note under the capacity discussion an example of the Supreme Court declaring that a historical Civil Code article was no longer valid

This is about the transition treatment of colonial law, since otherwise the question would be what is wrong with the picture of the court simply writing the legislative enactment out of existence?

CIVIL LAW (INDON. NAT'L)

BASIC DOCTRINAL ORGANIZATION (GAUTAMA) CONT'D

Under lawful purpose (*causa*), note the French law form (not in German law, tracing Civil Law branch families), as a basis for limiting agreement on which law poised otherwise

“Purpose” is still not the same as “public policy” as Common Law limitation in terms of circumscribing *pacta sunt servanda* enforceability idea

Is *causa* still circular as limitation of will, in the sense of a doctrinal nicety that serves chiefly to limit another doctrinal approach (*Wille, volunte*)?

CIVIL LAW (INDON. NAT'L)

BASIC DOCTRINAL ORGANIZATION (GAUTAMA) CONT'D

Re creation of contract, note the differing treatment of “offer” as an agreement to agree due to the doctrinal nicety of basing contract on will rather than consideration (and then circumscribing duration with “reasonableness” in the lack of a specific time)

CIVIL LAW (INDON. NAT'L)

BASIC DOCTRINAL ORGANIZATION (GAUTAMA) CONT'D

Re formalities, note the doctrinal side of contract extending to business entities in designating the corporate charter as formally a contract, alongside the Notarial formality side of Civil Law practice in also stamps

CIVIL LAW (INDON. NAT'L)

BASIC DOCTRINAL ORGANIZATION (GAUTAMA) CONT'D

Re performance & Gautama's description of the interchange of reasonableness, custom & statute, note the implicit limitation on freedom of contract and the automatic incorporation even without reference as Civil Law hallmark

The legal requirement of good faith performance, which Common Law lawyers often regard as Asian culture leaking in, is really a Civil Law effect

CIVIL LAW (INDON. NAT'L)

BASIC DOCTRINAL ORGANIZATION (GAUTAMA) CONT'D

With a view to frustration and future examination of changed circumstances, look at the good faith requirement popping up to permit a judge to change a contract as with 1955 Supreme Court case re equity of redemption and changed currency (1920s German inflation cases as direct parallel)

CIVIL LAW (INDON. NAT'L)

BASIC DOCTRINAL ORGANIZATION (GAUTAMA) CONT'D

Re assignment of risk, note that the equivalent of differing duties of care incorporated into the Civil Code for specific contract forms is beyond Common Law since (1) we would consider fiduciaries duties, etc. to not be part of contract, and (b) it reflects the Civil Law view of model contract forms all the way back to Roman law

CIVIL LAW (INDON. NAT'L)

BASIC DOCTRINAL ORGANIZATION (GAUTAMA) CONT'D

On a linguistic point, note that Gautama usually gives Dutch and Bahasa Indonesia concepts together but if only one language gives the Dutch

Gautama as old school, last full generation of Dutch educated law professors believing strongly in Civil Law, but even the new generation not oriented to Holland inherits the same conceptual Civil Law framework for the law of obligations or agreement even as Indonesia more broadly becomes a mixed jurisdiction