

Several notes concerning the Indonesian legal system: role of judges in civil court proceedings

*Setiawan**

1. Transitory provisions

Many people were not aware that when we proclaimed the independence of our country on August 17, 1945, the only national law in written form we had at that time was the Constitution. We proclaimed the said constitution as the 1945 Constitution, a name which implies a feeling of and at the same time a will to immortalize our struggle for independence with its culmination in 1945. No other sentence is able to express the attainment of the culminating point of the struggle more beautifully than the words contained in the Preamble of the Indonesian 1945 Constitution: „and the struggle of the movement for the Indonesian independence has a moment of rejoice because it succeeds in bringing the Indonesian people safely and successfully to the gate of the independence of the Indonesian State, which is free, united, sovereign, just and prosperous”.

The first problem of a nation (re)born, in the first years after the end of the World War, was the problem of filling in her independence, particularly in the legal field. Our founding fathers were wise enough by providing article II of the Transitory Provisions of the 1945 Constitution which states: „All existing state bodies and regulations which exist are still in force provided that they have not yet been replaced by new ones which are created according to the Constitution”. With these provisions vacuums in the legal field were to be prevented.

The intention to prevent vacuums in the legal field was asserted

* Setiawan S.H. is lid van de rechtbank van Jakarta-Pusat, Indonesië, en conrector van de opleiding Indonesische rechterlijke macht.

again in Government Regulation no. 2, 1945 issued on October 10, 1945. The said Government Regulation states once again that all state bodies and regulations existing at the time of the establishment of the Republic of Indonesia on August 17, 1945 are, as long as they are not replaced by new ones which are in conformity with the Constitution, considered still in force, provided that they are not in contradiction with the Constitution. Differing from article II of the Transitory Provisions, Government Regulation no. 2, 1945 which according to the elucidation thereof is issued to affirm the validity of article II, contains a subordinate clause reading as follows: „provided that they are not in contradiction with the Constitution”.

2. Efforts to establish a national law

At first allow me to state that the desire which is reflected in the said Transitory Provisions, the realisation of the desire to create our own national law, has not yet been completed.

Efforts towards the establishment of a national law have been made since the first years after independence was proclaimed. Professor Supomo, one of our well known Masters of Law, had touched on the said problem in his speech at the Dies Natalis of the Gajah Mada University in 1947. Professor Supomo indicated that inherent to the independence, to the revolution, the attitude and views of the people had changed. The people also demanded that actions be taken in various fields of law. In each of these fields, professor Supomo stated, there should be only one kind of national law enforced for all people of our country. The existence of separate laws in each field should be abolished¹.

Therefore it was understandable that before we stepped forward, we had to face another problem more complicated in nature; the first and the most important problem for us was to answer the question of how the nature of the new law should be; should we always maintain pluralism in the legal fields which we inherited from the past, or abolish the said pluralism totally by unification?

1. Prof. mr. dr. Sudargo Gautama, *Pembaharuan Hukum di Indonesia (Renewal of Law in Indonesia)*, Alumni Bandung 1973, page 26.

The initiative of professor Supomo was picked up by many Indonesian Masters of Law. Among others to mention one of them was mr. Suwandhi, who in his speech before the Association of Indonesian Masters of Law and the Indonesian Law Scholars Union in 1955 made a proposal to the Government to assign a committee to study and make preparations for renewing the law in our country². To the same purpose seminars on national law were organised everywhere. The first was conducted by the Indonesian National Legal Development Board which was established based on Presidential Decree no. 107, 1958 to gather scientific material to compose Indonesian national law pursuant to the aspiration of a just and prosperous society based on Pancasila (Five Principles of the Indonesian State and Nation).

But all these efforts did not find a sound response from legal experts themselves and therefore did not achieve the expected results.

3. Sahardjo's concept

The situation changed when in the year 1963, a Master of Law with a modest character named Sahardjo, who at that time was Minister of Justice gave a speech on July 5, 1963 on the occasion of receiving the title of Doctor Honoris Causa in the Legal Sciences which was given to him by the University of Indonesia. Sahardjo stated that article II Transitory Provisions and Government Regulation no. 2, 1945 should be interpreted thus that the Burgerlijk Wetboek (the Civil Code) and the Wetboek van Koophandel (the Commercial Code) were not longer to be considered as codifications. Those which are valid from both codes, Sahardjo said, are only those articles that truly live as law in Indonesia on the condition that:

- a. they are not in contradiction with the spirit of the 1945 Constitution;
- b. they are not in contradiction with the foundation and principles of our legal system.

2. Prof. mr. dr. Sudargo Gautama, loc.cit., page 5.

Articles fulfilling those conditions, he stated, were valid as unwritten law³.

This concept, which was thereafter known as the „Sahardjo concept”, obtained a very widespread response. The said concept was approved by the Supreme Court in its Letter no. 3, 1963, wherein the Supreme Court repealed various articles of the said BW; among others the article concerning the capabilities of a wife, paragraph 3 of article 248 concerning the recognition of a child and article 1460 concerning the risk in sale purchase transactions.

4. Turning-point in the development of national law

But as time passed the above mentioned radical concept lost its supporters. Prof. Subekti, who meanwhile replaced Dr. Wirjono Prodjodikoro as the Chief Justice of the Supreme Court at the opening of the second National Law Seminar held in Semarang in 1968, stated that „one of the problems that requests thoughts and considerations from the participants of the seminar is the problem concerning the judicial validity of the Burgerlijk Wetboek and the Wetboek van Koophandel which the late Minister of Justice, Dr. Sahardjo, has tried solving by introducing a „Transitory Law” and by claiming that the Burgerlijk Wetboek resp. the Wetboek van Koophandel is no longer to be considered as a wetboek but only as a „rechtsboek” or an important document as „guide” for the judge”. In professor Subekti’s view the problem was not to be solved by revoking (certain articles of) the Burgerlijk Wetboek or the Wetboek van Koophandel. For want of something better such policy, in his opinion, could only lead to chaos. As an alternative he forwarded another concept recognizing the competence of judges to preside over civil proceedings and, in implementing civil laws, giving them the right, in exceptional cases if they considered with conviction that a certain provision was obsolete or was no longer in conformity with the existing changes/progress of times, to

3. Sahardjo S.H., Pohon Beringin Pengayoman (The Banyan Tree of Pengayoman), Speech at the Ceremony of Receiving the Title of Doctor Honoris Causa in the Legal Sciences by the University of Indonesia, July 5, 1963, Rumah Pengayoman Sukamiskin, Bandung, page 4.

eliminate the related provision or develop the provision further if the changes/progress of times required such provision to be developed⁴. In his opinion the speech of the Minister of Justice and the circular of the Supreme Court merely contained a suggestion to our judges, not to hesitate or be afraid to eliminate a certain article from the Burgerlijk Wetboek if they consider that the said article or provision is not in accordance with the progress of time or with the situation of independence.

Based on the wordings of Professor Subekti we arrive once more at article II of the Transitory Provisions and Government Regulation no. 2, 1945 as stated above, particularly with regard to the subclause which reads: „as long as no new laws are created that are in accordance with the Constitution, the existing provisions are still valid provided that they are not contrary to the Constitution.”

5. The meaning of article II Transitory Provisions

If we read both article II of the Transitory Provisions and Government Regulation no. 2, 1945, then it seems as if the provisions mentioned therein only regulate matters concerning the validity of former legal provisions as long as no new ones have been adopted that are according to the Constitution, provided that are not contrary to the Constitution. But if we examine them more intensively, then two basic things can be traced, namely:

- a. The objective and will of the makers of the 1945 Constitution was that a national law should be created according to the spirit and soul of the 1945 Constitution, although this has not been stated explicitly such as in article 102 of the Provisional Constitution 1950 (which is no longer in force now). Article 102 of the Provisional Constitution of 1950 provided that national civil, commercial, penal, military penal, civil procedural and penal procedural law and the composition and authority of the courts were to be regulated in the form of a code except when the law makers deemed it necessary to regulate matters in separate laws.
- b. Article II of the Transitory Provisions and Government Regula-

4. Prof. R. Subekti S.H., *Pembinaan Hukum Nasional (Development of National Law)*, Alumni, Bandung 1981, page 23.

tion no. 2, 1945 give the right and obligation to judges (on account of their duty) to „adjust” and even to declare that a certain legal provision which originated from the period preceding the enforcement of the 1945 Constitution, is not valid if the regulation in question is „contrary” to the Constitution.

Thus on one side the establishment of a „new law” may be justified if such is really necessary through circumstances and on the other side judges are approved to „adjust” , and even to state that a legal provision from the period before the enforcement of the 1945 Constitution is no longer valid.

6. The right to test a law (toetsingsrecht)

Based on the above explanation we now come to the question of the „toetsingsrecht” (testing right) of a judge. This problem, in my opinion, needs some elaborations because of the existing provision under article 26 Law no. 14, 1970 concerning the basic principles of the competency of the Supreme Court. The said article is in extension as follows:

1. The Supreme Court has the authority to declare as null and void all legal regulations which are of lower level than the law based on the grounds that they are contrary to higher regulations.
2. The decision to declare the invalidity of the legal regulations may be taken during cassation proceedings. Revocation of the said regulations which have been declared as null and void is done by the authority concerned.

What is the connection between the provision as stipulated under article 26 of Law no. 14, 1970 and article II of the Transitory Provisions/Government Regulation no. 2, 1945 which obligate judges to evaluate and examine whether a regulation has the form of law and whether it is not contrary the Constitution?

To answer the question, firstly it should be noted that it was no intention of the law makers to indicate that it is prohibited to test the material of a law such as regulated by the provisions of article 26 of Law no. 14, 1970 with legal regulation originated from the old law, which is the law before the enforcement of the 1945 Constitution. Besides, the view of Professor Subekti should also be

mentioned here. He stated that article 26 which gives the Supreme Court the competency to „declare as null and void” a regulation which is lower than the level of law, is not usually considered as a „materieel toetsingsrecht”. „What is written there is only a small fragment (which practically does not mean much) of the whole competence of judicial power known as „toetsingsrecht”. In general, Professor Subekti further said, according to doctrine, the right to test a law (toetsingsrecht), all laws and regulations (including a law in the formal meaning thereof), is inherent to the „rechterlijke werkzaamheid” (judicial activity). It should be stated here with regret that up to now there has been no Supreme Court decision in this matter.

Speaking about the competency and even the obligation of judges to adjust, find and create law, we come to the problem which in the former law system was provided under article 22 A.B., and presently under article 14 of the Basic Law concerning Judicial Power as follows:

„Even though a judge may not find the provisions in the laws/regulations relating to a certain matter, he still has to judge the case. A judge may not refuse to examine a case on the grounds that it is not regulated by law”.

Article 27 of the Basic Law concerning Judicial Power further provides firmly that a judge, as the upholder of law and justice is obligated to dig, follow and understand legal views upheld by the people. In a community which still knows many unwritten laws that are still in the stage of process and transition, the elucidation of article 27 of Law no. 14, 1970 states further, a judge is the formulator and digger of legal codes existing among the people. Therefore he has to mix with the people in order to know, feel and be able to understand the feeling and sense of justice existing among the people. In so doing, a judge may be able to issue a decision which is according to the law and the sense of justice felt by the people. The existence of an obligation imposed upon the judge by the provisions regulated under article 27 of the Basic Law concerning the Judicial Power, places the judge and the court in a

central position in the development of law, whether in respect to material or formal law.

7. Pluralism of law and the structure of courts

Thus it may be said that the legal situation faced by judges is a heritage from the past period which is not only pluralistic in nature from the standpoint of material law, but also has a pluralistic nature from the point of procedural law such as pictured exactly by Professor Lemaire with the following words:

„Kenmerkend voor het bestaan van de verschillende rechtspraak-sferen was, dat niet alleen rechtsmacht door verschillende op basis van verschillende rechtsregelingen ingerichte, rechterlijke corporsen werd uitgeoefend maar bovendien bij elke soort rechtspraak verschillend recht, niet alleen verschillend formeel recht, maar ook verschillend materieel recht, tot gelding werd gebracht. Er was dus verscheidenheid van materieel en formeel privaats- en strafrecht, gekoppeld aan verscheidenheid van rechtsmachtsuitoefening en van rechterlijke organisatie”⁵.

We are grateful that the first steps taken by our law makers in the first years after the recognition of independence was the abolition of one aspect of that pluralism, being the pluralism within the scope of court jurisdiction. By the promulgation of the Emergency Law no. 1, 1951 hence the District Court becomes the one and only court of first instance for all groups of the community whether in regard to civil or criminal cases. Pursuant to its contents, the Emergency Law no. 1, 1951 provides actions concerning composition, power and procedure of civilian courts. Through Law no. 19, 1964 which was later revoked and replaced by Law no. 14, 1970, the contents of which are related to basic provisions concerning judicial power, the composition of the courts in our country is as such that we possess what is called four types of courts being religious, military, general and state administrative courts. It may be added here that state administrative courts have not yet been

5. Dr. W.L. Lemaire, *Het recht in Indonesia*, N.V. uitgeverij W. van Hoeve, 's-Gravenhage, Bandung, 1952, page 229.

established. At present works are in progress to compose a draft law concerning state administrative courts.

On the other hand in the field of material (civil) law the situation still does not differ very much from the situation pictured by Professor Lemaire as above. One of the national legal products in the field of material civil law is Law no. 1, 1974 which concerns marriage.

8. Article 393 HIR

On the one hand therefore it may be pictured how difficult the task of judges is in our country in order to be able to meet the instruction such as stated under article 14 of the Basic Law concerning Judicial Power mentioned above, but on the other hand it may be concluded that the decision of the judge, discovery made by the judge and the creation of law by the judge plays a very important role. This role is only important in order to fill in the existing vacuum in the field of law. The decisions made by judges are not merely a source of law. In our country, though not adhering to the principles of precedence such as in Anglo-Saxon countries, jurisprudence (read: decisions of the Supreme Court) possesses weight and great authority. It becomes an example for judges of lower level courts. But still, every judge may submit his standpoint that differs from the standpoint of the Supreme Court, and thereby deviate from the existing jurisprudence, provided that he gives his reasons to strengthen the direction of the development of law in our country.

Since our independence we have witnessed the elimination of various legal provisions (at the level of „wet”), either by doctrine or by jurisprudence. An example is article 284 (3) BW, which according to Professor Kollewijn was an offence against the Adat Law of the Indonesian people. Another example is article 393 HIR which according to the terminology of Indonesian lawyers previously had long been „hollowed out by court practices for Indonesian natives (landraden)”⁶. The revoked article 393 HIR provided „bij de

6. Prof. R. Subekti, loc.cit., page 35.

rechtspleging voor de Indonesische rechtbanken zullen geen meerdere of andere vormen in acht worden genomen dan die, welke bij dit reglement zijn omschreven". But experience has proved that the HIR as a „simplified edition” of the Reglement Rechtsvordering (Rv) could not meet the need of the people for justice, at the time before independence was proclaimed and the more so after independence. Our masters of law at that time, especially before the independence had hollowed out article 393 HIR in such a way that the said provision almost did not have any meaning at all. The Jakarta District Court stated in its decision d.d. January 17, 1955 (Law of Year 1956 no. 1 and 2, page 177) that because article 393 HIR prohibited the use of procedural forms other than those determined by the HIR, the court of first instance could not use regulations as provided in Rechtsvordering, but if it was considered necessary or useful, could use institutions which existed in Rechtsvordering but were not mentioned in the HIR provided that they were „within the framework of our own creation” without using regulations as stipulated in Rechtsvordering itself⁷. The above is one form of „excavation” (uitholling) of article 393 HIR. The said 1955 jurisprudence is still generally followed. Our experience also proves that, particularly in big towns, we use more and more institutions which are only found in Rv. Among others such as: vrijwaring (protection), intervention and regulations concerning arbitration. The mentioned Rv-provisions can of course not be applied automatically and formally in its original form. There are many bodies, either public institutions or systems of courts mentioned therein, that are no longer in conformity with the situation of the state and structure of courses that are presently valid. The provisions of the said Rv have been adjusted here and there. Therefore in a certain sense, we have to face (procedural) laws that are created by judges.

7. Prof. dr. Supomo SH, *Hukum Acara Pengadilan Negeri (Procedural Law of District Court)* Pradnja Paramita, Jakarta, 8th edition, page 10. See also: R.Z. Asikin Kusumah Atmadja, *Arbitrase Perdagangan Internasional (International Trade Arbitration)*, Prisma no. 6, year II, December 1973, page 56.

9. Role of the judge

Developments and changes run very quickly. Soon after the establishment of the Basic Law concerning Judicial Powers in 1964, Law no. 19, 1964, in 1970 the need was felt to replace the a.m. law with a new one and so Law no. 19, 1964 was revoked and replaced by Law no. 14, 1970.

The change and replacement was done before the procedural law concerning the cassation proceedings by the Supreme Court, the forming of which was instructed by Law no. 13, 1965 jo Law no. 19, 1964 had been implemented whereas the provisions concerning cassation proceedings as stipulated in the Supreme Court Law no. 1, 1950 had been revoked. To overcome a vacuum which occurred in the legal procedure, in deciding every cassation case the Supreme Court always took first into consideration that what had been stated as not valid was not the whole law concerning the Indonesian Supreme Court but only the part concerning the position, composition and competence of the Supreme Court, so that therefore in respect to matters related to cassation proceedings, the Supreme Court still needed to apply the provisions of the said Supreme Court Law no. 1, 1950. At present the Indonesian Parliament is discussing a draft law concerning Law Courts within the scope of the General Judicative Bodies and the composition and authority of the Supreme Court (including its legal procedure) in order to replace Law no. 13, 1965 as mentioned above.

With regard to the jurisprudence in the field of material (civil) law we are progressing in such a way, that the decisions of judges not only fill in the legal vacuum, but in a certain sense also determine the direction and pattern of legal development. In 1967, long before the enforcement of the law on marriage (which was enacted on January 2, 1974 and was effectively valid since October 1, 1975) the Jakarta District Court had adopted a decision, the influence of which can be said was as big as what was known as the „Grote Leugen”-arrest from the Hoge Raad in the Netherlands. The said District Court was confronted with a claim for divorce on the ground of „onheerbare tweespalt”. The problem was that the plaintiff and the defendant belonged to a category of persons who

were subjected to the Burgerlijk Wetboek which did not know such a ground for divorce, while on the other hand this ground did exist for other groups in the community not living under the rule of the BW. The Court in its decision considered that the ground of „onheerbare tweespalt”, although it is not mentioned in article 209 BW, is an argument for obtaining a divorce, because both the European and Chinese ethnic group have resided in Indonesia for a long time and have mixed with autochthonous Indonesians, therefore can be considered to have been dissolved into the Indonesian autochthonous group, so that the grounds which were valid for Indonesian Christians are considered also appropriate to be enforced upon European and Chinese ethnic groups. The argument of the plaintiff, based on „onheerbare tweespalt” in the said dispute proved to be „een onenigheid” (discord) in the life between the plaintiff and the defendant on which base the plaintiff's claim could be approved⁸. The said Jakarta District Court's decision was upheld by the Supreme Court in its decision dated June 2, 1968 (no. 105/Sip/1968). As from that time, the said decision has become a permanent jurisprudence. The said „onheerbare tweespalt” has even been adopted in the Basic Law on marriage mentioned above as one of the grounds for obtaining a divorce, and was regulated further in Government Regulation no. 9, 1975 concerning the implementation of Law no. 1, 1974 with regard to marriage. Under article 19 sub f. of Government Regulation no. 9, 1975 the a.m. ground is formulated as follows: „continuous disputes occurring between husband and wife and no hope to regain a peaceful family life („duurzame ontwrichting”).

10. Competency of public courts concerning dispute in state administration

Although the Basic Law concerning Judicial Powers stipulates a provision concerning state administrative courts, up to now no such said courts have yet been installed. A present concept concerning state administrative courts is being drafted. It seems that time is

8. Juriprudenci Indonesia (Indonesian Jurisprudence) Indonesian Supreme Court, Publication I, 1969, page 33.

still needed to realize the ideal of creating state administrative courts.

Nevertheless, jurisprudence is developing in such a way that at present it is accepted as a permanent jurisprudence as long as state administrative courts have not been established, the public courts are competent to examine cases which consist of unlawful acts performed by the government⁹. The decision of the Supreme Court of 1973¹⁰ also mentioned the competency of District Courts to judge against „onrechtmatige daad”.

The Supreme Court has already conducted a workshop twice concerning the problem of state administrative courts, respectively in Lembang in 1977 and Surakarta in 1978. The Lembang workshop in 1977 was still of the opinion that „the competency of judges of the general public courts to judge state administrative legal disputes (staats- en administratiefrechtelijke geschillen) was due to the non existence of provisions concerning an administrative court”. Its conclusion was as follows: „The view existing in the present jurisprudence is that the public court is competent to judge administrative legal disputes, if there is still no regulation concerning certain administrative courts. This is such particularly because no criteria or exact meaning can still be determined regarding administrative courts in Indonesia”¹¹. The Surakarta workshop in 1978 seemed to be more firm in its conclusion. It determined that „the introduction of state administrative courts should be implemented by extending the competency of the general courts”.

The general courts connected the problem concerning the „onrechtmatige overheidsdaad” with the „onrechtmatige daad” contained in the Burgerlijk Wetboek bij interpreting it as an unlawful act, especially in cases of violation of public law¹². This

9. Decision of the Supreme Court of the Republic of Indonesia, November 19, 1973, no. 63K/Sip/1973, Rangkuman Jurisprudensi Mahkamah Agung Republik Indonesia II (summary of jurisprudence of the Supreme Court of the Republic of Indonesia II) page 166.
10. Decision of the Supreme Court of the Republic of Indonesia, November 14, 1974, no. 339K/Sip/1973, summary of jurisprudence loc.cit., page 167.
11. The development of law, Supreme Court of the Republic of Indonesia, without year of issue, page 14.
12. The development of law, loc.cit., page 34.

opinion has become a permanent jurisprudence. In general the jurisprudence also follows the opinion that there should be a distinction between unlawful acts performed by the authorities in the meaning of public law and an authority as a particular individual. The first group encloses acts of the authorities which constitute a violation against the law and the other legal regulations, violations against decency that should be observed by the authority, and problems in respect of policy that may not be evaluated by the judge, except when they become „willekeurig”. The second is regarding unlawful acts by the authority as a particular individual covering matters when the said authority violates the provisions of civil law. The acts committed by the said authority official may also be committed by any other person. From what has been explained above we can take a conclusion that jurisprudence has cleared a path towards the creation of state administrative courts.

But this does not mean that district courts (general courts) examine and judge all administrative disputes at present. The history of the development of law in our country is such that besides state courts there exist ad-hoc bodies which are given the competency to settle administrative disputes. In such cases the said administrative disputes cannot be submitted to the court, but it is totally the competency of the said ad-hoc bodies to settle them; the role of the court is only limited to certain matters such as for instance to give an „exequatur” to the decisions of certain ad-hoc bodies as shall be explained hereunder.

Law no. 2, 1957 concerning the settlement of labour disputes provides that labour disputes, namely disputes concerning termination of labour relationships between employee and employer are solely the competency of the Regional Committee for the Settlement of Labour Disputes and/or the Central Committee for the Settlement of Labour Disputes. The Regional Committee for the Settlement of Labour Disputes exists in places which are deemed necessary by the Minister of Manpower and issues decisions of first instance. The Central Committee for the Settlement of Labour Disputes is an institution which re-examines the decision rendered

by the Regional Labour Disputes Settlement Committee. In certain cases the Central Committee may take over a certain labour dispute from the hand of the Regional Committee if the said labour dispute according to the opinion of the Central Committee may endanger the public interest. Thus concerning the last mentioned cases, the Central Committee issues decisions of first and last instance. The decision of the Central Committee is binding in nature and the execution thereof should be commenced, if within 14 days after the decision has been taken, the Minister of Manpower does not revoke or cancel the execution, if according to his opinion the matter is considered necessary to maintain the general security and to protect the interest of the state. Article 16 of the said Law no. 22, 1957 provides, if deemed necessary for the execution of the decision of the Central Labour Disputes Settlement Committee, that the party concerned may submit an application to the District Court in Jakarta to issue a declaration for the execution of the said decision. This is what is understood by furnishing a declaration of „exequatur”. After this declaration has been given the decision is then executed pursuant to regulations usually used for the execution of a court decision in a civil case. The District Court may only approve or reject the application for fiat execution. In approving/rejecting for fiat execution, matters which are examined by the court are only related to formal matters, in particular concerning jurisdiction (competency), whether be it an absolute or relative one¹³. It is already a permanent jurisprudence that in approving or rejecting an application for „exequatur” the court may not apply the usual civil procedural criteria as measurements. It is possible that there will be opposition (verzet) towards the fiat for execution. The said opposition shall be settled pursuant to the usual civil procedural law (HIR) with the understanding that the said opposition may not result in the cancellation or prevention of the execution of the decision concerned. A request for cassation can not be submitted upon the decision of the chairman of the District Court stating that the decision should be executed. According to

13. Circular of the Supreme Court no. 1, 1980 concerning the execution of the decision of the Committee for the Settlement of Labour Disputes.

article 16 of the Law concerning the Indonesian Supreme Court (State Gazette 1950, no. 30) those which may be requested for cassation are decisions, decrees and acts of courts and judges which are contrary to law¹⁴. The said article intends only to cover decisions, decrees, and acts of courts and judges within the level of the general courts, whereas of decisions and acts lying within the special legal sphere (bijzondere rechtssfeer), cassation may only be requested if in legal regulation, which specifically regulates the matters at hand it is expressly determined that such a request may be put forward.

Another ad-hoc body is the Housing Committee. This committee is created by Government Regulation no. 49, 1963 concerning matters in respect of the leasing of houses. This Government Regulation is promulgated to replace the „Huurprijbesluit 1949” which was issued during the difficult period in which houses were difficultly obtained, within the first years after our independence. According to Government Regulation no. 49, 1953, the head of the Housing Committee is appointed by the head of the Regional Government and has jurisdiction which covers the area of the head of the Regional Government concerned, wherein he is competent to decide the amount of rental price, permits, discontinuation of the lease without requiring a mutual agreement from both parties based on the claim of the lessee or the lessor and to issue instructions to vacate to persons who reside in houses without any right or housing permit which are administered by the head of the Regional Government. An appeal may be submitted to the head to the Regional Government against any decision in respect to the lease and usage of those houses within 30 days after the decision has been informed to the person(s) concerned. The appeal decision is considered as final and binding. Therefore after the enforcement of Government Regulation no. 49, 1963 on August 3, 1965 District Courts were not competent anymore to preside over cases of leasing of houses¹⁵. This situation changed when Government

14. According to the provision of Law no. 13, 1965 cassation may directed towards a decision or decree, issued by the court.

15. Circular of the Supreme Court no. 5 en no. 6, 1964.

Regulation no. 55, 1981 was issued on December 24, 1981, amending Government Regulation no. 49, 1963. The amendment was such that there was a shift/retransfer of competency in examining and deciding cases concerning housing problems to the District Court. Article 10 of Government Regulation no. 49, 1963 has been amended such, that it reads as follows: „termination related to the leasing of houses without mutual agreement by both sides may only be executed based on the decision of the District Court”. The competency of the head of Housing Committee is at present only limited to determining the rental price between the lessor and the lessee. Moreover the head of the Housing Committee still possesses the competency to issue instruction to vacate for tenants who inhabit without a valid housing right or permit houses which are still administered by the head of the Regional Government.

Another ad-hoc body is the Council for Tax Evaluation (ordinance dated January 27, 1927 concerning „Regeling van het Beroep in Belastingzaken”). The Council for Tax Evaluation in Indonesia is an administrative court (so that it is outside the jurisdiction of the Civil Court), it is seated in Jakarta, and is the highest instance which gives final decisions concerning tax disputes. The scope of competency of the Tax Evaluation Council covers decisions of disputes concerning:

1. All taxes collected by the state if it is allowed by law.
2. All regional taxes if the collection thereof is allowed by law.

The chairman of the council is appointed by the president who also appoints a vice-chairman from among the members. The members are also appointed by the president based on proposals he receives: two persons are proposed by the Supreme Court and two others by the Chamber of Commerce and Industry in Jakarta¹⁶.

The existing ad-hoc bodies do not exclude the possibility to always submit a claim based on unlawful acts by the authority¹⁷. Nevertheless it is the opinion based on jurisprudence that claims

16. R. Santoso Brotodihardjo S.H., *Pengantar Ilmu Hukum Pajak (Introduction of the Tax Legal Sciences)*, P.T. Ersesco Jakarta Bandung, 10th edition, page 127 etc.

17. Decision of the Supreme Court of the Republic of Indonesia, October 31, 1974 no. 981/Sip/1982, summary of the Republic of Indonesia, loc. cit., page 63.

by imposing based on tort „via de constructie van de onrechtmatige overheidsdaad” may not be processed with the aim to consider the contents of a decision of a certain ad-hoc body. The only thing that should be done by the court in such a case is to consider the policy thereof, namely whether the said „policy” is such that it becomes a „willekeur” and therefore „tyrannical”. In the decisions of the district courts concerning unlawful acts by the authority, the dictum of those decisions is merely limited to a statement that there exists a tort and to the granting of compensation thereof if there is sufficient reason to do so¹⁸. The furthest step that may be taken is to declare an administrative decision does not have a binding sanction according to the law.

In connection with the drafting of the law concerning state administrative courts, two important matters become the focus of attention namely:

1. The position of the said ad-hoc bodies after administrative courts have been established.
2. Which decisions of state administrative bodies may be „tested” by the administrative courts.

There is still no agreement concerning the position of the ad-hoc bodies in the future. Regarding the second matter it seems certain that decisions of state administrative bodies which have a „regelede” nature (settlements) may not be tested by administrative courts¹⁹. The position of the government authorities in our country and the connection between the government on one side and the people on the other differs with the position of the government in countries with a Western legal system. We are taking steps and making efforts to establish a state administrative court which is in conformity with our legal system. The experience from the jurispru-

18. Decision of the Supreme Court of the Republic of Indonesia no. 23K/Sip.1968, summary of jurisprudence, loc.cit., page 63. Decision of the Supreme Court of the Republic of Indonesia, September 17, 1973, no. 899K/Sip/1972, summary of jurisprudence, loc.cit., page 68. Decision of the Supreme Court of the Republic of Indonesia, January 6, 1961, no. 1198 K/Sip/1973, summary of jurisprudence, loc.cit., page 63.

19. Dr. Paulus Effendie Lotulung, interview.

dence is certainly to play a role in the framework of composing a draft law concerning state administrative courts.

11. The judges role is active

The active role of a judge is in accordance with our legal system and sense of justice. Far before the enforcement of Law no. 14, 1970 based on its article 27 mentioned above, judges were also demanded to take an active role in presiding civil proceedings.

It should be stated here that civil procedure before the court in principle is conducted orally, and that such is the more so because of the non-existing of „verplichte vertegenwoordiging”, then there is a direct contact between the judge and those involved in the lawsuit. Unlike the system adhered to by Rv, the HIR requires an active role by the judge. The judge leads the proceedings and, after the proceedings have ended, the judge also guides for execution (article 195 HIR). Thus if we talk about „lijdelijkheid” (passivity), then the said „lijdelijkheid” is partly true and limited to the scope of the case only. It is very correct that what has been stated by professor Lemaire, which was that „de lijdelijkheid van de rechter in het Indonesische procesrecht in zoverre bestaat dat de omvang van de rechtsstrijd - zoals ik boven reeds uitdrukte - aan het oordeel van de partijen is overgelaten. Ook hebben partijen het recht steeds een proces, aler een vonnis is gewezen, te beëindigen. Maar daarnaast valt te wijzen op een actieve rol van de rechter in het proces. Hij kan bij de indiening der vordering de eiser raad geven en hulp bieden (article 119 HIR, 143 R.Bg.) en gedurende het proces is hij bevoegd partijen de nodige voorlichting te geven en haar opmerkzaam te maken op de rechts- en bewijsmiddelen die zij kunnen aanwenden (article 132 HIR, 156 R.Bg.)”²⁰.

Our sense of justice expects that a judge may settle a dispute justly and wisely, procedural matter is considered secondary. It cannot be accepted by our sense of justice that a case will be

20. Dr. W.L. Lemaire, loc.cit., page 195.

stranded just because of procedural mistakes²¹. The centre of gravity of the settlement of a proceeding is laid on efforts towards a settlement that can be made at each level of proceedings. Several decisions of the Supreme Court are mentioned hereunder:

1. „To approve more than the petitum is allowed provided that it is according to the posita; that according to the Procedural Law which is in force in Indonesia, judges should be active²² both in penal and civil procedures”.
2. „To add legal argumentations which are not submitted by the parties, which according to article 178 RID is the obligation of the judge”²³.
3. „The oral argumentation made by the chief of the District Court is incomplete, but with the existence of a subsidiary request it is hoped that the District Court shall take a decision which it considers just and is in accordance with Adat Law. District Courts are appropriate to take decisions as just as possible by settling the civil disputes totally”²⁴.

12. The authority of a judge to intervene in the contents of an agreement

In a civil proceeding the judge has the authority to intervene in the contents of an agreement. It is indeed true that based on the provisions under article 1338 BW, an agreement binds the parties who enter into it as law. Also from the viewpoint of legal certainty it is expected that the parties concerned who bind themselves into agreement shall obey what has been agreed. But as we know the problem of legal certainty it is always related to the problem of justice. Legal certainty and justice are like two sides of a coin and

21. The decision of the Jakarta R.V.J., February 16, 1940 (T 152, page 168) which reads as follows: „Mistake concerning the procedure of the Landraad Court does not become an obstacle for giving the meaning of claim pursuant to its real intention thereof”; quoted from prof. Supomo S.H., loc.cit., page 25.
22. Decision of the Supreme Court of the Republic of Indonesia, July 15, 1975 no. 425K/Sip/1975, summary of jurisprudence, loc.cit, page 163.
23. Decision of the Supreme Court of the Republic of Indonesia, December 3, 1974, no. 1043K/Sip/1971, summary of jurisprudence, loc.cit., page 196.
24. Decision of the Supreme Court of the Republic of Indonesia, November 28, 1956, no. 195K/Sip/1955, summary jurisprudence, loc.cit, page 193.

therefore may not be separated. The certainty that an agreement binds those who enter into it, can only be maintained if both parties possess an equal and balanced position, whether viewed from the knowledge they possess in respect to the law in force or from their economic position. Moreover, it should be observed that both parties who enter into an agreement are respectively really conscious regarding the legal consequences created by the said agreement.

The above statement seems at a glance to be contrary to the fiction that every person is considered to know the law. The said legal fiction is also known and valid in our country. But the problem is not whether the legal fiction is recognized or not, but is more a wrestling fight between legal security on one side and justice on the other. I am fully aware how difficult it is to make a balance between such legal security and justice. But the fact that can not be neglected is that the bigger part of our people does not possess sufficient legal knowledge and are in an unfavourable economic situation and therefore it is easy (to force them) to enter into treaties, the result of which may be fatal to them. With the above explanation I do not intend to stress concerning the fictions between the rich and the poor, but merely wish to underline that the law in our country has the function of „Pengayoman”, namely to give protection to everybody and at the same time to implement its function in upholding justice. The wordings of article 2 of the Woeker Ordonansi (Usury Ordinance) of 1938, should be observed by our judges.

13. Good faith

Good faith is the most important element in order to determine whether an agreement or legal act violates the principle of reasonableness and justice.

In this context I refer to a decision of the Supreme Court dated May 11, 1955²⁵. The decision is also mentioned by professor Subekti²⁶. The said decision may be looked upon with pride because

25. Published by *Malajah Hukum* (Law Magazine) in 1955, no. 3.

26. Prof. R. Subekti, *loc.cit.*, page 68.

it is a very good decision concerning the realization of the principle of good faith in the execution of an agreement. In the said decision (which is taken within the sphere of Adat Law) the Supreme Court considered that it was appropriate and in accordance with the sense of justice that in case of pledging land the parties respectively have to bear half of the risk arising from a possible change of the value of the rupiah currency, and that the risk is measured from the disparity of the price of gold at the time of the pledge and the time of redeeming the said land. Another example of how big the role of good faith is, was the decision of the Supreme Court in respect to the Tancho trademark. The decision, which has become a permanent jurisprudence and is a „mijlpaal” (landmark) in the course of the Law concerning Trademarks of 1961 stipulated that „what is understood by law with the words „first user in Indonesia” should be interpreted as the first user in Indonesia who is honest (in good faith) in accordance with legal principles and that protection is given only to those who are in good faith and not to those who are in bad faith.” It needs to be stated here that according to the Trademark Law system in Indonesia (Law no. 21, 1961), the registration of a trademark only gives the right to a person or legal entity over the said registered trademark because he is considered as the first user of the said trademark until it is proven otherwise by other parties. Concerning the above case, although the original defendant Wong A Kiong (Ong Sutrisno) had registered the trademark Tancho earlier than plaintiff P.T. Tancho Indonesia Co. Ltd., his claim was rejected and he lost the case, because the registration was done in bad faith. The aim of the Trademark law, the Supreme Court said in its consideration, was to protect the people against imitated goods using the trademark which is known to them as the trademark of goods with good quality, namely by way of putting into order good morals in the trade world (handelsmoraal). The decision above is till present considered as a permanent jurisprudence²⁷.

These examples do not mean that the general principles of

27. Indonesian Jurisprudence, Supreme Court Jurisprudence Project, 1972, page 407.

contract law are not recognized in our country. From several decisions of the Supreme Court concerning the implementation of an agreement it can be seen that the creditor, due to existing default, without specifically demanding for annulment of the agreement first, may directly claim for compensation on the basis that the agreement is terminated due to default. According to the provisions in the Burgerlijk Wetboek (BW), every agreement means to give something, to make something or not to make something. If that result is not achieved, the obligation is dissolved into an obligation to pay substitutory damages²⁸.

14. Problem of interest and risk due to change of the value of currency

Another problem which also touches the sense of reasonableness and justice is the problem of interests of a loan agreement.

According to the jurisprudence of the Supreme Court, if in the agreement there is no provision concerning interest then generally in accordance with the law (S. 18848 no. 22) the rate of 6% shall be imposed. Although there is a decision of the Supreme Court concerning agreed interest which states that agreed interest is binding to both parties, more tendencies exist where judges through their „matigingsrecht” (mitigating right) can adjust the amount of the said interest, either by using a provision regarding statutory interest or in accordance with the official interest rate of deposits in Government Banks or according to the customary interest at the time of conclusion of the agreement.

The principle of reasonableness and justice is also realized in respect to the occurrence of risk due to the change in the value of money in loan agreement cases. The permanent jurisprudence of the Supreme Court adheres to the opinion that in a loan agreement, the risk occurred due to the change in the value of money should be borne equally by both parties²⁹. Furthermore, so can be stated, the

28. Law Miscellanies and Jurisprudence, Supreme Court, Jurisprudence Project, 1979, page 23.

29. Decisions of the Supreme Court of Indonesia, November 25, 1959, no. 140K/Sip/1953, summary of jurisprudence, loc.cit., page 44.

gold price is used as the basis for the evaluation thereof. According to the permanent jurisprudence of the Supreme Court, the amount of money that forms the basis of a claim should be valued in accordance with the gold price at the moment of the decision, where as the risk due to a change in the value of the money should be borne by both parties equally³⁰. In respect to adapting the amount of a compensation already granted, the Supreme Court also uses the gold price at the time the decision is taken and the price of gold at the moment of the execution thereof and imposes on both sides to bear the risk due to the change in the value of the unit of account equally³¹. The said decision is among the efforts of the judge to realize the principle of reasonableness and justice.

15. Motiveringsplicht (obligation to motivate)

Matters concerning good faith, reasonableness and justice, and concerning the authority of a judge to intervene in the contents of an agreement create a problem: how far may a judge still be considered able to issue a decision within the limit of reasonableness and justice. Reasonableness and justice often change in accordance with the changes that occur with the progress of the time and the experiences of the people themselves. The main problem, in particular, in a developing nation such as our country, is the problem related to the connection between the law and changes in the social relationships of the people. Therefore it is true that a judge should be able to follow and be conscious of the occurrence of changes regarding the values in the social relationships of the people, a good judge should be a legal „translator” with a good sense of justice for his own people and nation. He may not act at „willekeur”. The law imposes upon him the obligation to give a sufficient „motivering” (motivation) for each decision he takes.

30. Decision of the Supreme Court of the Republic of Indonesia, may 19, 1976, no. 380K/Sip/1975, summary of jurisprudence, loc.cit., page 45.

31. Decision of the Supreme Court of the Republic of Indonesia, April 30, 1969, no. 74K/Sip/1969, summary of jurisprudence, loc.cit., page 45.

Therefore the absence of sufficient grounds and judgement in issuing a decision may be used as reason to revoke a decision at the level of cassation. Article 23, paragraph 1 of the Basic Law on Judicial Power provides that every decision should contain the reasons and the basis for the said decision and should also contain certain articles from the said regulation concerned or mention the unwritten legal source, which is used as basis for the judgement. Permanent jurisprudence of the Supreme Court states that decisions of District Courts which are not sufficiently considered (onvoldoende gemotiveerd) should be annulled³². The same thing happens to decisions of the High Court which should be annulled if they are not sufficiently considered (niet voldoende gemotiveerd) and/or lack orderly procedures³³.

16. Conclusions

Now I come to the conclusion of my explanation. I am fully aware that the road we are taking is still very long and the difficulties are also many. Pluralism in the court system has been abolished; we have also destroyed the walls that separate the people into groups. But our efforts to establish a national law in such a form as we desire, is still at the stage of laying the corner stone thereof.

In one part of my explanation, I have expressed that a good judge should be a good legal „translator” and should have a good sense of justice towards his people and nation. Therefore there exists the necessity to extend the horizon of our view. To become a good judge in the real meaning of the word requires intensive knowledge of your people and nation. It seems paradoxal, but by knowing other legal patterns and systems, we will possess a deeper understanding regarding our legal pattern and system. By knocking on more doors we will meet many more people; thereby our point of view becomes more wide.

At present there is the need for improvement of technical skill;

32. Decision of the Supreme Court of the Republic of Indonesia, July 22, 1970, no. 638K/Sip/1969, summary of jurisprudence, loc.cit., page 237.

33. Decision of the Supreme Court of the Republic of Indonesia, October 18, 1972, no. 672K/Sip/1972, summary of jurisprudence, loc.cit., page 238.

interpretation methods should be more sufficient at hand in order to meet the demand for law and justice that is so widespread and that runs so quickly. We should follow the development of legal sciences that have so many patterns and types without losing the ground on which we stand on this earth.

The distance between the utmost tip of our archipelago and Jakarta is more than a hundred times that of Potsdam to Berlin, but we also do believe in the saying „er zijn nog rechters in Berlijn”, which according to a story was said by a farmer from Sanssouci near Potsdam, when the latter was to be bereaved from his mill by King Frederick the Great of Prussia. The problem is, how „to shorten” that distance, both actually and figuratively.