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In: Bijdragen tot de Taal-, Land- en Volkenkunde 145 (1989), no: 2/3, Leiden, 365-369

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THE END OF HUKUM ANTARGOLONGAN?

One of the oldest and possibly most distinguished chairs at the Universitas Indonesia is that of professor of *hukum antargolongan* (intergroup law) or '*intergentiel recht*', as it was called in colonial times. The chair was instituted with the establishment of the Rechtshogeschool in Batavia on 28 October 1924. The first dean of the Rechtshogeschool, P. Scholten, who was later to become one of the greatest Dutch legal dogmatists of this century, emphasized the role of the new school as an essential stepping-stone to the political independence of the country, as well as an essential medium for studying its enormous and characteristic diversity. The first lectures on the subject of intergroup law were given by Professor R.D. Kollwijn in a former residence of the then governor-general, D. Fock. Professor Kollwijn left for the Netherlands in 1932, and after a period of four years with the constitutional lawyer Professor J.H.A. Logemann as caretaker, Professor W.F. Wertheim replaced him in 1936 and stayed on until World War II. On 21 January 1946 the Rechtshogeschool was reopened as the Universitas Indonesia, with Professor W.L.G. Lemaire becoming the new holder of the chair of intergroup law. Lemaire had studied at the colonial Rechtshogeschool and obtained his PhD there on 15 April 1932, on the basis of a dissertation entitled '*Overgang van godsdienst als probleem voor het intergentiel privaatrecht*' (Change of religion as a problem of intergroup private law). With the gradually deteriorating relations between the Netherlands and Indonesia, Professor G.J. Resink, who had become an Indonesian national, took over the helm. In 1958, the very young Professor Gouw Giok Siong (he was only 28) replaced him, and he still is the chairholder now.

Kollwijn is generally regarded as the person who established the discipline of intergroup law, implying that there was essentially a national conflict of laws. He strongly defended the equality between the various systems of law in the archipelago and hence opposed any legal change affecting the Indonesian population that was proposed for the sole reason that it was European and hence superior. There was no place in his approach for any *mission civilisatrice* in the colonies, for which the idea of the superiority of the western cultural heritage was a necessary precondition. He was equally opposed to a strong tendency in the colony towards the imposition of Dutch law on the local population whenever the occasion called for this. The result of his attitude, combined with those of other influential scholars of his time, such as Van Vollenhoven, was the development of a body of different laws, applicable to different population groups distinguished essentially along racial lines. *Intergentiel recht* — the law between the '*gentes*' or ethnic groups — was the law that governed social interaction between these groups.

Given the colonial situation, it is not surprising that inequality persisted in spite of these lofty ideals, as was pointed out by Wertheim (1956:172). A notable problematic case was that of a Dutch woman marrying an

Indonesian man. The woman generally following the law of the husband in those days, the question then arose whether in that case she would become subject to *adat* law. Professor Gouw Giok Siong has studied the social aspects of this issue at depth in his doctoral dissertation (Gouw Giok Siong 1955). Moreover, a strong argument can be put forward for the idea that the system of legal pluralism is in itself irreconcilable with equality. Thus, the pluralism of legal systems also served to exclude Indonesians from certain economic facilities. Until the 1930s, for instance, Indonesians were prevented from participating in the colonial economy on an equal footing, as the western civil and commercial codes did not apply to them (Hartono 1979:3-4).

Whether in practical terms the system built by Kollewijn actually was intended to be discriminatory is irrelevant now. The fact is that this is how the system has been regarded by the Indonesian government from the very moment of independence. Not surprisingly, the Indonesian government set out from the very start to get rid of the plurality of legal systems inherited from the colonial regime. It has been a long-standing ambition of the Indonesian government to create a single set of legal rules for all its subjects. It is not necessary here to go too deeply into the legal complexities to which this has given rise, and which have not yet been solved. Suffice it here to point out that in a number of legal spheres, unity has been achieved at least to some extent. Thus, in the areas of constitutional and administrative law, the distinction between directly and indirectly governed territories has naturally disappeared with the creation of the unified republic. The very pluralistic system of judicial administration has been streamlined into an essentially dual system of general (secular) and religious courts. The colonial Criminal Code was made equally applicable throughout the archipelago. In the private law sphere, where pluralism was most pronounced, two laws that are almost too well-known have attempted to put an end to the pluralism that existed in the areas of property and family law, namely the Basic Agrarian Law of 1960 and the Marriage Law of 1974.

Will the chair of intergroup law as a result be abolished? In a recent number of the renowned legal journal *Hukum dan Pembangunan* the present holder of the chair, Professor Gautama (Gouw Giok Siong), mentions that teaching on the subject will probably be discontinued (Gautama 1987). This must be seen as a logical consequence of the developments described above. Not surprisingly, the most important argument for abolishing the chair of intergroup law has been that there is no more pluralism to be studied in the Indonesian legal system.

The interesting thing is, however, that in attempting to create legal unity, it may be that the Indonesian government has created a new kind of pluralism. With the disappearance of the white colonial power, the distinction along racial lines lost much of its relevance. Still, that is not to say that the legal differentiation between various groups of Indonesians has therefore totally disappeared. Rather, it has been replaced with something else. In Indonesian the chair, tellingly enough, is not designated with the term

'interracial', as the Dutch term '*intergentiel*' may be translated¹, but is styled rather the chair of 'intergroup law' (*hukum antargolongan*). One can, we believe, distinguish between essentially two sources of legal pluralism which exist nowadays in Indonesian state law.²

The first of these sources is conscious legal differentiation by the legislator. Curiously enough, the unification drive has led to new forms of pluralism within state law that are now beginning to become apparent. A notable example of this is to be found in the family law sphere. For, whilst the Marriage Law has abolished racial pluralism, it now appears to have introduced a pluralism along religious lines. This is manifest from, for instance, a fairly sizeable body of lower legislation applicable only to Muslims and adjudicated by separate courts. This body itself is furthermore showing a steadily increasing internal differentiation along the said lines. Thus legislation applicable exclusively to Muslims now differentiates between Muslims generally and Muslim civil servants specifically (Prawirohamidjojo 1986). Muslim civil servants specifically cannot claim certain rights possessed by Muslim citizens generally by virtue of their religion, notably in the fields of polygamy and unilateral divorce.

The second source of legal pluralism within the state law is to be found in the decisions of judges. The reason for this, we believe, lies in the potentially wide gap between state law and law in the field. As is pointed out by numerous anthropological studies, unity is not always effected in reality. This has resulted in a legal reality that is much more diverse and pluralistic than the relatively well ordered and unified legal fiction seems to indicate. The unification drive has thus led to sometimes almost intolerable tensions between law in theory and law in practice. Whilst the legislator can at least for some time wash his hands of the problematic situations to which this may give rise, judges cannot.

This has resulted in a steadily growing body of case-law in which the law is made to fit the facts rather than the other way around. The judges, faced with situations for which the Jakarta-made laws are evidently not adequate, tend to tailor these laws to their needs. Thus, as one of the present authors has tried to point out in an earlier article, judges sometimes recognize *adat* law divorces because not to do so would force them to apply a criminal sanction that would be evidently unreasonable and unduly harsh (Pompe 1987). This appears to be in flagrant conflict with the state law.

These developments may have unexpected consequences. They may result in a pluralism according to *adat* lines in fields of law in which hitherto there was no pluralism whatsoever. Recent examples in fact point in this direction. In a particular Lombok criminal case an incestuous relation between adults was recognized by the state judge as being criminal because it was considered a criminal offence by the local Hindu community, the Criminal Code not providing for such cases. In this particular case the judge set aside the important *nulla crimen sine previa lege* principle and applied the *adat* criminal law, in apparent contravention of

¹ Kollewijn translated the term into English as such (Kollewijn 1955:219).

² This assuredly is not the only form of legal pluralism or the only meaning of the term (Griffiths 1985).

Indonesian legislation.³ The commentator, Nuryanti, applauds the innovative decision of the judge with the following comment: 'If the formal rules are inadequate, one must not be afraid of flying in the face of legal certainty. One can simply apply already existing *adat* law.'

A more recent verdict concerned a marriage by elopement in which the man eventually decided not to marry the lady after going through all the steps of an elopement marriage in accordance with Sasak *adat*.⁴ The judge found the embarrassment for the girl, her family and the *adat* authorities to be 'unlawful' according to *adat*, though not according to the Indonesian Criminal Code. Still, the man was sentenced to twenty-one days' imprisonment and costs.

The door has thus been opened to differentiation in the interpretation of family law between various religions and of criminal law between the various *adatrechtskringen* (customary law groups). And through that door intergroup law is slipping back in. 'What law applies when a Muslim girl wants to marry a non-Muslim man?', is a typical question of intergroup law (Pompe 1988). What happens if an offence as dealt with in the Lombok case is committed not by a person from the village community, but by a Jakartan or a Minangkabau living for the moment in that same village? There can be no unity without respect to the diversity within Indonesian society. To deny that intergroup law exists nowadays or to claim that it is at its end, is an act of grotesque self-deception. Intergroup law is not at an end — it is changing, in constant movement, alive and kicking. It stands to reason that the chair should be maintained.

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³ Pengadilan Negeri Mataram 29 October 1987, *Hukum dan Pembangunan* 1988, 1:62-68, with a comment by Nuryanti. The draft Criminal Code allows the judge to recognize *adat* offences that are not recognized in the state law. The judge in this particular case does not refer to this draft, however.

⁴ Pengadilan Negeri Mataram 23 March 1988, *Varia Peradilan* 1988, 39:68-75, with a comment by Boediarso. The case was decided by the same court and the same judge as the previous one.

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