S. Pompe

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S. POMPE

Between Crime and Custom

Extra-Marital Sex in Modern Indonesian Law*

1. Introduction

In 1992 the Indonesian weekly *Tempo* reported the case of an unmarried young man who was having an affair with an unmarried girl. They saw each other regularly and, as healthy young persons are prone to do, showed each other their affection in the form of regular sexual intercourse. The parents, of course, did not know about this relationship. One fine morning, however, disaster struck as a love-bite (*cupang*) was discovered on the young lady's neck. Her parents, who evidently belonged to a different generation in both biological condition and mental outlook, were deeply shocked. They brought a charge against the young man at the Public Prosecutor's Office, which initiated legal proceedings. The young man was subsequently sentenced to three months' imprisonment (*Tempo* 10 October 1992).

This case is by no means unique in Indonesia. In fact, the general press and legal journals have recently begun reporting cases based on comparable facts, which often make good if somewhat tragic reading, with increasing frequency. Such cases touch upon an important legal issue in Indonesia, namely the relationship between the law of the state on the one hand, and normative systems and ideas outside state law on the other. As will soon become apparent, Indonesian law provides few grounds for conviction in cases like the above one, so that the question arises by what route judges reach their decisions, and what impels them to follow these routes. This paper will give a brief outline of the relevant issues with reference to a number of recent related cases.

* For this essay, I was able to draw on a useful academic essay on the Balinese perspectives on this issue by Mr. E. Rusdi. I am also grateful to my female respondents for their contribution towards a more profound appreciation of some of the issues dealt with in this paper. Of course all flaws in this article, being partly faults of temperament, are wholly my responsibility.

S. POMPE is a lecturer in Indonesian law at the University of Leiden, who holds degrees from the School of Oriental and African Studies in London and the universities of Cambridge and Leiden. He may be contacted at the Van Vollenhoven Instituut, Faculteit Rechtsgeleerdheid, Rapenburg 33, 2311 GG Leiden.

Something should be said first about the general legislative background. It may be recalled that already in colonial times the Netherlands Indies Criminal Code applied to the entire territory of the Netherlands Indies and, at least in principle, to all its inhabitants, regardless of colour or creed.¹ Admittedly, Indonesian indigenous law (*adat*) was not wholly excluded from the criminal law, but it had an essentially residual function. The plurality in the administration of justice and the distinction between directly and indirectly governed territories ensured that the *adat* law remained a source for criminal law as administered by indigenous courts in the directly and indirectly governed territories (*inheemsche rechtspraak* and *zelfbestuursrechtspraak*). Nevertheless, the Criminal Code was declared applicable in part even in these jurisdictional systems.²

As we know, the colonial diversity was abandoned after Indonesian independence. The effect of this development on criminal law has been succinctly summarized elsewhere ('Territoriale' 1953). The relevant colonial distinctions were abolished and criminal jurisdiction generally was transferred to a single court, the *Pengadilan Negeri* (Emergency Law no. 1/1951). This development strengthened the position of the state vis-à-vis local communities in a much more structured and emphatic way than had been the case during colonial times. The autonomous courts had their roots in the local communities and derived their legitimacy from them rather than from the central state. The *Pengadilan Negeri*, in contrast, was a state court and served first and foremost as an instrument of state law and state policies. These organizational changes hence confirmed the superior position of the state and of state law vis-à-vis the local communities and their normative systems and values.

It is hardly surprising to see in this context that the role of state law was strengthened at the expense of that of local *adat*. Indeed, *adat*, which had already been residual in colonial times, was all but abolished as a source for criminal law in the independent state. The relevant legislation, Emergency Law no. 1/1951, gives precedence to the colonial Criminal Code in an unequivocal manner, and only contains a few extra articles to cover the old *adat* laws. These articles have a transitional and residual character, and their inclusion is quite clearly meant only as a stop-gap measure pending the then generally expected inevitable decline and eventual elimination of *adat* from substantive criminal law.

The 1951 law has remained in force to the present day, and has never been supplanted or supplemented with additional legislation. Its articles

¹ The systematization of colonial criminal law did not start with the Criminal Code, but can be traced back through the transitional penal provisions of 1848 to the Batavian Statutes of 1642. Finally, the 1872 Criminal Code for the indigenous population was a copy, with a few exceptions, of the 1866 Criminal Code for Europeans. See generally Jonkers 1946:2.

² Ordonnantie op de Inheemse Rechtspraak S.1932-80; Zelfbestuursregelen 1938.

pertaining to *adat* can be briefly summarized as follows (for greater detail see Lemaire 1952:260-2 and Han Bing Siong 1961:56). Firstly, an act which is criminal according to both *adat* and the Criminal Code must be punished according to the Criminal Code. Secondly, an act which is criminal according to *adat* but not according to the Criminal Code must be punished according to *adat*, unless the judge considers such punishment to be incompatible with modern views. In the latter case, or in cases in which the *adat* punishment is ignored, a substitute punishment of at most three months' imprisonment (or a 500-Rupiah fine) may be imposed. If the *adat* punishment is more severe than a three-month prison term, a prison sentence of maximally ten years may be imposed by the judge. Evidently, although this law does give *adat* a function in the criminal law, the Criminal Code remains the prime point of reference, and as a result the application of *adat* is even more restricted.

Against this background, it is all the more remarkable that, rather than withering away, this small legislative seedling has blossomed beyond all expectations, as the judiciary is drawing *adat* more and more into the sphere of state criminal law. We shall see below how this has come about.

2. *Adat as an extension of criminal liability*

In March 1990 the Indonesian Supreme Court delivered a judgment which firmly established its views on the extension of criminal liability beyond the Criminal Code (Mahkamah Agung 15 March 1990, no. 61.K/Pid/1988). The facts of this case are astonishingly commonplace: a man seduced a woman with the promise to marry her. The woman became pregnant, whereupon the man reneged on his promise.

Cases based on similar facts have surfaced a number of times in Indonesian reports. The accounts invariably mention the embarrassment which the events have caused the woman and her relatives. Whilst in this particular case a pregnancy was involved, this does not appear to be an essential feature: in some of the earlier cases there was no question of pregnancy at all. In one case criminal liability was established on the mere basis of the following innocuous facts: a boy had driven through the Lombok countryside with a woman on the back of his motor cycle, whom he had dropped off at the house of a particular village head to await his return to marry her. In the event, he did not turn up at the appointed time, for the simple reason that, as it turned out, he was already married. Whilst he may have stolen a kiss or two from the girl, it was accepted by the court that sexual intercourse had not taken place with her. All the same, the boy found himself thrown in prison for two months (Pengadilan Negeri Mataram 23 March 1988, *Varia Peradilan* 39/1988). It should be noted that this is rather exceptional, and that all the other cases support the supposition that sexual intercourse had taken place.

The Supreme Court case and its precedents indicate that the Public

Prosecutor's Office considers these facts to provide sufficient grounds on which to prosecute. In this case, the prosecutor based his accusation on claims of violation of both the Criminal Code and *adat*. His appeal to the Criminal Code has a history in Indonesian law. In the not too distant past, Indonesian courts have acknowledged criminal liability on the basis of the Criminal Code in comparable cases, notwithstanding the fact that the Code does not explicitly provide for these cases. The reasoning behind this was that criminal liability could be established in these cases on the basis of the theft article of the Criminal Code (article 378). According to the interpretation of the article in these cases, the man had 'stolen' the honour of the lady under false pretences. It is generally believed that one of the first persons to have advanced this argument is the well-known judge Bismar Siregar, presently of the Supreme Court. For this reason this specific line of reasoning will hereafter be referred to as the Siregar argument. It should be noted here that the theft article provides for stiff penalties. In this connection, B. Siregar followed his line of reasoning through to the logical conclusion and made no bones about imposing the same stiff penalties as are provided for in article 378. Thus, when still President of the Medan Court of Appeal, he applied this logic to sentence a person to three years' imprisonment (Pengadilan Tinggi Medan no. 144/Pid./1983/P.T.Medan, *Varia Peradilan* 7/1986). As regards the relevant facts, the Medan case was identical to the 1990 Supreme Court case referred to above.

The Siregar line of reasoning has been followed in numerous lower court decisions throughout the country; see, for instance, Pengadilan Negeri Jember no. 198/B/1984, dated 2 March 1985, and Pengadilan Negeri Jawa Timur no. 97/Pid/1985, dated 18 May 1985. And indeed, in the 1990 Supreme Court case, the Public Prosecutor based his charge on the Siregar argument.

The 1990 Supreme Court case is noteworthy because it confirms a consistent line of reasoning by the Indonesian Supreme Court, which dismisses the Siregar argument and emphatically states that the Criminal Code does not provide for cases such as these. This is based on the argument that 'honour' is not an object (*zaak/benda*) in the sense of the relevant theft article, and that as a result one cannot speak of 'theft' here (see for precedents Mahkamah Agung no. 854.K/Pid/1983, dated 30 October 1984, *Varia Peradilan* 25/1987, for instance).

At the same time, the 1990 Supreme Court decision confirms another line of reasoning, which as a result is becoming more and more firmly rooted in Indonesian law. For it accepted the Public Prosecutor's claim that this was a case of adultery (referred to as '*zinah*') as meant by *adat* law, and that it was possible to make a conviction on the basis of Emergency Law no. 1/1951. Consequently, the man was sentenced to five months' imprisonment.

In this case, as in its precedents, the Supreme Court declared the defendant guilty because *adat* law, not the Criminal Code, had been violated,

particularly where men had reneged on promises of marriage. Thus, in one of the cases referred to above (Mahkamah Agung no. 854.K/Pid/1983, dated 30 October 1984, *Varia Peradilan* 25/1987), the Supreme Court dismissed the Siregar argument but still found the defendant guilty of an infraction of Balinese *adat* and sentenced him to two months' imprisonment – to mention just one example.

3. *Adat as a limitation of criminal liability*

In the previous case, and all the cases mentioned in connection with it, an extension of criminal liability beyond the limits of the Criminal Code was at issue. In this context should be mentioned another case, which to my knowledge constitutes a relative novelty insofar as the fact that the case had been tried by an *adat* tribunal was accepted as a sufficient reason not to prosecute in a state court (i.e., served as a full defence) (Mahkamah Agung no. 1644.K/Pid/1988, dated 15 May 1991, *Varia Peradilan* 72/1991).

The case concerns a woman who was raped while asleep – a feat which is somehow beyond my personal comprehension, but which was accepted for a fact by the court. Subsequent to the event, the man was apprehended by the local community and punished in accordance with *adat*. This punishment involved the gift of a cow and a piece of cloth by the man to the victim. Throughout the trial in the courts, the man's defence was based not upon a denial of the facts but upon the *ne bis in idem* principle. For to punish him according to the law of the state would have meant in effect punishing him a second time for the same offence, while it is a basic criminal law tenet that no one may be punished twice for the same offence.

The Public Prosecutor did not accept this argument. He took the traditional view that in criminal cases the state has a monopoly of the prosecution, trial and punishment of offenders. So he decided to take the case to court, basing his claim upon articles 285 and 281 of the Criminal Code (rape and committing an offence against the public morals), as well as on Emergency Law no. 1/1951 (*adat*).

Interestingly enough, the courts at all levels decided that the claim as based on the relevant articles of the Criminal Code should be dismissed. The judges felt that there was no question of violence being used, since the lady had been asleep, whilst no offence could possibly have been committed against the public morals, as the act had taken place in private. The judges apparently decided that the term '*with the use of force*' (*dengan kekerasan/met geweld*) in article 285 literally refers to the use of physical force. It should be pointed out in this connection that already in colonial times the meaning of the term was extended to include acts committed against the will of the object, however (Landraad Sambas 14 April 1913). Further, article 286 appears to fully cover the case in question, since the meaning of the term '*unconsciousness*' (*bewusteloosheid*) used here also applies to the state

of normal sleep (Hoog Militair Gerechtshof 18 January 1935, *Indisch Tijdschrift van het Recht* 141:529).

The Criminal Code having been dismissed, however, the judges then turned to consider the *adat* rules. The judges of the first two lower-level courts had no difficulty in pronouncing the defendant guilty. They gave little or no consideration to the fact that he had already been punished according to *adat* law.

In this case it was the Supreme Court which did accept the defence plea. The entire case was declared inadmissible by this court and the defendant was acquitted.

4. A brief comment

The Emergency Law and the two Supreme Court cases discussed above raise a number of interesting questions about the role of *adat* within the Indonesian criminal law system. It is clear, of course, that in leaving open the possibility of criminal liability on the basis of *adat*, the Emergency Law continued a system that was already in existence in colonial times, be it in a much diluted form. Nevertheless, the conditions under which this system operates have changed dramatically over the past fifty years, as Indonesian society experienced formidable changes. The absence of comprehensive documentation and research reports on Indonesian normative systems outside the state law makes it difficult to generalize. Nevertheless, it is beyond any doubt that the significance and role of *adat* law within Indonesian society at present are much less clear than they were before independence.

In the next section I will consider these questions in general terms. I will not deal with the specifics of the Indonesian situation, which, though interesting in themselves, have limited relevance outside that country.³ These general questions refer to how it is established what is *adat*, what the courts have done with *adat* in the context of legal reform, and to what problems the use of *adat* is giving rise in criminal justice.

³ Thus, one may query the substantive and geographical ambit of Emergency Law no. 1/1951. 'Substantive ambit' relates to the question of whether exclusively only *adat* may constitute an extra-statutory basis for criminal liability, as suggested by the explicit references to '*adat*', or whether other normative systems such as religious laws are also included here. The frequent references of the courts to '*zina*' (adultery) make this question particularly relevant. 'Geographical ambit' refers to the geographical areas in which the law applies: only those areas in which the original colonial jurisdiction which this law was intended to supplant was in force, or the whole of the territory of Indonesia? It may be pointed out in this connection that the relevant articles of the Emergency Law specify that it applies to persons who until 1951 were subject to the jurisdiction of indigenous courts in indirectly governed territories (*zelfbestuursrechtspraak*) and to indigenous jurisdiction in directly governed territories (*inheemse rechtspraak*). Quite a few categories did not come under the jurisdiction of either, however, and it is not entirely clear whether or not they have subsequently become subject to the Emergency Law.

(i) *The determination of adat by the courts*⁴

Indonesian legislation, court decisions and publications all refer to *adat* with a matter-of-factness that suggests that the meaning of the concept is beyond contention. Nothing could be further from the truth, however. Much in the same way as 'custom', '*adat*' is marked by a number of fundamental uncertainties that preclude a facile application.

There appear to be no commonly accepted general methods and instruments for an Indonesian court to establish the existence and precise content of a particular *adat* rule by. The reports of cases lack specific information on how court decisions as regards *adat* are arrived at. This presents considerable practical problems, of course. Very little research has been conducted on *adat* in Indonesia since independence, and the courts have no up-to-date written sources to rely on. Courts may presumably call witnesses to verify a particular *adat* rule, but this procedure is fraught with difficulties. It is seldom possible for a court to find an unprejudiced witness in a community which has been disturbed by a serious crime. Moreover, one may ask on the basis of what authority members of a particular community can claim the existence of specific *adat* rules. The members of a community are usually all too apt to assert that certain rules exist if their personal sense of justice has been injured, and such rules may be altogether different from shared normative rules.

Needless to say, under these circumstances courts are having serious problems verifying the existence and content of a particular *adat* rule. These difficulties are exemplified by a series of Balinese cases decided by the Indonesian Supreme Court on the basis of '*adat*' as laid down in an old Balinese code of law, the *Adi Agama* (see, for instance, *Mahkamah Agung* no. 854.K/Pid/1983, dated 30 October 1984, and no. 195.K/Kr/1978, dated 8 October 1978). In these cases, the Supreme Court invariably asserted in general terms that the Balinese code specifies that if a man induces a woman to have sexual intercourse with him by making false promises of marriage, he is liable to punishment.

It is not apparent from these cases whether the code in question still finds general acceptance within the relevant community. Surely the latter should be a relevant consideration in establishing whether a particular *adat* rule is

⁴ A number of authors have studied the way in which *adat* is applied in state courts. Among them, K. von Benda-Beckmann deserves special mention, although it is impossible in the scope of the present brief article, aimed primarily as it is at pointing out some recent developments in the criminal law sphere which largely fell outside the scope of her book, to do her publications justice. Nevertheless, it can be noted that the findings of this article fully support her ideas that judges do not in fact apply the *adat* as it actually exists in the field. However, whilst her critical remarks were primarily aimed at demonstrating how state law and state procedures mould *adat*, the present article purports to demonstrate that there are underlying conceptions of state and religious morality the reflection of which shapes the way in which *adat* is used by the judiciary.

genuine. Field reports published subsequent to the enactment of this Balinese law code suggest that it may have fallen into disuse with respect to the relevant issue. Korn (1932:446, 478), whose authority is unquestioned, reports that it was already customary in Bali in his days for prospective marriage partners to live together as though they were married. This at least suggests that premarital sexual intercourse itself was not punishable (though leaving a woman pregnant was).

Moreover, as is pointed out by I Ketut Artadi (1980:187-188), the relevant article of the *Adi Agama* itself is not as unequivocal as the court would have us believe. According to some sources, the article mentions sexual intercourse, whilst others say it refers simply to the existence of a romantic relationship. Yet others assert that it only applies to partners who are already married (hence only to cases of adultery), and others again that it also applies to unmarried persons. Finally, there is disagreement about whether the rule applies to specific categories of individuals, such as widowers.

Another example of uncertainty about the authenticity and content of an individual '*adat*' rule is furnished by the Supreme Court cases in which reference is made to '*zinah*'. In a case from Central Sulawesi, which may be taken as an illustration (Mahkamah Agung no. 61.K/Pid/1988, dated 15 March 1990), the Supreme Court is found to have stated emphatically that, according to local *adat*, it is forbidden for men to entice women by means of false promises of marriage to have sexual intercourse with them. This may be so, but from the published sources anyway, the existence of this rule is not so evident. Historical studies on *adat* in the 1920s reveal that in certain parts of Central Sulawesi not even extra-marital pregnancy was punishable, let alone extra-marital sexual intercourse (*Pandecten* 1926:232). There is no published evidence that *adat* has changed since then, though it undoubtedly must have. Even so, it has recently been argued in Indonesia itself that the *adat* of different regions still allows at least some forms of institutionalized pre- or extra-marital sexual relations.⁵

These cases raise serious questions about how Indonesian courts establish the authenticity and content of *adat* rules. It seems to be factually incorrect to assert quite simply that *adat* without exception or qualification disallows extra- or pre-marital sex, as the courts have done steadfastly in all the cases cited. The reason for this could be provided by the difficulties of ascertaining what is *adat*. Nevertheless, it would seem that other factors are responsible for this approach.

⁵ So it is argued in a recent Indonesian legal journal (*Forum Keadilan* 20:12) that the *adat* of various regions, such as Mentawai, Minahasa and Bali, allows these, and indeed, sometimes even encourages them, as in the case of *Bakupiara* in Manado.

(ii) *Adat as a judicial projection and instrument of reform*

The above cases support the idea that judges, rather than finding out what the relevant *adat* rule actually says, tend to project their own ideas of what it is, or better still, should be, into their interpretation and application of it. In fact, in the past judges have referred explicitly to their 'own experience' and 'own research' as a reason for incorporating rules of *adat* in the civil law (Lev 1962:215). The outcome of these 'experiences' and this 'research' sometimes deviated in spectacular ways from what the relevant *adat* rule was commonly believed to say. In fact, it is now commonly accepted that the '*adat*' which crystallized from the 'experiences' and 'research' of the courts was totally different from the normative systems that applied in practice, and rather reflected the ideas prevailing among the state judiciary at the time. By pretending to be merely applying '*adat*', the courts both obscured and legitimized legal reform. Nothing could be further removed from the normative rules applying in the field.

I would submit that this is actually the reason for the recent surge in criminal cases purportedly on the basis of *adat*: it is an outcome of a desire of judges to reform society rather than apply existing rules. Their shared objective is to make prosecution possible in cases involving extra-marital sexual relations. As is pointed out somewhat obliquely by Sobandi (1992: 139), Indonesian courts seem to be determined to fight the social reality of extra-marital sexual relations, and, more in particular, the practice of men inducing women by means of a false promise of marriage to have sexual intercourse with them. *Adat* is the instrument, the legitimation, and the pretext in the effectuation of this category of judicial reform, much in the same way as in the reform of the inheritance law in the past.⁶

In fact, imminent legislation supports and legitimizes this kind of activities on the part of the judiciary in the field of criminal law. The draft Criminal Code decrees, rather spectacularly, that the fundamental principle that no one shall be liable to criminal prosecution except by legal process, shall not apply to *adat* offences (article 1(4) Draft Criminal Code). This is tending to stimulate rather than discourage continued judicial references to *adat*, genuine or projected. Moreover, this draft will make all sexual relations out of wedlock punishable with imprisonment to a maximum of 5 years (*Forum Keadilan* 20:12). This is supporting the social reform drive of the courts, which may in fact be anticipating this law rather than reflecting *adat*. Libidinous field workers, be warned!

It appears, then, that judges are not applying rules as prevailing in the

⁶ It should be pointed out in this connection that, as soon as the legislation does offer a means of dealing with cases involving extra-marital sexual relations, references to *adat* are invariably omitted – see Mahkamah Agung no. 420.K/Pid/1988, dated 28 March 1988, *Varia Peradilan* 38/1988, and no. 1330 K/Pid/1986, dated 17 November 1986, *Varia Peradilan* 45/1989, involving military personnel and minors.

field, but are rather projecting their own ideas of what the rules in the field should be, and thus reforming the law. This judicial programme of social reform may be partially induced by the anticipated legislative reforms, but its real causes are deeper. In their campaign against extra-marital sexual relations, judges are manifesting themselves as agents of the state, not merely enforcing state rules but also purveying norms of state morality – which may themselves be imbued with the rather prudish ideas of religious morality. These norms of state morality, most evident perhaps in the Marriage Regulations for Civil Servants (Government Regulation no. 45/1990), are centred around the ideal of the harmonious family: a monogamous marriage for life – with some latitude for religious intermarriage – with a maximum of two children. Whilst these norms may in themselves be quite acceptable, they may easily evolve into instruments of intolerance. For all its references to *adat* and protestations that it is only applying the living law as generally accepted in Indonesian society, the Indonesian judiciary appears to be actually repressing *adat*. This is bound to ultimately widen the gap between the state and local communities, between the administration and the citizens.

(iii) *The defendant and the state*

Of course, the fact that *adat* is being distorted by the courts does not in itself signify that the projected legal reform, whereby extra-marital sexual relations will be banned, is a bad one. This is a matter for Indonesian society to decide. Nevertheless, there are some fundamental problems attaching to criminal liability on the basis of *adat* rules, real or projected. These problems relate to the lack of specificity of these rules.

The first problem is that the extension of criminal liability undermines the rights of the defendant. Contrary to the Criminal Code, *adat* rules, at least in our western view (which may be shared by Indonesians), are generally formulated with insufficient definiteness and accuracy to give the defendant adequate opportunities to prove his innocence or provide evidence mitigating his guilt. There has been no attempt in any of the cases reported to examine and analyse the relevant *adat* rule and to establish whether the conditions specified by it have been fulfilled. This may be a typically western approach, but judges do adopt this approach when applying the Criminal Code, or when examining evidence or passing judgment.

The vagueness of *adat* rules is helping prosecutors, judges, and local communities to bring particular acts under the broad umbrella of *adat*, indeed, to tailor *adat* to their needs. Conversely, defendants are at a serious disadvantage because they do not know what precisely to defend themselves against. Furthermore, this may contribute to inconsistencies in the mode of punishment.

This is exemplified by all the cases discussed above. Indeed, it may be pointed out that, whilst sexual intercourse seems to be the common

denominator in all these cases, in one of the examples described here a boy was sentenced to prison by the court even though it had been accepted that no sexual intercourse had taken place (Pengadilan Negeri Mataram 23 March 1988, *Varia Peradilan* 39/1988).

The vagueness of *adat* as interpreted by the courts is helping to bring very different cases within its ambit. Thus, the weekly *Tempo* of 17 March 1990 reported that a married Acehnese had been accused of having sexual intercourse with a woman to whom he was not married, who had become pregnant. The man had been dragged before an informal village *adat* tribunal, which condemned him to be ostracized for having violated an *adat* rule allegedly going back to Iskandar Muda. The 'love-bite' case of two years later, cited in the introduction to this article, ended in a conviction with reference to the same Iskandar Muda *adat* rule, even though the facts were quite different. Here, both parties were unmarried and the girl did not become pregnant. This did not prevent the boy being dragged before a state court and condemned to three months' imprisonment. In neither case was the *adat* rule actually specified, but it must be exceedingly broadly interpreted if such diverse facts can be brought within its ambit. It is not clear, furthermore, whether such differences in the mode of adjudication and the nature of punishments are desirable.

The second problem is that the restriction of the rules on criminal liability in its present form is limiting the rights of defendants, victims, and the state. In the second Supreme Court case considered in section 3 above, *adat* was accepted as a full defence argument. It will be recalled that the court argued that if a case has been settled according to *adat*, the state courts no longer have jurisdiction. This means that if someone has been raped or murdered, for instance, and the injured party or his relatives have been bought off, as is the custom in certain parts of Indonesia, the Public Prosecutor may not bring the case before a court. There can be no doubt that in some instances such settlements are effected to the satisfaction of all parties involved, and indeed, some cases are solved more satisfactorily this way than the law of the state could ever do. But such settlements may also be effected under duress, with either the defendant or the victim being put under pressure.

As far as the state is concerned, there can be little doubt that its interests are negatively affected if *adat* is accepted as a full defence argument. The *ne bis in idem* principle involves that the court must declare the prosecution's case inadmissible and acquit the defendant unconditionally. The court may not accept the *ne bis in idem* principle as a ground for commuting sentences (*strafvermindings- or strafuitsluitingsgrond*). Under the present circumstances, the Public Prosecutor may no longer prosecute for crimes (whether according to the Criminal Code or according to *adat*) which have already been punished under *adat* law, therefore. This undermines the state's monopoly of the enforcement of the criminal law, as it recognizes the

existence of a legal system beside that of the state. This assuredly is not in the interests of the state.

Finally, one may question the decision to admit *adat* as a full defence ground for technical reasons. The rule of *ne bis in idem* is found in article 76 of the Criminal Code. This article prescribes that no one can be prosecuted for an offence on which a judge has already pronounced judgment and the possibilities of appeal for which have been exhausted. Since the cases in question have not been decided by a judge, this article strictly speaking does not apply here.

5. Conclusion

Indonesian society is subject to rapid changes. There has been little systematic, and certainly no comprehensive, research on criminal *adat* law in the territory of Indonesia over the past decades, and neither the role nor the meaning of the concept of *adat* in modern Indonesia is exactly unequivocal. Under these circumstances, *adat* should be admitted in the criminal law system with due circumspection. On the evidence of the cases discussed here, the conclusion seems warranted that the relevant legislation requires further specification and that *adat* must be more carefully defined if the rights of the state, defendants, and victims are not to be damaged by this development. It would appear, moreover, that the courts are applying *adat* not in the sense of a living law as generally accepted by society, but as a construct essentially projected on the basis of state conceptions of morality. Seen in this light, references to *adat* in Indonesian criminal law may widen rather than close the gap between the state and its citizens.

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