Re-appraising Paul Scholten

His Influence on the Development of a National Legal System in Indonesia

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Abstract

In 1942, Paul Scholten, a prominent figure at the Rechtshogeschool at Batavia, argued that the native elite students of the Rechtshogeschool should learn to think scientifically in their own native language and that the development of positive law should take cognizance of societal needs. Later, during the period of Indonesia's post-independence few people remembered Scholten's name and could access his works. In the late 90', however, Paul Scholten's work was rediscovered by B. Arief Sidharta and used to boost the idea that the development of a national legal system not only should serve society's need but more importantly be built on the Volksgeist (collective mind of a nation). This paper outlines the influence of Scholten on B. Arief Sidharta and how this worked out in Sidharta's views on current legal practice in Indonesia.

Keywords

Paul Scholten; Arief Sidharta, legacy of; colonial legal education; the origin of Indonesian legal education, national legal development

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1. Introduction

Only a few Indonesian legal scholars put serious effort in trying to re-discover the roots – the very beginning – of Indonesian legal scholarship and science. Reasons for this lack of attention are plenty. Mostly legal scholars and practitioners primarily pay attention to the existing legal system, to positive law and how this can be used to further personal or societal interests and needs. Another explanation for this lack of interest is the diminishing ability of legal scholars to access historical records, legal documents and legal textbooks, still written in the Dutch language. Nonetheless exceptions exist, notably two Indonesian legal scholars (both passed away unfortunately), prof. B. Arief Sidharta and prof. Soetandyo Wignjosoebroto. Both recently wrote a book describing the beginnings and foundation of Indonesian legal scholarship. Soetandyo describes how Indonesian modern legal scholarship developed in the colonial social-political context.[1] But it was Sidharta, who, when tracing back the development of Indonesian modern legal scholarship, stumbled upon the name and work of prof. Paul Scholten. He re-discovered Paul Scholten's numerous writings and showed current Indonesian scholars – unable to read Dutch - how Paul Scholten's ideas developed in the 1930-40's and influenced the beginning and trajectory of Indonesian modern legal scholarship and legal science.

This article is an effort to trace back and identify, which from Sidharta's perspective, were Scholten's most influential ideas in the Indonesian context. The article also attempts to describe how the same ideas influenced Sidharta's thought on Indonesian legal scholarship and on the development of a (nationalist) legal science which was an elaboration of Scholten's view on language proficiency and the interrelationship between legal practice and dogmatic legal science. Focus shall be given specifically to the ability of Indonesian legal practitioners to think scientifically in their own language (Indonesian) as well as in the language, in which a number of basic legal documents is written (Dutch). Behind these questions lies a different more basic issue: whether Asian (specifically Indonesian legal) scholars are capable to think scientifically using their own indigenous language[2] and whether in that process they can develop a legal system compatible with the society in which they live.

I will start with shortly describing Scholten's role in the establishment of legal scholarship

in Indonesia. His view on how to teach legal scholars the competences for using and developing law to answer societal needs, will then be treated here. The next part will discuss Scholten's ideas on finding law[3] as adopted by Arief Sidharta, which will be linked to another adopted idea of legal practice[4] and to Sidharta's effort at embedding the legal system and legal scholarship in a nationalist and cultural (Indonesian) worldview. This process in the end should be viewed as part and parcel of the transformation of the colonial legal system in Indonesia into a national one.[5]

2. Paul Scholten and the Rechtshogeschool

2.1 Rechtsschool precursor of Rechtshogeschool

In 1909 the Dutch Indies colonial government for the first time made it possible for (a select few of) the indigenous population to enjoy modern-western education in Indonesia. This moment was marked by the establishment of the *Opleidingschool voor Inlandsche Rechtskundigen* (OSVIR or OVIR), better known as the *Rechtsschool[6]*the precursor of the rechtshogeschool[7] , by Gov.-Gen. J.B. van Heutz with the advice of Snouck Hurgronje.[8] Lev writes about this *Rechtsschool* that it:

> was actually a secondary law school, which students entered in their mid-teens for six year of study. Instruction was in Dutch, which meant that only the sons of elite families were admitted – after graduating from Dutch language primary and middle schools, and frequently being boarded with a Dutch family to improve their command of the language. The Rechtsschool offered a truncated program emphasizing criminal law and procedure. [9]

Alumni of this secondary law school were named indigenous legal practitioner[10] and employed by the Dutch colonial governmental administration of justice[11]. Another author remarks:

> Though in court the native rechtskundigen (legal practitioners T.M.) spoke the language of those coming before it, they actually worked and thought in the Dutch language and genres of the legal system and procedures they had internalized during their training and career to date. [12]

Those indigenous/native aristocrats (only this group was in fact considered eligible and admitted as students) acquiring western education, proficient in the use of Dutch language in their normal-daily as well as legal professional life, were elevated to the same level as Europeans, even though their legal rights and obligations were still the same as those of an Netherland-Indies' subject or *kawula*[13] from a lower class. The legal basis for this class differentiation can be found in Art. 75[14] and 109[15]*Regerings Reglement*[16] as amended by art. 131-163 *Indische Staatsregeling*[17]).[18] The importance of these articles, as noted by Berteke Waaldijk:

> But in practice the tripartite division of the population was based on, and formed the basis for racial discrimination: indigenous people from Indonesian archipelago and lower class Eurasians were called 'Natives' (they constituted more than 97% of the population), all Chinese and Arabs (2%) were called 'Foreign Orientals' and every white person, as well as those Eurasians who were recognized by their European fathers, or were married to European men, were called 'European' (a group that consisted of less than 1%) . The division also reflected different economic roles played by the different groups: Javanese were in large majority farmers, Eurasians formed the backbone of lower ranks of civil administration, whites were in positions of administrative or economic power, Chinese and Arabs dominated trade. The principle of a dual judicial system introduced different forms of jurisdiction for the different groups. Javanese both for civil and criminal cases were subjected to the judicial power of Dutch colonial administrators who had to respect Indonesian local common law, while Europeans were subjected to separate courts. [19]

It was under this socio-legal-political situation in the Netherland Indies that, under the government of Gov. General Dirk Fock (1858-1941) the institute for secondary professional training for legal practitioners was closed and the *Rechtshogeschool* was established.[20] The founder and temporary first chairman of the *Rechtshogeschool* was the famous Amsterdam scholar, Paul Scholten. It is in this position that he influenced the making of this school and the structure of its curricula.

One of the most important aspects of Scholten's influence was his choice of what language proficiency should be acquired by students.[21] He proposed to drop Latin from the curriculum and instead initiated the effort to introduce local vernacular (Malay and Javanese) as legal scientific language and therefore supported the development of legal science in the Netherland Indies to be more attuned to the needs and interest of the local population. By forcing native students to speak and think scientifically in their mother tongue they were at the same time forced to take cognizance of their own (native) world as distinct from the European worldview and consequently of their citizens-plights as indigenous population in the Netherland-Indies. Scholten in this respect stated that:[22]

> Further an Indonesian (Malay and Javanese) language is included in the program. The students of indigenous origin must learn to think scientifically [23] in their own language. For the others [non-Native students] at least the study of one language is necessary for an adequate knowledge of the native life (…) It is important for students to understand the structure of the society in which the law is applied (…) but that anthropological knowledge [24] only becomes of greater importance provided it is not a list of curiosa but if it is accepted as a basis of the study of society.(trans. TM)

Paradoxically, in that way the Western modern education, in a way to be perceived as a legal transplant, forces indigenous legal students (a small elite at that time) to take into account the strangeness of colonial rule in the Netherland Indies and its alienating effect on the majority of the population.[25] In addition, indirectly, Scholten paves the way for the development of the lingua franca of that time, Malay, into the Indonesian language (after independence).[26]

2.2 Colonial project of subject formation

Putting aside the differences between the *Rechtsschool* and *Rechtshogeschool*, both can be characterized in principle as offering legal education for native elites merely as a colonial project of subject formation, which was inseparable from colonial state formation (and) was deliberately designed to produce independent and critical Native jurists who were at the same time loyal to the Netherlands. This is for example the view of Djalins[27]

On the flip side, arguably Scholten's ideas as worked out in the *Rechthogeshool*'s curriculum were a push factor enabling native students of this school to think independently as autonomous legal scholars, realizing their worth as individuals on equal footing with the Europeans, and thus responding to the inequities embedded in the existing political-legal system.[28] Particularly, as mentioned earlier with regard to drop Latin from the curriculum, Scholten's deliberate choice to teach native students to think scientifically in their own mother languages: Malay which was to become the basis of the Indonesian national language and Javanese, plays a crucial role in enabling native legal scholars to respond to the existing colonial legal-political system. A number of those indigenous/native *Rechtshogeschool* students and graduates later on played an important role in preparing the Indonesian independence in 1945 by instigating the effort to build a national legal system to replace the previous (and still influential) Dutch colonial legal system.[29] This was also in line with Scholten's view on what a *Rechtshogeschool* actually means. The word encompasses in itself that it is a school of which the end goal is not to impart knowledge but to empower and liberate the native students by forcing them to think seriously about the higher goals of law.[30]

In addition, the decision to include anthropological knowledge[31] in the curriculum of the *Rechtshogeschool*, gives a boost to the view that adat law[32] is a legal system on the same footing as European Law and worth of scientific study. This proves later on to be important in the effort, after independence, to replace colonial law considered discriminatory, with national law based on the abstract and general principles of adat law.

2.3 Finding law and Legal Practice

With regard to Scholten's view on finding law[33] and legal practice[34], it is imaginable that with the curriculum, developed on the basis of above principles, the indigenous population (more correctly the native elites) will enjoy the same level of education as given in the Netherlands. More so, given the fact that the native elites at the *Rechtshogeschool* – different from the students of the institute for professional training of legal practitioners at secondary level – were obligated to pay attention to the development of law in the Netherland Indies *i.e.*, to acquire understanding of how the law in the Netherland Indies responds to society. Scholten, here, affirms what is now considered general knowledge:

> Looking at it from this side, it is clear that every country needs its own center of legal science. What would be needed to realize this? Firstly, knowledge of the actual human relations for which legal rules would be applicable. After all, legal rules differ from moral judgements in that they are oriented at being implemented and enforced and that they lose their meaning without this. The moral imperative is in force, even if people do not follow it; legal rules however lose their meaning, when they are not used or go out of use. A legal rule is a rule that is used by a community. (trans. TM) [35]

The interrelationship between law and society is also stressed in the importance of the language used to formulate law. Here again, Scholten, formulates what is now considered common knowledge in legal science, i.e. that language is an essential component in the conception of law. He wrote that:

> The authority of the language is so big and so self-evident that there is no need to give further arguments for it; if anywhere, then especially in the domain of law, the way one thinks is determined by language, viz. the language of a specific formula. [36]

This is in line with Scholten's view on the importance of the judicial decision (which plays a central role in the development of law in Scholten's view). He argued that the judicial decision is an activity *i.e.*, that it finds and formulates how the law should be in a case brought before the judges:

> The judge does something other than observing in favor of whom the scales turn, he decides. That decision is an act, it is rooted in the conscience of he who performs the act. That which is expected of a judge is a deed. [37]

To be able to *do* decide which law is applicable and how it should be applied judges (or in general legal practitioners) should be able to speak, read and write well or in other words to be able to use language (the tool of his/her trade) competently. Scholten by stressing that finding and applying law is not merely a mechanical process,[38] points out the importance of legal scholars who have acquired language proficiency, because it is considered the key to understand the society upon which certain laws are to be imposed. His view also clearly comes forward in another important observation he made:

> Consequently, any country that wants to develop its law should also need to develop its own legal science. And then further this. Legal science not only demands the understanding of rules and knowledge or even understanding of facts, it also requires an understanding of those for whom those rules are made. This latter understanding is more than knowing. It involves and includes sensitivity. Whoever wants to enlighten people in their search for law, should be able to comprehend them. Here too, compassion is most important. (trans. TM) [39]

By underlining the importance of indigenous language (as used in daily live by the native population) and the proficiency to utilize that language to think scientifically about the law

in Netherlands Indies, Scholten challenged the at that time native elite law students in the Netherland Indies to think scientifically about the existing pluralistic legal system and forced them to question whether it sufficiently answers the needs of the majority of the Netherland Indies' population at that time (or now in the Indonesian nation). In doing so *i.e.* , by opening up the possibility of Indonesian elites living in a colonial setting to encounter Western ideas about individual freedom, Scholten, through the works of the students of the *Rechtshogeschool*, lay the foundation for not only of the Indonesian independence but more importantly for the development of the Indonesian legal system as distinct from the colonial legal system.

3. Paul Scholten as perceived by Arief Sidharta

3.1 Volksgeist

Arief Sidharta read – as he said himself with the help of a dictionary – translated and published one of Scholten's work concerning the structure of legal science.[40] But Sidharta did more than that. He used Scholten's ideas as a basis to develop his own view on how Indonesian legal science should be developed. In one interview he proudly stated:

> I would not mind if my (doctoral) dissertation is perceived as an interpretation of Scholten's thoughts which I adapted to the Indonesian context. (trans.TM) [41]

In his doctoral dissertation,[42] we can find traces of Scholten's ideas, specifically those relating to the interconnectedness of legal practice[43] and dogmatic[44] legal science. Specifically telling is Arief's reference to Scholten's argument against Hans Kelsen's idea that legal science should be a pure logical ordering of existing legal materials.[45] In contrast, Scholten argues – and Arief seems to endorse this argument in his dissertation - that when ordering law (in a logical and systematic way), the spiritual elements, i.e. (pre-existing) ideas of law held by members of a people of a specific nation in a specific place and time, should also be taken into account. These pre-existing ideas about the law are conceptualized by judges and legislators alike. Thus, in Scholten's perspective dogmatic legal science and the practice of legal practitioners cannot but be perceived as interconnected, i.e., as what legal practitioners, such as legislators and judges, do, when they conceptualize pre-existing ideas of law.

Sidharta, borrowed Scholten's ideas on the need to take account of pre-existing ideas in developing a national based dogmatic legal science,[46] but does so in a new way, i.e. by relating it to the idea of *volksgeist.* Influential in respect of Arief's thoughts on the development of a "national" dogmatic legal science are the works of Meuwissen, which Arief translated.[47] First of all, Meuwissen (as Scholten did years earlier) affirms the interconnectedness of legal practice and dogmatic legal science and inspired Sidharta to coin the concept of pengembanan hukum which denotes the same idea.[48] But more

importantly he also borrowed Meuwissen's reading on Savigny who argues that the unified system of law expressed the *Volksgeist* as it had developed overtime at a certain place.[49] In any case, by reading both Scholten and Meuwissen, Sidharta is convinced about the necessity for Indonesian legal scholars to develop a legal system suited to answer the needs of (post-colonial) society and relate it to pre-existing ideas about the law or in Savigny's perspective, the *Volksgeist*. In contrast, however, Scholten himself emphasizes the impossibility of a collective consciousness[50] and also did not understand pre-existing ideas of law in that manner. In his view, the preexisting concept of law is related to a highly personal conscience of just and unjust.[51]

Nevertheless this idea of *Volksgeist*, translated and understood in Indonesia literary as *Jiwa Bangsa*[52] (in English it is translated as collective mind or the nation's soul), is taken over and is understood to denote the state ideology Pancasila[53], the five principles embodying the Nation's (official) world view. The same Pancasila is also thought of as embodying the abstract and ideal view of law[54] and the philosophical foundation[55] of the national legal system.[56]

3.2 The link between Volksgeist and Pancasilia

Sidharta, in addition, seems also to have been heavily influenced by Soediman Kartohadiprodjo[57], a native elite graduate from the *Rechtshogeschool* and later on an influential legal professor in Indonesia.[58] Soediman's thought on how the Indonesian legal system should develop is – similar to the view of Scholten as referred to above – that the system should be rooted[59] in society's interests and should further develop for the sake of these. He envisaged a society in which the individual as God's creation is perceived to be inseparable from the community. He wrote:

> (..) human being cannot be understood separate from his/her natural inclination; every human being is born, created by the Almighty with this natural inclination; at the same time, being human (and his/her personality as a human being) may only be completed within society, which in turn offers recognition and protection of the individual members. This duality between individuals and society is important. (trans. TM) [60]

Thus his main message addressed to Indonesian legal scholars is that they should develop (a national) legal system (and as its implication reject the unjust colonial legal system) taking cognizance of society's (Indonesian post-colonial society) interest and needs. In that respect, Sidharta also thinks that Scholten's view on finding law[61] as the core activity of legal scholars (in its broadest sense i.e., not limited to judges or the judiciary) should place societal interests at its basis. [62]

The difference with Scholten's view is that Soediman (to be followed by Sidharta) elaborates these ideas a little further. He then, with the purpose of distancing Indonesian legal system from its Dutch-colonial past, suggests to root Indonesian legal system in the Nation's soul,[63] i.e. Pancasila,[64] which rejects individualism and liberalism, which both

are considered to be embedded in the colonial legal system. These five principles are then considered, following Kelsen's view on the hierarchy of legal ordering, as a *grundnorm*, on which to develop a new and better legal system more suited to the Nation's specific worldview – as contrasted to the individualistic liberal worldview of the Western world. It is these five basic principles: The Belief in One God, Just and Civilized Humanity, Indonesian Unity, Democracy under the Wise Guidance of Representative Consultations and Social Justice for All the Peoples of Indonesia that should become the basis on which to develop a national legal system.

A half-hearted effort has been initiated since the 1950's to replace the Dutch colonial legal system, especially the Civil and Criminal Code. In 1958, the Government established the *Lembaga Pembinaan Hukum Nasional* (LPHN)[65], renamed to *Badan Pembinaan Hukum Nasional* (BPHN)[66] in 1974. The official site of the BPHN states that:

> This institute was established by virtue of Presidential Decree no. 107 of 1958 and answered directly to the Prime Minister as a special body with the task of developing a national legal system, reviewing systematically the colonial Dutch legal codes and ordinances with the idea of establishing a National Legal System (trans. TM) [67].

This institute is clearly built upon Soediman's ideas and in a National Seminar held at Jakarta in 1979 the conclusion was endorsed that (to develop a national legal system):

> a. Pancasila embodying the values of the Indonesian nation's soul (nilai-nilai kejiwaan bangsa Indonesia) should be considered the foundation of the Indonesian legal order, and to be used as a guideline and direction to develop a national legal system as an open system and also be used as a cornerstone to test (review) the propriety of any legislation.b. In drafting legislations, law-makers should point which values of Pancasila they use as reference point. In that way, any legal rules shall not contradict Pancasila.c. The reflection of Pancasila' values in any legislative products should be considered the cornerstone of the national legal system development. (trans. TM) [68].

In short, by being influenced by Soediman, Sidharta's reading of Scholten is influenced and colored by his concern to distance the Indonesian legal system from the Dutch colonial past and to ground it on a generalized and abstract concept of Indonesian *Volksgeist.* Consequently, also, finding law, in the context of the Indonesian legal system, should be done not so much in the interest of society but more in view of extrapolating what law should be from the viewpoint of the V*olksgeist*. In Sidharta's own words:

> Thus, legal science always possesses a nationalistic character: (therefore, sic TM) practicing legal science should be performed with a practical disposition, i.e. directed to provide legal solutions to legal problems or issues, certain societal problems within a certain positive law. (trans. TM) [69]

In addition, the notion of *adat* law (contrasted to the formal state law), which during the colonial times had been declared applicable for the indigenous population, was perceived

by post-colonial Indonesian legal scholars in a general and abstract way, as the nation's legal conscience – used interchangeably with the concept of *Volksgeist or Collective Mind*, the nation's particular world view - or more aptly the ideological foundation on which a national legal system more attuned to the needs of post-independence Indonesia could be developed.[70] Later on this notion of *Volksgeist* was also blended with the State ideology of the Five Principles (Pancasila) as the primary or normative source of the Indonesian legal system. On the other hand, Scholten, arguably, does not support this kind of approach. He states that:

> We can never declare that the legal conscience of the 'volk' (nation) demands some decision about an actual case. Such a statement requires too much knowledge of all circumstances, a weighing of all factors which point in the one or the other direction. This can only be done after mature deliberation, a cursory judgment by the very first man you meet is meaningless in this respect. We do not get any further than a general, vague conviction about what ought to happen in general. And even then it is very difficult to determine whether these are shared by many and especially if these are ´rechtsovertuigingen'' (convictions about how law should be or the ideal law) and not rather statements dictated by private or group interests or by prejudices. (General Method 493)

Be as it may, the deliberate use of this misconception about the Indonesian national (or post-colonial) society's conviction about law, *i.e.*, the nation's conscience may well have been driven by the need to justify the decision of the Indonesian government to not completely discard the old colonial legal system, and to retain important parts of the colonial legal laws and regulations, notably the *Burgerlijke Wetboek*[71] and the *Wetboek van Strafrecht*[72]. In this way, the old colonial laws could be interpreted as not conflicting with the needs of a post-colonial society. A different motive may well have been the need for the Indonesian government to distance and differentiate itself from the old colonial government, while using a similar (modern) legal system to govern and order post-colonial society.

3.3 Disregard for the link between language and autonomy

Absent in both Soediman's and Arief Sidharta's perspective, unfortunately, is Scholten argument on the importance of how to develop a socially focused legal system by improving (the native legal scholars' ability to) think scientifically in the language of the land. When Soediman and Sidharta focus on the Indonesian *Volksgeist* as embodied in the Five Principles and cast these principles as the foundation on which to develop a national legal system (distinct from the previous colonial legal system), they seem to disregard the importance of the Indonesian language.[73] Apparently their concern lies elsewhere. After independence and facing the problem how to reconcile the fact that the founding fathers made the obvious choice of retaining the Dutch colonial legal system (rather than the indigenous legal system or Islamic law), their solution was, rather on the basis of a pragmatic than ideological approach, to let the Dutch colonial legal laws and regulations continue to govern the country and even to adjudicate legal disputes. Law schools even to this date (2019) continue to teach the inherited Dutch colonial legal rules and principles as

part of the national legal system.

Notwithstanding efforts to establish a national legal system which is in tune with the imagined Indonesian *Volksgeist*, it is a fact is that even up to present, quite a number of basic laws[74] inherited from the Dutch colonial government are still considered binding law either wholly or partially. Present day legal students and scholars (officially under the duty to think scientifically in the national language), are not able to read the law in the original language and have to refer to a number of unofficial translations[75] or to rely on interpretations written down in handbooks and handed down by the first, second or third generation of Indonesian legal scholars (*Rechtshogeschool* alumni) or by those old generation lawyers still proficient in reading Dutch legal text.[76]

This does not mean that at present an official translation is needed and should be made. Various unofficial translations have been circulating for decades. Apparently, legal scholars nor the bureaucrats or even those who work at the BPHN, felt the need for an official one. On the other hand, there exists the real risk of wrong translations or interpretations of certain concepts or legal terms. Those translations will go unnoticed and will continue influencing the interpretation, implementation and enforcement of the Dutch colonial laws to answer the needs of a different population thinking and speaking in the Indonesian language.[77] Thus, ironically, all the effort at developing a distinct national legal development, albeit formally referring to Pancasila as the nation's soul and philosophical foundation, has still its roots deeply in the Netherland Indies legal system (of the 19th century).

In any case, one of the strange and disastrous results is the utilization of Dutch legal terms to show off intellectual or academic superiority, rather than deep (scientifically accountable) understanding of the legal key concepts or principles at hand. It is even believed that before Court or in seminars or legal scientific circles, those who can put forward Dutch legal terms are more scientific and trustworthy.[78] On the other hand, it goes without saying that proper interpretation or understanding of key concepts and basic legal principles (still written in Dutch; such as *schuld-onschuld*[79], *wederrechtelijke* or *onrechtmatige daad* [80] have become practically impossible for those legal scholars and practitioners exclusively thinking in the national language. A superficial understanding of those key concepts and basic legal principles in addition makes it difficult to change or modify rules and regulations or applying the law to cases. Thus Indonesian legal scholars and practitioners while discussing law in the national language refer to Dutch untranslated key concepts and principles. Here again comes to mind Scholten's warning which stressed the necessary interconnected nature of law, as on the one hand a national and locally determined science or general theory and on the other hand language. He states that:

> Both language and legal thinking are communal thinking (…). Both language and law reflect the ordering of our thinking. (transl. TM) [81]

With regard to the disconnection between the legacy of Dutch colonial legal thinking and the actual Indonesian legal scholarship and practice, David Linnan observed that:

> There are two enduring legal mysteries for foreigners trying to understand Indonesian legal development: first, why the New Order state, by reputation an autocracy, tried so hard- and yet failed so long in its attempts- to change laws written in a colonial language, now spoken by increasingly small numbers of Indonesians even among lawyers. Second, what explains the continuing chaotic state of an Indonesian world in which people talk incessantly about 'law' in terms of legality, but where the rule of law is lost from sight? Presidential and ministerial decrees proliferate, while legislative actions are few and far between. Answers to these questions are the Rosetta Stone of Indonesian law reform. [82]

The root cause for the above failure to change the laws is, according to Linnan,[83] not the unwillingness to translate Dutch colonial codes and other important Ordinances or Statutes, but government corruption and stagnation combined with a stagnant legal science.[84] The government's stance to the existing colonial law could also be explained by the fact that after independence and until the late 1960's the government was preoccupied with other important matters, i.e. fighting war against the Dutch military trying to re-establish the Dutch colonial state and putting down internal conflicts until the late 1960's. During those tumultuous years, legal reform was not to be prioritized in the national development programs. Serious effort to develop a national legal system was not commenced before the early 70's of the twentieth century.

Mochtar Kusumaatmadja, a professor of law, who became Minister of Justice under the New Order Government, offered a different solution, which was in complete disregard of the still existing colonial laws: using legislation as a tool for social engineering. He is of the opinion that:

> The statement that law should become a tool to renew (modernize) society is based on the assumption that establishing an orderly society is a prerequisite to develop the nation and be able to change it. A different assumption is that law in the form of rules can indeed function as a tool (regulator) to steer societal development. (trans. TM) [85]

In this way, there is no need to formally withdraw the existing colonial laws. The government and various ministries, in the name of national development, may promulgate lower laws or by- laws which in practice replace the old colonial laws. This alternative (or backdoor) way may be inspired by the Supreme Court's initiative in issuing regulations[86] or circular letters[87] addressed to lower ranking court to simply disregard the Burgerlijk Wetboek or the Civil Procedural Law (HIR/RbG) formally still considered in force.[88] In spite of the fact that also the government formally recognizes the importance of law in the state and nation building (or simply in modernizing Indonesia, including replacing the old colonial laws), the fact remains that there is a strong dependency of post-independence Indonesian legal scholars and even legal practitioners[89] on a law which in name is

national Indonesian, but is not internalized in Indonesian language and therefore culturally still is the Dutch colonial legal system, structure and line of thinking. It might be that the reluctance or inability to move on is the root problem causing the above-mentioned stagnation. Or referring to Scholten, it could be called the inability of Indonesian scholars to genuinely think scientifically about law in their own native language and by this connect law to society. This simple insight is totally lost when in the long and difficult struggle to wean the Indonesian legal system from its colonial past, legal education was not put on a new footing.

Be that as it is, it may well be that the decreasing ability to read the original Dutch colonial law and regulations proves to be a blessing in disguise. It forces the Indonesian legal scholars and lawyers to innovate and develop the Indonesian legal system by borrowing legal concepts and principles from other foreign legal systems, which can more easily be accessed and at the same time take the effort seriously to develop a scientific legal discussion about these borrowed concepts in Indonesian language.

4. Conclusion

Scholten certainly has had a great influence on a first generation of Western educated Indonesian legal scholars and has indirectly inspired them to think independently and critically about the Dutch colonial legal system. However, with a few exceptions traces of his original ideas are rarely found in the Indonesian legal literature. One the few Indonesian scholars who did mention him is Arief Sidharta.

Sidharta re-introduced Scholten to a younger generation of Indonesian legal scholars. His main message was that current Indonesian legal scholars as well as practitioners should find the law with a view to and on the basis of developing a national legal system. Unfortunately, though, he and this also applies to Soediman, fails to take to heart Scholten's most important admonition: for legal scholars to be able to think scientifically in their own language.

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Glossary

English-Dutch

- anthropological knowledge. “volkenkunde”.
- finding law, law finding. “rechtsvinding”.

- guilt. “schuld”.
- indigenous legal practitioner at secondary level. “inlandse rechtskundige”.
- legal practice. “rechtsbeoefening”.
- natives. “inlanders”.
- oriental people from abroad. “vreemde oosterlingen”.
- philosophical foundation. “filosofische grondslag”.
- scientifically. “wetenschappelijk”.
- subject. “onderdaan”.
- unlawful. “onrechtmatig,” or “wederrechtelijk”.
- view of law. “rechtsidee,”

English-Indonesian

- circular letters. “surat edaran”.
- finding law. “penemuan hukum”.
- legal practice. “pengembanan hukum”.
- legal practitioners. “pengemban hukum”.
- philosophical foundation. “landasan filosofis”.
- the five principles. “Pancasila”.
- the original or primary source of all legal sources. “sumber dari segala sumber hukum”.
- the state (ideological) foundation. “dasar negara”.
- rooted. “berakar”.
- subject. “Kawula”.
- view of law. “cita hukum”.
- Volksgeist, Collective Mind, Nation’s soul.“Jiwa Bangsa”.

Legislation of Neth-Indies and Indonesia

1848

- Civil Code of Neth-Indies 1848, applicable to Europeans, Foreign Orientals and Natives, who voluntarily declare to be wholly or in part be bound to the European Code (Burgerlijk Wetboek van Ned. Indië, vastgesteld bij KB 30 April 1947, ingevoerd 1 Mei 1848)
- Regulation (1848) of the maintenance of law and order, administration of civil law and criminal procedure for natives and the like. (Inlandsch Reglement 1848, Reglement op de uitoefening der Politie, de Burgerlijke Regtspleging en de Strafvordering onder de Inlanders en daarmee gelijkgestelde personen op Java en

Madoera, Stb. van Nederlandsch Indië, 1848, 16).

- Regulation to secure or guarantee that new laws will also be considered binding and used by the government in the territories outside Java and Madura, 1848, revised in 1927, declared not applicable qua Criminal Procedures by KUHAP 1981, (Reglement Buitengewesten (RbG) (1848), bepalingen tot verzekering van de regelmatige werking der nieuwe wetgeving op de buitenbezittingen en tot regeling van enige onderwerpen van Strafwetgeving vooruitlopende op de later vast te stellen Strafrechtwetgeving, 1848, herzien 1927, Stb. of Ned Ind., No 227).

1854

- Regulation of the Netherland Indies Government (Peraturan Pemerintah) 1854 (Regeringsreglement (RR), Reglement op het beleid der Regering van Nederlandsch Indië. 1854, Stb. van Ned. Ind. 1855).

1909

- Regulation of the professional training of indigenous legal practitioners (Reglemen Untu Sekolah Pendidikan Ahli Hukum Pribumi)1909 (Reglement voor de Opleiding voor Inlandsche Rechtskundigen. Stb. van Ned. Ind. No. 93/1909.).

1915

- Criminal Code (Kitab Undang-Undang Hukum Pidana (KUHP), 1915. After independence declared applicable to the whole Indonesian territory by virtue of Indonesian Republican Law 1 of 1946 and Law 73 of 1958 (Wetboek van strafrecht, Stb. van Ned. Indië, 1915 No 732).

1924

- Higher Education Law, Ordinance of 9 October 1924 (Hoger Onderwijs Wet, Ordonnantie 9 Oktober 1924 No.1, Stb van Ned. Ind. No. 457/1924).

1925

- Netherlands-Indies Constitution (Konstitusi Hindia Belanda) 1925. Abolished with Independance (Indische Staatsregeling, Wet op de Staatsinrichting van Nederlandsch-Indië., Stb. van Ned. Ind. 1926).

1941

- Revised Ruling for natives of 1848. Renamed and confirmed with Independance as Revised Indonesian Ruling, applicable to all Indonesians: Reglemen Indonesia Yang Diperbaharui (R.I.B.). Declared not applicable anymore qua Criminal Procedures by KUHAP 1981 (Herzien Inlandsch Reglement (H.I.R) 1941, Stb. van Ned. Indië. 1941-

44.)

1945

- Indonesian Constitution of 1945 (Undang-Undang Dasar Negara Republik Indonesia (UUD)1945).

1958

- Presidential Decree no 107 of 1958 by which the Institute or board for the development of National Law was established (Keputusan Presiden No. 107 of 1958: Badan Pembinaan Hukum Nasional (BPHN)).

1963

- Circular Letter of the Indonesian Supreme Court, addressed to Heads of Districts Court and High Court to consider the Burgerlijke Wetboek not as binding law but only as reference (Surat Edaran Mahkamah Agung 5 September 1963, No. 1115/P/3292/M/1963; Available at: Http://Bawas.Mahkamahagung.Go.Id/Bawas_doc/Doc/Sema_no_3_tahun_1963.Pdf).

1966, 1973,1978

- People's Consultative Assembly Decree (Besluit van Volksraadpleging). (Ketetapan Majelis Permusyawaratan Rakyat (TAP MPR) No.XX/MPRS/1966, No.V/MPR/1973 and No.IX /MPR/1978).
- Memorandum of the Indonesian parliament. (Memorandum DPR-GR 9 Juni 1966).

1981

- Code of Criminal Procedures (replaces qua Criminal Procedure HIR en RbG). (Kitab Undang-Undang Hukum Acara Pidana (KUHAP), Law No1 1981).

2009

- Law concerning Judiciary Power (Undang-Undang Nomor 48/Tahun 2009 Tentang Kekuasaan Kehakiman).

Institutions of Neth-Indies and Indonesia

- adat law. "customary law, tribal, indigenous or native Law".
- surat edaran. "circular letters, used by the Supreme Court in Indonesia addressed to heads of lower courts used by the Supreme Court in Indonesia with internal binding force".
- gouvernementsrechtspraak "dutch colonial governmental administration of justice".

- Himpunan Perma dan Sema. “Compilation of Circular Letters Used by the Supreme Court of Indonesia”.
- Lembaga Pembinaan Hukum Nasional (LPHN). “National Law Development Institute”.
- Sumber Dari Tertib Hukum Di Indonesia. “original source of the Indonesian legal system”.
- Pancasila. “Five principles which embody the official ideological foundation of the State Indonesia”.
- Paul Scholten Collection, “Personal documents of Paul Scholten's, concernig his life and work in the National Archives at The Hague: NL-HaNA, Scholten, P., 2.21.319.”.
- PPKI. “Preparatory Committee for Indonesian Independence”.
- Rechtshogeschool. “Institute for Professional Training at University Level”.
- Rechtsschool or Opleidingschool voor Inlandsche Rechtskundigen (OSVIR or OVIR). “Institute for Professional Training of Legal Practitioners at Secondary Level”.
- Peraturan. “regulations made by the Supreme Court in Indonesia which have internal binding force”.
- Sumpah Pemuda. “Threefold declaration of Unity of Nation, Homeland and Language, Made at a Congress of Nationalist Youth Organizations in Jakarta at the End of October 1928”.

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- https://paulscholten.eu/cp/wp-content/uploads/Koerdi-Algemeen-Deel-hfst-3.pdf

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[1]Wignjosoebroto, *Dari hukum kolonial ke hukum nasional: suatu kajian tentang dinamika sosial-politik dalam perkembangan hukum selama satu setengah abad di Indonesia, 1840-1990* (From Colonial Law to National Law: An Analysis of the Socio-Political Dynamics of One and Half Century Development of the Indonesian Legal System, 1840-1990).

[2]Mahbubani, *Can Asians Think?*

[3]In Dutch “rechtsvinding.”; In Indonesian “penemuan Hukum.”

[4]In Dutch “rechtsbeoefening.”; In Indonesian “pengembanan Hukum.”

[5]Massier, “Van ‘recht’ naar ‘hukum.’”; also published in English: Massier, *The Voice of the Law in Transition*.

[6]Rechtsschool or Opleidingschool voor Inlandsche Rechtskundigen (OSVIR or OVIR), “Institute for Professional Training of Legal Practitioners at Secondary Level.”

[7]Rechtshogeschool, “Institute for Professional Training at University Level.” In the Old Dutch spelling it was written: *Rechthoogeschool*. The Old Dutch spelling was the spelling used in Scholten’s articles and in the legal documents of that time. The Dutch spelling has been changed several times. In this article, I will use the new spelling or otherwise indicate which spelling was used by the text.

[8]Operated by virtue of the Regulation of the professional training of indigenous legal practitioners of 1909, Reglement voor de Opleiding voor Inlandsche Rechtskundigen. (Reglemen untu Sekolah Pendidikan Ahli Hukum Pribumi).

[9]Lev, *Legal Evolution and Political Authority in Indonesia*. pp. 256-257.

[10]“inlandse rechtskundige.”

[11]“gouvernementsrechtspraak.”

[12]Massier, *The Voice of the Law in Transition*. 126. (Dutch edition: Massier, “Van ‘recht’ naar ‘hukum.’” 97.)

[13] In Dutch “onderdaan.” In Indonesian “kawula.”

[14]Artikel 75 RR (Regeringsreglement i.e. Regulation of the Netherland Indies Government of 1854): Civil law, commercial law and criminal law, together with the law of civil and criminal procedure will be regulated by general by-laws. These general by-laws will: a. concerning Europeans follow the laws which are in force in the Netherlands with only a few changes, which are necessary because of the special conditions in the Netherlands Indies; b. concerning the natives, “Inlanders.”, oriental people from abroad, “Vreemde Oosterlingen.” and the components that make up both these main groups of the population the regulations in force for Europeans are declared applicable to the extent that this is required by their apparent social needs, while for the rest their own legal rules are followed, which correlate with their religions and habits. The competence of natives and oriental people from abroad to voluntarily submit themselves either for a specific legal act or in general to the non-applicable prescripts of civil and commercial law of Europeans, and the consequences there of, will be regulated by a general by-law. In the parts of the Netherland Indies, where the people enjoy their own administration of justice, the general by-laws which are implied by this article are merely applicable to the extent to which they are compatible with it. (trans. DPSP-editor). For full Dutch text see Hirsch, *Het Reglement op het beleid der Regeering van Nederlandsch Indië*.

[15]Artikel 109 RR: When the provisions of this Regulation, general and other by-laws, rules of procedures, ordinances by police and other administrative provisions distinguish between Europeans, indigenous people and oriental people from abroad, the following rules should be used for their application. To the provisions for Europeans are subjected:

1°. All Dutch people; 2°. All persons, not included in no. 1, who come from Europe; 3°. All Japanese and further on all persons from elsewhere, not included in no. 1 and 2, who in their own country would have been subject to a family law, mainly founded in the same principles as the Dutch family law.; 4°. All legal and illegal children born in the Netherland Indies and other descendants of the persons intended in no. 2 and 3.

Subject to the provisions for natives are, save for the indigenous Christians, of whom the legal status will be regulated by general by-law, all who belong to the indigenous people of the Netherlands Indies and who are not transferred to another population group than this group of natives and also those who did belong to another population group than the one of the natives, but have dissolved into the indigenous population. Subject to the regulations of oriental people from abroad are, save for the professing Christians of these, of whom the legal status will be regulated by general by-law, all who are not designated by the terms of the second and third paragraph of this article.

[16]Regulation of the Netherland Indies Government of 1854, (Regeringsreglement (RR) (Peraturan Pemerintah): Reglement op het beleid der regering van Nederlands Indië.

[17]Netherlands-Indies Constitution of 1925. Abolished with Independence in 1945. (Indische Staatsregeling (Konstitusi Hindia Belanda) Wet op de staatsinrichting van Nederlandsch-Indië.

[18]For a more complete commentary see also Anrooij and Brood, *De koloniale staat, 1854-1942*. From the Indonesian perspective read also Soetoprawiro, *Susunan clan Kedudukan Pemerintahan Pusat, Pemerintahan di Daerah serta Peradilan pada Masa Hindia Belanda.* (The Structure and Position of the Central Government, Regional Government and Judiciary during the Netherland-Indies period).

[19]Waaldijk, “Subjects and Citizens.” Available at: https://www.researchgate.net/publication/237733554. Cf.: Jones, *Tussen onderdanen, rijksgenoten en Nederlanders. Nederlandse politici over burgers uit Oost en West en Nederland 1945-2005*., p. 60: It can be concluded that respect for different population groups was, especially after the Regulation of the Netherland Indies Government of 1854 and the exclusion of the vast majority of the population from full Dutch citizenship in 1892, not a goal in itself, but had above all an instrumental hegemonic function. In fact the legal division of the population in Europeans and Natives – later on in Dutchmen and Dutch subjects not being Dutchmen – meant a stratification of the population according to race. The amount of being Dutch determined according to the criteria of the Dutch government whether one had or could get access to the European elite and its privileges of

education, influential position in the colonial administration and political rights. (trans. DPSPeditor). Original text in Dutch: "*Kortom, 'respect voor verschil tussen bevolkingsgroepen' was, helemaal na het regeringsreglement van 1854 en de uitsluiting van het overgrote deel van de bevolking uit het volwaardige Nederlanderschap in 1892, geen doel op zichzelf, maar bleek vooral een instrumentele, hegemoniale, functie te bezitten. In de praktijk kwam de juridische indeling van de bevolking in 'Europeanen' en 'Inlanders' en later in 'Nederlanders' en 'Nederlandse onderdanen niet-Nederlanders' neer op een stratificatie van de bevolking langs raciale lijnen. De 'mate van Nederlands zijn' bepaalde volgens de criteria van het Nederlandse bestuur of men toegang had of kreeg tot de Europese bovenlaag en de bijbehorende privileges qua onderwijs, invloedrijke functies binnen de koloniale bureaucratie en politieke rechten*." Cf also Elson, "Constructing the Nation.": *Indies society at the turn of the twentieth century was deeply divided by race with Europeans enjoying paramountcy, privilege and prestige out of all proportion to their numbers. Below them were ranked the Chinese and other 'Foreign Orientals', and below them again the 'native population'*.

[20]Established as the implementation of the Higher Education Law, Ordinance of 1924.

[21]Djalins, 'Paul Scholten and the Founding of the Batavia Rechtshogeschool.'

[22]Proposal for the curriculum of the Rechtshogeschool in Batavia, archived in the Paul Scholten Collection in the National Archives: NL-HaNA, Scholten, P., 2.21.319.

[23]"wetenschappelijk."

[24]"volkenkunde."

[25] Modern legal education, during colonial times, at the same time becomes a lesson in justice and injustice. This understanding comes from a perspective presented by Gurpur and Rautdesai, "Revisiting Legal Education for Human Development."

[26]Foulcher, "Sumpah Pemuda: The Making and Meaning of a Symbol of Indonesian Nationhood."

[27]Djalins, "Re-Examining Subject Making."

[28]Djalins, "Paul Scholten and the Founding of the Batavia Rechtshogeschool."

[29]Resink, "Rechtshoogeschool, Jongereneed, 'Stuw' En Gestuwden."

[30]According to Scholten the word *Rechtshogeschool* means three things: "it is a school and therefore it has to serve the need for knowledge, as a school for higher education it has to pursue scientific knowledge, while as *a rechtshogeschool* it has to serve the science of law and ultimately the law itself." (Trans. TM) See for Dutch: Scholten, "Rede uitgesproken bij de opening van de Rechtshoogeschool te Batavia.", 319-20.

[31]"volkenkunde."

[32]adat law, “customary law, tribal, indigenous or native law.”

[33]In Dutch “rechtsvinding.”; In Indonesian “penemuan hukum”.

[34]In Dutch “rechtsbeoefening.”; In Indonesian “pengembanan hukum”.

[35]Scholten, “Rede uitgesproken bij de opening van de Rechtshoogeschool te Batavia.” 324.

[36] 'General Method'. § 10, 154.

[37] 'General Method', 505

[38]'General Method' §1&2. In doing so, Scholten, puts an end to the legal myth, because judges (it might well be applicable to legal scholars) are never neutral. Scholten thus perceives law as an open system. See further Manen, 'Jumping Judges.'

[39]For Dutch text see Scholten, 'Rede uitgesproken bij de opening van de Rechtshoogeschool te Batavia.', 326.

[40]Scholten, '15. De Structuur Der Rechtswetenschap'. or Sidharta, 'Struktur Ilmu Hukum (Indonesian Translation of Paul Scholten’s Structuur Der Rechtswetenschap)'. See also Hartono's Indonesian translation of Paul Scholten's Algemeen Deel (1992) and Soemintapoera’s Indonesian Translation (1985) of the Third Chapter of Paul Scholten’s Algemeen Deel.

[41]*Saya tidak keberatan jika disertasi saya disebut sebagai buah pikiran Scholten yang saya sesuaikan dengan konteks Indonesia.* Shidarta, Selamat Jalan Prof. Bernard Arief Sidharta, 24 november 2015, available at http://business-law.binus.ac.id/2015/11/24/selamat-jalan-prof-bernard-arief-sidharta/ (9/11/2018).

[42]Sidharta, “Refleksi tentang struktur ilmu hukum: sebuah penelitian tentang fundasi kefilsafatan dan sifat keilmuan ilmu hukum sebagai landasan pengembangan ilmu hukum nasional Indonesia (Reflections on the structure of legal science: a study of philosophical foundations and the scientific nature of legal science as a basis for the development of Indonesian national law).

[43]*pengembanan hukum*

[44]Scholten speaks of Rechtswetenschap. A translation of the Scholten’s rechtswetenschap by “legal science” is confusing, because in current speech legal science has the connotation of science according to the methods of the natural sciences, such as sociology of law or history of law. For this reason the term dogmatic legal science is used, in conformance with the text of Meuwissen, which is translated by Sidharta. See Sidharta, *Meuwissen Tentang Pengembanan Hukum, Ilmu Hukum, Teori Hukum dan Filsafat Hukum* (Indonesian translation of D.H.M. Meuwissen’s chapters XV, XVI and XVIII in the fully revised 18th edition of the Introduction to Law of Van Apeldoorn from 1985, preceded by a first

chapter with Meuwissen's article, "Vijf Stellingen over Rechtsfilosofie" (in English: five statements about philosophy of law; in Indonesian: Lima Dalil tentang Filsafat Hukum) taken from the 1979 "Ars Aequi" Law Journal with the theme "Een Beeld van Recht" (An Image of Law)).

[45] '15. De Structuur Der Rechtswetenschap'.,434.

[46]Sidharta, *Ilmu hukum Indonesia: upaya pengembangan ilmu hukum sistematik yang responsif terhadap perubahan masyarakat* (Indonesian legal science: efforts to develop systematic legal science that is responsive to changes in society).

[47]Sidharta, *Meuwissen Tentang Pengembanan Hukum, Ilmu Hukum, Teori Hukum dan Filsafat Hukum*.

[48]The booksections: Meuwissen, "Rechtswetenschap (XVI)." Section 452 and Meuwissen, "Vijf stellingen over Rechtsfilosofie." Stelling 3 in Sidharta, *Meuwissen Tentang Pengembanan Hukum, Ilmu Hukum, Teori Hukum dan Filsafat Hukum.*

[49]Hattenhauer and Stern, *Thibaut Und Savigny?: Ihre Programmatischen Schriften*.

[50]'General Method', § 27

[51]'General Method', 503 and 526. "But no more than we are allowed to attribute absolute value to the written law in its meaning according to parlance, are we allowed to do so with the tradition as does the Historical School, or with the case law as does the doctrine of precedent. The value of all of this remains relative. A fixed hierarchy, such as art. 1 of the Swiss code (See p. 9.) tried to establish, doesn't exist. Custom doesn't come after interpretation, but contributes in the interpretation. Sometimes an interpretation that would be preferable from a historical or systematic point of view has to yield to established case law and the judge takes into account which rule he would formulate if he were legislator, not only in situations in which he seems to have nothing to go by, but continuously in all his work".(503) "And hereby I return to the questions I have just raised: how is it possible that there is so much difference of opinion concerning legal issues and that still the decision of the judge is the only one possible? The answer resides, in my opinion, in his responsibility. The decision is not the only one possible in the context of the legal system and probably somebody else would have decided differently, but for him every other decision is ruled out, because it is a conscientious decision. But such a conscientious decision can only be passed by the one who is aware of his responsibility, by the judge who takes his job seriously. It is this difference in responsibility which marks the difference between a judge and a lawyer". (526)

[52]Volksgeist, Collective Mind, Nation's soul, "Jiwa Bangsa."

[53]"Five principles which embody the official ideological foundation of the State Indonesia."

[54]In Dutch “Rechtsidee.”; In Indonesian “Cita Hukum.”

[55]In Dutch “filosofische grondslag.”; in Indonesian “landasan filosofis.”

[56] Shidarta and Myrna, “Prawacana: Eksistensi Dan Implikasi Sebuah Teori Tentang Hukum” (A Discussion: Existence and Implication of a Theory of Law).

[57] Sidharta, “Revisitasi Pemikiran Prof. Soediman Kartohadiprodjo Tentang Pancasila Berkaitan Dengan Pengembangan Sistem Hukum Nasional” (Revisiting Prof. Soediman Kartohadiprodjpo’s Thoughts on Pancasila in Relation to the Development of a National Law System). Oratio Dies FH-Unpar September 2009.; Kartohadiprodjo, “Penglihatan Manusia Tentang Tempat Individu Dalam Pergaulan Hidup (Suatu Masalah)” (Vision about the Place of Individuals in Society (a Problem). Oratio Dies Unpar 1962.

[58]Resink, “Rechtshoogeschool, Jongereneed, ‘Stuw’ En Gestuwden.” 438-440.

[59]“berakar.”

[60]*‘(..) manusia itu tidak dapat dilepaskan dari kepribadiannja; tiap manusia dilahirkan, ditjiptakan oleh Jang Maha Kuasa dengan dan untuk kepribadiannja; tetapi sekaligus kepribadian itu baru berwudjud dalam suatu pergaulan hidup jang sebaliknya baru berwujud pula dengan dihargai dan dilindunginja kepribadian individu-warga di dalamnja terdapat suatu sifat kedwitunggalan antara individu dan kesatuan pergaulan hidup*” Soediman Kartohadiprodjo 1965, Kumpulan Karangan (Compilation of Articles), hal.86.

[61]“rechtsvinding.”; “penemuan hukum.”

[62]Sidharta, *Refleksi tentang hukum: pengertian-pengertian dasar dalam teori hukum*. (Indonesian translation of J.J.H. Bruggink’s Rechtsreflecties: grondbegrippen uit de rechtstheorie)., Chapter 1 (hukum dan bahasa; *law and language*): 1-15 & Chapter VII: keberlakuan kaidah hukum; *validitiy of law*), pp. 141-157 and Pontier and Sidharta, *Penemuan hukum = Rechtsvinding*., 6.

[63]“Jiwa Bangsa.”

[64]The statement that these five principles “Pancasila.” should be considered as the state (ideological) foundation, “Dasar Negara.” is found in the fourth paragraph of the Introduction of the Indonesian Constitution of 1945, Undang-undang Dasar Negara Republik Indonesia (UUD) and in the Memorandum of the Indonesian parliament of 1966, Memorandum DPR-GR. The memo stipulates that Pancasila as the nation’s worldview, formulated by the PPKI, “Preparatory Committee for Indonesian Independence.” on behalf of the Indonesian people, should be considered as the Indonesian unitary State’s (ideological) foundation. This Parliamentary Memo has been validated by People’s Consultative Assembly Decrees of 1966, 1973 and 1978 (Ketetapan Majelis Permusyawaratan Rakyat (TAP MPR) No.XX/MPRS, No.V/MPR and No.IX /MPR). These decrees have affirmed the status of the Five Principles as the “original or primary source of

all legal sources" (Sumber Dari Segala Sumber Hukum) or "original source of the Indonesian legal system" (Sumber Dari Tertib Hukum Di Indonesia). These Five Principles have since become the blueprint of the Indonesian nation.

[65]"National Law Development Institute."

[66]"National Law Development Board."

[67]*Pertama kali didirikan tanggal 30 Maret 1958 institusi ini bernama Lembaga Pembinaan Hukum Nasional (LPHN) dibentuk berdasarkan Keputusasn Presiden RI No. 107 tahun 1958 dan ditempatkan langsung dibawah Perdana Menteri. sebagai badan khusus untuk melakukan pekerjaan pembinaan hukum nasional, peninjauan kembali perundang-undangan masa penjajahan secara sistematis yang dilandasi oleh cita-cita untuk mewujudkan Sistem Hukum Nasional*. Quoted from the official website of BPHN: https://bphn.go.id/readinfo/main_history, last visited 10/06/2019.

[68]BPHN, 1979, Seminar Hukum Nasional IV, 1979, Departemen Kehakiman RI, Jakarta. The end statement reached by all delegates/participants reads, as a conclusion, inter alia, that: 1. Pencerminan nilai-nilai Pancasila dalam perundang-undangan: a. Pancasila yang mengandung nilai-nilai kejiwaan bangsa Indonesia merupakan dasar tertib hukum Indonesia , pedoman dan penunjuk arah perkembangannya dengan sistem yang terbuka dan adalah batu ujian mengenai kepatutan dan perundang-undangan. b. Dalam menyusun undang-undang, pembentuk undang-undang perlu dengan tepat menunjukkan nilai-nilai Pancasila, yang mendasari ketentuan undang-undang itu. Dengan demikian peraturan-peraturan hukum merupakan pelaksanaan undang-undang itu tidak boleh mengandung hal-hal yang bertentangan dengan Pancasila. c. Pencerminan nilai-nilai Pancasila di dalam perundang-undangan merupakan hakekat pembentukan sistem hukum nasional.

[69]"*Ilmu Hukum itu selalu bersifat nasional" and "jadi pengembanan ilmu hukum dijalankan dengan disposisi praktis, yakni terarah untuk menyelesaikan masalah hukum, yaitu masalah kemasyarakatan tertentu berdasarkan hukum positif tertentu*", Sidharta, "Refleksi tentang struktur ilmu hukum: sebuah penelitian tentang fundasi kefilsafatan dan sifat keilmuan ilmu hukum sebagai landasan pengembangan ilmu hukum nasional Indonesia" (Reflections on the structure of legal science: a study of philosophical foundations and the scientific nature of legal science as a basis for the development of Indonesian national law). p. 134.

[70] Cf. Kartohadiprodjo, *Hukum Nasional*.; Kartohadiprodjo, *Pengantar tata hukum di Indonesia* (introduction to law in Indonesia). and Koesno, "Hukum Adat Sebagai Suatu Model Hukum Bag. I (Historis)" (Adat Law as a Legal Model, Part 1, History).

[71] Civil Code of the Neth. Indies 1948., which was applicable to Europeans, Foreign Orientals and Natives who voluntarily declare to be wholly or in part bound to the European Code.

[72]Criminal Code 1915, which after Independence was declared applicable to the whole Indonesian territory by virtue of Indonesian Republican law 1 of 1946 and law 73 of 1958.

[73]The Indonesian language was considered one of the three constituting elements of the Indonesian nation in the Sumpah Pemuda, “Threefold Declaration of Unity of Nation, Homeland and Language, proclaimed at a congress of the Nationalist Youth Organizations in Jakarta in 1928.” It was subsequently cast as a sacred pledge of Indonesian unity. One national language is thus a symbol for a societal construction which differs fundamentally from the one found in the Indische Staatsregeling of 1925 or its precursor the Regeringsreglement of 1854. Both these rulings segregated the Neth-Indies populace into 3 different classes. See Foulcher, “Sumpah Pemuda: The Making and Meaning of a Symbol of Indonesian Nationhood.”.

[74]The Civil Code (BW, Burgerlijk Wetboek) 1848 of the Neth-Indies is for example only partially replaced by national laws. In 1974, the rules on family law were replaced. Part of the rules about legal bodies and corporations was effectively replaced by a new Company Law in 1997. The rules on objects (incl. land) were replaced in 1960 by the Basic Agrarian Law. The Faillissements verordening was post independence only used once. In 1999 it was abolished and replaced by a new Bankruptcy Law. As regards contract law however, the old BW (civil code) still reigns. The basic principles and laws on contracts still retain binding force and are used as reference in legal practice and education. As regards civil procedure the segregation between population groups is indeed abolished with Indonesian Independence, but the differentiation between Java and Madura and all the other territories is maintained in conformance with two old colonial laws: 1. Herzien Inlandsch Reglement (H.I.R) of 1941. In 1945, with Independence, this law was renamed and confirmed as an Indonesian ruling applicable to all Indonesians: Reglemen Indonesia yang Diperbaharui (R.I.B.) The law was then in 1981 declared not applicable anymore qua criminal procedures by KUHAP; 2. Reglement Buitengewesten (RbG) (1848), which in 1981 also was declared not applicable any more qua criminal procedures by KUHAP. The criminal code for Neth-Indies of 1915 (Kitab Undang-Undang Hukum Pidana ,KUHP) is still fully operational. It is declared applicable to the whole Indonesian territory by virtue of Indonesian Republican law 1 of 1946 and law 73 of 1958. Only since 1981 the criminal code is paired with a nationally made criminal procedural law (Kitab Undang-Undang Hukum Acara Pidana (KUHAP), which replaces qua criminal procedure the HIR and the RbG. Cf. C.F.G. Sunaryati Hartono (ketua tim), 2015, Laporan Badan Pembinaan Hukum Nasional (BPHN), “Analisa dan Evaluasi Peraturan Perundang-undangan Peninggalan Kolonial Belanda” (BPHN Report: Legal Analysis and Evaluation of Dutch Colonial Legislations), BPHN, Kementerian Hukum dan Hak Asasi Manusia, available at https://www.bphn.g.o.id/data/documents/ae_peraturan_perundang-undangan_peninggalan_kolonial_belanda.pdf

[75]See for example: Hukum Online, “Hingga Kini, Belum Ada Terjemahan Resmi KUHP” (Up to Present, No Official Translation of the Criminal Code), available at

http://www.hukumonline.com/berita/baca/hol17086

[76]The *Burgerlijke Wetboek* 1848 was translated by Prof (R) Soebekti and R. Tjitrosoedibio *Kitab Undang-Undang Hukum Perdata (Burgerlijke Wetboek) Dengan Tambahan Undang-Undang Pokok Agraria Dan Undang-Undang Perkawinan.* (The Civil Code with the Addition of Basic Agrarian Law and Law on Marriage). A different version exists and is published in the Engelbrecht compilation of Indonesian legislation: *Kitab Undang-Undang Dan Peraturan-Peraturan Serta Undang-Undang Dasar 1945 Republik Indonesia* (Acts, Regulations and the 1945 Constitution). Also various different translations of the Criminal Code of 1915 are in circulation and in use. The Criminal Code was translated by P.A.F. Lamintang & C. Dijsman Samosir: *Hukum Pidana Indonesia* (Indonesian Criminal Law)., Prof. Moeljatno: *KUHP (Kitab Undang-Undang Hukum Pidana)* (Criminal Code). and R. Soesilo: *Kitab Undang-Undang Hukum Pidana Serta Komentar-Komentarnja Lengkap Pasal Demi Pasal Untuk Para Pejabat Kepolisian, Kedjaksaan, Pamong-Pradja Dsb* (Criminal Code with commentary, for the use of police, public prosecutors, civil servants, etc). All these translations have no formal binding force and therefore readers (students, legal scholars and practitioners) are more prone to dispute the correctness of the translation and interpretations given than to interpret and develop understanding of how the law should answer real needs and interests.

[77] See for a case-study: Wulandari and Moeliono, “Problematika Pengertian Aanslag-Aanslag tot en feit: Perbandingan Makar dalam KUHP, WvSNI dan Sr.” (Problems of Understanding Aanslag-Aanslag tot en feit: comparison of Makar in the Criminal Code, WvSNI and Sr).

[78] Personal communication, prof. Asep Warlan from the Faculty of Law, Unpar-Bandung. August 2018.

[79] “schuld.”

[80] “wederrechtelijk.” or “onrechtmatig.”

[81] Scholten, '15. De Structuur Der Rechtswetenschap'. p. 446.: Taaldenken is als rechtdenken gemeenschapsdenken. (…) In taal en recht beide komt de orde van ons denken uit.; Sidharta, “Struktur Ilmu Hukum, Indonesian Translation of Paul Scholten’s Structuur Der Rechtswetenschap.” Block 24: Berpikir bahasa, berpikir hukum adalah berpikir dalam kebersamaan (…)Dalam bahasa dan hukum, kebertatanan pikiran manusia menampilkan diri..

[82] Linnan, “Indonesian Law Reform, or Once More unto the Breach: A Brief Institutional History.”

[83] Linnan.David K. op cit.

[84] See Pompe, *The Indonesian Supreme Court.*

[85] “Mengatakan hukum merupakan “sarana pembaharuan masyarakat” didasarkan kepada

anggapan bahwa adanya keteraturan atau ketertiban dalam usaha pembangunan dan pembaharuan itu merupakan suatu yang diinginkan atau dipandang (mutlak) perlu. Anggapan lain yang terkandung dalam konsepsi hukum sebagai sarana pembaharuan adalah bahwa hukum dalam arti kaidah atau peraturan hukum memang bisa berfungsi sebagai alat (pengatur) atau sarana pembangunan dalam arti penyalur arah kegiatan manusia ke arah yang dikehendaki oleh pembangunan dan pembaharuan". See Kusumaatmadja, *Pembinaan Hukum Dalam Rangka Pembangunan Nasional*.(Legal development in the context of national development), p.3.

[86] "peraturan."

[87] "surat edaran."

[88] Compiled as Himpunan Perma dan Sema, "Compilation of Circular Letters Used by the Supreme Court of Indonesia."Himpunan Perma dan Sema: https://jdih.mahkamahagung.go.id/. The most famous or infamous circular letter is the Surat Edaran Mahkamah Agung 5 September 1963 Available at: http://bawas.mahkamahagung.go.id/bawas_doc/doc/sema_no_3_tahun_1963.pdf..

[89] "pengemban hukum."

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