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Rættur, Rockur og Stjórn

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Kári á Rógvi

Póllóg

Nú frættist, at Alting Íslands hevur samtykt at játta átta milliónir krónur íslendskar til verkætlanina hjá Háskóla Akureyrar nevnda á enskum Polar Law. Ætlanin er at skipa gransking og undirvísing innan løgfrøði viðkomandi fyri tjóðir og lond í norðurhøvum.

Tó at Akuroyri ikki røkkur norð um pólkringin, og vit føroyingar somuleiðis eru á nakað lágum breiddarstigum at hevda okkum sum pólbúgvar, er verkætlanin sera týðandi. Navnið spillir ongan, og merkingin 'lóg har norði' kann vera tann neyvara.

Men í øllum førum eru hetta sera viðkomandi fyri mong. Ísland, Føroyar, Grønland, Hetland og aðrar bretskar oyggjar, útjaðari í Noregi og øðrum Norðurlondum, inuittar og samar eru løgdømi og tjóðflokkar, ið øll hava til felags, at sera fá fólk skulu stýra sera stórum økjum tengdum at náttúrutilfeingi og nógv størri grannum.

Akuroyri sum býur er gott dømi um tær avbjóðingar, ið útjaðarin í norðurhøvum má megna lyfta. Býurin mátti umskipast eftir at Sovjett datt sundur og ikki orkaði at keypa vørur úr Íslandi longur. Samstundis gekk afturá hjá landbúnaði og unga fólkið flutti til Reykjavíkar at leita sær vinnu og útbúgving og koma ofta ikki aftur.

Nú hevur býurin ment seg til universitetsbý, har tíggindi hvør íbúgvi er lesandi, har lærdi háskúlin er størsta arbeiðspláss, og býurin 'útflytir' kunnleika til onnur útjaðarapláss í Íslandi sum fjarlestur av ymsum slagi.

Nógv er granskað í búskapi og mannfrøði, tá útjaðara umræður. Men ov lítið er gjørt við løgfrøði, stjórnarfrøði og fyrisiting. Hvussu kunnu vit skipa lond sum Føroyar við víðfevndum sjálvræði? Tey á Akuroyri hava longu viðgjørt stjórnarskipanaruppskot okkara og skipað fyri ráðstevnu og fundum um hana. Hvussu er best at skipa kommunur, háskúlar og alskyns aðrar óheftar stovnar undir hesum umstøðum? Hesar og aðrar spurningar fara tey nú at viðgera.

Millum størstu avbjóðingar okkara her norði eru at umsita náttúrutilfeingi, handil og samveldi. Vit eru hótt av bæði dálking, misfarnum umhvørvisfólki, ið halda at til ber at friða livandi tilfeingið uttan at heysta, eins og broytingum í veðurlagi. Vit mugu samráðast við altjóða umhvørvið, samveldislond okkara

og flertjóða fyritøkur um fiskiveiði, oljuleiting og handilsfrælsi. Vit mugu fáa greiðu á viðurskiftum okkara mótvegis mannarættindarskipanum, samveldis- og grannalondum og ikki minst størru handils- og samveldisskipanum sum ES, EBS og EFTA.

Við hesum stigi, ið Ísland hevur tikið, eru vit nærri samstarvi tvørtur um norðurhøv um gransking og útbúgving grundað á fortreytir okkara, um viðurskifti okkara, ætlað ungdómi og framtíð okkara.

Kári á Rógvi

Polar Law

Recently, Iceland's Assembly (Alþingi) has voted to fund to the tune of 8 million Icelandic crowns the project of the University of Akureyri called Polar Law. The plan is to conduct research and teaching in law relevant to nations and lands in the North Atlantic.

Even though the city of Akureyri does not quite reach the Arctic Circle and we Faroese likewise are on a somewhat low **longitude** to call ourselves polar dwellers, the project is highly significant. Polar may e stretching it and the real significance is 'law of north.'

In any case, this is of relevance to many. Iceland, the Faroe Islands, Greenland, Shetland and other British Isles, the outer districts of Norway and other Scandinavian countries, Inuits and Sámi are jurisdictions and nations that all have in common that very few people have to govern very large areas closely connected to natural resources as well as significantly larger neighbours.

Akureyri as a city is a good example of the challenges that the periphery in northern seas must face. The city had to transform after the Soviet Union collapsed and could no longer afford Icelandic imports. At the same time, they faced agricultural decline and the flight of young people to Reykjavík in search of work and education, often never to return.

Now the city has developed into a university city with one in ten inhabitants a student, the University as the largest employer, and the city is now 'exporting' knowledge to other outlying districts in Iceland as distance learning of various kinds.

Much research has been done in the fields of economics and anthropology concerning periphery life. However, too little is done in the fields of legal, political, and administrative science. How can we organise countries like the Faroes with extended autonomy? In Akureyri, they have already held seminars and discussion on the draft Faroese Constitution and analysed its potential. How can we best run municipalities, universities and numerous other independent bodies under these circumstances? These and other questions will now be undertaken and analysed.

Among the biggest challenges that we face up north is to manage the natural resources, trade and federations. We face diverse threats from pollution, misguided environmentalists overly keen on conserving everything without harvest, as well as climate change. We have to negotiate with the international communities, our federal partners, and multinational companies on fisheries, oil exploration, and free trade. We have to figure out relationship with human rights regimes, federal and neighbour relations, and not least rising trade federations such as the EU, EEA, and EFTA.

With this step that Iceland has taken, we are closer to cooperation across the northern oceans on research and education based on our circumstances intended for our youth and future.

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Johanna Nilsson[1]

INDONESIAN LAW
– legal history and legal pluralism

Abstract
The aim in this article is to describe the legal history of Indonesia and to present an overview of the pluralist legal system that constitutes contemporary Indonesia's legal reality.

Indonesia was colonized by the Netherlands for about 400 years. The colonial administration practiced a principle of *suum cuique*. Consequently, separate law applied to 'Natives' and 'Europeans'. The law of the 'Natives' was called *adat*, and was closely studied and categorized by the Dutch professor van Vollenhoven and his disciples at the Leiden Adat Law School, who were deeply influenced by the German 'Historic School'.

After the declaration of independence in 1945, the development of the Indonesian state began with the drafting of the Constitution. The 1945 Constitution provided for authoritarian governance through the philosophy of the 'integralistic state'. After a short period of parliamentary democracy under the 1950 Constitution, President Sukarno unilaterally reinstalled the 1945 Constitution and declared law second to policy, abolishing the separation of powers. After a failed *coup d'état* in 1965, general Suharto became president. Under Suharto's presidency, the Indonesian society underwent significant improvement in terms of public welfare, but the deterioration of the judiciary continued. In the aftermath of the Asian financial crisis, Suharto stepped down in 1998 as the result of violent protests.

In the last eight years, Indonesia has had four presidents and the 1945 Constitution has been amended four times. The country is today considered a democracy

1 The author is a doctoral candidate (LL.D.) in international human rights law at the Faculty of Law, Lund University. This article is an elaboration of the text presented at a yearly doctoral prolongation seminar at the Faculty of Law in May 2006. The author would like to extend her sincere gratitude to the colleagues who commented upon this text, especially Professor Mason Hoadley, Dr. Christina Johnsson, Dr. Jonas Grimheden and Jur. kand. David Karlsson.

and is undergoing a significant decentralization process, with increased regional autonomy as a result.

The contemporary Indonesian legal system is complex after centuries of *suum cuique* and decades of corrupt governance and interference in the judiciary. Statutory law, *adat* and *syariah* (Islamic law) exist as parallel, and partly overlapping, sources of law. In theory, these parallel sources are applied by different courts. In reality however, both formal and informal 'overstepping' is common. This form of legal pluralism is referred to as 'horizontal legal pluralism' in this article. The increased regional autonomy in Indonesia creates another form of legal pluralism, in this text referred to as 'vertical legal pluralism', as regional regulations contradict national laws or even the Constitution. Although a formal norm hierarchy is in place, under which lower norms may not contradict higher norms, the reviewing of regional regulations is malfunctioning and ambiguous.

Føroyskt úrtak

Endamálið við hesi grein er at lýsa rættarsøguna hjá Indonesia og at geva ein samandrátt av teirri pluralistisku rættarskipanini, sum er ein veruleiki í Indonesia í dag.

Niðurlond løgdu fyri umleið 400 árum síðani Indonesia undir seg sum hjáland. Hjálandaumsitingin fór fram sambært meginregluni um, at hvør fólkabólkur skal hava sína rættarskipan (suum cuique-meginreglan). Sum avleiðing av hesum var ymisk lóg galdandi fyri upprunafólk og evropear. Lógin fyri upprunafólkið varð kallað *adap*, og varð hon gjølliga granskað av hollendska professaranum van Vollenhoven og hansara næmingum á Leiden Adat lógskúlanum, sum var undir stórari ávirkan av týska sokallaða søguliga skúlanum.

Eftir at Indonesia lýsti seg at vera sjálvstøðugt í 1945, byrjaði við stjórnarskipanini sama árið menningin av indonesiska statinum. Stjórnarskipanin frá 1945 skipaði eitt autoritert stýri samsvarandi hugsjónini um samansjóðaða statin. Eftir styttri skeið við tingræði undir stjórnarskipanini frá 1950 setti Sukarno forseti í 1959 autoriteru stjórnarskipanina frá 1945 í gildi aftur og setti harvið til viks fólkaræðislig íkast so sum valdsbýtið. Eftir eitt miseydnað statskvett í 1965 gjørdist Suharto generalur forseti. Undir Suharto gjørdi indonesiska samfelagið stór framstig innan almenna vælferðarøkið, men støðan hjá dómstólunum versnaði framhaldandi, og m.a. var mutur av dómarum dagligur kostur. Eftir hørð mótmæli í sambandi við asiatisku fíggjarkreppuna legði Suharto frá sær í 1998.

Seinastu átta árini hevur Indonesia havt fýra forsetar, og stjórnarskipanin frá 1945 er broytt fýra ferðir. Landið er í dag at meta sum eitt fólkaræði og er í ferð við eina týðandi miðspjaðingartilgongd til tess at økja um lokala sjálvræðið.

Eftir øldir við *suum cuique*-meginregluni, muturkendum stýri og uppíblandi í virkið hjá dómstólunum er verandi indonesiska rættarskipanin heldur fløkjaslig og samansett. Tinglógir, *adat* og *syariah* (islamisk lóg) liva lið um lið og umskarast lutvíst. Í teoriini eiga ymiskir dómstólar at nýta hesar síðusettu og lutvíst umskarðandi keldur til lóg, men í veruleikanum fara dómstólarnir tó inn um mørkini hvør hjá øðrum. Hetta slag av rættarpluralismu verður í hesi grein nevnd „horisontal rættarpluralisma". Økta lokala sjálvræðið í Indonesia hevur eitt annað slag av pluralismu við sær, og verður tað í hesi grein nevnt „vertikal rættarpluralisma", tí í praksis fara lokalar lógir ímóti statsligum lógum, onkuntíð enntá stjórnarskipanini. Hóast eitt formligt stigveldi (hierarki) er í indonesisku skipanini, har lægri lóg ikki má stríða ímóti hægri lóg, so er støðan tann, at roynd av lokalum lógum er fløkjaslig og virkar ikki væl, og tí er ofta mótstríð millum hægri og lægri lóg.

Hóast henda greinin er um indonesisk viðurskifti, so setir hon spurningar av breiðari áhuga. Hvussu verður ein nýggjur statur „skaptur" við lóg eftir sjálvstøðu frá fyrrverandi hjálandaveldi? Hvussu verður „eldri lóg" lagað til í nýggjari rættarskipan? Hvar finst javnvágin millum statsligar reglur og virði á eini síðuni og á hini síðuni tillaging av lokalum áhugamálum og lóggávu? Ætlanin við greinini er, at lesarin, uttan mun til, um hann kennir til Indonesia framman undan, skal halda greinina vera áhugaverda frá einum generellum løgfrøðiligum sjónarhorni og kanska kenna spurningar aftur, sum á líknandi hátt eru avbjóðandi fyri aðrar modernaðar statir – fyrrverandi hjálandaveldi ella ikki.

DISPOSITION

Contemporary Indonesia constitutes a most interesting case study for the person interested in how colonialism, religion and multi-ethnicity impact law and legal culture. This vast archipelago state, stretching over three time-zones and almost 5000 km, is the world's forth most populated country. Despite this, European media reports on Indonesia rarely go beyond terrorism, religious fundamentalism, natural disaster and avian influenza. Indonesia has more stories to tell. One is about its long and burdensome journey from almost four centuries of colonial oppression, through more than four decades of authoritarian rule, to a reformed and decentralized modern democracy. This article gives an insight to this process, with the law as a point of departure. Among other issues addressed are legal pluralism, the effects of colonial law on contemporary Indonesian law and its relation to pre-existing religious- and customary law, and the legal results of regional autonomy.

Although this article is on the Indonesian context, it carries questions of a wider interest. How is a new state 'created' through law after independence from a former colonial power? How is 'old law' accommodated in a new legal system,

be it indigenous law under colonialism or new law after independence? How is balance struck between national rules and values on the one hand, and cultivation of regional interest and decentralized legislation powers on the other? Thus, it is the author's ambition that the reader, regardless of previous knowledge of Indonesia, will find this article interesting from a general legal perspective, and perhaps recognize issues that similarly challenge other modern states – post-colonial or not.

The article is divided into two parts. The first part gives an overview of Indonesian legal history, with a focus on post-independence legal development, such as the naissance and subsequent reforms of the Indonesian constitution. The second part provides an outline over the contemporary Indonesian legal system, understood by the author as both 'horizontal' and 'vertical' in its pluralism.

1. INDONESIAN LEGAL HISTORY

1.1 Introduction

This is a text on Indonesian legal history in brief. It is challenging to describe the legal history of a former colony, because of the dual or multiple legal systems that coexist (or coexisted). A former colony that consists of over 17,000 islands, more than 200 million people,[2] over 300 ethnic minorities, the world's largest Muslim population and (at least) 19 different customary legal systems, add to that challenge. However, when faced with the fact that Indonesia is currently involved in a complicated process of democratization and decentralization, after over forty years of authoritarian and centralized rule, one realizes that knowledge of the country's legal history is of utmost importance for an understanding of its legal future.[3]

2 The exact population of Indonesia is difficult to estimate, due to lack of adequate statistics. According to the Population Census in 2000, the population of Indonesia was approximately 206 million, *see* (Population of Indonesia by Province 1971, 1980, 1990, 1995 and 2000, BPS Statistics Indonesia 2006). The Swedish Foreign Ministry estimated the population to be approximately 220 million in 2003, *see* (Utrikesdepartementet 2006), whereas the U.S. Department of State estimates the Indonesian population to about 241 million, *see* (Bureau of Democracy 2006).

3 Kaarlo Tuori's model of the law as 'multi-layered' provides guidance to understanding the process: „Even with the law, approached in its symbolic normative aspect, we can distinguish between layers obeying different historical times. At the *surface level*, change is an everyday phenomenon, at the level of the *legal culture* the pace of change slows down, and the most inert level in its variation is the *deep structure*, which represents the *longue durée* of the law." *See* (Tuori 2002), p. 150. According to Tuori, law (legislation, jurisprudence, doctrine) on the 'surface level' rests as a sedimented memory in the 'legal culture' through its 'actors' (*e.g.* lawyers), even after it has been replaced by new law on the 'surface level'. *See* (Tuori 2002), pp. 162-163.

1.2 Pre-Colonial Law in Indonesia

Indonesia as a country did not exist in its contemporary form before Dutch colonization.[4] Therefore, it is misleading to describe pre-colonial law in what today constitutes Indonesia as 'pre-colonial Indonesian law'.

Before the Dutch colonized the archipelago that today constitutes Indonesia, the islands were ruled through a variety of political and legal orders.[5] Java consisted of various kingdoms with a hierarchal society ruled by aristocratic elites.[6] The ancient law applicable to most inhabitants of this territory is referred to as the 'Laws of Java'.[7] The Laws of Java predate the advent of Islam, and have their roots in Indian law and consequently have Hindu influences.[8] The content of the Laws of Java is known through three types of texts: notes issued to the winner of a lawsuit (*jayapattra*), taxation and land charters, and law books from the islands Java and Bali.[9] The oldest known legal documents are from the eighth century.[10]

In Sumatra, where the pre-colonial society was clan-based and law primarily served the purpose of upholding and regulating kinship relations, written law sources were less common.[11] According to legal historian Daniel S. Lev, „[n]owhere in pre-colonial Indonesia was written law important to social cohesion"[12].

Islam brought new perspectives on law to pre-colonial Indonesia. Many key legal terms in *Bahasa Indonesia* originate from Arabic, *e.g. hukum* (law), *adat* (custom), *keadilan* (justice*), hak* (right), *hakim* (judge).[13]

1.3 Colonial Time – The Netherlands' East Indies

During the first period of colonization, until the late eighteenth century, Indonesia was not ruled by the Dutch state, but by the Dutch East-Indies Company

4 The province of Papua (Irian Jaya) and the now independent state of East Timor (Timor Leste) were never colonized by the Netherlands. *See e.g.* (Ruth-Heffelbower 2002), p. 225.
5 In this article, however, I limit the examples to Java, Sumatra and Bali.
6 *See* (Lev 2000b), p. 163.
7 'Java' is in this sense not restricted to the geographical entity of the island Java. Texts from the 'Laws of Java' have been found from south Sumatra in the west to Lombok in the east, which has led researchers to conclude that there was „a common legal culture". *See* (Hoadley 2004), p. 5.
8 *See* (Hooker 1978a), p. 17.
9 *Ibid*. p. 35.
10 *Ibid*. p. 36.
11 *See* (Lev 2000b), p. 163.
12 *Ibid*., p. 163.
13 *See* (Lev 2000b), p. 164. *See also* (Haverfield 1999), p. 42. The spread of Islam in Indonesia is beyond the scope of this article.

(*Vereenigde Oost-Indische Compagnie* or VOC).[14] In sixteenth and seventeenth century Europe, the legal debate on how to best govern a people also concerned the laws and administration of colonies. Grotius reflected explicitly on the situation in the East Indies in *Mare Liberum*:

> "Java, Sumatra, the Moluccas have their own kings, public institutions, laws and rights and they have had them always. One is not entitled to deprive these infidels of their will and princely power because they do not believe. Indeed it is even heresy to assume that the infidels should not be master of their goods, for it is no less theft and robbery to deprive them of their goods than it would be if a Christian were concerned."[15]

According to legal historian Daniel S. Lev, the exclusive purpose of colonization was to extract natural resources, which influenced the legal approach to people of the East Indies:

> "From the start, the Dutch East-Indies Company (VOC) resolved to respect local law – another way of saying that, by and large, they could not have cared less – except for when commercial interests were at stake."[16]

From the onset of the colonial period, the principle of *suum cuique* dominated the Dutch administration of the East-Indies. Apart from mere economical interests, legal historian M.B. Hooker also asserts the diversity of ethnic groups, and the uneven *de facto* control over territory as contributing practical reasons for preferring legal pluralism over *e.g.* the French policy of 'imposing civilisation' onto the colony.[17] The result was a highly pluralistic legal system, with separate laws and legal institution for separate population groups. The two dominating groups were 'Natives' and 'Europeans'. People that did not fit into either category were defined as either 'Chinese' or 'Foreign Orientals'.[18] Accordingly, the basic principle was that indigenous customary law (*adat*) applied to 'Natives', and in criminal law matters additionally to 'Chinese' and 'Foreign Orientals'. Dutch law applied to 'Europeans,' and in commercial law matters also to 'Chinese' and 'Foreign Orientals'. With the emerging of Japan as an influential Asian state,

14 *See* (Hooker 1975), p. 252.
15 Cited in (Hooker 1978b), p. 71.
16 *See* (Lev 1985) p. 58.
17 *See* (Hooker 1975), pp. 250-251. In the words of Daniel S. Lev: „Unlike the French, who did not doubt the superiority of their own civilization and law over that of their colonies, Dutch legal scholars took a more relativistic approach." *See* (Lev 1965), p. 284.
18 *See* (Lev 1985), pp. 61-62. The definition 'Foreign Orientals' primarily referred to Indians and Arabs. *See* (Lev 1965), p. 282.

the Japanese became 'honorary Europeans', to which Dutch law consequently applied.[19]

The principle of *suum cuique* was supported throughout the colonial period, and was enhanced by the so-called 'Ethical Policy' that dominated Dutch colonial administration during the late nineteenth and early twentieth century.[20] Arguably, no other colonial power invested more in understanding the customary law of its colony, than the Netherlands did with regard to the East-Indies.[21] Despite the ongoing liberalisation within continental European law, there was a metropolitan support for keeping and respecting indigenous laws for the 'Natives' of the East-Indies.[22]

The impact of the Adat Law School of Leiden University – and the influence of its founding scholar, Cornelis van Vollenhoven (1874-1933) – can hardly be overestimated. Van Vollenhoven was a firm believer in cultural and legal relativism. In order for norms to be valid, apart from being correctly promulgated, they had to reflect the cultural characteristics of the specific people addressed.[23] In the view of van Vollenhoven, *adat* was „a thought-world alien to the mind of Europeans"[24]. One of the main characteristics van Vollenhoven identified as differentiating *adat* from Western legal cultures was the *adat* focus on interests of family, group and community over that of the individual.[25] Through in-depth studies, the diversity and contradictions of *adat* would be resolved and a coherent and comprehensible system would emerge. Van Vollenhoven, who saw himself as on a mission similar to that of Linneaus, was convinced that deep down under the surface of differences, an *ur-adat* common to all Indonesian cultures could be discovered.[26] According to David Bourchier, the Leiden School was highly influenced by the German Historical School (*Historische Rechtsschule*) and the *Volksgeist* philosophy of Friedrich Karl von Savigny.[27] Disappointed over the developments in Europe, van Vollenhoven turned to the colony with his vision of *Volksrecht* over *Juristenrecht*.[28] And David Bourchier concludes: „Such were the successes of van Vollenhoven and his disciples, Savigny's Historical School is

19 *Ibid.,* p. 62. From 1906, Dutch law applied to Japanese persons in the East Indies. *See* (Djojodigoeno 1950), p. 6.
20 *See* (Hooker 1975), p. 250.
21 *See* (Lev 1985), p. 63.
22 *See* (Hooker 1978a), pp. 191-192.
23 *Ibid*. p. 192.
24 *See* (Burns 1989a), p. 8.
25 *See* (Burns 1989b), p. 85.
26 *See* (Burns 1989a), pp. 8-9, 96.
27 *See* (Bourchier 1999), pp. 187-189.
28 According to van Vollenhoven, Roman law was *Juristenrecht* – a system that had oppressed the indigenous non-Roman European peoples' law. *Ibid*., p. 188.

said to have had a more enduring impact in Indonesia than anywhere else in the world."[29] And in the words of Canadian law professor Peter Burns: „The Leiden doctrine was a reflection of the Founder's mind, of his great learning and of his misconception of scientific endeavour, of his generous liberal conscience and of his romantic Orientalism."[30]

Van Vollenhoven and the Leiden school had their critics. In the mid-1920s, the Leiden school came under fire for being too soft on matters of colonial policy. The work of Leiden was dismissed as „insufficient, unscientific, aprioristic and anti-historic"[31]. Influential business people with interests in the colony funded a new school in Utrecht for training of officers in the administration. The Utrecht Institute was by its adversaries also referred to as 'the Petroleum Faculty' because of its support from the petroleum industry.[32]

According to Daniel S. Lev, *adat* is „fundamentally a Dutch creation"[33]. He elaborates: „By this I do not mean that substantive adat rules – of inheritance say, or exchange – are other than Indonesian in origin, but that the understanding of adat, the myth of adat, as it were, and the relationship between adat and state authority are the result of Dutch, not Indonesian, work."[34]According to Dutch *adat* scholars, there were 19 geographical *adat* law areas (*rechtskring*), distinguishable by cultural characteristics.[35] The tradition of *adat* is dominantly oral, although there are written codified *adat* in *e.g.* Bali.[36] The oral *adat* concerned the Dutch administrators, partly because of the difficulties in adapting an oral tradition to the requirements of the state, and partly because of the ambiguity of norms as a result of linguistic considerations.[37]

1.4 Post-Independence

On the 17 August 1945, after the defeat of the Japanese, but before the Dutch administrators had managed to return to the country, Indonesia declared its independence.[38] The Constitution of the Republic of Indonesia had been drafted during July and August the same year – mainly by the well-known Indonesian

29 *Ibid*., p. 189.
30 *See* (Burns 1989a), p. 78.
31 *Ibid.,* p. 49.
32 *Ibid.,* p. 49.
33 *See* (Lev 1985), p. 64.
34 *Ibid.,* p. 64.
35 *See* (Hooker 1978b), p. 16. A list of all *adat* law areas can be found in B. Ter Haar, *Adat Law in Indonesia*, (Haar, Hoebel, and Schiller 1948), pp. 7-10.
36 *See* (Hooker 1978b), pp. 52-53.
37 *Ibid.,* p. 53.
38 *See e.g.* (Ellis 2002), p. 121. Indonesia was occupied by Japan 1942-1945, during the Second World War.

legal scholar Raden Supomo.[39] It would take another four years until the Netherlands agreed to surrender Indonesia and accept its independence through the so-called Round Table Agreement in December 1949.[40] This four-year period of independence struggle is commonly referred to as 'The Revolution'.[41]

The 1945 Constitution deserves a separate comment, because of its impact on Indonesian legal evolution until this very day, (further discussed below).[42] The main drafter, legal scholar Raden Supomo, was a former student of van Vollenhoven and had held high positions during the occupation administration.[43] Supomo adopted the concept of the 'integralistic state'[44], arguably influenced by van Vollenhoven's idea of Indonesian legal culture as fundamentally different from European, especially with regard to the supposed 'collectivism'.[45] The 'integralistic state' is described as 'organic' in the sense that society is a body of people. Since the state in itself consists of the people, there is no need for individual rights or legal protection of individuals, because the interests of the individual were – per definition – the interest of the state.[46] The 'integralistic state' is best served by an authoritarian leadership, governed by a father figure, who knows what is best and decides for his people.[47] According to David Bourchier, „(…) many Indonesian lawyers were won over by the arguments of the *adat* lobby that 'Western' models of law and government, with their emphasis on individual rights and impersonal rules, were inappropriate for Indonesia."[48].

1.5 the sukarno Presidency – the Old Order

Sukarno[49], the leader of the independence movement and the political party *Partai Nasional Indonesia* (PNI), arose as the first Indonesian president after

39 *Ibid.,* pp. 116, 121.

40 *Ibid.,* p. 122.

41 *See e.g.* (Lev 1973), p. 12. The definition of whether Indonesia became independent in 1945 or in 1949 depends on the source. Most Indonesians commentators regard 1945 as the year of independence and the national holiday is 17 August.

42 *See* (Ellis 2002), p. 122.

43 *See* (Lev 1973), p. 5. *See also* (Reid 1998), p. 31. Arguably, Japanese nationalist ideals and Leiden educated lawyers could find common ideological grounds, which might have led to the recruitment of Supomo. *See* (Bourchier 1999), p. 190.

44 Sometimes also referred to as '*intergralistic staatsidee*', *see e.g.* (Lubis 1999), p. 171.

45 With 'collectivism' the author refers to the focus on interests of family, group and community over that of the individual, as described above. *See* (Burns 1989b), p. 85.

46 *See* (Lindsey 2002), p. 253.

47 *See* (Bourchier 1999), p. 191. *See also* (Lubis 1999), pp. 173-175. Supomo used the example of Nazi Germany to explain a model for the 'integralistic state' in terms of leadership: one supreme leader in a total unity. *See* (Lubis 1999), p. 174.

48 *See* (Bourchier 1999), p. 189. According to Borchier, legal romanticism have a natural tendency to attract people who had their culture and society humiliated and abused for decades by colonisers.

49 Sometimes spelled 'Soekarno'.

independence. In the nationalist mobilisation to fight the colonial power, and during his 20 years of presidency, Sukarno used a three-stage concept he called *Trimurti*[50] to describe the Indonesian history: awareness of the 'bounteous past' (pre-colonization); the 'dark ages' (colonization and post-colonization); and the 'promise of a brightly beckoning future' (independence).[51] Sukarno furthermore introduced the Indonesian state ideology; *Pancasila*[52]. He presented *Pancasila* in a speech on 1 June 1945, and the principles were included in the preamble of the 1945 Constitution.[53] The *Pancasila* consist of five principles:

1. Belief in the One and Only God;
2. Just and Civilized humanity;
3. The Unity of Indonesia;
4. Democratic life led by wisdom of thoughts in deliberation amongst representatives of the people;
5. Achieving social justice for all the people of Indonesia.[54]

According to Sukarno, the *Pancasila* contained indigenous Indonesian values.[55] Other commentators argue that the principles were a necessary compromise to accommodate the interests of 'odd bedfellows' – Muslims, Communists, traditionalists and the military – who all took part in the independence movement.[56]

A new constitution called the Provisional Constitution entered into force in 1950.[57] The idea of the 'integralistic state' was partly abandoned, which limited the executive power and provided for political diversity.[58] However, the Leiden-influenced theories of law had a continued role within academia and were taught

50 Interestingly, according to Kamus Indonesia Inggris (An Indonesian-English Dictionary) *Trimurti* is also a reference to the „oneness of the three Hindu gods Brahma, Vishnu and Shiva". *See* (Echols and Shadily 1989).

51 *See* (van Klinken 2001), p. 242.

52 *Pancasila* means 'five pillars' in Sanskrit.

53 *See* (International Commission of Jurists, Thoolen, and Stichting Studie-en Informatiecentrum Menservechten 1987), p. 36.

54 *See* the Preample of The 1945 Constitution of the Republic of Indonesia.

55 *See* (International Commission of Jurists, Thoolen, and Stichting Studie-en Informatiecentrum Menservechten 1987), p. 37.

56 *See e.g.* (Donovan 1998), p. 726.

57 The Provisional Constitution provided for a Constituent Assembly (*Konstituante*) to draft a new Constitution. *See* (Damian and Hornick 1972), p. 494.

58 *See* (Bourchier 1999), p. 192. By the early 1950s, it seemed like even Supomo had abandoned the ideal of the 'integralisic state' and maintained that codified law and basic concepts of human rights were part of „modernity". He concluded that colonization had left Indonesia with Western institutions and that the process of modernization is inevitable. *See* (Supomo 1953), pp. 227-235.

in Indonesian law schools.[59] An illustrative example is the 1950 publication *Adat Law in Indonesia* where law professor M.M. Djojodigoeno elaborates on the un-applicability of 'foreign concepts' such as liberalism, individualism and codified law, to Indonesians:

> "We are socio- and traditio-bound people: everyone of us has to act and to behave as all others do, one has to be common, *biasa* (Javanese *lumrah*). Being different from others is being strange, astonishing, wicked, condemnable. In short, what is normal gets a normative trait. In this course of ideas an individualistic state of mind and an individualistic pattern of behaviour and action will arouse opposition, disapproval and condemnation. (…) And this process of adjustment [to social conditions] should be carried out, not by the legislative body which is clumsy, but by the judge who is able to give decisions according to concrete needs and circumstances – the more so where, as in Indonesia, the judge has a very, very active role in judgment, where he has to administer law which ought to be identic with justice, where he is the judge, prosecutor, defendant, solicitor and barrister, not to one of the parties in dispute, but to both; in short, where he is the trustee of both parties, who expect justice in the highest sense of the word from him."[60]

Sukarno himself became increasingly dissatisfied with the 1950 Constitution and repeatedly blamed it for the slow development and hardships of the Indonesian society.[61] On 5 July 1959, Sukarno unilaterally revoked the 1950 Constitution through a presidential decree and reinstalled the 1945 Constitution.[62] With the reinstallation of the 1945 Constitution followed Sukarno's so-called 'Guided Democracy', a form of governance he considered to be better suited for Indonesians than 'Western' democracy.[63] Arguably, the 1945 Constitution as such served a

59 *See* (Bourchier 1999), p. 192. There are various theories on why the parliamentary governance embedded in the 1950 Constitution failed. Daniel S. Lev presents a few in 'Social Movements, Constitutionalism, and Human Rights', *e.g.* that the real power was not with the Indonesians since the middle-class was small and consisted of Chinese and the power of private economic was still with the Dutch. Furthermore, that the societal institutions were left-overs from the colonial period. *See* (Lev 2000c), p. 325.

60 *See* (Djojodigoeno 1950), pp. 11, 17.

61 *See* (Ellis 2002), p. 123.

62 As a justification for Sukarnos unilateral action, it has been argued that Sukarno was left with no choice but to reinstall the 1945 Constitution because no parliamentary consensus could be reached. *See* (Damian and Hornick 1972), p. 494.

63 „Sukarno did not believe parliamentary democracy was appropriate for Indonesia. He wanted an 'Indonesian Democracy', not a model based on '50 per cent plus one,' which reflected Western individualistic thinking. Indonesian society was not individualistic but like a family." *See* (Dalrymple 2000), p. 460. On Indonesia as a 'family', *see also*

limited practical function when Sukarno „rose self-consciously as a patrimonial phoenix to embody the spirit of this nation on the move".[64] Subsequently, in 1960, the blindfolded Justitia was replaced by a stylized *banyan* three and the Javanese word *pengajoman* (shelter, succour) as the official symbol of justice, an action which to some commentators also symbolised deterioration of justice and a move towards paternalistic protection of the people (as opposed to formal justice).[65] In Sukarno's 'Guided Democracy', he was 'President for Life' and 'Revolutionary Law' made law secondary to policy.[66] Publication of new legislation was delayed for months, if published at all.[67]

One of the features of 'Guided Democracy' was the close ties between the executive and the judiciary. Sukarno, who openly rejected separation of powers (*tiras politika*), appointed the Supreme Court Chairman to a Cabinet position.[68] Through Law No. 19 of 1964 and Law No. 13 of 1965, the president was assigned a legal right to intervene directly in any judicial process or decision.[69] Sukarno was of the opinion that „You cannot make a revolution with lawyers"[70] and subsequently diminished the role of the judiciary until he stepped down in 1965.

1.6 The Suharto Presidency – the New Order

On 30 September 1965 six army generals were killed at the Luang Buaya airbase outside Jakarta, and rumours spread of an alleged communist *coup d'état*.[71] During the following months Sukarno gradually transferred his presidential powers to General Suharto[72], High Commander of the armed forces, and in March 1968 Suharto was appointed president by parliament.[73] Little is know about the army's systematic mass-killings of communists (and suspected communists) that took place during the first years of Suharto's presidency.[74] Some commentators

(Reid 1998), p. 25.

64 *See* (Lev 2000c), p. 326.

65 *See* (Lev 1965), p. 282. *See also* (Lev 2000b), p. 200.

66 *See* (Lindsey 1999a), p. 7. *See also* (Lindsey 1999b), p. 13.

67 *See* (Lev 2000b), p. 203, footnote 68.

68 *Ibid*., pp. 176-177.

69 *Ibid*., p. 171. *See also* (Lindsey 1999b), p. 14.

70 Sukarno quoted in (Lindsey 1999b), p. 13.

71 *See* (Damian and Hornick 1972), p. 508. *See also* (van Klinken 2001), p. 327.

72 Sometimes also spelled 'Soeharto'.

73 *See* (Damian and Hornick 1972), p. 508. For a comprehensive overview of the process, *see also* (International Commission of Jurists (1999), pp. 14-15.

74 The portrayal of communist women – as having an extreme libido with sadistic preferences – in official anti-communist propaganda, has been elaborated upon in later years within the feminist discourse. *See e.g.* (Sen 2000), pp. 111-114. *See also* (Wieringa 2000) and (Katjasungkana and Wieringa 2003). This is however beyond the scope of this particular article.

estimate that over a million people were murdered and that 120,000 persons were imprisoned in Suharto's quest to outlaw communism.[75]

During a short period of Suharto's initial years of presidency, the judiciary expected a revival. Concepts such as the rule of law, the fight against corruption and for individual rights were openly discussed among lawyers and intellectuals.[76] As described by Daniel S. Lev: „Judges flung off the khaki uniforms they had been forced to adopt under Guided Democracy and again donned solemn black robes."[77] However, the expectations soon died when it became apparent that Suharto would not let go of the presidential control over the judiciary.[78]

If Sukarno was known for *Pancasila* and *Trimurti*, Suharto was known as *Bapak Pembangunan* (Father of Development).[79] During his thirty years of presidency, the standard of welfare for the Indonesian majority improved significantly, mainly because of national programs on primary education and health care, family planning and food distribution to the poor.[80] Due to the progress of the country's welfare and economy, international criticism of Suharto's governance as such, was limited. Foreign commentators and political leaders frequently regarded Suharto's so-called 'soft-authoritarian' rule as necessary to hold the diverse country together.[81]

As the welfare of the Indonesians improved, so did the welfare of the Suharto family. Through various forms of corruption, including close relations with high-ranking bank officials who accredited loans, it is estimated that Suharto and his relatives controlled a financial empire worth over USD 25 billion and had interests in all major Indonesian companies.[82] Suharto's wife Madame Tien

75 *See* (Draper 2002), pp. 391-392. *See also* (International Commission of Jurists (1999), p. 14.

76 *See* (Lev 2000b), pp. 179-183.

77 *See* (Lev 2000a), p. 228.

78 Although Suharto abolished Law No. 19 of 1964 and Law No. 13 of 1965, he enjoyed the same rights in practice. *See* (Lindsey 1999b), p. 14.

79 *See* (Schwarz 1997), p. 119.

80 *See e.g.* (Dalrymple 2000), pp. 447-448, 457. For an overview of the history, mandate and organization of the national family planning program, *see* (Nilsson 2005), pp. 32-44.

81 *See* (Dalrymple 2000), p 446. However, criticism against human rights abuses was expressed by, among others, the International Commission of Jurists and human rights organizations, *see e.g.* (International Commission of Jurists, Thoolen, and Stichting Studie-en Informatiecentrum Menservechten 1987).

82 *See* (Levinson 2001), p. 112. During the spring of 2006, attempts have been made to put Suharto on trial for corruption during his presidency. So far all attempts have failed due to various reasons, mainly related to the former president's health conditions, although some commentators suspect that political reasons are more contributing factors. *See e.g.* (Siboro 2006), (Taufiqurrahman and Hotland 2006) and (Suharto, 84, in 'Good' Shape after Operation2006).

was sometimes humorously called 'Madame Ten Percent', referring to her share of all public contracts.[83]

The justice system under Suharto suffered extensively from corruption. With salaries that could not meet the expected standard of living for a judge, justice could often be bought by the highest bidder.[84] When a Supreme Court clerk was caught on tape in 1997 explaining to a party that the highest bribe would win him the case, the poor state of the Indonesian judiciary became painfully apparent.[85] As a consequence of corruption, the authority of the Supreme Court was severely undermined. Legal scholar Adriaan Bedner concludes that:

> "A remarkable finding during my fieldwork was that judges in the lower courts in fact do not accept case-law as a source of law, even if they say they do. Generally speaking, Supreme Court judgements have lost much of their authority because of their inconsistency and the widely held (and supported) assumption that they are influenced by collusion and corruption."[86]

It is apparent to most commentators that Suharto's regime required a weak judiciary, and consequently, weak lawyers and judges. Therefore, legal education was not invested in, and was generally of poor quality.[87]

1. 7 Reformasi

Following the 1997 Asian financial crisis and massive protests from mostly students, religious groups and the urban middle-class, Suharto stepped down on 21 May 1998.[88]

83 *Ibid.,* p. 112.

84 *Ibid.*, p. 113. In 'Administrative Courts in Indonesia: A Socio-Legal Study', Adriaan Bedner quotes a judge describing the embarrassment experienced by judges having to ride home on motorbikes or public transportation, while the rich businessmen they just acquitted from corruption allegations drive off in luxury cars. *See* (Bedner 2001), p. 234.

85 *See* (Barry 2000).

86 *See* (Bedner 2001), p. 216. Bedner explicitly describes how bribing judges with gifts (*rezeki*) was (is) a part of the judicial process in Indonesia. He elaborates on justifications of bribing as an alleged part of Javanese culture and the public's dismissal and disapproval of such culture. *See* pp. 222, 234-238.

87 Until 1970, most judges had no formal legal education at all, and becoming a judge was not considered a preferable legal career because of the unfavourable working conditions and low salary. *Ibid.*, pp. 197-198. Generally on the Indonesian legal education *see e.g.* (Moeliono 1999) and (Juwana 2001).

88 Rawdon Dalrymple describes how the International Monetary Fund (IMF) required significant reforms of Indonesian governance and the financial system in exchange for emergency assistance when the Indonesian rupiah gradually collapsed. Requirements that Suharto failed or refused to meet, which resulted in lost of public authority and finally his loss of presidency. Ironically for Suharto, those who brought him down were the products of his policies on improved education, the rising middle-class. *See* (Dalrymple 2000), pp. 444, 448.

On the days preceding his resignation, riots broke out on the streets of Jakarta.[89] Because of Suharto's close link with the Chinese business elite, stores owned by Chinese people were looted and Chinese women were raped.[90]

In 1998, B.J. Habibie became Indonesia's third president and with him commenced the reform – *Reformasi*. Habibie had been close to Suharto, but he was determined to demonstrate that his rule would be a different one.[91] Although his presidency lasted less than two years, several important law reforms were introduced, the main one being steps towards decentralization of power through increased local autonomy.[92] Increased regional autonomy in a diverse country such as Indonesia sparked fears of territorial disintegration through regional claims of secession. With the referendum and subsequent independence of East Timor fresh in memory,[93] the solution was to transfer the political decision power to units that were too small to provide ground for mobilization of separatist movements. With Act 22/1999 on Regional Governance, regional autonomy was granted to the lower level of the over 300 districts, instead of the 32 provinces.[94] Another important law reform was the adoption of Act No. 39/1999 on Human

89 The last days of Suhato's presidency are illustratively described by the Jakarta-based journalist Julia Suryakusuma. *See* (Suryakusuma 2004).

90 The mass-rapes that took place in Jakarta on 13-14 May 1998 have never been properly investigated and the number of women who were raped remains unknown. Numbers vary from around 60 to over 150. The United Nations Special Rapporteur on Violence Against Women, Ms. Coomaraswamy, visited Indonesia in December 1998 to investigate the incident. *See* (Sen 2000), pp. 117-120. *See also* (Primariantari 1999), pp. 258-265.

91 *See* (Juwana 2003), p. 647.

92 *See e.g.* (Damuri and Amri 2004), p. 273.

93 Habibie had authorized a UN-administrated referendum on the independence of East Timor on 30 August 1999. 78.5 per cent of the East Timorese voted in favour of independence. The result took the Indonesians, and especially the army, by surprise. Within hours of the announcement of the result, the Indonesian army went into East Timor and destroyed basically all towns, villages and infrastructure, leaving thousands of people dead and about 250.000 people forcibly displaced to West Timor. *See* (Linton 2004), p. 305. For an detailed review and critique of the following *ad hoc* trials against army officials and soldiers, *see* (Linton 2004), pp. 303-361. No army officials were ever convicted for the atrocities in East Timor. *See* (Sulistiyanto 2005). For an elaboration on the use and consequences of rape as a mean of warfare in East Timor, *see* (Mydans 2001)

94 *See* (Hull and Hull 2005), pp. 60-62. Under Act 22/1999 on Regional Governance, the local government have the mandate to decide over which kind of public services to provide, and to organize the budget accordingly. There are five areas of public administration that are not subject to decentralization; foreign policy, national defence, fiscal and monetary authority, the judicial system and religious affaires. Among the public service subject to decentralization, there are eleven mandatory services that the district government are obliged to provide *e.g.* education and health services. *See* (Damuri and Amri 2004), pp. 273-275.

Rights (Human Rights Act), which also established the National Commission on Human Rights (*Komnas HAM*).[95]

In August 1999, an election with more than one potential outcome was held for the first time in thirty-two years.[96] The religious leader and human rights activist Abdurrahman Wahid, popularly known as Gus Dur, was elected president by People's Consultative Assembly.[97] Sukarno's daughter Megawati Sukarnoputri was elected vice-president.[98] Wahid was known to have a personal commitment to democracy and the rule of law.[99] Under his presidency, the first reforms of the 1945 Constitution were initiated. The first amendment came in October 1999 and concerned the main legislative power, which was basically moved from the president to parliament in order to prevent future authoritarian presidents.[100] The second amendment on 18 August 2000 further enhanced the parliament as the primary legislator, making presidential approval through signature unnecessary for enactment of legislation.[101] Arguably the most significant change of constitutional ideology was introduced by the second amendment: Chapter XA on Human Rights, containing a catalogue of rights extending beyond most countries constitutional guarantees.[102] Other related reforms initiated during the Wahid presidency were the establishment of the Ministry of Human Rights and

95 *See* Articles 75-103, 105 of Act No. 39/1999 on Human Rights. *Komnas HAM* succeeded the National Commission of Human Rights established by Presidential Decree No. 50 of 1993. *See also* 'Sejarah Komnas HAM', <http://portal.komnasham.go.id/portal/page?_pageid=35,294424&_dad=portal&_schema=PORTAL >, last visited 26 August 2006.

96 *See* (Levinson 2001), p. 107.

97 Under article 6 (2) of the 1945 Constitution, the president of the Republic of Indonesia was elected indirectly by the parliamentarians and appointed members of the second chamber, MPR.

98 For details on the actual election process and the subsequent division of seats in parliament, *see* (Levinson 2001), pp. 107-109. Megawati as a potential president stirred up emotions around Indonesia, and the leading Muslim scholars were divided over the question whether or not a woman could be president. *See e.g.* (Mydans 1999).

99 *See* (Juwana 2003), pp. 650-651.

100 *See* 'The First Amendment to the 1945 Constitution of the Republic of Indonesia', particularly Article 20. For an elaboration on amendment process, *see* (Lindsey 2002), pp. 246-250.

101 *See* 'The Second Amendment to the 1945 Constitution of the Republic of Indonesia', particularly Article 20 (5). The Second Amendment also diminished the role of the army in national politics, which since independence and under Suharto had held a strong position. Through Article 30, the administration of the police was separated from that of the army.

102 *See* (Lindsey 2002), p. 254. Chapter XA consists of ten articles, with a unconventionally extensive protection of economic, social and cultural rights, (rights to obtain medical care, social security and housing) and even an individual right to development. 'The Second Amendment to the 1945 Constitution of the Republic of Indonesia', Articles 28A-28J.

the adoption of Act 26/2000 on Human Rights Courts.[103] The Human Rights Courts had jurisdiction over cases of 'gross violations of human rights',[104] for which individuals may be sentenced to death.[105] As president, Wahid has been described as 'aloof' and 'unpredictable' and his presidency as rather 'chaotic'.[106] Because of his physical blindness, he had to rely on others to read him documents, a fact that arguably left him subject to manipulation by staff and relatives.[107] This matter has been used to explain why the human rights situation did not significantly improve during Wahid's administration, despite what had been expected. Arguably, the top bureaucrats were unable or reluctant to implement his policies.[108]

As more people became critical of Wahid's leadership, especially after his involvement in two corruption investigations, he left the presidency to his vice-president Megawati Sukarnoputri, leader of the Democratic Party for Struggle (PDI-P) in July 2001.[109] Megawati continued the democratisation process of *Reformasi* with a third amendment of the 1945 Constitution. Through the amendment of 9 November 2001, the president is appointed through direct vote of the people of Indonesia, and no longer indirectly by the People's Consultative Assembly (MPR).[110] The third amendment additionally strengthened the independence of the Supreme Court and established a Constitutional Court with the mandate to review constitutionality of legislation.[111] To many commentators, this constituted a major step to establish a balance between the judicial, the legislative and ex-

103 In August 2000, the Ministry for Human Rights merged with the Department of Justice. *See* (Juwana 2003), p. 651. Article 43 of Act 26/2000 on Human Rights Courts also provided for the establishment of *ad hoc* courts with a mandate to hear cases of gross human rights violations that took place prior to the coming into force of the Human Rights Courts Act.

104 The definition of 'gross human rights violations' corresponds to the crimes of 'war crimes' and 'crimes against humanity' under the Rome Statute, *see* Articles 8-9 of Act No. 26/2000 on Human Rights Courts.

105 *See* Articles 36-37 of Act No. 26/2000 on Human Rights Courts. The fact that a human rights law provide for death penalty for violations of human rights is undoubtedly unconventional and has sparked criticism from, among others, Amnesty International. *See e.g.* (Amnesty International 2004).

106 *See* (Levinson 2001), p. 111.

107 *Ibid.,* p. 111.

108 *See e.g.* (Juwana 2003), p. 653.

109 *See* (Levinson 2001), p. 110. *See also* (Rieffel 2004), p. 98.

110 *See* 'The Third Amendment to the 1945 Constitution of the Republic of Indonesia', Article 6A.

111 *See* 'The Third Amendment to the 1945 Constitution of the Republic of Indonesia', Articles 24- 24C. Among other measures to strengthen the independence of the Supreme Court, a Judicial Commission was established to propose Justices. According to Timothy Lindsey, the regulation is not detailed enough to provide a sufficient guarantee of independence, *see* (Lindsey 2002), pp. 164-165.

ecutive power.[112] A fourth constitutional amendment was passed in 2002, which established a second round of direct elections if neither of the two presidential candidates who received the highest number of votes received more than 50 per cent in the first round.[113] The fourth amendment also regulated the relation between the two parliamentary chambers, MPR and DPR.[114] According to legal scholar Timothy Lindsey, the most interesting part in the process of the fourth amendment was what was *not* included, namely draft article 29 on the practice of Islamic law (*syariah*) as a constitutional obligation for Muslims.[115]

Megawati's presidency inherited a weak economy and high unemployment – the leftovers from the financial crisis. Although the economy improved significantly between 2001 and 2004,[116] people were unsatisfied with her governance and after the second round of the first direct presidential election in 2004, Megawati lost the presidency to former army general, Susilo Bambang Yudhoyono, popularly known as SBY.[117] Yudhoyono is the current president of Indonesia.

2. Legal Pluralism: Statutory Law, Adat and Syariah – When and Where?

2.1 Introduction

The inherent complexity of law in contemporary Indonesia is comprehensible against the background of its legal history. After centuries of colonialism and *suum cuique*, decades of centralized authoritarian rule and interference in the judiciary, a democratized and decentralized Indonesia is emerging, based on the *Reformasi*-version of its founding constitution. In the process, issues familiar

112 *See* (Lindsey 2002), p. 261. On the lack of enforceability of constitutional rights under Chapter XA after the second amendment, but before the third, *see* (Bell 2001a), pp. 784-806.

113 *See* 'The Fourth Amendment to the 1945 Constitution of the Republic of Indonesia', Article 6A.

114 *Ibid.,* Article 2. Before the forth amendment, the MPR had appointed members, including 38 seats reserved for the military. *See e.g.* (Lindsey 2002), pp. 268-269.

115 *Ibid.,* pp. 269-270. There was never a majority for this provision in DPR, and the fact that the two largest Muslim organisations Nahdlatul Ulama and Muhammadiyah were against the suggestion probably contributed to this. The inclusion of a provision on *syariah* had been discussed already in 1945, when the first constitution was drafted, but was rejected. The process is known as the 'Jakarta Charter'. *See also* (Ellis 2002), pp. 147-148.

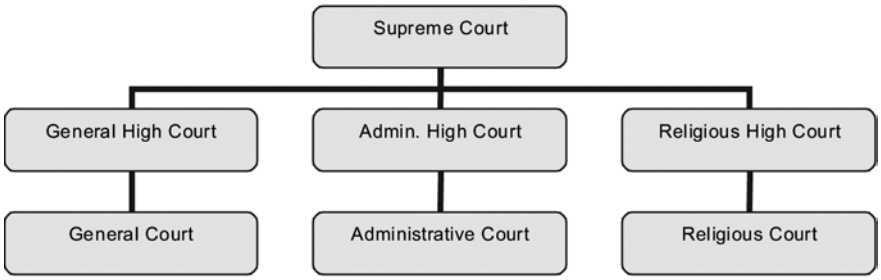
116 *See e.g.* (Rieffel 2004), p. 106.

117 Susilo Bambang Yudhoyono was Mines and Energy Minister under the Wahid administration and Coordinating Minister of Politics and Security under Megawati, before he founded the Democratic Party (Partai Demokrat – PD) *See* (Suryadinata 2005), p. 23.

to most legally-trained persons emerge, *e.g.* questions of legitimacy of norms and what constitute legal authority. The text below is an attempt to describe contemporary Indonesian law, with a focus on sources and institutions.

2.2 Overview of the Court System

Before the legal sources are presented and elaborated upon, it may be useful for the reader to have an overview of the Indonesian court system. After independence, the *adat* courts with jurisdiction over the 'Native' and those categorized as such, were abolished.[118] Consequently, general courts handle criminal and civil law matters. Administrative courts with jurisdiction over administrative law matters were established in 1986.[119] Since established after independence, the administrative courts are not based on a Dutch tradition, but primarily on the French model.[120] Although various forms of Islamic courts had been in place in parts of Indonesia for centuries, it was not until 1989 that the religious court system was formalized through law.[121] The Supreme Court is the highest instance for general, administrative and religious courts, as illustrated by the model below:[122]



118 The abolishment of *adat* courts commenced in some parts of Indonesia during the Japanese occupation. *See e.g.* (Lev 1973), p. 11.

119 For an detailed description on the process behind the instalment of administrative courts in Indonesia, *see* (Bedner 2001), pp. 31-51.

120 Interestingly, there is no similar system in the Netherlands. *Ibid.*, pp. 11, 50.

121 *See* Act No. 7/1989 on the Religious Judicature. Reprinted in an English translation in (Salim and Azra 2003), pp. 257-278. A Ministry of Religion was established in 1946 to secure that administration of Islamic institutions were conducted by Muslim leaders and not by the more secular Ministry of Justice. The Ministry of Religion constitute a unique feature in the Muslim world. On the initiative of the Ministry, a regulation to approve the establishment of Islamic courts wherever general courts existed was adopted. The Ministry additionally heard appeals from the Islamic courts until 1965. *See* (Hooker 1999), pp. 100-101. *See also* (Cammack 1997), pp. 147-148.

122 For review of cases on *syariah*, the Supreme Courts has a special panel of six judges trained in religious law. *Ibid.*, p. 154.

In principle, the courts of first instances are located in the district capitals and the second instances in the provincial capitals.[123] The jurisdiction of the courts is regulated in law, as further discussed below. However, a certain tendency of 'forum shopping' has been observed by, among others Adriaan Bedner, as judges in the administrative courts tend to assume that their court has jurisdiction, almost regardless of the issue at stake.[124]

Following the civil law tradition, the Indonesian courts do not apply the principle of precedent.[125] This is particularly evident regarding the religious courts and religious high courts, which quite often rule contrary to the Supreme Court on the same matters.[126] The reason for this inconsistency could arguably be based on the differences in educational background between the judges on the various levels. It could also be linked to the administration of the courts. *I.e.* the religious courts and religious high courts are administrated by the Ministry of Religion, whereas the administration of the Supreme Court falls under the Department of Justice. Another contributing factor to the variations between findings could be that few court decisions are published and accessible.[127]

Widespread corruption within the judiciary is a left-over from the authoritarian days of Sukarno and Suharto, and is arguably as rampant as ever on all levels of the court system.[128] In the fall of 2005, the Supreme Court and its Chief Justice Mr. Bagir Manan were under investigation for accepting large bribes in a graft case

123 *See e.g.* Article 4 of Act No. 7/1989 on the Religious Judicature. This is however merely theoretical, since not all districts have all first instance courts. The increase in numbers of districts has also contributed to the uneven distribution of courts. In the early 2000s, there where about 300 districts, but today there are over 450.

124 *See* (Bedner 2001), pp. 82-83. I have not been able to establish whether or not this assumption of jurisdiction is similarly applied by the general and religious courts. However, Daniel S. Lev writes on 'forum shopping' between the general and religious courts before the religious courts had the mandate to issue final judgments. Before 1989, the findings of Islamic courts were in the forms of *fatwa* (advisory opinion) and not judgements. The *fatwa* could therefore be tried in a civil court under *adat* if the party was not happy with the outcome. The final outcome was thus dependent on the civil judge's attitude towards Islam. *See* (Lev 2000b), pp. 194-195.

125 *See* (Tabalujan 2002).

126 *See* (Pompe and Otto 1990), pp. 429-430.

127 Arguably, there is no official method for selecting cases for publication. *See* (Bedner 2001), p. 53. Specifically on the scarce reporting from the religious courts, *see* (Hooker 1999), p. 104.

128 Indonesia is ranked as one of the world's most corrupt countries by Transparency International. In the yearly 'Corruption Perception Index', Indonesia was ranked 137 out of 158 in 2005, which places the country on the same level as, among others, Liberia and Iraq. *See* (Corruption Perception Index 2005-2006). *See also* (Törnquist 2005) and (International Commission of Jurists (1999), p. 42.

involving businessman Probosutjedjo, Suharto's half-brother.[129] No charges have been pressed against Mr. Bagir Manan, but after two dawn-raids by the Corruption Eradication Commission against the Supreme Court in October and November 2005, the authority of the Supreme Court has suffered severe damage according to most commentators.[130]

The low salaries for judges and court clerks are often attributed as the most significant factor contributing to corruption.[131] Generally, Indonesians trust the religious courts to be less corrupt than general courts.[132] If this perception also reflects reality, it might be linked to the conclusion made by John Richard Bowen: „Judges in Indonesia are notoriously corrupt, but one ought to qualify this claim. It is fairly predictable where one will find the most corruption, namely, when the most money is involved."[133]

2.3 Statutory Law

After independence, it was decided that Dutch laws would remain in force until it had been replaced by new legislation.[134] As of today, approximately 400 Dutch laws are part of the statutory laws of contemporary Indonesia. After the turmoil of authoritarian rule and blurred dividing-lines between the legislative, executive and judicial power, resulting in a variety of contradictory statutes, there was a need for a regulated hierarchy of norms. Decree No. III/MPR/2000 on Legal Sources and Legislative Regulations Order establishes a definition of what constitute sources of law and the hierarchy of regulations. Article 1 reads:

1) "The legal source shall be the source for composing legislative regulations.
2) The legal source shall consist of written and unwritten legal sources.
3) The National basic legal source shall be Pancasila as written in the Preamble of the 1945 Constitution, namely Belief in One and Only God,

129 According to Mr. Probosutjedjo, his lawyer had given Rp. 6 billion (approximately USD 600,000) to bribe the Chief Justice and other court officials. *See* (Saraswati 2005b).

130 *See* (Komandjaja 2005), (Saraswati 2005a), (KPK Search Supreme Court Again over Bribery Case 2005) and (Bribery Rampant in Court: Commission 2005). After the corruption allegations, Mr. Bagir Manan is now advocating for a law to protect judges from slander and unlawful accusations. *See* (Law Sought to Protect Judges 2006).

131 *C.f.* Bedner and Levinson in footnote 84 above. The 'Indonesia Corruption Watch', a well-known Jakarta-based NGO tend not to agree with low salaries as the main reason for corruption within the judiciary. In their recent report 'Lifting the Lid „Judicial Mafia"', they list political unwillingness of government to seriously fight corruption as the main contributing factor. *See* (Indonesia Corruption Watch 2004), pp. 26-28.

132 *See e.g.* (McBeth 2002), p. 12.

133 *See* (Bowen 2003), p. 84.

134 *See e.g.* (Tabalujan 2002).

> Just and civilized humanity, the Unity of Indonesia, Democracy guided by the inner wisdom of deliberation among the representatives, as well as realization of Social Justice for all the People of Indonesia, and the content of the 1945 Constitution."[135]

As established in article 1(2), a legal source on which a regulation is to be based can be 'unwritten', a matter which will be elaborated on below. Article 2 establishes the hierarchy of norms, called the 'Legislative Regulations Order' as:

1) The 1945 Constitution;
2) Decree of the People's Consultative Assembly of the Republic of Indonesia;
3) Statutes/law;
4) Government Regulations in lieu of statutes (Perpu);
5) Government Regulations:
6) Presidential Decree;
7) Regional Regulations.

Under article 4 (1), „each legal rule of lower level may not contradict with the legal rule of higher level".

The Decree No. III/MPR/2000 on Legal Sources and Legislative Regulations Order only regulated the norm hierarchy of legislation and does not provide for a hierarchy of written norms *vis-à-vis adat* or *syariah* norms. One may therefore conclude that the Decree is primarily a tool for the legislators and not for the judiciary.[136]

As elaborated upon above, the main legislative power lies with the House of Representatives after the four constitutional amendments. However, the initial years of legislative activity have been marked by ineffectiveness. In 2005, the House of Representatives had planned the deliberation of 52 laws, but only 14 were ever debated.[137] The target for 2006 is adoption of 77 laws, but by 23 March no law had yet been adopted.[138] One of the harshest critics of the legislators' ineffectiveness has been Vice-President and Golkar party leader Yusef Kalla, who recently referred to the majority of parliamentarians as 'unqualified' and

135 *See* 'Decree of the People's Consultative Assembly of the Republic of Indonesia number III/MPR/2000 on Legal Sources and Legislative Regulations Order'.

136 Article 2 states that: „The Legislative Regulations Order shall be a guidance in preparing the legal rules below it". *See* 'Decree of the People's Consultative Assembly of the Republic of Indonesia number III/MPR/2000 on Legal Sources and Legislative Regulations Order'.

137 *See* (Saraswati 2006).

138 *See* (Witular 2006).

primarily interested in personal gains.[139] The background of this critique may be the recent 100 per cent salary increase for parliamentarians, and the frequent and expensive study trips to foreign countries.[140]Considering the backload in parliament and lengthy legislation process, it is apparent that the replacement of Dutch law with Indonesian legislation will take significant time.

2.4 Syariah

Application of *syariah* is formally restricted to the jurisdiction of the religious courts, *i.e.* to matters of marriage, divorce, inheritance, and administration of charitable trusts.[141] Since 1989, the jurisdiction, structure and organization of the religious courts are regulated by law.[142]

139 *Ibid*. After the 2004 election, there was a public aspiration for improvement of the legislators' qualification, considering the fact that 49 per cent had university degrees and 33 per cent had masters or PhDs. *See* (Sijabat 2005).

140 The salary for a parliamentarian in 2006 is Rp. 24 million (approximately USD 2,500) per month. The salary increase for other public servants was on average 15 per cent. *See e.g.* (Atmanta 2006). The issue of legislators' study trips has gained significant attention in Indonesian media, since there are no requirements for participation in these trips. The decision on who may go has not been based on merit, but on a rotation basis, and there are no obligations of reporting or financial accountability. In reality, several study trips have turned out to be mainly exclusive shopping-sprees. The allocated budget for foreign trips for 2005 was Rp. 14.96 billion (approximately USD 1.4 million) and Rp. 31.46 billion for 2006. *See* (Hotland 2005) According to Mr. Agung Laksono, Speaker of Parliament, the allocated budget for 2007 of Rp. 71 billion for 2007 will be reduced after the latest wave criticism. *See* (House to Restrict Overseas Trips 2006)

141 *See* Article 49 of Act No. 7/1989 on the Religious Judicature. The exception is Aceh, where *syariah* additionally applies through bylaws criminalizes gambling, drinking and extra-marital sex. In November 2005, six convicted gamblers received public caning, whereas corporal punishment does not apply in the rest of Indonesia. *See* (Afrida 2005). The separate regulation for Aceh, allowing regional autonomy to legislate on issues of religion was initiated by President Habibie by Act No. 1999/44 as part of the agreement on increased regional autonomy to curb the conflict between the Free Aceh Movement (GAM) and the government. *See* (Kamaruzzaman 2004). The Achenese have traditionally regarded themselves as more religious than the rest of the population and the province is sometimes referred to as 'the front porch of Mecca'. *See* (Emmerson 2000), p. 98. There is now an ongoing debate on whether or not non-Muslims in Aceh should be subject to *syariah* criminal law, or if the defendant should have the right to choose a trial under the secular Criminal Court by a general court. *See* (Taufiqurrahman 2006).

142 On the history and mandate of the Indonesian religious courts before 1972, *see* (Lev 1972). One significant difference after 1989 was that religious courts again had jurisdiction over inheritance cases. Through a decree in 1937, inheritance cases were handled by *adat* courts, and after their abolishment, by general courts, as a result of the Dutch preference for *adat* courts of religious courts. According to the Leiden school-inspired 'reception theory' *syariah* should only be applied to the extent it could be established that the norm had incorporated into *adat*. *See* (Cammack 1997), p. 146. *See also* (Lev 1972), pp. 196-197. The 'reception theory' has in modern times received

As is common knowledge, *syariah* is not a set of norms universally applied in all Muslim countries, but traditionally refer to norms derived from various sources depending on the religious tradition and 'school' of thought.[143] Indonesia, as most of Southeast Asia, is of the Sunni Muslim *Shafii* school.[144] In Indonesia, *syariah* norms have been codified in statutory legislation. The first major act based on religious law was Act 1/1974 on Marriage.[145] Although positive law regulation of religious law is a contradiction in itself for many Muslims, who regard God as the sole authority, the government and various interest groups called for codification of norms to reduce *e.g.* child marriage and unilateral and arbitrary divorce.[146] The Indonesian women's movement had been requesting reforms of family law since before independence, particularly focusing of the eradication of child marriage.[147] Act 1/1974 on Marriage was a compromise between various interests, but ended up introducing a number of novelties compared to traditional *syariah* norms.[148] Under the Act, divorce is only legal if obtained with the involvement of the court, after submission of an application,[149] and polygamy requires court

severe criticism by Muslim scholars. Law professor Hazairin of University of Indonesia even referred to it as 'the Devil's theory'. *See* (Bowen 1998), pp. 68-69. Apart from regulating the religious court system and the requirements and recruitment of judges, Act 7/1989 on Religious Courts contains substantive procedural rules with regard to marriage and husband- and wife initiated divorce. *See* Chapter 4 of Act 7/1989 on Religious Judicature. Reprinted in an English translation in (Salim and Azra 2003), pp. 257-278.

143 Traditionally Islamic law consists of four sources, together known as the *Syariah*. The highest authority is the *Koran*, followed by *Sunna*. *Sunna* translates to 'good conduct to be followed' and refers to the conduct of Prophet Muhammed, which is known through *Hadith*, the fixed textual utters written down by people around the Prophet during his lifetime. The third source is *Ijma,* which literally mean 'consensus', and consists of legal opinions agreed upon by *Mujtahids*, master jurists. The fourth source of law is *Qiyas*, a word difficult to translate, but often understood as meaning 'analogy'. I have written on Islamic law elsewhere, s*ee* (Nilsson 2004), pp. 18-22.

144 *See* (Hooker 1984), p. 3. The other three Sunni Muslim schools are Hanbal, Malik and Hanifa, all named after their founding fathers. *See e.g.* (Hallaq 2001), p. 60.

145 Re-printed in an English translation in (Salim and Azra 2003), pp. 235-256.

146 *See* (Cammack, Young, and Heaton 1996), pp. 45, 53.

147 *See* (Blackburn and Bessell 1997), mainly pp. 113-126.

148 The first Marriage Act version was drafted without the involvement of either the Ministry of Religion or religious organizations, and arguably received more public protest than any other proposed Indonesian law had ever done. It reformed traditional *syariah* norms to a significant degree, including a requirement of registration for validity of marriage, legality of marriage of parties of different religions, and legitimate status of children born during engagement but before marriage. *See* (Katz and Katz 1975), pp. 660-662. *See also* (Cammack 1997), pp. 151-152.

149 *See* Articles 39-40 of Act 1/1974 on Marriage. These provisions sparked significant criticism since husbands traditionally has a right to unilateral divorce at any time and under any circumstances through the pronunciation of *talak*. The compromise was to make court involvement a precondition for a *legal* marriage and divorce (under positive law) whereas marriage or *talak* pronounced outside of court can still be *valid*

permission.[150] Due to its positivist law character and the considerable reinterpretations of traditional *syariah*, the Act 1/1974 on Marriage is generally not regarded as religious law. As concluded by Professor Mark Cammack: „To begin with, the statute was drafted by legislators who were ill-equipped to claim the role of *mujtahid* – one who engages in *ijtihad*."[151]

In 1985, the Supreme Court and the Ministry of Religion were assigned the mission to draft a compilation of Indonesian *syariah*, to ensure uniformity of the law applied in religious courts.[152] The project had *ijtihad* ambitions, and against the background of previous 'religious laws' not being received as such, the involvement of religious clerics and scholars was significant.[153] The Compilation of Islamic law was completed in 1988 and contains 229 articles.[154] According to Mark Cammack, it is apparent that the drafters had a copy of the 1974 Marriage Act close at hand as the end result corresponds to a large extent with its wording.[155] The Compilation was never enacted as law by parliament, but was ratified by numerous religious clerics in a ceremony that lasted several days.[156] The ratification ceremony, and the fact that the norms were composed as a 'compilation' and not a 'codification', contributed to a sense of legitimacy of the Compilation and the norms as authentic Indonesian *syariah*.[157] The Compilation was additionally put forward as a Presidential Instruction in 1991, with an instruction to the Ministry of Religion to implement it.[158] Arguably, with the Compilation of Islamic law, the government succeeded in what they failed to accomplish with the laws of 1974 and 1989 – to create law, but keep the legitimacy enclosed in religious authority.[159] As Mark Cammack concludes: „The law has come full circle, but with an important difference. Whereas registration of marriage and judicial approval for divorce were conceived as legislative requirements in the original

(under Islam). *See* Article 2(1). The sanctions for an illegal (but valid) marriage or divorce are state refusal of registration. *See* (Cammack, Young, and Heaton 1996), pp. 62-64. *See also* (Cammack 1989), p. 59.

150 *See* Article 3(2) of Act 1/1974 on Marriage.

151 *See* (Cammack 1999b), pp. 56-57. '*Ijtihad*' is the Arabic term for the process in which Muslim scholars engage all their energy to search for the true meaning and application of God's law. *See e.g.* (Hallaq 1984), p. 3.

152 *See* (Cammack 1999b), p. 57.

153 *Ibid*., p. 57.

154 Reprinted in an English translation in (Salim and Azra 2003), pp. 279-325

155 *See* (Cammack 1999b), p. 58.

156 *See* (Cammack 1999a), pp. 24-25.

157 *See* (Bowen 2003), pp. 58-59. *Ibid*., p. 24.

158 *See* 'The Presidential Instruction of the Republic of Indonesia Number 1 of the year 1991 on the Compilation of Islamic Law' in (Salim and Azra 2003), pp. 279-325. *See also* (Hooker 1999), pp. 106-107.

159 *See* (Cammack 1999b), p. 21. *See also* (Bowen 1998), p. 58.

proposal, in the Compilation they become commands of Islamic law."[160] The status of the Compilation as a source of law, however, remains unclear. It is contested whether its provisions have to be followed, or merely constitutes recommendations that can be set aside.[161]

2.5 Adat

Adat remains the main source of law for the absolute majority of Indonesians, and coexists with statutory law and *syariah*, as applied in the courts.[162] As described above, *adat* can be both written and unwritten and the norms vary throughout the country. Despite the arguments of van Vollenhoven and Djojodigoeno that all *adat* share common features, such as 'collectivism' and strive for equilibrium of life, some contemporary scholars claim that the regional differences of *adat* are so significant that it is meaningless to speak of a common norm basis.[163]

Ter Haar's book *Adat Law in Indonesia* from 1948 gives an overview of the law in the 19 *rechtskring* as identified by the Leiden School.[164] The content of contemporary *adat* norms may however be difficult to establish, even for judges working within the geographical area. Anthropology Professor John Richard Bowen describes the law-finding process in Aceh as: „Judges on the civil court interview men judged sufficiently old to have an authentic version of adat, and read several lists of adat rules drawn up over the years by men with leisure and interest."[165] The potential for unpredictability and arbitrariness, has led to critique of the use of *adat* as a source of law, especially in criminal law cases.[166] According to Dr. Sebastiaan Pompe: „The vagueness of *adat* rules is helping prosecutors, judges, and local communities to bring

160 *See* (Cammack, Young, and Heaton 1996), p. 21.

161 *See* (Bowen 2003), p. 191.

162 There is room for exceptions for *adat* from *syariah* provided that the *adat* norm does not contravene the tenets of Islam. *Ibid.,* p 71.

163 *See e.g.* (Fitzpatrick 1997). One conclusion in Fitzpatrick's article on the 1960 Land Law is that modern legislation cannot be built on claims of specific universal *adat* principles, because the regional variations of *adat* are too significant. However, according to Fitzpatrick, modern law could be based on the *authority* of *adat*, which requires the recognition of *adat* communities as such and their participation in law reform.

164 *See* (Haar, Hoebel, and Schiller 1948).

165 *See* (Bowen 2003), p. 57.

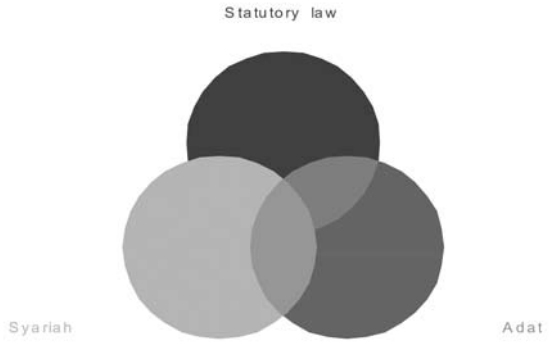
166 *See e.g.* (Pompe 1999), p. 116. „Indonesian legislation, court decisions and publications all refer to *adat* with a matter-of-factness that suggest that the meaning of the concept is beyond contention. Nothing could be further from the truth, however. Like 'custom', *adat* is marked by a number of fundamental uncertainties that preclude a facile application. There appears to be no commonly accepted general methods and instruments by which an Indonesian court can establish the existence and precise content of a particular *adat* rule by."

particular acts under the broad umbrella of *adat* and, indeed, to tailor *adat* to their needs. Conversely, defendants are at serious disadvantage because they do not know what precisely to defend themselves against."[167] According to Pompe, judges frequently refer to *adat* to disguise a personal agenda of *de lege ferenda*.[168]

2.6 'Horizontal Legal Pluralism': Concluding remarks: on the system as parallel but overlapping

As can be concluded from the text above, statutory law, *syariah* and *adat* exist as parallel systems, in terms of sources of law. Furthermore, these sources are derived from different authorities. Statutory law is mainly passed through parliament, *adat* is customary law and *syariah* is religious law. In theory, the three sources are applied by different institutions. Statutory law and *adat* are applied by general and administrative courts, whereas *syariah* is applied by the religious courts.

However, statutory law, *syariah* and *adat* are also *overlapping* systems, both in terms of sources and as applied by the courts. One could define this as 'legislative overlapping' and 'judicial overlapping', which can be illustrated by this model:



As previously elaborated upon, there is a legislative overlap of statutory law and *syariah* as sources, after the adoption of the Marriage Act, the Religious Judicature Act and the Compilation of Islamic law. Furthermore, there is an

167 *See* (Pompe 1999), p. 119.

168 "[J]udges, rather than finding out what the relevant *adat* rule actually says, tend to project their own ideas of what it is, or even, should be, into their interpretation and application of it." (…) „By pretending to merely applying *adat*, the courts both obscured and legitimised legal reform." *See* (Pompe 1999), p. 117.

overlap between statutory law and *adat* through *e.g.* the enactment of the 1960 Basic Land Law, which was intended as a codification of *adat* land law.[169]
In terms of application of the three different sources of law by the courts, there is judicial overlap. General and administrative courts apply statutory law and *adat*, arguably without any predictability.[170] Religious courts apply *syariah* through the traditional *syariah* sources, but also through statutory and semi-statutory sources such as the Marriage Act, the Religious Judicature Act and the Compilation of Islamic law. Additionally, the religious courts apply *adat*, when found appropriate.[171] In this text, the definition of this parallel but overlapping legal system is 'horizontal legal pluralism'. The legal pluralism is horizontal in the sense that the sources coexist and apply 'on the same level', *i.e.* there seems to be no norm hierarchy *between* statutory law, *adat* and *syariah*, as they are applied by the various courts. Conclusively, on the first, second and third instance level, statutory law, *adat* and *syariah* apply, creating a system of 'horizontal legal pluralism'.

2.7 'Vertical Legal Pluralism': the result of regional autonomy
Besides 'horizontal legal pluralism' in terms of norms and their application by the courts, there is another form of legal pluralism resulting from decentralization of legislative powers through increased regional autonomy. This form of legal pluralism is found in the *relation* between legal sources on *different* levels, *i.e.* in terms of norms on different levels of the norm hierarchy that contravene each other. This can be defined as 'vertical legal pluralism'.

As described above, Act 32/2004 on Regional Administration delegates sixteen areas to be legislated upon by the districts.[172] Five areas are kept within the exclusive legislative mandate of central governance: foreign affairs, defence and security, the administration of justice, monetary and fiscal matters and, religion.[173] The system can be illustrated with the following:[174]

However, in reality, several districts are overstepping their legislative mandate and enact bylaws on issues which fall within the exclusive mandate of

169 *See* (Fitzpatrick 1997) and footnote 163 above.
170 *See e.g.* the critique by Sebastiaan Pompe above.
171 *See* (Bowen 2003), p. 71 and footnote 162 above.
172 Article 14 (1) of Act 32/2004 on Regional Administration lists these mandatory areas, *e.g.* health care, education and culture, agriculture, communications, industry and trade, investment, environment, land affairs, cooperatives, and manpower. *See* 'Undang-Undang Republik Indonesia Nomor 32 Tahun 2004 Tentang Pemerintahan Daerah. Not available in official English translation. *See also* (Bell 2001b), p. 16.
173 *See* 10(3) of Act 32/2004 on Regional Administration. *See* (Bell 2001b), p. 17.
174 The bold letters in 'Central Gov't' and 'District' as compared to 'Province' is to illustrate where the main legislative power is placed.

central government, *e.g.* religion, administration of justice and security.[175] Other districts enact bylaws that appear to contravene national legislation, or even the 1945 Constitution. Examples are bylaws on mandatory dress-codes and curfew for women after certain time at night,[176] and prohibition of public display of intimacy.[177] These bylaws are often enacted with reference to public values, *e.g.* 'moral' or 'religion',[178] although some bylaws have resulted in public protest.[179]

There are some efforts undertaken by the central government to tackle the emerging of extra-mandate regulations, amongst other suggestions, by criminal responsibility for local leaders.[180] However, despite Decree No. III/MPR/2000 on Legal Sources and Legislative Regulations Order and Act 32/2004 on Regional Administration,

175 *E.g.* the districts of Padang in West Sumatra, Cianjur in West Java, Pamekasan in East Java, and Bulukumba in South Sulawesi have enacted bylaws to support the implementation of *syariah* in other than nationally established areas. *See* (Parties Warn of Conflict over Contentious Local Regulations 2006). *See also* (Govt Told to Act on Religious Violations 2006). On the employment of district security forces with policing mandate, *see* (Kristiansen and Trijono 2005), p. 236, who concludes that „(…) local security bodies are being developed without control by the central government or local level democratic bodies. There is a total lack of transparency and accountability in security affairs and much power is concentrated in the hands of the district heads, the bupati."

176 Bylaw No. 8/2005 enacted in the district of Tangerang, a Jakarta suburb, states that a woman out in public after 7 pm would be considered to be a sex worker and arrested. This provision stirred up emotions after a married and pregnant schoolteacher was arrested on her way home from work, was fined Rp. 300,000 and had to spend four days in prison. Furthermore, several districts in South Sulawesi have enacted bylaws requiring female civil servants to wear Muslim attire. *See* (Experts Decry Sexist Bylaw as Threat to the Nation 2006). *See also* (Fidrus 2006a).

177 Bylaw No. 8/2005 that bans physical intimacy in public places received international attention after Reuters reported on the established 'five-minute rule' for kissing in public. *See* (Kissing Limit is 5 Minutes in Indonesia 2006), *See also* (Fidrus 2006c)

178 One example is the district of Depok, West Java, where the draft of a 'morality bylaw' is based on the Tangerang bylaw No. 8/2005', but additionally planned to included a prohibition of adultery and homosexuality. The background of this initiative is arguably the prevalence of unmarried couples cohabiting in the University of Indonesia dormitories, located in Depok. *See* (Febrina 2006). Another example is the district of Tangerang, and the municipality of Jakarta that banned the selling of alcohol in other places than 3 to 5 star hotels before Ramadan in 2005. The ban is still in force, although beer may still be sold in Jakarta stores. *See* (Yuliandini 2005).

179 Protests against the curfew for women in Tangerang turned violent in April 2006 when the pro-regulation 'Tangerang Saviors Forum' took over an anti-regulation press conference held by the 'Tangerang Journalists' Working Group and forced away members of the 'Tengerang Urban Poor Network' who were preparing a demonstration against the bylaw. *See* (Fidrus 2006d).

180 State Minister of Administrative Reforms, Mr. Taufik Effendi, is preparing a bill on legislative responsibility for local leaders. *See* (Siboro 2005).

which establish that regional regulations are the lowest source in the norm hierarchy, and that lower sources may not contradict higher sources,[181] the mandate of review of local regulation is ambiguous. Under Article 145 of Act 32/2004 on Regional Administration, all regional regulations should be submitted for review to the central government. If found contrary to national regulations, a presidential decree on annulment should be adopted, which in turn can be revoked by the Supreme Court, should the regional government contest the presidential decree.[182] However, none of the controversial bylaws presented above have been annulled by the central government, which has sparked criticism among lawyers and scholars alike.[183] Under the 1945 Constitution, review of the constitutional conformity of regulations on any level, falls under the mandate of the Supreme Court and the Constitutional Court.[184] According to the President of the Constitutional Court, Mr. Jimly Asshiddiqie, the governmental mandate to review regional regulations is *in itself* unconstitutional, although he still encourage the government to exercise the possibility of annulment in cases on unconstitutional bylaws on *syariah*.[185] Furthermore, a human rights group recently filed a request for judicial review of the Tangerang bylaw on prostitution directly to the Supreme Court.[186]

Conclusively, on the confusing status of bylaw review, the government has the potentially unconstitutional review mandate, which is not exercised in practice. The Supreme Court and Constitutional Court have the general reviewing mandate, although the division of this mandate remains unclear. The Supreme Court is *de facto* receiving review requests from individuals, but the question is whether or not such reviews may even be initiated by individuals under the law.

Under the current circumstances, there are norms of lower status (regional regulations) contravening norms of higher status (laws or the 1945 Constitution). This

181 *See* Articles 2 and 4 of 'Decree No. III/MPR/2000 on Legal Sources and Legislative Regulations Order' and Article 136(4) of Act 32/2004 on Regional Administration.

182 The regional regulation should be submitted for review within seven days after adoption (paragraph 1) and the presidential decree should be issued within 60 days (paragraph 3) if the regulation contradicts a higher legal source. *See* Article 145 of Act 32/2004 on Regional Administration.

183 Judging by the reports in the Indonesian media, the review of regional regulations seems non-existent. *See e.g.* (Home Minister: All Regional Regulations to Be Evaluated2006). *See also* (Parties Warn of Conflict over Contentious Local Regulations 2006) and (Govt Told to Act on Religious Violations 2006).

184 The division of review of legislation between the Supreme Court and the Constitutional Court is however ambiguous in itself. Under Article 24A(1) of the 1945 Constitution the Supreme Court has the authority to „review ordinances and regulation made under any act", whereas under Article 24C(1), the Constitutional Court has „the final power of decision in reviewing laws against the Constitution".

185 *See* Interview with Mr. Jimly Asshiddiqie in (Saraswati and Atmanta 2006).

186 *See* (Fidrus 2006b).

order creates 'vertical legal pluralism', as norms operating on different levels in the norm hierarchy contradict each other.

CONCLUDING REMARKS

It has been said that former French President Charles De Gaulle once asked: „How can anyone govern a nation that has 246 different kinds of cheese?[187]" The question in Indonesia is rather how anyone can govern a state that has over 246 ethnic groups, (and a population of over 200 million on many thousands of islands, for that matter)?

Van Vollenhoven and his disciples made an enormous effort to map and systematize *adat*. The core *adat* values they described, such as 'collectivism' and 'unity', later became the normative foundation of the 1945 Constitution. However, as elaborated on above, some modern commentators argue that the 'discovered' *adat* was more Dutch than indigenous, and that the system was in fact mostly the creation of one man's romantic vision of *Folksrecht*. Whether or not this is true will continuously be debated among legal historians and anthropologists, but it seems apparent that the principle of *suum cuique* is to some extent still lingering in Indonesian law. On the surface level, this phenomenon can be described as 'horizontal legal pluralism'. And although legislation may change through unification and interaction of norms with difference origins (*e.g.* in Act 1/1974 on Marriage and the Compilation of Islamic Law), it is likely that the sedimented memory of older law will rest for a while longer in the legal culture.

During the first decades of independent Indonesia, law was second to policy. Authoritarian rule was made possible *de jure* under the 1945 Constitution, through its lack of separation of power. *De facto* governmental interference with, and diminution of, the judicial power further under-blew this development and provided for corruption and uncertainty in the legal system. With the fall of Suharto came the new *Reformasi*-era with visions of democracy, rule of law and decentralization of power from Jakarta to the regions. Since then, the Constitution has been amended four times to accommodate for separation of powers and acknowledgment of human rights. Four presidents have held office, the current one elected by direct public vote. Increased autonomy has led regions to cultivate their uniqueness, but has also created regulations contradictory to national law, including the Constitution.

Thus, as elaborated on in this article, legal uncertainty is the result of both 'horizontal' and 'vertical' pluralism, exemplified by:

187 *See* 'Charles De Gaulle Quotations', www.quotationspage.com/quote/79.html, last visited 24 August 2006.

- non-consistent jurisprudence, because of:
  - lack of published cases;
  - unclear division of jurisdiction;
  - differences in court administration by ministries;
  - differences in judges' educational background, and
  - corruption within the judiciary.
- lack of respect for the norm hierarchy, because of:
  - extra-mandate regional regulations, and
  - ambiguous regulation reviewing mandate.

Against the background of these conclusions, one is easily discouraged. However, this is the contemporary Indonesian legal reality, created by centuries of colonialism and decades of authoritarian rule. It is evident that post-*Reformasi* Indonesia faces many and heavy legal challenges ahead.[188] As thought-provokingly put by Professor Mason Hoadley:

> "At the risk of being facetious, the role of law in Indonesia can be compared to a lacklustre Division I football club. Its role on the pitch is modest, if not declining, its performance lacks credibility, and to make matters worse it is mostly foreign. Yet no matter how bad it plays or how many red cards are handed out, it cannot be sent down."[189]

So, how anyone can govern a state of more than 246 ethnic groups, 200 million people and 17,000 islands, is perhaps a question that really cannot be answered. But it has to be done, and it is, through the slow and sometimes painfully frustrating process of democratic legal reform.

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188 One such challenge is the implementation of the various international human rights treaties that Indonesia has ratified. Indonesia is a party to *e.g.* the 1966 International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, the 1979 Convention on the Elimination of All Forms of Discrimination against Women and the 1989 Convention on the Rights of the Child. *See* 'United Nations Treaty Collection', last visited 24 August 2006.

189 *See* (Hoadley 2004), p. 1.

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Prospective Analysis of Faroese Legal Arguments in the Rockall Dispute

Føroyskt úrtak

Henda grein er ein framlítandi lýsing av á hvørjar rættarligar reglur Føroyar skulu grunda síni krøv í Rockall Hatton økinum. Grundað á úrskurðir hjá altjóða dómsstólum og gerðarrættum í undirgrundartrætumálum innan fyri 200 fjórðingar verður hildið uppá, at tey ásettu rættvísismát (equitable criteria) fyri at finna eina rættvísa avgerð (equitable solution) í markaósemjum einans vóru ætlað at galda fyri ósemjur innan fyri 200 fjórðingar. Tískil kann ikki verða hildið, at havrættarligu meginreglurnar um avmarking av landgrunninum innan fyri 200 fjórðingar eisini koma at galda í trætumálum um landgrunsmørk uttan fyri 200 fjórðingar.

Ognarrættur avger avmarkingina, og viðurskiftini viðvíkjandi ognarrætti eru øðrvísi fyri økið uttan fyri 200 fjórðingar enn innan fyri 200 fjórðingar. Fjarstøða er grundarlagið fyri avmarking innan fyri 200 fjórðingar, meðan jarðfrøðislig og geomorfologisk kriteriu eru grundarlag fyri áseting av rættarstøðuni viðvíkjandi undirgrundini, ið fer út um 200 fjórðingar. Tískil kunnu meginreglurnar fyri avmarking í m.a. Rockall Hatton økinum metast at verða øðrvísi enn meginreglurnar at avmarka innan fyri 200 fjórðingar, og hevur hetta m.a. við sær, at útlitini hjá oyggjum til at fáa ognarrætt yvir undirgrundini ikki eru avmarkað á sama hátt sum í trætumálum innan fyri 200 fjórðingar.

Sum niðurstøða verður hildið uppá, at um Føroyar megna at prógva, at Rockall Hatton økið er eitt framhald av føroyska langrunninum, so skal Føroyska samráðingarnevndin ikki himprast við at seta stór krøv mótvegis samráðingarpørtunum, tí rættvísismát og mát fyri rættvísa avgerð í markaósemjum innan fyri 200 fjórðingar fara ikki at verða grundarlag undir avgerðum um ósemjur uttan fyri 200 fjórðingar.

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English Summary

This article is a prospective analysis of which legal arguments the Faroe Islands shall put emphasis on in its claims to the Rockall Hatton area. It can not be ruled out, on the basis of the established normative jurisprudence of delimitations within 200 NM, that the established equitable criteria and methods for finding an equitable solution delimitations were solely set to prevail in delimitations within 200 NM. Consequently it can be held that the established principles for delimitation of the continental shelf within 200 NM will not apply for delimitations of outer continental margins.

Title commands delimitation and the title for the zone beyond 200 NM differ the title within 200 NM. Wherein the distance criterion is the title for the zone within 200 NM, geologic and geomorphologic criteria are the basis of the title for the legal continental shelf that extends 200 NM. Accordingly the established normative principles in delimitation in inter alia the Rockall Hatton area are likely to differ from the established prevailing principles within 200 NM and will imply that the title of islands will not be diminished, in order to find an equitable solution, as in delimitations within 200 NM.

In conclusion it is held that if the Faroe Islands shall not be inhibited, if it is established that the Rockall Hatton area is a continuation of the Faroese continental shelf, to raise grand claims vis-à-vis the other coastal States, because equitable criteria and methods in order to find an equitable solution in delimitations within 200 NM will not apply mutatis mutandis for delimitations beyond 200 NM.

I – Introduction

A delineation or delimitation of the outer continental shelf is by its essence an act whose validity depends on international law as it has always an international feature and if not done in accordance with international law will not be opposable to other States.[1] In the words of the International Court of Justice (hereafter the ICJ or Court), albeit in another context, a unilateral establishment of the continental margin 'regardless of the legal position of other States is contrary to recognised principles of international law.'[2] Otherwise stated the validity of the act of delineation or delimitation depends on international law.[3] Needless to say that this principle also prevails in the Rockall Hatton dispute although the question is open with regard to applicable principles in that and other disputes

1 ICJ, *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine* Area (hereafter *Gulf of Maine*), ICJ Reports (1984), 292, para 87.

2 ICJ, *Tunisia* v. *Libyan Arab Jamahiriya* (hereafter *Tunisia* v. *Libya*), *ICJ Reports* (1982), (hereafter *Tunisia v Libya)*, ICJ Reports (1982) 66, para 87.

3 ICJ, *Fisheries case*, ICJ Reports (1951) 116, para 132.

beyond 200 nautical miles (hereafter NM). The Rockall is 25 metres wide at its base and rises sheer to a height of 22 metres.[4] The Rockall dispute is not a territorial one[5] but an outer continental margin dispute to the Hatton Rockall area where four coastal States claim sovereign rights, namely Great Britain, Ireland, Iceland and Denmark on behalf of the Faroe Islands.[6]

No international fora has yet ruled substantively on the question whether delimitation principles in disputes within 200 NM will apply *mutatis mutandis* to outer continental margin delimitations. This manuscript seeks accordingly prospectively to analyze, on the basis of theory of international law, whether delimitation principles in disputes within 200 NM will apply by way of analogy to outer continental margin disputes before determining whether the fact that the Faroe Islands is an archipelago can be considered to have prejudicial effects on its claim to the Hatton Rockall area. The underlying structure of the manuscript is based on the perception that the two modes of delimitation (i) the judicially decided and (ii) the negotiated and agreed ones must be distinguished as there is a „world of difference"[7] hence the reason for which this manuscript will not examine the impact of on-going negotiations in other disputes nor in the Rockall dispute.

All delimitations shall, in accordance with Article 83 of the United Nations Convention on the Law of the Sea[8] (hereafter Convention or UNCLOS), lead to an equitable solution.[9] The ICJ and various arbitral tribunals have nourished and edified a rich international case law of applicable principles to find an equitable solution in continental shelf delimitations. The obligation to find an equitable solution is in the words of the ICJ a „fundamental norm" of the law

4 Rockall is a small, isolated islet in the North Atlantic Ocean and is located at 57°35_48_N, 13°41_19_W.

5 Neither Ireland, Iceland nor the Faroes contest the British sovereignty of the islet itself. In accordance with Article 121(3) of the Convention islets as Rockall, which cannot sustain human habitation or economic life of their own, shall have no exclusive economic zone or continental shelf. The dispute concerns only the outer continental shelf rights in the Hatton Rockall area.

6 For a historical analysis of the claims of the different coastal States, see U.S.Wang, 'Who´ll get the Rockall', 1 *Faroese Law Review* (2001), pp. 113-148.

7 Sep. op. Judge Jimenez de Arechaga, Tunisia v. Lybia, ICJ Rep 1982, p. 117, para 61.

8 Concluded on 10 December 1982, entered into force on 16 November 1994, 1833 UNTS p. 396.

9 The relevant provision of Article 83(1) provides „The delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution."

of delimitation.[10] It is on that basis that the Court has ruled that the obligation to find an equitable solution leads to the dismissal of the equidistance concept as the legally required point of arrival in a delimitation between States with opposite or adjacent coasts. Archipelagos and small islands have in delimitations within 200 NM been considered as relevant circumstances for departing from the equidistant line as they have been perceived as conferring a given State an unreasonable claim to the continental shelf. The question arises whether that solution will prevail in outer continental margin delimitations. Contrary to delimitations of continental shelves within 200 nautical miles (hereafter NM), whose title is based on a distance criterion from the coastal baselines, the title to the outer continental margin is based on geological and geomorphologic elements and this fact will influence outer continental margin delimitations because delimitation is linked to title. The title of the disputing States to the Rockall Hatton area are not *per se* concurrent but depend on geological and geomorphologic criteria. It is consequently held that should the Faroese hydrographic, geological and geomorphologic studies prove that the Rockall Hatton area is a natural extension of the Faroese continental shelf the Faroese government should not be inhibited in its outer continental margin claims by its insular status and small physical territory because delimitation is linked to title. The basis for that conclusion is that a prospective examination of legal aspects in outer continental margin delimitations leads us to the conclusion that the relevant circumstances for finding an equitable solution in delimitations within 200 NM will not apply by way of analogy to outer continental margin delimitations because the title to the Hatton Rockall area are not *per se* concurrent as it depends on geological and geomorphologic criteria.

II – The Court's conceptual method of delimitation

It occurs clearly in the established case law that, once the UNCLOS was signed, geomorphologic and geologic elements were deemed to be irrelevant for the matters of delimitation and it is on that conceptual basis that adjudicators ruled that geographical elements had a significant role to find an equitable solution.

A – The declaratory approach of the ICJ

The ICJ's initial conceptual approach to delimitations was influenced, and distinguished by the fact that it was developed before the opening of the Third United Nations Conference on the Law of the Sea. It is the landmarking *North Sea Continental Shelf Case*, in which the Court referred to the continental shelf as the *natural prolongation* of the land domain of a coastal State and held that this natural prolongation was a continuation of the land domain under the sea.

10 ICJ, *Gulf of Maine*, para 111.

Further, the Court held that the element that „confers the ipso jure title which international law attributes to the coastal State in respect of its continental shelf, is the fact that the submarine areas concerned may be deemed to be actually part of the territory over which the coastal State already has dominion.“ the ICJ embraced a declaratory approach of delimitation of the continental shelf and in which [11] The embraced approached reflect a declarative concept of delimitation where great importance was conferred to the fact that the title to the disputed area was not perceived to be based on a distance criterion[12] but on pre-existing physical elements.[13] The natural prolongation element was the determinant factor for the Court to establish what territory coastal States already possess and hence influenced the Courts endorsed conception of which segments of the continental shelf belong to each State. In the words of the Courts: „whenever a given submarine area does not constitute a natural – or the most natural – extension of the land territory of a coastal State, even though that area may be closer to it than it is to the territory of another State, it cannot be regarded as appertaining to that State.“[14] There is in the Court's view nothing to delimit, it is all about determining the extent of title of each State: *suum cuiqere tribuere*.[15] More concretely it can be held that the Court established the title of each party to each segment of the continental shelf before distributing to the parties what they were entitled to as the continental shelf of any State „must not encroach upon what is the natural prolongation of the territory of another State.“[16] It can be held that the Court put emphasis on the point to leave to each disputing party as much as possible of „all those parts of the continental Shelf that constitute a natural prolongation of its land territory into and under the sea.“[17] Hence it can be held that the Courts embraced conception in the *North Sea* case of delimita-

11 ICJ, *North Sea Continental Shelf* case (hereafter *North Sea*), *ICJ Reports* (1969), 31, para 43.

12 Article 6(1) of the 1958 Convention reads "[w]here the same continental shelf is adjacent to the territories of two or more States whose coasts are opposite each other, the boundary of the continental shelf appertaining to such States shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is the median line, every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.“ (emphasis added)

13 One of the Parties to the dispute was not a contracting party to the Geneva Convention (FRG) and after thorough examination the ICJ held that the equidistance and special circumstance rule in the 1958 Continental Shelf Convention in the 1958 Convention did not reflect customary international law.

14 ICJ, *North Sea*, ICJ Reports (1969) 31, para 43.

15 P Weil, *The Law of Maritime Delimitations – Reflections*, (Grotius Publications 1989), 23.

16 ICJ, *North Sea,* ICJ Reports (1969) 47, para 85(c).

17 Ibid, 62, para 101.

tion was constitutive of a declaratory conception of delimitation, being that is, an act of recognition.

B – The decline of the declarative concept

The constitutive concept of delimitation is clearly reflected in the Convention and was one of the main elements driving the Court to abandon its endorsed declarative approach in continental shelf delimitations.

The erosion of the declarative concept of delimitation started in *Tunisia v Libya* in which the Court was to decide whether geomorphologic elements should prevail over geological ones as Tunisia and Libya, in the light of the *North Sea* case law, argued that the geomorphologic features should prevail[18] whereas Libya held that the geology of the marine depths should triumph.[19] The Court ruled quite emphatically that the natural prolongation was not one solely based on physical features.[20] That first-step approach was followed up in the *Gulf of Maine* judgment where the Court was more explicit on its new approach in which the declaratory concept of delimitation was subject to an erosion. The Chamber held that „[l]egal title' to certain maritime or submarine areas is always and exclusively the effect of a legal operation. The same is true of the boundary of the extent of the title. That boundary results from a rule of law and not from any intrinsic merit in the purely physical fact."[21] In *Libya v Malta* the Court further developed the above-mentioned endorsed reasoning when taking into account the „new development in the law"[22] – implicitly referring to the UNCLOS. First the Court stressed that all coastal States possess an inherent right to a continental shelf solely based on a distance criterion. Following dialectically that statement the Court subsequently ruled that there is therefore no reason to confer „any role to geological or geophysical factors within that distance either in verifying the legal title of the States concerned or in proceeding to delimitation as between their claims."[23] This statement of the Court represents a U-turn compared to its earlier rulings on the same substance but finds its origin in the fact that the new law gave no importance to natural prolongation of the land domain as each Contracting Party to the UNCLOS was vested a sovereign right to the continental shelf within 200 NM. The Court ruled that „title [within 200 NM] depends solely on the distance from the coasts of the claimant States of any areas of seabed claimed by way of continental shelf, and the geological or geomorphologic characteristics of those areas are completely immaterial."[24]

18 ICJ, *Tunisia v Libya*, 52-53, paras. 58-60.
19 Ibid, 50-52, paras 52-57.
20 Ibid, 46, para. 43.
21 ICJ, *Gulf of Maine*, para 103.
22 ICJ, *Libya v Malta*, 35, para. 39.
23 Ibid, 36, para 40 (emphasis added).
24 Ibid, 36, para 39 (emphasis added).

The fact that the entitlement to the continental shelf was based on a distance criterion implied, in the Court's view, that the geological or geomorphologic features were irrelevant. Accordingly the sectors of overlap within 200 NM had to be divided in an equitable manner, in order to find an equitable solution, in which geographical were given an important role to find the equitable solution.[25] It can be postulated that geomorphologic and geologic elements were in the aftermath of the *North Sea* case excluded any relevance for the outcome of continental shelf delimitations within 200 NM. It is of interest to note the Separate Opinion of Judge Mbaye which in the authors view reflects accurately the evolution of the law of delimitation in the aftermath of the *North Sea* case when holding that there has been a „tendency to extend the concept of continental shelf and to attach it increasingly to legal principles, and to detach it ever more surely from its physical origins."[26]

III – Legal implications of different title

All coastal States have an inherent right to the continental shelf within 200 NM regardless the structure of the soil as this right is solely based on a distance criterion whereas only some coastal States are vested a right to an outer continental margin. Otherwise stated and put in the current context only some States are vested a legal title to the Rockall Hatton area which implies that the titles are not per se concurrent.

The entitlement is founded on two principles: namely that (i) land dominates the sea by (ii) intermediary of the coast.[27] The ICJ is clear and unambiguous on this point when holding that „the land is the legal source of the power which a State may exercise over territorial extensions to seaward."[28] It can be deduced from that statement that the attributive rights of the title are not primary rights but derived rights.[29] The erosion of the declarative concept of delimitation was partially due to the fact that the ICJ was interpreting the UNCLOS, although in *status nascendi*, which established a new régime[30] for entitlement which differs considerably the provisions of the 1958 Geneva Convention on the Continental Shelf.[31] In the words of the Court: „the distance of 200 [NM] is in certain cir-

25 P Weil, op cit, n 15, 58.
26 Sep Op of Judge Mbaye in *Libya v Malta*, 94.
27 Ibid, 51.
28 ICJ, *North Sea*, 51, para 96.
29 ICJ, *Libya v Malta*, 41, para 49.
30 See Article 76(1) of the Convention.
31 Article 1 of the Geneva Convention provides that for the purposes of that Convention, the term continental shelf refers „(a) to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 meters or, beyond the limit, to where the depth of the superjacent waters admits

cumstances the basis of the title of a coastal State."[32] *A fortiori*, if the distance criterion is in certain circumstances the basis of the title it implies that the basis of the entitlement will in certain situations be based on something else than the distance from the coast.

At the outset it shall be stressed that scholars have already observed that the basis of the legal area beyond 200 NM is „based on something other than distance."[33] This difference implies that the methods of finding an equitable solution in those areas will be different compared to the embraced methods of delimitation in disputes within 200 NM because delimitation is linked to the title as the applicable methods of delimitation have to be consistent with the title. Hence the identification of the basis of the title is of great importance as that determination depends in the Court's case law the determination of the applicable law to find an equitable solution, ie. the determination of which factors should be utilized in arriving to the equitable solution. The latter occurs clearly in *Tunisia v Libya* where the Court held that „[i]t is only the legal basis of the title to continental shelf rights – the mere distance from the coast – which can be taken into account as possibly having consequences for the claims of the Parties."[34] This approach was reiterated in the *Anglo-French* award, in which the Court of Arbitration rejected a method of delimitation suggested by France on the basis of the fact that it did not see it as compatible with the underlying basis of the title to continental shelf.[35] In *Tunisia v Libya* the Court was clear with regard to the fact that the applicable law in a delimitation is subjected to the title to that area as principles and rules of international law which may be applied for the delimitation of continental shelf areas must be derived from the concept of the continental shelf itself, as understood in international law.[36]

It follows of the abovementioned statements that having in mind that geological and geomorphologic elements are the source of the entitlement to the continental shelf beyond 200 NM the applicable law in order to find an equitable solution can be held to be ruled by principles other than the ones established for the

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of the exploitation of the natural resources of the said areas, and (b) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands."

32 ICJ, *Tunisia v Libya*, 48, para 47 (emphasis added).

33 DA Colson, 'Delimitation of the Outer Continental Shelf Between States with Opposite or Adjacent Coasts' in MH Nordquist, JN Moore, and TH Heidar (eds) *Legal and Scientific Apects of Continental Shelf Limits* (Martinus Nijhoff Publishers 2004) 291.

34 Ibid, 48, para 48 (emphasis added).

35 Case Concerning the Delimitation of the Continental Shelf Between the United Kingdom of Great Britain and Northern Ireland, and the French Republic award (hereafter Anglo-French award), 30 June 1977, Reports of International Arbitration Awards, Vol. XVIII, para 246.

36 ICJ, Tunisa v Libya, para 36.

delimitation of the area within 200 NM in which the applicable methods were based on geographical elements.[37] This contention finds also support in the ICJ's ruling in *Libya v Malta* where the Court held that when the determination of a title is disputed „in so far as those areas are situated at a distance of under 200 miles from the coast in question, title depends solely on the distance from the coasts of the claimant States of any areas of seabed claimed by way of continental shelf, and the geological or geomorphologic characteristics of those areas are completely immaterial."[38] It can consequently be held that the Court distinguishes the applicable law in delimitation within 200 NM from the delimitation beyond 200 NM on the basis of the fact that the basis of a coastal State's entitlement to these areas is different.[39]

The postulate which the author argues finds support in the writing of scholars who contend that geological and geomorphologic criteria will reemerge but for the delimitation of the outer continental shelf and will „serve as specific facts deemed relevant for determining title."[40] This contention should, in the authors view, not be understood as meaning that geological and geomorphologic criteria will operate in exclusion of other relevant facts as it would be inconsistent with Article 83(1) of the Convention.[41] It is however an undisputable fact that the Court left open the debate on applicable law and the determination of which legal principles of delimitation shall apply in outer continental margin disputes[42] and having in mind the linkage of delimitation and title it can be concluded that the applicable methods of delimitation within 200 NM will not be transposed to outer continental margin delimitations and consequently not applicable to the Rockall dispute. In order to understand the impact of the abovementioned it is a prerequisite to describe to succinctly analyze the applicable principles for finding an equitable solution in continental shelf disputes within 200 NM.

IV – Established principles for equitable solution in delimitations within 200 NM

The Court has, as mentioned earlier, recurrently ruled that the obligation to find an equitable solution in a continental shelf dispute is the „fundamental norm" in delimitation.[43] It is in this context of interest to note that the Court itself has

37 B Kunoy, 'The Rise of the Sun: Legal Arguments in Outer Continental Margin Delimitations', 53 *Netherlands Internacional Law Review* (2006), pp. 245 – 272.
38 ICJ, *Libya v Malta*, 35, para 39 (emphasis added).
39 P Weil, op cit, n 15, 291.
40 DA Colson, 'The Delimitation of the Outer Continental Shelf Between Neighbouring States', 97 *American Journal of International Law* (2003), 107.
41 P Weil, op cit, n 15, 103.
42 See DA Colson, op cit, n 40, 100.
43 ICJ, *Gulf of Maine*, para 111.

held that the obligation to find an equitable solution leads to the dismissal of the equidistance concept as the „legally required point of arrival."[44]

A. Reshaping nature?

Delimitation of continental shelves in which the basis is the title is concurrent geographical elements has influence the Courts perception of applicable methods and has resulted in the edification of a method in which the equidistance method is the starting point for the delimitation.[45] This makes place for equity although the obligation to find an equitable solution shall not be understood as literal equity.

The Court has established a consistent reasoning which is based on the fact that the obligation to find an equitable solution shall not be understood as the case is decided under an *ex aequo et bono* basis.[46] These statements find their source in the legal fact that a „delimitation is a legal operation … which must … be based on consideration of law."[47] The continental shelf rights are the same for all States as „the derivate character of maritime rights stems from the fact of the coast and this introduces discrimination between States."[48] In its well known dictum the Court held that delimitation does not „seek to make equal what nature has made unequal"[49] and there cannot be „any question of completely refashioning nature or totally refashioning geography"[50] in order to find an equitable solution. It is though clear in the latter citation that the use of the term „completely" reveals clearly that the Court deems it adequate and necessary to diminish the effect of certain „unreasonable" geographical features in order to find an equitable solution.

Because the coastal States' entitlement to the continental shelf within 200 NM is generated by the coast it follows that the relevant geographical feature to take into account in delimitations within 200 NM is coastal geography.[51] In *Jan Mayen*, the Court held that a disparity in length of relevant coasts constituted a special circumstance under Article 6 of the Geneva Convention. In the words of the Court: „Special circumstances are those circumstances which might modify the result produced by an unqualified application of the equidistance principle."[52] In

44 Article 83(1) of the Convention.
45 P Weil, op cit, n 15, 83.
46 ICJ, *North Sea*, 48, para 88; *Tunisia v Libya*, 60, para 71.
47 ICJ, *Guinea v Guinea Bissau*, (1988) 77 ILR, 656 para 120.
48 P Weil, op cit, n 15, 53 (emphasis added).
49 ICJ, *Libya v Malta*,) 40, para 46.
50 ICJ, *North Sea*, at 49-50, para 91 (emphasis added).
51 *Tunisia v Lybia*, 64, paras 73, 74; *Gulf of Maine*, 330, para. 205.
52 ICJ, *Case Concerning Maritime Delimitation Between Greenland and Jan Mayen*, (hereafter *Jan Mayen*) ICJ Reports (1993) 62, para 55.

Tunisia v Libya the Court gave only half-effect to Tunisia's Kerkennah Islands even though the main island of Kerkennah is 69 square miles in area and has a population of 15.000.[53] This line of thinking occurs also clearly in *Libya v Malta* where the Court ruled that the uninhabited island of Filfa, belonging to Malta, should be disregarded altogether and that the main island of Malta should be given only partial effect because of its small size in relation to Libya's broad coast.[54] In the *Anglo-French* award, the geographical situation of the Channel Islands, their size, population and political status influenced the position of the arbitrators.[55] The Arbitration Court ruled further on that the Scillies were despite being islands of a „certain size and population"[56] only attributed a reduced effect. The fact that they are situated twice as far to west from the landmass of the UK, as is the Isle of Ushant from the landmass of France, was in the eyes of the arbitrators a special geographical feature which could not be completely ignored and were hence only conferred an half effect.[57] Special or incidental geographical features which appear to be constitutive of inequity for the issue of delimitation shall be conceived as special circumstances, that is the thrust of delimitations within 200 NM. If that endorsed method of delimitation, in which an equitable solution is found, was to apply in the Rockall dispute it is not an extrapolation to state that the establishment of an equitable solution would be detrimental to the Faroes as the adjudicators would considerably depart from the equidistant line on the basis of the fact that the Faroes are a dependant and very small archipelago compared to the other disputing coastal States. It would hence be detrimental to the Faroese position if the applicable methods for finding an equitable solution in delimitations within 200 NM were transposed in order to find an equitable solution in the Rockall dispute. Before prospectively analyzing in depth the applicable law in that dispute we shall study other delimitation methods in disputes within 200 NM.

B. Corrective perception of equity

The Court's first approach to the equitable solution was based on a corrective perception of equity. The *North Sea* judgment and the *Anglo-French* award analyzed the content of equity on the basis of law in the form of equitable principles.[58] This normative approach with regard to equitable principles was in extended, in the *Anglo-French* award, to also comprise the methods utilised. Arbitrators were consequently considered to be bound to apply some kind of methods which in the *Anglo-French* award was reflected in a statement of the

53 ICJ, *Tunisia v Libya*, 89, para 129.
54 ICJ, *Libya v Malta*, 48, para 64.
55 *Anglo-French* award, paras 201-202.
56 Ibid, para 248.
57 Ibid, para 251.
58 P Weil, op cit, n 15, 171.

Tribunal in which it held that it did not have a „carte blanche to employ any method that it chooses in order to effect an equitable delimitation."[59] The Court held in *Tunisia v Libya* that the „equitableness of a principle must be assessed in the light of its usefulness for the purpose of arriving at an equitable result. It is not every such principle which is in itself equitable; it may acquire this quality by reference to the equitableness of the solution."[60] Accordingly the Court's conclusion was that all that matters is the equitable result as the methods utilised to reach this result are deprived of any normative character.[61] The Court therefore perceived it justified to approach the delimitation disputes on a casuistic basis, enabling it to take into account the particular circumstances and hence deviates the undertaken approach in the *Anglo-French* award. This approach of the Court was reiterated in the *Gulf of Maine* judgment and in *Guinea v Guinea-Bissau*.[62] The Courts sudden departure from the autonomous concept of equity was severely criticised by some judges.[63] Criticism and claims of lack of predictability in delimitation issues drove the Court to re-conceptualize its autonomous concept of equity.

The Court modified in *Libya v Malta* its conceptual perception of the notion of equity, from being a subjective one to an objective concept ruled by a legal content. The Court relied on the necessity of consistency and predictability in order to enrich the legal content of equity in delimitation matters and hence justified its new approach.[64] After having identified the uniqueness of each delimitation case the Court stated in *Libya v Malta* that „only a clear body of equitable principles can permit such circumstances to be properly weighed, and the objective of an equitable result, as required by general international law, to be attained."[65]

On the basis of the abovementioned it can be contended that the ICJ edified in *Libya v Malta* a new corpus of legal rules in order to find an equitable solution

59 *Anglo-French* award, 114, para 245.
60 ICJ, *Tunisia v Libya*, 59, para 70.
61 Ibid, 79-80, para 111.
62 ICJ, *Gulf of Maine*, 300, para 37; *Guinea v Guinea Bissau*, 77 *International Law Reports*, 636, para 89.
63 The concept of equity with so little legal contents has been challenged by several judges. Judge Oda held that the delimitation line adopted by the Court „does not exemplify any principle or rule of international law … [the] equidistance method is … the equitable method par excellence, and for this reason alone should be tried before others." See Diss Op in *Tunisia v Libya*, 269-270, paras 180-181; Judge Gros held that by choosing to draw „lines of direction which no principles dictates … [the judgment has] strayed into subjectivism." See Diss Op Judge Gros in *Tunisia v Libya*, ibid, 152-153, paras 17-19.
64 ICJ, *Libya v Malta*, 38, para 45.
65 Ibid, 55, para 76 (emphasis added).

in continental shelf delimitations. The normative character of the equitable principles has been reiterated in the subsequent cases, *Jan Mayen*, *Qatar v. Bahrain*, *Guinea v. Guinea-Bissau*, *St. Pierre and Miquelon* and *Eritrea v. Yemen*.[66] The normative feature that has been conferred on the equitable principles was however not extended to comprise the applicable methods. In the words of the Court, UNCLOS „sets a goal to be achieved, but is silent as to the method to be followed to achieve it. It restricts itself to setting a standard, and it is left to the States themselves, or to the courts, to endow this standard with specific content."[67]

C. Equidistant line

In a recent arbitration case, *Eritrea v. Yemen* and the recent cases dealt with by the ICJ, *Jan Mayen*, *Qatar v. Bahrain* and *Cameroon v. Nigeria* the equidistant line has been relied on as a starting point to the resolution of the dispute.[68] Former judge Guillaume in his report to UN General Assembly in 2001 stated that the "equidistance – special circumstances rule" is to be relied on to achieve an equitable solution and that "such a result may be achieved by first identifying the equidistance line, then correcting that line to take into account special circumstances or relevant factors, which are both essentially geographical in nature."[69] Accordingly it can be held that the equidistance method in disputes within 200 NM is utilized as a provisory demarcation line susceptible to be modified, on the basis of geographical elements, in order to rectify nature's inequity.

It would be purely speculative and hypothetical to try and identify the applicable methods of delimitation in the Rockall dispute. However it can considering the abovementioned conceptual perceptions of the Court that adjudicators will be bound to confer a considerable importance to the fact that the title to that area differs the title to the continental shelf within 200 NM. The question that arises is whether the provisory equidistant line will be the starting point in a potential Rockall dispute. The underlying reason for which the Court has embraced the approach of drawing a provisory equidistant line is because of competing titles to all areas within 200 NM. If the Faroese government provides the proof that the Rockall Hatton area is a "natural prolongation" of the Faroese continental shelf then there is no competing title to that area and hence no overriding reason for starting the delimitation process with a provisory equidistant line. This is the thrust in the Rockall dispute. The provisory line should reflect the extent

66 DA Colson, op cit, n 40, 101.

67 ICJ, *Libya v Malta*, 30, para 28 (emphasis added).

68 DA Colson, op cit, n 40, 101.

69 Judge Guillaume, speech to the Sixth Committee of the General Assembly of the United Nations, 31 October 2001, summing up the contemporary state of delimitation case law, available at <www.icj-cij.org/icjwww/ipresscom/iprstats.htm> (last visited 15 September 2006).

of title of each State party to the dispute and it it is only hereafter that equity will play a role in the Rockall dispute. This postulate implies that the provisory line in that dispute should be drawn independent of geographical factors. This would have the evident effect that if geological and geomorphologic studies support the idea that if the area is a natural extension of the Faroese continental shelf the provisory line will be drawn in abstraction to the small land territory of the Faroe Islands.

V – Applicable law and principles by an international adjudicative body in a Rockall dispute

It follows in the Court's constitutive concept of delimitation that the applicable methods to find an equitable solution should be consistent with the basis of the entitlement.[70] Accordingly, if the Rockall dispute is brought to an international tribunal one of the features that will characterize the adjudicative body´s findings is that little or no legal importance will be conferred to the small Faroese coastline nor its small landmass.

A. Distinctive methods and equitable principles

The Court has stated that the „legal basis of that which is to be delimited, and of entitlement to it, cannot be other than pertinent to that delimitation."[71] In *Libya v Malta*, when holding that the geological elements were not to be taken into account, the Court argued that there was no reason why a factor „which has no part to play in the establishment of title should be taken into account as a relevant circumstance for the purposes of delimitation."[72] *A fortiori* a factor that is the basis of the title must, to paraphrase the Courts language, „play a role" in the determination of „relevant circumstances for the purposes of delimitation" as delimitation must be done in a „manner consistent with the concepts underlying the attribution of legal title."[73] To put it in the present context this means that if studies reveal that the Rockall Hatton area is irrefutably an extension, in the sense of Article 76 UNCLOS, of the Faroese continental shelf, it can not be excluded that instead of drawing a provisory equidistant line, as undertaken in delimitations within 200 NM, the provisory line will reflect the extent of the Faroese title to that area and possibly in detriment to the claims of the other disputing States.

It is not disputed that raw facts cannot coincidently bring forth a legal solution, like Venus rising from the waves. Facts can only produce law if there is a pre-

70 ICJ, *Libya v Malta*, 46-47, para 61.
71 ICJ, *Libya v Malta*, 30, para 27.
72 Ibid, 35, para 40.
73 ICJ, *Libya v Malta*, 46-47, para 61.

existing legal norm applied to them. By themselves, they are powerless to create law.[74] One can transpose that statement of Weil into ruling debate concerning applicable law and methods for finding equitable solutions in outer continental margin delimitations. It is not the scientific studies on geological and geomorphologic elements in the Rockall area that create the applicable law in that dispute. That contention is based on the fact that there is a pre-existing legal norm which applies to that specific case, namely Article 76, in conjunction with Article 83, of the UNCLOS which embraces a conception of the title to the area beyond 200 NM which is based on geological and geomorphologic elements. Hence the thrust of delimitation disputes settled to date, that is, partial or no effect shall be given to a special or unusual geographical feature which appears to lead to inequity cannot be blindly transposed to delimitations beyond 200 NM, including the Rockall dispute.

It can not be excluded that adjudicative bodies will endeavor a *suum cuiqere tribure* approach in outer continental margin delimitations. This postulate finds its legal basis in the Court's early case law as the continental shelf of any State must „not encroach upon what is the natural prolongation of the territory of another State."[75] Could elements such as the disparity in length of relevant coasts then be recognized as a special circumstance, so as to limit a coastal State title or should this be considered as immaterial for delimitation in the Rockall dispute? It shall be reiterated that it is „only the legal basis of the title to continental shelf rights … which can be taken into account as possibly having consequences" for the claims of States in continental shelf disputes.[76] Weil contends that given that geological and geomorphologic elements are the basis of the entitlement implies that adjudicators will be prevented from adopting the inner 200 NM approach for finding an equitable solution because title commands the delimitation and the „délimitation est fille du titre."[77] It can be held that the abovementioned reinforces the postulate that where other criteria than the distance criterion are the basis of the title, it is difficult to perceive how geographical elements will have an impact for the choice of equitable criteria and methods in order to find an equitable solution, hence the short coastline of the Faroe Islands nor its insular status will not be prejudicial to its claims if the Faroese government provides geological and geomorphologic studies that support the contention that the Rockall Hatton area is an extension of the Faroese continental shelf. Consequently the prognostic for a considerable extension of the Faroese continental

74 P Weil, op cit, n 15, 181.

75 ICJ, *North Sea*, 47, para 85(c).

76 ICJ, *Tunisia v Libya*, 48, para 48 (emphasis added).

77 P Weil *Ecrits de Droit International* (Presses Universitaires de France 2000) 258. Lucchini and Voeckel support the same view: *'[l]e titre est en effet, l'élément fondamental de base. La délimitation ne peut avoir lieu qu'à partir de lui et en s'appuyant sur lui.'* L Luchini and M Voeckel, *Droit de la mer*, t. 2, Délimitation (Pedone 1996) 211.

shelf to comprise important parts of the Rockall and Hatton area, regardless the small and remote situation of the Faroe Islands, could be likely. In other words the ICJ's death warrant in *Libya v Malta*[78] to geological and geomorphologic elements for matters of delimitation within 200 NM will not be applicable law in the Rockall dispute.

B. An equidistant line?

The function of relevant circumstances is to ascertain that the particular facts in a dispute do not render inequitable the line dictated by legal considerations related to title, and do not call for a correction of this line.[79] The role of relevant circumstances is to test the equity of equidistance and it is by taking these circumstances into consideration that the individualizing and corrective function of equity expresses itself.[80] Which principles shall adjudicators apply, in the event that the negotiations in the Rockall dispute are not fructuous and the matter is set to an international adjudicative body? Should the international fora embrace the provisory equidistant line and then alter it according to geographical features? The response to the latter question is, as enshrined in the above section, infirmative.

In *Libya v Malta*, when the Court abandoned the natural prolongation criterion, it thoroughly and recurrently distinguishes the delimitation régime within 200 NM from the delimitation régime beyond 200 NM.[81] Hence the applicable principles for finding an equitable solution will differ the ones utilized in delimitations within 200 NM as the relevance of geographical elements for finding an equitable solution in delimitations were utilized because the basis of the entitlement of the area within 200 NM was itself based on a geographical factor. The Court held in *Libya v Malta* that it is logical „that the choice of criterion and the method which it is to employ … should be made in a manner consistent with the concepts underlying the attribution of legal title."[82] Accordingly, it is „logical" that the methods and applicable equitable principles for finding an equitable solution in the Rockall dispute must be „consistent with the concepts underlying" the title for the area beyond 200 NM. Hence it can be argued, as already observed by certain scholars, that the criteria established in the *North Sea* judgment are regaining importance – though this time for the delimitation beyond 200 NM.[83]

78 This is an expression utilised by P Weil, op cit, n 15, 43.
79 P Weil, op cit, n 15, 209.
80 Anglo-French award, para 195; Diss. Op. Jimenez de Arechaga, Tunisia v Libya, 106, para 24.
81 DA Colson, op cit, n 33, 291.
82 ICJ, *Libya v Malta*, 46-47, para 61 (emphasis added).
83 DA Colson, op cit, n 40, 107.

It is of importance to highlight that the reason for which this paper has undertaken an empirical study on the implication title has for delimitation is that by transposing, by way of analogy, the ICJ's delimitation case law within 200 NM to a potential Rockall dispute would have prejudicial effects to the Faroese claims. The legal reasons which drove the Court to (i) solely confer a diminished effect in *Tunisia v Libya* to Tunisia's Kerkennah Islands despite the fact that the main island of Kerkennah is 69 square miles in area and has a population of 15.000, (ii) the fact that the Maltese island Filfa was disregarded altogether in the *Libya v Malta* case (iii) and that the main island of Malta was only given partial effect due to its small size is of no relevance for adjudicators in the Rockall dispute as the shape of the Faroese archipelago and its small size compared to the other disputing parties will not be a prejudice to find an equitable solution if viable studies reveal that the disputed area is most likely a continuation of the Faroese continental shelf.

The abovementioned statement does not neglect the importance that has to be conferred to the obligation for any adjudicator to find an equitable solution as a delimitation must fulfil two essential conditions in order to be founded in the law: (i) it must be carried out according to a schema connected with the legal nature of the title to the maritime area in question and (ii) it must establish an equitable line, for which purpose it must comply with principles of equity.[84] However it shall be reiterated that a delimitation is not „a matter of finding simply an equitable solution, but an equitable solution derived from the applicable law"[85] and that statement of ICJ in the *Fisheries case* should be advanced by the Faroese government. It is on the basis of a well established case law that it can be contended that the length of a coastal has no independent role in determining the areas over which the coastal State has legal title within 200 NM and was hence not conferred a direct and independent role in determining the legal title to the continental shelf of coastal States. This however, did not exclude considerations of coastal lengths from having an importance in the second stage of the delimitation operation as being a factor related to the proportionality of a final line. In Gulf of Maine the Chamber of the Court held that the „difference in length… is a special circumstance of some weight … justifies a correction of the equidistance line, or of any other line".[86] The Rockall Hatton area is beyond 200 NM and beyond the delimitation principles established by the Court in delimitation disputes within 200 NM hence the reason for which the Faroese government shall not be inhibited in its claims by the small physical size of the archipelago.

84 P Weil, op cit, n 15, 202.
85 ICJ, *Fisheries case*, ICJ Rep, 1951, p. 133.
86 ICJ, *Gulf of Maine*, para 175.

CONCLUSION

It would indeed not be virtuous for the Faroese government if the delimitation principles that prevail in disputes within 200 NM were directly transposed to delimitations beyond 200 NM. In that event it could be deduced that regardless of whether or not the Rockall Hatton area is a natural prolongation of the Faroese continental shelf, the establishment of the Faroese outer continental margin would be reduced on the basis of the prevailing geographical situation, population and political status of the Faroe Islands.

No case law exists which could confirm or refute the undertaken postulate in this manuscript. It is hence almost a truism to state that the points that are set forward in this article are based and constructed on a prospective analysis. The author is however of the conviction that the ICJ has, deliberately, left the debate, concerning applicable law in outer continental margin delimitations, open and it is hence for all parties to argue in accordance with their own convictions and interests. Though it is unquestionable that even though the debate is open it can reasonably and objectively be deduced from the existing case law that the methods and principles for finding an equitable solution in the Rockall dispute will not be based on geographical factors. This opens the possibility for the introduction of a relative notion of equity in outer continental shelf delimitations, ie. one that takes into account, and has as its departing point, the fact that the titles are not concurrent and which implies for the Rockall dispute that as much as possible should be left to the coastal State which demonstrates the best proof that the Article 76 UNCLOS criteria are fulfilled to the Rockall Hatton area.

Jógvan Sundstein, fyrrverandi løgmaður

Uppskot til Stjórnarskipan Føroya[1]

Summary

The Author is a former Law Man (Prime Minister) of the Faroe Islands. His note on the draft Faroese Constitution concerns some central concerns regarding the future Faroese nation building. Law Man Sundstein compares the present drafts to the revised Constitutional Act enacted in the mid 1990s under difficult circumstances, Part III of the draft Constitution is a revision of that document; some if its changes are welcomed, others may seem to be too detailed or warrant further debate. Most attention is given to the Preamble, Part I on national identity, self-determination and other central issues for which the Faroese have not hitherto agreed found a common foundation, and Part II on rights and duties. These parts are welcomed as important building blocks in raising the Faroese Nation to its full potential. The note was written prior to the publication of the final draft that can be seen on the web pager www.ssn.fo

Samandráttur

Høvundin er fyrrverandi Føroya løgmaður. Grein hansara um uppskotið til stjórnarskipan viðvíkur týðandi atlitum til framtíðar tjóðarbygging Føroya. Sundstein løgmaður samanber uppskotini nú við yngru stýrisskipanarlógina samtykta miðskeiðis í nítiárunum undir truplum umstøðum, triði partur av stjórnarskipanaruppskotinum er endurskoðan av stýrisskipanini; summar broytingar eru vælkomnar, aðrar kunnu sigast vera ov nágreiniligar ella krevja drúgari umrøðu. Mest verður gjørt burturúr formæli, fyrsta parti, um tjóðskaparliga samleikan, sjálvsavgerðarrætt og aðrar avgerandi lutir, ið føroyingar ikki higartil hava samst um felags støði undir, og øðrum parti um rættindi og skyldur. Hesir partar eru vælkomnir sum týðandi hornasteinar undir at reisa Føroya Tjóð til fulnar. Greinin er skrivað undan endaliga álitinum, ið er at síggja á www.ssn.fo

1 Henda grein er grundað á *Fyrra flaggdasálit*. Greinin varð skrivað áðrenn endaligt álit (Stjórnarskipan Føroya) varð handað løgmanni 18. desember í 2007. *Fyrra flaggdagsálit* og *Álit* um Stjórnarskipan Føroya kunnu takast niður frá heimasíðuni www.ssn.fo.

Frá grundlóg til stjórnarskipan

Fullveldislandsstýrið setti í síni tíð Grundlógarnevndina. Núverandi landsstýrið endurskipaði síðani nevndina við navninum Stjórnarskipanarnevndin. Báðar nevndirnar hava gjørt eitt drúgt og gott arbeiði, og hevur tann seinra bygt á grundvøllin hjá teirri fyrru.

Eitt fyribils, men ógvuliga grundleggjandi úrslit varð handað løgmanni flaggdagin 2004 og fekk heitið Fyrra Flaggdagsálitið. Álitið umfatar uppskot til stjórnarskipan, viðmerkingar til uppskotið og frágreiðandi greinar av serkønum. Seinri er komin frá Stjórnarskipanarnevndini ein bóklingur við uppskoti til stjórnarskipan, sum byggir á tað frá flaggdagsálitinum. Í hesum bóklingi er eisini uppskotið umsett til enskt mál soleiðis, at fólk, ið ikki skilja føroyskt hava møguleikar at kunna seg um tilfarið og luttaka í einum orðaskifti.

Sum ein, ið hevur stóran áhuga fyri hesum arbeiði og heitt ynski um, at Føroyar veruliga fá staðfest sína egnu grundlóg og stjórnarskipan, og samstundis við eini ávísari erfaring frá føroyskum politikki, skal eg loyva mær at geva eitt ummæli av arbeiðinum og koma við nøkrum viðmerkingum. Í vissan mun fari eg at sitera orðaljóðið í summum lógargreinum.

Formæli

Ein lóg um stjórnarskipan ella grundlóg er ætlað sum ein yvirskipaður karmur fyri eitt land. Nøkur grundleggjandi fyribrigdi verða tikin við um fólksins og landsins identitet, stýriskipanarviðurskifti, rættindi og skyldur fólksins og myndugleikanna. Tað at ásetingarnar eru yvirskipaðar hevur við sær, at vanlig lóggáva um daglig viðurskifti verða niðurfeld í vanliga lóggávu. Stjórnarskipanin skal tryggja, at vanliga lóggávan ikki er í stríð við yvirskipaðu lógina, og samstundis fremur andan í hesi.

Allir partar av stjórnaskipanini hava alstóran týdning, men eg kann ikki sleppa teirri hugsanini, at allar størsta týdningin hevur Formælið og Fyrsti partur. Formælið ljóðar soleiðis:

Vit, fólkið í Føroyum, samtykkja hesa stjórnarskipan okkara. Hon er grundarlag undir stýri okkara og tann fyriskipan, ið skal tryggja frælsi, trygd og trivnað okkara.

Vit bygdu hetta landið í fornari tíð og skipaðu okkum við tingi, lógum og rættindum.

Vit hava hildið ting til hendan dag og skipað okkum eftir fólksins tørvi um landið alt.
Føroyar hava í sáttmála viðurkent felagsskap við onnur lond. Ongin sáttmáli kann tó sløkkja sjálvræði landsins. Landsins egnu lógir og avgerðir eru bert tær, sum framdar eru á rættan hátt í landinum sjálvum eftir fólksins vilja.

Føroyar verða skipaðar eftir nútíðar tørvi á siðaarv okkara við valdsbýti, løgræði og rættindum.

Tað hevur helst tikið arbeiðsbólkunum langa tíð at gjørt hesa orðingina. Men hon er afturfyri vorðin so góð, at hon neyvan kann sigast betur. Hon talar um „*at tryggja frælsi, trygd og trivnað*" og „*at ongin sáttmáli kann sløkkja sjálvræði landsins*".

Fyrsti partur

Í fyrsta parti, greinunum 1-6 verða mest fundamentalu viðurskiftini staðfest.

Grein 1 (1) er soljóðandi: „*Føroyar eru land og føroyingar tjóð*". Hetta er sjálvur hjartatátturin í komandi føroysku stjórnarskipanini. Alt tað, sum kemur aftaná er undirgivið hesum og byggir á hesa „proklamatiónina".

Punktini (2) og (3) í grein 1 um, at Føroyar hava verið knýttar at øðrum londum sambært sáttmálum, og at tær eisini kunnu vera tað í framtíðini broytir ikki punkt (1). Tvørtur í móti ásannar hendan greinin í síni heild, at Føroyar alla tíðina hava verið land, hóast tætta tilknýtið til í fyrsta lagi Noreg, og í øðrum lagi Danmark. Men harafturat verður sagt, at hendan sáttmálastøðan (ríkisrættarliga støðan) kann broytast við lógligari samtykt av Føroya Løgtingi og Føroya fólki.

Grein 6 ásetur, at Føroyar hava (egið) flagg og aðrar ímyndir eftir lóg. Eisini verður sagt, at almenna málið er føroyskt. Hetta er stutt og greið tala, og kann væl neyvan sigast betur.

Í greinunum 2 – 5 verður ásett í greiðum orðum, at stjórnarskipanin byggir á valdsbýti (Balance of Powers), løgræði (Rule of Law) og rættvísi. Natúrliga fylgir síðani, at fremstu stovnar landsins eru: Løgtingið, Landsstýri og Løgrætturin, t.v.s. lóggevandi, útinnandi og dømandi myndugleikarnir. Fólkaræðið (demokratiið) kemur eisini við, tá ið tað stendur, at Føroya fólk skal altíð hava sum mest av ávirkan á landsins stýri. Tað verður nakað meiri útgreinað seinri í skipanini, bæði í grein 4, har sagt verður, at Føroyar eru land við fólkaræði, og at fyrst og fremst Løgtingið skal, men eisini aðrir stovnar kunnu, vera fólkavalt.

Staðfest verður eisini beinleiðis, at allir føroyingar og íbúgvar landsins (fremmandafólk, sum býr í landinum) eiga javnbjóðis rættindi. Tó kann valrættur vera treytaður av heimarætti.
Hesin parturin er grundarlagið fyri stýrislagnum. Fólkaræðið, Lóggavutingið, Útinnandi stjórnarvaldið og Dómstólurin. Eitt, sum ikki er við, er regentviðurskiftini. Tað rokni eg við, er grunda á, at tann sáttmáli við onnur lond, sum vit hava í løtuni, júst er sáttmálin um, at vit hava felags kong við Danmark. Skal hetta broytast, sum tað kann við lógligari viðtøku, er neyðugt at broyta stjórnarskipanina samsvarandi. Fyri mær at síggja, er hetta einasta broyting, sum neyðug er at gera í hesi stjórnarskipan, um Føroyar skipa seg sum fullveldi.

Annar partur – Rættindi

Hesin parturin, sum umfatar allar greinarnar frá 7 til 37, átti kanska at iti rættindi og skyldur. Tí hóast denturin verður lagdur á rættindini hjá borgarunum, so ber tað eisini í sær, at borgarin sjálvandi eisini hevur skyldur mótvegis landinum, samfelagnum, myndugleikunum og næstanum. Og tað kemur eisini fram í summum ásetingum.

Grundleggjandi verður sagt, at stovnar landsins skulu verja fólksins rættindi.

Annars verður tikið fram um:

JØVN RÆTTINDI, herundir:
Javnrættindi, javnstøðu, frammíhjárættindi (ikki ásetast). Øll eru jøvn í metum. Javnrættindi millum kvinnur og menn o.s.fr.

PERSÓNLIG RÆTTINDI, herundir:
Rætt til lív og trygd, deyðarevsing kann ikki ásetast, persónligt frælsi, viðgerð av pesrsónum fyri dómstóli, persónligur bústaður og samskifti skulu verjast fyri almennum inntrivum, ognarrætturin skal verjast fyri ágangi

TRÚARRÆTTINDI
Her er tað fyrst og fremst trúarfrælsið, sum er tryggjað. Øll hava rætt at útinna sína trúgv, kristnitrúgvin kann fáa sømdir frá Løgtinginum, uttan tó at gera seg inn á aðrar fatanir. Fólkakirkjan eigur lut eftir gomlum siði. Hesar ásetingarnar eru, sum eg uppfati tær, ein ásannan av tí siðaarvi og tolsemi, sum er vanliga føroyinginum íborin.

POLITISK RÆTTINDI, herundir:
Valrættur, framsøgufrælsi, felagsfrælsi og savningarfrælsi.
Rættin at velja umboð á ting v.m. hava vit havt leingi, men kortini hevur hann

verið avmarkaður líka upp til okkara tíð, serliga hvat aldursmarkinum viðvíkur. Tað var ikki fyrrenn aftaná krígslok, at valrætturin varð settur niður frá 25 árum til 21 ár. Síðani er hann lækkaður til 18 ár. Tað er helst hóskandi svarandi til myndugleikaaldurin, men er kortini ein avmarking. Møguleikin fyri fólkaatkvøðu eigur at vera tikin við í stjórnarskipanina. Tað, at triðingurin av tingmonnum kann senda eina og hvørja samtykta lóg til fólkaatkvøðu, virkar ógvuliga „frælst". Tað vil vera eitt sindur løgið, um ein og hvør skatta- ella avgjaldslóg varð løgd út til fólkaatkvøðu. Men hesin møguleiki regulerar helst seg sjálvan, og verður neyvan (mis)brúktur sum frálíður.

Undir framsøgufrælsi verður givið fjølmiðlunum serligan rætt at kanna, lýsa og bera fram. Eg haldi tað vera skeivt at geva fjølmiðlunum hendan frammíhjárætt. Sjálvandi hava teir rættin, men ikki framm um øll onnur.

VINNURÆTTINDI, herundir:
Rætt til at arbeiða og til at reka vinnu og rætt til útbúgving til at útinna arbeiðsførleika. Verja skal vera móti avlagan av vinnuligari kapping. Eisini verður her ásett, at tann, sum ikki sleppur fram at egnari vinnu ella løntum arbeiði, eigur at fáa almennan stuðul og styrk.

BÚRÆTTINDI
Hesi rættindi, sum verða rópt Innløgurættindi, Hvørsmansrættur og Óðalsrættindi, skilji eg sum tryggjan av siðbundnum rættindum sum grindapartar, innløga frá sjónum til sín sjálvs, rættin til frítt at ferðast á landi og sjógvi, men uttan ampa fyri fólk, fæ, ogn og náttúru. Eisini skal landsins lóg tryggja, at sum flest sleppa fram at jørð at byggja, velta ella fæhalda.

SOSIAL RÆTTINDI, herundir:
Rættin til skúlagongd, sosiala veitingartrygd og familjutrivnað. Rætturin til skúlagongd hevur eisini við sær skúlaskyldu í barna- og ungdómsárum. Foreldur fá eisini álagt ábyrgdina. Landið skal tryggja øllum sømilig (fíggjarlig) kor og hava umsorgan fyri, at øll fáa pensión. Her verður í stjórnarskipan álagt landinum ein beinleiðis økonomisk (peningalig) skylda. Grein 29 um familjuna er helst at skilja sum ein proklamatión.

FYRISITINGARLIG RÆTTINDI
Hesi umfata Alment innlit, Hoyring og Umboðan. Hesar ásetingar virka nátúrligar í eini nútíðar stjórnarskipan, og hava eisini samanhang við tað, sum er ásett undir politiskum rættindum.

RÆTTARLIG RÆTTINDI
Hesi snúgva seg um rættindini í sambandi við ákæru, revsing og dómsviðgerð. Tað sum stendur her er í samsvar við góða rættarskipan. Eg sakni tó nakað

um rættindi í samband við handtøku. Danska grundlógin hevur til dømis eina orðing um, at eingin kann vera afturhildin í meira enn 24 tímar uttan at koma fyri ein dómara.

Triði partur – Stýrisskipan

Hesin parturin umfatar háttin Føroyar verða stýrdar eftir. Trídeildu uppbýtingina í lóggevandi, útinnandi og dømandi valdi, tað vil siga fyrst og fremst Løgtingi, Landsstýri og Dómstólarnar. Síðani yvirskipaðar reglur fyri valið til og útnevning av persónum til stovnarnar.

Í galdandi stýrisskipanarlóg hava vit slíkar reglur, og tí er hesin partur ein reformering av galdandi skipan. Og tað sum nýggja skipanin broytir kann haldast upp ímóti teirri galdandi. Sum heild haldi eg, at fyriliggjandi uppskot er gott og er eitt gott grundstøði at byggja eina stýrisskipan á. Men tá ein hevur verið við til at viðgera og samtykkja galdandi skipan er kanska okkurt, sum ein heldur, ikki eigur at vera slept. Tí vera nakrar viðmerkingar um sumt av tí, sum eg eri eitt sindur ósamdur um.

Í grein 45 stendur (1) at landsins stovnar varða um tilfeingi landsins. Tað er sjálvandi rætt.

Men síðani stendur (2) „ Er ætlan at vinna úr tilfeingi, tá skal landið krevja gjøld ella tryggja øllum vinnurætt.“ Tað er neyvan møguligt at tryggja øllum íbúgvum landsins vinnurætt til vinnuligt tilfeingi. Fiskatilfeingið er væl tað mest aktuella í løtuni. Hinvegin ber væl heldur ikki til í stjórnarskipanarlóg at áseta ein konkretan skatt sum tilfeingisgjald. Tað skal skattalóggávan gera. Um orðingin um tilfeingið skal vera har, eigur væl at standa „kann“ í staðin fyri „skal“.

Í grein 49 er ásett, at tingið skal veljast fyri fýra ár í senn. Tað er eitt hóskandi áramál, og soleiðis hevur verið í øldir. Síðani stendur í § 49 (2): „Eru tríggir fjórðingar av øllum tingmonnum fyri, kann tingið samtykkja, at val skal vera í ótíð“. Eftir nú galdandi skipan kann vanligur meiriluti í tinginum samtykkja nýval, sum løgmaður skal útskrivað. Men løgmaður kann eisini sjálvur taka avgerð um at útskrivað val í ótíð. Javnvág eigur at vera í myndugleikanum millum útinnandi og lóggevandi valdið. Løgtingið kann seta løgmann frá sambært grein 58 (2). Tí skal løgmaður eisini kunna áleggja tinginum at endurnýggja seg við einum nývali. Annars haldi eg, at ásetingin í §58 (2) um misálit á løgmann eigur at vera vanligur meiriluti og ikki tríggir fjórðingar. Annars meti eg ikki, at tað er rætt, at varaløgmaður av sær sjálvum tekur við. Í prinsippinum situr løgmaður til nýggjur er valdur. Umstøðurnar kunnu tó gera, at hann fer frá beinanvegin.

Í grein 58 (1) verður sagt, at løgmansskeiðið fylgir tingskeiðinum. Hetta eigur at verða umhugsað, tí sjálvt um ein nýggjur løgmaður vanliga verður valdur aftaná eitt løgtingsval, so kann løgmaður eftir galdandi skipan halda fram aftaná eitt val,

um hann ikki hevur meirilutan ímóti sær. Og tað er ikki ein ónátúrlig mannagongd. Eftir viðmerkingunum í fyrra flaggdagsálitinum at døma er ætlanum við hesum ásetingum júst at broyta valdsbýti ella valdsskákanina millum løgmann og tingið. Eg eri ikki heilt samdur við teimum viðmerkingunum, og kundi hugsað mær, at ikki varð farið alt ov langt burtur frá núverandi skipan.

Í grein 59 (3) stendur: „Er løgmaður tingvaldur, skulu landsstýrismenn vera tingmenn". Hendan áseting virkar eitt sindur løgin. Mest sannlíkt er sjálvandi altíð, at løgmaður er ein politiskur leiðari, og sostatt eisini tingvaldur, men um landsstýrismenninir altíð **skulu** vera tingmenn, so kann úrvalið at velja ímillum við hvørt vera eitt sindur avmarkað. At so landsstýrismenn sum oftast eisini eru tingmenn er ein onnur søk. Í núgaldandi stýrisskipanarlóg er ásett, at løgmaður og landsstýrismaður, sum er valdur tingmaður skal siga tingsessin frá sær og lata varamannin koma inn. Tað er ikki kravt í hesum uppskoti til stjórnarskipanarlóg. Hvat, ið er betur, er eitt sindur torført at avgera. Eg haldi ikki, at núverandi skipan hevur prógvað seg at vera betur, síðani hon fekk gildi. Skipanir á hesum øki í øðrum londum eru eisini ymiskar. Í Noregi hava teir okkara núverandi skipan, ein ministari skal siga tingsessin frá sær. Í Bretlandi er tað øvugt (men tað er helst siðvenja), har sleppur ein, sum ikki er valdur í parlamentið ikki at vera ministari. Í Danmark hava teir eina sjálvvljuga skipan. Ein fólkatingslimur, sum verður ministari ger sjálvur av, um hann heldur fram sum tinglimur. Sjálvur haldi eg donsku skipanina vera tað bestu. Men tað, at um løgmaður er tingvaldur ella ikki, skal vera avgerandi fyri, um landsstýrismenn skulu vera tingmenn ella ikki, er helst eitt sindur torført at argumentera fyri.

Grein 71 viðgerð lóggávumannagongd. Fyrst er at siga, at tað virkar løgið, at lógaruppskot bert kunnu leggjast fyri tingið í august og september (frá ólavsøku til mikkjalsmessu). Tingið situr altíð og eigur altíð at kunna taka uppskot til viðgerðar. At arbeiðsgongdin av praktiskum orsøkum verður skipað soleiðis, at tingið hevur ein seinasta framløgudag um várið, eigur at standa í tingskipanini.

Um tað er betri, at tingformaðurin (§71 (5)) heldur enn løgmaður kunnger samtyktar lógir veit eg ikki. Men hetta er væl ein skipan, sum bert er galdandi til vit eina ferð fáa eina sjálvstøðuga regentskipan. Tann møguleikin, at viðkomandi noktar at staðfesta eina samtykta lóg, er neyvan til. Men tað, at ongar lógir – samtyktar í eini tingsetu – ikki fáa gildi fyrrenn nýggja tingsetan byrjar á ólavsøku, skilji eg einki av. Ein slík skipan brennir skjótt saman, sjálvt um undantaksreglan um at tríggir fjórðingar av tingmonnum kunnu framskunda gildiskomuna.hjálpir uppá tað. Ein samtykt lóg eigur at fáa gildi beinanvegin, hon er kunngjørd, ella tá tað er hóskandi eftir innihaldinum í lógini.

Mannagongdin viðvíkjandi árligu fíggjarlógini er útgreinað í §82. Millum annað

stendur, at allar metingar í fíggjarætlanini skulu gerast av óheftum stovnum. Tað virkar eitt sindur ógreitt skulu hetta skal skiljast.

Eisini virkar tað heldur ógreitt, tá sagt verður í § 87, at løgtingið velur tríggjar nevndarlimir í Landsbankan. Er tað tríggjar limir av fleiri, ella skulu bert tríggir nevndarlimir vera? Tað virkar eitt sindur óneyðugt at seta slíkar ásetingar í eina stjórnarskipanarlóg.

Samanumtak

Tað hevur tikið langa tíð at koma so langt, sum nú er komið, við uppskotinum til Stjórnarskipan Føroya. Men sjálvt um glopp hava verið í arbeiðinum, so er væl komið burtur úr. Fyriliggjandi uppskot liggur nú frammi til meiri almenna viðgerð og má sigast at vera eitt valaverk. Tað smæðist ikki burtur millum aðrar grundlógir, tvørturímóti umfatar tað alt, sum hóskar til eitt framkomið samfelag, sum byggir á fólkaveldi, mannarættindi og smidligt stýrislag.

Teir fyrstu partarnar: **Formæli, Stjórnarskipan og Rættindi** eru essentiellir. Tann seinasta partin: **Stýrisskipan** havi eg kanska havt eitt sindur av avvíkjandi viðmerkingum til. Kanska verður farið eitt sindur ov langt í smálutir í onkrum førum, og kanska eri eg eitt sindur bundin av, at eg ikki haldi núverandi stýriskipanarlóg vera so vánaliga, sum viðmerkingarnar í fyrra flaggdagsálitinum vilja gera hana til.

Vónandi verður arbeiðið nú gjørt liðugt í góðari semju. Og vónandi verður endaliga lógin samtykt av sitandi løgtingi og síðani aftur av nýggja løgtinginum aftaná komandi val. Og síðani endaliga samtykt av einum stórum meiriluta á eini fólkaatkvøðu skjótast gjørligt aftan á aðru løgtingssamtyktina.

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