Chapter 6

Between crime and custom: Extra-marital sex in modern Indonesian law[1]

Sebastiaan Pompe

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

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

Something should first be said about the general legislative background. It may be recalled that in colonial times the Netherlands Indies Criminal Code already applied to the entire territory of the Netherlands Indies and, at least in principle, to all its inhabitants, regardless of colour or creed.[2] Admittedly, Indonesian indigenous law (*adat*) was not wholly excluded from the criminal law, but it had an essentially residual function. The plurality in the administration of justice, and the distinction

1 In revising this chapter, the author was able to draw on a useful academic essay on the Balinese perspectives on this issue by Bpk E Rusdi. The author is also grateful to his female respondents for their contributions towards a more profound appreciation of some of the issues. Of course all its flaws, being partly faults of temperament, are wholly the author's responsibility.

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

been punished under *adat* law undermines the state's monopoly of the enforcement of the criminal law, as it recognises the existence of a legal system beside that of the state. This is assuredly not in the interests of the state.

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

Conclusion

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

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