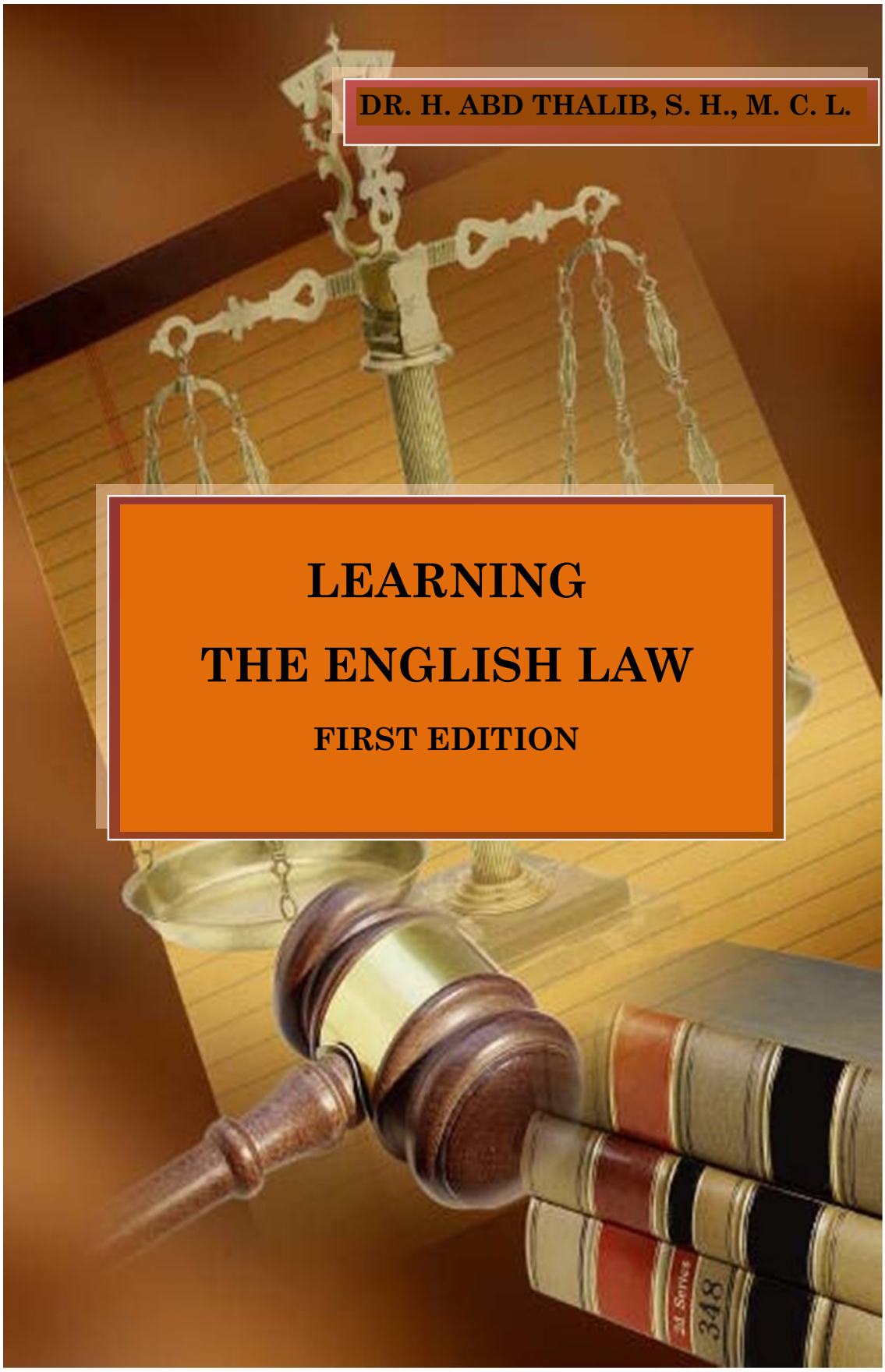
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THE ENGLISH LAW
FIRST EDITION

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PREFACE

The materials in this book are taken from web site, foreign textbooks, Constitution of Indonesia (UUD 1945), Encyclopedia, Indonesian textbooks, others, and intended to give certain of law students a strong foundation in reading law texts in English. Therefore, vocabulary items are particularly those often met in texts about law.

Given the limited hours for studying English law in most law departments in Indonesia, so it is advisable to those students to still continue studying English after completing this book. Further, to encouraged them to do additional work at home.

This book offers a general view of English law reading materials and a brief guide to correct English usage, which are expected to be of use of law students and non-law students as well.

Furthermore, this book consists of Six Chapters i.e: Chapter ONE about Introduction dealing with the legal history; Chapter TWO is about What Is Law; (vary law systems); Chapter THREE is relates to The History and Legal System of Law of Indonesia, describes about some of legal sources applied in Indonesia; Chapter FOUR is about Contract Law; Chapter FIVE is dealing with Sample of Contract and the last; Chapter SIX is about LawTerm – Glosary of Legal Term and Meaning.

Last but not least, I would like to express my sincere gratitude to those and specially my wife Erlida Hanum, S. H., and children: Nur Aisyah Thalib, Iqbal Salim Thalib and, Farhan Thalib, who gave me moral support and encouragement for publishing this book.

Pekanbaru, 01 January 2014

Sincerely Yours,

Dr. H. Abd Thalib, S. H., M. C. L.

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CHAPTER I

INTRODUCTION

A. Overview

Law is a system of rules a society sets to maintain order and protect harm to persons and property. Such systems are ancient, dating back at least to the Code of Hammurabi, written by an ancient Babylonian king around 1760 BC. Today, most countries have tens or hundreds of thousands of pages of laws. They are enforced by the police, supported by the court and prison systems. Laws are written by legislators such as senators or congressmen. In America and many other countries, these rules must uphold and not contradict the Constitution, a document outlining the most basic rules of the country.

Aside from law being a set of rules, the word also refers to the profession practiced by lawyers, who either prosecute or defend a client from an accusation of violating the law. Becoming a lawyer requires attending law school and passing a bar exam. This entitles the lawyer to a license. Only lawyers with a license are allowed to practice.

There are many categories of law. These include contract, property, trust, tort, criminal, constitutional, administrative, and international. Each of these sets the rules for a distinct area of human activity. Without laws, there is lawlessness, which historically has led to a general breakdown in society, sometimes to the point of a near-standstill in the economy. Those that advocate the abolition of all laws are called anarchists.

Depending on one's political orientation, they will generally favor more or less law. At one end of the spectrum are libertarians, who advocate minimal rules or government intervention into the affairs of the public. At the other end are fascists, who seek to create

laws regulating practically everything, generally under the assumption that a disciplined nation will be a powerful nation. Historically, most fascist governments have collapsed.

B. Legal History

Legal history or the history of law is the study of how law has evolved and why it changed. Legal history is closely connected to the development of civilizations and is set in the wider context of social history. Among certain jurists and historians of legal process it has been seen as the recording of the evolution of laws and the technical explanation of how these laws have evolved with the view of better understanding the origins of various legal concepts, some consider it a branch of intellectual history. Twentieth century historians have viewed legal history in a more contextualized manner more in line with the thinking of social historians. They have looked at legal institutions as complex systems of rules, players and symbols and have seen these elements interact with society to change, adapt, resist or promote certain aspects of civil society. Such legal historians have tended to analyze case histories from the parameters of social science inquiry, using statistical methods, analyzing class distinctions among litigants, petitioners and other players in various legal processes. By analyzing case outcomes, transaction costs, number of settled cases they have begun an analysis of legal institutions, practices, procedures and briefs that give us a more complex picture of law and society than the study of jurisprudence, case law and civil codes can achieve.

1. Ancient World

Ancient Egyptian law, dating as far back as 3000 BC, had a civil code that was probably broken into twelve books. It was based on the concept of Ma'at, characterised by tradition, rhetorical speech, social equality and impartiality.[1] By the 22nd century BC, Ur-Nammu, an ancient Sumerian ruler, formulated the first law code, consisting of casuistic statements ("if... then..."). Around 1760 BC, King Hammurabi further developed Babylonian law, by codifying and inscribing it in stone. Hammurabi placed several copies of his law code throughout the kingdom of Babylon as stelae, for the entire public to see; this became known as the Codex Hammurabi. The most intact copy of these stelae was discovered in the 19th

[1] Théodoridés "law", *Encyclopedia of the Archaeology of Ancient Egypt*.
* VerSteeg, *Law in ancient Egypt.*

century by British Assyriologists, and has since been fully transliterated and translated into various languages, including English, German and French. Ancient Athens, the small Greek city-state, was the first society based on broad inclusion of the citizenry, excluding women and the slave class. Athens had no legal science, and Ancient Greek has no word for "law" as an abstract concept,[2] retaining instead the distinction between divine law (*thémis*), human decree (*nomos*) and custom (*díkē*).[3] Yet Ancient Greek law contained major constitutional innovations in the development of democracy.[4]

2. Southern Asia

Ancient India and China represent distinct traditions of law, and had historically independent schools of legal theory and practice. The *Arthashastra*, dating from the 400 BC, and the *Manusmriti* from 100 AD were influential treatises in India, texts that were considered authoritative legal guidance.[5] Manu's central philosophy was tolerance and pluralism, and was cited across South East Asia.[6] But this Hindu tradition, along with Islamic law, was supplanted by the common law when India became part of the British Empire.[7] Malaysia, Brunei, Singapore and Hongkong also adopted the common law.

3. Eastern Asia

The Eastern Asia legal tradition reflects a unique blend of secular and religious influences.[8] Japan was the first country to begin modernizing its legal system along western lines, by importing bits of the French, but mostly the German Civil Code.[9] This partly reflected Germany's status as a rising power in the late nineteenth century. Similarly, traditional Chinese law gave way to westernization towards the final years of the Ch'ing

[2] Kelly (1992), *A Short History of Western Legal Theory*, Oxford University Press, pp. 5-6. ISBN 0 – 19 – 876244 - 5.

[3] J.P. Mallory, "Law", in *Encyclopedia of Indo-European Culture*, 346.

[4] Ober, *The Nature of Athenian Democracy*, 121.

[5] Glenn (2000), *Legal Traditions of the World*, Oxford University Press, p. 255. ISBN 0-19-876575-4.

[6] *Ibid*, 276.

[7] *Ibid,* 273.

[8] *Ibid*, 287.

[9] *Ibid*, 304.

dynasty in the form of six private law codes based mainly on the Japanese model of German law.[10] Today Taiwanese law retains the closest affinity to the codifications from that period, because of the split between Chiang Kai-shek's nationalists, who fled there, and Mao Zedong's communists who won control of the mainland in 1949. The current legal infrastructure in the People's Republic of China was heavily influenced by soviet Socialist law, which essentially inflates administrative law at the expense of private law rights.[11] Today, however, because of rapid industrialization China has been reforming, at least in terms of economic (if not social and political) rights. A new contract code in 1999 represented a turn away from administrative domination.[12] Furthermore, after negotiations lasting fifteen years, in 2001 China joined the World Trade Organization.[13]

4. Islamic Law

One of the major legal systems developed during the Middle Ages was Islamic law and jurisprudence. A number of important legal institutions were developed by Islamic jurists during the classical period of Islamic law and jurisprudence, One such institution was the *Hawala*, an early informal value transfer system, which is mentioned in texts of Islamic jurisprudence as early as the 8th century. *Hawala* itself later influenced the development of the *Aval* in French civil law and the *Avallo* in Italian law.[14]

Many social changes took place under Islam between 610 and 661, including the period of Muhammad's mission and the rule of his four immediate successors who established the Rashidun Caliphate.

According to William Montgomery Watt, for Muhammad, religion was not a private and individual matter but rather "the total response of his personality to the total situation in

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[10] *Ibid,* 305.

[11] *Ibid*, 307.
[12] *Ibid*, 309.
[13] Farah, Paolo (2006), *Five Years of China WTO Membership*, "Five Years of China WTO Membership. EU and US Perspectives about China's Compliance with Transparency Commitments and the Transitional Review Mechanism". *Legal Issues of Economic Integration* **33** (3):pp. 263-304. http://papers.ssm.com/sol3/papers.cfm?abstract_id=916768.

[14] Badr, Gamal Moursi (Spring, 1978). "Islamic Law: Its Relation to Other Legal Systems". *The American Journal of Comparative Law* (American Society of Comparative Law) **26** (2 [Proceedings of an International Conference on Comparative Law, Salt Lake City, Utah, February 24–25, 1977]): 187–198 [196–8]. Doi:10.2307/839667. JSTOR 839667.

which he found himself. He was responding [not only]... to the religious and intellectual aspects of the situation but also the economic, social, and political pressures to which contemporary Mecca was subject."[15]

Bernard Lewis says that there are two important political traditions in Islam - one that views Muhammad as a statement in Medina, and another that views him as a rebel in Mecca. He sees Islam itself as a type of revolution that greatly changed the societies into which the new religion was brought.[16]

Historians generally agree that changes in areas such as social security, family structure, slavery and the rights of women improved on what was present in existing Arab society. For example, according to Lewis, Islam "from the first denounced aristocratic privilege, rejected hierarchy, and adopted a formula of the career open to the talents."[17]

5. European Laws

5.1 Roman Empire

Roman law was heavily influenced by Greek teachings.[18] It forms the bridge to the modern legal world, over the centuries between the rise and decline of the Roman Empire.[19] Roman law, in the days of the Roman republic and Empire, was heavily procedural and there was no professional legal class.[20] Instead a lay person, *iudex*, was chosen to adjudicate. Precedents were not reported, so any case law that developed was disguised and almost

---

[15] Cambridge History of Islam (1970), p.30.

[16] Lewis, Bernard (1998-01-21). "Islamic Revolution". The New York Review of Books. http://www.nybooks.com/articles/4557. See, also: Lewis, Bernard (1984). *The Jews of Islam*. US: Princeton University Press. ISBN 0-691-05419-3.

[17] *Ibid*

[18] Kelly, *note* 2.

[19] As a legal system, Roman law has affected the development of law in most of Western civilization as well as in parts of the Eastern world. It also forms the basis for the law codes of most countries of continental Europe ("Roman law". Encyclopaedia Britannica.).

[20] Gordley-von Mehren (2006), An Introduction to the Comparative Study of Private Law, p. 18. ISBN 978 – 0 - 521 – 68195 – 8.

unrecognised.[21] Each case was to be decided afresh from the laws of the state, which mirrors the (theoretical) unimportance of judges' decisions for future cases in civil law systems today.

During the 6th century AD in the Eastern Roman Empire, the Emperor Justinian codified and consolidated the laws that had existed in Rome so that what remained was one twentieth of the mass of legal texts from before.[22] This became known as the *Corpus Juris Civilis*. As one legal historian wrote, "Justinian consciously looked back to the golden age of Roman law and aimed to restore it to the peak it had reached three centuries before."[23]

5.2 Middle Ages

During the Byzantine Empire the Justinian Code was expanded and remained in force until the Empire fell, though it was never officially introduced to the West. Instead, following the fall of the Western Empire and in former Roman countries, the ruling classes relied on the Theodosian Code to govern natives and Germanic customary law for the Germanic incomers - a system known as folk-right - until the two laws blended together. Since the Roman court system had broken down, legal disputes were adjudicated according to Germanic custom by assemblies of learned lawspeakers in rigid ceremonies and in oral proceedings that relied heavily on testimony. After much of the West was consolidated under Charlemagne, law became centralised so as to strengthen the royal court system, and consequently case law, and abolished folk-right. However, once Charlemagne's kingdom difinitively splintered, Europe became feudalistic, and law was generally not governed above the county, municipal or lordship level, thereby creating a highly decentralised legal culture that favored the development of customary law founded on localized case law. However, in the 11th century, Crusaders, having pillaged the Byzantine Empire, returned with Byzantine legal texts including the Justinian Code, and scholars at the University of Bologna were the first to use them to interpret their own customary laws.[24] Mediæval European legal scholars began researching the Roman law and using its concepts[25] and prepared the way for the partial

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[21] *Ibid*, 21.

[22] Stein (199), *Roman Law in European History*, Cambridge University Press, p. 32. ISBN 0-521-64372-4.
[23] *Ibid*, 35.
[24] *Ibid*, 43.

[25] Roman and Secular Law in the Middle Ages.

resurrection of Roman law as the modern civil law in a large part of the world.[26] There was, however, a great deal of resistance so that civil law rivaled customary law for much of the latter mediæval period. After the Norman conquest of England, which introduced Norman legal concepts into mediæval England, the English King's powerful judges developed a body of precedent that became the common law.[27] In particular, Henry II instituted legal reforms and developed a system of royal courts administered by a small number of judges who lived in Westminster and traveled throughout the kingdom.[28] Henry II also instituted the Assize of Clarendon in 1166, which allowed for jury trials and reduced the number of trials by combat. Louis IX of France also undertook major legal reforms and, inspired by ecclesiastical court procedure, extended Canon-law evidence and inquisitorial-trial systems to the royal courts. Also, judges no longer moved on circuits becoming fixed to their jurisdictions, and jurors were nominated by parties to the legal dispute rather than by the sheriff. In addition, by the 10th century, the Law Merchant, first founded on Scandinavian trade customs, then solidified by the Hanseatic League, took shape so that merchants could trade using familiar standards, rather than the many splintered types of local law. A precursor to modern commercial law, the Law Merchant emphasised the freedom of contract and alienability of property.[29]

5.3 Modern European Law

The two main traditions of modern European law are the codified legal systems of most of continental Europe, and the English tradition based on case law.

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[26] Roman Law.

[27] Makdisi, John A. (June 1999). "The Islamic Origins of the Common Law". North Carolina Law Review 77 (5): 1635–1739 suggests that there may have been some importation of Islamic concepts as well, but others have shown that occasional similarities are more likely coincidence than causal.

[28] Klerman D, Mahoney PG (2007). "Legal Origins". Journal of Comparative Economics 35 (2): 278–293. Doi:10.1016/j.jce.2007.03.007. http://lawweb.usc.edu/users/dklerman/documents/klerman.LegalOrigin.JCompEcon.pdf. Retrieved 2009-09-04.

[29] Sealey-Hooley, Commercial Law, 14

As nationalism grew in the 18th and 19th centuries, *lex mercatoria* was incorporated into countries' local law under new civil codes. Of these, the French Napoleonic Code and the German *Bürgerliches Gesetzbuch* became the most influential. As opposed to English common law, which consists of massive tomes of case law, codes in small books are easy to export and for judges to apply. However, today there are signs that civil and common law are converging. European Union Law is codified in treaties, but develops through the precedent sat down by the European Court of Justice.

6. United States

The United States legal system developed primarily out of the English common law system (with the exception of the state of Lousiana, which continued to follow the French civilian system after being admitted to statehood). Some concepts from Spanish law, such as the prior appropriation doctrine and community property, still persist in some U.S. states, particularly those that were part of the Mexican Cession in 1848.

Under the doctrine of federalism, each state has its own separate court system, and the ability to legislate within areas not reserved to the federal government.

C. Vocabulary:

Jurisprodence : the science or philosophy of law.

Transliterate : in the closest corresponding letters of a different alphabet or language.

Affinity : a spontaneous or natural liking for or attraction to a person or thing.

Denounce : condemn, or accuse publicly.

Adjudicate : a decide judicially regarding to (a claim, etc.).

Disguise : misrepresent, or unrecognizable.

Splintered : break into fragments (a group or party that has broken away from a larger one).

D. Reading Comprehensive

(i) Why Legal history is closely connected to the development of civilizations?

(ii) In general how many legal system in the world.

(iii) Bernard Lewis says Islam itself as a type of revolution that greatly changed the societies into which the new religion was brought. Please explain it.

(iv) What is the different between Europen and British legal system?

(v) What is the concept under the doctrine of federalism in the USA?

CHAPTER II

WHAT IS LAW

A. Legal Term

***L**egal* comes from Latin *lex* "law")[30] has been defined as a "system of rules",[31] as "any system of regulations to govern the conduct of the people of a community, society or nation",[32] as an "interpretive concept" to achieve justice,[33] as an "authority" to mediate people's interests,[34] and even as "the command of a sovereign, backed by the threat of a sanction".[35]

1. Noun

1) any system of regulations to govern the conduct of the people of a community, society or nation, in response to the need for regularity, consistency and justice based upon collective human experience. Custom or conduct governed by the force of the local king were replaced by laws almost as soon as man learned to write. The earliest lawbook was written about 2100 B.C. for Ur-Nammu, king of Ur, a Middle Eastern city-state.

Within three centuries Hammurabi, king of Babylonia, had enumerated laws of private conduct, business and legal precedents, of which 282 articles have survived. The term "eye for an eye" (or the equivalent value) is found there, as is drowning as punishment for adultery by a wife (while a husband could have slave concubines), and unequal treatment of the rich and the poor was codified here first. It took another thousand years before written law codes developed among the Greek city-states (particularly Athens) and Israel. China developed similar rules of conduct, as did Egypt.

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[30] Online Etymology Dictionary, see also http://en.citizendium.org/wiki/Law, and Mirriam-Webster's Online Dictionary

[31] This the definition H. L. A. Hart (1994), gave in his work *The Concept of Law*, 2nd edition (Oxford: Clarendon Press), (Campbell, *The Contribution of Legal Studies*, 184).

[32] Law.com Dictionary, see also *note* 30.

[33] Dworkin, Ronald (1986), *Law's Empire*, (Cambridge, Mass.: Harvard University Press). p. 66, see also *note* 30.

[34] Raz, Joseph (1985). "Authority, Law and Morality," *The Monist* 68: 295-324, pp. 3-36, see also *note* 30.

[35] Bix, Brian H. (2000), "On the Dividing Line Between Natural Law Theory and Legal Positivism,"*Notre Dame Law Review*, vol. 75, pp. 1613–1624, has quoted John Austin (1879), *Lectures on Jurisprudence*, or *The Philosophy of Positive Law*, two vols., R. Campbell (ed.), 4th edition, rev., London: John Murray [Bristol: Thoemmes Press reprint, 2002]. see also *note* 30.

The first law system which has a direct influence on the American legal system was the codification of all classic law ordered by the Roman Emperor Justinian in 528 and completed by 534, becoming the law of the Roman empire. This is known as the Justinian Code, upon which most of the legal systems of most European nations are based to this day.

The principal source of American law is the common law, which had its roots about the same time as Justinian, among Angles, Britons and later Saxons in Britain. William the Conqueror arrived in 1066 and combined the best of this Anglo-Saxon law with Norman law, which resulted in the English common law, much of which was by custom and precedent rather than by written code. The American colonies followed the English Common Law with minor variations, and the four-volume Commentaries on the Laws of England by Sir William Blackstone (completed in 1769) was the legal "bible" for all American frontier lawyers and influenced the development of state codes of law. To a great extent common law has been replaced by written statutes, and a gigantic body of such statutes have been enacted by federal and state legislatures supposedly in response to the greater complexity of modern life.

2) A statute, ordinance or regulation enacted by the legislative branch of a government and signed into law, or in some nations created by decree without any democratic process. This is distinguished from "natural law," which is not based on statute, but on alleged common understanding of what is right and proper (often based on moral and religious precepts as well as common understanding of fairness and justice).

3) A generic term for any body of regulations for conduct, including specialized rules (military law), moral conduct under various religions and for organizations, usually called "bylaws."

2. Adjective

1**:** of or relating to law.

2 *a* **:** deriving authority from or founded on law **:** de jure .

b **:** having a formal status derived from law often without a basis in actual fact **:** titular <a corporation is a *legal* but not a real person>.

c **:** established by law; *especially* **:** statutory.

3 **:** conforming to or permitted by law or established rules

4 **:** recognized or made effective by a court of law as distinguished from a court of equity

5 **:** of, relating to, or having the characteristics of the profession of law or of one of its members.

6 **:** created by the constructions of the law <a *legal* fiction>.

— **le·gal·ly** \-gə-lē\ *adverb*.

Examples of *LEGAL*

1. She has a lot of *legal* problems.
2. Do you know your *legal* rights?
3. The amount of alcohol in his blood exceeded the *legal* limit.
4. What you did was not *legal*.
5. "Is it *legal* to fish in this river?" "Yes, it's perfectly *legal*."
6. The referee said it was a *legal* play.

3 Origin of *LEGAL*

Anglo-French, from Latin *legalis,* from *leg-, lex* law.

First Known Use: circa 1500.

3.1. Synonyms **:** lawful, legit [*slang*], legitimate, licit.

3.2.Antonyms **:** illegal, illegitimate, illicit, lawless, unlawful, wrongful.

3.3. Related Words **:** allowable, authorized, noncriminal, permissible; justifiable, warrantable; constitutional; de jure, regulation, statutory; good, innocent, just, proper, right.

3.4. Near Antonyms **:** bad, corrupt, evil, immoral, iniquitous, reprobate, sinful, wicked, wrong; banned, criminal, forbidden, guilty, impermissible, outlawed, prohibited, unauthorized, unjust; under-the-counter,under-the-table; nonconstitutional, unconstitutional see all synonyms and antonyms.

3.5. Other Legal Terms: actionable, alienable, carceral, chattel, complicity, decedent, larceny, malfeasance, modus operandi.

3.6. Rhymes with *LEGAL*: beagle, eagle, regal, Segal.

3.7. Law is the Science

Laws inform everyday life and society in a wide variety ways, reflected by numerous branches of law. Contract law regulates agreements to exchange goods, services, or anything else of value, so it includes everything from buying a bus ticket to trading swaptions on a derivatives market. Property law defines people's rights and duties towards tangible property, including real estate (= "real property" -- land or buildings) and their other possessions (= "personal property" -- clothes, books, vehicles, and so forth), and intangible property, such as bank accounts and shares of stock.

Tort law provides for compensation when someone or their property is harmed, whether in an automobile accident or by defamation of character. Those are fields of civil law, which deals with disputes between individuals. Offenses against a federal, state, or local community itself are the subject of criminal law, which provides for the government to punish the offender.

Society itself is built upon law. In the United States, Constitutional law governs the federal government and its citizens, providing a framework for making new laws, protecting people's civil rights, and electing political representatives, while administrative law governs the way governmental agencies function. States, counties, municipalities, school boards, water districts, and other local-governmental entities are governed by separate systems of law that define which systems are subordinate to which, so that conflicts between their provisions

can be resolved. International law regulates the affairs between sovereign nation states in everything from trade, to the environment, to military action.

Legal systems around the world elaborate legal rights and responsibilities in different ways. A basic distinction is made between civil law jurisdictions and systems using common law; because its system derives from the common-law system of England, the U.S. is a common law jurisdiction, as are its constituent states, although vestiges of civil law systems survive in states, such as Louisiana and California, with strong roots in French or Spanish legal systems. A few countries still base their law on religious scripts.

Scholars investigate the nature of law through many perspectives, including legal history or philosophy, and social sciences, such as criminology, economics, and sociology. The study of law raises important questions about equality, fairness and justice. This is not always simple. "In its majestic equality," said the author Anatole France in 1894, "the law forbids rich and poor alike to sleep under bridges, beg in the streets and steal loaves of bread."[36] But as the ancient Greek philosopher Aristotle wrote in 350 BC, the rule of law is better than the rule of any individual.[37] The most important institutions for law are the judiciary, the legislature, executive government, its bureaucracy, the military and police, the legal profession and civil society.

B. Legal Subject

Different countries often categorise and name legal subjects in different ways. Sometimes people distinguish "public law" subjects, which relate closely to the state (including constitutional, administrative and criminal law), from "private law" subjects (including contract, tort, property). In civil law systems contract and tort fall under a general law of obligations and trusts law is dealt with under statutory regimes or international

[36] The original French is: "la loi, dans un grand souci d'égalité, interdit aux riches comme aux pauvres de coucher sous les ponts, de mendier dans les rues et de voler du pain" (France, *The Red Lilly*, Chapter VII, see also *note* 30: http://en.citizendium.org/wiki/Law

[37] "No one then denies, that it is necessary that there should be some person to decide those cases which cannot come under the cognisance of a written law: but we say, that it is better to have many than one" Miller, Fred, "Aristotle's Political Theory", *The Stanford Encyclopedia of Philosophy (Spring 2011 Edition)*, Edward N. Zalta (ed.), URL = <http://plato.stanford.edu/archives/spr2011/entries/aristotle-politics/>. (Aristotle, *Politics* 3.16).

conventions. All legal systems deal with the same issues, because the same questions are raised in every society.

To practice law, students usually learn certain core subjects, which for example in England are European Community Law, constitutional and administrative law, criminal law, contract, tort, property law and trusts. However there are many further disciplines, which may be of even greater *practical* importance than the traditional core subjects and outside the EU, students may focus on different agreements under international law, such as NAFTA, SAFTA, CSN, ASEAN or the African Union. The best way to grasp the importance of these subjects is careful individual study.

1. International Law

In a global economy, law is globalising too. International law can refer to three things, public international law, private international law or conflict of laws and the law of supranational organisations.

(i) Public International Law

Public international law concerns the relationships between sovereign nations. Public international law has a special status, because it has no police force, and its courts lack the capacity to punish disobedience.[38] The sources of its development are custom, practice and treaties between sovereign nations. The United Nations, founded under the UN Charter and the Universal Declaration of Human Rights is the most important international organisation, established after the failure of the Versailles Treaty and World War II. Other international agreements, like the Geneva Conventions on the conduct of war and international bodies such

[38] The prevailing manner of enforcing international law is still essentially "self help"; that is the reaction by states to alleged breaches of international obligations by other states . See, Schermers, Henry G.; Blokker, Niels M. (1995). "Supervision and Sactions", *International Institutional Law*. The Hague/London/Boston: Martinus Nijhoff Publisher, in (Robertson, *Crimes against Humanity*, 90; Shermers-Blokker, *International Institutional Law*, pp. 900-901).

as the International Labour Organisation, the World Trade Organisation, or the International Monetary Fund also form a growing part of public international law.

(ii) Conflict of Laws

Conflict of Laws (or "private international law" in civil law countries) concerns which jurisdiction a legal dispute between private parties should be heard in and which jurisdiction's law should be applied. Today businesses are increasingly capable of shifting capital and labour supply chains across borders, as well as trading with overseas businesses. This increases the number of disputes outside a unified legal framework and the enforceability of standard practices. Increasing numbers of businesses opt for commercial arbitration under the New York Convention 1958.

(iii) European Union

European Union [EU][39] **law**[40] is the first and only example of a supranational legal framework. However, given increasing global economic integration, many regional agreements, especially the **Union of South American Nations**[41] abbreviated in its spoken languages as follows: in Dutch (*Unie van Zuid-Amerikaanse Naties*) *UZAN*, in Portuguese (*União de Nações Sul-Americanas*) *UNASUL*, in Spanish (*Unión de Naciones Suramericanas*) *UNASUR*) and

(iv) Association of Southeast Asian Nations

Association of Southeast Asian Nations, abbreviated *ASEAN* [42] are on track to follow the same model. In the EU, sovereign nations have pooled their authority through a system of courts and political institutions. They have the ability to enforce legal norms

[39] Shermers-Blokker, *International Institutional Law*, ibid, p. 943
[40] C-26/62 *Van Gend en Loos v. Nederlanse Administratie Der Belastingen*, Eur-Lex
[41] *Entick v. Carrington* (1765) 19 Howell's State Trials 1030

[42] Locke, John (1689). Two Treatises of Government/The Second Treatise of Government: An Essay Concerning the True Origin, Extent, and End of Civil Government (Chapter , section 124).

against and for member states and citizens, in a way that public international law does not.[43] Therefore, European Union law constitutes "a new legal order of international law" for the mutual social and economic benefit of the member states.[44]

2. Constitutional and Administrative Law

Constitutional and administrative law govern the affairs of the state. Constitutional law concerns both the relationships between the executive, legislature and judiciary and the human rights or civil liberties of individuals against the state. Most jurisdictions, like the United States and France, have a single codified constitution, with a Bill of Rights.

A few, like the United Kingdom, have no such document; in those jurisdictions the constitution is composed of statute, case law and convention. A case named *Entick v. Carrington*[45] illustrates a constitutional principle deriving from the common law. Mr Entick's house was searched and ransacked by Sheriff Carrington. When Mr Entick complained in court, Sheriff Carrington argued that a warrant from a Government minister, the Earl of Halifax was valid authority. However, there was no written statutory provision or court authority. The leading judge, Lord Camden stated that,

> "The great end, for which men entered into society, was to secure their property. That right is preserved sacred and incommunicable in all instances, where it has not been taken away or abridged by some public law for the good of the whole... If no excuse can be found or produced, the silence of the books is an authority against the defendant, and the plaintiff must have judgment."

The fundamental constitutional principle, inspired by John Locke,[46] is that the individual can do anything but that which is forbidden by law, while the state may do nothing but that which is authorised by law. Administrative law is the chief method for people to hold state bodies to account. People can apply for judicial review of actions or decisions by local councils, public services or government ministries, to ensure that they comply with the law.

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[43] Auby, Jean-Bernard (2002). "Administrative Law in France", Administrative Law of the European Union, its Member States and the United States edited by F. A. M. Stroink, René Seerden. Intersentia, 75. ISBN 9-050-95251-8.

[44] "Criminal law". Encyclopaedia Britannica. (2002).

[45] "Procedural law". *Encyclopaedia Britannica*. (2002).

[46] See Locke, *note* 42.

The first specialist administrative court was the *Conseil d'Etat* set up in 1799, as Napoleon assumed power in France.[47]

3. Criminal Law

Criminal law is the body of law that defines criminal offences and the penalties for convicted offenders.[48] Apprehending, charging, and trying suspected offenders is regulated by the law of criminal procedure.[49] In every jurisdiction, a serious crime is committed where two elements are fulfilled. First, the defendant must have the requisite guilty mind to do a criminal act, or *mens rea* (evil mind).

In modern criminal law as recommended by the American Law Institute's Model Penal Code and enacted in many states, mens rea, also known as "mental culpability," has four main forms: purposely (or intentionally as in intentional murder); knowing (as in knowingly possessing narcotics); reckless (as in reckless manslaughter); and criminally negligent (as in criminally negligent manslaughter). Second, the defendant must commit the voluntary criminal act, or *actus reus* (guilty act). Examples of different kinds of crime include murder, assault, fraud or theft.

If relevant facts are alleged and proved, exculpatory defences exist to crimes, such as killing in self defence, or pleading insanity. A famous case in 19th century England, *R v. Dudley and Stephens* [50] involved the defence of "necessity". The *Mignotte*, sailing from Southampton to Sydney, sank. Three crew members, and a cabin boy, were stranded on a raft. They were starving, the cabin boy close to death. So the crew killed and ate the cabin boy. The crew survived and were rescued, but put on trial for murder.

They argued it was necessary to kill the cabin boy to preserve their own lives. Lord Coleridge, expressing immense disapproval, ruled, "to preserve one's life is generally

[47] Auby, Jean-Bernard (2002). "Administrative Law in France", *Administrative Law of the European Union, its Member States and the United States edited by F. A. M. Stroink, René Seerden*. Intersentia, 75. ISBN 9-050-95251-8.

[48] See *note* 45.

[49] *Regina v. Dudley and Stephens* ([1884] 14 QBD 273 DC).

[50] *Regina v. Dudley and Stephens* ([1884] 14 QBD 273 DC).

speaking a duty, but it may be the plainest and the highest duty to sacrifice it." They were sentenced to hang. Yet public opinion, especially among seafarers was outraged and overwhelmingly supportive. In the end, the Crown commuted their sentences to six months.

The offenses that involve criminal law are those construed as being against the state[51] In common law countries the government takes the lead in prosecution and cases are cited as "*The People* v. ..." or "*R.* v. ..." Also, in many countries, lay juries determine the guilt of defendants on points of fact, although they may not change legal rules themselves. Some developed countries still have capital punishment for criminal activity, but the normal punishment for a crime will be imprisonment, fines, or community service. Modern criminal law has been affected considerably by the social sciences, especially with respect to sentencing, legal research, legislation, and rehabilitation.[52]

The idea of a crime that puts one beyond the law of nations begain with the doctrine of *hostis humanis generis*, originally focused on piracy. The idea of a generic crime against humanity was brought out in the International Military Tribunal (Nuremberg); such crimes were assumed to include genocide although that is not rigorously defined.

On the international field 104 countries have signed up to]]Rome Treaty]] creating the International Criminal Court, which was set up to try people for crimes against humanity.[53] Not all countries, especially major powers, have agreed to participate in this court, in part with concerns about sovereignty and in part with concerns that international humanitarian law can be used as a means of political "lawfare".

Note that the International Criminal Court is distinct from the International Court of Justice; the latter is intended to try states, not individuals. Just war theory bears on national actions. There has been somewhat more consensus on specific criminal courts, such as the International Criminal Court for the Former Yugoslavia or the International Criminal Court for Rwanda.

4. Contract

[51] See *note* 45.
[52] See *note* 45.
[53] The States Parties to the Rome Statute, International Criminal Court.

Contract is based on the Latin phrase *pacta sunt servanda* (promises must be kept).[54] Contracts can be simple everyday buying and selling or complex multi-party agreements. They can be made orally (e.g. buying a newspaper) or in writing (e.g signing a contract of employment). Sometimes formalities, such as writing the contract down or having it witnessed, are required for the contract to take effect (e.g. when buying a house).[55]

In common law jurisdictions there are three key elements to the creation of a contract. These are offer and acceptance, consideration and an intention to create legal relations. For example, in *Carlill v. Carbolic Smoke Ball Company* a medical firm advertised that its new wonder drug, the smokeball, would cure people's flu, and if it did not, buyers would get £100.[56] Many people sued for their £100 when the drug did not work. Fearing bankruptcy, Carbolic argued the advert was not to be taken as a serious, legally binding offer.

It was merely an invitation to treat, or mere puff, a gimmick. But the court of appeal held that to a reasonable man Carbolic had made a serious offer. People had given good "consideration" for it by going to the "distinct inconvenience" of using a faulty product. "Read the advertisement how you will, and twist it about as you will," said Lord Justice Lindley, "here is a distinct promise expressed in language which is perfectly unmistakable".[57]

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[54] Wehberg, Hans (October 1959). "Pacta Sunt Servanda". *The American Journal of International Law* **53** (4): 775-786.

[55] e.g. In England, s.52 Law of Property Act 1925

[56] *Carlill v. Carbolic Smoke Ball Company* [1893] 1 QB 256. See a full law report from Justis, Incorporated Council of Law Reporting, Special Issue – 135 Years of The Law Reports and The Weekly Law Reports, Special Issue – 135 Years of The Law Reports and The Weekly Law Reports, [IN THE COURT OF APPEAL.], CARLILL v. CARBOLIC SMOKE BALL COMPANY.

1892 Dec. 6, 7. LINDLEY, BOWEN and A. L. SMITH, L.JJ.

The summary of this case, viz: The defendants, the proprietors of a medical preparation called "The Carbolic Smoke Ball," issued an advertisement in which they offered to pay 100l. to any person who contracted the influenza after having used one of their smoke balls in a specified manner and for a specified period. The plaintiff on the faith of the advertisement bought one of the balls, and used it in the manner and for the period specified, but nevertheless contracted the influenza:-
Held, affirming the decision of Hawkins, J., that the above facts established a contract by the defendants to pay the plaintiff 100*l.* in the event which had happened; that such contract was neither a contract by way of wagering within 8 & 9 Vict. c. 109, nor a policy within 14 Geo. 3, c. 48, s. 2; and that the plaintiff was entitled to recover. For more detailed, see available at: http://www.justis.com/data-coverage/iclr-r9321042.aspx, retrieved, 2012-04-25.

[57] *Ibid.*

"Consideration" means all parties to a contract must exchange something of value to be able to enforce it. Some common law systems, like Australia, are moving away from consideration as a requirement for a contract. The concept of estoppel or *culpa in contrahendo* can be used to create obligations during pre-contractual negotiations.[58] In civil law jurisdictions, consideration is not a requirement for a contract at all.[59] In France, an ordinary contract is said to form simply on the basis of a "meeting of the minds" or a "concurrence of wills". Germany has a special approach to contracts, which ties into property law. Their 'abstraction principle' (*Abstraktionsprinzip*) means that the personal obligation of contract forms separately from the title of property being conferred. When contracts are invalidated for some reason (e.g. a car buyer is so drunk that he lacks legal capacity to contract)[60] the contractual obligation to pay can be invalidated separately from the proprietary title of the car. Unjust enrichment law, rather than contract law, is then used to restore title to the rightful owner.[61]

5. T o r t

Torts, sometimes called delicts, are civil wrongs. To have acted tortiously, one must have breached a duty to another person, or infringed some pre-existing legal right. A simple example might be accidentally hitting someone with a cricket ball[62] Under negligence law, the most common form of tort, the injured party can make a claim against the party responsible for the injury.

The principles of negligence are illustrated by *Donoghue v. Stevenson*.[63] Mrs Donoghue ordered an opaque bottle of ginger beer in a cafe in Paisley. Having consumed half of it, she poured the remainder into a tumbler. The decomposing remains of a dead snail floated out. She fell ill and sued the manufacturer for carelessly allowing the drink to be

[58] Austotel v. Franklins (1989) 16 NSWLR 582

[59] e.g. In Germany, § 311 Abs. II BGB. For more detailed see at: http://dejure.org/gesetze/BGB/311.html, retrieved, 2012-04-25.

[60] See, § 105 Abs. II BGB, Nichtigkeit der Willenserklärung (1) Die Willenserklärung eines Geschäftsunfähigen ist nichtig. (2) Nichtig ist auch eine Willenserklärung, die im Zustand der Bewusstlosigkeit oder vorübergehenden Störung der Geistestätigkeit abgegeben wird.

[61] Smith, Stephen A. (winter 2003). "The Structure of Unjust Enrichment Law: Is Restitution a Right or a Remedy". *Loyola of Los Angeles Law Review* 36 (2): 1037-1062. Retrieved on 2012-05-08.

[62] *Bolton v. Stone* [1951] A.C. 850

[63] *Donoghue v. Stevenson* ([1932] A.C. 532, 1932 S.C. (H.L.) 31, [1932] All ER Rep 1). See the original text of the case in UK Law Online, available at: http://www.leeds.ac.uk/law/hamlyn/donoghue.htm

contaminated. The House of Lords decided that the manufacturer was liable for Mrs Donoghue's illness. Lord Atkin took a distinctly moral approach, and said,

> "The liability for negligence... is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay... The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour."[64]

This became the basis for the four principles of negligence; (1) Mr Stevenson owed Mrs Donoghue a duty of care to provide safe drinks (2) he breached his duty of care (3) the harm would not have occurred but for his breach and (4) his act was the proximate cause, or not too remote a consequence, of her harm[65]

Another example of tort might be a neighbour making excessively loud noises with machinery on his property.[66] Under a nuisance claim the noise could be stopped. Torts can also involve intentional acts, such as assault, battery or trespass. A better known tort is defamation, which occurs, for example, when a newspaper makes unsupportable allegations that damage a politician's reputation.[67] More infamous are economic torts, which form the basis of labour law in some countries by making trade unions liable for strikes,[68] when statute does not provide immunity.[69]

6. Property

Property law governs everything that people call 'theirs'. Real property, sometimes called 'real estate' or a right *in rem*, refers to ownership of land and things attached to it.[70] Personal property, or a right *in personam*, refers to everything else; movable objects, such as

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[64] *Donoghue v. Stevenson* [1932] A.C. 532, 580

[65] *Donoghue v. Stevenson* ([1932] A.C. 532, 1932 S.C. (H.L.) 31, [1932] All ER Rep 1). See *Note*, 63.

[66] *Sturges v. Bridgman* (1879) 11 Ch D 852

[67] e.g. concerning a British politician and the Iraq war, *Galloway v. Telegraph Group Ltd* [2004] EWHC 2786

[68] *Taff Vale Railway Co. v. Amalgamated Society of Railway Servants* [1901] AC 426

[69] in the U.K., Trade Union and Labour Relations (Consolidation) Act 1992; c.f. in the U.S., National Labor Relations Act.

[70] *Hunter v. Canary Wharf Ltd.* (1997) 2 AllER 426.

computers or sandwiches or intangible rights, like stocks and shares or the copyright on a song. The classic civil law approach to property, propounded by Friedrich Carl von Savigny is that it is a right good against the world. This contrasts to an obligation, like a contract or tort, which is a right good between individuals.[71] Preferred in common law jurisdictions is an idea closer to an obligation; that the person who can show the best claim to a piece of property, against any contesting party, is the owner.[72]

The idea of property raises important philosophical and political issues. John Locke famously argued that our "lives, liberties and estates" are our property because we own our bodies and mix our labour with our surroundings.[73] The idea of property is still contentious. French philosopher Pierre Proudhon most famously proclaimed, "property is theft".[74]

Land law forms the basis for most kinds of property law, and is the most complex. It concerns mortgages, rental agreements, licences, convenants, easements and the statutory systems for registration of land. Regulations on the use of personal property fall under intellectual property, company law, trusts and commercial law.

7. Trust and Equity

Equity is a body of rules from England that used to be separate from the "common law". Whilst "law" was administered by judges, the Lord Chancellor was the King's keeper of conscience.[75] He had authority to overrule the judges' law if they were too strict. Equity operates by principles rather than rigid rules. Whereas civil law systems, and the common law, do not allow two people to split ownership of one piece of property, equity allows this through the trust instrument. 'Trustees' control property, whereas the 'beneficial' (or

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[71]Savigny, Friedrich Carl von (1803). "Zu welcher Classe von Rechten gehört der Besitz?", *Das Recht des Besitzes*. (German).

[72] P. Matthews (Autumn 1995). "The Man of Property". *Medical Law Review,* **3**: pp. 251-274.

[73]Locke, John (1689), *Two Treatises of Government/The Second Treatise of Government: An Essay Concerning the True Origin, Extent, and End of Civil Government*

[74] Proudhon, Pierre (1840). "Chapter I (Method Pursued in this Book - The Idea of a Revolution)", *What is Property? or, an Inquiry into the Principle of Right and of Government (original French: Qu'est-ce que la propriété? ou Recherche sur le principe du Droit et du Gouvernment)*.

[75]McGhee, John (2000). *Snell's Equity*. London: Sweet and Maxwell. ISBN 0421852607.

'equitable') ownership of trust property is held by people known as 'beneficiaries'. Trustees owe duties to their beneficiaries to take good care of the trust.[76]

For example, in the early case of *Keech v. Sandford*[77] a child had inherited the lease on a market in Romford, London. Mr Sandford was entrusted to look after this property for the benefit of the child, until he was an adult. But the lease on the market was about to expire, and the landlord had (apparently) told Mr Sandford that he would not renew it for the child. But the landlord was happy, instead, to give the opportunity to Mr Sandford. Later on, the grown up child, Mr Keech sued his old trustee for the profit that he had made by getting the market's lease, because it represented a conflict of interest. The Lord Chancellor, Lord King, agreed and ordered Mr Sandford should disgorge his profits. He wrote,

> "I very well see, if a trustee, on the refusal to renew, might have a lease to himself few trust-estates would be renewed... This may seem very hard, that the trustee is the only person of all mankind who might not have the lease; but it is very proper that the rule should be strictly pursued and not at all relaxed."[78]

Of course, Lord King LC was worried that trustees might exploit money they were meant to look after for their own benefit instead of doing their job. Just recently there had been a stock market crash, involving abuse of trusts. Strict duties like this made their way into company law and were applied to directors and chief executive officers.

Another example of a duty might be for the trustee to invest the property wisely or sell it.[79] This is especially the case for pension funds, the most widely used type of trust, where banks are trustees for people's savings until their retirement. But trusts can also be set up for charitable purposes, famous examples being the British Museum or the Rockefeller Foundation.

C. Vocabulary

1. *pacta sunt servanda*: each concensus of both parties as a rule and binding (promises must be kept).

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[76] See, c.f. *Bristol and West Building Society v. Mothew* [1998] Ch 1

[77] See, *Keech v. Sandford* (1726) Sel Cas. Ch.61

[78] *Ibid.*

[79] *Nestle v. National Westminster Bank plc* [1993] 1 WLR 1260

2. Mortgage : a conveyance of property by a debtor to a creditor as security for a debt.

3. License: a permit from an authority to own or use something.

4. Easements: a right of way or a similar right over another's land.

5. Assault : a violent physical or verbal attack.

D. Reading Comprehensive

(i) What a basic distinction is made between civil law jurisdictions and systems using common law?

(ii) Scholars investigate the nature of law through many perspectives, what does it mean?

(iii) In common law jurisdictions there are three key elements to the creation of a contract.

(v) What do you know about property, particularly in broad meaning?

CHAPTER III

THE HISTORY AND LEGAL SYSTEM

OF LAW OF INDONESIA

A. History and Origin

Law of Indonesia is consists of "written and unwritten law.

1. Written Law

Law of Indonesia is based on a civil law system, intermixed with customary law and the Roman Dutch law. Before the Dutch colonization in the sixteenth century, indigenous kingdoms ruled the archipelago independently with their own custom laws, known as *adat*. Foreign influences from India, China and Arabia have not only affected the culture, but also weighed in the customary *adat* laws. Aceh in Sumatra, for instances, observes their own sharia law, while Toraja ethnic group in Sulawesi are still following their animistic customary law.

Dutch presence and subsequent occupation of Indonesia for 350 years has left a legacy of Dutch colonial law, largely in the Indonesia civil code. Following the independence in 1945, Indonesia began to form its own modern Indonesia law, not developing from scratch but with some modifications of the precepts of existing laws. As a result, these three components *(adat*, Dutch-Roman law and modern Indonesia law) still co-exist in the current Indonesia laws.

B. Legal System

1. Written Law

Indonesia legislation come in different forms. The following official hierarchy of Indonesia legislation (from top to bottom) is enumerated under Law No. 10 Year 2004 on the Formulation of Laws and Regulations:

1 1945 Constitution (*Undang-Undang Dasar 1945* or UUD'45)

2 Law (*Undang-Undang* or UU) and Government Regulation in Lieu of Law (*Peraturan Pemerintah Pengganti Undang-Undang* or Perpu)

3 Government Regulation (*Peraturan Pemerintah* or PP)

4 Presidential Regulation (*Peraturan Presiden* or Perpres)

5 Regional Regulation (*Peraturan Daerah* or Perda)

In practice, there are also Presidential Instruction (*Instruksi Presiden* or Inpres), Ministerial Decree (*Keputusan Menteri* or Kepmen) and Circulation Letters (*Surat Edaran*), which sometimes conflicts with each other. Once legislative products are promulgated, the State Gazette of the Republic of Indonesia (*Lembaran Negara Republik Indonesia*) is issued from the State Secretariat. Sometimes Elucidation (*Penjelasan*) accompanied some legislations in a Supplement of the State Gazette. The Government of Indonesia also produces State Reports (*Berita Negara*) to publish government and public notices.

(1.1) 1945 Constitution

The Constitution of Indonesia 1945, UUD '45) is the basis for the government of the Indonesia.

The constitution was written in June, July and August 1945, when Indonesia was emerging from Japanese control at the end of World War II. It was abrogated by the Federal Constitution of 1949 and the Provisional Constitution of 1950, but restored on 5 July 1959.

The 1945 Constitution then set forth the Pancasila, the five nationalist principles devised by Sukarno, **a** (Indonesian: *Undang-Undang Dasar Republik Indon*

as the embodiment of basic principles of an independent Indonesian state. It provides for a limited separation of executive, legislative, and judicial powers. The governmental system has been described as "presidential with parliamentary characteristics". Following the Indonesian 1998 Upheaval and the resignation of President Suharto, several political reforms were set in motion, via amendments to the Constitution of Indonesia, which resulted in changes to all branches of government as well as additional human rights provisions.

The 1945 Constitution is the highest legal authority in Indonesia, of which executive, legislative and judicial branches of government must defer to it. The constitution was written in July and August 1945, when Indonesia was emerging from Japanese control at the end of World War II. It was abrogated by the Federal Constitution of 1949 and the Provisional Constitution of 1950, but restored after the President Sukarno's decree on July 5, 1959. During the 32 years of Suharto's administration, the constitution had never been amended. Suharto refused to countenance any changes to the constitution and the People's Consultative Assembly passed a law in 1985 requiring national referendum for the constitution amendments.

After the Suharto's fall in 1998, the People Consultative Assembly amended the constitution four times in 1999, 2000, 2001 and 2002. Important amendments include the direct presidential election by the people (third amendment) and the presidential office term from unlimited to only two (first amendment), the regulation of which had made the possibility for Suharto's administration held in office for more than five terms. After the last amendment, the People's Representative Council gained more power to control the executive branch, the Regional Representatives Council was established, regional government was recognized in a section and an expanded section about civil rights among other changes. Currently, the constitution consists of 16 sections and 37 articles.

(1.2) History of the Constitution

The Japanese invaded the Netherlands East Indies (Indonesia) in 1942, defeated the Dutch colonial regime, and occupied it for the duration of the Second World War.

Indonesia then fell under the jurisdiction of the Japanese Southern Expeditionary Army (Nanpo Gun), based in Saigon, Vietnam. The Japanese divided Indonesian territory into three military government regions, based on the largest islands: "Sumatra" was under the Japanese 25th Army, "Java" under the Japanese 16th Army and "East Indonesia" (the eastern island), including part of "Borneo" (Sarawak and Sabah under Japanese 38th Army)was under the Imperial Japanese Navy. As the Japanese military position became increasingly untenable, especially after their defeat at the Battle of Leyte Gulf in October 1944, more and more Indonesians were appointed to official positions in the occupation.

On 29 April 1945, the 16th Army established Badan Penyelidik Usaha-usaha Persiapan Kemerdekaan Indonesia (BPUPKI; Indonesian: Agency for Investigating Efforts for the Preparation of Indonesian Independence), for Java. The 25th Army later established a BPUPKI for Sumatra. No such organisation existed for the remainder of Indonesia.

The BPUPKI in Java, when established, consisted of 62 members, but there were 68 in the second session. It was chaired by Dr Radjiman Wedyodiningrat (1879–1951). The future president Sukarno and vice-president Mohammad Hatta were among its members. They met in the building that had been used by the Dutch colonial quasi-parliament, the Volksraad ("People's Council") in central Jakarta. It held two sessions, 29 May-1 June and 10–17 July 1945. The first session discussed general matters, including the philosophy of the state for future independent Indonesia, *Pancasila*. the philosophy was formulated by nine members of BPUPKI: Soekarno, Hatta, Yamin, Maramis, Soebardjo, Wahid Hasjim, Muzakkir, Agus Salim and Abikoesno.The outcome was something of a compromise, and included an obligation for Muslims to follow syari'ah Islamic law, the so-called Jakarta Charter. The second session produced a provisional constitution made up of 37 articles, 4 transitory provision and 2 additional provision. The nation would be a unitary state and a republic.

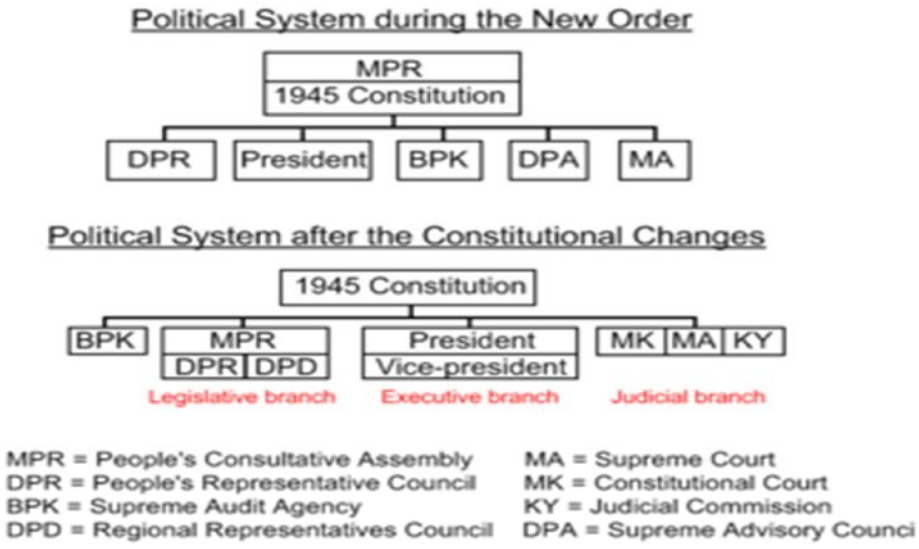
On 26 July 1945, the Allies called for the unconditional surrender of Japan in the Potsdam Declaration. The Japanese authorities, realizing they would probably lose the war, began to make firm plans for Indonesian independence, more to spite the Dutch than anything else.On 6 August, an atomic bomb was dropped on Hiroshima. On 7 August, the *Nanpo Gun* headquarters announced that an Indonesian leader could enact a body called the *Panitia Persiapan Kemerdekaan Indonesia* (PPKI; "Preparatory Committee for Indonesian Independence"). The dropping of a second atomic bomb, on Nagasaki, on 9 August prompted the Japanese to surrender unconditionally on 15 August 1945. Sukarno and Hatta declared independence on 17 August 1945, and the PPKI met the following day.

In the meeting chaired by Sukarno, the 27 members, including Hatta, Supomo, Wachid Hasjim, Sam Ratulangi and Subardjo, began to discuss the proposed constitution article by article. The Committee made some fundamental changes, including the removal 7 words from the text of Jakarta Charter which became the preambule of the constitution, and the clause stating that the president must be a Muslim. The historical compromise was made possible in part by the influence of Mohamad Hatta and Tengku Mohamad Hasan. The Committee then officially adopted the Constitution.

(1.3) Other Constitutions

The 1945 Constitution (usually referred to by the Indonesian acronym UUD'45) remained in force until it was replaced by the Federal Constitution on December 27, 1949. This was in turn replaced by the Provisional Constitution on 17 August 1950. In 1955 elections were held for the House of Representatives as well as for a Constitutional Assembly (Indonesia Konstituante) to draw up a definitive constitution. However, this became bogged down in disputes between nationalists and Islamists, primarily over the role of Islam in Indonesia. Sukarno became increasingly disillusioned by this stagnation and with the support of the military, who saw a much greater constitutional role for themselves, began to push for a return to the 1945 Constitution. This was put to the vote on 30 May 1 June and 2 June 1959, but the motion failed to gain the required two-thirds majority. Finally, on 5 July 1959 President Sukarno issued a decree dissolving the assembly and returning to the 1945 Constitution.

(1.4) Constitutional Amendments



Suharto, who officially became president in 1968, refused to countenance any changes to the Constitution despite the fact that even Sukarno had viewed it as a provisional document. In 1983, the People's Consultative Assembly passed a decree stipulating the need for a nationwide referendum to be held before any amendments were made to the Constitution. This led to a 1985 law requiring such a referendum to have a 90% turnout and for any changes to be approved by a 90% vote. Then in 1997, the dissident Sri-Bintang Pamungkas and two colleagues were arrested and jailed for publishing a proposed modified version of the 1945 Constitution.

With the fall of Suharto and the New Order regime in 1998, the 1983 decree and 1985 law were rescinded and the way was clear to amend the Constitution to make it more democratic. This was done in four stages at sessions of the People's Consultative Assembly in 1999, 2000, 2001 and 2002. As a result, the original Constitution has grown from 37 articles to 73, of which only 11% remain unchanged from the original constitution.

Limiting presidents to two terms of office

Establishing a Regional Representative Council (DPD), which together with the People's Representative Council (DPR) makes up an entirely elected People's Consultative Assembly.

Purifying and empowering presidential system of government, instead of a semi presidential one.

Stipulating democratic, direct elections for the president, instead of the president being elected by the People's Consultative Assembly

Reorganizing the mechanism of horizontal relation among state organs, instead of giving the highest constitutional position to the People's Assembly.

Abolishing the Supreme Advisory Council

Mandating direct, free and secret elections for the House of Representatives and regional legislatures

Establishing a Constitutional Court for guarding and defending the constitutional system as set forth in the constitution.

Establishing a Judicial Commission

The addition of ten entirely new articles concerning human rights.

Among the above changes, the establishment of Constitutional Court is regarded as a successful innovation in Indonesia constitutional system. The court was established in 2003 by 9 justices head by Professor Jimly Asshiddiqie,a prominent scholar from the University of Indonesia. There are five jurisdictions of the court, i.e. (i) constitutional review of law, (ii) disputes of constitutional jurisdiction between state institutions, (iii) disputes on electoral results, (iv) dissolution of political parties,and (v) impeachment of the president/vice president. The other icon of success in Indonesian reform is the

establishment of the Corruption Eradication Commission which independently fights against corruption and grafts. Corruption in Indonesia is regarded an extraordinary crime.

(1.5) The Legal Standing of the Constitution

The 1945 Constitution has the highest legal authority in the nation's system of government. The executive, legislative and judicial branches of government must defer to it. The Constitution was originally officially enacted on 18 August 1945. The attached Elucidation, drawn up by Prof. Raden Soepomo (1903–1958), Indonesia's first justice minister, was officially declared to be a part of the Constitution on 5 July 1959. The Preamble, the body of the Constitution and the Elucidation were all reaffirmed as inseparable parts of the Constitution in 1959, and then again in Provisional MPR Decree No. XX/MPRS/1966. However, since the amendments, the Elucidation has not been updated, and still refers to the original document, including parts that have been removed, such as Chapter IV. During the sessions in the People's Assembly, all the ideas setforth in the Elucidation was transformed become articles in the new amendments. Then, final article of the amended Constitution states that the Constitution consists of the Preamble and the articles.

(1.6) Content of the Constitution

Preamble

The preamble to the 1945 Constitution of Indonesia contains the Pancasila state philosophy.

Chapter I: Form of state and sovereignty

States that Indonesia is a unitary republic based on law with sovereignty in the hands of the people and exercised through laws.

Chapter II: The People's Consultative Assembly

States that the People's Consultative Assembly is made up of the members of the People's Representative Council and the Regional Representatives Council, all of who are elected via general election. The People's Consultative Assembly changes and passes laws, appoints the president, and can only dismiss the president or vice-president during their terms of office according to law.

Chapter III: Executive powers of the state

Outlines the powers of the president. States the requirements for the president and vice president. Limits the president and vice-president to two terms of office and states that they be elected in a general election. Specifies the impeachment procedure. Includes the wording of the presidential and vice-presidential oath and promise of office.

Chapter V: Ministers of state

Four short articles giving the cabinet a constitutional basis. The president appoints ministers.

Chapter VI: Local government

Explains how Indonesia is divided into provinces, regencies and cities, each with its own administration chosen by general election. The leaders of these administrations are "chosen democratically". Autonomy is applied as widely as possible. The state recognizes the special nature of certain regions.

Chapter VII: The House of Representatives

The members of the House are elected by general election. The House has the right to pass laws, and has legislative, budgeting and oversight functions. It has the right to request government statements and to put forward opinions.

Chapter VII-A: The Regional Representatives Council

An equal number of members is chosen from each province via a general election. The Council can put forward to the House of Representatives bills related to regional issues. It also advises the House on matters concerning taxes, education and religion.

Chapter VII-B: General elections

See also: Elections in Indonesia

General elections to elect the members of the House of Representatives, the Regional Representatives Council , the president and vice-president as well as the

regional legislatures are free, secret, honest and fair and are held every five years. Candidates for the House of Representatives and regional legislatures represent political parties: those for the Regional Representatives Council are individuals.

Chapter VIII: Finance

States that the president puts forward the annual state budget for consideration by the House of Representatives.

Chapter VIII-A: The supreme audit agency

Explains that this exists to oversee the management of state funds. (Cf. Supreme Audit Institution)

Chapter IX: Judicial power

Affirms the independence of the judiciary. Explains the role and position of the Supreme Court as well as the role of the judicial commission. Also states the role of the Constitutional Court.

Chapter IX-A: Geographical extent of the nation

States that the nation is an archipelago whose borders and rights are laid down by law.

Chapter X: Citizens and residents

Defines citizens and residents and states that all citizens are equal before the law. Details the human rights guaranteed to all, including:

the right of children to grow up free of violence and discrimination

the right of all to legal ertainty

the right to religious freedom

the right to choose education, work and citizenship as well as the right to choose where to live

the right of assembly, association and expression of opinion

the right to be free from torture

It also states that the rights not to be tortured, to have freedom of thought and conscience, of religion, to not be enslaved, to be recognized as an individual before the law and to not be charged under retroactive legislation cannot be revoked under any circumstances. Furthermore, every person has the right to freedom from discrimination on any grounds whatsoever.

Finally, every person is obliged to respect the rights of others.

Chapter XI: Religion

See also: Religion in Indonesia

The nation is based on belief in God, but the state guarantees religious freedom for all.

Chapter XII: National defence

See also: Military of Indonesia

States that all citizens have an obligation and right to participate in the defence of the nation. Outlines the structure and roles of the armed forces and the police.

Chapter XIII: Education and Culture

See also: Education in Indonesia

States that every citizen has the right to an education. Also obliges the government to allocate 20 percent of the state budget to education.

Chapter XIV: The national economy and social welfare

See also: Economy of Indonesia

States that major means of production are to be controlled by the state. Also states that the state takes care of the poor.

Chapter XV: The flag, language, coat of arms, and the national anthem

Specifies the flag, official language, coat of arms, and national anthem of Indonesia.

Chapter XVI: Amendment of the constitution

Lays down the procedures for proposing changes and amending the Constitution. Two-thirds of the members of the People's Consultative Assembly must be present: any proposed amendment requires a simple majority of the entire People's Consultative Assembly membership. The form of the unitary state cannot be changed.

Transitional provisions

States that laws and bodies continue to exist until new ones are specified in this constitution. Calls for the establishment of a Constitutional court before 17 August 2003

Additional provisions

Tasks the People's Consultative Assembly with re-examining decrees passed by it and its predecessors for their validity to be determined in the 2003 general session.

(1.2) Law (Act or UU)

Undang-Undang or simply meaning that Laws can only be established by the People's Representative Council or DPR. The executive branch (the President) can propose a bill (Indonesian: *Rancangan Undang-Undang* or RUU) to DPR. During the process of establishing a bill into a law, DPR will create a small task group to discuss the bill with the corresponding ministries. When a joined agreement has been reached, then the President shall endorse a bill into law. However, even if the President refuses to endorse a bill that has reached joined agreement, the bill is automatically in thirty days enacted as law and be promulgated as such. When an agreement cannot be reached to enact a bill into law, the bill cannot be proposed again during the current term of the legislative members.

Undang-Undang is the highest law in the hierarchy of *peraturan perundang-undangan.* It can determine applicable penal, civil, or administrative sanctions. It is also a form of law that can immediately apply to and bind the public. Every *Undang-Undang* is enacted through three phases, a) preparation of a bill, essentially the researching and drafting of the bill, b) elaboration and approval of the bill, essentially the discussions held between the DPR and the President to reach a consensus, and c) the enactment. After a bill is passed by both the DPR and agreed by the President, the President must sign it. To ensure the President's power to veto a bill is not absolute the MPR amended the Constitution to stipulate that after 30 days should the President fail to sign the bill, the bill would self-enact and automatically become Law.

There are a number of ambiguities in society about several of the key concepts related to the process leading to enactment of *Undang-Undang*. First, is the ambiguity related to the concept of *Undang*-Undang in a *formal sense* and *Undang*-Undang in a *material sense*. Those two terms are based on the distinction between *wet in formele zin* dan *wet in materiele zin* that exists in the Netherlands. Traditionally, the common misconception that many people held was that the terms refer to two separate kinds of *Undang-Undang.* However, this misconception is rare nowadays, as people see *Undang*-Undang in the *formal sense* that is any law that is named a *Undang-Undang,* while *Undang*-Undang in the *material sense* are any kind of laws that bind the public. In other words, there is only one kind of *Undang-Undang*.

Second, is the ambiguity with respect to the concept of *Undang-Undang Pokok* and *Undang-Undang Payung*. Many people believed that *Undang-Undang Pokok* could be used as the mandatory source of law for another *Undang-Undang.* However, that conception is not popular currently, because many people have accepted the point of view that all *Undang-Undang,* regardless of name, are at the same level of the hierarchy. Therefore, an *Undang Undang* can not act as the mandatory source of law for another *Undang-Undang.*

(1.3) Acts / Government Regulation in Lieu of Act

The Law (Undang-Undang) is drafted by the DPR with the President's consent. In the event of emergency, the President can enact immediately a Government Regulation in Lieu of Law Peraturan Pemerintah Pengganti Undang-Undang or Perpu), which shall be subject to an immediate review by the DPR. Both are also subject to constitutional review through the Constitutional Court review process.

PERPU is a form of law that exists at the same level of hierarchy as *Undang-Undang.* A *PERPU* is issued by the President and is immediately in force. The basic requirement that must be satisfied before a *PERPU* is issued is that the legal matter that is to be regulated is an emergency, the need is immediate, and cannot be legislated or regulated in any other way. A *PERPU* once enacted is only applicable for a definite period of time; namely, a *PERPU* must be ratified by the DPR in their first sitting after the enactment of the *PERPU.* Should the DPR ratify the *PERPU* then it will be reenacted as an *Undang-Undang.* In contrast, where the DPR rejects the *PERPU* then it is void at law and the regulatory framework returns to the status quo that existed prior to the enactment of the *PERPU*.

(1.4) Government Regulation

Government Regulation (Peraturan Pemerintah or PP) is enacted by the President to implement Laws. *Peraturan Pemerintah* functions as a law that is used to implement an *Undang-Undang.* It can only be made if it relates to a particular *Undang-Undang*. Nevertheless, a *Peraturan Pemerintah* can be made even if it does not mention explicitly the *Undang-Undang* to which it relates. A Government Regulation may only contain sanctioning provisions if the Law to which it relates also contains those same sanctions.

(1.5) Presidential Decree

Presidential Regulation (Peraturan Presiden of Perpres) is enacted by the President within his authority. It used be referred to as Presidential Decree (Keputusan Presiden or Keppres). Now, Presidential Decree is referred to as presidential administrative act as opposed to Presidential Regulation that has regulatory and public policy effect.

Generally, *Keputusan Presiden* is issued in one of two forms; namely, a declaration or a public rule. That second form of *Keputusan Presiden* is considered as a *peraturan perundangundangan*. In assisting the President, Ministers can also enact regulations called *Keputusan Menteri*, and only those *Keputusan Menteri* that function as public rules can be considered to be *peraturan perundang-undangan*. There are three Ministerial levels; Ministers of a Department (*Menteri Departemen*), State Ministers (*Menteri Negara*), and Coordinating Minister (*Menteri Koordinator*). State Ministers and Coordinating Minister cannot issue *Keputusan Menteri* that bind the public, they can only enact internal rules and regulations.

(1.6) Regional Regulation

The Regional Regulation (Peraturan Daerah or Perda) is drafted by the DPRD with the head of the regional's consent.

Peraturan Daerah is enacted by the Head of the Regional/Local Government (the "Governor", the "Regent", or the "Mayor") upon approval of the DPRD. This law regulates matters related to regional autonomy or as the implementation provisions for higher laws. *Peraturan Daerah* can determine penal sanctions up to six months in prison or fines to a maximum of IDR 5 million.

In order to facilitate implementation of the *Peraturan Daerah* the Head of the Regional/Local Government can pass a *Keputusan Kepala Daerah* (Head of the Regional/Local Government Decision). *Peraturan Daerah* and *Keputusan Kepala Daerah* that regulate and bind the public must be published in the *Lembaran Daerah* (Regional/Local Gazette).

2. Unwritten Law

The term "unwritten laws" here refers to laws not promulgated by a state authority. Article I Paragraph 2 of TAP MPR No. III/MPR/2000 on Sources of Law and Hierarchy of Laws and Regulations stipulates that sources of law consist of written laws and unwritten laws.

(1). Custom

Customs (*kebiasaan*) or convention which can be classified as a source of law is customary law which is differentiated from ordinary customs. Customary laws (hereinafter "**custom**") encompass rules that even though not enacted by the state or its subordinate authority are applicable as law. There are two requirements for custom to have the binding power of law:

a) There has to be similar conduct in a similar condition to which society has always abided to.

b) There has to be *Opinio juris sive necessitatis* over such conduct, meaning a belief in the society that such conduct is binding as law ("**legal belief**"). Legal belief can come from the substance and/or the form of the custom.

According to Article 15 of *Algemene Bepalingen Van Wetgeving voor Indonesie* (AB) which is General Regulation for Indonesia inherited from the Dutch and still prevails by virtue of Article I of Transitional Rule of the 1945 Constitution, customs has a legal force if a law refers to such customs to be applied. A good example is Article 1339 of the Indonesian Civil Code (*Kitab Undang – Undang Hukum Perdata*) which states that agreements are binding not only for matters stipulated therein, but also for any matters which pursuant to the nature of the agreements is subject to customs.

(2). Adat Law

Adat Law (*hukum adat* or *adat recht*) is a set of local and traditional laws and dispute resolution systems in many parts of Indonesia. Hence, there is no united Adat Law for the whole Indonesian people. A Dutch legal scholar, Van Vollenhoven classified Adat Law into 23 subdivisions based on a combination of region and ethnicity. Its sources are unwritten laws evolving from and maintained by legal awareness of the people.

Adat law is in principle also part of custom, but it is distinguished due to its close attachment to ethnicities. Due to its evolutionary nature, Adat Law has the ability to adapt

to changes within society. For example, subsequent to its adoption as religious belief, Islam has been part of the Adat law for certain ethnicities such as Minangkabau and Aceh.

Adat Law is important in several areas of law such as family law, inheritance law, and agrarian law.

(3). Syariah Law Principles

Syariah law is not conventionally regarded as part of sources of Indonesian law. Nevertheless, recent political developments especially after the reform era have contributed in introducing syariah law to a broader scope within the Indonesian legal system.

Originally, syariah law can be found to be the commanding principles in marriage and inheritance law for Muslims and is applied by the Court of Religion. The primary source used is the Islamic Law Compilation (*Kompilasi Hukum Islam*)

The promulgation of Law No. 3 Year 2006 on Court of Religion broadens the scope of judicial authority of Courts of Religion to include disputes pertaining to syariah economy. Syariah economy itself has been noted and can be found in many parts of banking regulations, notably Law No. 7 Year 1992 on Banking as amended by Law No. 10 Year 1998 which clearly distinguishes conventional banking and syariah banking.

Another example of syariah law application is the unique status of the Province of Nanggroe Aceh Darussalam. Under Law No. 11 Year 2006 on Aceh Government, it is the only Province in which governance is founded, among others, by Islamic principles.

The law also required that syariah law be implemented in Aceh which encompasses matters of family law, civil law, criminal law, court, education, etc, which will be further regulated under Qanun Aceh. This law in turn provided for Aceh to have a distinctive legal system within the national legal system.

(4). Doctrine

Doctrine is opinion of law from jurists or legal scholars. Doctrine is applied to interpret a general conception of law within other legal sources or to provide explanation on ambiguity of laws. Doctrine in and of itself does not have a binding power. It will have a binding power when it is used as consideration in a court decision. It is quite common for litigation cases to supplant their arguments with doctrine and submitting books of legal scholar pointing to a certain doctrine as evidence in court.

For research purposes, doctrine can be found in books, papers, or other media for jurist opinions. Example of notable doctrine is the opinion of J. Satrio, in which books, papers, and lectures have been a common reference for practitioners in the field of civil law, and Yahya Harahap, in which writings have been sought as source of clarifications for both criminal and civil procedural law.

However, it should be noted that most of the scholarship of J. Satrio and Y. Harahap has been published either in Dutch or Indonesian, and thus its accessibility to researchers without the requisite reading ability in such languages will be limited.

(5). Jurisprudence

Court decisions commonly referred to as jurisprudence, or case law, or judge made law do not have a binding power other than for the persons or parties being subjected to the decision. This is because Indonesia as a civil law country (which ascribed to European continental legal system), following the Dutch, does not adopt *stare decisis* principle.

Nevertheless, there are two streams of opinion regarding the same decisions made three times by the Supreme Court or the Constitutional Court. Some jurist classified this as a permanent precedence under the doctrine of *faste jurisprudence* which serves a somewhat binding power. Other jurists on the other hand, still treat such precedence like any other precedence, *i.e.*, as not having any binding power. They merely have a persuasive force of precedence.

Here is a link to jurisprudences from the Supreme Court and Constitutional Court.

English translations of decisions of the Constitutional Court are available on the Court's website http://www.mahkamahkonstitusi.go.id/index.php?page=website_eng.Home . These include some high-profile decisions since 2003, such as death penalty cases involving terrorism and cross-border drug trafficking. From the English-language version of the home page of the Court's website, click on the "Advocation" tab, then the "Decision" tab. The downloadable full text English translations of the Court's opinions are in reverse chronological order.

(6). Legal Profession

Since the enactment of Law No. of 2003 on Advocate ("**Advocate Law**"), the existing 8 bar organizations were forced to be merged. The single bar association is named Perhimpunan Advokat Indonesia or PERADI (Indonesian Advocate Association) (www.peradi.or.id). There have been law suits and litigation challenging the legitimacy of Peradi, one of them is a challenge from the Congress of Indonesian Advocate (Kongres Advokat Indonesia or KAI).

Under the Advocate Law, the following are the requirements to be admitted as an advocate:

a. Indonesian National;

b. reside in Indonesia;

c. not having the status of civil servant or public officer;

d. at least 25 years of age;

e. graduated with a bachelor of law degree (qualified degree);

f. having passed the bar exam;

g. two years of internship in law office;

h. never convicted of crime with 5 years or more penalty;

i. good behavior, honest, responsible, and having intact integrity.

In addition to the above, PERADI also broadens the internship requirement such as having involved or report on at least 2 civil cases and 1 criminal case.

Foreign lawyers are not allowed to practice Indonesian law. They may work in an Indonesian law firm to provide advice on foreign law only. However, this rule is not strictly upheld. Many foreign lawyers are working in Indonesia and many are representing international firms. They must also comply with several requirements set by the Ministry of Justice, lastly by Minister of Law and Human Rights Decree No M.11-HT.04.02 of 2004 on Requirements and Procedure in Employing Foreign Advocate and Duty to Provide Free Legal Services for Education Purposes and Legal Research.

C. Civil Legal System

1. Background

The basis for all private law applicable in the European group, and former colonies of the European Group, has been the Dutch Civil Code (*Burgelijk Wetboek – Kitab Undang-Undang Hukum Perdata*) of 1848. Subsequent amendments to the Dutch Code were also incorporated into the Codes for Indonesia as well based on the principle of concordance.

It was not uncommon that changes to the Dutch Codes were never fully realized nor implemented in the Indonesian Codes. It can be argued that even aside from the varied special regulations incorporated into the Indonesian codes that deviated from the Dutch codes that the two codes were never exactly the same.

According to Article 163 of the *Indische Staatsregeling* (the "IS"), the population was divided into groups and special laws were enacted to govern and regulate the actions of each group. Article 163 of the IS was an amendment to Article 109 of the *Regerings Reglement* of 1920, and later incorporated into the IS requiring all persons living in Indonesia to be classified into one of three groups; namely:

(1) European

(2) Natives

(3) Foreign Orientals which was further distinguished into Chinese and non-Chinese.

Following independence, the principle of concordance was abandoned, and was a direct consequence of the recently acquired independence of the State. Independence gave rise to a desire to ensure that Indonesia was not merely free of the Dutch Colonialists but also free from Dutch influence in all of the recently independent nation's institutions. It can be fairly stated that since independence legislative development in Indonesia has generally not followed the Dutch model.

Nevertheless, there remain many remnants of Dutch law within Indonesian laws and a movement to modernize and Indonesianize law has developed since independence despite the deviations between Indonesian and Dutch codes becoming more pronounced than ever before.

Transitional Provision Articles I and II of the Constitution states explicitly that all existing institutions and regulations valid at the date of Independence shall continue to be valid pending the enactment of new legislation complying with the Constitution to the contrary.

One of the major criticisms of the continued existence of Dutch laws within the Indonesian codes is that despite claims that the laws were drafted to maintain peace and order, it is clear that the primary purpose was to protect the interests of the Dutch colonialists. Therefore, any maintenance of elements of Dutch law in the Indonesian codes is clearly contrary to the tenets of the Indonesian Revolution.

Nevertheless, it was quickly realized that the revocation in its entirety of all Dutch influenced Indonesian law would lead to chaos as the new legislation had not been drafted. Therefore, in order to avoid the legal vacuum that uniform revocation would cause, all laws and institutions valid at date of Independence would continue until such time as they were revoked and replaced.

The difficulty in determining which laws remain valid and which laws have been revoked is a complicated and somewhat unsatisfactory process. Government Regulation No. 2 of 1945 states that all Dutch law whether amended or replaced is to be deemed invalid when it does not comply with the Constitution. The complication and difficulty arises because the mechanism to determine constitutionally valid of laws was through judicial review by a competent court. Therefore, until such time as a provision was challenged through the courts then it was to be inferred that the Dutch laws remained valid enforceable.

2. The Indonesian Civil Code

The Indonesian Civil Code contains four books that regulate all private law matters:

1. Book One – titled Individual, regulates all aspects concerning the enjoyment and loss of civil rights, assets and the distinctions between them, residence or domicile, matrimony, the rights and obligations of spouses, legal community property and management thereof, prenuptial agreements, community property or prenuptial agreements in the event of second or further marriages, the division of assets, the dissolution of marriage, separation from bed and board, paternity and the descent of children, the relationship by blood and marriage, parental authority, amendment and revocation of support payments, minority and guardianship, emancipation, and conservatorship.

2. Book Two – titled Goods, regulates all aspects concerning assets and the distinctions between them, possession and the rights resulting there from, ownership, the rights and obligations among owners of neighboring plots of land, the rights and obligations of spouses, servitude, the right to build, the right of tenure by long lease, land rent, use of proceeds, use and occupation, succession by demise, last wills, executors of last wills and managers, the right of deliberation and the privilege of estate description, the acceptance and rejection of inheritances, estate division, ungoverned inheritances, priority of debts, pledges, mortgages.

3. Book Three – titled Contracts, regulates all aspects concerning contracts in general, disputes arising from contracts or agreements, disputes arising by force of law, recision of contract, sale and purchase, exchange, granting and acquiring leases, agreements regarding the performance of services, partnerships, legal entities, gifts, deposits, lending for use, loans for consumption, fixed or perpetual interest, aleatory agreements, the issuance of mandates, guarantees, and settlement.

4. Book Four – titled Evidence and Procedure, regulates all aspects concerning general evidence, evidence by witnesses, inferences, confessions, legal oaths, and Procedure. The Indonesian Civil law has been in a constant state of development since independence. In 1963, the Supreme Court issued Circular Letter No. 3 which specifies a certain number of Articles of the Civil Code that are no longer valid. specifically, eight Articles are noted:

(i) Articles 108 and 110 regarding the competence of a married woman to undertake legal action and appear in Court without the assistance of her husband.

(ii) Article 284(2) concerning the cknowledgment (*erkenning*, *pengakuan*) by a European father of a child born out of wedlock to a Native Woman.

(iii) Article 1683 which requires that all gifts be effected by a notarial deed.

(iv) Article 1579 which stipulates that a lessor cannot terminate a lease on the ground that he intends to use the leased property himself, unless the lease agreement explicitly permits him to do so.

(v) Article 1238 which provides that a written demand to perform must precede any civil suit for breach of contract.

(vi) Article 1460 which assigns the risk of loss to the purchaser from the moment a contract of sale is concluded even though delivery has not been made.

(vii) Article 1603X(1) and (2) which regulated what was regarded to be European Labor and what was non-European labor. This Article distinguishes and discriminates between European and Native laborers.

3. Law of Marriage

After the promulgation of the new Indonesian Marriage law (*Undang-Undang No.1 tahun 1974 tentang Perkawinan*) the Marriage Law was deemed to be a uniform law and as such applicable to all Indonesian nationals without any differentiation between ethnic groups. The law also replaced the Marriage law in Book One of the Indonesian Civil Code.

The Indonesian Marriage Law requires a one step procedure for all persons seeking to divorce that the divorce petition be administered through the General Court system. However, Moslems are required to process their divorce petitions through the Religious Court (*Pengadilan Agama*) system.

The definition of mixed marriage has changed as a result of the enactment of the new Marriage Law. Mixed marriage no longer means the marriage of persons from different Indonesian ethnic groups but rather refers to marriages between Indonesians and non-Indonesians.

4. Land Law

The Basic Agrarian Law (1960) ended the dualism that had existed in Indonesian Agrarian law between the Adat Law and European Law. The Basic Agrarian Law has revoked all regulations relating to land and the whole of Book Two of the Civil Code as it relates to matters of soil and water. All regulations relating to the provision and administration of mortgages were revoked with the enactment of the Mortgage Law (*"Undang-Undang No. 4 tahun 1996 tentang Hak Tanggungan"*). The Law has been very successful in terms of unifying the national law on land rights and mortgage law.

D. Criminal Legal System

The Indonesian Criminal Code in force since independence is in essence the Netherlands Indies Criminal Code and which came into force in 1918. It incorporates certain amendments promulgated by the revolutionary government in 1946 and since 1958 it has been applied uniformly throughout the Republic of Indonesia.

The criminal law is one of three systems of law in operation in the nation since the nineteenth century, the other two being a system of European-derived commercial codes and a civil law based on customary law (*adat*), which included Islamic law (*"syaria"*). The criminal law is the only one of these three systems that was essentially codified and applied uniformly throughout the national territory. Prior to January 1918 the Indonesian Criminal Legal System was divided into a dual system containing two distinct penal codes; one for native Indonesians (from January 1873) and one for Europeans (from January 1867).

The Indonesian Criminal Code or Kitab Undang-undang Hukum Pidana (the "KUHP") and also known as *Wetboek van Strafrecht* remained valid after Independence in accordance with the Transitional provision Articles of the Constitution which state that, all regulations in force at the time of Independence are declared to remain valid unless or until they are such time as they are replaced in a manner prescribed by the Constitution; namely, Statute (Article I Transitional Provisions). Evidently this transitional provision was to ensure that there was no legal vacuum in the intervening period between initial independence from the Dutch and full independence of Indonesian institutions and the legal system.

The KUHP qualifies two types of criminal behavior; offences and crimes. Offences can be described as misdemeanor crimes where the applicable criminal penalty is a fine. An example of this type of criminal behavior is a driver who does not have a driving license when he or she drives a car or ride a bicycle at night without a lamp. In contrast crimes are defined as felonies or serious criminal behavior such as murder, abuse, theft, and robbery, among many others. Crimes can be further distinguished into:

Crimes or Felonies committed against the government and government institutions – these would include such crimes and felonies as insubordination; subversion; condemnation of the President or desecration of State symbols (national flag); tax delinquency, or a crime committed against a government official while they are on duty.

Crimes or Felonies committed against humanity – these would include crimes against the right to life such as murder; abuse; crimes against the right of freedom; kidnapping; crimes against human dignity; crimes against property.

This discussion of the Indonesian criminal legal system will explore the principles and theories of the system. The first principle is the legality or validity principle as stated in Article 1(1) of the Criminal Code or KUHP. This principle allows at least three possible consequences to occur, namely: an act cannot be punished if at the time of the alleged commission of the act it was not a crime - *nulla peona sine lege nula poena sine crimene*

nullum crimen sine poena legali; the criminal law and statutes cannot be enforced retroactively – an exception exists where the alleged crime is committed in a transitional period between laws where the most favorable statute or law to the benefit of the accused shall be applied therefore if the previous law is more favorable then it will be applied in spite of any non-retroactivity principle; and, analogy and interpretation are not permissible in criminal law.

In order to determine the validity of the KUHP and its subsequent application with respect to an alleged offence or crime, there are four principles applied; namely, the Territorial Principle, the Active Nationality Principle, the Passive Nationality Principle, and Universality Principle. The Territorial Principle specifies that the KUHP may be applied if the locus of the crime is within Indonesian territory irrespective of the accused's citizenship. The Active Nationality Principle specifies that the KUHP may be applied if the accused has Indonesian Citizenship. The Passive Nationality Principle states that the KUHP may be applied if there is an Indonesian legal interest that has been violated. Finally, the Universality Principle states that the KUHP may be applied if there is a legal interest of all humankind that has been violated.

Causality theory – simply relies on there being a causal condition between the effect of the crime and the action. This theory can be applied to *materiel delict* (crime) because this kind of crime specifies the effect of the crimes. It also can be applied to qualifying crimes (*door het gevolg gequalifiseerde delicten*).

The *Conditio Sine Qua Non* theory can be separated from Von Bury, a jurist whose theories are applied to criminal law in Indonesia, that each and every single action or cause cannot be dismissed in order to determine the subsequent effect.

The Criminal Law Code is contained in three chapters.

Chapter I defines the terms and procedures to be followed in criminal cases and specifies any mitigating circumstances that may affect the severity of a sentence. Chapters II

and III, respectively, define the categories of felonies and misdemeanors and prescribe the penalties for each type of offense. The distinction between felonies and misdemeanors generally conforms to the same distinction that is maintained in Western countries. As noted above, several other statutes dealing with criminal offenses are also in force, the most significant of which are laws concerning economic offenses, subversive activities, and corruption.

As of 2004, the available penalties for serious offenses included death, life imprisonment, local detention, and fines. The total confiscation of property is not permitted. Penalties for minor crimes and misdemeanors include the deprivation of specified rights, forfeiture of personal property, and publication of the sentence of the court. Punishments listed in the code are the maximum allowable; therefore judges maintain some discretionary authority to impose lesser punishments. A public campaign for the abolition of the death penalty was launched in 1980 following the execution of two individuals convicted of murder. However, the death penalty remains in force and it seems that this public campaign has made little headway in the elimination of this type of punishment. Nevertheless, despite the death penalty being available to judges, Indonesia has a significantly small proportion of people of death row. The majority of people sentenced to death were convicted pf drug related offences. After a long hiatus in executions Indonesia has recently resumed the execution process.

Widespread complaints regarding the penal code and a perception that it is not reflective of Indonesian society or modern criminality as it is an archaic relic of Dutch Colonialism has been gaining ground over a number of years. However, the committee that was established in the early 1980s to overhaul the criminal code to Indonesianize and modernize it has been largely unsuccessful in its endeavors to do so. Nevertheless, a recent draft of the new criminal code is expected to reach the floor of the parliament for debate sometime during the 2004-2009 parliamentary sessions.

Under Indonesian law, certain categories of crime may be dealt with under purposively drafted statutes outside the penal code**]**. . Offenses such as bribery, the

assessment of illegal "levies," and the diversion of public funds for private use by business figures or officials formed a special class of crime usually handled under a 1955 statute on Economic Crimes (the statute no longer put into effect) and a 1971 statute on Corruption which has been revised as Law.No. 31 of 1999 on Corruption which also has been revised by Law No. 20 of 2001 on Revised of Law. No 31 of 1999 on Corruption. Political offenses and acts that Indonesian authorities regarded as threats to national security were usually prosecuted under Presidential Decree No. 11 of 1963 on the Elimination of Subversive Activities (the "Subversives Law"). This Decree was promulgated as a Law in 1969 and to all intensive purposes remains in force to this day. The law grants far-reaching powers to the relevant government authorities in dealing with almost any act that does not conform to government policy. The law allows for a maximum sentence of death to be imposed on individuals convicted under its provisions.

1.*The National Commission of Human Rights (Komnas HAM)*

During the New Order period one of many problems that confronted human rights activists was the protection of human rights is a system that granted little or no legal protection to human rights. Until very recently the sources of legal authority in Indonesian law for the protection and maintenance of human rights remained uncertain and were not formulated in a cohesive manner.

This was the result partly from a historical legacy of the Dutch and partly as a result of the omissions of the New Order State. The history of the modem Indonesian State exhibits considerable resistance to absorption of the notion of the rule of law or *negara hukum*, both as a founding constitutional principle and as a basis upon which to build a working legal infrastructure. Many basic civil and political rights rest upon rule of law concepts, particularly in relation to notions of equality before the law and the right to a fair trial. Nevertheless the current climate of political reform in Indonesia offers considerable opportunities for reform and the establishment of a legal system based on the rule of law.

Understanding why the Indonesian legal system currently still falls short of the rule of law ideal requires a review of the historical development of the legal system as it currently exists. Following the resignation of Soeharto in 1998, the Habibie government appeared to adopt a more conducive stance towards human rights law reform and protection. Upon assuming office the Habibie administration immediately announced that it would undertake a program of human rights reform, electoral reform including bringing forward the MPR/DPR and Presidential elections, as well as reform of the State apparatus. To be sure, the Habibie administration remained dominated by allies of the recently resigned Soeharto, but nonetheless prevailing public opinion, expressed in social unrest, required at least modest reform. The Habibie administration set about signing and or ratifying a number of International Conventions (see below), and revoking some of the more excessive legislation of the Soeharto era (examples include law with respect to the Press, public demonstrations, and subversive activities). While such moves were uneven, and often incorporated attempts to preserve restrictive laws by moving them to other legislative instruments, the overall pattern of reforms favored a more open and democratic political environment.

In addition to the ongoing efforts to establish a permanent human rights court within the existing court structures, a number of important *ad hoc* courts have been established to try matters pertaining to particular human rights abuses. While generally viewed as a step forward in the efforts to hold those responsible for human rights abuses accountable these *ad hoc* courts have also come under some severe criticism**.** Komnas HAM as the national independent investigator of human rights abuses has been strengthened after the resignation of Soeharto. In September 1999 the Habibie government introduced, and the DPR approved, legislation which increased the number of members sitting on the commission and provided a more legislatively secure framework under which it works; namely, the repeal of the original Presidential Decree establishing the commission and replacing it with a Regulation. In doing so Komnas HAM in effect was granted a greater level of autonomy and independence from executive interference than it had enjoyed before. With respect to the day-to-day workings of Komnas HAM, the Habibie legislation also granted the commission subpoena powers for the first time, thus increasing its effectiveness as an investigative body. During the Abdurrahman Wahid administration Komnas HAM was also empowered to seek immediate clarification from the Attorney General's Office with respect to the progress of human rights prosecutions. This important additional power introduces a degree of accountability in the prosecution of human rights cases by the Attorney General's Office, which it is hoped will lead to an

improvement in the performance of the Attorney General's Office and prosecutors with respect to human rights cases in the future.

2. *The National Commission of Women (Komnas Perempuan)*

In an attempt to uphold human rights in the Indonesian Criminal Legal System and in particularly Criminal justice, the new Indonesian Criminal Procedure Code affords suspects and defendants many rights to ensure some basic protections of their humanr rights. Unfortunately, it would appear that the new code opportunely forgot to protect the rights of victims and witnesses of and to crime that is critical in gaining the convictions desired. In response to rapid increases of domestic violence and sexual crimes committed against women and children a group of leading Indonesian feminists set out to found an organization to advocate for these rights and protections. Consequently, the National Commission of Women was established. The primary purpose of the national commission is to advocate for change to the legal system to ensure that the rights of women are protected and that these protections are guaranteed. One of the most notable changes that has occurred as a result of this advocacy is a greater understanding of domestic violence and an appreciation that longterm violence can lead to murder. The Indonesian Criminal Code now recognizes self-defense as a legitimate defense for women who have been subject to long-term violence at the hands of their husbands. This is most often referred to as 'battered women's syndrome' the ability to prove this defense is a matter of fact however if so proven then the defendant is entitled to plead not guilty and where the facts bear out a judgment for acquittal (Putusan Bebas).

E. Customary Law/Adat Law

Introduction

Indonesia is a country with a very rich and diverse cultural history. The diversity of and between cultures is enhanced because of the physical nature of the Republic – an archipelago. The Indonesian archipelago consists of thousands of islands and hundreds of different ethnic groups, each with their own laws and customs. Consequently, there is no

single Adat or customary law that is common to the whole of Indonesia. On the contrary, as was so ably pointed out by Snouck Hurgronje that Adat law ("*adatrecht*" in Dutch), the law of the archipelago was dominated by the customary or adapt practices of the indigenous (*"native"*) populations. The term adatrecht was later popularized by Van Vollenhoven and then translated to English as Adat law. The major question facing legal scholars and experts has always been how to define Adat law. Adat law is not easy to define because of the breadth and variety of legal principles between groups nevertheless the definition promulgated by Ter Harr is the one that has received most discussion. Ter Harr defines Adat law as decisions made by the law enforcer within the relevant society. Decisions in Adat law include not only decisions made by judges, village leaders, and religious leaders but also decisions made by the village assembly.

Adat law itself can be in either statutory or non-statutory forms. However, the reality in Indonesia is that Adat law is predominantly non-statutory.

Types of Adat Society

All Adat law is unique. Adat law developed according to the needs of each community (adat society). There are 3 types of adat society that are territorial in structure:

1. Village society

Included in village society are groups of natives who live by the same principles, ways of life, and have the same beliefs. The community is fixed, remaining at the same location, and is governed by a village chief.

2. District society

The adat district society comprises of a number of village societies of the same adat that live within the same district but with each community retaining its independence. As noted earlier each village society will retain its own organizations and structures but remain united under the district society in that singular village communities cannot be separated from the whole.

3. Village union society

The village union is formed on the basis of cooperation between the district societies that are located within the same adat territory. The aim of the cooperation between district societies is to work together and create a good and prosperous adat society where all activities are undertaken and completed in the best interest of the adat society as a whole.

Before the unification of laws it is important to note that adat law was the only source of law for and among Indonesian natives. The introduction of Islam to the archipelago through trade and other activities with middle-eastern merchants and emissaries, particularly to the islands of Sumatra, Java, Borneo, and the Celebes allowed for adat law to be influenced by Islam. The Acehnese, located at the northern most tip of the island of Sumatra, based their adat law specifically on theprinciples and tenets of Islam. Islam has exerted a similar influence over the adat law of West Sumatra as well.

Adat Law in the Indonesian Legal System

There is not one single Article in the Indonesian constitution that clearly regulates Adat Law or its application. However, Article I of the Transitional Provisions of the Constitution, stipulates that all regulations in existence are to remain in force for so long as there are no new laws or regulations established pursuant to the provisions of the Constitution.

Adat Law varies between the different parts of Indonesia. Adat is simply traditional or community law and reflects the norms of the relevant community. The major areas where Adat law differs from other laws in the Indonesian legal system are:

1. Marriage law
2. Inheritance law
3. Land law
4. Law of Delict

Marriage Law

Marriage in Adat communities is the means by which organized relationships within the group form to define the autonomous community and personal concerns. Marriage in Adat communities can also be a matter that reflects social staus – either in a positive or negative manner. Marriage is an integral part of the renewal process of village and regional communities as it often results in the addition of new members to the community or the social nucleus. Marriage also carries with it the heavy burden and privilege of responsibility for the spiritual and material welfare of the community.

Marriage ceremonies reflect the often primitive and animistic ideas and customs of the community even in this modern world. The cultures of all Adat communities reflect the integral role of religion in the community's social interactions with each other and particularly during the ritual of marriage.

Marriage law in Adat communities differs between the regions, some are more influenced by religion and others remain more true to Adat culture that may have existed prior to any religious influence. The marriage law includes not only the rules

and regulations governing marriage but also the rules and regulations as they relate to the dissolution of marriage, divorce. In marriage and divorce law, particularly the requisites of marriage, the rights and obligations of the husband and wife, the grounds for divorce, have always been, and are now still heavily influenced by Adat Law. Consequently, the intricate details on the above noted matters may vary from village to village and region to region.

Nevertheless, it is interesting that a primary principle that is uniform to most adat law is the sharp distinction maintained between *'original'* property (goods owned by either party before entering the marriage) and *'common'* property (gained or acquired by their joint efforts of the husband and wife during the marriage).

In a marriage that has not resulted in children being born of the marriage then on dissolution the *original* property must return to the respective families while *common* property must be divided between the husband and wife. This usually would occur as part of a court sanctioned divorce petition and dissolution with the court resolving the most equitable division of property. In contrast the adat system provides a greater amount of this responsibility for determining the division of property to the parents of the husband and wife, as they were responsible for 'arranging' the marriage. The parental responsibility for the division of property is substantially different from Western cultural perspectives on marriage where the marriage contract is executed only between the parties to the marriage and not their respective families.

Inheritance Law

The Adat law with respect to inheritance is a series of legal regulations that govern the eternal process of passing material and non-material property from generation to generation.

The rules of inheritance in adat systems are not only subject to influences from social changes in the community and the expansion of family ties and the family tree which usually includes a concomitant decrease of the influence of clan and tribal ties, but also to the influence of rules of inheritance contained in foreign legal systems. The rules of inheritance of foreign legal systems that enter into adat systems of law are a result of certain external connections within the adat community to the elements outside the adat community, most often through religion.

The most common system that is used in Adat Law with respect to inheritance is the bilateral system. This system gives the children equal rights to inherit from both parents. In case of adoptive children, they have the same rights as legitimate children with respect to the *common* property of both parents.

Nevertheless, adopted children do not have rights to *original* property as this may only be inherited by legitimate children born of the marriage.

Furthermore, children of deceased parents can inherit from their grandparents' estates the same share that was to be inherited by those parents.

Land Rights

Prior to the Basic Agrarian Law there were two legal systems that had been used to determine and distinguish rights to land, namely:

1. rights based on Adat Law

2. rights based on the Civil Code

For indigenous Indonesians these rights were based upon Adat Law and for foreigners these rights were based upon the Civil Code. The Basic Agrarian Law revoked all regulations concerning land including all of Volume II of the Civil Code concerning 'soil and water'. However, the parts of Volume II of the Civil Code that related to the provision and administration of valid 'hypothec' or mortgage securities were not revoked. Rights to land under adat law were not entirely extinguished with the enactment of the Basic Agrarian Law as *'ulayat'* rights or the rights of certain communities over certain parcels of land were maintained.

There are several characteristics of rights to land that are recognized according to Adat law. Adat law recognizes a distinction between the rights to land and the rights to everything on or above the land. Simply stated this means that a right to land does not necessarily include any right to the development of that land or any structures that may be on it. A further example of this unique characteristic relates to debts where the security is land. When a person incurs a debt to any other party and gives their land as a collateral guarantee (pledge of land) as security against any future failure to pay those debts, the creditor may become the owner of that land through the exercise of their right over the security.

However, with the aim of protecting the weakest party in a pledge of land states that where a pledge has been in existence for more than 7 years shall be deemed to have expired thereby allowing the person pledging the land to reclaim that land free of any debt.

The Law of Delict

Adat law also recognizes delict – a disturbance to the equilibrium of an individual or the community that is deemed unacceptable by the community. Any such action that disturbs this equilibrium requires some form of reaction to restore the equilibrium. In most cases where the delict relates to money or property which can be quantified in financial terms then equilibrium is restored through a series of fines.

However, the motives or objective of disturbance and the subsequent restoration of the equilibrium include the consideration of highly personal elements such as being made feel ashamed for the conduct, rage, the need for revenge for the victim,, and the negligence and (or) intent of the perpetrator. The process is not exclusively personal as it requires the blending of the best interests of the individual and the wider adat community to ensure the full restoration of the equilibrium.

When delict occurs and both the victim and the offender are from the same adat community then the overall 'well-being' of the community requires that a remedy be found to restore equilibrium irrespective of whether the victim may have claimed any injury or damage. The village chief is obligated to take any necessary action to remedy the injury or damage to ensure that there is no further weakening of the community and to prevent more serious repercussions from the original act. In this instance the fine that may be payable as a consequence of the delict may be received by the victim, or by the victim and the community, or just by the community dependent on the offence committed.

In the event that the injury or damage is caused by an outsider or someone within the district community but not of that village, then the relevant district and village chiefs acknowledge the breach and seek to remedy the situation as quickly as possible. Any injury or damage by an outsider will be perceived as an attack not only on the individual but also an attack on the community at large.

To ensure that the original delict does not escalate into a viscous circle of reprisals then it is the responsibility of the district and village chiefs to remedy the

situation. The most common remedy even during inter-village disputes is to return to a point of acceptable equilibrium and is usually similar to those processes undertaken within the communities themselves to resolve internal delict acts. In the event there is a specifically mandated board or authority to deal with these matters then representatives of each of the communities will appear as individuals on behalf of their respective communities.

Indonesia has numerous Adat laws and each with different characteristics and each with their own particular influence within the Indonesian legal system. Some of these distinct adat characteristics are listed below:

1. the Adat communities of North Sumatera usually follow a patriarchal form of family relationships meaning that inheritance is from father to son(s)

2. the Adat communities of West Sumatra usually follow a matriarchal form of family relationships meaning that inheritance is from mother to daughter(s)

3. the Adat communities of Java usually follow a bilateral system that allows inheritance from both parents.

The unique nature of the adat law system does not prohibit the relevant communities from following or practicing these laws so long as they are not in conflict with the national system of Indonesian law.

F. Constitutional Law

One definition of Constitutional Law widely used in Indonesia is that constitutional law is a set of rules that regulate and govern the organization, relationship, and interaction of the institutions of the State both vertically and horizontally. However, an alternative

definition often noted in Indonesia is that of Oppenheim and Van Volenhoven that is constitutional law as the law of States in hiatus mode.

As an organization Indonesia is a Republic based on the sovereignty of its people. The primary goals of the State are:

1. to protect all Indonesian people;
2. to advance the general welfare of the people;
3. to raise educational standards, and
4. to contribute in maintaining world order based on the principles of independence, eternal peace, and social justice.

In order to satisfy these goals the Republic of Indonesia has adopted a basic set of principles known as Pancasila. Pancasila simply means the five principles. These principles are:

1. a belief in one God;
2. a just and civilized humanity;
3. the unity of Indonesia;
4. socialism that is lead by wisdom with conference/representation,
5. social justice for all Indonesians.

All of these basic principles are written in the Preamble of the Constitution.

The Preamble of the Constitution of Indonesia is a part of the Constitution and may be considered with regard to statutory interpretation. Nevertheless, the majority of the substance of the Constitution is contained in the *Batang Tubuh* or the Content. The Content contains a series of provisions which can be said to set out the basic legal norms of the Indonesian

community. The first Constitution consisted of just 37 Articles, 2 Additional Provisions, and 2 Transitional Provisions. The Constitution clearly states that it is only the Parliament that may amend the Constitution and sets out very specific rules governing how these amendments are to be enacted.

Constitutional amendment in Indonesia has moved through several distinct and identifiable phases. Initially, the Constitution that was drafted for the purposes of Indonesian independence was introduced and applicable to all the parts of the Netherlands East Indies that came under the auspices of the Indonesian Government on independence. During the period of 27 December 1949 – 17 August 1950 There was a period of change and flux in Indonesia resulting in the Declaration of the Unitary Republic of Indonesia from the previous union and the 1950 Constitution was applied. The 1950 Constitution was an early draft of the new Constitution under development by the *Konstituante*. The application of the 1950 Constitution was temporary as the *Konstituante* was never able to complete the drafting of a new Constitution and in fact was dismissed by former President Sukarno on 5 July 1959 for this failure. The dismissal of the *Konstituante* included the reapplication of the 1945 Constitution.

During the Presidency of President Soeharto any amendment to the Content of the Constitution was expressly forbidden. The Constitution to all intensive purposes had assumed the status of being a 'sacred' text not in need of any amendment.

Furthermore, any person that demanded or even suggested that the Constitution should be amended fell victim to the Soeharto government policy of declaring all opposition or activism for change the enemy of the State that must be eliminated to maintain stability, security, and prosperity. The sacred nature of the Constitutional text ceased on the resignation of Soeharto from the Presidency on 20 May 1998 with the amendments coming at regular intervals. The first amendments were completed in October 1998, the second series of amendments were completed in October 1999, the third series of amendments were completed in October 2000, and the fourth series of amendments were completed in October 2001.

According to the Constitution of Indonesia the State body must at a minimum include the following:

1. *Majelis Permusyawaratan Rakyat* (People's Representative Assembly);
2. *Dewan Perwakilan Rakyat* (House of Representatives);
3. President;
4. Ministers;
5. *Mahkamah Agung* (Supreme Court);
6. *Mahkamah Konstitusi* (Constitutional Court);
7. *Komisi Yudisial* (Judicial Commission);
8. Central Bank;
9. *Dewan Perwakilan Rakyat Daerah* (House of Regional Representatives); and
10. *Pemerintah Daerah* (Regional Government).

If these State bodies are viewed from the perspective of a division of power, then the MPR is a constitutive body, the DPR and the DPD the legislative body, the President, Ministers, Central Bank, and Regional Government is the executive body, and the Supreme Court, the Constitutional Court, and the Judicial Commission are the judiciary. The remainder of State bodies and institutions are to be regulated and governed by other types of subsidiary law to the Constitution.

This subsidiary law cannot be classified as a source of constitutional law. However, it is critical to acknowledge that a significant portion of law is related to the establishment and implementation of mechanisms set out in the Constitution. Some of the more significant of these include Law No. 24 of 2003 on the Constitutional Court, Law No. 5 of 2004 on Judicial

Power, Law No. 5 of 2004 on the Amendment of Law No. 14 of 1985 on the Supreme Court, Law No. 4 of 1999 on the Organization and Position of the MPR, DPR, and DPRD, Law No. 23 of 2003 on the General Election of the President and Vice President, Law No. 12 of 2003 on the General Election of Members to the DPR, the DPD, and the DPRD, Law No. 31 of 2002 on Political Parties, Law No. 22 of 1999 on Regional Government,Law No. 39 of 1999 on Human Rights, and Law No. 62 of 1958 on Citizenship.

Human Rights in Indonesia are seen to be a set of rights that attach to the nature and existence of human beings as creatures of the one and only God. These human rights must be respected, honored, and protected by the State and its laws, government, and citizen. Several sources of law that play an important role in the protection of human rights in Indonesia are the Second Amendment of the Constitution, particularly Articles 28 A-J, Law No. 39 of 1999 on Human Rights, and Law No. 26 of 2000 on the Human Rights Court.

Indonesian citizenship laws have undergone several phases of development. Prior to the enactment of Law No. 62 of 1958 on Citizenship the principle used to determine nationality in Indonesia was *ius soli* or nationality determined by the place of the individual's birth. This meant that a) all descendants of the Dutch who were either born in Indonesia or who had been resident for at least the 6 months prior to 27 December 1949 were given the chance to choose to become citizens of the new Republic of Indonesia, b) indigenous Indonesians qualifying or holding Dutch citizenship residing in Indonesia were given the opportunity to assume Indonesian citizenship, and c) Arabs and Chinese resident in Indonesia and who were classified as Dutch citizens in Indonesia were also afforded the opportunity to assume Indonesian citizenship.

This principle of citizenship changed with the enactment of Law No. 62 of 1958 with the introduction of *ius sanguinis* or nationality based on blood relations. However, based on the Sonario-Chou agreement any Chinese descendants of Indonesian citizens have the right to choose and or remain Indonesian citizens. Foreign people may become citizens of Indonesia in either one of two ways; namely, and official request or the State grants citizenship on the

grounds of some kind of State interest in doing so or a significant contribution made by the foreign individual to Indonesia.

G. Islamic Law

Islamic law is often stated to be universal in nature. This is because in part the law constitutes a basic tenet of the religion. Theoretically, Islamic law by its very nature should be applied to Muslims wherever they may reside and irrespective of any nationality they may hold. This is in contrast with National law or the applicable law of individual States regulating and governing the behavior of its citizens.

Islamic law entered Indonesia with traders and emissaries from neighbouring Islamic sultanates and spread peacefully throughout the archipelago. The Dutch colonial government continued to allow this peaceful spread of Islamic law in Indonesia.

Notably the Dutch colonial government even arranged and published a resume (*compendium*) about Islamic marriage law and the Islamic inheritance law that was to be used by the Indonesian court system to resolve disputes among Moslems. Even during the period of British colonial rule this situation did not change as Thomas Raffles stated that the Koran formed the general law of Java.

Islamic law is a law that finds its primary sources to be the *Al-Qur'an* and the *hadist* of the Prophet Muhammad SAW and is referred to as *syari'at*. This law was then developed, enhanced, and refined through *ijtihad* or evaluation and examination by expert scholars of Islamic law. These expert scholars were tasked with interpreting the law based on the teachings of the *Al-Qur'an* and the *hadist.*. Aside from the *syari'at,* there is the science of establishing the basic legal norms to be applied to all Muslims from the specific provisions contained in the *Al-Qur'an* and general rules of Islam as set out in the *hadist*. This process gives rise to *Fikih* or the understanding of the law in the *Al-Qur'an* and the *hadist* that is to be applied to all Muslims. This system has seen the creation of five basic norms in the Islamic legal system – *al-ahkam al-khamsah*.The norms are *fard* (obligation), *sunnah* (suggestion), *ja'iz*/*mubah/ibadah* (allowed), *makruh* (denunciation), and *haram* (prohibition).

The first and the main source of Islamic law is the *Al-Qur'an*. The *Al-Qur'an* is the holy text that contains the written statements of Allah's vision as given to the Prophet Muhammad SAW. According to experts, the *Al-Qur'an* generally consists of matters related to faith, rules governing interaction between people and people with Allah, general behavior, stories of human history, stories of the future, core principles of science including the basic laws of the universe.

The second source of Islamic law is the *Sunnah* or the *Hadists*. The *Hadists* is an authentic interpretation and explanation of the Al-Qur'an. These interpretations and explanations are based on the statements, actions, and unspoken behavior of the Prophet Muhammad SAW in spreading Islam. The Hadists explains almost all aspects of life that are regulated in the *Al-Qur'an*. The third source of Islamic law is *Ijtihad*. *Ijtihad* is the human investigation and pursuit of interpretation of the fundamental legal norms contained in the *Al-Qur'an* and the general legal norms of the *Hadists*. This pursuit leads to the formulation of the applicable law. The person who completes the *ijtihad* is called a *mujtahid.* The methods of *ijtihad* are:

1. *Ijma'*

   It is the agreed opinion of the experts about a particular problem that has occurred in any one place at any one time.

2. *Qiyas*

   It is a legal analogy with respect to a matter that is not clearly regulated in the *Al-Qur'an* by comparing the similarities to other similar matters that are regulated.

3. *Istidal*

A conclusion drawn from two or more different legal systems that regulate the same matter or problem.

4. *Al-masalih al mursalah*

It is finding an acceptable legal norm based on the public interest, public policy, or public order for a matter which has not been regulated in the Al-Qur'an or the Hadists.

5. *Istihsan*

Law that is made parallel to existing rules of justice and public interests, policy, and order.

6. *Istishab*

Similar to precedent in that it is law that has developed on previous occurrences of the matter that remains in force until such time as there is concurrence in opinion that changes the law.

7. *'Urf*

'Urf is a traditional custom that does not conflict with the principles of Islamic law and it can be applied to all members of a certain community.

Despite there being no sanctions for non-compliance individuals comply with the tenets of the law as part of their faith. The binding power of Islamic law is equivalent to the level of each individual Moslem's faith and subsequent acceptance of the law.Islamic law has a very broad scope and includes not only human interaction with each other and their community (*muammalah*) but also the relationship between people and Allah (*ibadah*). Islamic law is not limited to worldly matters as it also expresses a view of the hereafter.

Islamic law does not differentiate between civil law and public law because it views each as being part of the other. The parts of Islamic law are:

1. *Munakhat* (private law)

   This includes marriage and divorce law and the consequences of each.

2. *Wirasah* (inheritance law)

   This includes the method by which property is inherited.

3. *Mu'amalah* (trade law)

   This includes all matters related to the regulation of property and rights over property with respect to trading, leasing, and other agreements, among others.

4. *Jinayat/'Ukubat* (criminal law)

   This includes all criminal regulations where there is a relevant threat of punishment either as determined by the *Al-Qur'an* (*jarimah hudud*) or by the relevant authority (*jarimah ta'zir*).

5. *Al-ahkam as-sulthaniyah* (constitutional law)

   This includes the regulation of all matters related to governance such as the Office of the President, Central and Regional government relationships, soldiers, and taxation, among others.

6. *Siyar* (international law)

This includes the regulation of all matters related to war and peace as well as relations between States.

7. *Mukhasamat* (legal proceeding)

This includes the regulation of all matters related to the judiciary and *legal procedure* (hukum acara).

In summary the main characteristics of Islamic law are:

1. Part of the religion of Islam;

2. Strong correlation between faith and behavior;

3. Two main sources of law the *syari'at* (Al-Qur'an) and the *fikih* (Hadists),

4. Two primary relationships : *ibadah* (with Allah) and *muamalah* (with other people);

5. Structure: (a) Al-Qur'an, (b) Hadist, and (c) Ijtihad, and (d) Practices,

6. Obligations rather than rights;

7. Universal – applied to all Moslems all over the world;

8. Respect of human values; and

9. Enforcement.

H. Vocabulary

1. Doctrine : is opinion of law from jurists or legal scholars

2. Jurisprudence : Court decisions commonly referred to as jurisprudence, or case law, or judge made law do not have a binding power other than for the persons or parties being subjected to the decision.

3. Legality : principle as stated in Article 1(1) of the Criminal Code or KUHP. This principle allows at least three possible consequences to occur, namely: an act cannot be punished if at the time of the alleged commission of the act it was not a crime - *nulla peona sine lege nula poena sine crimene nullum crimen sine poena legali*; the criminal law and statutes cannot be enforced retroactively – an exception exists where the alleged crime is committed in a transitional period between laws where the most favorable statute or law to the benefit of the accused shall be applied therefore if the previous law is more favorable then it will be applied in spite of any non-retroactivity principle; and, analogy and interpretation are not permissible in criminal law.

4. Islamic Law : is often stated to be universal in nature.

H. Reading Comprehensive

(1) Law of Indonesia is consists of "written and unwritten law. Why?

(2) There are five jurisdictions of the Constitutional Court, describe it.

(3) Every Act is enacted through three phases, tell it.

(4) Indonesia has numerous Adat laws and each with different characteristics and each with their own particular influence within the Indonesian legal system. Please prove it.

CHAPTER IV

CONTRACT LAW

A. Introduction

The law of contract is a set of rules governing the relationship, content and validity of an agreement between two or more persons (individuals, companies or other institution) regarding the sale of goods, provision of services or exchange of interests or ownership. While this is a wide definition it does not cover the full ambit of situations in which contract law will apply. The reason for this is due to the vast number of examples in which contracts can arise in everyday life.

Contract law has been more formally defined as a promise or set of promises which the law will enforce. Another definition and a somewhat competing view, is that a contract is an agreement giving rise to obligations which are enforced or recognized by law. Either definition confirms the involvement of the law by way of enforcement, suggesting that should there be an infraction or breach of the terms of the agreement then the aggrieved party may seek recourse via the Courts. As is noted above, a contract can arise is a plethora of scenarios; from buying a loaf of bread in the corner shop, to the sale of a house. It is unsurprising therefore that certainty is needed before the Courts will intervene to enforce any agreement. The law of contract has confirmed the basic foundations of any contract, regardless of its complexity and substance, that it must contain to make the agreement enforceable in law.

There must be an offer and this must be accepted to make an agreement. While this would in the first instance appear to be self explanatory, it is important to distinguish between what the law says amounts to a valid offer. An offer can be made orally, in writing or by way of conduct. Regardless as to the manner of the offer, it is the willingness or intention of the person making the offer (the offeree) which is of importance, and that is clearly subjective. If a person says that I want to sell this orange for £1.00 but then mistakenly advertises it for 1p, and that offer is accepted, then a valid agreement will be upheld. Simply because there was a mistake in the offer, it does not invalidate the contract. There was an intention to sell on the

part of the offeree. It is important to distinguish at this point however between an offer and an "invitation to treat".

Parties may enter into preliminary negotiations or pre-emptive talks before entering into a contract. The issues they cover will not necessarily form part of the contract and are considered to be invitations to treat. A classic example of this is the produce on display at Supermarkets and on shelves. The price highlighted amounts to an invitation to treat only. The offer does not materialize until the goods are taken to the checkout and the price confirmed. At that point the customer can accept the goods and pay the total amount, thereby completing the transaction and formalizing the contract. A similar situation is evidenced in auction rooms, where the offer is made when bids are put forward by prospective purchasers and acceptance once the auctioneers hammer falls.

Just as important in contract law as the offer, is the legality of the acceptance. This must be an unqualified expression of assent to the terms of an offer. An acknowledgement of an offer would not amount to acceptance, nor would a statement of intent. There must be a clear unequivocal communication of acceptance of the offer on the terms put forward by the offeree. Any attempt to amend the terms of the offer would amount to a counter offer. This would then put the parties back to square one and the offer would be open for acceptance with the offeree becoming the offeror.

The importance of contract law here may not be clear at first glance. Contract law not only governs what happens when the contract breaks down, but it also establishes what the terms of the contract are, in the event of a dispute. While the contract may be self explanatory in what the parties intend i.e. you pay £50 and I'll give you this washing machine, there are of course terms as to the time of payment, delivery, condition of the goods etc that need to be established. The most important terms are of course the quality of the goods and the method of payment. Certain pieces of legislation will import terms into the contract without any acknowledgement or agreement between the parties that they will be so included. An example of this is the Sale of Goods Act 1979 which ensures that in sales to consumers by anyone in the course of a business, that the goods are of satisfactory quality, fit for their purpose and correspond to their description. Contract law protects the purchaser without his knowledge. The phrase usually displayed at checkouts regarding sales and offers, "This will not affect your statutory rights" refers to such implied terms.

The offer and acceptance are the visible conditions of the contract, but perhaps even more obvious is the requirement of consideration. This term refers to the exchange of money for goods or services, or something else of value traded between the parties. It is also perhaps the most complex and contentious of the requirements for a valid agreement. Without some form of consideration, the contract is nothing more than a promise, which is unenforceable under English Law. But it is not enough that the parties make this exchange of worth, it must be "valued" consideration as opposed to inadequate consideration. This concept of "valued consideration" refers to something that is capable of estimation in terms of economic or monetary value. Furthermore it is not enough that such consideration has taken place in the past, there must be contemporaneous value by way of exchange to create a formal agreement. These technicalities have led to a raft of case law upon the issue of what amounts to consideration, hence the importance of contract law to mediate any dispute.

With the agreement between two or more people confirmed as an agreement, containing an offer and acceptance, and the exchange amount to money or something in money's worth, there must still be the requisite intention to create legal relations. While in a commercial transaction it would appear obvious that the parties to the contract intended to create legal relations, in a more relaxed and informal setting there may be a question over how serious the parties were being? This does not mean that individuals i.e. consumers are free to return goods on the basis that they were never aware of the intention to create such legalities. The Courts may draw an inference from conduct and common knowledge that shoppers are well aware of the binding nature of any agreement to purchase goods or services. What we are referring to is the scenario where one party mistakenly believes that there is no formal intention, and the other party has knowledge of that error but fails to inform them. The Court will apply an objective test to consider all the facts of each individual case. A case involving a pupil barrister who accepted an offer from a Barristers Chambers was held to be a binding contract between the trainee and the whole chambers, not just the pupil master. The absence of specific intention on the part of the rest of chambers was irrelevant. There was clearly intent from the conduct of the parties.

More informal agreements between co-habitants living in a quasi-marital relationship can lead to dispute, particularly upon the break up of that relationship. Historically there was a question about whether a contract would form when the "stay at home mother" would find herself without recourse via matrimonial legislation. The contract was said to relate to the

offer to be maintained for life by the husband, which was accepted, and the consideration would be foregoing the right to earn a living and/or providing a home for the family. The only question was relating to the formal intention of creating legal relations, a hurdle that many women could not overcome. While alternative remedies in equity exist to remedy such a scenario, it is a useful illustration of how intention can negate what at first instance appears to be a valid contract. Of course, the most obvious way to ensure that any agreement shows the intention of the parties is just to write it down. A statement of "This agreement is not entered into as a formal legal agreement" would probably suffice.

This basic overview of the law of contract demonstrates its importance and need to stay in touch with modern developments. The next section will deal more fully with this issue in terms of the scope of contract law in every day lives but it is fair to say that the need for this protection is fundamental. An unknowing party can enter into a contract without being fully aware of the implications. The development of legislation such as the Unfair Contract Terms Act 1977 and the various Consumer Credit Acts have all evolved from the basic principles of contract law and the principle of putting the parties on as equal a playing field as possible.

2. The Element of Contract

Typically, in order to be enforceable, a contract must involve the following elements:

(i) A "Meeting of the Minds" (Mutual Consent)

The parties to the contract have a mutual understanding of what the contract covers. For example, in a contract for the sale of a "mustang", the buyer thinks he will obtain a car and the seller believes he is contracting to sell a horse, there is no meeting of the minds and the contract will likely be held unenforceable.

(ii) Offer and Acceptance

The contract involves an offer (or more than one offer) to another party, who accepts the offer. For example, in a contract for the sale of a piano, the seller may offer the piano to the buyer for $1,000.00. The buyer's acceptance of that offer is a necessary part of creating a binding contract for the sale of the piano.

(iii)Mutual Consideration (The mutual exchange of something of value)

In order to be valid, the parties to a contract must exchange something of value. In the case of the sale of a piano, the buyer receives something of value in the form of the piano, and the seller receives money.

While the validity of consideration may be subject to attack on the basis that it is illusory (e.g., one party receives only what the other party was already obligated to provide), or that there is a failure of consideration (e.g., the consideration received by one party is essentially worthless), these defenses will not let a party to a contract escape the consequences of bad negotiation. For example, if a seller enters into a contract to sell a piano for $100, and later gets an offer from somebody else for $1,000, the seller can't revoke the contract on the basis that the piano was worth a lot more than he bargained to receive.

(iv) Performance or Delivery

In order to be enforceable, the action contemplated by the contract must be completed. For example, if the purchaser of a piano pays the $1,000 purchase price, he can enforce the contract to require the delivery of the piano. However, unless the contract provides that delivery will occur before payment, the buyer may not be able to enforce the contract if he does not "perform" by paying the $1,000. Similarly, again depending upon the contract terms, the seller may not be able to enforce the contract without first delivering the piano.

In a typical "breach of contract" action, the party alleging the breach will recite that it performed all of its duties under the contract, whereas the other party failed to perform its duties or obligations.

Additionally, the following elements may factor into the enforceability of any contract:

(i) Good Faith

It is implicit within all contracts that the parties are acting in good faith. For example, if the seller of a "mustang" knows that the buyer thinks he is purchasing a car,

but secretly intends to sell the buyer a horse, the seller is not acting in good faith and the contract will not be enforceable.

(ii) No Violation of Public Policy

In order to be enforceable, a contract cannot violate "public policy". For example, if the subject matter of a contract is illegal, you cannot enforce the contract. A contract for the sale of illegal drugs, for example, violates public policy and is not enforceable.

Please note that public policy can shift. Traditionally, many states refused to honor gambling debts incurred in other jurisdictions on public policy grounds. However, as more and more states have permitted gambling within their own borders, that policy has mostly been abandoned and gambling debts from legal enterprises are now typically enforceable. (A "bookie" might not be able to enforce a debt arising from an illegal gambling enterprise, but a legal casino will now typically be able to enforce its debt.) Similarly, it used to be legal to sell "switchblade kits" through the U.S. mail, but that practice is now illegal. Contracts for the interstate sale of such kits were no longer enforceable following that change in the law.

3. Oral Contract

There is an old joke that "an oral contract isn't worth the paper it's written on". That's a reference to the fact that it can be very difficult to prove that an oral contract exists. Absent proof of the terms of the contract, a party may be unable to enforce the contract or may be forced to settle for less than the original bargain. Thus, even when there is not an opportunity to draft up a formal contract, it is good practice to always make some sort of writing, signed by both parties, to memorialize the key terms of an agreement.

At the same time, under most circumstances, if the terms of an oral contract can be proved or are admitted by the other party, an oral contract is every bit as enforceable as one that is in writing. **There are, however, "statute of fraud" laws which hold that**

some contracts cannot be enforced unless reduced to writing and signed by both parties.

B. Where is Contract Law Used Today?

As was mentioned above on several occasions, contract law permeates our day-to-day lives, and often we are not aware of its presence. While legally qualified individuals may be aware every time a contract comes into existence and note phrases such as "the customer uses this at their own risk" with a wry smile, the majority of society lives in blissful ignorance of how deeply indebted to contract law they are.

In the first instance it would be a useful exercise to list a few of the various instances of contract law coming into play when we may not expect it.

(i) Public Transport – every ticket bought on a bus train or on the underground forms a contract. This is a contract of services and the majority of terms will be implied rather than express. If one was to state the whole list of terms on the back of a ticket as to the obligations of the provider of the transport to the customer, it would result in a piece of paper resembling an instruction sheet from Ikea rather than a ticket.

It should be mentioned here that such express terms that form part of the contract must be present at the moment it was entered into. The terms of importance will usually be on display either around the point where a ticket is bought, or it will direct the customer to a full list of the conditions elsewhere.

(ii) Employment – every employee must have a contract of employment with their employer. While it is a fact that some employers have not bothered with the formality of drafting a document setting out the rights and expectations of both parties, the Employment Rights Act 1996 will infer a number of basic rights for the employee in any event. The offer and acceptance of taking a new job is a given, as is the consideration (days work for a days pay). The intention is not necessarily so obvious but the relationship the contract creates leaves no room for discussion as to its formality in a legal sense.

(iii) Any purchase of goods or services – while this is dealt with in more detail below, the sale of goods or services is the most basic form of contract. While we may not

appreciate the scope of the law and its impact upon a basic purchase of e.g. a new car, the terms and conditions of sale, the various pieces of legislation importing terms and the case law stretching back more than 100 years on similar issues all have a bearing upon a customers (and suppliers) rights and obligations. It is of course rare for anyone to be made aware of all the terms in existence and the "small print" usually covers most things of relevance.

(iv) Buying a house – most people who have become involved in the conveyancing process will recall the stress of waiting for the solicitor to confirm that they have "exchanged contracts". While the ownership of a property in England & Wales can only pass by way of deed, the contract is pivotal. The contract will set out the terms of sale, including the price, items of furniture and fixtures that are being left behind and the date of completion. Once the purchase is completed and the monies paid, any issue that may be taken between the parties will have to be raised as a breach of contract. While in the majority of cases the axiom "Caveat Emptor" (buyer beware) will apply, the specific terms of the contract must still be fulfilled and depending upon the severity of extent of the breach, this will dictate the appropriate remedy available.

What can be seen above is that Contract Law is everywhere. From the purchase of a newspaper in the morning to the service of gas and other utilities, there exists a contract to govern most relationships outside the domestic scenario. It is understandable therefore that this area of law may be the most diverse in its impact upon everyday life, yet its principles remain comparatively straightforward. There are of course complex issues and certain types of contract (acquisitions and mergers, share holders agreements etc) require specific rules to govern their application, most contracts have a quality that allows them to operate without the knowledge of their existence.

The most influential and commonly used contracts are those relating to the purchase of goods and services. The Sale of Goods Act 1979 and Supply of Goods and Services Act 1982 have developed from a background of Caveat Emptor, where consumers were unprotected from sellers able to peddle goods that were less than of merchantable quality. While the image of "Del Boy" flogging various items out of a suitcase springs to mind, it was actually the larger and more commonly used suppliers of goods that took the brunt of this legislation. We mentioned terms as to quality and fitness above, and a multitude of cases have gone as far as the House of Lords to ensure the protection granted under a contract is

enforced. We have contracts for the sale of goods when we do our weekly shopping, buy a new appliance or finally get that pair of shoes. Similarly contract for the supply of services exist over the cables service for the TV, the mobile phone company or the plumber who comes into fix the leak upstairs. However they are created, the contracts that we are party to are numerous and often we are not specifically aware of our obligations under them, save to pay what we have agreed to.

While we have focused on consumers and individual contracts, that is not to say that there are any fewer contracts that exist between companies, corporations, charities or even governments. Most companies will have several contracts for the services it obtains from other companies i.e. cleaning, catering, accountancy etc. There will be contracts of employment with every member of staff, as well as contracts with each shareholder as to the money they have invested and the dividends received each period. They will in turn have contracts with the customers who retain their services, or even other companies by way of merger or shared services within a larger agreement. This is a non-exhaustive list but a good example of how contract law not only creates the basis for the relationship between individuals, companies etc, but also regulates their rights and obligations and ultimately provides a solution in the event of a dispute. The scope of this area of law clearly has no limit.

C. Contract Law Cases - Examples

Carlill v. Carbolic Smoke Ball Co (1893) 1 QB 256 (CA)

This case involved the defendant company who produced and advertised smoke balls as a preventative measure against influenza and the common cold. The advertisement stated that they would give £100 to anyone who used the product for three times a day for two weeks but still contracted one of these illnesses. The defendant also stated that they had placed £1,000 in a bank account to demonstrate their sincerity. Suffice to say that the claimant took up the challenge and after roughly 8 weeks of continuous use she contracted the flu. Mrs. Carlill claimed the £100 but the defendant refused to pay; they claimed that there was no contract in place for her to enforce the claim.

This matter progressed to the Court of Appeal. The defendants maintained that there was no intention to create legal relations and the advert amounted to nothing more than an invitation to treat. At no stage did the claimant tell them that she had accepted their offer.

Nevertheless the Court of Appeal confirmed that there was in fact a contract in effect between the parties. This situation amounted to a "unilateral contract" whereby one party offers money in exchange for the performance of a stipulated act. Whereas normally an advert would amount to nothing more than an invitation to treat, the request for the performance of an act made it an offer. There was no requirement for Mrs. Carlill to inform the defendant that she had accepted it, the undertaking of the challenge was tantamount to acceptance.

There were arguments from the defendant that the wording of the advert was too vague for it to amount to a contract. There is always a requirement that the specifics of the offer are precise so as to avoid confusion. While there was some scope for interpretation, the Court adopted a literal meaning to the advert, which simply state that providing the claimant took the smoke balls continuously and then contracted any of those illnesses she would receive £100. The deposit of £1,000 into an account was a demonstration of the defendants meaning and willingness to rely upon their product in light of this challenge. The Court had no hesitation is finding in these specific circumstances that there was a contract under which the claimant was due £100.

While this case demonstrates how the law of contract protects the party who in good conscience accepts the terms put forward by the offeror, it remains something of an anomaly. This situation would only be enforceable where the offeree was required to undertake a specific task, thereby removing the need for communicating acceptance and transferring an invitation to treat into a formal offer. There is also a lesson for the naïve or careless when setting challenges and making proposals to others. A contract can arise even when the intention was to make an informal offer, but in the absence of a specific statement to that effect, the conduct of the offeror may infer the requisite legal intention.

Coward v. Motor Insurers' Bureau (1963) 1 QB 259 (CA)

In this matter Mr. Coward and Mr. Cole were work colleagues who had an arrangement regarding shared lifts to work. Cole would drive his motorbike and Coward would ride pillion in return for a weekly sum of money. Unfortunately both were killed in a road traffic accident and the wife of Mr. Coward made a claim for damages against the estate of Mr. Cole. However Cole's insurance policy did not cover pillion passengers and as his

estate had no assets or money to satisfy the judgment, Mrs. Coward pursued the Motor Insurance Bureau (MIB).

The MIB have an agreement whereby accidents and consequential claims would be satisfied by the Government in circumstances where the driver has no relevant policy of insurance. However the rules covering this situation require Mr. Coward was carried for "hire or reward". Consequently Mrs. Coward needed to prove that there was a contract in place between Coward and Cole for the lifts to work.

There was clearly an offer of transport and this was accepted. In addition the consideration exchanged by the parties was the service of transport and the money paid by Mr. Coward. However there was a question over how formal this arrangement was so as to amount to an intention to create legal relations. Once again this matter progressed to the Court of Appeal and it was decided that notwithstanding the regular payment of money in return for the lift, it was not so formal as to create a contract. There were no terms as to how long this was to last, what would happen in default of payment or the availability of transport, or anything written down so as to at least make their intention clear.

The practice of colleagues sharing a lift to work (or "car pooling") is an accepted and wide spread practice. Parties will usually agree that one will take their car and in return the others will make a contribution towards the petrol costs. This is usually a matter of convenience, reducing costs or even a conscious decision to reduce emissions from each separately taking a vehicle. It cannot be said however that the agreement is so formal as to form a contract for the provision of this service. The contrast is to a previous example, that of public transport. There are no tickets, conditions or terms of agreement and no business or profit making organization is involved.

There can be no obligation upon people in this scenario to ensure that transport is always made available to the party that pays. What would happen when the owner of the vehicle went on holiday or there was a shift change? In these circumstances an element of common sense must come into play. Most people will make informal agreements ranging from car pooling to picking up children from school or even being the designated driver on a night out. None of these create a contract as the intention is one of informal assistance or a mutual benefit, not to create legal relations.

Olley v. Marlborough Court Ltd (1949) 1 K.B. 532

Mr. Olley visited the hotel belonging to the defendant. He had not made an in advance booking and upon arrival requested a room for the night. He signed the register and there was no mention at that stage of any other terms or conditions that might impact upon his stay at the hotel. During the course of his stay Mr. Olley discovered that someone had broken into his room and stolen certain property including a fur coat. It subsequently became known that the defendant was negligent in relation to the security within the hotel. Nevertheless, the defendant sought to rely upon an exclusion clause that was placed in the bedroom the claimant stayed in. This stated that the hotel would not accept liability for lost or stolen items belonging to customers.

The question was whether the exclusion clause that was displayed in the bedroom constituted a valid term of the contract. It was not disputed that there were all the required components to for the agreement i.e. offer, acceptance, consideration and intention, but that was not to say that all the terms the hotel sought to rely upon could actually be enforced against Mr. Olley. As we mentioned above, terms must be brought to the attention of the customer, consumer or party against whom they are trying to be enforced at the moment the contract was entered into. Otherwise it would allow parties free will to include other terms at a later stage, albeit if the customer had known of such a term they might have decided not to enter into it in the first place.

The Court decided that the contract was entered into the moment Mr. Olley arrived at reception and signed the register. That was the point when the room was offered to him and he accepted. Intention was not an issue and in consideration of the agreement, he would receive a room to stay for which the hotel would receive payment. The fact that payment would usually come after the stay was irrelevant. Consequently Mr. Olley was not given notice of this exclusion clause until he had already entered into the contract and therefore it was unenforceable against him.

Similar examples of this issue of notice and timing of the terms of any contract can be seen where clothes are purchased and notices attempting to exclude liability are put on the receipt. The example of public transport above and the terms and condition relating to the travel must be stipulated at the relevant time. It should be pointed out here however that the actual notice of these terms need not be something that is brought to someone's attention

every time they enter into a contract. If there is a course of dealing or repeated business, and in a previous transaction a term was brought to the attention of the customer, then they could be held to have been made aware of it and it becomes a term of the contract. If Mr. Olley had stayed at the hotel on a number of previous occasions, it would have been difficult for him to argue that he had no knowledge of the exclusion term. In such circumstances it is arguable that he would have been deemed to have had knowledge and the hotel could have relied upon the term within the contract.

Adams v. Lindsell (1818) 1 B. & Ald. 681

This case concerns the acceptance of an offer and the importance of how that acceptance is communicated to the offeror. Here the defendant offered to sell the claimant fleeces of wool for a certain price. They requested that the response be made by post. This letter was misdirected by the defendant so that it was not received for 3 days after it was sent. The claimant decided to accept the offer and responded on the same day. This was posted on the 5th September but not received until the 9th September. However the defendant decided on the 8th September that as they had not received a response decided to sell the wool to someone else. The claimant argued that a contract had been created as he had accepted their offer.

The Court confirmed that the delays were entirely the fault of the offeror. Had the letter been posted correctly then this scenario would in all likelihood not have arisen. Furthermore the contract was created on the 5th September when the acceptance was posted, not when it was received. While the agreement was not communicated to the offeror, it could not prevent the contract being created. To decide otherwise would be to prevent contracts being created by post completely. It would otherwise require (in this scenario) the claimant to wait until the defendant had received the offer and then written to him saying that the terms were agreed and so on. This system of acceptance was thereafter referred to as the "postal rule".

In contrast the offer itself can only be communicated to the offeree via the post once it has been received. Any pre-emptive negotiations or discussions are likely to amount to nothing more than an invitation to treat pending the formal offer.

While there has naturally been some development in this area, the most obvious issues arise with the creation of the internet and on-line shopping. The majority of people with

access to the internet have purchased something at one time or another. The question as to the formation of any contract here is when does that contract arise? While it is not important to examine the legislation and case law in that particular area (which is vast) what is crucial is how this example of a seemingly antiquated rule can be adopted into a new and totally unforeseeable system through the medium of contract law. While the rule itself remains applicable to postal orders via catalogues and other postal services, the evolution does not stop and wait for something completely new to take its place. The law of contract in this area requires modification and adaptation to meet the demand of e-commerce and a society moving towards carrying out the majority of household and social affairs through the internet. Protection for the unwary or even experienced surfer of the web, when entering into contracts on-line is clearly an important function of modern contract law.

D. Conclusion

We have seen how contract law permeates every section of our lives. From employment, to conveyancing or even to social and recreational activities such as buying a drink in the pub, contracts are created all around us. While the majority are short lived and the terms fairly simple and unobtrusive, breaches of such agreements may still be enforced with all the force of the law as with the more serious forms of contract.

The public perception of contracts is often misleading as many have not found it necessary to enforce such terms. As we live in a capitalist society with freedom of choice, the need to ensure quality often negates the need for a consumer to enforce their rights as to quality and fitness under a contract of sale. Standards are maintained by Government bodies and independent organizations i.e. BSI. The consumer rarely has the need to enforce breaches of contract, and even if they do, retailers are so aware of the rights of consumers that they will allow an exchange of goods without question. It is more often that not (certainly in the current financial climate) that the terms as to payment are enforced by suppliers and sellers in default of the agreement more frequently. Issues of credit are widespread at the moment and the contracts that regulate the borrowing of money against property (hire purchase) or simply under a general agreement (credit card) are being breached every day. This is the other side of the coin for contract law. There are terms and conditions for both parties. This is the

essence of a legal contract, the exchange of consideration without which there is nothing more than an unenforceable promise.

The law of contract needs to change with the developments in economics, technology and social attitudes. It is usually a matter for Parliament to intervene and legislate for new situations and introduce law that will govern particular relationships and the contract that arise between them. It is impossible however to legislate for all potential eventualities as a situation may arise that was not foreseen, or the technology, issue or relationship that it was intended to regulate may have moved on. It is then for the Courts to interpret the law so as to find the solution to any dispute. This is how contract law was in 1818 with the case of Adams v. Lindsell and how it will probably remain for the foreseeable future. While the variety and scope of contracts continue to evolve and increase, the general principles that we have examined above remain applicable. It may be that in years to come there will be introduced a system that will create a standard form of agreement based upon the nature and relationship of the parties to it e.g. companies or businesses in the same market dealing between themselves but there will always be the isolated agreement, or informal shake of hands that ultimately creates a contract and the enforceable terms it grants to those party to it.

E. Vocabulary

Contract Law	:Agreement giving rise to obligations which are enforced or recognized by law.
Good Faith	:A thing is deemed to be done in good faith where it is, in fact, done honestly, whether it is done negligently or not.
Mutual Consent	:The parties to the contract have a mutual understanding of what the contract covers.
Offer and Acceptance	:The contract involves an offer (or more than one offer) to another party, who accepts the offer.

F. Reading Comprehensive

(i) What is contract law?

(ii) What is the elemet of contract?

(iii) Where is contract law used today?

(iv) The law of contract needs to change with the developments in economics, technology and social attitudes, why?

CHAPTER V
SAMPLE OF CONTRACTS

A. Introduction

Human relationships are the engine of innovation; they drive the creative use and management of intellectual property (IP). Patents, trademarks, and copyrights provide mechanisms through which actors in the private and public sectors can build relationships, coordinate activities, assign responsibility, and allocate the benefits arising from innovation and its distribution. The contract links these actors and the various IP regimes. Gold ER and T Bubela. 2007. Drafting Effective Collaborative Research Agreements and Related Contracts. In Intellectual Property Management in Health and Agricultural Innovation: A Handbook of Best Practices (eds. A Krattiger, RT Mahoney, L Nelsen, et al.). MIHR: Oxford, U.K., and PIPRA: Davis, U.S.A. Sharing the Art of IP Management: Photocopying

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Drafting Effective Collaborative Research Agreements and Related Contracts E. Richard Gold, Director, Centre for Intellectual Property Policy, McGill University, Canada Tania Bubela, Assistant Professor, School of Business, University of Alberta, Canada GOLD & BUBELA focus more on actual contractual wording and the dictates of the civil code. However, irrespective of jurisdiction, the written contract is the strongest objective manifestation of the intentions of parties as they enter into a relationship.

Parties can most easily avoid disputes if the contract describes, as fully and simply as possible, the bargain made by the parties. This notion has important consequences for contract document drafting. Long-winded sentences, boilerplate provisions and impossible-to-understand definitions only complicate lives and understanding in a futile attempt to remove doubt concerning, and ambiguity of, complex and evolving relationships. Such lengthy documents are not only unreadable by the actual signatories to the contract but do little to provide guidance to the business people and judges who may eventually have to settle disputes based on those documents.

Instead of thinking about contractual documents as an attempt to pin down every last aspect of a relationship between parties in complex legal jargon, this chapter suggests a different approach, one drawn from the experience of large corporate law firms: explain the provisions of the bargain as simply as possible, in a logical sequence, using plain language. By explaining the bargain in a clear and accessible manner, not only are the chances better that the parties will comply with the essence of the contractual relationship, but also business people and judges will resolve disputes in conformity with the fundamental intentions of the parties.

Undoubtedly there is temptation to use standard form contracts and boilerplate provisions to lower transaction costs and legal fees, but in the end, the use of poorly written or inappropriate contractual provisions may lead to greater costs, rather than save money. That is not to say that every contract need be drafted from scratch; the use of contractual precedents is a judicious use of legal resources. Select precedents that are well written and constructed. Parties to the contract should question the relevance of each provision to the bargain within the appropriate cultural context. When using clauses from standard form

contracts, the key question to ask is: do you understand the language and does it accurately describe the arrangements between the parties, given the cultural and legal context?

1. Explaining the Bargain:

The art of contract drafting If one were to read court decisions about contracts, one would soon see that judges struggle not as much to determine what the documents say, as to determine the nature of the relationships underlying the contracts. When judges find this difficult because the contract document is confused and convoluted, they are more likely to misinterpret the original agreement between the parties. Such misinterpretations lead to decisions that run against the allocation of responsibilities and benefits that the parties originally intended, increasing uncertainty and undermining the business rationale for the contract.

What judges seek to find in contractual documents are objective indications of what the parties intended to do: Who was to take on what risks? Who was to benefit from the results of the contract? How were the parties to deal with disputes and controversies? Judges want to understand what the parties bargained for so that they can figure out who should do what, when, and where.

A good contractual document is one that sets out the bargain as clearly and simply as possible; a bad document is one that muddles it with too many words, arcane language, and legal mumbo jumbo. The job of a lawyer is to identify the essence of the relationship so that the parties and judges understand exactly what the business deal is about. This involves setting out the contract in a structured way that focuses on the essential elements of the bargain.

The simplest contract is one in which one party promises to deliver something to another in return for something (monetary or otherwise). If a dispute arises, the parties agree to follow a set procedure (such as arbitration or mediation) or to sue in court (litigation).1 This progression should be defined in the contract (for example, mediation procedures, followed by binding arbitration).

Further, the agreement should clearly explain how one party is to deliver something to the other, the heart of what Article 1 should cover. Article 2 should deal with payment: to whom should the payment be made? in what currency? In which form (electronic, bank draft,

for example) and when? One could also add a few sentences dealing with late payments: will there be interest charged and, if so, how much? how would a currency crisis (for example, currency cannot be exported out of the country) be dealt with? The third article deals with resolving problems: steps to be taken if the receiving person is unsatisfied with what was delivered, either in terms of quality or quantity; how the parties would resolve the conflict; what the first person should do if he or she is not paid. The parties can agree to litigation or arbitration but may first prefer to set up a mechanism through which they can elevate the problem to senior management who, presumably, want to avoid the costs and embarrassment of going to court or arbitration.

The key to drafting these articles is to keep the essence of the bargain clear and as uncomplicated as possible. Sentences should be short, free of vague adjectives, and be written in the active voice. The vocabulary should be accessible both to business people (with technical knowledge but limited legal knowledge) and judges (with limited technical knowledge but with extensive legal knowledge). Use correct grammar and a simple vocabulary. If the document would get low grades from a secondary school teacher, do not use it. In fact, sometimes legal disputes turn on grammar.

One recent commercial dispute in Canada, worth $2 million (Canadian), was resolved on the basis of a rogue comma.2 After the parties explain the main provisions of the bargain, the parties will need to define words and phrases used in the contract. The parties should include clauses that take into account the local law that applies to the contract. These clauses can have important implications for the bargain, and so writing them requires expert legal knowledge. Such clauses can deal with what would happen if there were natural disasters or labor strikes, or how much leeway is given with regard to time lines, or how to calculate exchange rates.

This information must be relevant to the local area, however, because the detailed legal rules of one place, say California, U.S.A., may be quite different from the detailed legal rules in another place, say Uttar Pradesh, India. Written contractual documents depend to a large extent on local customs. That is, the contract can be meaningful only within the set of business practices and norms that exist in the place where the contract is to be performed. As practices and norms vary tremendously, so do the contractual documents that serve to reflect contractual relationships. So, for example, contractual documents in the United States tend to be very detailed and long, while a contractual document on a similar topic will be shorter and

much less detailed in Germany. Exporting one style of contractual document from one place to another can be risky, since the business people and courts will have difficulty interpreting a document written for a different place with different customs.

This is another good reason to avoid a slavish devotion to standard-form contracts and why this chapter does not include a sample contract with boilerplate provisions, but instead sets out only the main elements of a contract.

Of course, when the parties are from two different places, say Uttar Pradesh and California, the parties must adopt a more generic style of contractual language that reflects, to the extent possible, the practices in both jurisdictions. This is not principally for legal reasons; the contractual document will be interpreted in accordance with the laws and customs of only one of the jurisdictions. Rather, the effort to reflect both cultures is important to maintaining business relationships, since people from both places must feel comfortable with the contractual document.

Finally, it is helpful to recognize that, while legal systems abound, there are two principal ones that govern most commercial contracts: the common law and the civil law. While some countries use hybrid legal systems (for example, Oman, Puerto Rico, and Indonesia), most contracts dealing with collaborations and research will be subject to one or the other of these two systems. Usually, common law countries are former colonies of the United Kingdom and follow the English legal system, while civil law countries are generally the former colonies of continental European powers.

Common law and civil law systems are usually similar in result, but there are differences in law and in practice that could ambush the unwary. For example, for a common law contract to be enforceable there must be an exchange of something of value, called consideration. Consideration can be in the form of money, return promises, action, or forbearance. On the other hand, civil law does not require consideration. Therefore, a failure to provide consideration (for example, a license with no payment and no obligation of confidentiality) may not be enforceable in the common law. Another difference between the two legal systems is that the civil law imposes background obligations of good faith as well as more limits on what can be the subject of a contract than does the common law.

However, these differences are relatively rare. They are unlikely, in most cases, to affect collaborative or research agreements greatly. The bigger difference is one of style: common law contractual documents tend to be longer and more detailed, while civil law contractual documents tend to be short and refer to the civil code for more detail.

2. Contracting to innovate

Contractual documents that deal with innovation should follow the general rule of contracts: explain the bargain in simple, straightforward sentences. Clarity and simplicity are, once again, the keys to a successful contractual document. If the contract is well drafted, neither the institutions involved nor judges will misunderstand the responsibilities of the parties involved. Following the rule does not, of course, avoid all conflict, but minimizes it and provides business people and courts a framework within which to resolve disputes.

The License

Traditionally, a license is a grant of permission for a party to enter onto the physical property of another, that is, an agreement not to hold the party liable for illegal trespass. With respect to intellectual property (IP), a license is a promise not to sue a party for actions that would otherwise constitute infringement. In other words, a license is permission to make use of another's IP under carefully laid out conditions and terms.

There are a variety of contracts, and associated documents, that relate to intellectual property. A basic license is the simplest of these contracts. The first article of a basic license should describe the rights being licensed (patent rights, copyright, trade secret rights, data-use rights, and so on) and the scope of the license (limitations on geography, users, and time). Article 1 should provide sufficient detail so that the business people and judges understand as clearly as possible both the nature and the limitations on what is being licensed. Article 1 should also discuss any ancillary license (for example, a license back or cross-license).

The second article should deal with payment. Is there, for example, an up-front fee? Are there royalty payments and, if so, how long will royalty payments have to be made? How and when should payments be made? The third article will set out the dispute-resolution mechanism: arbitration, courts, and/or some form of mediation.

One should supplement these articles with an explanation of what brought the parties together and what their goals are. The contract also should either acknowledge or reject

relevant local laws regarding liability for problems that may arise (those within the parties' control, such as failure to pay, and outside their control, such as flood or fire). The contract should clearly state which country's (or state's) law applies and so on. The parties should take care in setting out definitions and should include these at the end (or in the introduction, if one prefers). The other issues can be dealt with in a concluding article that would include mundane, but essential topics, such as how the parties are to notify one another.

Other forms of contractual documents dealing with intellectual property expand the license agreement and may, in addition to the basic license, include articles dealing with matters such as information exchange, staff, and IP rights (as in a consortium research agreement).

3. Types of Contracts

Just as there are no real limits to the bargains we can make, there is no limit to the type of contracts we can create. As circumstances change, new technologies are introduced, and business people and lawyers try to identify new niches, we encounter new ways of contracting. The imagination is the only thing that limits what a contract can be about. Therefore, instead of trying to cover all possible forms of contracting with respect to innovation—an impossible task—we will concentrate on a discussion of the main types and leave it to the reader to imagine different scenarios. Since the key is, as always, to be clear and transparent, one can adapt the basic forms of contractual arrangement covered here to other circumstances.

The remainder of the chapter concentrates on two types of contracts: research contracts and collaborative research or sponsorship agreements.

The collaborative research and sponsorship agreements are the more complicated and incorporate most of the basic terms of the research contract. Heeding the warning against using standard form agreements, the discussions below will concentrate on some of the principal issues that arise in the various types of contract. However, one must adapt the contractual arrangements to the fundamental underlying relationship and not get overly caught up in presenting minutiae.

(1). Research Contracts

A research contract is one in which a researcher seeks to obtain the rights to use some knowledge (be it patented or protected as a trade secret) to advance his or her research project. That is, the rights obtained are an important ingredient in the carrying out of a research project, whether at a public, not-for-profit, or for-profit institution. A basic outline of a research contract would include the following:

(i) Article 1 : the license

(ii)Article 2 : payment terms and process

(iii)Article 3 : problem escalation and dispute resolution

(iv)Article 4: intellectual property emerging from research (where applicable)

(v) Article 5 : confidentiality and publication rights

(vi) Article 6: legal terms, such as what to do in case of an "act of God" or other intervention, timing issues, and notification procedures

(vii) Article 7: definitions The simplest form of research contract would begin, in Article 1, with a holder of intellectual property granting a license (that is, promising not to sue for infringement) to a researcher in order to allow the latter to make use of a certain technology for a defined research use.

Generally, however, research contracts are more complex, and the license forms only one part of the broader research contract. The contract may include a promise to provide a sample of the material. Material transfer agreements are discussed more fully elsewhere,3 but it is worth noting that these agreements are not only particularly significant for research, but are also often the most problematic of contracts to negotiate. There are real worries about the sharing of research materials and results in a research environment that is increasingly industry funded, competitive, and focused on commercializing research results. These agreements also give rise to significant practical difficulties, such as the time and labor needed to prepare and transfer research materials, and the need to internationally ship biological material.4

The research contract may call for a payment (often nominal, to cover expenses) in cash as well as in-kind (for example, a promise not to do or disclose certain things). The contract may also discuss how to resolve disputes over exactly what was licensed (for

example, slight variations on the initial technology), payment amounts (how to handle the production of material that was never used), and so on.

That is the basic bargain. With a clearly written contract, one has already avoided most possible conflicts. There remain, however, a few contentious issues that we cover here in more detail. These include publication rights, confidential information, tricky licensing concerns, payment, and rights to the results of the research performed.

2.1 Publication rights

It is seldom the case that a technology is solely protected by patents that are available for review by the public, and it is bad business practice to use only patents if other forms of business protection are also available. Therefore, when a party licenses the use of a certain technology, that party often must provide associated confidential information.

To protect the party against the disclosure of this information, he or she often asks for a right to approve any publications. In addition, if the research may result in new information that may affect the technology owner's interests (the research shows that the technology does not work or works better than expected), the technology owner may wish to have time to prepare for this eventuality prior to any public disclosure. This also would lead the owner to seek the right to approve publications.

Given the interests of technology owners to guard against uncontrolled disclosures, these owners may insist that a clause be added to the research contract providing that the researcher may only publish articles after first getting permission from the technology owner or after first giving the technology owner enough time to prepare itself for the publication. Delays of three to six months for the technology owner to review publications to ensure that no confidential information is disclosed are reasonable, provided that the article's author is permitted to submit the article to the journal for a confidential review during this time. As normal peer-review processes usually take at least this much time, it provides little inconvenience to the author.

If the technology owner also has the right to new inventions coming out of the research (usually this only happens in a sponsored-research setting, which will be discussed later), then the owner may also reasonably request a publication delay in order to assess the publication for any disclosure that could threaten the patentability of the new invention.

2.2 Confidential information

Patents often represent only a part of a technology, for example, an early prototypical embodiment of an invention. The remainder, such as secrets and know-how, are protected under most legal regimes as trade secrets or as confidential information. In addition, the research conducted under a contract may result in the creation of new confidential information. The person who possesses confidential information can only prevent others from disclosing it, for example, to a competitor, if a confidential relationship exists between the person and the party to whom the information was initially disclosed. One of the best ways of ensuring this protection from disclosure is through a contract.

The obligation to maintain confidentiality will often be reciprocal. The technology owner may seek to include a confidential information clause in the research contract to prevent the researcher from disclosing confidential information initially disclosed by the owner. The researcher may wish to insert this type of clause into the contract to protect the results of his or her research effort.

It is important to pay attention to how broadly one defines the term confidential information. A narrow definition can be clear, but may leave out important information. A broad definition may, on the other hand, prevent the parties from getting on with their work. Therefore, both parties to the research contract should review the definition carefully and make sure it is clear to them.

There are several mechanisms that can increase clarity. First, one can limit confidential information to material that is clearly identified (because it is marked confidential) or limit confidential information to clear and discrete categories of information (for example, business plans or customer lists). Caution should be used in accepting an open definition (for example, “Confidential Information includes but is not limited to … .”), especially where there is no requirement that the confidential information be specifically marked as such. In addition, some courts may strike down an overly broad confidentiality provision. This is because they sometimes see these provisions as contrary to public policy, since they limit competition.

Overall, the scope of what is held to be confidential should not be so broad as to prevent publication of research results and the use of research by others. Moreover, since what should be kept confidential will depend on how the information is to be used, no single definition will apply well in all cases.

The contractual provisions dealing with confidential information should make clear to whom the information may be disclosed (for example, other researchers, including graduate students in the same and other institutions, and so on). Care should be taken to ensure that the obligations would not prevent doctoral students or post-doctoral fellows from publishing theses and making presentations.

The confidentiality provisions should also include a sunset clause that would end the obligation of confidentiality under a variety of circumstances, including situations where the information is made available to the public through no fault of the receiving party and cases where a court requires that the information be disclosed.

Finally, the contract should set out how much care must be taken by the person receiving the information to keep it confidential. For example, must the receiving party lock away the information in a safe, or can he or she leave it filed in office filing cabinets? This is important, since it establishes the level of precaution the receiving party must undertake to protect the information, and how the party ought to address inadvertent disclosures. The agreement should also specify what information the recipient of information is entitled to keep after the expiration of the contract and what must be returned or destroyed.

2.3 The license

The researcher's freedom to carry on research using a patented, or otherwise protected, invention is determined by the scope of the license. A license may be narrow and provide only for a defined field of use, such as use in conjunction with certain vectors, or the license may be broad and cover all research. The broader the scope, the more freedom the researcher has to conduct research.

The researcher needs to recognize the counterintuitive fact that receiving a license to an invention does not guarantee that he or she is entitled to use the invention. The researcher may need, for example, regulatory approval, or may need to license other inventions from the

same or different providers. It is therefore critically important for the researcher to determine, normally with the assistance of the licensor, how he or she will be able to legally use the invention. A license can be a nonexclusive license, a sole license, or an exclusive license. A technology owner who grants a nonexclusive license is permitted to grant the same or a similar license to anyone else (however, the owner may not grant someone else a sole or exclusive license). Unlike a nonexclusive license, an exclusive license incorporates two promises. The first is the license itself, that is, a promise not to sue the researcher for patent infringement. The second is a promise by the technology owner to neither use the invention himself or herself nor grant a license to anyone else. Coexclusive licenses, prevent the owner from granting a license outside of an identified group.

A sole license is similar to an exclusive license except that the technology owner retains the right to use the invention herself or himself. Normally, the greater the degree of exclusivity requested, the greater the royalty paid by the researcher, since fewer sources of revenue are available to the technology owner. In an academic setting, researchers usually require only nonexclusive licenses. In the private sector, especially where a technology is key to developing a particular application, a research organization may need an exclusive or co-exclusive license that justifies the investments needed to bring the technology to the market. This is often the case if the research organization faces a significant risk or the market for the technology is expected to be small.

Some inventions in the biotechnology field, such as genetic inventions and platform technology, tend to represent upstream inventions: these are inventions that are needed in a large variety of settings and applications. Granting exclusive or sole licenses over all applications (generally referred to as fields of use, in-license agreements) for these types of inventions is not recommended.

Indeed, the Organisation for Economic Co-operation and Development (OECD) has recently issued best practice guidelines for licensing genetic inventions that emphasize the general preference for nonexclusive licensing for genetic technologies.5 However, we can infer that nonexclusive licensing is more broadly preferred, especially for platform technologies. One study indicated that exclusive licensees often fail to actually invest the necessary funds to move a technology forward.6 This may happen if the licensee lacks funds

or loses interest in developing the technology. Thus, strong exclusive relationships are generally not the best way to advance research or commercialization.

If an exclusive license is necessary, particularly with respect to very early-stage research, it is best to narrowly define fields of exclusive use for the invention so that the technology owner has the flexibility to permit researchers in other fields with different applications the freedom to conduct research. Where an exclusive license is required, the parties should draft the license to include provisions that enable the technology owner to take back the rights granted in certain circumstances. These circumstances might include the failure of the research organization to develop the invention in the manner described in the license agreement, failure to fully exploit all aspects of development for the invention, or failure to sublicense as appropriate. These take-back provisions should address, for example, the loss of the license, the conversion of the exclusive license into a nonexclusive license, or the reduction in scope of the exclusive license.

To preserve the freedom of researchers, in general, to engage in research for humanitarian purposes, licenses should, whenever possible, explicitly recognize the rights of third parties to conduct humanitarian research. This can be accomplished by having one of the parties retain the right to provide licenses to others who plan to carry on such work. The parties may even go so far as to impose an obligation to do so in specifically defined circumstances. When seeking to include this type of provision, a lawyer should be consulted in the relevant country to make sure that the obligation is enforceable, especially in case of bankruptcy.

One important, but occasionally overlooked, element of a license is a description of the organizations and people that are entitled to benefit from the license. Without such a list, the default is that the license will apply only to the licensee. Where the research is being used by researchers at several institutions, or several locations, or by research teams from multiple corporate entities within the same family of companies, the license must be drafted so as to permit all of the researchers to use the technology. To accomplish this, the license should specifically permit the research organization signing the license with the right to allow others to use the invention through a sublicense. On the other hand, the technology owner will often want to ensure that this group does not become too large. Thus, it is in both parties' interests to specifically define the group to which access to the inventions will be provided. In

addition, the license should identify all countries where the researcher requires access to the invention.

2.4 Payment

In general, those who receive a license for an invention pay a combination of up-front fees and ongoing royalties for the right to use the invention. Where the technology is a research tool and the market for the technology consists primarily of those conducting research, a market price will be charged. In the case of research agreements, however, it is standard practice to either not demand these fees or to set them at a rate that compensates the technology provider for out-ofpocket expenses. There are other cases where a fee will normally not be requested, such as where the license is provided as part of a cross-license arrangement or where the parties wish to contract for the provision of know-how related to research that falls within existing research exemptions.

Where payment is required, the amount of the fees depends on many factors, including the scope and nature of the license, the type of invention, and whether the researcher is sponsored by the private or the public sector. In general, care must be taken in establishing up-front fees, especially where these fees may present a barrier to access.

2.5 Rights to intellectual property created through research

Research conducted using licensed innovation may itself result in patentable inventions. Some of these inventions may relate to the licensed-in technology. For example, they may constitute a modified or improved form of the original technology, or they may be substantially different. If the research agreement is silent on the ownership of these new inventions, then the researcher or the researcher's employer, or a combination of the two, would be entitled to hold a patent over it, depending on the IP policy of the particular research institution. This means that the original technology owner would, in the absence of any agreement to the contrary, normally have no IP right to this new invention and, therefore, no right to use the new invention, let alone control access to it. This situation can be changed through an appropriate assignment, through grant-back clauses, or through license provisions in the research contract.

2.5.1 Ownership

In the research setting, ownership of intellectual property developed using licensed-in technology should generally remain with the researcher or the researcher's employer. This is especially true where the research takes place at a university or public research center and where public funds are used to conduct research. Thus, reach-through license agreements, in which the original technology owner claims rights to research resulting from the use of licensed inventions, should generally be avoided.

The situation is different for sponsored research where the researcher is essentially hired to conduct research for the original technology owner. In this case, it is appropriate for the researcher to assign IP rights to the technology owner, since the default rule would leave the intellectual property in the researcher's hands. Where there is an assignment, the researcher should ensure that other researchers, graduate students, and postdoctoral fellows working on the project understand this and agree to transfer intellectual property to the original technology owner.

The contract should also set out whether the researcher or the original technology owner has the responsibility to file and maintain patents for the new inventions. Normally, this would fall on the party who ends up with the patent or who holds an exclusive license to the invention.

2.5.2 License back

The research contract would not normally include a license back from the researcher to the original technology owner for inventions made during the course of the research. This is because the risk and responsibility for new inventions rests with the researcher, not the original owner. The situation is slightly different with respect to improvements to licensed-in inventions. In this situation, the original technology owner may wish to have access to those improvements both for his or her own sake but also for the sake of his or her other licensees.

It may be appropriate for the researcher to license back improvements on a nonexclusive basis to the original technology owner, to the extent that this is necessary for the owner and his or her other licensees to continue using the (improved) invention. A reasonable royalty may be required. The scope of the license back should not be so large as to prevent the researcher from licensing the improvement to other parties.

2.6 Alternative structures for research relationships

Researchers will often require access to many inventions to accomplish their work. Indeed, a researcher may be required to purchase many licenses to carry out a particular research project. The need for multiple licenses, referred to as patent stacking, can lead to problems, because the costs, in terms of both time and money, associated with obtaining those licenses to a large number of patents simply is prohibitive. In order to avoid potential problems, license agreements need to ensure that the total royalty burden faced by the researcher is reasonable. This can be accomplished by setting a maximum total royalty burden that the researcher must pay to all licensors.

To the extent that the total royalty burden exceeds that amount, the researcher would pay the technology owner a pro rata amount of the total royalty burden. The owner may wish, however, to set minimum royalty rates. Alternatively, licensors and licensees may wish to contemplate creating patent pools, patent clearinghouses, or other open-source means to ensure that researchers at both public and private institutions have access to basic technology. License agreements would then be standardized and ensure access to a variety of inventions at a reasonable cost.

A patent pool is an arrangement in which "two or more patent owners agree to license certain of their patents to one another and/or third parties." Patent pools bring together patent holders in a specific area of innovation, such as a viral genome, to facilitate the efficient use and development of a technology. The patents are pooled because the arrangement allows inventors in the pool to use all their patented inventions under favorable licensing terms. The group then shares any benefits that may materialize from this arrangement. The motion picture industry, aeronautics firms, and those developing new DVD technology have all successfully used patent pools to advance their respective technologies.

There are many challenges to setting up a patent pool. For example, patent pools may trigger anti-competition laws. Second, researchers may choose not to join in the patent pool because, even though these pools reduce research transaction costs and spread risk, they also decrease the potential for large profits. Thus, parties need to
strike the right balance between research goals and profit motives. Open source patent systems share the goal of promoting the free dissemination of research between inventors and the public, in contrast to the creation of marketplace monopolies. Open source systems can be

directed at end products or research tools used to develop products. There are several functioning examples of open source patent systems. One such initiative is the Public

Patent Foundation (PPF). It facilitates the creation of free zones in which patents are pooled and made freely available to other participants. The PPF accomplishes this by granting nonexclusive and royalty-free licenses to participants. Another example is the Biological Innovation of Open Society (BIOS). It involves technologies that have already been granted patent rights. Focusing on research tools rather than on final products, BIOS (like PPF) has established licensing terms to achieve their specific goals. One final example of an open source patent system is the Tropical Disease Initiative (TDI). With this system, inventions are not necessarily subject to patent rights. TDI's aim is to maintain an accessible Web database to facilitate research and development and to make research information readily accessible to researchers.

(2). Collaborative Research and Sponsorship Agreements

While the research contract normally provides a one-way flow of technology from the technology holder to a researcher, more complex arrangements exist. This section considers two of them: the collaborative research agreement and the sponsorship agreement.

A collaborative research agreement involves multiple partners, often a mixture of private and public sector actors, working together on a particular research project. The partners each contribute an amount of money, skilled talent, and technology to a central pot that they then harness to conduct research. Usually, the private sector actor either obtains the intellectual property to the resulting research or, more often, a priority right to license that intellectual property. By adding additional players and providing a morecomplex ownership scheme for the resulting technology, collaborative research agreements form a more-complex transaction than the one-way flow of technology in the research contract. A basic collaborative research agreement would include the following

• Article 1: joint obligations to participate in the collaborative research effort

• Article 2: a high-level description of what each party brings to the research project (money, technology, material, skills) with cross-references to articles 3, 4 and 5. The details of each party's contribution may be attached as an appendix to the agreement.

• Article 3: payment terms and process stipulations

• Article 4: licenses from the various parties to use pre-existing technology (including a mechanism to add additional technology)

• Article 5: a list of materials needed to be transferred to conduct the research

• Article 6: provision for who holds intellectual property emerging from the research

• Article 7: licenses to technology emerging from the research (including who has the right to license-out the technology)

• Article 8: allocation of financial returns from the use or license of emerging technology and payment terms

• Article 9: addition and removal of collaborative team members

• Article 10: management structure that will be used to supervise the research and research results\

• Article 11: problem escalation and dispute resolution

• Article 12: confidentiality and publication rights

• Article 13: legal terms, such as what to do in case of an "act of God" or other intervention, timing issues, and notification procedures

• Article 14: definitions

A sponsorship agreement is a research contract instigated by an actor, usually in the private sector, for the benefit of that actor. In some ways, it is research for hire. However, when the researcher or research organization being hired is in the public sector, the agreement normally also creates knowledge for that organization or the research community in general. As in the collaborative research agreement, the sponsor will normally, in addition to providing a license to original technology, pay for the research and retain certain IP rights in the outcome of that research. The basic structure of a sponsorship agreement includes the following:

• Article 1: a description of the research to be conducted by the researcher

• Article 2: payment terms and process stipulations

• Article 3: the license to any technology necessary to conduct the research

• Article 4: any materials needed to be transferred to conduct the research

• Article 5: ownership of intellectual property emerging from the research

• Article 6: any license to use technology resulting from the technology

• Article 7: problem escalation and dispute resolution

• Article 8: confidentiality and publication rights

• Article 9: legal terms, such as what to do in case of an “act of God” or other intervention; payment schedules and other timing issues; and notification procedures

• Article 10: definitions

Both collaborative research and sponsorship relationships are complex and so the nature of these relationships will be context dependent. This means that one should avoid the automatic use of standard-form agreements and ensure that the contract is context specific. The more complex the contract, the greater the need for clarity and structure.

3.1 Confidential information

The discussion that follows presumes the reader understands the content of the previous discussion with respect to research contracts, and thus only highlights areas of particular importance and adds provisions not required for the ordinary research contract. The reader is thus advised to read carefully the previous section on research contracts before continuing further.

A research sponsorship or collaborative research relationship is designed to build new knowledge and new inventions. While some of these inventions may be patented, others may be held as trade secrets. In the latter case, the agreement should normally establish how to ensure trade secret protection. In virtually all collaborative research or sponsorship agreements, all parties will be obliged to maintain confidentiality, in order to protect both what was brought into the research project and what is to be produced through the research partnership.

Unlike standard research contracts, it is highly likely that, with both collaborative research and sponsorship agreements, information will likely flow back and forth between a number of parties, perhaps in different jurisdictions. The agreement must therefore clearly

provide for information sharing and for a mechanism to keep track of who has accessed what information and when. Such provisions will not only help maintain control over the information, but make it easier to identify which party is responsible for any security lapses, should they occur. It is also important, in cross-jurisdictional agreements, to ensure that confidential information provisions are enforceable in all relevant jurisdictions.

The parties should carefully describe what should be done at the end of the project with confidential information that is brought into or created through the project. Thus, the agreement should specify whether, at the end of the research, other participants in the research project are entitled to use the confidential information brought into the project by another party. Similarly, the parties must determine who will be entitled to use information created through the research program and for what purposes.

In order to ensure that confidential information can be licensed to others, it is also important for the agreement to stipulate which of the parties is entitled to make decisions about the licensing of the information. In the absence of such a provision, it will be difficult to transfer confidential information developed through the research program to eventual licensees of the technology.

3.2 License to contributed patented technologies

Participants in a research project will likely bring with them not only confidential information, but patented technology for use in the course of the research. Given the evolving nature of complex research projects, the parties are unlikely, at the beginning of the project, to know exactly which technology they will each need to contribute. To handle this problem, the agreement should list the technology and associated patents that need to be included in the project. The parties should establish a mechanism through which additional technology (and associated patents) can be added, for example, a committee that formally approves the addition of new items to the technology and patent list. By establishing such a mechanism, the contract provides transparency to the participants and yet includes flexibility to adjust to new developments.

3.2.1 License scope and nature

Unlike a standard research contract, which licenses technology to one party, in the collaborative research agreement and occasionally in the sponsored research agreement, the license will need to extend to all research participants at all institutions. Therefore, the agreement needs to describe the set of persons who are entitled to use the technology, as well as set out a mechanism to add additional researchers and institutions who may later join the project.

Normally, material or information contributed through a sponsorship or collaborative research agreement will be licensed on a nonexclusive basis to those carrying out the research. It is good practice to include these provisions even in countries where a formal research exception exists, given both ambiguities in the law and differences between the legal rules in different countries. The parties should ensure that the scope of the license is sufficiently broad as to accommodate changes in research direction.

Where there are multiple parties to an agreement, the contract should provide a mechanism through which participants can withdraw. This is particularly important for bankruptcy issues that otherwise could plague ongoing research. Such a mechanism can also address any changes in status of one of the participating institutions (for example, a subsidiary company merging with its parent company).

These agreements should normally state that the remaining parties are entitled to continue using material or information and should also stipulate the process for adding new parties to the collaboration, subject to national bankruptcy and competition laws as well as other contractual obligations. Once again, one must recognize that a license by itself does not guarantee that the licensee or other parties named in the agreement can actually use the invention.

3.2.2 Payment

As licenses granted to researchers actively contribute to the research effort, they are usually provided either free of charge or at a reasonable rate.

3.3 Rights to intellectual property created through research

One of the most important goals of the sponsorship or collaborative research arrangement is to develop a new technology that can be commercialized. Because of this, some of the key IP provisions in these agreements relate to the intellectual property produced through the research, rather than to existing inventions.

3.3.1 IP rights associated with the sponsorship agreement

If a sponsor wishes to alter the default legal provision that the researcher or employer retains IP rights to research results, the agreement ought to clearly specify the respective ownership stake of each of the parties in inventions resulting from the research. The sponsor and researching organization ought also to specify which of them has the power to make decisions about the licensing of these inventions. This need not be the same as the ownership entitlements, although it frequently is. The parties should also specify which of them has the responsibility to file and maintain patents, with respect to the inventions. In normal cases, the sponsor holds the IP rights and the obligation to maintain patents.

3.3.2 IP rights associated with the collaborative research agreement

The ownership of intellectual property that results from a research collaboration can be difficult to determine. Often the institutions have different sets of rules governing the ownership of intellectual property. Some institutions may leave intellectual property in the hands of their researchers and students, while others will claim ownership to the intellectual property. In reality the issue of ownership is more complicated, since ownership rules often depend on who funds the research (that is, the government, a philanthropic foundation, or the private sector). Furthermore, on a practical level, it may be difficult to assess which party has the greater claim to inventions made during the course of the research.

In the above circumstances, the parties would be well advised to specifically address the question of which of them will obtain ownership of patents and other IP rights. If the parties fail to address this issue, they risk blocking further development and use of research results arising from the collaboration. Ownership may also be particularly important with respect to avoiding seizure by others, as in the case of bankruptcy. The parties ought also to specify which of them has the responsibility to file and maintain patents over those inventions.

A related issue is which party or parties will have the power to make decisions about the future use of intellectual property, including decisions concerning licensing out technology developed during the course of the research program. What is important here is not actual ownership, but which party has control over the use and further licensing of those inventions.

In general, no matter which party or parties own the technology and associated intellectual property, all of the parties ought to have the right to use the developed technology on a nonexclusive basis for internal use and the use of their subsidiaries. There may, however, be cases where such an arrangement is not practical or effective (for example, when the parties do not plan to work on the technology after the research project and prefer to license it exclusively to a third party).

The power of a party with the right to grant licenses to others should not be unconstrained. For example, the collaboration agreement should normally provide that licenses over research tools or platform technology developed through collaboration should be nonexclusively licensed. If that is impossible, and the collaboration agreement provides that resulting technology can be licensed exclusively, there should be limits. An exclusive license should preserve the right of all collaborating researchers, and preferably all researchers anywhere, to continue conducting research on the technology and using it in a teaching environment.

Second, any exclusive license should ensure that further development and use of the technology is not blocked. This can be accomplished through the use of provisions that enable the collaboration to nullify licenses in certain well-defined circumstances (for example, the failure of the future license holder to develop the technology in the manner described in the license agreement, to fully exploit all aspects of development for the technology, or to sublicense as appropriate). The nullification provision can take the form of a loss of the license, the conversion of the exclusive license into a nonexclusive license, and the reduction in scope of the exclusive license.

Just as the issues of technology ownership should be separated from control of the technology, so should the issue of ownership be separated from that of revenue allocation.

What is critical is that the agreement clearly states how licensing and other revenue is to be divided among the collaborators.

4. Conclusion

The best contractual document is one that, once signed, is never looked at again. This can be the case when the parties have so well described their relationship that it is obvious who is to do what and who bears the risks. In the unfortunate and rare situation where a dispute arises, a clearly drafted contract is essential for assisting both the business people administering the contract and the judges that may be called upon to interpret it to find an appropriate and fair solution.

The basic elements of a bargain between parties, whether with regard to a simple research contract or to more complex sponsored research or collaborative research agreements, determine the structure, language, and length of a contractual document. The goal of the contract drafter is to capture the main components, laying them out in order of importance to the overall between the parties. While legal detail cannot be ignored, it shoond place to clear drafting practices.

B. Contract Sample

ARTICLE 1 – COMMODITY, LOADING PORT, SHIPMENT TERM AND QUANTITY.

1.1	Commodity	: Indonesian Steam (Non-Coking) Coal in Bulk
1.2	Loading Port	: One Safe Anchorage in South Kalimantan
1.3	Contract Period	: 12 months (1 year)
1.4	Shipment Terms option	: +/- 600,000 MT/3 months +/- 10% at vessel's
1.5	Partial shipment	: Allowed

ARTICLE 2 – PRICES

2.1 Shipment Price: USD 35.00 /MT FOB MOTHER VESSEL

ARTICLE 3 - SHIPMENT DATES

3.1 1st Laycan being agreed to be advise

ARTICLE 4 - QUALITY DETERMINATION

4.1 The quality of coal to be supplied hereunder shall be with the following of typical specifications determined and analyzed as per ASTM standard by PT Geoservices/ PT Sucofindo, Indonesia. All percentages used refer to percentage by weight.

Parameters	**Basis**	**Contracted Specs**	**Rejection Limits**
Total Moisture	ARB	24% Max	26%
Inherent Moisture	ADB	12% Max	15%
Ash Content	ADB	12% Max	18%
Volatile Matter	ADB	40%	
Fixed Carbon	ADB	By Difference	
Total Sulphur	ADB	0.9%	% M1ax
Gross Calorific Value	ADB	5,600 kcal/kg	< 5,300 kcal/kg
HGI(as per ASTM Standard)		46	
SIZE 0-50 mm		90%	

Guaranteed Parameters for price basis :
GCV (ADB) 5600 Kcal/Kg
Total Moisture (AR) 24%
Ash (ADB) 12%
Sulphur (ADB) 0.9%

6.1 following formula:

$$\text{Invoiced Price} = \text{FOB Price} \times \frac{\text{Actual GCV (ADB)}}{\text{Contractual GCV (ADB) Kcal/kg}}$$

6.2 BUYERS reserve the right to reject the cargo in the event PT Geoservices analysis is found to exceed/go below the limits specified under the Heading 'Rejection' in Article 4 of this contract.

ARTICLE 7 - PAYMENT AND DOCUMENTATION

7.1 PAYMENT TERMS

Payment for each shipment to be paid by an At Sight Irrevocable Letter of Credit (L/C) established for 100% of the cargo shipment value through a prime international bank.

After receiving the L/C then the Seller bank must be issued the 2% performance bond back to Buyer.

(a) One (1) original plus three (3) copies of Seller's manually signed and stamped Commercial Invoice showing the basis on which the Price is calculated, in accordance with Article 4,5&6;

(b) A full set of "clean on board" charter party Bill of Lading consigned to the order of bank and notify applicant marked freight payable as per charter party;

(c) Manually signed one (1) original plus three (3) copies of Certificate of Sampling & Analysis issued in accordance with Article 4;

(d) Manually signed one (1) original plus three (3) copies of Certificate of Weight issued in accordance with Article 5;

(e) Manually signed one (1) original plus three (3) copies of Certificate of Origin issued by the Indonesian Chamber of Commerce or equivalent Government Authority;

(f) Manually signed one (1) original plus one (1) copy of the statement of Draft Survey issued in accordance with Article 5;

7.2 All bank charges at SELLER'S end shall be borne and paid for by SELLER. All bank charges at BUYER'S end shall be borne and paid for by BUYER.

ARTICLE 8 – VESSEL NOMINATION, LOADING TERMS AND DEMURRAGE / DESPATCH SETTLEMENT

8.1 BUYER shall nominate the vessel at least fourteen (14) days prior to the first day of laycan at the loading anchorage.

8.2 Loading Rate:
The Buyer shall arrange for the utilization of a bulk carrier suitable for the carriage of the coal and suitable to load from barge at the Loading Port. The vessel shall be equipped with 4 sets of hydraulic system crane minimum capacity 25 MT and 4 sets of grabs each with minimum capacity of 8 cbm to achieve the loading rate of 8,000 MT/day. In the event the loading is only from one side of the vessel due to bad weather (rough sea, high swell, etc) then the loading rate will be calculated on pro-rata basis depending on number of cranes working.

8.3 Laytime :
Laytime shall commence 12 hours after vessel agent's tendering NOR

8.4 In case SELLER is unable to load the full quantity (a spill over tolerance of 1% is acceptable) as demanded by the Master of the Vessel, SELLER will be liable for dead freight for the quantity short load. Such dead freight, if any, shall be settled through L/C and deducted from the invoice value.

8.5 Vessel once on demurrage will remain always on demurrage. However if the seller's barges are available near the vessel but the barges are prevented from coming alongside the vessel or loading is prevented by vessel's hatches being closed due to bad weather including but not limited to rain, high waves, strong winds etc such condition shall automatically be deemed as Force majeure without seller having to give written notice. Such event shall be recorded in the Statement of Facts and will be accepted by all parties concerned without dispute. The duration for which the barges are prevented from being discharged shall not be counted for demurrage calculation.

8.6 Demurrage and Despatch money, under this Agreement shall be settled directly between BUYER and SELLER by Telegaraphic Transfer 30 (thirty) days after completion of loading and issuance of the Statement of Facts. Demurrage/Despatch calculations shall be made on the basis of 'Statement of Fact' signed by the Master/Owner's agent at loading point.

(a) The Seller shall be liable to pay to the Buyer all Demurrage charges calculated in accordance with the terms of this Agreement. Demurrage charges shall be paid in respect of time all time in excess of Laytime required to load the vessel.

(b) The Buyer shall be liable to pay to the Seller Despatch in respect of time of Laytime saved in loading the vessel, at the rate of the relevant charter party per day (pro-rata) for Laytime saved.

(c) Demurrage/Despatch rate: As per charter party during vessel nomination.

8.7 Notice of Readiness:
Notice of readiness shall be tendered on office hours only between 0900 to 1800 Mondays through Saturdays, Sundays and public holidays not included, when the vessel is ready in all respects to load the cargo except for Indonesian public holidays.

8.8 BUYER shall give notice to SELLER at least 10/7/5/3/2/1 days prior to the expected date of arrival of the nominated vessel suitable for loading at the Anchorage Loading The BUYER shall nominate the performing vessel at least 7 (seven) days with quantity in 60,000 MT prior to the first day of laycan.

8.9 Any time lost in waiting for completion of SELLER'S export formalities will be to SELLER'S account.

8.10 SELLER'S guarantee one (1) safe anchorage where the vessel shall always be afloat. SELLER also guarantees suitable draft at anchorage point for the vessel and for loading the contracted quantity.

ARTICLE 9 – TITLE, RISK AND LIABILITY

9.1 Title with respect to shipment shall pass on to BUYER when SELLER has received whatever payment is due to him after adjustment for quality, quantity shortage, dead-freight, demurrage and stevedoring damages, if any, etc. for each shipment

ARTICLE 10 – TAX AND DUTIES

All taxes, duties, levies, dues, etc., of the coal loaded onto the vessel, if any, at the port of loading to be paid by SELLER and similarly, at the port of unloading shall be to BUYER'S account.

ARTICLE 11 - BUYER'S OBSERVATION

BUYER'S at their own expense shall reserve the right at any time to observe or appoint an observer/representative/third party international inspection agency during mining and stockpiling of the coal for the shipment, sampling and analysis, loading and weighing at the stockpile/jetty/loading port/anchorage for which SELLER'S to extend all necessary cooperation.

ARTICLE 12 – INSURANCE

BUYER shall at his or her own expense, arrange for suitable marine insurance cover for the material shipped by SELLER.

ARTICLE 13 – LIMITATION ON ASSIGNMENT

Neither party may assign the whole or any part of it's right or obligation under this contract to a third party without the prior consent in writing of the other party.

ARTICLE 14 – FORCE MAJEURE

Either party shall be relieved of its obligations and responsibilities under this Contract, if the performance of this Contract is wholly or partially prevented and/or delayed by act of God and any other cause or causes beyond the control of either party such as Fire, War. Flood and any government action. Either party shall promptly give notice to the other party of any force majeure event effecting its obligations under this Contract along with documentary evidence and certified by certification of the same from the Indonesian Government Authority. If such notice is given, the obligations and responsibilities of the party giving such notice as well as the corresponding obligations and responsibilities of the other party shall be relieved to the extent made necessary by and during the continuance of force majeure.

In the event that a delay, interruption or failure occurs or is likely to occur, the party directly affected shall promptly notify the other party by cable or telex, and shall also within ten (10) days thereafter notify the other party in writing of particulars of the relevant event and supporting evidence as well as certification from the Indonesian Government Authority.

The party so affected shall make its best efforts to remove the cause of delay in compliance with its obligations under this Agreement. Upon the removal or resolution of the cause of delay, interruption or failure, the party so affected shall notify the other party by cable or telex, and in writing within ten (10) days thereafter, of such removal or resolution. The Contracting party's obligation to perform the contract shall continue to remain in force as soon as the force majeure condition ceases

Currently the price is fixed at PMT for 12 shipments. However, at any point of time, due to international price come down heavily, the seller and buyer will coordinate and renegotiate the price. For taking stock of such matters, the international coal index can be referred to.

ARTICLE 15 – ARBITRATION

All disputes or differences whatsoever arising between the parties out of or relating to the construction, meaning and operation or effect of this Contract or the breach thereof shall be settled by arbitration in Singapore, in accordance with the Rules of Arbitration of International Chamber of Commerce (ICC) and the award made in pursuance thereof shall be binding on both the parties.

The arbitration shall be governed by Indonesia law and shall be conducted in English language. The Arbitration shall be borne by the losing party. Should there be no such losing party or winning party as in the case of a compromise, the expenses shall be borne by initiating party, except in cases where the SELLER and the BUYER agree otherwise on mutual consultation or where the Arbitrator gives a specific Award otherwise in which event the said Agreement or the said specific Award shall be respected**.**

ARTICLE 16 **– RISK PURCHASE**

Once the Buyer has complied with all the terms and conditions of sales contract and the seller fails to perform the contract, then the buyer has the right to claim the difference between the contracted price under this contract and the contracted price under a new contract by the Buyer with alternative suppliers.

In case of delay in the shipment as per the mutually agreed schedule, seller should arrange the same quality material as per the specification mentioned in the contract from any other source at their cost. In case of failure for the arrangement of the material by seller within 30 days from agreed shipment date, buyer has the option to arrange the material from any alternative source and the differential cost of the same over and the agreed price will be recovered from the seller on actual basis, which shall be forthwith paid by the seller to the buyer on demand forthwith.

ARTICLE 17 - NO WAIVER

No waiver by either party of any provision of this Contract shall be binding unless made expressly and expressly confirmed in writing. Further, any such waiver shall relate only to such matter, non-compliance or breach as it expressly relates to and shall not apply to any subsequent or other matter, non-compliance or breach.

ARTICLE 18 - APPLICABLE LAW

This agreement shall be governed by and construed in accordance with English Law and each of the parties hereby submits to the exclusive jurisdiction of the courts of Singapore.

ARTICLE 19 – CONFIDENTIALITY

This Agreement is confidential and shall not be disclosed except to appropriate governmental entities unless otherwise.

ARTICLE 20 - ENTIRE AGREEMENT

This contract contains the entire agreement between BUYER and SELLER in relation to the sales purchase of coal and supersedes all prior negotiation, understandings and agreements whether written or oral in relation to the contact.

ARTICLE 21 – AGENCY

The Loading Port Agent shall be nominated by charter's and appointed by the Vessel Owner.

ARTICLE 22 – BANKING INFORMATION

Seller's Bank Name	: PT. BANK MANDIRI
Branch Address	:
Tel / Fax	:
Account Number [USD]	:
Account Name	:
SWIFT Code	: BMRIIIDJA
Bank Officer	:

IN WITNESS WHEREOF the parties hereto have caused this Agreement to be duly executed as of the day and year first above written.

For and on behalf of Buyer:	For and on behalf of Seller:
Director	Director
Witness from the Buyer's Party	Witness from the Seller's Party
Director	Director

CHAPTER VI

LAW TERM – GLOSARY OF LEGAL TERM AND MEANING

A. Law Term

Legal jargon can be confusing and incomprehensible for many. Nevertheless, most of us have to encounter these complex terminology at some points in life. Here is a compilation of legal terms and meanings which can help you in understanding legal terminology.

Have you ever heard about *Ignorantia juris non excusat* or *Ignorantia legis neminem excusat*? These are Latin phrases which encode the legal principle that ignorance of law is no excuse. In short, no one can escape the liability for violating a law by claiming that he was unaware or ignorant of the law. Even though this legal principle has many exceptions, normally, it is deemed that the people of a certain territory are aware of the laws applicable to that jurisdiction (at least the ones which may affect their day-to-day activities). However, many people are still ignorant of the relevant laws and land in trouble. Forget about the laws, even legal terms are confusing and unnerving for many, except those with substantial legal training. But don't panic; a little bit of effort can help you in understanding the law terms, meanings and definitions.

The following is a legal terminology list, which is a compilation of some common legal terms and meanings which may be of your help in understanding law terms, and will make your confrontation with laws a lot easier. This legal terms list is given in an alphabetical order, from A to Z. You may either scroll down to find the law term or click on the list of alphabets given right below. Each alphabet has a list of legal terms, starting with that letter.

B. Law Terms and Meanings - Glossary of Legal Terms and Definitions

A

A fortiori: Latin term used to denote a reason, which is similar to the existing one, but more stronger in nature. This term is often used to explain a situation in which one fact is already proven and ascertained, then it can be inferred that the related second fact is more true. For example, it is already proved that 'A' can carry a weight of 120 kilograms. Then, *a fortiori*, 'A' can also carry this object, which is only 60 kilograms in weight'.

Ab Initio: Latin term, commonly used in association with contracts, marriages, etc. It means 'from the very beginning'. The marriage is void *ab initio*, means that the marriage was not valid from the beginning itself.

A Priori: Latin term, which means that 'from the cause to the effect'. It is based on the assumption that if the cause is a generally accepted truth, then a particular effect must follow. So, *a priori* judgment is considered to be true, but based on presumption and not on factual evidence.

Abandonment: The voluntary relinquishment of a right by express words or by action. This term can be used in the context of rights or obligations under a contract, over property, person (spouse or children) or voluntary withdrawal from the commission of a crime.

Abandoned Property: Such property, which has been abandoned by the owner.

Abatement: This term refers to the plea to squash and end a suit. It may also denote reducing or lessening of something. For example, in case of an eviction case, where the landlord is seeking unpaid rent, the tenant may make a plea for rent abatement, citing the poor living conditions of his premises.

Abduction: Refers to the crime of taking away a person by fraud, persuasion or force. It is different from kidnapping, which is done by force or threat only.

Abet: To aid or assist someone in committing a crime or inducing another to commit a crime. The person who gives assistance is called the abettor.

Abeyance: The condition of being suspended temporarily. If the ownership of a property is yet to be ascertained, it is said to be in abeyance.

Abscond: Fleeing the jurisdiction or hiding in order to escape legal proceedings or criminal prosecution. A person is said to have absconded, when he deliberately leaves the jurisdiction to avoid arrest or other such legal proceedings.

Absolute: A right is said to be absolute, when it is free from any condition or qualification. Absolute liability makes a person held liable for his action and no defense is available.

Abuse: Improper or excessive use of any legal right or process. It is abuse of discretion, when a court does not use appropriate laws or if the decision is based on erroneous facts. It is abuse of process, when civil or criminal legal procedure is initiated against any one for a malicious reason.

Acceleration Clause: A contractual provision, which hastens the due date of payment or obligation, as a penalty for default in the payment/obligation.

Access: A term used in family law and refers to the right of a spouse, which allows to spend time with children on a regular basis.

Accessory: A person is said to be an accessory, if he/she helps or encourages the commitment of a crime. He is an accessory before the fact, if he knows about the commission of the crime beforehand. He is an accessory after the fact, if he conceals the facts about the crime or aids in the escape of the perpetrator. An accessory may or may not be present at the scene of the crime.

Accident: An unforeseen incident caused by carelessness, ignorance or unawareness. The affected party can claim compensation if the accident results in injury.

Accomplice: A person who knowingly and voluntarily participates in the planning or commissioning of a crime. Such a person is differentiated from an accessory by being present or directly assisting the crime, and is liable for the same charge and punishment as the principal criminal.

Accord and Satisfaction: When disputing parties agree for a settlement and end the dispute regarding their reciprocal rights and obligations, an agreement is reached, which, when carried out will be capable of satisfying both parties. This method of discharging a particular claim is referred to as accord and satisfaction.

Accused: The term used to denote a person who is charged with the commission of an offense.

Acknowledgment: The term used for the certification given by an authorized official, that the person who has executed the document has appeared before him and declared under oath that the document and the signature in it are genuine.

Acquittal: The verdict of a jury, declaring that a criminal defendant is not guilty.

Action: A litigation or a legal proceeding which results in a judgment on completion. If the action is against a person, it is an *action in personum*, and if it against a thing (usually property), then it is an *action in rem*.

Act of God: A natural calamity (like, earthquake, tornado, flood, etc.), which cannot be prevented by anyone. It is a natural process which happens without any human interference.

Actus Reus: The Latin term for a guilty act, which can be an action done or failure to do an action.

Ad Damnum: The specific clause of a legal complaint that deals with the damages suffered and claimed by the plaintiff.

Ad hoc: For a specific purpose. This term is commonly used as 'Ad hoc' committees, which are created for specific purposes.

Ademption: The revocation of a gift in a will by destructing or disposing of the gift before death, so that at the time of his/her death, the property no longer belongs to the person who has made the will.

Adjourn: To postpone the session of a court or any other similar tribunal to another date.

Admissible: Those evidence which can be legally used in a court.

Admission: A statement of a party involved in a claim, admitting all or some part of the other party's claims is called admission.

Admiralty Law: Otherwise known as maritime law, and deals with the law regarding shipping, navigation, transportation by sea, etc.

Adoption: The legal process which makes a person (usually a child) a legal member of another family. On finalization of the proceedings of adoption, the rights and obligations of the biological parents get terminated, and the same is vested with the new parents of the adopted child.

Adultery: The term which denotes voluntary sexual intercourse of a married person with a man/women, other than the spouse. Adultery is often used as a ground for divorce.

Adverse Possession: Acquisition of rights to a particular property belonging to another, by possessing it for a statutory period (usually 12 years). The continued use of a land or property by a person (other than the owner), for a statutory period without any complaint from the owner, makes him entitled to the 'title to the land', which is known as 'possessory title'.

Advocate: A lawyer, who represents a party to a case in a court of law.

Affidavit: A sworn statement in writing, confirmed on oath by the party who makes it, before someone who is officially entitled to administer oaths.

Affirmation in Law: A solemn statement by a person that the evidence he or she is giving is true. An affirmation is equivalent to oath, as the witness may have no religious belief or he cannot take an oath, as per his religious beliefs.

Affray: A fight that takes place in some public place between two or more persons, to the terror of other people.

Agent: A person who is authorized by another to act for the latter (known as principal). The relationship between the principal and the agent is termed as an agency.

Aggrieved Party: A person whose pecuniary status has been affected by a decree or judgment, statute or any other legal proceeding. Such aggrieved parties can challenge the legality of the judgment or statute.

Agreement: A term that denotes the mutual consent between two or more parties regarding their rights and obligations in relation to a particular issue or thing. An agreement can be in a written form or verbal.

Alibi: Is a claim made by the defense counsel that the accused was somewhere else at the time the crime was committed.

Alienate: Alienation is the transfer of title to property (lands and tenements) and possession by one person to another.

Alimony: A periodical payment made by one spouse to the other in case of divorce, separation or while a matrimonial action is pending. Otherwise known as maintenance or spousal support, this amount is decided by the judge and a court order is passed to this effect.

Allegation: A statement made by a party in a pleading, which he/she is prepared to prove.

Amendment: A term used to denote any changes made in a bill, law or other court documents. As per the law of procedure, amendments must be authorized by the court and the amended document supersedes the original one.

Amicus Curiae: The literal meaning of this Latin term is 'friend of the court'. It can be a person who is not a party to the case, but is allowed by the court to provide information about the case.

Amnesty: A legislative or executive proclamation granting pardon for committing some specific crime. Amnesty is usually granted to a whole group of criminals or supposed criminals, especially political criminals.

American Law Reports: A publication series which reports all court cases from all United States jurisdictions, legal doctrines and principles.

Annulment: Annul means to invalidate something, and the term annulment refers to the judgment that declares a marriage as void. As per such a judgment, the persons are to be considered as never having been married at all.

Appeal: A request or an application made by the defeated party (to a lawsuit) to a higher court for reviewing the decision of the lower court. The party who is making the application for appeal is called an appellant, and the party who opposes the appeal is called appellee. The court which has the jurisdiction to hear the appeal and review the decision of a trial court is known as appellate court. Appeal bond is a guaranty by the party who files the appeal to the effect that the court costs will be paid and the appeal will be filed within the statutory time limit (appeal period).

Appearance: Being present before a court of law as a party to a suit, either in person or

through an attorney. An appearance notice is a document which demands the appearance of people before the court on the specified dates.

Application: Filing of the requisite court form to initiate a legal proceeding or a request made to a court.

Approver: A criminal who confesses the crime and accuses his accomplice for the same. An approver is granted permission to give evidence against the accomplice.

Appurtenances: Things incidental to the principal thing, which is commonly referred to as dominant. In case of land, appurtenances include easement, right to way, etc.

Arbitration: The alternative process of solving disputes, in which the disputing parties agree to abide by the decision of an arbitrator (a private and impartial person, who is chosen by the parties for solving the dispute. In most places, the provisions for arbitration are governed by statutes.

Argument: A reason advanced to prove a point or to rebut it.

Arraignment: A legal proceeding in which the accused is brought before the court to formally read the complaint against him. An arraignment is meant to inform the accused of the charges against him/her, and the person is required to enter a plea whether he/she is guilty or not.

Arrest: To detain a person with lawful authority, especially those who are suspected to have committed a crime. The term is also used to denote a seizure of personal property by legal authority.

Arrest of Judgment: The court withholds the pronouncement of the judgment, upon the application of a party to the dispute who claims to prove a material error in the records or trial, which can make the entire proceeding invalid.

Arson: The willful burning of the house or other structures belonging to others without any

legal authority is called arson. Burning of wild land areas without any lawful authority also comes under arson.

Articles: Agreements are usually divided into separate paragraphs and each paragraph is referred to as an article. The same term applies to the separate sections of the Constitution.

Articles of Confederation: The first constitution made the original thirteen states of the United States of America, and came into force on March 1, 1781. It was the supreme law of the land till March, 1789.

Artificial Person: Unlike a natural human being, an artificial person is a legal entity, created by law, who may be attached with legal rights and duties.

Assault: Any willful attempt or threat to inflict injury on some person, with an ability to carry out the threat. It also includes a display of force to frighten the victim and make him believe that the former is capable of causing bodily harm.

Assets: Property of any kind, which is owned and possessed by any person, corporation, estate, or other entity. Assets include real and personal property, like cash, real estate, securities, vehicles, etc., and should be of some economic value to its owner.

Assignment: The transfer of property rights (real or personal) to another person through a written agreement. The person, who is the recipient of the rights is called an assignee, and the one who had transferred the rights is called an assignor.

Attachment: The process of legally seizing a property in order to force the person to appear before the court or to ensure that the owner of the said property complies with the decision of the court in a pending suit.

Attempt: The intentional and overt act, which if succeeds, would have been considered as a crime. The attempt to commit a crime in itself is a criminal offense.

Attestation: The act of signing a document as a witness, affirming that the information given in the legal document (will, deed, etc.) is true.

Attorneys: An attorney, who is otherwise called a lawyer, barrister or solicitor, is a person authorized by the state to practice law. The term 'attorney' is mainly used in the United States to denote a practitioner in a court of law. The main responsibilities of attorneys include providing legal counsel, representing and defending their clients before courts, drafting legal documents, etc.

Award: The term used to denote the final decision of a court in some lawsuits. Mainly used in case of judgments granting money or other damages to the party in whose favor the judgment is delivered. It is also used to denote the final decision of an arbitrator.

B

Bachelor of Laws: A degree granted to a person who has successfully completed graduation from a law school. This degree is abbreviated as L.L.B, and nowadays some law schools grant a Juris Doctor (J.D.) degree instead of the former.

Bad Faith: A concept which refers to the malicious intention of a person who enters into any transaction, like a contract or a legal procedure. The action of such a person involves an intention to deceive or mislead another, so that the former gains some advantage.

Bail: The amount deposited or the property pledged to a court in order to secure the release of a person who is in custody as a crime suspect. The money deposited or the property pledged acts as a guarantee to ensure the appearance of the person released as required by the court.

Bailment: A transfer of possession of property by one person called the bailor to another called bailee, for a specific purpose and for a fixed period is called bailment. The bailor retains the right to recover the possession of the said property once the purpose of the transfer is fulfilled.

Bait and Switch: A type of fraud associated with retail sales, wherein the store lures customers by advertising that some products are offered at very low prices, but induces them to buy other expensive products, citing the excuse that the advertised product is no longer available or is not of good quality. Bait and switch can be a cause for a personal lawsuit for false advertising, if damages are proved.

Bankruptcy: The inability of an individual or an organization to pay off the debts to the creditors. The condition of bankruptcy is legally declared by the bankruptcy courts, which hear and decide petitions filed by individuals and organizations for being declared as bankrupt, and to eliminate or repay the debts as per the bankruptcy laws.

Bar: A collective term used to denote all attorneys or lawyers who are permitted to practice in a particular jurisdiction. A bar association is an organization or body of lawyers. A bar examination is a state test covering a wide range of legal topics, and those who want a license to practice law or become lawyers must pass this test.

Battery: Causing bodily harm to another person willfully and intentionally is called battery, which is a crime, as well as a ground for a lawsuit as a civil wrong if there is any damage.

Bearer: As per the law of negotiable instruments, a bearer is a person who is in actual possession of a negotiable instrument, like a check, bank draft, promissory note, etc.

Bench: A term used to denote the seat of the judge in a court room or the judge himself. It is also used as a collective term for all judges in a court.

Beneficiary: An individual or an organization entitled to some assets or profits, through some legal device like a will, trust, insurance policy, etc.

Bequests: Gifts of personal property left by a last will or testament.

Bifurcation: The process of dividing the trial into two parts - a liability phase and a penalty phase. While both phases are tried separately, in some cases, different judges may be empaneled for the different phases.

Bigamy: The condition of being married to two persons at the same time. Having two spouses at the same time is a criminal offense.

Bill: A draft of a proposed law which has been presented before a legislative body for approval. An approved bill is enacted as law. The term is also used to denote a statement, whereby one person acknowledges himself to owe unto another, a certain amount or some particular thing. Learn more about how does a bill become a law.

Bill of Exchange: A bill of exchange is an unconditional written order from one person (drawer) to another (payor), asking the latter to pay a fixed amount to a third person (payee) at a fixed date. A check is like a bill of exchange drawn on a bank account.
Bill of Lading: A receipt received by the shipper of goods from the carrier, describing the type and quantity of goods being shipped, the carrying vessel, the shipper, the consignee and the port of loading and discharge.

Bill of Rights: The first ten amendments of the U.S. Constitution that deals with the fundamental rights and privileges guaranteed to the people, like freedom of speech, religion, due process, speedy trial to accused, etc.
Black Letter Law: Well-known principles of law that are not doubted or disputed.

Blackmail: A form of extortion, where the victim is threatened to act against his/her will or to cause injury to another person. The most common threat associated with blackmail is to release any information (usually true), which can be embarrassing, damaging or disgraceful to the victim. It is not the revelation of the information which comprises the crime, but demanding money or threatening to withhold the same.

Blasphemy: The act of speaking or writing any derogatory words about the God or the official religion of a state.

Bona fide: The Latin word for 'good faith'. A bona fide purchaser of a property, means a person who is genuine, without any knowledge of defect in title.
Bond: A written instrument which is executed by a person, wherein a definite promise is given regarding the fulfillment of a legal obligation.

Breach: The act of violating a legal obligation or a failure to do a duty. It is breach of contract, when a party to a contract fails to perform the terms or violates the terms of the contract. A failure on the part of a trustee to perform his duties is called a breach of trust.

Bribery: The receiving or offering money or some valuable item to any public official, with the objective of influencing his official decisions contrary to his duty.

Brief: A document stating the facts of a case and the legal arguments which is supported by relevant statutes and precedents. Such documents are prepared by lawyers who represent the disputing parties, and are submitted to the court.

Burden of Proof: The responsibility of proving a fact regarding issues raised by disputing parties in a court case. Generally, the plaintiff has to prove that the allegations in the complaint are true. The defendant is given sufficient opportunity to rebut the same, but if the defendant raises some factual issue while defending the claims of the plaintiff, the former has the responsibility to prove thesame.

Burglary: Breaking into a building or illegal entry into the building with the intention of committing a crime. Whether the crime is committed or not is not relevant as far as burglary is concerned.

By-law: The set of laws adopted and enforced by a local authority. Generally used to denote those rules, which are passed for the governance of a corporation or other entity.

C

Canon Law: The laws of the church, which are based on religious beliefs and customs. These laws are not binding, as far as the judicial system is concerned. Canon law deals with the matters related to church, like, funerals, baptism, church property, etc.

Capital Punishment: The sentence of death, awarded to those who commit very serious crimes. It is otherwise known as the death penalty.

Case Law: As opposed to the statutes and treaties, case laws are legal principles developed by the courts through the years while deciding cases. A case law is a collection of reported judicial decisions related to specific topics, and is an important part of the modern legal rules.

Causa Mortis: A Latin term which means, "in expectation of the approaching death". This term is mainly used to denote gifts, which are given by a person who is expecting death. Such gifts are called deathbed gifts or gifts causa mortis, which are deemed to be effective only if the death of the person is imminent due to a known condition, and he/she dies as a result of this condition. In case of recovery of the donor, such gifts can be revoked.

Cause of Action: A set of facts, which may entitle a person with a right to sue another person. If such facts are proved, it would result in a judgment in favor of the plaintiff.

Caveat: A Latin term for a formal warning. This term refers to a notice sent to a judge or court official with a request to suspend the proceedings in a particular lawsuit, until the merits of the notice are determined or until the notifier is given an opportunity to be heard.

Caveat Emptor: A common law rule, which is a Latin term meaning, "let the buyer beware". This rule applies to the sale of all goods, especially those relating to real estate. As per this rule, the buyer has the full responsibility to check and verify the quality of the goods for sale or the title to the land, in case of real estate.

Cease and Desist Order: It is an order issued by any authority or judge to halt any activity, or else face legal action. It can be sent to any person or organization. This order or request can be sent by any person asking the recipient to stop some activity to avoid legal action.

Certificate: The term 'certificate' has different meanings as per the context. It can be a document which certifies the truth of some facts, like marriage, birth, death, etc. It can be a document which certifies the ownership of a property, like a stock certificate. While some certificates are issued to people who complete some course, there are certificates which authorize persons to practice certain profession. Some certificates are issued by courts, certifying the facts or decisions of the concerned cases, like the certificate of divorce, certificate of appointment of estate trustee with a will, etc.

Certified Copy: A copy of a document, which is attested by the concerned authority to be the true copy of its original.

Certiorari: The Latin term, which means 'to be informed of'. This legal term refers to the order issued by a higher court to an inferior court, tribunal or public authority, directing the latter to certify certain records in a particular case and return to the former. Certiorari, which is otherwise called cert, is a type of writ seeking judicial review. The mechanism, which was adopted by the Supreme Court of the United States, in order to manage the rising number of petitions of certiorari is called the 'cert pool'.

Chain of Title: The legal term used to denote the history of transfers of title to property from the present owner to the original owner. Such records regarding properties are maintained by a registry office or civil law notary.

Change of Venue: A legal term used to denote a change in the location of the trial. A venue should be a place which is deemed to be proper and convenient for filing/handling a particular case. Though the venue is decided as per the rules of every state, the parties can also ask for a change in the venue. However, a change of venue is usually granted to avoid prejudice against any party to the case.

Champerty: A practice of sharing the benefits of a lawsuit, by a person who is not a party to that lawsuit. A person who has no interests in a lawsuit, offers assistance to one of the litigants to conduct the legal proceedings, on condition that the former receives a portion of the judicial award.

Charge: This legal term is used to denote a formal accusation of an offense against a person, and is considered as the first step to prosecution. This term can also refer to the instructions given to the jury by the judge before the verdict and is known as charge to the jury.

Charity: As per legal terminology, the term charity refers to organizations, which are created and operated exclusively for the benefit of the society, rather than pecuniary benefits. These organizations, which are exempted from federal taxation, hold their assets in trust to serve the purpose for which they are created. The purpose can be religious, scientific, educational or

anything which benefits the society.

Chattel: All movable items of property, which do not include land or those permanently attached to land. While buildings and trees are not considered as chattels, furniture or growing crops (like corn) are deemed to be chattels.

Check or Cheque: A check/cheque is a negotiable instrument, like a bill of exchange drawn on a bank by one of its depositors. The bank has to pay the specified amount to the bearer of the instrument (check/cheque) or the person named therein.

Circumstantial Evidence: As compared to direct evidence, like the testimony of the eyewitness, circumstantial evidence can be considered as indirect evidence or facts which are inferred from the proven facts. Circumstantial evidence can be best explained with fingerprints, which can prove the presence of a particular person at the crime scene or his/her contact with an object used in the commission of a crime.

Citation: An order issued by a court to a person to appear before it to answer the charges or to do a certain thing. This legal term also denotes the reference to previously decided cases.

Civil Action: Legal proceedings are mainly divided into two categories- civil and criminal. A criminal action is prosecuted by the state against a person, who is charged with a public offense. Civil actions are generally classified as those which are not criminal in nature. Such cases involve disputes between private parties, organizations or the government, whereas criminal cases deal with those actions which are harmful to the society.

Claim: An assertion of a fact which establishes a legally enforceable right to some form of compensation or remedy.

Codicil (Will): A document that amends or adds to an existing will is called a codicil. A codicil does not replace the original will, but only amends it. As in the case of a will, a codicil should also be dated, signed and witnessed as per the relevant rules.

Coercion: Coercion refers to the crime of forcing a person to commit an act against his will, by using threats, physical violence or trickery.

Collusion: A secret understanding or agreement between two or more parties to deceive a

third party or to mislead a court.

Commitment: The warrant or order issued by a court to send a person to the prison. A commitment can be final, after the sentence is pronounced or till further hearing.

Common Law: A legal system developed in Britain through the centuries. Contrary to statutory laws, common laws are based on the traditional customs, but are enforced through judgments. These rules, which are embodied in case laws developed into a body of laws, and are still followed in Britain and some of its erstwhile colonies. Most countries have modified these laws and enacted them into statutes.

Commutation: The reduction or lessening of a sentence of a convicted person by officials authorized by law. Usually, the executive head of the government is vested with this power.

Compensation: Damages recovered for an injury suffered or in case of violation of a contract. This term also refers to the rewards received by an employee for his work.

Complaint: The first document filed in a court to initiate a lawsuit. A complaint states the brief facts of the case, on the basis of which, a legal remedy is sought. The person who files the complaint is called the plaintiff and the party against whom the complaint is filed is called the defendant.

Confession: A voluntary admission by the accused person that he has committed the acts, which constitute the crime.

Conspiracy: An agreement between two or more persons to commit an illegal or unlawful act, and the act if committed would amount to an offense. Conspiring to commit such acts is also an offense.

Constitution: This legal term refers to the fundamental law of a state or a nation. It is as per the provisions in the constitution that the government is founded and the divisions of sovereign powers are regulated.

Contempt of Court: A misconduct inside the court or any willful disobedience to a court

order.

Contract: A voluntary agreement between two or more legally competent parties, in which the parties are obliged to do or refrain from doing certain things.

Conviction: A decision taken by a judge after a criminal trial, which finds the defendant guilty of the crime.

Copyright: A type of intellectual property, which gives the owner the exclusive right to control the publication, distribution and adaptation of creative works, for a certain period of time.

Cybersquatting: Registering of an Internet domain name with the intent of making huge profits by selling it to someone else.

D

Damages: Damages are the pecuniary compensation given by the process of law, to a person for the actionable wrong that another has done him.

Dangerous Offender: A person who has committed a serious personal injury offense, and the law believes that it is highly probable that he can commit the crime again, and is considered high risk for the community. Such prisoners are sentenced to federal prisons for an indefinite period oftime.

Date Rape: Forcible sexual intercourse, while on a voluntary social outing where the women resisted the sexual advances of the man.

Deceit: It is a false and fraudulent representation as to a matter of fact, made in order to induce a person to act thereon.

Decision: An act of deciding a dispute. Or a conclusion, determination; giving a judgment or order.

Decree: A judgment that resolves the rights of the parties with regard to all or any of the issues in a particular suit. Such judgment issued by a judge has the force of law, but could be either preliminary or final.

Death: Death is defined as the cessation of beating of the heart and the act of breathing. The tax which is payable or levied on transmission of property on the death of the owner thereof is called death duties.

Death Penalty: Death Penalty is usually awarded by courts for heinous crimes such as murder, rape, and in serious crimes against the state. The methods of meting out death penalty are several like hanging, the electric chair, and also the lethal injection.

Debenture: Various forms of instruments are called debentures. A debenture is a document which either creates or acknowledges a debt. The term debenture is usually associated with a company of some kind, and are securities given by a company, but they are often granted by clubs and occasionally by individuals.

Debt: A sum of money due from one person to another. Debt means any pecuniary liability, whether payable presently or in the future, or under a decree of the civil court or revenue court. A person who owes a sum of money to another person is called a debtor.

Decapitation: Decapitation is where a part of human body above the neck is severed from the trunk. Such kind of a punishment is mainly in the middle east countries.

Decedent: A person, who is no longer alive.

Deed: A deed is a instrument in written form, executed in the manner specified by some person or corporation named in the instrument, wherein it expresses that the person or corporation so named makes, concurs, confirms or consents to some assurance of some interest in property, or of some legal or equitable title, right or claim or undertakes some obligation, duty or agreement enforceable at law, or in equity, or does or concurs in some other act affecting the legal relationship or position of a party to the instruments, or of some other person or corporation.

Deem: The word 'deemed' is used a great deal in modern legislation. Sometimes, it is used to impose for the purposes of a statute an artificial construction of a word or phrase that would not otherwise prevail. Or sometimes, it is used to give a comprehensive description that includes what is obvious, what is uncertain and what is in the ordinary sense impossible.

De Facto: In simple terms, it means 'in fact'. Even when it is not a legal or formal authority or right, some rights are recognized as de facto rights. For example: A de facto guardian is not a legal guardian, i.e. he is not a natural guardian nor is he appointed by law. If a person, even though he is a stranger, who is interested in the child and takes charge of the minor and his property, he is called a de facto guardian.

Defamation: A false statement either spoken or written, or is published or intended to be read by others, which can cause harm to a person's reputation is called defamation. If a statement is published it is libel and if the statement is spoken, it is slander.

Defamatory Libel: When a false statement is made (either written or printed), which harms the reputation or status of a person, and is without legal justification.

Defeasance: Rendering something null and void. The termination or annulment of interest in accordance with the stipulated conditions (as in if a deed completely or partially negates something on the happening of some condition.)

Defendant: A person against whom a lawsuit is filed is called a defendant.

Defense: A term used to describe the act of an attorney representing a defendant, to show why the plaintiff or the prosecutor does not have a valid case. Defense Attorney or Defense Counsel is a person who represents a defendant in a civil or criminal case.

Delegatus Non Potest Delegare: This Latin maxim means that a person to whom, an office or duty is delegated, cannot lawfully delegate the duty to another, unless he is expressly authorized to do so.

Delict: Delicts are small offenses, where a person by fraud or deceit causes damage or tort to someone. Delicts can be public or private. Public delicts are those offenses which affect the entire community, and private delicts are directly injurious to a particular individual.

Delinquent: This is a person who has disobeyed the law, or is guilty of some crime or failure of duty. It also refers to failure of a payment that is due.

Demand Letter: It is a document served by one party to another, stating their version of the facts, and making a legal claim for compensation to resolve the dispute.

De Minimis Non Curat Lex: This Latin maxim literally means that the law does not concern itself with trifles. This common law principle basically means that even if technically there is a violation of law, the judges will not sit in a case of minor transgressions of law or where the effect is very minor.

Democracy: It is a form of government wherein the supreme power is with the people, wherein the executive or administrative head are chosen by the people through periodical elections.

Demurrage: It is the agreed damages to be paid for delay of the ship in loading or unloading beyond an agreed period.

De Novo: This Latin term means 'new'. It is usually used in case of a new or fresh trial. (as if previous partial or complete decision had not been made)

Deportation: Deportation implies a legal procedure of permanent exclusion of person from a country to another. In the United States, If you have been deported, you are not allowed to enter the US again for at least 5 years. The main reasons for deportation is usually when a person overstays with an expired visa or commits some serious crime.

Deponent: A deponent is a person who gives his testimony in a court of justice or one who makes an affidavit. Deposition is an act of giving public testimony, especially the evidence put down in writing by way of answers to questions by a witness.

Descendant: A person who is in direct line to an ancestor, such as a child, grandchild, great grandchild etc. Descendants include natural born children and legally adopted descendants.

Detention: The act of retaining a person or property in temporary custody while awaiting trial.

Deterrence: Any law or legislation enacted has to be coupled with a penalty or punishment for non conformity thereto, which will act as a deterrent for breach thereof.

Detinue: It is a form of action which lies in conversion for loss or destruction of goods, which a bailee (not the owner) has allowed to happen in breach of his duty.

Devastavit: When a personal representative in accepting the office accepts the duties of the office, and becomes a trustee in the sense that he is personally liable for all the breaches of the ordinary trust, which in courts of equity are considered to arise from his office. The violation of his duties of administration and mismanagement of the estate, which results in an avoidable loss is termed as devastavit.

Dicta or Dictum: A statement of law made by a judge in the course of a decision of the case, but not necessary to the decision of the case itself, is called dictum, and often as *obiter dictum*. These are not binding on the parties and often go beyond the occasion, and lay down a decision which is unnecessary for the purpose at hand.

Digital Millennium Copyright Act: This is a federal act which addresses a number of copyright issues created by the Internet that protect Internet Service Providers.

Diplomatic Immunity: Where a representative of a country is stationed in another country, he is offered immunity for any offense he may commit in the country where he is stationed and is immune from the jurisdiction thereof.

Dismissal: A dismissal in a court setting has a definite connotation implying a final disposal by the tribunal rejecting the case of the suitor. A defendant may also be dismissed from a lawsuit, i.e. the suit is dropped from against that party.

Dispose: The act of ending a legal case or termination of a judicial proceeding.

Dissolution of Marriage: A dissolution of marriage is a legal termination of the marriage bond.

Directed Verdict: A directed verdict is a verdict in the defendant's favor, after the plaintiff presents his case, but without listening to the defendant's evidence. It is generally given by a judge, if he feels that the plaintiff has failed to offer the minimum amount of evidence necessary to prove his case.

Direct Evidence: Evidence presented in a case must always be direct evidence, which means that it cannot be hearsay or circumstantial evidence, but has to be clear evidence of a fact or happening.

Direct Tax: A tax which is levied on a taxpayer who is intended to suffer the final burden of paying tax.

Disability Insurance: A disability is a physical impairment that substantially limits one or more major life activities. An insurance policy that pays benefits in such a case is called disability insurance.

Discharge: A discharge is to perform one's legal duty and complete the obligation. In a criminal context, if an offender is discharged, the wrongdoer has no criminal record. In an absolute discharge, a conviction is not entered against the accused, and in a conditional discharge, a conviction is not entered against the accused if certain conditions are met.

Discrimination: Discrimination indicates an unjust, unfair or unreasonable bias in favor of one and against another on the basis of a protected characteristic, such as race, gender, caste or disability.

Dishonor: To refuse or neglect to accept or pay when duly presented for payment of a bill of exchange or promissory note or draft.

Distress: It is a seizure of a personal possession, without legal process, of a wrongdoer, into the hands of an aggrieved party, in order to obtain payment for money owed or performance of a duty.

Divorce: Divorce is a termination of a marriage otherwise than by death or annulment. It is derived from the Latin word 'divortium', which means to separate from. Read more on pro bono divorce lawyers.

Doctrine: A legal doctrine is a rule or principle of law, framework, set of rules, when established by a precedent through which judgments can be determined in a given legal case.
Domicile: A state in which a person has permanent residence, and intends to keep living there even if he leaves that place for a while, or a state where the business headquarters are located.

Domestic Violence: Use of physical force by someone in the household to hurt or dominate on the other. Domestic violence can include physical violence, sexual assault and emotional abuse.

Double Jeopardy: Double jeopardy is based on the principle that no person can be punished more than once for the same offense.

Double Taxation: Double taxation is taxation of the same property for the same purpose twice in a year, or taxation of corporate dividends twice.

Drunk Driving: When a person operates a vehicle while he is under the influence of alcohol, he commits the crime of drunk driving. State laws have specified the level of alcohol present in the blood which can be termed as drunk driving.

Due Process: A principle wherein it is a fundamental right to have a legal process, like a hearing conducted for each individual so that no unjust or unequal treatment is given to any person.
Duress: Any intimidation or restraint on action or anything tending to restrain free and voluntary action. Generally speaking, duress may be said to exist whenever one, by the unlawful act of another, is induced to make a contract or to perform some other act under

circumstances which deprive him of the exercise of free will.

Dying Declaration: A dying declaration is the evidence provided by a person who is on his death bed, and are given the same weightage as regular evidence. The reason behind this is that a person who is dying and knows it, generally will not tell a lie.

Dynasty Trust: A trust wherein it is designed in a way to pass down for many generations in order to avoid tax.

E

Earnest Payment: This is a kind of deposit made in real estate transactions, where the money signifies the commitment to the contract and the project. The remaining money has to be paid on a particular date or after certain conditions are fulfilled.

Ear Witness: A ear witness is similar to an eyewitness, but as the name suggests, an ear witness testifies in court that he has heard something, instead of actually seeing it.
Easement: An easement is a right annexed to land. It is the right held by a person to use the land belonging to another person for a special purpose.

Ecclesiastical Law: The part of law which regulates the administration and rights and obligations of the Church of England.

E-commerce: E-commerce means electronic selling of goods or service over the Internet.

Eighth Amendment: The Eighth Amendment to the constitution of the United States prohibits the Federal Government from imposing excessive bail, fines or cruel punishments. The Eighth Amendment was adopted in 1791 as part of the Bill of Rights.

Ejusdem or Ejusdem Generis: The rule of ejusdem generis means that when particular words forming part of the same class or same category are followed by general words, then the general words must be construed in the context of particular words.

Emancipation: When a minor has achieved independence from his parents either by attaining the age of majority, getting married or fully self-supporting. It is also possible for a minor to get emancipated by getting a order from the court.

Embezzle: Fraudulent misappropriation of money or assets by an agent or employee, who is entrusted to manage those assets.

Eminent Domain: Government's power of compulsory acquisition of private property for public use is called an eminent domain.

Emolument: The advantage or benefit which the employee is entitled to by virtue of his office or employment in addition to his salary.

Emphyteusis: A right subject to assignment and descent, charged on productive real estate. The person who has this right can enjoy the property on the condition of taking care of the estate or paying taxes or rent annually.

Enactment: The act of passing of a bill by a legislative approval and sanction, after which it is established as a law.

Encumbrance: It is a burden (claim, lien or liability) attached to the land or interest in land by the owner of the land. Examples are charge, mortgage, etc.

Endorsement: Endorsement is to inscribe or sign one's name on the back of a check in order to obtain cash or credit represented on the face of it.

Endowment: Endowment is an act or process of providing money or property for a particular reason or purpose. It is usually given gratuitously to any institution whose income is derived from donations.

Equity: Equity is a body of rules that are present besides the common law. It is usually used by judges in case they feel that the common law is not suitable for that particular case to achieve a just result.

Escheat: The process by which a person forfeits his property to the state if he dies without

any heirs or descendants.

Escrow: Prior to closing a sale, occasionally a deed or some funds are delivered to a neutral third person to be delivered to the other party or parties, upon the performance of a condition like payment of money, etc. It is then said to be delivered as an escrow.

Estate: An estate denotes all the property which a person owns, including personal property, real property, stocks, bonds, bank accounts, etc., at the time of his death.

Estate Law: It is the part of law which governs the rights of an owner with respect to his property when he dies, i.e. wills, probates, etc.

Estoppel: Estoppel is a rule of law that prevents a person from denying or asserting certain facts on account of his own actions which resulted in proving those facts earlier. The court does not allow a contradiction of something that you have already accepted as true.

Euthanasia: Commonly known as mercy killing, euthanasia is the act of bringing about the death or deliberately ending the life of a person who is terminally ill.

Evasion (tax): A deliberate attempt of avoiding to pay tax by fraudulent means is called evasion of tax.

Eviction: Any wrongful act of a permanent nature done by the landlord with the intention of depriving the tenant of enjoyment of the premises.

Evidence: It is the usual means of proving or disproving a fact or matter in issue. This information is presented to a judge to convince the court of the facts. Evidence can be oral, documentary, circumstantial, direct or hearsay.

Examination in Chief: The examination of a witness by the counsel that calls him to testify is called examination in chief.

Excise: A tax levied by the Federal or State Government on the manufacture of goods within the country, sale of goods or services of a particular occupation.

Execution: This legal term in a wider sense, refers to the enforcement of or giving effect to the judgments or orders of the courts. It can also mean carrying out of a death sentence.

Executor: An executor is a person to whom the last will of a deceased person is, by the testators appointment, confided.

Executory Contract: A contract in which something is to be done after the contract is concluded.

Ex Parte: The Latin expression means 'for one party', where the court allows only one party to be present to pass an order for the benefit of that party itself. This is an exception to the general rule where both the parties have to be present for the judge to pass an order.

Ex Post Facto: This means 'after the fact'. These laws make an act which was legal when committed, illegal after committing it. These laws are specifically prohibited by the US Constitution, Article I, Section 9.

Expropriation: Confiscation of private property or rights by a government authority, with the purpose of public interest or maintaining social equality.

Express Trust: An express trust is a trust expressly declared by a will, deed or any written instrument or can be created orally too. For constituting an express trust, three matters have to be designed - the property subject to the trust, the persons to be benefited and the interests which have to be taken.

Expunge: The official and intentional destruction or erasure of records or information. When an offender who is a minor reaches majority, his records are expunged.

Extortion: An act of obtaining property or valuable security by intentionally putting a person in fear of injury or even dishonestly inducing a person.

Extradition: Extradition is a process whereby under treaty or upon basis of reciprocity one state surrenders to another state at its request, a person accused or convicted of a criminal offense committed against the laws of the requesting state.

Ex Turpi Causa Non Oritur Actio: This Latin doctrine means "an action does not arise from a base cause," i.e. a claimant will not be able to take action on an act which arises out of his own illegal act.

Extrinsic Evidence: Evidence regarding a contract that is not included in the written version of the contract like the circumstances that surround the contract or statements made by the parties. The court can use extrinsic evidence, if it feels that the contract is ambiguous in nature.

Eyewitness: A person who was actually present at an event and saw the event, usually a crime and testifies in court is called an eyewitness.

F

Face Amount: The original amount stated on the face of the insurance policy as stated in the document without calculating interest.

Fact: Any information, event, or anything that occurred which can be proved in a court of law.

Fair Comment: Fair comment is usually a defense used for a criminal prosecution of libel. It proves that the statement made was based on facts and was not made with dishonorable motives. If he proves that, then he can say that his comment was a fair comment. The US Supreme Court has ruled that even if a statement that is not true is made on a public figure, it will not be libel unless it is proved that the intention was malicious.

False Arrest: Restraining personal liberty without lawful authority is called false arrest. It involves illegal arrest, actual detention, and complete loss of freedom.

False Impersonation of a Citizen: Assuming the identity of a citizen to gain benefit, avoid an expense, or cause harm to a person is called a false impersonation.

Family: Family includes a group of persons related by blood, marriage or adoption, who live together under common household authority.

Family Allowance: Family allowance is an amount determined by law, given to the deceased person's family members to support the spouse and children during the time it takes to probate the estate.

Family Court: A court that has jurisdiction over family related or domestic matters which include divorce, alimony, adoption, maintenance, child custody etc.

Family and Medical Leave Act (FMLA): A law that allows an employee to take unpaid leave during a family member's serious illness, to take care of a newborn or recover from a serious illness. After the leave, the employer is bound to allow him or her to return to the same job post or equivalent position. Read more on maternity laws.

Fault: In the legal sense, fault mostly is synonymous to negligence. It can also mean responsibility for an act or intentional omission that causes damage to another.

Federal Court: Federal courts are courts having jurisdiction over matters of the US Constitution, labor law, federal taxes, federal crimes, etc. These courts derive their power directly from the constitution.

Fee: The general meaning of the term fee is money charged for professional services rendered. It can also mean an inherited or heritable estate in land.

Felony: A crime of grave nature, unlike a misdemeanor, which has a serious punishment of imprisonment of more than a year and sometimes even death.

Filing: The process of submitting a document to the court's clerk for the court's consideration or proving of evidence, etc.

Final Beneficiary: An individual or institution entitled to receive trust property upon the death of a beneficiary. In a family, if the wife is receiving income from the trust left by her husband, the daughter being the final beneficiary receives the principal amount of the trust.

Final Decree: A decree is final when the adjudication in the suit completely disposes off the suit, i.e makes a final judgment in a court case where there is no scope for an appeal.

Final Judgment: When the final decision of the case is put in writing, and where there is no further need or scope of perfecting an order or decision, it is referred to as a final judgment.

Final Settlement: The mutual understanding reached by the parties to resolve a dispute, usually recorded in writing, which they arrive at by compromising and negotiating terms or demands.

Finding: This term covers material questions which arise in a particular case for decision by authority having the case, or the appeal which, being necessary for passing the final order or giving the final decision in the appeal, has been the subject of controversy between the parties.

Finding of Fact: It is the decision which the judge takes on the factual question submitted to it for decision.

First Degree Murder: A murder that was committed by premeditation, or during the course of a serious felony, or by heinous and cruel methods is termed as a first degree murder.

Fixture: An article that has been so annexed or attached to the real estate, that if it is removed it would get damaged, and is regarded as part of the property is called a fixture.

Floating Easement: A floating easement is a right to use another person's property as an access to use a property connected to the former, but without specifying the manner or limiting the right in any manner.

Forbearance: Refraining to do something that he has a legal right to, voluntary.

Foreclosure: The legal proceedings initiated by a creditor to regain the collateral for loan, when the loan is in default.

Foreign Divorce: A divorce obtained in the court of a foreign country. The divorce jurisdiction of a foreign court depends solely upon the domicile of the parties.

Foreign Laws: The system of laws prevailing in a geographical area outside the country.

Forensics: When scientific principles and methods are utilized in investigation of crimes for presenting evidence in a court of law.

Foreseeable Risk: It is the anticipated danger that a reasonable person should be able to expect in a given set of circumstances.

Forfeiture: A loss or deprivation of goods or property in consequence of a crime, offense, breach of contract, or by way of penalty of the transgressions or punishment for an offense.

Forgery: Whoever marks any false document or part of a document, with the intent to cause damage or injury to any other person, or to deceive someone into believing something is real, commits forgery.

Fraud: Deceit, trickery or intentional perversion of truth in order to induce another to part with something of value, or to surrender a legal right.

Fraudulent Transfer: Every transfer of the immovable property made with the intent to defeat or delay the creditors of the transferors is called a fraudulent transfer.

Free Speech Right: The First Amendment of the United States Constitution, which gives the people the right to express their thoughts without censorship or restraint by the government.

Friendly Witness: A witness who is called by you for helping your case and who you do not need to testify is called a friendly witness.

Full Disclosure: Mostly in cases of real estate, it is the act of providing all material information about the property intended to be sold, transferred or leased, which can influence the decision of the buyer.

Full Faith and Credit: A doctrine contained in the US Constitution that requires all states to

respect the records, judicial proceedings, and public acts of all other states.

Fundamental Right: Fundamental rights are certain rights conferred by the constitution and are guaranteed to all the citizens. They are binding as directly valid law, and no legislation or government who is in violation of them can have legal force or validity.

G

Gag Order: When a judge issues an order prohibiting the attorneys and parties to go to the media or public with the information about the case, as he thinks it will influence the decision, it is called a gag order.

Gambling: To play a game for money or other stakes, or taking a risk for gaining an advantage.

Garnish: It is a court order usually issued not against a debtor but a third party that holds funds for the debtor to set aside funds for the benefit of the creditor.

Garnishment: A court order seizing a person's property, credit or salary through a third person known as a garnishee, for paying the debt of the creditor.

General Damages: Pecuniary loss for injuries suffered, or breach of contract which cannot be calculated exactly, or cannot be given a value for the injuries are known as general damages. They include pain and suffering, harassment etc.

Generation Skipping Transfer Tax: A tax levied by the Federal Government on the money given or left to grandchildren or great grandchildren. The purpose of this is to prevent families from avoiding tax on property left by the grandparents.

Generation Skipping Trust: If a trust is designed for the principal beneficiary to be the grandchildren of the maker of the trust, with his children receiving only fixed income from it, it is called generation skipping trust. The main purpose is to avoid paying tax on the trust by the middle generation.

Genericide: A process by which a brand name or trademark has become a generic description for a product or service, rather than referring to the specific meaning intended by the brand or trademark holder. Some examples are Band-aid, Coke, Escalator, Q-tip, Beer, etc.

Genetic Information Nondiscrimination Act (GINA): An act passed by the Federal Government on 21st May, 2008, which prohibits discrimination by insurers and employers on the basis of genetic information.

Gift: Gift means the transfer by one person to another of any existing movable or immovable property, voluntarily and without any consideration in money or money's worth. Any person who acquires any property or money under a gift is called a donee and a donor is the person who makes the gift to another.

Gift Tax: In the United States, if the value of a gift or combination of gifts from one person to another exceeds $13,000 a year, then a Federal tax called gift tax is levied on the gifts.

Golden Rule Argument: The golden rule argument is when the lawyers try and persuade the jury to make a decision on the case by trying to put themselves in the plaintiff's shoes, and then deliver the verdict. This form of argument is not always preferred by all judges.

Good Cause: A legally substantial reason presented before a judge for a ruling, that is not arbitrary, irrational or unreasonable, is said to be a good cause.

Good Faith: A thing shall be deemed to be done in good faith, if it is in fact done sincerely and honestly, without any intention to defraud another person.

Good Title: A title to a property that is free from any reasonable doubt, valid in law and does not hold a considerable chance of litigation.

Goods: Goods include all materials, articles, commodities and all other kinds of immovable property, but does not include newspapers, actionable claims, stocks, shares and securities.

Goods and Chattels: Personal property of any kind, but sometimes limited to tangible property.

Goodwill: The advantage or benefit which is acquired by a business, beyond the mere value of the capital, stocks, funds or property employed therein, in consequence of the general patronage and encouragement which it receives from consent or habitual customers.

Governing Law: A provision stipulated in the contract which determines which state laws should be followed in the event of a dispute.

Governmental Immunity: A personal favor granted by the government to its employees against any crime without the consent of the government.

Grace Period: The period of time beyond a particular date, during which a debtor not paying his debt will not be charged a fee. Usually most credit card companies give a grace period of 20 days before interest is charged.

Grand Jury: A body of persons chosen randomly and sworn to inquire into a matter of fact, and to declare the truth upon such evidence as is presented before them by a prosecutor. There are different types of juries, and grand juries do not decide whether a person is guilty or not, they only decide whether a person should stand trial.

Grand Jury Witness: A witness who testifies before a grand jury.

Grand Larceny: The unlawful taking and carrying away of personal property over a certain value set by state law, with the intent to deprive the rightful owner of it permanently.

Grand Theft: The theft of property or services whose value exceeds a specified amount and considered as a felony is called a grand theft.

Grandfather Clause: A provision or clause created by a new law, that exempts the persons who were already in the system and is applicable only to the persons that are new to the system is called a grandfather clause.

Grant: A grant may be defined as a transfer of property by an instrument in writing without the delivery of the possession of any subject matter thereof.

Grant deed: A deed to a property containing an implied or express promise that the transferor has a good title of the property, and that there are no encumbrances of any kind, or if there are, then they should be expressly mentioned in the deed.

Gratuitous: Something given voluntarily or not involving a return benefit, compensation or consideration.

Gross Estate: The total estate that a person owns at the time of his death, including his real and personal property, that may be passed by will or by intestate succession. While calculating the estate tax, the gross estate is taken into consideration.

Gross Income: The entire income of an individual or business from all sources, before subtracting pensions, exemptions or adjustments is called gross income.

Gross Lease: A lease in which the tenant pays a fixed amount of lease for the property, per month or year, irrespective of the maintenance, taxes and other costs that the landlord pays.

Gross Negligence: The intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another is considered as gross negligence.

Grounds for Divorce: The legal reasons or facts and materials to be taken into consideration by the adjudicating authority while giving a divorce.

Group Insurance: A single or blanket insurance policy under which individuals in a group are covered as long as they remain a part of it.

Guarantee: Guarantee includes any obligation undertaken usually to agree to pay another's debt or the document in which this assurance is made.

Guardian: A person who in the opinion of the competent authority is legally appointed to take charge of a minor or his property is called a guardian.

Guardian ad Litem: Where the defendant is a minor, the court shall appoint a proper person to be his/her guardian,who protects the interests of the child during the course of legal proceedings.

Guardianship: When the court appoints a guardian for a minor, the relationship that is created by law is called guardianship.

Guilty: A defendant is said to be guilty either if he admits that he has committed a crime or the finding by a judge or jury that the defendant has committed the crime.

H

Habeas Corpus: A writ of habeas corpus is a prerogative writ of the highest constitutional importance. It is designed to afford immediate relief from illegal confinement or restraint. Such a court order directs the authorities to bring the detained person before the judge for a hearing to determine the legality of the detention.

Habitual Offender: A person, who has been convicted of multiple felonies, and who by force or habit has grown accustomed to a life in crime. Such offenders are usually, in case of further criminal convictions, given a severe punishment.

Halliday Order: A special court order which is specially designed for reasons of privilege, privacy, confidentiality or the potential personal embarrassment of the party, wherein the plaintiff first obtains the records sought by the defendants to determine what in his or her view is private and confidential, and what is relevant, before the documents reach the defendants.

Harassment: Employment discrimination consisting of unwelcome verbal or physical conduct that is so severe or pervasive, that it affects the terms and conditions of the victims employment. It can be in the form of words, actions gestures, demands, etc.

Hatch Act: The Hatch Act is a Federal law whose aim is to "prohibit Federal employees from engaging in partisan political groups or any political organization which advocates the

overthrow of our constitutional form of government."

Hazard Insurance: An insurance policy that protects against physical damage to the property caused by unexpected and sudden events such as fire or storms.

Healthcare Power of Attorney: A document giving another person the right to take medical or health care decisions on behalf of the maker if he is unable to do so.

Hearing: The entire process of the trial before a tribunal, judge or jury, beginning with the examination of witnesses, presenting evidence and argument until the final decision or order of the court is termed as a hearing.

Hearsay: When a witness testifies in the court providing evidence, that he or she does not know personally, but what he has heard someone else say.

Heir: Any person who is entitled under state law to succeed to the property of a deceased person is called an heir. Though usually it includes the family members of the deceased, it may also include any person who is to inherit his property.

Hidden Asset: Something of value that is not declared as an asset in the books of business, mostly for escaping from taxes.

High Seas: High seas denotes all parts of the sea not included in the territorial sea, and international waters of any state.

Himalaya Clause: A provision included in the contract to protect the third party who is not a part of the contract. It is mostly applicable to marine waters and stevedores.

Holding Over: A tenant who continues in possession after the efflux of time with the consent, express or implied, of the landlord, is said to be holding over tenant.

Holograph Will: A will that is written by the testator with his own hand is called a holograph will.

Home Invasion: Home invasion is an unauthorized and forceful entry into a residential

premises with forced confinement, assault or battery of the occupants.

Homicide: The killing of a human being by another human being is known as a homicide. Homicide may be culpable (criminal), justifiable or excusable.

Hostile Possession: Occupation or possession of real property, in contravention of the owner's rights, with the intention, whether express or implied, to possess the land exclusively.

Hostile Witness: A witness who testifies against the party, who called the witness to testify is called a hostile witness.

Hotchpot: In a partition suit, all the properties are mixed together in order to facilitate a proportional division between all the parties. This blending of properties is called hotchpot.

Human Rights: Human rights are basic rights or freedom to which all human beings are entitled to, without the government interference. Some examples of human rights are liberty, freedom of expression, equality, etc.

Hung Jury: If a jury cannot reach a final decision in a particular case, it is called a hung jury. In such a case it results in a mistrial.

Husband-wife Privilege: A right wherein the married couple is not obligated to divulge their private conversations even to the court.

Hypothecation: The act of pledging a thing as a security for a debt or demand without parting with the possession.

I

Identity Theft: It is a crime in which a person obtains key pieces of personal information in order to impersonate someone else for their personal benefit.

Illicit: Unlawful/forbidden by law or contrary to accepted morality.

Illusory Promise: A statement that seems like a promise, but in reality is very ambiguous and does not bind the person by any liability.

Immunity: A personal favor granted by law contrary to the general rule. There are different types of immunities, such as diplomatic immunity, sovereign immunity, etc.

Impanel: Act of the clerks of the court to select a list of possible jurors for the trial of a particular case.

In Camera: When a legal trial is held before the judge in private chambers, where the public is not permitted to witness it, then it is called an in camera hearing. These are common in cases regarding family matters.

Indemnify: The act of securing against damage, loss, injury or penalty.

Inadmissible Evidence: Any testimony, documentary or tangible evidence that fails to meet the state rules, because it is considered unreliable to be taken into consideration as evidence.

Intellectual Property: Property that is intangible and created by the human mind like books, inventions, trademarks, etc. is called intellectual property.

Insolvency: A person is said to be insolvent when he/she is unable to pay the debts as they come due, or when the value of the debts exceed the value of his/her assets.

Interim Orders: A temporary order made by a judge during the trial, until a final order is passed.

International Law: International law comprises the rules of conduct, which the states feel themselves bound to observe in their relations with each other.

Intestate: A person is deemed to die intestate when he dies without making a valid will.

Ipso Facto: Latin term, which means, "by the act itself". It is used by lawyers when the point is so clear that there is no need for any elaboration.

Irrevocable Trust: A trust that once made, cannot be revoked or changed. They are permanent in nature.

J

Jeopardy: A person is said to be in jeopardy when he or she is placed on trial and is at the risk of conviction and punishment. Jeopardy attaches after a jury is sworn to try the case. **Joint and Several:** Usually used in a judgment of negligence or recovery of debt, when there are two or more defendants, each of the defendants are responsible for the entire debt or damages regardless of the individuals share.

Joinder: When various lawsuits or various parties are joined together in one lawsuit, because the factual conditions or issues are the same for all the parties it is called a joinder.

Judgment: A judgment is the final court decree or order given by the judge based on all the facts and evidence presented by the parties.

Judicial Review: It is a process wherein the courts have the power to examine the decisions of the lower courts or executive and legislative actions to determine whether it is against the constitution. It has the power to revoke the act if it is against the principles of the constitution.

Judicial Proceeding: The entire process in the court by which a legal judgment is reached upon by the judge or jury is called a judicial proceeding.

Jump Bail: When a person fails to attend court after he is released on depositing bail, he is said to jump bail.

Juris Doctor: A juris doctor is the degree awarded to a student who has completed his or her graduation in law in the United States.

Jurisdiction: A valid legal authority to hear and give a judgment on a case. If a court does not have a valid jurisdiction, the judgment passed will not hold any value.

Jurisprudence: The word jurisprudence comes from the Latin word 'juris prudentia', which means the study of knowledge or science of law. It covers the study of the entire legal system and legal philosophies.

Jus Naturale: Latin term for 'natural law'. It is the set of principles that are not derived from the constitution or any legal authority, but from the universe and are applicable to all human beings.

Just Cause: Also known as good cause or lawful cause, it means a legally valid or sufficient cause to prove your claim. The plaintiff has to prove to the court that there is a just cause for his claim to be granted.

Justice: The fair and undiscriminated treatment of all individuals while deciding on a judgment or a public officer authorized to decide cases in a court of justice.
Juvenile Court: A special court designed for hearing cases involving the rights, welfare and health of children under the age of 18. Children charged with a crime have their cases heard in juvenile courts.

Juvenile Delinquent: A minor charged with a crime is called a juvenile delinquent. They usually have different punishments that do not apply to adults, and are tried in juvenile courts.

K

Kangaroo Court: A term, which refers to a bogus court or sham legal proceedings that deny the basic rights of a party to a case. This term may denote an unauthorized court or an authorized one, which conducts its proceedings without taking into account the principles of law and justice.

Kidnap: Forceful and unlawful abduction, and detention of a person against his/her will, with the intent to demand ransom, to make him hostage, to threaten a third person, to cause physical harm to the person or to abuse sexually, or for any such reason.

Kin: The closest relatives of a person, especially by blood, but includes those who are related by marriage and adoption too. This term is mostly used to denote those relatives, who are entitled by law to inherit the property of a person who dies without leaving a will.

Kick-out Clause: A provision incorporated in sales contracts, which allows the seller to void the agreement in case of receiving a better offer before the closure of the sale. This clause is mostly used in real estate contracts.

Knowledge: An awareness of the actual facts. A person can be guilty of an unlawful act, if he is doing it with actual knowledge of the facts. For example, a person buying stolen goods, with the knowledge of the real facts that the goods are stolen, makes his act a crime. But some people may buy the goods without any knowledge of the facts. So, knowledge plays a vital role in proving such crimes.

L

Laches: The legal doctrine, which takes away the right to seek remedy from those people who cause unreasonable delay in asserting or claiming a legal right, thereby causing disadvantage to the opposing party.

Laissez-faire: A French doctrine, which is mainly used in the context of economic policies. The phrase, which literally means, "leave things alone", is a doctrine that opposes governmental intervention in economic policies.

Larceny: Earlier, the crime of theft was referred to as larceny. This legal term denotes unlawful taking away of another's property, without the consent of the latter. This term is still in usage in some common law jurisdiction.

Law: A set of rules established and enforced by a governing authority of a state, and is applicable to the people of that state. These laws are enforced by threat of punishment, in

case of violation.

Lease: A form of contract, whereby the owner of a property allows another to possess and use the same for a limited period of time, subject to certain conditions, in exchange of rent or some value. The owner retains the ownership and has the right to take back the possession after the stipulated period. A person who grants a lease is called the lessor, and to whom it is granted is called a lessee.

Legacy: The term legacy refers to a gift of money or personal property by will. Usually, it does not cover the gifts of real property by will, which is termed as 'devise'. A person to whom a legacy is given is called a legatee.

Legal Terrorism: This term refers to the misuse of legal provisions in order to gain some advantage. It is using or threatening to use some legal proceedings against a person or a group of people, by the perpetrator, in order to satisfy his motives. Such misuse of laws are termed as legal terrorism.

Legal Transplant: In almost all countries, some laws are enacted on the same lines of the existing legal provisions in some other country. Such borrowing of laws or enactment of new laws, after getting inspired by some foreign examples is called legal transplant, which is otherwise known as legal diffusion too.

Lemon Laws: These laws make it mandatory for the manufacturers to repair defective cars. If they fail to do so within a reasonable time, they have to make a refund of the purchase price after deducting some amount for the use of the car.

Letter Rogatory: A formal request made a court in one country to a foreign court for judicial assistance, is called letter rogatory. This mechanism is mainly used for the service of process, and for taking evidence. If 'A', staying in the US, wants to sue 'B', a resident of Brazil, the former has to approach the US court, which issues a summons against 'B', and requests the Brazilian court through a letter rogatory, to serve the process on 'B'. The same applies in case of examining a witness staying in another country.

Liability: An obligation, duty or responsibility to do something or to refrain from doing

something is called a liability. This can be created by a contract, or by status, or by conditions of social living. An obligation to pay money on breach of contract or for committing a tort is also a liability.

License: A permission given by the concerned authority to do some act, that would be illegal, without that special permission or authorization.

Lien: A right over a property, granted by the owner to another person, as a security for the performance of some obligation, on the part of the former to the latter. The person who grants a lien is called a lienor, and the one who receives it is termed as the lienee.

Life Estate: A right to use and occupy a property, by a life estate holder, only for the duration of his lifetime. This right terminates on the death of the holder, who is called a life tenant. Once terminated, the estate reverts back to the title holder or his/her heirs.

Limited Divorce: Otherwise known as legal separation, limited divorce is granted by to those couples who do not have any grounds for absolute divorce, but are not able to solve their differences. In such cases, the court issues an order, declaring that the couple is no longer living together, but the marriage bond is not dissolved. Read more on legal separation and divorce.

Lineal Descendant: This legal term is applied to ancestry and descent. A lineal descendant is a direct descendant or a blood relative in the direct line of descent. For example, the relation of natural parent and the child or the relation between child, father and grandfather.

Liquidated Damages: A clause commonly found to be incorporated in contracts, wherein the parties agree to pay a fixed sum, in case of violation of the provisions of the contract.

Living Trust: Otherwise known as *trust inter vivos* (between the living), a living trust is created during the lifetime of the trustor. Read more on living trust and will.

Living Will: A document executed by a person regarding the life support and other medical treatment, that he/she prefers, in case of sudden debilitation due to some fatal illness that leads ultimately to death.

Locus Standi: A right to bring an action or a right to address a court on a matter before it. For example, a person whose right is violated, has the right to approach a court. There must be sufficient reason to bring an action, and the plaintiff must prove this reason.

M

Magna Carta: A document signed by King John on June 15, 1215, which established the rights of English barons, landowners and common people, and limited the powers of the King. Magna Carta is a Latin term, which means the great charter.

Maintenance: The support provided by one person to another with a means of livelihood, especially in cases where the former is legally bound to do so. In family law, this term (also known as alimony or spousal support) is used to denote the financial assistance given by one spouse to another, in case of separation or divorce. Likewise, a father is legally bound to maintain the children, a son/daughter is bound to support the parents, who have no means to live, provided, the former has the ability to maintain the latter.

Mala Fides: An action done in bad faith. A person who buys stolen goods with the knowledge that they are stolen is said to be a mala fide buyer. It is opposed to a bona fide purchaser, who buys the goods without knowing that they are stolen.

Malfeasance: Doing an act, which is illegal and wrongful. If a person omits to do something which he ought to do, then it is non-feasance, whereas doing a lawful act in an unlawful and improper way, so as to cause harm to another is misfeasance. Misfeasance happens due to carelessness or negligence, but malfeasance is done with the intention to cause harm.

Malice: A legal term, which refers to a person's intention to commit a wrongful act, which will result in injury or harm to another.

Mandamus: The name of a writ in Latin, which means 'we command'. This writ is issued to order a governmental agency, individual or administrative tribunal to perform an action, required by law, in case of failure to do that act, or to correct a prior illegal action, or if the

official has earlier refused to do that act.

Marriage: A contract made under law, between a man and a woman to become a husband and wife. This legal relationship creates rights and obligations as per the relevant laws of that state.

Material Witness: A witness, whose testimony is considered to be vital for the outcome of the case, as he is presumed to have knowledge about the subject matter of the case.

Medical Malpractice: A professional negligence on the part of a health care provider by an act or omission, in which he/she deviates from the accepted standards of practice of the medical profession and thereby causes harm, injury or death of a patient is termed as medical malpractice.

Mens Rea: This Latin term, which literally means 'guilty mind', refers to the intent required to commit a crime. Mens Rea is one of the two factors that are necessary to constitute a crime. The other factor is *actus reus*, which denotes the guilty act.

Mesne Profits: The profits made from a land, by an illegal tenant, who is in wrongful possession of the land, which belongs to another. This amount is calculated when a claim is made by the true owner of the property to recover the profits made by the illegal tenant.

Miranda Rights: The rights of a person, who is taken into police custody. It is mandatory for the law enforcement officers to inform the suspects in custody about the Miranda rights. Such action from the side of the police is called Miranda warnings, which informs the detained person about the Miranda rights: right to remain silent and right to an attorney.
Misappropriation: Illegal use of another's property or funds intentionally. In law, misappropriation is mainly used to denote such action by a public official, trustee, executor or any agent, who is entrusted with the responsibility to take care and protect another's assets.

Modus Operandi: This Latin term means the method of committing a crime. It is also referred to as M.O., which can be used to identify the person who has committed a crime, in case of repeated criminal acts, which have a particular pattern of performance.

Moratorium: In simple terms, moratorium means any temporary suspension of an activity. It can be a suspension of legal action against a person or a group of persons. It can be a voluntary suspension of the collection of debts by banks or by the government or under court order.

Mortgage: Pledging a real property as a security for the repayment of the debt involving that property is called a mortgage. The person who receives the mortgage and lends money is called a mortgagee, and the person who concede a mortgage is called a mortgagor.

Motion: A proposal or application to the court by a litigant or his counsel, seeking some order or ruling. Motions can be made orally or written, either on notice or ex-parte. The applicant is known as the movant or the moving party.

Motive: A very important factor as far as criminal law is concerned, motive is the reason for a person to commit a crime. It is the inner drive, which induces the person to act in such a way, so as to commit a crime. It is not necessary that there will be a motive behind every crime, but proving the motive makes it easier to understand the case.

Murder: One of the most serious crimes, murder can be defined as the intentional and unlawful killing of one person by another, without any legal justification or provocation.

N

Naked: In a legal context, this word is used to denote something, which is devoid of any power or effectiveness, or something that is not complete. A 'naked title' is a title which does not give the holder any rights over the property. A naked contract (*nudum pactum*) means a contract which lacks consideration, so that it is not a proper contract.

Named Plaintiff: In a class action (a lawsuit, in which large number of people collectively bring a claim to court), a small group of plaintiffs are identified by their name, and they represent the interests of the larger group. This is done with the approval of the court.

Negligence: The failure to exercise reasonable care to avoid causing harm to another person or other's property is called negligence. The factors which constitute negligence varies with the facts of individual cases. It can be an action or an inaction.

Negotiable Instrument: A written instrument signed by the maker for the purpose of unconditional payment of a fixed amount of money, at a specified future date or on demand, to the payee or to his order or to the bearer. E.g.: check, bill of exchange, etc.

Next Friend: A term used to denote a person, who appears for another in litigation without any official appointment. The next friend may or may not be a close relative, but the person for whom he appears must be unable to maintain a suit, or does not have an appointed legal guardian or must be an infant.

Next of Kin: A legal term used to denote the nearest blood relatives of a person, who dies intestate.

No-fault Divorce: A no-fault divorce is granted in such cases, where there is no prospects of reconciliation and the incompatibility between the spouses is considered as a ground for divorce. This type of divorce does not require the finding of any fault-based grounds for dissolution of the marriage.

Notary or Notary Public: Notary public is an official appointed by the state, and has the power to administer oaths, certify documents, take acknowledgments, and to take depositions (if he/she is also a court reporter). In case of attestation of affidavits by a notary, the signature and seal of that official is necessary. Read more on certified notary signing agent and becoming a notary public.

Notice: Information or knowledge, communicated through various means. It is said to be an actual notice, if the information can be shown to have reached the other party. It is constructive notice, when it is presumed by law that the information has been communicated, when certain acts are done.

Novation: Displacing an existing valid contract with a new one, which happens with the mutual agreement of all the concerned parties. This gives rise to new rights and obligations,

which is accomplished by substituting any of the parties to the contract or the performance to be made under the contract.

Nuisance: Any activity (intentional, negligent or ultra hazardous), which causes substantial interference with the occupation and enjoyment of property. Nuisance violates the right of another person to use and enjoy his/her property and may lead to a lawsuit for damages or injunction.

O

Obiter Dictum: An opinion, remark or comment made by a judge which does not form an important part of the court's decision. The term 'obiter dictum' is derived from a Latin word meaning 'things said by the way'. It is basically a side opinion which is not an integral part of the judgment.

Obligation: A legal requirement to do what is imposed by law, contract, or as a result of unlawful harm caused to the person or property of another. In a more technical meaning, it is a duty to do something agreeably to the laws and customs of the country in which the obligation is made.

Occupational Crime: A crime committed by a person during the course of legal employment like misuse of an employer's property, theft of employer's property, or misuse of sensitive information for personal gains.

Of Counsel: It is a reference to an attorney, who assists in the preparation or management of the case, or its presentation on appeal, but is not the principal attorney for the party. This attorney is not actively involved in the day-to-day work of a law firm, but can be available for specific matters or consultation. Read for more on tips for selecting a law firm.

Offense: A violation of law or an act which contravenes the criminal law of the state in which it occurs. Crime, offense and criminal offense are often used interchangeably.

Offer: An offer is an explicit proposal to an agreement, which, if accepted, completes the

agreement and ties both the person who made the offer and the person accepting the offer to the terms of the agreement.

Oligarchy: The term 'oligarchy' means "rule by a few". It is a form of government in which a few persons (usually the rich) rule and govern for their own advantage, rather than the public good by assuming all legislative and administrative authority.

Ombudsman: It is an official appointed by the government or parliament to safeguard rights of citizens by receiving, investigating or addressing complaints against the government services or policies.

Omission: A failure to carry out or perform an act. According to the criminal law, if a person breaches his/her duty or does not take adequate action to prevent a foreseeable injury or harm, then such an act or failure constitutes an omission.
Omnibus Bill: A draft law before a legislature which comprises more than one substantive matter, or several minor matters which have been put together into one bill, apparently for the sake of convenience.

Omnibus Hearing: A criminal pretrial hearing soon after a defendant's arraignment (the accused is brought before the court to formally read the complaint against him). The main objective of the hearing is to determine the admissibility of evidence which includes testimony and evidences seized at the time of arrest. These hearings are governed by the state laws and the local court rules, that vary by area.

Onus Probandi: A general rule in which the party who alleges the affirmative of any proposition has to produce proof for it, i.e. the party has to support their case by a particular fact of which they should be cognizant.

Open Verdict: It is an option open to a Coroner's jury at an Inquest in the legal system of England and Wales. The verdict implies that the jury confirms that the death is suspicious, but is unable to trace any of the other verdicts open to them, i.e. the jury affirms that a crime has been committed without stating by whom. Most cases of open verdict is related to suicides, where the intention of the dead person is difficult to prove.

Order of Filiation: An official document declaring a man to be the father of a child. Once the order is made, the father has an obligation to support the child and may have rights regarding the child's custody or visitation.

Outcry Witness: The outcry witness is the person who first witnesses the child's outcry regarding the child's abuse, and is obligated to report the abuse to the concerned authorities.

Outlaw, Outlawry: Outlaw is an act of being put out of the protection of the law, by a process regularly sued out against a person who is in contempt in denying to become amenable to the court having jurisdiction. These proceedings are also known as the outlawry.

Overrule: It refers to a judge's dissent with an attorney's objection to a question to a witness or admission of evidence. Overrule may also refer to the appeals court overthrowing a previous ruling on a legal issue, so that the prior decision is no longer a valid precedent on that legal question.

Overt Act: It's an action which might be innocent in itself, but if part of the preparation and active furtherance of a crime, can be considered as an evidence of a defendant's involvement in a crime. However, the contemplation or intention to commit a crime is inadequate to convict the person of a criminal attempt, conspiracy or treason, a manifestation of such an intent by an overt act is sufficient.

Ownership: It's the state or fact of exclusive legal rights or possession over property, which can be an object, land/real estate or intellectual property.

P

Palimony: The term palimony has meaning similar to 'alimony', except that award, settlement or agreement arises out of non-marital relationship of couples who lived together for a long period of time, and then terminated their relationship. The deciding factor in such a support is whether there was an agreement that one partner would support the other in return for the second making a home and doing other domestic duties.

Paralegal: A paralegal is a person who performs substantive and procedural legal work as authorized by law, without a law license, which would have been performed by an attorney in the absence of the para legal.

Parens Patriae: The term Parens Patriae is derived from a Latin word meaning 'parent of his country'. It's an inherent jurisdiction of the courts to make decisions regarding people who are unable to look after themselves, like children or incompetent persons.
Parental Consent: Also known as parental involvement or parental notification laws, parental consent is referred to the parent's right to give consent before their minor child gets engaged in certain activities like body modifications, marrying, education, field trips, etc.

Parricide: It's an act of killing one's father, a family member or close relative.

Partial Verdict: According to criminal law, a partial verdict occurs when the jury finds the defendant guilty of one or more, but not all the counts against him. The verdicts may or may not be announced instantly.

Partnership: It's an affiliation of two or more people who agree to share in the profits and losses of a business venture. There are different types of partnerships: general partnerships, limited partnerships, and limited liability partnerships.

Patent: An exclusive right granted to an inventor to make, use or sale an invention for a fixed period of time, approximately 17 years from the date the patent was published.

Peace Bond: A commitment by an individual to a court of law, that sets out specific conditions in which he commits himself to keep the peace, good behavior and protect the safety of others or property.

Pedastry: It's a sexual abuse crime wherein an adult sexually assaults an adolescent. The convict is harshly punished under general child sexual abuse offenses, as it is not treated as a separate crime.

Pendente Lite: The legal term pendente lite means 'pending the litigation'. It's a court's order

that lasts until the date of the trial or until the parties to a lawsuit work out a settlement.

Perjury: Also known as forswearing, it's an intentional act of lying or stating a false oath or affirmation to tell the truth, whether verbally or in writing, pertaining matters material to a judicial proceeding.

Perpetuating Testimony: It's the recording of evidence, when there's a fear that the person may soon die or disappear, and the evidence if recorded, could be used to prevent any kind of injustice or to support a future claim of property.

Pillory: A medieval punishment and constraining device made of mobile and adjustable boards through which a prisoner's head or limbs were pinned.

Plea Bargaining: Negotiations during a criminal trial, between an accused person and a prosecutor in which the accused accords to admit to a crime (quite often a lesser crime than the one set out in the original charge), avoiding the expense of a public trial, in return for which the prosecutor agrees to ask for a more lenient sentence than would have been advocated if the case had of proceeded to full trial.

Pleadings: Written statements of the parties to litigation in which they formally set out the facts and law which support that party's position. The principal pleadings are the complaint, answer, reply or petition.

Power of Attorney: A power of attorney is an instrument containing an authorization for one to act as the agent on someone else's behalf in legal or business matters. Also called the letters of attorney, it terminates at some point in the future either by its terms and conditions, or by operation of law like death of the person or agent.

Preamble: The term is particularly applied to an introductory statement, a preliminary explanation of a statute or contract, which summarizes the intention of the legislature in passing the measure.

Precedent: It refers to a prior reported opinion of an appeals court which forms the basis in the future on the same legal questions and facts decided in the prior judgment.

Prima Facie: The term prima facie is derived from a Latin word meaning 'at first look' or 'on its face'. It's an evidence before trial, which is enough to prove the case unless there's significant contradictory evidence shown at the trial. A prima facie case has to be presented to the Grand Jury by the prosecution in order to get an indictment.

Privileged Will: It's a will valid despite the defect of form, made by mariners or soldiers.

Privity of Contract: A doctrine of contract law that forbids any person from seeking the enforcement of a contract, or suing on its terms, unless they are a party to that contract.

Q

Qualified Immunity: A legal doctrine that is used to protect state and federal officials from liability of civil damages, in case of violation of an individual's federal constitutional rights, of which a reasonable person would have known. The defense of qualified immunity is developed by the US Supreme Court, in order to shield and protect state and federal officials from the fear of litigation while performing discretionary functions, entrusted to them by law. So, even if a violation of a constitutional right has occurred, the official will be protected, if the said right was not clearly established or the official could have reasonably believed that his conduct was lawful.

Qualified Privilege: This legal term is used to denote a defense in defamation actions, according to the specific occasions, which give rise to the defamatory statement from the defendant. A qualified privilege is available, only when the defamatory statement comes under these specific occasions, like a statement made in good faith without malice, or the defendant has an interest or duty to make such a statement and the plaintiff has a corresponding interest or duty to receive that statement.

Quantum Meruit: A Latin term, which means, "as much as he deserved". This is a legal principle that determines the actual value of goods exchanged or services rendered. When a person hires another to do some work and the contract is not completed or rendered non-performable, the employee can sue the employer for the services rendered. The law implies a

promise from the employer to the employee that he will pay him for the services rendered as he may deserve or merit. If there is an express contract, the employee cannot sue the employer for a quantum meruit, but in case of failure of consideration, this principle can be used.

Quasi-contract: An obligation created by an order of the court and not by an agreement between the parties. A quasi-contract is created by a court, in a dispute regarding payment or service, when one party is getting some unjust enrichment.

Quid Pro Quo: A Latin term which literally means, "something for something". This concept of getting something of value in return of giving something of value is similar to the contractual concept of consideration.

Quit Claim Deed: The deed through which a person relinquishes his right or a right he may have in the future, over a property and transferring the right to some other person is called a quit claim deed. A quit claim deed does not guarantee that the title of the grantor (person granting the right) is clear. Read more on how to file a quit claim deed.

Quo Warranto: A type of writ, which literally means, "by what warrant or authority"? This writ is used to challenge the authority of a public official or a corporation to exercise a particular power.

R

Ratio Decidendi: The Latin term, which refers to the reason behind a decision of a court or the principle upon which the decision rests. Ratio decidenti of the higher courts are binding on the lower courts, while deciding similar cases. So this can be considered as an important tool for a lawyer.

Real Property: Land and the permanent fixtures attached to the land constitute a real property. Hence, a building attached to land is real property, but the furniture in the building are not.

Reasonable Doubt: A legal term used in the law of criminal procedure. An accused person can be acquitted, if the prosecution fails to prove the guilt of the accused beyond 'reasonable doubt' and the jury is not convinced of his/her guilt. In order to pronounce an accused person to be guilty, there should not be any doubt regarding the guilt of the accused, and it should be proved with ample evidence.

Rebuttable Presumption: A presumption of fact, which is accepted by a court of law, until it is proved to the contrary.

Record Sealing: In some cases, the court records are sealed or destroyed, so as not to make it accessible to public as a public record. If anyone wants to review such records, court permission is required, and otherwise such records will be kept sealed.

Recusation: A legal term, which denotes the process by which a judge or prosecutor voluntarily excuses himself from a legal case, or is removed form a case due to various reasons, like conflict of interest, bias or relation to a party to the case, etc.

Rectification: A correction or an amendment done to a written document through a court order.

Redemption: A seller buying back the property, which has been sold, by returning the purchase price to the buyer.

Redirect Examination: Examination of a witness, after the cross examination, in order to question him about the matters, which were brought up during the cross examination.

Remainder: A legal term, which refers to a future interest, held by a person in a real property of another person. Such future interest becomes effective on the expiration of other interests over the property created at the same time as that of the future interest. This can happen when the owner of a property gives the present interest of the property to one or more persons for a stipulated period or for life, and at the same time gives a future interest to another. Such future interest is called a remainder.

Remand: The literal meaning of the word is 'to send back'. In the legal context, a case is said

to be remanded when an appellate court sends back an appeal case to the trial court for further action. In criminal cases, an accused person, presented before a judge for preliminary hearing may be remanded into custody, if the judge feels that there is sufficient reason to keep the accused in detention, before trial.

Remittitur: A legal term, which has different meanings as per the context. In case of a verdict, a remittitur means an order by a judge, reducing the award or damages granted by a jury in a civil case, as it exceeds the amount claimed by the plaintiff. Such an order is granted when a motion is moved in the court to that effect. This legal term is also used in place of 'remand', to denote the sending back of an appeal case from the appellate court to the trial court.

Res Ipsa Loquitur: A Latin phrase, which means, "the thing speaks for itself". This is a legal doctrine, which presumes negligence on the part of a person who causes injury to another, when the former was in exclusive control of whatever caused the injury, and it is almost impossible for such an accident to occur without the negligence of such person.

Rotating Custody: A custody agreement, wherein there is no primary custodial parent, as the parents alternate custody of the child. Otherwise known as split custody, rotating custody is granted by the court after taking into account many factors, like the preferences of the child, so as to avoid any disruptive effect on him/her.

S

Safe Harbor: Legally speaking, a safe harbor refers to that provision or clause in a statute that eliminates or lessens the liability of a party to the case under the law, considering the fact that the actions of the party were in good faith.

Sanction: Generally, the word sanction means to approve or ratify, but in law, sanction can denote the penalty or punishment awarded to a person for breach of law.

Scienter: A Latin term which means, 'guilty knowledge'. If a person does an act voluntarily and intentionally, fully knowing the consequences, he is said to have the guilty knowledge, which has to be proved in some crimes.

Scrivener: A scrivener is a person who drafts legal and other documents for others, usually for a fee. It can be a lawyer, if he does not give any legal advice, but simply drafts the document. It can be a non-lawyer too, who may land in trouble for practicing law without a license.

Scrivener's Error: A term used to denote an error done by a clerical staff in a legal document. This term is mainly used to save higher officials from the blame of committing a mistake in a document, and putting the blame on the clerical staff.
Second Degree Murder: A murder, which is not pre-planned, but results from an assault, which is likely to cause death. Unlike a first degree murder which is pre-meditated and intentional or results from a crime, like arson, rape, robbery, etc., a second degree murder lacks premeditation, and is done with malice afterthought.

Sedition: The crime of revolting or supporting an uprising against the government. This crime involves speeches or publications, which may trigger public unrest and disrupts the operations of the government.

Self Defense: The right to protect one's person, family members and property (in some cases) from injury, from the attacks of an aggressor is called self defense. It is a defense in some cases, where the person is not held responsible for an act which is carried out in self defense.

Sentence: A punishment given to an accused person, who has been convicted of a crime.

Sequester: The process of separating the jury from outside influences by isolating them from any external contact, like the media, general public and even families. This is done to avoid anyone from influencing the verdict.

Sequestration: The act of taking away the property of a person from his possession under the process of law, for the benefits of a creditor or the state. A sequestration can be voluntary, if the person deposits the property by his own will, or it can be involuntary, if the authorities seize the property. Such an act is done when the ownership of the property in under dispute and a verdict is being awaited.

Servient Estate: A legal term used to denote a piece of real property, which is subject to any use that benefits another property is called a servient estate. For example, a property with a right of way imposed upon it, in order to benefit an adjoining property is called a servient estate, and the other one which uses the said property (for right of way) is called a dominant estate.

Severability: A legal term, which refers to a contract clause, which states that if some parts of a contract are held to be illegal and hence unenforceable, it does not mean that the rest of the contract is also unenforceable. In short, even if some parts are held unenforceable, the rest of the contract is still valid and binding.

Sobriety Test: A test to find out whether a person is in an intoxicated state or not. This test may involve the use of devices to check the level of blood alcohol or a breath test, or some test to check the motor skills which may be affected by intoxication.
Solatium: A compensation for emotional harm or for hurting feelings. This type of compensation, which is different from that which is awarded for financial or physical harm, is used in Scots law.

Sovereign Immunity: A legal doctrine, which shields the sovereign or the government from civil suits and criminal prosecution, and states that the sovereign cannot commit a legal wrong. This doctrine is used to protect the government servants too, if they were acting on behalf of the government.

Solvency: Unlike insolvency, wherein a person or entity is in unable to pay off the debts, solvency describes the status of a person or entity, who has enough assets to pay off the debts or liabilities.

Space Law: The body of law, which governs the space-related activities and includes international treaties, conventions, etc.

Specific Performance: Specific performance can be considered as an equitable remedy in case of breach of contracts, where monetary damages are deemed to be inadequate and compels the party to comply with the contractual obligation.

Station House Bail: It is a type of bail, which is granted to those who are accused of misdemeanors (lesser criminal acts), and are permitted to pay at the police station itself, facilitating their release prior to appearing before a judge.

Stare Decisis: A Latin term, which means, "to stand by things decided". It is a legal doctrine, which states that the decision made by a court, in a particular case, on a certain set of facts, has to be followed and applied by lower courts or courts of same rank, in future cases with a similar set of facts. In simple terms, decided cases or precedents are binding on lower courts, while deciding cases with similar facts.

Status Quo: A legal term, which refers to the present state of affairs and a status quo order is issued by a judge, in order to prevent the actions of the parties to the case, until the case is resolved.

Statutory Rape: A legal term, which denotes a sexual intercourse by an adult person with a minor, who is below the age of consent or who is below the statutorily designated age.

Sweetheart Contract: A contract made as a result of collusion between the management and the labor representatives, at the expense of the rights of the union workers. Such contracts are made exclusively for the benefit of the management and not the workers.

T

Tangible Asset: Tangible asset refers to any asset that has a physical existence. Such assets can be perceived through the sense of touch and can have a price or value attached to it.

Tenancy: Tenancy refers to a state or contract by which the owner of a property, who is known as the landlord, gives sole possession of his property to another person known as the tenant. In exchange of this transfer of possession of property, the tenant makes a periodic payment of a particular amount to the landlord that both the parties have mutually agreed upon.

Testamentary Capacity: It refers to the lawful ability of a person to sign a will.

Testimony: Testimony is a law term that refers to the statement made by a witness under oath in a legal proceeding. This testimony is treated as an evidence.

Title (property): It is the legal term for ownership. The term also encompasses the right and duty to protect a property and the power to dispose it.

Tort: Tort refers to a civil wrong that does not consist of a breach of contract. An injured person can sue the wrongdoer for the tort and claim damages as well.

Trademark: Any slogan, mark, picture or logo used by a person or company to identify and distinguish goods or services that he provides from those of others in the same field.

Transfer: The act by which the owner of a thing delivers the thing and all his rights on it to another person.

Treason: Treason refers to betrayal, treachery or breach of allegiance against the head of a state (the government or the monarch). The Constitution of United States defines this law term as any act that imposes war on the state or aid or comfort given to its enemies.

Trespass: As per law terms, trespass refers to unlawful interference, violation or entry into another person's property or rights. It also includes illegal violence against a person that may cause harm to the victim.

Trust: Trust is the property given by a donor to a trustee who looks after the property for the benefit of a third person called the beneficiary. This beneficiary gets interests and dividends from the assets in the trust for a specific number of years. Read more on setting up a trust fund, how does a trust fund work and real estate investment trust.

Turbary: In common parlance, turbary refers to an area of peat land from which mat of grass and grass roots (turf) or any other material can be extracted to be used as fuel. As a legal term, turbary refers to the right of an individual to cut turf from a turbary that is jointly owned by him and another person or from a turbary that is exclusively owned by someone else.

U

Unalienable: A thing or a right, which cannot be transferred to another. While some rights like the right to life cannot be transferred, the transfer of some things are prohibited by law (for example, pension granted by the government cannot be sold or transferred).

Under Color of Law: An act done by a state official, during the course of his official duties (whether or not within his power), is said to be an act under color of law. An action under color of law, which deprives the federal civil rights of an individual is in itself a crime.

Ultra Vires: A Latin term, which means, "beyond powers". Mostly used as a doctrine in the law of corporations, ultra vires denotes an action by a corporation or the officials of the corporation, which is outside the powers granted to them by law. Such actions are considered to be illegal. In short, any action done by any individual or entity beyond their powers is considered as ultra vires.

Undue Influence: Any act by a person, which influences the free will of another or persuades another to do something, which he would not have done otherwise, amounts to undue influence. But such an act does not involve any force or threat, and is often used as a defense in will contests to refer to outside influences that affected the free will of the testator or the maker of the will.

Unjust Enrichment: Availing benefits from the action or property of other person without any legal justification is called unjust enrichment. It is an equitable doctrine which can be applied when there is no contract between the parties, and is used to prevent unjust enrichment. The person who is getting unfair benefits must return the same.

Unlawful Assembly: A gathering or three or more persons, with an intention to commit a crime, to disturb the peace or that creates a fear in the mind of the observers that some unlawful action, which involves violence will result.

Unnatural Will: Otherwise known as undutiful wills, unnatural wills are made to bestow the estates of the testator to complete strangers, rather than close relatives. Unlike an unnatural

wills, an officious will is made to distribute the testator's estates to his natural heirs.

Usufruct: The right to use and enjoy the property of another for a stipulated time period or for life. A person with this right can use the property, enjoy the benefits or income arising from it, can rent it out and collect the rents for himself. He need not share anything with the real owner of the property, but cannot alter or destroy anything in it and should not dispose it.

Usury: Charging a person with interest rates more than what is allowed by the law is called usury. If it is proved before a court that the interest rates on a loan is higher than the legally allowed one, the court may order the person to pay the principal amount only and makes the interest due void.

V

Vacate: A term with various meanings, vacate refers to overruling of court orders or decisions or making it void. Usually, a decision is vacated for any error, if it is substantial enough to affect the verdict.

Vagrancy: Legally speaking, vagrancy is an offense, which refers to a condition of being intentionally unemployed by refusing to work and living idly without any settled home. It may also include loitering, drunkenness, association with criminals and prostitutes, etc.

Venue: The legally proper and convenient place to file a particular case and to conduct its hearing. The laws regarding venue can be different for different states.

Vicarious Liability: The liability of a person for the negligent and criminal action of another person, even though the former is not responsible for the act. This happens when the person liable is responsible for the acts of the person, who does the act. For example, an employer can be held vicariously liable for the actions of an employee.

Void: Something which is not legally binding and is worthless. A statute, which is declared void no longer exists and the same applies to void contracts, legal proceedings, documents, etc. Something which can be made void at the instance of a party or at the happening of some

conditions is said to be voidable (which may become void).

Volenti Non Fit Injuria: A Latin term, which literally means, "to one who is willing, no harm is done". This explains a legal doctrine that a person, who willingly undertakes a dangerous task or puts himself in risky situations, cannot sue for the resulting damages at a later stage.

W

Waiver: A voluntary and intentional relinquishment of something, especially some known rights. It can be done by express statement or by conduct.

War Crimes: Brutal crimes committed by a country's armed forces during a war. Such acts are done in violation of international laws, treaties and practices regarding military conflict between countries.

Ward: A person who is under the care of a guardian appointed or confirmed by a court of law. Usually, a ward can be a minor or an incompetent person who is incapable of taking care of himself.

Warranty: A promise made by the seller of a product to the buyer regarding the performance of the product or for doing something.

Warrant of Committal: The power of a judge or magistrate in some countries to enforce a judgment against a person or corporation. This action is initiated when the person or corporation refuses or neglects to comply with the judgment within a known fixed time period.

Will: A legal term with different meanings as per the context. It can be thoughts of a person, which leads to actions. Mainly this term is used to denote a document which is executed by a person to distribute his estates on the event of his death.

Writ: A court order signed by the issuing judge, making a command to the person to whom it is addressed, to perform a specific act.

Wrong: A violation of another's right or injury caused to the person or property of another. While a wrongful arrest refers to the detention of a person without any legal excuse, a discharge of an employee from service, without any lawful reason and in violation of the contract of employment is called a wrongful discharge.

Y

Year and a Day Rule: A legal principle, which has its roots in common law. Year and a day rule states that in order to constitute a murder, the death must happen within one year and one day of the act or omission, which is alleged to be the cause of the death.

Yellow Dog Contract: An unlawful contract, which compels the employees to make a decision that they will not join any union or participate in the activities of any union, as a precondition for employment. Such contracts are legally prohibited.

Yellow stone Injunction: A legal proceeding, which can be initiated by a tenant to prevent the landlord from terminating the lease prematurely, in case of any claimed default by the tenant.

Young Offender: A minor, who commits a crime is called a young offender, who are treated differently as compared to adult criminals. Young offenders are generally between the age of eight to eighteen, and are tried in special youth courts.

Z

Zipper Clause: A clause, which can be found in employment agreements, which makes both parties waive the rights to bargain on any matter, which is not in the employment contract when it was negotiated and signed.

Zoning: A law regarding the use of land, which is enforced by the local governments. It is used to demarcate various geographic areas in order to protect any specified area, for

developing a township, channel traffic, etc.

Most people find it difficult to understand legal terminology because law terms sound like Greek or Latin to them (As a matter of fact, there are many Latin terms and phrases in the legal jargon). I hope this glossary of legal terms and meanings may help you in understanding the definitions and meanings of law terms and phrases, and enrich your legal knowledge.

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APPENDIX

PREAMBLE

Whereas independence is a genuine right of all nations and any form of alien occupation should thus be erased from the earth as not in conformity with humanity and justice,

Whereas the struggle of the Indonesian independence movement has reached the blissful point of leading the Indonesian people safely and well before the monumental gate of an independent Indonesian State which shall be free, united, sovereign, just and prosperous,

By the grace of God Almighty and urged by the lofty aspiration to exist as a free nation,

Now therefore, the people of Indonesia declare herewith their independence,

Pursuant to which, in order to form a Government of the State of Indonesia that shall protect the whole people of Indonesia and the entire homeland of Indonesia, and in order to advance general prosperity, to develop the nation's intellectual life, and to contribute to the implementation of a world order based on freedom, lasting peace and social justice, Indonesia's National Independence shall be laid down in a Constitution of the State of Indonesia, which is to be established as the State of the Republic of Indonesia with sovereignty of the people and based on the belief in the One and Only God, on just and civilized humanity, on the unity of Indonesia and on democratic rule that is guided by the strength of wisdom resulting from deliberation / representation, so as to realize social justice for all the people of Indonesia.

THE CONSTITUTION

SECTION I - FORM AND SOVEREIGNTY

Article1

(1) The State of Indonesia shall be a unitary state, with the form of a Republic.

(2) Sovereignty is vested in the people and implemented pursuant to the Constitution. ***

(3) The State of Indonesia is a state based on the rule of law. ***

SECTION II- MAJELIS PERMUSYAWARATAN RAKYAT

Article 2

(1) The MPR consists of the members of the DPR and the members of the DPD who are chosen through general elections and further regulated by law.****
(2) The MPR shall convene at least once every five years in the capital of the state.
(3) All decisions of the MPR shall be taken by majority vote.

Article 3

(1) The MPR has the authority to amend and to ordain the Constitution.***
(2) The MPR installs the President and/or the Vice President. ***/****
(3) The MPR may only dismiss the President and/or Vice President during their term of office in accordance with the Constitution. ***/****

SECTION III - THE STATE'S EXECUTIVE POWERS

Article4
(1) The President of the Republic of Indonesia shall hold the power of government in accordance with the Constitution.
(2) In exercising his duties, the President shall be assisted by a Vice President.

Article5
(1) The President is entitled to submit bills to the DPR. *
(2) The President shall issue government regulations to implement laws as needed.

Article6
(1) A Presidential candidate and a Vice Presidential candidate has to be an Indonesian citizen from birth, who has never received another nationality of his own volition, who has never betrayed the country, and who is mentally and physically capable of carrying out his duties as President or Vice President. ***
(2) The requirements to become President and Vice President are further regulated by law. ***

Article6A
(1) The President and the Vice President shall be elected as a pair by the people directly.***

(2) Each pair for President and Vice President shall be proposed prior to general elections by a political party or by a coalition of political parties contesting the general elections. ***

(3) The pair of Presidential and Vice Presidential candidates that receives more than fifty percent of the vote from the total of votes in the general election with at least twenty percent of the vote in more than half of the total number of provinces in Indonesia, shall be installed as President and Vice President. ***
(4) In the event that no pair for Presidential and Vice Presidential candidates is elected, the two pairs of candidates who have received the first and second highest number of votes in the general election shall be submitted to direct election by the people and the pair that gets most of the votes shall be installed as President and Vice President.***
(5) The procedure to organize the election for President and Vice President shall be further regulated by law. ***

Article7

The President and Vice President hold office for a term of five years and can afterwards be elected to the same office, for one other term only. *

Article7A

The President and/or Vice President may be dismissed from office by the MPR based on a proposal from the DPR, either when proven guilty of violating the law by betrayal of the state, of corruption, of bribery, of any other felony, or because of disgraceful behavior, as well as when proven no longer to fulfill the conditions as President and/or Vice President. ***

Article7B

(1) A proposal to dismiss the President and/or Vice President can only be submitted by the DPR to the MPR after filing first a request to the Constitutional Court to investigate, to bring to trial and to pass judgment over the DPR's view that the President and/or Vice President has violated the law by betrayal of the state, through corruption, bribery, any other felony, or by disgraceful behavior; and/or over the view that the President and/or Vice President is no longer capable of fulfilling the conditions as President and/or Vice President. ***
(2) The DPR's view that the President and/or Vice President has committed such a crime or is no longer capable of fulfilling the conditions as President and/or Vice President is to be seen in the framework of the DPR implementing its supervisory function. ***
(3) The DPR's request to the Constitutional Court can only be submitted if supported by at least 2/3 of all DPR members present in a plenary session that is attended by at least 2/3 of the total number of members in the DPR. ***

(4) The Constitutional Court must investigate, bring to trial and pass the fairest judgment possible over the DPR's view at the latest ninety days after the DPR's request was received by the Constitutional Court. ***

(5) In the event that the Constitutional Court resolves that the President and/or Vice President is proven guilty of violating the law by betrayal of the state, of corruption, of bribery, of any other felony, or because of disgraceful behavior; and/or if proven that the President and/or Vice President is no longer capable of fulfilling the conditions as President and/or Vice President, then the DPR shall convene a plenary session to submit a proposal to the MPR to impeach the President and/or Vice President. ***

(6) The MPR shall convene a session to decide on the DPR's proposal at the latest thirty days from the moment the MPR received this proposal. ***

(7) The MPR's decision on the proposal to impeach the President and/or Vice President shall be taken in a plenary session of the MPR attended by at least ? of the total number of members in the MPR and supported by at least 2/3 of the members present, after the President and/or the Vice President has been given the opportunity to present his explanation to the plenary session of the MPR. ***

Article 7C

The President may not lock out or dissolve the DPR. ***

Article8

(1) If during his term the President passes away, resigns, is impeached, or is unable to carry out his duties, he shall be replaced until the end of that term by the Vice President. ***

(2) In case the position of the Vice President falls vacant, the MPR shall convene at the latest within sixty days to select a Vice President among two candidates nominated by the President. ***

(3) If during their term both the President and Vice President simultaneously pass away, resign, are impeached, or are unable to carry out their duties, the office of the presidency shall be taken up collectively by the Minister of Foreign Affairs, the Minister of Internal Affairs, the Minister of Defense. After thirty days at the latest, the MPR shall convene to elect for the remainder of the term a President and a Vice President among the two pairs for Presidential and Vice Presidential candidates who were proposed by a political party or by a coalition of political parties and who came in first and second as pairs of candidates for President and Vice President in the last general election. ****

Article9

(1) Prior to taking office, the President and the Vice President shall take oath according to their religion, or to make a solemn pledge before the MPR or the DPR as follows:

The Oath of President (Vice President):

"I swear by God to fulfill the duties of President (Vice President) of the Republic of Indonesia to the best of my capabilities and in the fairest way possible, to uphold the Constitution by all means and to execute all laws and regulations as straightforwardly as possible as well as to dedicate myself to the service of the Nation and the People."

The Pledge of the President (Vice President):

"I solemnly pledge to fulfill the duties of President (Vice President) of the Republic of Indonesia to the best of my capabilities and in the fairest way possible, to uphold the Constitution by all means and to execute all laws and regulations as straightforwardly as possible as well as to dedicate myself to the service of the Nation and the People." *

(2) In the event that the MPR or the DPR is unable to convene, the President and the Vice President shall take oath according to their religion, or make a solemn pledge before the leadership of the MPR witnessed by the leadership of the Supreme Court. *

Article10

The President is the Supreme Commander of the Land Forces, the Navy and the Air Force.

Article11

(1) With the approval of the DPR the President may declare war, make peace and conclude treaties with other countries. ****

(2) When entering into other international agreements that entail broad and fundamental consequences for the existence of the people because of links to the state's financial burden, and/or because they require amendments to laws or the enactment of new ones, the President needs the approval of the DPR. ***

(3) Further provisions as to international agreements shall be regulated by law. ***

Article12

The President declares the state of emergency. The conditions and consequences of a state of emergency shall be regulated by law.

Article13

(1) Ambassadors and consuls are appointed by the President.
(2) In appointing ambassadors, the President shall take into account the considerations of the DPR. *
(3) The President receives the accreditation of ambassadors from other countries taking into account the considerations of the DPR. *

Article14

(1) The President may grant clemency and rehabilitation taking into account the considerations of the Supreme Court. *
(2) The President may grant amnesty and abolition taking into account the considerations of the DPR. *

Article15

The President may grant titles, decorations, and other insignia as provided by the law. *

Article16

The President is to set up an advisory council whose duty it is to give the President advice and recommendations, and which is to be further regulated by law. ****

SECION IV - DEWAN PERTIMBANGAN AGUNG

Abolished ****

SECTION V - STATE MINISTERS

Article17

(1) The President is assisted by state ministers.
(2) The ministers are appointed and dismissed by the President. *
(3) Each minister is responsible for a specific area of governance. *
(4) The establishment, changes, and dissolution of state ministries shall be regulated by law. ***

SECTION VI - REGIONAL ADMINISTRATION

Article18

(1) The Unitary State of the Republic of Indonesia is divided into provinces and a province is divided into kabupaten and kota, with each province, kabupaten and kota having its own regional administration, regulated by law. **

(2) The administration of a province, of a kabupaten, and of a kota shall regulate and manage its own government matters in accordance with the principles of regional autonomy and the duty of providing assistance. **

(3) Each provincial, kabupaten, and kota administration shall have its own DPRD whose members shall be elected through a general election. **

(4) A Governor, Bupati, and Mayor, each heading respectively the administration of a province, a kabupaten, and a kota shall be elected democratically. **

(5) A regional administration shall exercise the broadest possible autonomy, except for matters of governance that are determined by law as the prerogative of the Central Government. **

(6) A regional administration shall have the right to adopt regional regulations as well as other rules to implement autonomy and the duty of providing assistance. **

(7) The organization and mechanisms of implementing regional administration are to be regulated by law. **

Article18A

(1) Relations as to authority between the central government and the administrations of a province, a kabupaten, a kota, as well as between a province and a kabupaten or a kota, are to be regulated by law with special regard for the specificity and diversity of each region. **

(2) Relations as to finance, public services, the exploitation of natural and other resources between the central government and the regional administrations are to be regulated by law and implemented in a just and synchronized way. **

Article18B

(1) The State shall recognize and respect entities of regional administration that possess a specificity or a distinctiveness that are to be regulated by law. **

(2) The State shall recognize and respect, to be regulated by law, the homogeneity of societies with customary law along with their traditional rights for as long as they remain in existence and in agreement with societal development and with the principle of the Unitary State of the Republic of Indonesia. **

SECTION VII - DEWAN PERWAKILAN RAKYAT

Article19

(1) The members of the DPR are elected through a general election. **

(2) The organization of the DPR is regulated by law. **

(3) The DPR convenes at least once a year. **

Article20

(1) The DPR has the power to enact laws. *

(2) Each bill shall be discussed between the DPR and the President so as to reach a joint agreement. *

(3) If a bill fails to reach a joint agreement, it may not be introduced to the DPR again during its current term. *

(4) The President shall endorse into law a bill that has reached a joint agreement. *

(5) When a bill that has already reached a joint agreement is not endorsed by the President within thirty days after it has been jointly approved, the bill shall nevertheless become a valid law that has to be promulgated as such. **

Article20A

(1) The DPR has legislative, budgeting and supervisory functions. **

(2) To carry out its functions the DPR, apart from the rights regulated elsewhere in this Constitution, has the rights of interpellation, of enquiry, and of expressing opinions. **

(3) Apart from the rights regulated elsewhere in this Constitution, each member of the DPR has the right to ask questions, to make proposals and to give his opinion along with the right to immunity. **

(4) Further provisions regarding the rights of the DPR and of the members of the DPR shall be regulated by law. **

Article 21

(1) The members of the DPR have the right to introduce bills. *

Article22

(1) In compelling crisis situations the President shall have the right to issue government regulations in lieu of law.

(2) Such government regulations have to be approved by the DPR in its next session.
(3) If not approved, the government regulation in question has to be revoked.

Article22A

Further provisions about the procedure to enact laws shall be regulated by law. **

Article22B

Members of the DPR can be removed from office, according to conditions and procedures to be regulated by law. **

SECTION VIIA - DEWAN PERWAKILAN DAERAH

Article22C

(1) The members of the DPD shall be elected from each province through a general election. ***

(2) The total number of DPD members from each province shall be the same and the total number of members in the DPD shall not be more than 1/3 of the total number of members in the DPR. ***

(3) The DPD shall convene at least once a year. ***

(4) The organization and authority of the DPD are to be regulated by law. ***

Article22D

(1) The DPD may submit to the DPR bills dealing with regional autonomy, relations between the center and the regions, the establishment and growth as well as the merger of regions, the management of natural and other economic resources, and matters related to the financial balance between the center and the regions. ***

(2) The DPD is to participate in debates on bills dealing with regional autonomy; relations between the center and the regions; the establishment, growth and merger of regions; the management of natural and other economic resources, and matters related to the financial balance between the center and the regions; and, moreover, give its recommendations to the DPR on bills dealing with the state budget as well as on bills dealing with taxation, education, and religion. ***

(3) The DPD may supervise the implementation of laws regarding: regional autonomy, the establishment and growth as well as the merger of regions, the management of natural and other economic resources, the implementation of the state budget, taxation, education, and

religion and may in addition submit the results of this supervision to the DPR as input for follow-up considerations. ***

(4) Members of the DPD can be removed from office, according to conditions and procedures to be regulated by law. ***

SECTION VIIB - GENERAL ELECTIONS *

Article 22E

(1) Every five years general elections are to be organized in a direct, public, free, secret, honest, and fair way. ***

(2) The general elections are organized to elect the members of the DPR, the DPD, the President and the Vice President and the DPRD. ***

(3) The participants in the general elections to elect the members of the DPR and of the DPRD are political parties. ***

(4) The participants in the general elections to elect the members of the DPD are individuals. ***

(5) The general elections shall be organized by a general election commission that shall be national, permanent and independent in nature. ***

(6) Further provisions regarding the general elections are to be regulated by law. ***

SECTION VIII - FINANCIAL MATTERS

Article23

(1) The state budget as the materialization of the state's financial management shall annually be determined in the form of a law and be implemented in an open and accountable way in order to achieve maximum prosperity for the people. ***

(2) The bill on the state budget shall be submitted by the President for joint debate with the DPR taking into account the recommendations from the DPD. ***

(3) If the DPR does not agree with the bill on the state budget proposed by the President, the Government is to implement the state budget of the preceding year. ***

Article23A

Taxes and other compulsory levies required for the needs of the state are to be regulated by law. ***

Article23B

The kinds and value of the national currency shall be regulated by law. ****

Article23C

Other matters regarding state finances shall be regulated by law. ***

Article23D

The state owns a central bank the organization, authority, competence, responsibilities, and independence of which are regulated by law. ****

SECTION VIIIA - BADAN PEMERIKSA KEUANGAN***

Article 23E

(1) To audit the management of and accountability for the state's finances a free and independent BPK shall be set up. ***
(2) The results of the state finances' audits shall be submitted to the DPR, the DPD, the DPRD, in accordance with the competence of each. ***
(3) The audit results are to be followed through by the representative institutions and/or by other bodies in accordance with the law. ***

Article23F

(1) The members of the BPK are selected by the DPR taking into account considerations from the DPD and shall be installed by the President. ***
(2) BPK's management is selected from among and by its members. ***

Article23G

(1) The BPK has its main seat in the state's capital, with representations in each province. ***

(2) Further provisions regarding the BPK are to be regulated by law. ***

SECTION IX - THE JUDICIAL POWERS

Article24

(1) The judicial powers shall be independent with the authority to organize the judicature in order to uphold law and justice. ***

(2) The judicial powers shall be carried out by a Supreme Court and by its subordinate judicatory bodies dealing with general, religious, military, state administrative judicial fields, and by a Constitutional Court. ***

(3) Other bodies dealing with judicial powers are to be regulated by law. ****

Article24A

(1) The Supreme Court shall have the competence to try cassation cases, to review regulations made under a law against that law, as well as other competences as provided by law. ***

(2) Each supreme justice must have integrity and a personality beyond reproach, be just, professional and experienced in matters of law. ***

(3) Candidates for supreme justices are proposed by the Judicial Commission for approval to the DPR and subsequently installed as supreme justices by the President. ***

(4) The chairman and vice chairman of the Supreme Court are to be chosen from among and by the supreme justices. ***

(5) The organization, authority, membership, and judicial procedures of the Supreme Court as well as of its subordinate judicatory bodies shall be regulated by law. ***

Article24B

(1) The Judicial Commission shall be independent in nature and have the competence to make proposals for the appointment of supreme justices as well as other competences within the framework of safeguarding and upholding the honor, the high status and the behavior of judges. ***

(2) The members of the Judicial Commission must have knowledge and experience in matters of law and an integrity and personality beyond reproach. ***

(3) The members of the Judicial Commission are to be appointed and dismissed by the President in agreement with the DPR. ***

(4) The organization, authority, and membership of the Judicial Commission shall be regulated by law. ***

Article24C

(1) The Constitutional Court shall have the authority to make final decisions in cases of first and last instance handling the review of laws against the Constitution, to decide on authority arguments among state institutions whose competence is enshrined in the Constitution, to decide on the dissolution of political parties, and to decide on disputes regarding general

election results. ***

(2) The Constitutional Court has the duty to rule on an opinion of the DPR regarding alleged violations of the Constitution by the President or the Vice President. ***

(3) The Constitutional Court shall have as its members nine constitutional justices, to be installed by the President, three among them nominated by the Supreme Court, three by the DPR, and three by the President. ***

(4) The chairman and the vice chairman of the Constitutional Court are to be elected from among and by the constitutional justices. ***

(5) The constitutional justices must have integrity and a personality beyond reproach, be just, statesmanlike, master constitutional and state administrative matters, and not hold a position as state official. ***

(6) The appointment and dismissal of constitutional justices, judicial procedures and other provisions dealing with the Constitutional Court are to be regulated by law. ***

Article25

The conditions to become or to be dismissed as a judge are determined by law.

SECTION IXA - STATE TERRITORY**

Article 25A

The Unitary State of the Republic of Indonesia is an archipelagic state the surface and boundaries of which are to be established by law. **

SECTION X - CITIZENS AND RESIDENTS

Article26

(1) Citizens are those who are indigenous Indonesians and persons of foreign origin who are legalized as citizens in accordance with the law.

(2) Residents consist of Indonesian citizens and foreigners residing in Indonesia. **

(3) Matters of citizenship and residency are to be regulated by law. **

Article27

(1) All citizens shall have equal status before the law and the government and hold without exemption the law and the government in esteem.

(2) Each citizen shall be entitled to an occupation and an existence proper for a human

being.

(3) Each citizen shall have the right and the duty to participate in the defense of the nation. **

Article28

The liberties of association and assembly, the freedom of thought expressed verbally or in writing and similar rights are to be determined by law.

SECTION XA - FUNDAMENTAL HUMAN RIGHTS**

Article 28A

Each person has the right to live and the right to defend his life and existence. **

Article28B

(1) Each person has the right to establish a family and to generate offspring through a lawful marriage. **

(2) Each child has the right to live, grow up, and develop as well as the right to protection from violence or discrimination. **

Article28C

(1) Every person has the right to self-realization through the fulfillment of his basic needs, the right to education and to partake in the benefits of science and technology, art and culture, so as to improve the quality of his life and the well-being of mankind. **

(2) Each person has the right to self-improvement by way of a collective struggle for his rights with a view to developing society, the nation, and the country. **

Article28D

(1) Each person has the right to recognition, security, protection and certainty under the law that shall be just and treat everybody as equal before the law. **

(2) Every person is entitled to an occupation as well as to get income and a fair and proper treatment in labor relations. **

(3) Each citizen has the right to equal opportunity in government. **

(4) Each person has a right to a nationality. **

Article28E

(1) Each person is free to worship and to practice the religion of his choice, to choose

education and schooling, his occupation, his nationality, his residency in the territory of the country that he shall be able to leave and to which he shall have the right to return. **

(2) Each person has the right to be free in his convictions, to assert his thoughts and tenets, in accordance with his conscience. **

(3) Each person has the right to freely associate, assemble, and express his opinions. **

Article28F

Each person has the right to communication and to acquiring information for his own and his social environment's development, as well as the right to seek, obtain, possess, store, process, and spread information via all kinds of channels available. **

Article28G

(1) Each person is entitled to protection of self, his family, honor, dignity, the property he owns, and has the right to feel secure and to be protected against threats from fear to do or not to do something that is part of basic rights. **

(2) Each person has the right to be free from torture or inhuman and degrading treatment and shall be entitled to obtain political asylum from another country. **

Article28H

(1) Each person has a right to a life of well-being in body and mind, to a place to dwell, to enjoy a good and healthy environment, and to receive medical care. **

(2) Each person has the right to facilities and special treatment to get the same opportunities and advantages in order to reach equality and justice. **

(3) Each person is entitled to social security enabling him to develop his entire self unimpaired as a dignified human being. **

(4) Each person has the right to own private property and such ownership shall not be appropriated arbitrarily by whomsoever. **

Article28I

(1) The rights to life, to remain free from torture, to freedom of thought and conscience, to adhere to a religion, the right not to be enslaved, to be treated as an individual before the law, and the right not to be prosecuted on the basis of retroactive legislation, are fundamental human rights that shall not be curtailed under any circumstance. **

(2) Each person has the right to be free from acts of discrimination based on what grounds ever and shall be entitled to protection against such discriminative treatment. **

(3) The cultural identities and rights of traditional communities are to be respected in conjunction with progressing times and civilization. **
(4) Protecting, promoting, upholding, and the full realization of human rights are the responsibilities of the state, foremost of the government. **
(5) To uphold and protect human rights in accordance with the principles of a democratic and law-based state, the implementation of fundamental human rights is to be guaranteed, regulated, and laid down in laws and regulations. **

Article28J

(1) Each person has the obligation to respect the fundamental human rights of others while partaking in the life of the community, the nation, and the state. **
(2) In exercising his rights and liberties, each person has the duty to accept the limitations determined by law for the sole purposes of guaranteeing the recognition and respect of the rights and liberties of other people and of satisfying a democratic society's just demands based on considerations of morality, religious values, security, and public order. **

SECTION XI - RELIGION

Article29

(1) The state is based on the belief in the One and Only God.
(2) The state guarantees each and every citizen the freedom of religion and of worship in accordance with his religion and belief.

SECTION XII - DEFENSE AND SECURITY OF THE STATE**

Article 30

(1) Each citizen has the right and the duty to participate in the defense and security of the state. **
(2) The defense and security of the state are undertaken through a defense and security system that encompasses the entire population with TNI and POLRI as the main powers, and the population as the supporting power. **
(3) TNI comprises the Land Forces, the Navy, and the Air Force as the state's instruments to defend, protect, and maintain the state's integrity and sovereignty. **
(4) POLRI is the state's instrument to safeguard security along with law and order among the

population and has the duty to protect, to shield, and to serve the population, as well as to uphold the law. **

(5) The structure and the authority of TNI, of POLRI, the relations as to the authorities of each TNI and POLRI in exercising their duties, the conditions under which the citizens can partake in the state's defense and security, as well as other aspects regarding defense and security are to be regulated by law. **

SECTION XIII - EDUCATION AND CULTURE**

Article 31

(1) Each citizen has the right to an education. ****

(2) Each citizen is obliged to follow elementary education and the government has the duty to fund this. ****

(3) The government organizes and implements a national education system, to be regulated by law, that aims at enhancing religious and pious feelings as well as moral excellence with a view to upgrading national life. ****

(4) The state shall give priority to the education budget by allocating at least twenty percent of the state's as well as of the regional budgets to meet the requirements of implementing national education. ****

(5) The government advances science and technology along with holding religious values and national unity in high esteem with a view to promoting civilization as well as the well-being of humanity. ***

Article32

(1) The state shall advance Indonesia's national culture among the civilizations of the world by guaranteeing the freedom of the people to maintain and develop cultural values. ****

(2) The state shall respect and preserve the languages in the regions as national cultural treasures. ****

SECTION XIV - NATIONAL ECONOMY AND SOCIAL WELFARE**

Article 33

(1) The economy is to be structured as a common endeavor based on familial principles. ****

(2) Production sectors that are vital to the state and that affect the livelihood of a considerable part of the population are to be controlled by the state. ****

(3) The land and the waters as well as the natural riches therein are to be controlled by the state to be exploited to the greatest benefit of the people. ****

(4) The organization of the national economy shall be based on economic democracy that upholds the principles of solidarity, efficiency along with fairness, sustainability, keeping the environment in perspective, self-sufficiency, and that is concerned as well with balanced progress and with the unity of the national economy. ****

(5) Further provisions regarding the implementation of this article are to be regulated by law. ****

Article34

(1) Impoverished persons and abandoned children are to be taken care of by the state. ****

(2) The state develops a social security system for everybody and empowers the weak and underprivileged in society in accordance with their dignity as human beings. ****

(3) The state has the responsibility to provide proper medical and public service facilities. ****

(4) Further provisions regarding the implementation of this article are to be regulated by law. ****

SECTION XV - THE STATE'S FLAG, LANGUAGE, AND COAT OF ARMS, AND THE NATIONAL ANTHEM**

Article 35

The flag of the Indonesian state is the "Sang Merah Putih".

Article 36

The language of the state is "Bahasa Indonesia".

Article36A

The state's Coat of Arms is the "Garuda Pancasila" with "Bhinneka Tunggal Ika" as its motto. **

Articles 36B

The national anthem is "Indonesia Raya". **

Article36C

Further provisions regarding the flag, language, and coat of arms of the state, as well as to the national anthem are to be regulated by law. **

SECTION XVI - AMENDMENTS TO THE CONSTITUTION

Article37

(1) Proposals to amend articles of the Constitution can be put on the agenda of the MPR session if submitted by at least 1/3 of the total number of members in the MPR. ****

(2) Each proposal to amend articles of the Constitution has to be submitted in writing and to mention clearly which part should to be amended and for what reason. ****

(3) To amend articles of the Constitution the MPR session has to be attended by at least 2/3 of all members of the MPR. ****

(4) A decision to amend articles of the Constitution requires the agreement of at least fifty percent plus one vote of all the members of the MPR. ****

(5) Especially those provisions regarding the form of the Unitary State of the Republic of Indonesia may not be amended. ****

TRANSITIONAL PROVISIONS

ArticleI

All existing laws and regulations shall remain valid until new ones under this Constitution come into effect. ****

ArticleII

All existing state institutions shall continue to implement the provisions of the Constitution as long as they have not been replaced by new ones under this Constitution. ****

ArticleIII

The Constitutional Court has to be established at the latest by 17 August 2003 and until such establishment all its competencies shall be carried out by the Supreme Court. ***

ADDITIONAL PROVISIONS

ArticleI

The MPR shall review the contents and the legal status of the decisions of the MPRS and the MPR for decision by the MPR session of 2003. ****

ArticleII

With the enactment of these constitutional amendments, the 1945 Constitution of the Republic of Indonesia shall consist of a Preamble and articles. ****

Remarks

Up to July 2003, the Constitution has been amended four times. The asterisks used in the titles of the Sections or after a paragraph in an article, refer to the amendment concerned:

* the First Amendment of 19 October 1999

** the Second Amendment of 18 August 2000

*** the Third Amendment of 9 November 2001

**** the Fourth Amendment of 11 August 2002

This present translation is an original one, made for an on behalf of the Ministry of Foreign Affairs of the Republic of Indonesia as a Certified Translation, and completed on July 1, 2003. The work of the experts and translators involved was coordinated and supervised by Idris Kyrway, certified translator for law matters: kyrway@indosat.net.id or jbs@indo.net.id.

Comments are welcomed and e-mail respondents are assured of a personal reply.

The Translation Team has preferred to keep typical Indonesian terms and / or acronyms for which there is no standard English translation yet, pending a regulation on this matter, in Bahasa Indonesia. In the order as they appear in the Constitution, these terms are:

MPR - Majelis Permusyawaratan Rakyat. The English equivalent most often used is: People's Consultative Assembly

DPR - Dewan Perwakilan Rakyat. The English equivalent most often used is House of Representatives.

DPD - Dewan Perwakilan Daerah, Regional Representatives Council.

Dewan Pertimbangan Agung. The English equivalent that was most often used for this abolished institution was Supreme Advisory Council.

Kabupaten - a geographical and administrative subdivision immediately under the provincial level, often translated as "regency" when referring to colonial times, or as "district" in post-colonial times.

Kota - At the national level, an agglomeration as an administrative unit has to answer several criteria to be considered a "city" or kota. Yet, since the introduction of regional autonomy, the capital of a kabupaten is also called a "kota", often without fulfilling the requirements to be recognized as a "city" at the national level. "Kota" is often translated as "municipality" (Dutch: gemeente - French: commune, municipalite - German: Gemeinde) but all these foreign terms may in their country of origin also apply to small administrative units some of which would be considered in Indonesia a "desa" or village.

DPRD - Dewan Perwakilan Rakyat Daerah, Regional House of Representatives.

Bupati - the Chief of akabupaten.

BPK - Badan Pemeriksa Keuangan, Financial Audit Board.

TNI - Tentara Nasional Indonesia. Since the Police split up from ABRI (Angkatan Bersenjata Republik Indonesia - the Indonesian Armed Forces), TNI now refers exclusively to the military. TNI is often translated as "Army", although this term is better reserved to refer to the ground troops or land-forces (Angkatan Darat).

POLRI - Polisi Republik Indonesia. The Police, or the Police Forces.

Sang Merah Putih - "The Red-White", referring to the two colors of the state flag.

Bahasa - In Indonesian, the name of a language as for example in bahasa Inggris or Bahasa Indonesia is normally preceded by "bahasa" meaning simply "language". When placed before "Indonesia" the term is written with a capital letter. When used on its own, the term "Bahasa" refers exclusively to "the Indonesian Language."

Garuda Pancasila - Garuda is a mythological eagle and among other things also the symbol and emblem of Indonesia's national airline "Garuda Indonesia"; Pancasila is a Sanscrit term meaning "five principles", referring to the 5 tenets of the state's ideology.
Bhinneka Tunggal Ika - Sanscrit for "Unity in Diversity".
Indonesia Raya - great, or glorious Indonesia.
MPRS - Majelis Permusyawaratan Rakyat Sementara. This term refers specifically to the emergency session of the MPR during which President Soekarno was replaced as Head of State by General Soeharto.

PERSPEKTIF KONFLIK DAN PENTINGNYA KELEMBAGAAN SERTA MEKANISME PENYELESAIAN KONFLIK SUMBER DAYA ALAM*

H. Abd Thalib, S. H., M. C. L., Ph. D.**

A. PENDAHULUAN

Riau sedang giat-giatnya membangun merangkul para investor (dalam dan luar) sebagaimana juga dilakukan oleh daerah-daerah provinsi lainnya di Indonesia, akhir-akhir ini rentan berpotensi konflik dari kubu-kubu berseberangan kepentingan. Kasus-kasus di Riau yang pernah terjadi seperti, kasus Koto Panjang, Torganda, Bagan Sinemba, Hamba Raja, Pelindo Dumai, Pertamina Dumai, Batam, Bintan, Arara Abadi, RAPP, Siak Ampayan Rotan, Tambusai Selatan, Koperasi Usaha Tani, KKPA, serta kasus PT. RAKA di Tapung, Kampar pada bulan Mei tahun 2012 yang lalu, berakhir dengan 6 (enam) orang meninggal dunia.

Meruntut peristiwa dari peristiwa di atas sebenarnya telah berlangsung sejak pemerintahan Orde Baru yang lalu. Rezim yang sangat kental dengan system pemerintahan "sentralisme-nya". Artinya, daerah-daerah adalah sebagai pihak yang ditentukan oleh pemerintahan pusat, dan mereka tidak punya hak menolaknya.

Fenomena di atas menunjukkan suatu fakta terjadinya proses peralihan hak-hak penguasaan atas tanah secara besar-besaran, dari rakyat kepada pihak-pihak korporasi di daerah-daerah. Keadaan ini seolah-olah suatu 'rekonstruksi' dari peristiwa yang dialami masyarakat di Jawa pada zaman kolonial Belanda dulu, berdasarkan *Agrarische Wet* 1870 No. 55 yang disusun berdasarkan prinsip "ekonomi liberal" yang diterapkan di Indonesia.[80]

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* Disampaikan pada forum diskusi/VISITING LECTURER dengan tema "Perspektif Konflik dan Pentingnya Kelembagaan serta Mekanisme Penyelesaian Konflik Sumber Daya Alam", 19 Januari 2015, INSTITUTE FOR ENVIRONMENT & DEVELOPMENT (LESTARI) UNIVERSITI KEBANGSAAN MALAYSIA (UKM).

** Dosen (Pembantu Dekan 1), Fakultas Hukum Universitas Islam Riau.

[80] J. H. Boeke (1971), "*De Grenzen van het Indonesische Dorp*" (Batas-batas dari Masyarakat Pedesaan Indonesia), Panitia Seri Terjemahan Karangan-karangan Belanda, Bharatara, Djakarta.

B. PERSEKUTUAN HUKUM – HAK ULAYAT

Keberadaan Persekutuan Hukum (*Recht Gemenschaft*) dan hak ulayatnya tidak perlu diragukan. Dalam kerangka hubungan antara Negara dengan wilayahnya, prinsip ajaran hukum adat tentang hubungan Persekutuan Hukum dengan ulayatnya diikuti dengan tegas dan konsekuen di dalam Hukum Dasar Negara.[81]

Pidato Bung Karno pada tanggal 1 Juni 1945 dalam Sidang I (29 Mei-1 Juni 1945) "*Dokoritsu Zyunbi Tyoosakai*" (Badan Penyelidik Usaha Persiapan Kemerdekaan), dikemukakan arti perkataan 'merdeka', bahwa kemerdekaan ialah "*political independence*, *politieke onafhankelijkheid*". Artinya tak lain dan tak bukan, satu jembatan emas …, bahwa di seberangnya jembatan itulah disempurnakan kita punya masyarakat. Di dalam Indonesia merdeka itulah kita memerdekakan hatinya bangsa kita.[82]

Lebih lanjut Bung Karno menyatakan:

> "Mendirikan Negara Indonesia Merdeka bukan untuk seorang, atau segolongan orang, tetapi 'semua buat semua' … yang baik dijadikan dasar buat Negara Indonesia ialah dasar kebangsaan. Kita mendirikan satu Negara kebangsaan Indonesia… Satu *Nationale Staat* … Apa yang dinamakan bangsa?. Apakah syaratnya?. Menurut Ernest Renan syarat bangsa ialah 'kehendak akan bersatu'. Menurut definisi Ernest Renan, maka yang menjadi bangsa yaitu satu gerombolan manusia yang mau bersatu, yang merasa dirinya bersatu. Sedangkan menurut Otto Bauer suatu *natie* (Bangsa adalah satu persatuan perangai yang timbul karena persatuan nasib)…, tetapi Mr. Yamin berkata: "*verouderd*" (sudah tua)… Memang sudah tua, karena ketika Ernest Renan dan Otto Bauer mengadakan definisinya, belum timbul satu ilmu baru yang dinamakan 'Geopolitik'. Kemaren kalau kita tidak salah, saudara Ki Bagoes Hadikoesoemo, atau tuan Moenandar mengatakan tentang "Persatuan antara orang dan tempat". Persatuan antara orang dan tempat, tuan-tuan sekalian, persatuan antara manusia dan tempatnya. Ernest Renan dan Otto von Bauer hanya sekedar melihat orangnya, hanya mengingat karakter, tidak mengingat tempat, tidak mengingat bumi, buni yang didiami manusia itu… Tempat itu, yaitu tanah air. Tanah air itu adalah satu kesatuan. … definisi bangsa menurut Ernest Renan dan Otto von Bauer tidak cukup, karena tidak cukup "*le desir d'etre ensemble*". Saya mengambil contoh 'Minangkabau', di antara bangsa Indonesia yang paling ada "*d'esir d'etre ensemble*', … Pendek kata, bangsa Indonesia, '*Natie'* Indonesia bukanlah sekedara satu golongan orang yang hidup dengan "*le d'esir d'etre ensemble*" di atas daerah

[81] H. Moh. Koesnoe (1994), "*Hak-hak Persekutuan Hukum Adat Dalam Sistem Hukum Indonesia (Antara Harapan dan Kenyataan), dalam Tanah Hutan dan Pembangunan*", Universitas Islam Riau Press, hal. 105.
[82] Lembaga Pengkajian Ekonomi Pancasila (1982), "*Ekonomi Pancasila*", Penerbit Mutiara, Jakarta, hal. 55-57).

> yang kecil seperti Minangkabau, atau Madura, atau Yogya, atau Sunda, atau Bugis, tetapi bangsa Indonesia ialah seluruh manusia-manusia yang menurut geopolitik yang telah ditentukan oleh Allah SWT tinggal di kesatuannya semua pulau-pulau Indonesia dari ujung Utara Sumatera sampai ke Irian".[83]

Kutipan pernyataan Bung Karno di atas memperlihatkan suatu konsep Negara kebangsaan, bukan diambil dari konsep Barat, melainkan konsep hukum adat mengenai 'Persekutuan Hukum dengan Hak Ulayatnya'. Tidak ada Persekutuan Hukum tanpa Hak Ulayat, dan tidak ada bangsa tanpa tanah air.

Sementara itu Bung Hatta pada kesempatan lain (21 Juni 1979) dalam pidato pengarahannya kepada Lembaga Pengkajian Ekonomi Pancasila mengemukakan, nasib yang diderita oleh rakyat Indonesia seluruhnya dan kekuasaan ekonomi asing yang begitu kuat di Indonesia di bawah perlindungan pemerintahan jajahan, mempengaruhi jalan pikiran … ekonomi. … Dibenarkan di bawah tindasan imperialisme dan kapitalisme kolonial, dengan sendirinya pergerakkan kebangsaan tidak dapat menerima stelsel ekonomi liberalisme. Liberalisme yang dipraktekkan oleh Belanda di Indonesia, tidak sedikitpun membayangkan semboyan waktu lahirnya kemerdekaan, persamaan, dan persaudaraan. Pengalaman yang dialami rakyat ialah pemerasan kaum buruh (tani), perampasan tanah rakyat, penindasan kemerdekaan dan perkosaan dasar-dasar kemanusiaan. … Selanjutnya Bung Hatta menyatakan, dengan sentimen itu lahirlah dalam pengakuan pergerakkan kebangsaan konsepsi ekonomi nasional yang berdasarkan kolektivisme.[84]

Prinsip 'Kolektivisme' adalah ajaran hukum adat yang tersimpul pada 'Persekutuan Hukum'. Substansi hubungan 'Persekutuan Hukum' dengan 'Hak Ulayatnya' sebagai sumber ekonomi bersama, dikukuhkan dalam Pasal 33 (ayat 1 – 5) Undang-undang Dasar (UUD) 1945. Pada ayat 3 Pasal 33 UUD 1945 dengan lugas ditegaskan prinsip 'kolektivisme' dimaksud yang berbunyi:

> "Bumi dan air dan kekayaan alam yang terkandung di dalamnya dikuasai oleh Negara dan dipergunakan untuk sebesar-besar kemakmuran rakyat".

[83] *Ibid*, hal. 62-64.
[84] *Ibid*, hal. 78-89.

Sehubungan dengan ketentuan dari Pasal 33 UUD 1945 di atas, Notonagoro berpendapat bahwa istilah yang perlu diperhatikan pada pasal itu adalah penggunaan kata "dikuasai" dan "dipergunakan". Dipergunakan dalam arti bahwa dipergunakan itu sebagai tujuan terhadap dikuasai. Artinya "dikuasai oleh Negara" berdasarkan pada tujuan dipergunakan untuk "sebesar-besar kemakmuran rakyat". Sebaliknya akan terjadi peristiwa anarkis apabila bumi dan air dan kekayaan alam yang terkandung di dalamnya telah dikuasai oleh Negara, justru menimbulkan sebesar-besar kesengsaraan bagi rakyat.[85]

Tidak ada hukum adat yang mengajarkan bahwa Hak Ulayat itu adalah Hak Milik Persekutuan Hukum, melainkan hanya menguasai, dalam arti menggunakan, mengatur, dan mengawasi serta tidak dapat diserahkan untuk selama-lamanya (*can not be permanently alinated*). Singkat kata Hak Ulayat adalah 'asal' dan 'akhir' dari sumua hak atas tanah.

Mengenai ruang lingkup dan batas-batas Hak Ulayat dari suatu persekutuan hukum selalu dipersoalkan, baik oleh orang hukum sendiri terlebih pihak aparat pemerintahan secara administrative cenderung menganut paham '*successie*', menuntut bukti hak secara tertulis (positivisme). Sikap yang demikian ini jelas-jelas tidak bersesuaian dengan ajaran kaidah-kaidah hukum adat yang tidak tertulis. Kekuatan pembuktian Hukum Adat yang tidak tertulis, tidak terletak pada bukti tertulis. Misal, jika terjadi ketidakjelasan karena perubahan alam, maka dapat ditempuh jalan musyawarah untuk mufakat dalam menentukan batas-batas tersebut. Dalam dunia modern sekarangpun, batas wilayah suatu negara dengan negara lain, juga sering diselesaikan dengan kesepakatan yang mereka tuangkan dalam perjanjian bilateral.

Dalam kaitannya dengan batas Hak Ulayat persekutuan hukum, sejak zaman colonial Belanda sudah terjadi dualisme pendapat antara pengikut C van Vollen hoven dengan Nolst Trenite. C van Vollen hoven telah membagi habis seluruh wilayah Indonesia menjadi ulayat-ulayat persekutuan hukum adat secara garis besar 19 (sembilan belas) lingkungan hukum adapt (*rechtskringen*). Sebaliknya, Nolst Trenite tidak demikian, masih ada tanah-tanah

[85] Notonagoro (1986), "*Politik Hukum dan Pembangunan Agraria di Indonesia*", Penerbit PT. Bina Aksara, Jakarta, hal. 106.

hutan dan belukar yang berada di luar ulayat persekutuan hukum adat yang ada. C van Vollen hoven menggunakan dasar pikiran adapt sebagaimana diajarkan dan diikuti serta diyakini oleh orang-orang adat. Sebaliknya Nolst Trenite berpedoman kepada ukuran Barat tentang batas-batas kekuasaan terhadap suatu lingkungan, yakni berdasarkan ukuran yang pasti yang dapat dibuktikan secara tertulis.[86]

Kenyataan sekali rumusan dari Undang-undang Pokok Agraria No. 5 Tahun 1960 telah mengikuti pandangan C van Vollen hoven sebagaimana sebelumnya telah dituangkan dalam Pasal 33 UUD 1945 ayat (3), sehingga *domeinverklaring* dihapus. Sementara Undang-undang Nomor 5 Tahun 1967 yang lama tentang Ketentuan-ketentuan Pokok Kehutanan mengikuti pandangan Nolst Trenite dengan melanjutkan *domeinverklaring* atas hutan, sehingga berseberangan dengan Undang-undang Pokok Agraria No. 5 Tahun 1960 dan Pasal 33 ayat (3) UUD 1945.

Setelah Pemerintahan Orde Baru, muncullah berbagai Undang-undang yang secara formal menyatakan konsep pembangunan perekonomian berdasarkan ketentuan Pasal 33 ayat (3) UUD 1945 notabene sesuai dengan rumusan Pasal-pasal dalam UUPA No. 5 Tahun 1960, namun dalam kenyataannya adalah berlawanan dengan ketentuan-ketentuan tersebut. Katakanlah seperti Undang-undang Penanaman Modal Asing Nomor 1 Tahun 1967 (lama), Undang-undang Nomor 11 Tahun 1967 tentang Pertambangan (lama), dan Undang-undang Nomor 5 Tahun 1967 Tentang Kehutanan (lama) serta Undang-undang Nomor 5 Tahun 1979 Tentang Pemerintahan Daerah (lama) yang diikuti dengan berbagai Kepres dan Peraturan Menteri Dalam Negeri Nomor 15 Tahun 1975 (lama), sebagaimana telah diubah dengan Kepres Nomor 55 Tahun 1993 pada Era Reformasi. Kesemuanya itu dapat dikatakan telah menciderai ketentuan sebagaimana yang telah diamanatkan dalam Pasal 33 ayat (3) UUD 1945 maupun UUPA No. 5 Tahun 1960.

Beranjak dari Era Orde Baru ke zaman Reformasi dirasakan lebih dilematis lagi yakni dengan direvisinya ketentuan mengenai penanaman modal (asing dan domestik) yang lama kepada Undang-undang Nomor 25 Tahun 2007. Pasal-pasal di dalam Undang-Undang Nomor 25 Tahun 2007 yang kontroversial dan menjadi sorotan bagi publik. Proses

[86] H. Moh. Koesnoe, *note*, 2, hal. 102-103.

pembahasan Rancangan Undang-Undang Nomor 25 Tahu 2007 yang hampir memakan waktu 4 tahun ternyata tidak menjamin bahwa setelah disahkan tidak terdapat kontroversi di tengah-tengah masyarakat baik dari kalangan politisi,akademisi, maupun pelaku usaha domestik. Sikap kritis yang ditunjukkan oleh masyarakat tidak lain didasari pada kekhawatiran bahwa Undang-Undang Penanaman Modal sangat liberal yang bisa memberikan ruang gerak sangat luas bagi pemodal asing untuk menancapkan dominasinya di Indonesia. Salah satunya dapat dilihat di pasal-pasal yang tidak membatasi pengalihan aset (kecuali untuk kawasan hutan dan kawasan konversi), kebebasan transfer/repatriasi modal, keuntungan dan dana. Di dalam Undang-Undang Penanaman Modal tersebut masih ada beberapa pasal yang masih dinilai oleh masyarakat sebagai pasal-pasal yang kontroversial. Berikut ini akan ditunjukkan contoh beberapa pasal-pasal yang menurut masyarakat kontroversial, yaitu di antaranya sebagai berikut:

1. UU PMA yang baru memiliki perhatian khusus terhadap lingkungan serta pembangunan yang berkelanjutan (sustainable development) .

Tujuan UUini adalah selain untuk meningkatkan pertumbuhan ekonomi,namun juga meningkatkan usaha untuk membangun pertumbuhan ekonomi yang berkelanjutan. Dampak dari aturan yang baru yang diterapkan dalam UU ini adalah bahwa dalam setiap aturannya harus melakukan pendekatan-pendekatan seperti di atas. Terkait dengan kelestarian lingkungan hidup, UU juga mengatur aspek pengawasan serta pemberian insentif. Kedua aspek tersebut bisa kita lihat di dalam:

Pasal 3 ayat (1) UU No. 25 Tahun 2007 tentang Penanaman Modal, yang berbunyi:

> “penanaman modal diselanggarakan berdasarkan asas berwawasan lingkungan”.

. Yang dimaksud dengan“asas berwawasan lingkungan”adalah asas penanaman modal yang dilakukan dengan tetap memperhatikan dan mengutamakan perlindungan dan pemeliharaan lingkungan hidup.

Hal tersebut diantisipasi dengan pemberian kewajiban terhadap penanam modal yang disebutkan di dalam Pasal 16 huruf d UU No.25 Tahun 2007 yang berbunyi:

“Setiap penanam modal bertanggung jawabmenjaga kelestarian lingkungan hidup”

.

Lalu di dalam Pasal 17 UU No. 25Tahun 2007 yang berbunyi:

“penanaman modal yang mengusahakan Sumber Daya Alam yang tidak terbarukan wajib mengalokasikan dana secara bertahap untuk pemulihan lokasi yang memenuhi standar kelayakan lingkungan hidup, yang pelaksanaanya diatur sesuai dengan ketentuan peraturan perundang-undangan”

.

Hal ini memiliki keterkaitan dengan Peraturan Perundang-undangan yang mengatur tentang Lingkungan Hidup (UU No. 32 Tahun 2009 tentang Perlindungandan Pengelolaan Lingkungan Hidup).

Pasal 3 ayat (2) UU No. 25 Tahun 2007 tentang Penanaman Modal, yang berbunyi: “Tujuan penyelenggaraan penanaman modal, antara lain untuk: (c.) meningkatkan pembangunan ekonomi berkelanjutan”.

2. Ketentuan yang menuai kontroversi berikatnya adalah mengenaifasilitas hak atas tanah

. Pada dasarnya, UU No. 25 Tahun 2007 tetapmengacu kepada UU No. 5 Tahun 1960 mengenai Pokok Agraria. Hak yang tercantum dalam pasal tersebut adalah untuk memberikan kemudahan, namun demikian hak pengelolaan atas tanah tersebut tidak selamanya diberikan seperti yang tercantum dalam UU. Pemberian hak atas tanah juga didasaridengan syarat-syarat tertentu yang telah diatur UU.

Pasal 21 Undang-undang Nomor 25Tahun 2007 tentang Penanaman Modal,yang berbunyi: "

> Selain fasilitas sebagaimana dimaksud dalam Pasal 18, Pemerintahmemberikan kemudahan pelayanan dan/atau perizinan kepada perusahaan penanaman modal untuk memperoleh: (a.) hak atas tanah; (b.) fasilitas pelayanan keimigrasian; (c.) fasilitas perizinan impor".

Pasal 22 ayat (1) UU No. 25 Tahun 2007 tentang Penanaman Modal, yang berbunyi: "Pasal 21 huruf a dapat diberikan dan diperpanjang di muka sekaligus dan dapat diperbarui kembali atas permohonan penanam modal, berupa:Hak Guna Usaha dapat diberikan dengan jumlah 95 (sembilan puluh lima) tahun dengan cara dapat diberikan dan diperpanjang di muka sekaligus selama 60(enam puluh) tahun dan dapat diperbarui selama 35 (tiga puluh lima) tahun; Hak Guna Bangunan dapat diberikan dengan jumlah 80 (delapan puluh) tahun dengan cara dapat diberikan dan diperpanjang di muka sekaligus selama 50 (lima puluh) tahun dan dapat diperbarui selama 30 (tiga puluh) tahun; dan Hak Pakai dapat diberikan dengan jumlah 70 (tujuh puluh) tahun dengan cara dapat diberikan dan diperpanjang di muka sekaligus selama 45 (empat puluhlima) tahun dan dapat diperbarui selama 25 (dua puluh lima) tahun.

C. MEKANISME PENYELESAIAN KONFLIK

Sistem hukum yang efektif akan memperluas kesempatan berusaha dan mampu mengundang investasi asing. Sebaliknya pengalaman menunjukkan tidak efektifnya hukum telah menyebabkan kehancuran ekonomi Asia yang pada awalnya disebut sebagai "keajaiban," Para ahli berkesimpulan bahwa sistem hukum dari negara-negara yang terkena krisis tersebut merupakan salah satu faktor yang memberikan kontribusi. Terpuruknya industri perbankan misalnya, selain menyangkut masalah pemilik, pengelola dan pengawas bank, juga menyangkut kelembagaan penegakan hukum dan seluruh perangkat kelembagaannya, dari ketentuan perundangan sampai ke lembaga penegakan hukum.

Selama aparat penyidikan, aparat penuntutan, aparat pengadilan dan sanksi hukum belum menunjukan profesionalisme dan integritas yang memadai, sulit mengharapkan penyelesaian sengketa dapat diselesaikan dengan cepat dan mudah karena penyelesaiannya tergantung pada penegakan hukum. Penegakan hukum hanya dapat dilakukan melalui sistem peradilan yang efisien dan efektif. Upaya-upaya peningkatan efisiensi lembaga peradilan di negara maju dan negara berkembang sangat bervariasi. Namun demikian, terdapat tiga elemen sebagai kunci keberhasilan upaya peningkatan efisiensi lembaga peradilan, yaitu: Pertama, peningkatan akuntabilitas hakim. Kedua, penyederhanaan prosedur peradilan. Ketiga, peningkatan anggaran.

Akuntabilitas hakim akan menciptakan peradilan yang lebih efisien sebab mampu menyelesaikan perkara dengan cepat dan adil. Faktor utama yang dapat meningkatkan akuntabilitas hakim adalah keterbukaan informasi tentang kinerja badan peradilan sehingga masyarakat dapat memonitor kinerja hakim. Monitoring masyarakat memainkan peranan penting dalam meningkatkan akuntabilitas hakim. Peningkatan efisiensi dapat dilakukan dengan penyederhanaan atau reformasi struktural yaitu pendirian pengadilan khusus, mekanisme *alternative dispute resolution* (ADR) dan penyederhanaan prosedur hukum. Keberadaan pengadilan khusus telah terbukti efektif dalam mempercepat proses peradilan di banyak negara. Mekanisme ADR dapat dijadikan sebagai substitusi prosedur hukum formal yang tidak efektif. Sistem ini dapat dijalankan oleh swasta atau oleh negara. Kehadiran ADR dapat mengurangi kesempatan melakukan korupsi di banyak negara

berkembang, Salah satu faktor yang menyebabkan timbulnya inefisiensi di negara berkembang adalah dominannya penggunaan prosedur tertulis yang harus dilakukan Dalam proses persidangan.

Penggunaan prosedur lisan, terbukti positif di Italia, Paraguay dan Uruguay. Rumitnya prosedur telah menurunkan kualitas transparansi dan akuntabilitas sehingga meningkatkan kesempatan untuk menerima suap.Aparat pengadilan dan pengamat seringkali mengatakan bahwa kurangnya anggaran dan staf merupakan faktor utama timbulnya inefisiensi. Akan tetapi, bukti yang tersedia tentang meningkatnya efektifitas seiring dengan peningkatan anggaran dan staf tidak begitu menyakinkan. Data dari Amerika Serikat, Amerika Latin dan negara-negara Karibia memperlihatkan tidak adanya korelasi yang pasti antara peningkatan anggaran dan staf dengan waktu yang dibutuhkan untuk menyelesiakan suatu perkara.

Langlah-langkah pembaruan sistem peradilan tersebut tentunya akan meningkatkan peran pengadilan dalam penegakan hukum sehingga hukum akan menciptakan ketertiban karena tujuan pokok dan pertama dari segala hukum adalah ketertiban. Dengan adanya ketertiban, maka kegiatan dan keingginan berusaha akan meningkat sehingga proses pemulihan dan pemantapan ekonomi akan berjalan baik. Analisis yang dilakukan oleh The European Bank for Reconstruction and Development (EBRD) terhadap infrastruktur hukum pada transition economies menunjukan korelasi signifikan antara efektifitas sistem hukum dan pertumbuhan ekonomi. Analisis ini juga memperlihatkan bahwa keberhasilan reformasi perekonomian tergantung pada berfungsinya sistem hukum dengan baik

Itu pulalah yang menyebabkan mengapa liberalisasi terkadang berfungsi baik, yaitu mampu mengakumulasi modal dengan pertumbuhan yang cepat atau mencapai kemajuan sosial, akan tetapi juga sering mengalami goncangan dan krisis. Penyebabnya adalah liberalisasi akan berjalan efektif apabila hukum mampu menjamin bahwa distorsi yang disebabkan oleh persaingan dan akumulasi modal dapat dijaga dalam batas-batas tertentu sehingga kompatibel dengan pertumbuhan dan *social cohesion*.

Iklim investasi yang baik memberikan kesempatan dan insentif kepada dunia usaha untuk melakukan investasi yang produktif, menciptakan lapangan kerja dan

memperluas kegiatan usaha. Investasi memainkan peranan penting dalam meningkatkan pertumbuhan ekonomi dan mengurangi kemiskinan. Memperbaiki iklim investasi adalah masalah kritikal yang dihadapi pemerintah di negara berkembang. Menyediakan lapangan kerja penting untuk menciptakan keseimbangan dan kedamaian.

Peran pemerintah dalam menciptakan iklim investasi diperlukan untuk mengatasi kegagalan pasar (*market failure*) atau kegagalan *laissezfaire* mencapai efisiensi. Mengatasi kegagalan tersebut pemerintah melakukan intervensi melalui hukum dan peraturan. Pemerintah mengatur dunia usaha dan transaksi untuk meminimalkan information asymetries dan mencegah monopoli. Namun, pemerintah acapkali gagal mengurangi kegagalan pasar, bahkan tidak jarang intervensi pemerintah malah memperburuk iklim investasi. Pemerintah perlu menyusun kerangka acuan yang jelas dalam bentuk peraturan perundang-undangan agar kompetisi berjalan dengan baik. Kerangka pengaturan yang baik akan menciptakan persaingan antar dunia usaha sehingga hanya perusahaan efisien yang dapat bertahan hidup (*survival of the fittest*). Kondisi ini pada gilirannya akan menguntungkan konsumen. .

Kegagalan menciptakan iklim investasi yang baik pada dasarnya bukan semata-mata karena kekurangan dana. Peningkatan iklim investasi tidak banyak memerlukan anggaran pemerintah. Contohnya adalah negara-negara kaya minyak dan atau kaya bahan tambang lainnya memiliki iklim investasi buruk. Iklim investasi yang buruk juga bukan semata-mata disebabkan kurangnya tenaga ahli. Pada saat mendesain rejim investasi agar sejalan dengan perubahan yang diinginkan memang diperlukan tenaga ahli khusus, tetapi kebutuhan akan tenaga ahli berkurang pada tahap implementasi. Pemerintah di hampir semua negara berkembang memiliki berlimpah laporan dan rekomendasi berisikan rincian tentang bagaimana meningkatkan kualitas iklim investasi.

Iklim investasi yang baik membutuhkan dukungan berbagai sektor. Industri perbankan, apabila berfungsi baik, menghubungkan dunia usaha dengan pemberi pinjaman dan meningkatkan minat investor membiayai dunia usaha dan berbagi risiko. Infrastruktur yang baik menghubungkan dunia usaha dengan konsumen dan

pemasok serta membantu dunia usaha memanfaatkan teknologi produksi modern. Sebaliknya industri perbankan dan infrastruktur yang lemah menciptakan hambatan terhadap kesempatan berusaha dan meningkatkan biaya baik bagi perusahaan kecil maupun perusahaan multinasional. Hambatan masuk ke pasar menyebabkan berkurangnya saingan bagi perusahaan yang lebih dulu ada sehingga mengurangi insentif munculnya inovasi dan keinginan meningkatkan produktifitas.

Masalah dasar yang dihadapi industri perbankan dan infrastruktur berawal dari kegagalan pasar. Di industri perbankan masalahnya terletak pada ketidaksimetrisan informasi. Sedangkan persoalan infrastruktur terletak pada kekuatan pasar yang terkait dengan skala ekonomi. Intervensi yang dilakukan pemerintah untuk mengatasi kegagalan pasar pada industri perbankan justru mengakibatkan kondisi menjadi lebih buruk. Kebijakan tentang bank milik pemerintah, monopoli, kredit bersubsidi atau kredit komando dan kebijakan lain yang dimaksudkan untuk kepentingan jangka pendek para politisi dan kelompok kepentingan tertentu menyebabkan industri perbankan tertekan dan terdistorsi. Kondisi ini umumnya menghantam pengusaha kecil lebih keras.
Industri perbankan yang berkembang baik menyediakan jasa sistem pembayaran, memobilisasi tabungan dan mengalokasikan pembiayaan kepada perusahaan yang ingin dan layak melakukan investasi. Apabila industri keuangan bekerja dengan baik maka sumber dana untuk melakukan investasi tersedia bagi segala bentuk dunia usaha. Pasar keuangan yang sehat juga memaksakan disiplin bagi dunia usaha agar memperbaiki kinerja, mendorong efisiensi baik secara langsung maupun melalui penyediaan fasilitas bagi masuknya pemain baru ke pasar.

D. KESIMPULAN

Masalah besar yang dihadapi pemerintah dalam menciptakan iklim investasi yang baik adalah kemungkinan terjadinya benturan antara kepentingan dunia usaha dan kepentingan masyarakat. Dunia usaha adalah pencipta utama kemakmuran, oleh sebab itu iklim investasi harus diciptakan sesuai dengan kepentingan mereka. Di sisi lain iklim investasi yang baik seharusnya ditujukan untuk kepentingan masyarakat secara keseluruhan bukan hanya kepentingan dunia usaha. Kepentingan dunia usaha dan kepentingan masyarakat ini sering kali berbeda. Sering juga yang terjadi adalah

perbedaan preferensi dan prioritas antara dunia usaha dan masyarakat dan antar sesama dunia usaha. Pemerintah diharapkan dapat mengatasi benturan kepentingan tersebut. Bagaimana pemerintah mengatasi tantangan tersebut akan berpengaruh terhadap iklim investasi yang pada gilirannya berpengaruh pula terhadap pertumbuhan dan pengurangan kemiskinan. Untuk itu pemerintah perlu membatasi pemburu rente (*rent-seeking*). Kebijakan tentang iklim investasi adalan sasaran menarik bagi para pemburu rente baik yang berasal dari kalangan dunia usaha, pejabat pemerintah maupun kelompok kepentingan. Korupsi meningkatkan biaya untuk melakukan kegiatan usaha. Korupsi yang dilakukan oleh pejabat tinggi pemerintah menciptakan distorsi pada kebijakan pemerintah. Kolusi dan nepotisme juga menciptakan distorsi. Menguntungkan bagi sekelompok masyarakat dengan cara merugikan kelompok masyarakat lainnya.

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Pekanbaru

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Dr. H. Abd Thalib, S. H., M. C. L.

Pekanbaru, 05 Mei 2015

Perihal : **Klarifikasi Kode Mata Kuliah FH UIR**

Kepada Yth

Wakil Rektor Bidang Akademik Universitas Islam Riau

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Pekanbaru

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No	Nama Prodi	Kode MK	Nama MK	Semester
1	Ilmu Hukum	MPKB 03	Hukum Bisnis Internasional	VII
2	Sda	MKK 12	Hukum Internasional	III

3	Sda	MKK 07	Hukum Tata Negara	II
4	Sda	MKK 05	Hukum Pidana	II
5	Sda	MKBF 02	Magang	VII
6	Sda	MKK01	Ilmu Negara	I

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Wakil Dekan Bid. Akademik

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