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## Achieving Accessibility of Legislation via Consolidation

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## CHAPTER I

### Introduction

The number of state organs, the layer of government and the size of jurisdiction has exaggerated our countries with legislation loads. Growing complexity in the society; international relations makes us have lots of legislation more than before.

We are surrounded by rules. Moreover, it is not only in the number but also in the complexity on the matter regulated. As a citizen of a country, one is ruled in many things from international level to the state level and to the local level government; from regulation on international trading to the rules about garbage collection thing. There are so many valid laws should be applied. This enormous numbers and volume of legislations need sufficient capacity and budget to be implemented. Very often, neither government nor citizen has sufficient capacity to implement and obey the rules. This inspires a view of legislation as something to be followed only of one feels like it, which undermines the normative function of laws.<sup>1</sup> In the 1980s, this was described as '*legisferitis*' which has one symptom called '*anomie*' or the neglect of legal norms.<sup>2</sup>

Legislation is laid down by the government to 'assist in the implementation of complex policies which are intended to have far-reaching political, social and economic consequences'.<sup>3</sup> Therefore, 'it is important that efforts be made to understand the reasons why legislation is enacted and once enacted, the reasons for its success and failure'.<sup>4</sup> A statutory provision may be judged efficacious if the consequences which it brings about in practice realize the purposes for which it was enacted.<sup>5</sup> Does that mean too many legislation results in inefficacious? At least scattered rules result in difficulties of accessibility. By access we mean not only for the citizens but also for the businesses and the policy maker. If the ruled and the rulers find difficulties to access the rules, it is very unlikely that efficacy can be achieved.

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<sup>1</sup> NA Florijn, 'Quality of Legislation: A Law and Development Project' in J Arnscheidt, B van Rooij and JM Otto (eds) *Law Making for Development; Exploration into The Theory and Practice of International Legislative Project* (LUP 2008) 81

<sup>2</sup> *ibid*

<sup>3</sup> David R Miers and Alan C Page, *Legislation* (Sweet and Maxwell 1982) 217

<sup>4</sup> *ibid* citing Tomasic, 'The Sociology of Legislation' in *Legislation and Society in Australia* (Tomasic ed., 1980) p. 9

<sup>5</sup> *ibid* at 216

Most importantly, volume of legislation needs to be managed. Putting the legislation in the ministerial webpages is not enough if what we aim is to improve access to the rules because 'access' is more than just to 'download' legislation easily but to provide a user-friendly format for the reader.

For a legal system to be credible, legislation must be accessible. The stock of legislation needs to be managed so that parliaments, governments and local authorities know what are their powers, duties and responsibilities. It needs to be managed also because businesses and citizens need to know their duties and their rights and the standards with which they are expected to comply.<sup>6</sup>

Making legislation more accessible means make it easier for the user to comply with. Improving access to legislation has discussed from many angles; said the urge of plain language<sup>7</sup>, style and structure<sup>8</sup>, formats and the use of technology. These discussions are tied by the common pursuit called efficacy. However, Helen Xanthaki wrote that efficacy refers to the broad sense that is pursued by all actors in the policy process of which legislative drafting is only a part of it.<sup>9</sup> Therefore it is not efficacy but effectiveness which can be used as the functionality glue to transfer legislative solution across jurisdictions and across legal traditions.<sup>10</sup> Now we could see that improving accessibility of legislation is in the same platform which aims to pursuit effectiveness of legislation itself.

It is likely that in a more concise format, legislation is more accessible. In a comprehensive arrangement we integrate scattered rules as well as reduce the volume of legislation. There is a notable technique in amalgamating scattered rules to a more concise format that we recognized as consolidation. As a mechanism, Consolidation is designed to bring together the text of existing statutes, usually within a single generic topic and to amalgamate them in such a way that all amendments are integrated into the new single text; it is then updated and is structured (or re-structured) in a more logical sequence.<sup>11</sup>

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<sup>6</sup> Edward Donelan, 'European Approaches to Improving Access to and Managing The Stock of Legislation' (2009) 30 (3) Statute Law Rev 147

<sup>7</sup> See Peter Butt and Richard Castle, *Modern Legal Drafting; A Guide to Using Clearer Language* (2<sup>nd</sup> edn, CUP 2006) There is a debate about the use of plain language, argument in favor said that drafters is encouraged to draft in modern standard English rather than archaic words which no longer used today. The people against this argue that legal terms should be firm so people respect the law as it is. Even though there is still a debate about the use of plain language in legislation, in my view this movement invites good practice in legislative drafting. Drafters become more aware of clarity.

<sup>8</sup> Wim Voermans, 'Styles of Legislation and Their Effects' (2011) 32 (1) Statute Law Rev 38

<sup>9</sup> Helen Xanthaki, 'On Transferability of Legislative Solutions' in Constantin Stefanou and Helen Xanthaki (eds), *Drafting Legislation: A Modern Approach* (Ashgate 2008) 16

<sup>10</sup> *ibid*

<sup>11</sup> Jonathan Teasdale, 'Statute Law Revision: Repeal or Something More?' (2009) 11 EJLR 157,

Knowing that consolidation provides a way to produce a more user-friendly format, it then can be devised as alternative mechanism in managing the loads of legislation in order to improve access. What we could achieve by consolidating is mainly reduction of laws and simplicity of structure. Therefore the impact of the exaggerate legislation will at least become more controllable which in turn will be able to support effectiveness. How consolidation deals with volume of legislation and contributes to accessibility of legislation? What is the challenge?

Lately in Indonesia, legislation has reached an enormous level and there is no sign of decreasing. The legislative system has not yet provided a solution for the volume of legislation. Legislation and secondary regulation is made regularly by default in the system. Draft bills are passed each year. The tasks of harmonizing the bills with the existing rules become even more complicated because of the added number of legislation.<sup>12</sup> Often, publication is done only in the statute book without further attempt to socialize it. In some cases, it is a private publisher or one government body who independently issues one version of collection of rules in such area. This is helpful for the reader. Unfortunately, this does not bring significant influence to the legislative policy in improving access to legislation.

Why a civil law jurisdiction like Indonesia does not codify or consolidate in order to amalgamate the volume of legislation? For Indonesia codification is a big project which is superfluous to be carried in a dynamic society while consolidation which mostly exercised in common law jurisdiction is not taken seriously as one technique to bring together the scattered rules. So, how consolidation can be carried to improve accessibility of legislation in Indonesia? This dissertation attempts to find the answer.

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<sup>12</sup> AA Oka Mahendra, 'Harmonisasi Peraturan Perundang-undangan' (1 April 2010) <<http://ditjenpp.kemenkumham.go.id/htn-dan-puu/421-harmonisasi-peraturan-perundang-undangan.html>> accessed 8 February 2013

## **CHAPTER II**

### **Hypothesis and Methodology**

This research intends to discuss the practice of consolidation as one tradition of statute law revision. This dissertation attempts to examine and analyze how consolidation can be employed as an effective tool for achieving accessibility of legislation, unraveling the problem of high volumes of legislation, considering Indonesia as a case study. The aim is to prove that accessibility of legislation can be achieved via consolidation.

In chapter III I would like to depart from the problem of volume to the accessibility of legislation. This chapter considers the Indonesian legislative system in addition to another jurisdiction. This chapter will arbitrarily set up the term 'accessibility' and the term 'effective' for the purpose of this dissertation. Overall, this initial chapter tries to tie the volume of legislation with the problem of accessibility.

Next in chapter IV, firstly, I would like to explore the tradition of consolidation as well as codification to know the basic principles of both. Then, this chapter will discuss the benefit as well as the drawbacks of consolidation in order to have an objective view when it is implemented in Indonesian legislative system. Chapter IV attempts to come up with pointers from notable practice of consolidation.

The point we explicate in chapters 3 and 4 will be the basis of the forthcoming chapters. Chapter 5 discusses the facets of accessibility explored previously, with consolidation so it can contribute to the pursuit of accessibility of legislation in Indonesia.

Lastly, Chapter 6 will arrive at conclusions.

## CHAPTER III

### Volume of Legislation and Accessibility

*One is presumed to know the law. Up-to-date legislation that is easily accessible and comprehensible to the public may be regarded as part of the basic infrastructure society, as essential as roads or a reliable telecommunications system, and without which everyday functioning of society is more difficult.<sup>13</sup>*

It is undeniable that legislative production in the (post) modern society has reached critical quantitative limits.<sup>14</sup> Some other also speaks about 'overproduction of legislation'. Why is there so much legislation? Svein Eng in the Fourth Benelux-Scandinavian Symposium on Legal Theory pointed four potential causes of the overproduction as the causes of the legislation itself.

First, legislation serves as an expression of values that change with time or that are held by some but not all sections of the population. Secondly, legislation is used as a means to shape society in accordance with political ideas. Thirdly, legislation is used as a means to solve problems created by social, economic and technological change. Fourthly, legislation may fulfill a legal duty to legislate.<sup>15</sup>

Former Chief Executive, Office of the Parliamentary Council, John Gilhooly on his lecturer at IALS on March 2013 mentioned some triggers which could possibly be the cause of legislation loads; greater complexity in the domestic and worldwide; new technology; economic growth; influence of the media and new technologies. Constitutional and institutional changes for instance devolution, decentralization or joining international community bring out some consequences affected the volume of legislation. Moreover, the cause of overproduction of legislation could be the role of government itself which has been changing overtime. Government nowadays has more responsibility in providing public service. The paradigm has changed from minimum involvement to welfare provider. For this reason, government carry obligation to legislate more than before.

The number of Acts increases from year to year. Not only that, the length of it has also increased over the period of time with an upward trend. As an illustration, In the UK, there were 63 Acts in 1900. After reaching a peak in 2006 with 55 Acts, the annual total of Acts decline at 21, 33,

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<sup>13</sup> Geoff Lawn, 'Improving Public Access to Legislation' (2004) 6 UTS L Rev 49, 60

<sup>14</sup> Svein Eng, 'Legislative Inflation and The Quality of Law' in Luc J. Wintgens (ed), *Legisprudence : A New Theoretical Approach to Legislation* (Hart Publishing 2002) 65

<sup>15</sup> *ibid* at 68

21 and 41 from 2007 to 2010 respectively. Besides the primary legislation, there is secondary legislation which also experienced a great increase. From 994 pieces in 1900, it rose significantly to 3,459 pieces in 2006.<sup>16</sup>

What happened in Indonesia lately is not a far from that. The number of state organs, the layer of government and the size of jurisdiction has exaggerated Indonesia with legislation loads. Article 7 of Laws of The Republic of Indonesia on Legislative Drafting<sup>17</sup> implies hierarchy of legislation and regulation. There are 7 layers of laws based on this act. Furthermore, the authority given to the local government in the provincial and city levels allow them to enact local legislations.<sup>18</sup> There are at least 15 to 20 new bills listed in the national legislation program annually.<sup>19</sup> If on one acts enacted is followed by two secondary legislation, then we will have 30 to 40 new regulation. Likewise, if 33 provinces and 400 cities enact local government we will have the statute book getting thicker and thicker each year. Seems like every day we have one regulation enacted.

We are overregulated both in number, structure and on the matter regulated. At this point, a jurisdiction, at least Indonesia is in challenge of bad legislation and in its ability to provide legal certainty.

Quality of legislation depends on the legal environment of drafting and implementing the law, in other words: on the level of development of the State. Five criteria may, however, be applied to every piece of legislation, wherever it is drafted; level of legislation, procedural quality of the law; formal quality; substantive quality; and costs of the law.<sup>20</sup>

Applying those Karpen's parameters to the reality in Indonesian legislation, some discourse may appoint. Firstly, layers of government and number of state organ put weighs in the production of regulation. It looks like vessels which flow from primary to secondary legislation. The paradigm of 'let the administrative deals with details' makes the flow even longer. Delegation is continuously given to the lower level of regulation. As a result the number of administrative regulation is definitely uncontrolled. Furthermore, the foremost problem with regulation is that it is crucial in the context of

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<sup>16</sup> This data is summarized from John Gilhooly's lecture at IALS on March 2013

<sup>17</sup> Laws of The Republic of Indonesia number 12/2011 on Legislative Drafting at article 7 it introduces hierarchy of law which graded 7 levels or legislation includes presidential instrument and local level legislation.

<sup>18</sup> The Constitution of The Republic of Indonesia 1945 at article 18 also Laws of The Republic Of Indonesia no. 32/2004 on Local Government

<sup>19</sup> List of bills under Parliamentary Deliberation 2012-2013 session, <<http://dpr.go.id/id/uu-dan-ruu/ruu-sedang-dibahas>> accessed 18 August 2013

<sup>20</sup> Ulrich Karpen, 'Improving Democratic Development by Better Regulation' in Constantin Stefanou and Helen Xanthaki (eds), *Drafting Legislation; A Modern Approach* (Ashgate 2008) 156



public service in the daily basis but scattered and are not published publicly make it inaccessible even for the administrative itself.<sup>21</sup>

Secondly, the number of state organs complicates coordination between them. In many cases, norms in the legislation are inconsistency as a result of sporadic policy. An example on this can be seen at a case on mining authorization; in order to know the requirements of this authorization, a private company at least should trace it on two laws regarding local decentralization<sup>22</sup> and the laws regarding minerals, energy and coal mining<sup>23</sup> to know national basic policy on mining; legal definition of 'mining', 'exploration', 'exploration contract' and so on. After that, they should look up at least two more Governmental Instrument number 23/2010 and 24/2010 explaining categorization of the mining authorization they are eligible. Because of the fact that the National Government is decentralized into Provinces and Cities then the company should also be aware of Local Legislation which probably differs from one to other city. For only one type of authorization or license, there are too many layers and conflict of norms. Consequently, public service becomes inefficient, high cost and less predictable.

In broader view, legislation loads undoubtedly bring out some economic consequences. In the EU level it is felt that such an amount of legislation makes it difficult to find, access and understand (EU legislation) for citizens. It is also overburdening the citizens and economic actors (in the EU). Moreover it is very expensive in Europe with its many languages, due to the cost involved in translation.<sup>24</sup>

We spend too much effort in understanding regulation and implement it. The overproduction challenges value of foreseeability and negative value of having to spend time on reading.<sup>25</sup>

But should we stop enacting new laws? This choice seems impossible to apply with respect to the cause of legislation itself as stated earlier in this chapter. As time goes by, people changes and so the society for this reason laws are always needed. Without laws, government cannot govern.<sup>26</sup>

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<sup>21</sup> Zafrullah Salim, 'Legislasi Semu (Pseudowetgeving)' (10 May 2011) <<http://ditjenpp.kemenkumham.go.id/htn-dan-puu/1299-legislasi-semu-pseudowetgeving.html>> accessed 20 August 2013

<sup>22</sup> Laws of The Republic of Indonesia number 32/2004 on Local Government

<sup>23</sup> Laws of The Republic of Indonesia number 4/2009 on Minerals and Coal Mining

<sup>24</sup> Wim Voermans et al, Codification and Consolidation in the European Union: A Means to Untie Red Tape' (2008) 29 (2) Statute Law Rev 65

<sup>25</sup> Eng (n 1) 66-67

<sup>26</sup> Ann Seidman, Robert B. Seidman and Nalin Abeysekere, *Legislative Drafting for Democratic Social Change A: Manual for Drafters* (Kluwer Law 2001) 13

However, legislation loads should be managed. Deregulation is imperative<sup>27</sup> in dealing with overregulation. What we are all can do is to find how that exaggerated legislation is still accessible.

The vast number of rules and regulations were seen as detrimental to the accessibility, transparency, and effectiveness of legislation. The quantity of legislation harmed the quality of legislation. Quality in this sense is defined in term of enforceability, consistency, comprehensibility, transparency, clarity, plainness and accessibility.<sup>28</sup>

Since legislation incorporates the norms by which society operates, its availability in an up to date, accessible and coherent form is crucial for the orderly and effective functioning society, in particular the rule of law.<sup>29</sup> Improving accessibility of scattered rules into a more user friendly format is more than a technical issue. It is an issue in itself and an issue in human rights. "A body of case law emerging from the European Court of Human Rights showing that clarity, accessibility and foreseeability in the law standards that codification tends to promote, are indeed human right issues."<sup>30</sup>

## Accessibility

There is no excuse for ignorance of the law. In other words, no matter what is the background, whether one has law degree or no degree at all, one is considered to know the law. That is to say law is made for any person ranging from one live in a metropolitan to one live in remote village, and they who graduate from law school to they who are illiterate. It is not to say that the law should satisfy all of them. That is to emphasize that law is binding everyone therefore it should be – beside another criteria such as, clear, precise, and unambiguous - easy to access. With the growing importance of enforceable human rights and the wider international consensus certainty, foreseeability and accessibility are core components of the rule of law.<sup>31</sup>

Accessibility of legislation amounts to more than just readability and comprehensibility of the legislative text. The overall accessibility of legislation is also determined by the way it is formally and informally communicated (promulgation, publication, public relations, press releases, etc) and the manner in which the legislative text may be accessed.<sup>32</sup>

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<sup>27</sup> Alec Samuels, 'Repealing or Amending Legislation by Non-Legislative Means' in Constantin Stefanou and Helen Xanthaki (eds), *Drafting Legislation: A Modern Approach* (Ashgate 2008) 107

<sup>28</sup> Koen J. Muylle, 'Improving the Effectiveness of Parliamentary Legislative Procedures' (2003) 24 Statute Law Rev (3) 169

<sup>29</sup> Patricia T Richard-Clarke, 'Access to Justice: Accessibility' (2011) 11 Legal Information Management 159

<sup>30</sup> Eva Steiner 'Codification in England: The Need to Move from an Ideological to a Functional Approach—A Bridge too Far?' (2004) 25 (3) Statute Law Rev 209

<sup>31</sup> Kim Stevenson and Candida Harris, 'Breaking the Thrall of Ambiguity-Simplification (of the Criminal Law) as an Emerging Human Rights Imperative (2010) 74 JCL (6) 516

<sup>32</sup> Wim Voermans, 'Styles of Legislation and Their Effects' (2011) 32 (1) Statute L Rev 38

Accessibility is vital to the credibility of legal and political systems that operate on the presumption that everybody is supposed to the law.<sup>33</sup> Good laws should be presented in a good form. Laws which is good presented are equally important with its ability to bring justice for all. Eric Clive on his article regarding French Civil Code emphasizes the importance of accessibility of laws.

It is reasonable that we have a common need for good laws in a good form. By good laws, I mean laws that are fair and efficient in tune with the needs and values of the times. By laws in a good form, I mean laws that are readily accessible and reasonably easy to understand, use and apply. There is no point in having substantially good laws if they are in a chaotic and disorganized form.<sup>34</sup>

Everyone will agree if accessible is not enough with just download a legislation text easily. Technological breakthrough, internet makes us easier to manage data. More than that, we could even communicate every changes of the bill during the debate to the public via parliament or ministerial websites. However, this attempt is not enough if what we aim is to improve access to the rules because what we mean by accessibility of legislation is one step forward from just publish it to a format which is user-friendly.

A good practice in New Zealand could be an instance on this; New Zealand keeps this view of improving accessibility as the basis on their consolidation process. They believe to achieve real improvements; it is not just a case of building a website and putting the material up in the HTML. They have taken a holistic view of the process of improving access to legislation, and part of the project involves improving access to legislation as well, not just its output.<sup>35</sup>

What criteria can we get to assess accessibility? Most of the time, accessibility of legislation is connected to the style, language and structure of legislation.<sup>36</sup> Likewise, there is also an attempt to involve technology to manage legislative documents.<sup>37</sup> It shows that the term accessibility of legislation can be interpreted widely from many points of view. The red tape is that all of those discussion attempt to improve access to contribute to the effectiveness (or efficacy) of the legislation.

First of all we should look at what does the term 'accessible' mean. Based on Oxford Dictionary, the term accessible (*adjective*) means able to be reached or entered; able to be easily obtained or used; easily understood or appreciated; and (of a person, especially one in a position of

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<sup>33</sup> *ibid* citing CC E Donelan Accessibility of Legislation: Opportunities and Challenges (2009)

<sup>34</sup> Eric Clive, 'Thoughts From a Scottish Perspective on the Bicentenary of the French Civil Code' (2004) Edin L R 415

<sup>35</sup> Lawn (n 13)

<sup>36</sup> Voermans (n 32)

<sup>37</sup> Giovanni Sartor, 'Open Management of Legislative Documents' in Constantin Stefanou and Helen Xanthaki (eds), *Drafting Legislation: A Modern Approach* (Ashgate 2008) 259

authority) friendly and easy to talk to; approachable.<sup>38</sup> Similarly Collins Dictionary provides the meaning of accessible as easy to approach, enter, use, or understand; obtainable; available; easy for disabled people to enter or use; 4. (*logic*) (of a possible world) survey-able from some other world so that the truth value of statements about it can be known.<sup>39</sup> The term accessible is synonym with the words understandable, conceivable, user-friendly, intelligible, coherent, graspable, approachable, available, friendly, informal, cordial, affable, conversable.

The *noun* form of 'accessible' is 'accessibility', still based on the same source 'accessibility' means the fact of being easy to reach, get to, or enter; the fact of being easy to use or obtain; the fact of being easy enough to understand and appreciate; and the fact of being approachable and easy to talk to. In a more formal definition 'accessibility' means 'open to something'. In addition to our search of criteria on accessibility Geoff Lawn argue that accessibility to legislation covers both substance and format.

Accessibility to legislation has two components: accessibility in the physical sense and equally important, the accessibility of the content and meaning. Language, format, and structure also need to be understandable. Accessibility of legislation needs to be linked with changes in drafting style and legislative format, and possibility enhanced reprinting powers and a regular clean out of dead wood, so that legislation and the overall statute book are truly accessible.<sup>40</sup>

However, the need for accessibility does not necessarily mean that the law should always be fully graspable to the layman. As legal documents legislation must be complete and legally accurate without unnecessarily complicated style.<sup>41</sup> The principle may still be satisfied 'where the person concerned has to take appropriate legal advice to assess, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.'<sup>42</sup> Drafting must relate to the intended readers or audience.<sup>43</sup>

In the analysis of this dissertation we use also the term 'effective' which should also be elaborated. The term 'effective' is an adjective word means successful in producing a desired or intended result: (of a law, rule, or policy) operative: and [*attributive*] existing in fact, assessed

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<sup>38</sup> Oxford Dictionaries Online, definition of accessible in Oxford Dictionary (British & World English)

<[http://oxforddictionaries.com/definition/english/accessible?q=accessibility#accessible\\_\\_8](http://oxforddictionaries.com/definition/english/accessible?q=accessibility#accessible__8)> accessed 28 July 2013

<sup>39</sup> Collins English-Dictionary Online, definition of accessible

<<http://www.collinsdictionary.com/dictionary/english/accessible?showCookiePolicy=true>> accessed 28 July 2013

<sup>40</sup> Lawn (n 13)

<sup>41</sup> Robert D Eagleson, 'Efficiency in Legal Drafting' in David St L Kelly (ed) *Essays on Legislative Drafting; In Honour of J Q Ewens, CMG, CBE, QC* (Adelaide Law Review Association 1988) 15

<sup>42</sup> Comment on ; Simplification (of the Criminal Law) as an Emerging Human Rights Imperative; Breaking the Thrall of Ambiguity-Simplification (of the Criminal Law) as an Emerging Human Rights Imperative (2010) 74 JCL (6)

<sup>43</sup> Robert C Dick, *Legal Drafting in Plain Language* (3<sup>rd</sup> edn, Carswell 1995) 14

according to actual rather than face value.<sup>44</sup> Likewise, based on Collins dictionary 'effective' means productive of or capable of producing a result; in effect; operative; producing a striking impression; impressive; prenominal actual rather than theoretical; real.<sup>45</sup>

Given these points, a means is effective for achieving accessibility of legislation if it successful or capable in producing legislation which is easy enough to understand, easy to use or obtain and clean from 'dead wood' covers both format and substance.

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<sup>44</sup> Oxford Dictionaries Online, definition of effective in Oxford Dictionary (British & World English)  
<<http://oxforddictionaries.com/definition/english/effective?q=effective>> accessed 28 July 2013

<sup>45</sup> Collins English-Dictionary Online, definition of effective  
<<http://www.collinsdictionary.com/dictionary/english/effective?showCookiePolicy=true>> accessed 28 July 2013

## CHAPTER IV

### Codify or Consolidate?

Discussing consolidation and codification cannot be separated from legal tradition where these distinguish technique was firstly introduced. Codification is generally presented at the most important and widespread product of the civilian legal tradition whilst the most distinctive manifestation of the common law tradition remains the doctrine of binding precedent.<sup>46</sup>

The civilian naturally reasons from principles to instances, the common lawyer from instances to principles. The civilian puts his faith in syllogisms, the common lawyer in precedents; the first silently asking himself as each new problem arises, "what should we do this time?" and the second asking about in the same situation, "what did we do last time?".<sup>47</sup>

While civil law renowned with the tradition of codification, common law famous with the doctrines of precedent. Then, the question is will the common law tradition be torn by codification? There are some arguments implies that codification will be contaminant for the common law. Eva Steiner cited Sir Leon Radzinowicz's words in his Seiden Society lecture on the life of Sir James Stephen; "The common law of this country (UK), like the forces growth which determine it, is sui generis; it constitutes an integral part of the national and discharges a political, social and moral function which is much more precious than the shapely codes which the seekers after a legal paradise aspired to create."<sup>48</sup> Practically, however, Steiner also noted that English law displays in many areas the principled approach usually found in civil law systems and, in turn, French law does not ignore the casuistic approach prevalent in the common law.<sup>49</sup> The increasing use of judicial decisions in the civil jurisdictions combined with the expansion of the coverage of statute law in common law jurisdictions means that real distinctions are being reduced.<sup>50</sup> At the end of the day what drafters pursuit across the divide of civil and common law system is the same; 'quality of legislation' which defined as

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<sup>46</sup> Steiner (n 30)

<sup>47</sup> T. M. Cooper, 'The Common and The Civil Law—A Scot's View' (1950) 63 Harvard Law Rev 468

<sup>48</sup> Steiner (n 30) 212

<sup>49</sup> Steiner (n 30) 213

<sup>50</sup> Timothy J Arnold-Moore, 'Point-in-time publication of legislation (XML and legislation): Automating consolidation of amendments to legislation in common law and civil jurisdictions' <[http://www.frlil.org/IMG/pdf/2004\\_frlil\\_conference\\_tja.pdf](http://www.frlil.org/IMG/pdf/2004_frlil_conference_tja.pdf)> accessed on 6 August 2013

effectiveness.<sup>51</sup> In search of quality legislation the two legal systems are glued by the virtue of effectiveness which is the platform of transferability of laws, institutions and legislative solutions.<sup>52</sup>

Growing complexity of legal rules as a result of international relations (for example European Community legislation) or domestic significances challenges us to simplify our legislation no matter what the legal tradition is. Uniquely, the problem of too many legislation is not a recent problems. The idea of bringing together bulk of legislation into one single book is not new at all. When King Edward was 15<sup>th</sup> years old, he was expressing his wish that "the superfluous and tedious Statutes were brought into one sum together and made more plain and short," and of Bishop Burnett's opinion that this was "too great a design to be set on foot or finished under an infant king".<sup>53</sup> Time passed, people change, legislation change but the idea of consolidating are still taken our attention for centuries.

The need to simplify and restructure the enactments is not only because of its sum. It urges because of life circle of legislation itself, which somehow being partly amended. In many cases, amendment to provision in legislation is not incorporated in the original act. It is put separately in the format of an amending act.<sup>54</sup> This can be complicated because in both original and amendment format the user cannot read through whether such provision is still effective. The process of compilation is designed to produce an accurate and up-to-date statement of law. In this way, the compilation process is a key aspect of making legislation accessible.<sup>55</sup> Furthermore, the need to update the laws can be due to some factors such as;

1. The pace in which new legislation is placed by parliament on the statute book
2. The need for new legislation to refine and make amendments to existing legislation
3. The need for users of the statute book to have ready access to updated material
4. The need to integrate statutory material which is derived from more than one source (for example, in colonies and dependant territories, where law is applied both generally and specifically by the imperial legislature, and where that law needs to dovetail-in with local devolved legislation
5. Where legislative amendment has been made by reference rather than textual amendment.<sup>56</sup>

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<sup>51</sup> Helen Xanthaki, 'Editorial: Burying The Hatchet Between Common and Civil Law Drafting Styles in Europe' (2012) 6 (2) *Legisprudence* 133, 147

<sup>52</sup> Xanthaki (n 9) 16

<sup>53</sup> Rt. Hon. Viscount Jowitt-Lord Chancellor, *Statute Law Revision and Consolidation*, Published by The Holdsworth Club of the University of Birmingham 1951

<sup>54</sup> In Indonesia, amendment act can have quite a long title because it is numbered separately. For example Laws number 2/2011 on the amendment of the Laws number 2/2008 on Political Parties. The title and the considerations do not mention amended part unless we look into the substantive provisions.

<sup>55</sup> Arnold-Moore (n 50) citing New Zealand Parliamentary Office, Public Access to Legislation: A Discussion paper for public comment. Wellington: NZ PCO (1998), 3.1.5 <http://www.pco.parliament.govt.nz/pl/papers.html>.

<sup>56</sup> Teasdale (n 11)

Legislation follows behind society's needs. Where society needs a rule, legislation is made. People change faster than legislation. Therefore, it seems impossible to stop the 'production' of legislation. The more statute law there is the more difficult it becomes to consolidate, but the more necessary.<sup>57</sup> Society developed. What is relevant today might be no longer relevant to regulate next couple of years. One significant common feature that can be found in the condition that have led to codification is the fact that at the relevant time of their development, codes were needed to rationalize and modernize a law that had become fragmented and thus unwieldy in form and end full of archaisms, obsolete rules and uncertainty in content.<sup>58</sup>

So, how codification and consolidation could help us to cope with the problem of scattered rules?

The process of codification is understood as a process whereby different parts of law on a related subject are integrated into a single act. Typically codification involves the repeal of former acts replacing them by new ones or any other form of legislative substitution. Once codified acts are promulgated, they have 'force of law', are considered 'authentic' and general principles of law such as 'new rules supersede prior rules' apply.<sup>59</sup>

Codification process takes into consideration current concept, changing principles and changing value in particular area of law. To codify means to modify.<sup>60</sup> A shift to a codified system would involve a fundamental culture change.<sup>61</sup> Codification defined as the provision of sets of written, harmonized rules. Indeed, codification usually occurred at times when local customs were no longer regarded as means sufficient to ensure legal coordination, making it necessary to resort to a systematically elaborated attempt of legal organization.<sup>62</sup> Traditionally, codification has three main objectives; the first objective is legal harmonization. This defined as a search for conformity of the whole community in the same area of rules. The next objectives relates to the quality of the legal order which is applied within the society. The third objective relates to the enlargement of the informational scope of the rule.<sup>63</sup>

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<sup>57</sup> Alec Samuels, 'Consolidation: A Plea' (2005) 26 (1) Statute Law Rev 56

<sup>58</sup> Steiner (n 30) citing R. Pound, 'David Dudley Field: an Appraisal?' In David Dudley Field; Centenary Essays (1949) 3, 8-9 and 'Codification in Anglo-American Law' in B Schwartz (ed.), *The Code Napoleon and The Common Law World* (New York University Press, 1956), 267. See also, R. Batiza, 'Sources of the Field Civil Code: 'The Civil Law influences on a Common Law Code' 60 Tulane L R 799-819 (1986)

<sup>59</sup> Voermans (n 24)

<sup>60</sup> Benedicte Fauvarque-Cosson, 'Modern Developments in French Codification' (2000) Edin L R 350

<sup>61</sup> Eric Clive, 'Current Codification Project in Scotland' (2000) Edin L R 341

<sup>62</sup> Sophie Harnay, 'Was Napoleon a benevolent dictator? An Economic Justification for Codification' (2002)

EJL&E 237

<sup>63</sup> *ibid*



The key point to distinguish between codification and consolidation is whether it changes the law or not.

Most of the time consolidation consists of a republication of the consolidated text, integrating all subsequent amendments made to an Act. Original recitals and preambles of amending acts are lost in process of consolidation, but all remaining parts of the original basic Act and amendment made to it, which are still in force, are included in the consolidated text. In most countries, changes to the wording, structure or any other part or element of the basic text on the occasion of consolidation are strictly forbidden.<sup>64</sup>

While code as a result of codification gets its validity as it incorporates, consolidation does not affect validity of the laws in its new format. Any principles of prior law that were incorporated in the codes received their validity not from their previous existence, but from their incorporation and reenactment in codified form.<sup>65</sup> Further, Wim Voermans explained comprehensively the validity of consolidation that,

Consolidation is not considered a legal act in itself, but only a 'plain' act. Consolidation implies the regrouping of the diverse fragments of legislation governing a given matter without affecting the validity of those fragments and without the regrouping having any 'real' legal effect. Most of the time consolidation is no more than a mechanical process whereby the provisions of the basic act governing a particular matter and all its amendments are brought together, without any further examination or alteration of the text. Consolidation does not require the involvement of a competent legislative authority; even private companies may edit and consolidated versions. Most of the time consolidated texts only express information and have no legal status of force of law, nor are consolidated texts considered authentic.<sup>66</sup>

In the process of consolidation, legislations are put together in a coherent form. The law is not amended but merely reordered with the purpose to make the law more coherent and more easily accessible.<sup>67</sup> Consolidation involved the preparation for re-enactment of a number of older statutes, dealing with the same or allied subject-matter, in a single new act rationally arranged and, as far as possible, expressed in modern language.<sup>68</sup>

Consolidation is the restatement or re-enactment of the statutory law, the form not the substance, in a single reorganized form, bringing all the scattered relevant statutory law together in one statute. The long title says that it is a consolidating statute. The principal purpose is to facilitate the user. Consolidation may be a prelude to reform; more commonly it is the consequence form of reform, or at least change. There is no need for Parliamentary debate or dissent. The classification of statutory law which are generally understood in legal profession should not impede the attainment of the desirable effect of one subject one

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<sup>64</sup> Voermans (n 24)

<sup>65</sup> John Henry Merryman and Rogelio Perez-Perdomo, *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America* (3<sup>rd</sup> edn, Stanford University Press 2003) 28

<sup>66</sup> Voermans (n 24)

<sup>67</sup> Fauvarque-Cosson (n 58)

<sup>68</sup> N. Marsh, 'Law Reform in The United Kingdom: a New Institutional Approach' (1971) 12 *William & Mary Law Rev* 263

statute, a scope of consolidating statute neither too wide or too narrow and pragmatic but rational broad categories.<sup>69</sup>

Furthermore, consolidation is also considered as 'informal-codification'. This view sees there are various format of codification from merely compilations to a brand new reconsideration of the law.

1. Compilations, designed to bring together existing laws, either in chronological order or by subject but without altering their form.
2. Consolidation, which brings together in to one statute what was previously contained in a number of them. Consolidation restates the law on a given topic, but only by replacing a series of statutes by a single more voluminous one.
3. Restatement, whereby a given branch of law is set out in a single, coherent and comprehensive piece of legislation. This type of codification does not necessitate reconsideration of the relevant law with a view to reform, although it may include minor improvements such as the repeal of obsolete texts or the elimination of inconsistencies.
4. Codification-reform, which means a complete reconsideration of the law in a particular field with a view to its reform.<sup>70</sup>

Basically consolidation does not bring out any change to the law except its format. Therefore, the involvement of legislative authority in a consolidated text can be unnecessary. I said it can be unnecessary because this could be an issue of validity of the consolidated text itself. At least this should be clear in the system who and by what kind of process consolidation can be done.

Even though it is said that consolidation merely 'compiles' or bring up into a single format, in practices changes are undoubtedly done there. Jonathan Teasdale in his article wrote it is done 'with a view to its systematic development and reform and designed to produce the reduction of the number of separate enactments and generally the simplification and the modernization of the law.'<sup>71</sup> The work of consolidation requires intimate acquaintance with past as well as with existing laws and institutions; involves rewriting and not merely the placing together.<sup>72</sup> In this case, we point back to the discussion of the validity of the consolidated legislation. Is it possible that the non-legislative authority make changes to legislation? The UK practice provides an answer for this. In the UK, consolidation with the purpose of 'updating' is called 'corrective consolidation'. This kind of consolidation includes correction, renumbering and restructuring which is decided on a case-by-case basis<sup>73</sup>.

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<sup>69</sup> Samuels (n 57)

<sup>70</sup> Steiner (n 30)

<sup>71</sup> Teasdale (n 11)

<sup>72</sup> Reed Dickerson, *Materials on Drafting* (West Publishing Co 1981) 391

<sup>73</sup> Teasdale (n 11) and Voermans (n 24)

From the definition of codification and consolidation we have boiled down. We get three notable pointers to compare codification and consolidation. Firstly, in terms of structure both serve a single voluminous. In both processes changes are inevitable, but there are no substantial changes in the consolidation while in the codification changes are of course done thoroughly. Thirdly, as codification is actually a new enactment, therefore codification text is authentic. On the other hand, because of the fact that consolidation does not touch the substance but merely restructure and orthographic correction, the consolidated text cannot be said as authentic. Moreover, consolidation can be carried without parliament involvement. Therefore, the authenticity of consolidated version is still owned by the original act as it enacted.

**Figure 1 Codification and Consolidation Digest**

	<b>Codification</b>	<b>Consolidation</b>
<b>Single format</b>	Yes	Yes
<b>Changes</b>	Major changes	Partly, in terms of correcting errors
<b>Authenticity</b>	Yes	No

Both codification and consolidation are big project. Basically, everyone is in favor of the two techniques. Law in single instrument is surely more approachable. Moreover, this effort is worth for better regulation quite for a long time. However, process of codification and consolidation are time consuming. In the process some rules became out of date even before being enacted, due to the impact of new enactment in the meantime. This is one drawback of this process especially for codification where major change is made. At this point, inauthenticity of consolidated text provides us with some sort of benefits. Non-involvement of Parliament in consolidation shortens its time processing. Rather than codification, consolidation is more promising technique if what we attempt to do is improving access to the law.

In short what we got from consolidation is actually, a single instrument with clearer structure. It is less debate therefore it is less time consuming. Furthermore reduction of volume from consolidated text could be a prelude to reform at least starts from systematizing the laws. It is common to divide law reform into two types – one is the limited exercise of systematizing and rationalizing the law while the other incorporates the socio-political dimension of law reform such as

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developing new approaches and new concepts in keeping with the changing needs of modern society.<sup>74</sup>

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<sup>74</sup> Celia Wells, 'Codification of the Criminal Law – Part 4: Restatement or Reform' (1986) *Crim L R* 314

## **CHAPTER V**

### **Improving Access by Consolidating**

Is consolidation effective to improve accessibility of legislation? In chapter 3 we conclude that to volume of legislation should be manage. A means is effective to achieve accessibility of legislation is if that tool successful or capable in producing legislation which are easy enough to understand; easy to use or obtain and clean from 'dead wood'.

In the chapter before we have discussed what we can boil down from the practice of consolidation. In this chapter we would like to elaborate all what we have got then analyze it in order to proof the hypotheses as well as formulate a good recommendation of the application of consolidation. For the purpose of this dissertation, we will take Indonesia as a jurisdiction to study.

#### **Easy enough to understand**

By consolidating we have a single instrument and a clearer structure. In a more simply look, legislation is easier to understand. Reordered the structure in a logical sequence could help the reader to grasp the area coverage of such legislation.

#### **Easy enough to use**

The process of tidying up results in reduction of volume. Consolidation will be able to tide up the area of law which is too narrow into a wider one. With this in mind legislation is easy to use. Of course rather than scattered laws, searching for rules will be easier to do in a single voluminous instrument.

#### **Clean from dead wood**

This is the important point of consolidation which contributes most to the accessibility. The major problem of exaggerate legislation is to sort out the obsolete rules. In many cases, amendment is done in a separate legislative format and not be integrated. By consolidating we integrate it out so we have an update rules.

Although the process of consolidation remain puzzling, this is more reasonable to manage compare to codification. Amalgamating rules in an area of laws, integrating scattered amendment and restructure it for simplicity is not simple. Due to the fact that consolidation is not including changes and that the legislative authority involvement is minimal, consolidation could save more time. Moreover, considering time consuming on the process of codification, it is more likely to hold codification in an area of laws which remain unchanged or static. This is the reason why codification is obviously done in the field of criminal and civil law.

The fact that the process of consolidation is one step simpler and less time consuming could be the point to determine the area of law to consolidate. In other words, consolidation is possible to be carried in wider area than on codification. This practice, of course is not new for the common law jurisdiction. Australia has been undertaking consolidation program in the various States and Territories for years. A full consolidation of the statute book in the colony of Victoria was started in 1865 then continuously in 1890, 1915, 1928 and lastly in 1958 since then regular reprinting has taken place.<sup>75</sup> It was not only in Victoria, another states for example New South Wales has been also undertaking consolidation since 1937.<sup>76</sup> In Ireland one instance on Taxes Consolidation Act 1997 was able to reduce 40 separate acts.<sup>77</sup> In the UK, the work of consolidation is undertaken by the Law Commission.<sup>78</sup> Furthermore, in New Zealand in order to improve public access to legislation Parliamentary offices hold a project including incorporated amendment to the legislation more easily to find;<sup>79</sup>

The question is, is it possible for civil law jurisdiction for example Indonesia to employ consolidation as one technique to improve accessibility to legislation? If it is so, in what area should consolidation be carried? Everyone might be in favor to what consolidation can serve. But for a jurisdiction which is only recognize the long process of bringing up scattered rules into single volume as codification will ask twice before implement it.

The early development of Indonesian laws was started in 1945 when Indonesia proclaimed its independence from colonial government. The proclamation of independence was the sign of

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<sup>75</sup> Richard-Clarke (n 29)

<sup>76</sup> *ibid*

<sup>77</sup> *ibid*

<sup>78</sup> See Teasdale (n 11) 163-166

<sup>79</sup> David Harvey, 'Public Access to Legislative Information and Judicial Decisions in New Zealand: Progress and Process' (2002) 4 UTS L Rev 105

demolition of the colonial legal system. The development was firstly begun with the born of Constitution of The Republic of Indonesia on 18 August 1945. This written constitution was the fundamental basis for the national legal system. As the new independent states the early project to do was to stabilize the territory. During 1945-1949 the states gave attention fully for protecting independence physically from the invasion of colonial government. Until 1959 the developments of laws was stagnant and still looking for the best format.

Legal passion in the early Indonesia was to abolish colonial rules as much as possible. It showed strong desire to keep the unity by gathering local concept of law. However, the long and settled legislative system was not that easy to swap. Moreover, Indonesia has not yet being able to conceptualize new law due to the pluralism. Therefore, in the project of initiating national legal system, the Indonesian government focused on bridging the gap by adapting traditional legal system<sup>80</sup> and sorting out only the relevant rules from the colonials which was not in contrast with the spirit of independence.

In the 70s, the blue print of legal development became clearer. The government started to think seriously about how we should develop the national laws. Moreover, the government set up an informal committee to formulate the development project. The agenda of legal development was made in line with the development of economic and social welfare. There were three principles of national legal developments in 1970s. Firstly, initiating substantial laws which are extracted from national value not the law inherit from colonial government. Secondly, empowering legal apparatus and thirdly promoting legal awareness to the society.

Two decades of 70s to 80s was a time when the government used their maximum effort to engage public participation. The government called this phase as take-off stage. Furthermore, to make sure people are in favor with the development project, the government then infiltrated these three agenda to the ethnic community using their local language.<sup>81</sup> The adagio of 'law as a tool of social engineering' was famous and inspiring most of legal policy. It was to emphasize that law is the

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<sup>80</sup> Indonesia based on article 18B subsection (2) The Constitution 1945 respect the living rules of the ethnic group.

<sup>81</sup> The three agendas are translated into Javanese as 'trikrama pembangunan'. For Batak people it was called 'dalihannatolu' and for people from Minangkabau it was 'tigo tungku sajarangan'. In the early independence, the Indonesian was working hardly to preserve unity. In many programs the government frequently used local jargon in order to make people participate. Based on the data released by the Center of Statistic in 2010, there are at least 1128 ethnic groups living in Indonesia. They speak in their mother tongue but for the administrative purpose people speak Indonesian. From the total of 1128, there are at least 8 predominant ethnic groups by the number of its population.

key in order to transform the society to a better value. Laws stand in front and society will follow then.

By the end of 90s, Indonesia experienced huge reform in many aspects. The amendment of The Constitution of The Republic of Indonesia 1945 has change the constellation of state organs. Nearly in 2000 the biggest challenges for law reform was the skepticism of public to the legal apparatus. Moreover, the change constellation of state organs and the early implementation of decentralization undoubtedly caused the law growing wild. For the second time Indonesia should re-think about the legal development plan using the amended Constitution as the guide to established the new integrated legal development avoid what we called as '*wilde groei van het recht*'.<sup>82</sup> If in the 50s Indonesia was facing problem of vacuum of law. Now, Indonesia is dealing with the problem of scattered and too many legislation.

Since 1960s until recently the only existing codification format enacted in Indonesia were criminal code, civil code, code of commercial law and a compilation of Islamic family law. The criminal code was translated from *Wetboek van Strafrecht (WvS)* which was nationalized under the Law of The Republic of Indonesia no. 1/1949. Same as criminal code, the civil code was also adapted from Netherland colonial government. The civil code was translated from *Burgerlijk Wetboek (BW)*. And the code of commercial law was translated also from *Wetboek van Koophandel*. Uniquely, there was no formal translation published by the government. The books mentioned were translation work of Indonesian lawyers (jurist). Besides the three codes, there is also the compilation of Islamic principle on family law<sup>83</sup> which was attached to the Laws of the Republic of Indonesia no. 1/1974 on Family Law and the Laws of the Republic of Indonesia no. 50/2009 on the second amendment of the Laws no. 7/1989 on Procedural Law in Islamic Court.<sup>84</sup>

Unless the three codes and one compilation, Indonesia has never carried any project on codification. The attempt to revitalize criminal code has been starting since 2002 and until a decade it has not finished yet. The revitalization of criminal code is mainly addressing specific crime which was

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<sup>82</sup> HAS Natabaya, *Menata Ulang Sistem Peraturan Perundang-undangan Indonesia* (Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi 2008) 206, Prof. H.A.S. Natabaya was the Justice of Constitutional Court of The Republic of Indonesia during the term of office 2003-2008. The book was published by the Secretariat General of Constitutional Court on 2008.

<sup>83</sup> *Kompilasi Hukum Islam (KHI)* enacted by the Instruction of The President of The Republic of Indonesia no. 1/1991 on 10 June 1991

<sup>84</sup> In the case regarding family law (e.g. marriages, inheritance) Indonesian citizen who are muslims allowed to choose whether to suit in the Court by National Law or the Islamic Court by Islamic Law as compiled in KHI



regulated separately in one act. Not only that, the new bill of criminal code also accommodates new crime, changes on language and changing concept on imprisonment.

Even though codification is not a new thing for civil law jurisdiction like Indonesia, it is not explicitly mentioned in the Law regarding legislative drafting as one mechanism can be taken to tide up scattered rules. Codification is the same as new act without any exception in its mechanism. Moreover, the long and complicated process attached to codification makes the policy maker take a more pragmatist policy to enact laws without proper focus on how to simplify it.

### **National Legal Development Plan 2010-2014 and the Annual Legislative Program**

On 20 January 2010, President of The Republic of Indonesia laid down an instrument about National Legal Development Plan for 5 years from 2010 to 2014.<sup>85</sup> In this document, the government was aware of the legislative problem in general as inconsistency; overlapping; and overregulated especially with regards to the secondary legislation and the local legislation. Based on these considerations, national legal plan aims to produce a more consistent rule both horizontal and vertical. The plan includes;

- (1) Strengthening coordination between organs
- (2) Improving Public Service sectors
- (3) Building capacity and accountability of Law Implementing Agencies
- (4) Legal research as the basis of legislative drafting to improve effectiveness
- (5) Review mechanism to keep the regulations in harmony

Before going too far it is necessary to emphasize here that, Indonesia has a law of laws as guide in legislative process. It regulates hierarchy of law, types, scopes and substances of regulations.<sup>86</sup> Horizontal consistency means harmonious of the rules in the same level of regulation while vertical consistency means compatibility of the rules with the rules in the higher level.

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<sup>85</sup> Presidential Instrument No. 5/2010

<sup>86</sup> Laws of The Republic of Indonesia No. 12/2011 on Legislative Drafting, at article 7 there are hierarchy of laws stated 7 layers of regulation from the Constitution at the top as the prime source of law to the Local Level Legislation in the lowest level.

The legal development plan, of course is too broad to apply. Therefore, legislative program is made annually to systematize legislature work. In the annual program<sup>87</sup>, draft bill are prioritized. The annual legislative program includes planning to review and to amend such legislation. In fact, however, legislation program have not shown any intention to reduce legislative burdens. From the government side there is also no sign of deregulation policy. At least there are 30 draft bills put on the list of legislative program per year. During 2010-2013 there are 71 new enactments. These new acts of course do not stand alone. Most of the time it delegates to the administrative authority to enact secondary legislation. Due to the lack of time it is too often that the legislative left the technical matter to be filled by the executive.<sup>88</sup> Again we face a reality of too many legislation in each layer.

Harmonization of rules should be supported by a policy to simplify. An example of simplification is shown below.

Under the term 'simplification', includes; Deregulation – removing regulation from the statute book, leading to greater liberalization of previously regulated regime; Consolidation – bringing together different regulations into a more manageable form and restating the law more clearly. By improving transparency and understanding, it should reduce compliance costs; Rationalization – using 'horizontal' legislation to replace a variety of sector specific 'vertical' regulations and resolving overlapping or inconsistent regulations.<sup>89</sup>

Without another supporting policy harmonization task will not make significant change to the problem of inconsistency and overlapping. The more the sum of legislation the more difficult it becomes to keep it in harmony. Sad to say, harmonization in the legislative program is not functioned very well. Harmonization used to be the prelude for consolidation.

So, in what kind of area should we consolidate? There are two aims of consolidation we can think of. They are pragmatist aim and long term aim. For the pragmatist view, consolidation is useful to be done for example to attract investors. Simplification of regulation regarding licensing benefits economic and business sectors. In a comprehensive format of legislation, rules are more digestible.

For the long term use, consolidation can be done in the area which remains unchanged dynamically for example decentralization. In this area of laws, government can use consolidation as the way to engage the public to the government policy as well as to show government policy direction in particular term.

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<sup>87</sup> Laws of The Republic of Indonesia No. 12/2011 on Legislative Drafting at article 17

<sup>88</sup> Jimly Asshiddiqie, *Perihal Undang-undang* (Rajawali Pers 2010) 207

<sup>89</sup> Better Regulation Task Force Report, 'Regulation – Less is More; Reducing Burdens, Improving Outcomes' (March 2005) <[www.bruf.gov.uk/reports/simplifyeulaw.asp](http://www.bruf.gov.uk/reports/simplifyeulaw.asp)> accessed on May 2013

## Bill Drafting Process and Consolidation

When or in what stages should the idea of consolidation explicated and who should carry the task to consolidate? To answer this we should start from the whole bill drafting process. And to narrowing the explanation a set of criteria is taken to identify the key actors of the process. The questions are;

How do process for new legislation enter the system – and from whom?; Who preliminary explicates these idea and how?; Who decides, and by what criteria and procedures, to spend scarce drafting resources on some bills – and not others?; Who employs what procedures to ensure that bills meet format standards, and do not contradict other laws?; Who does what kind of research to determine the bills' details?; how do input and feedback institutions grant to some people, and not others, the power supply information to those preparing bills about facts, various theories and various groups' claims and demands?<sup>90</sup>

In Indonesia draft bills originate from two sides, the Executive<sup>91</sup> and the Legislative<sup>92</sup> body. The bills are drafted based on the legislative program agreed by both bodies. From the representative's side, bills are drafted and coordinated by legislation board committee. While on the Executive side, draft bills are prepared by the departments or ministries. Then the ministry of law and human rights is in charge to synchronize the final draft before entering debate session in the Parliament.

The draft bills from both sides then are listed assessed and prioritized considering such criteria<sup>93</sup> mentioned in the Laws of Legislative Drafting. The concept paper of the draft bills should explain; the background; the policy aim; and the scope of the legislation. In Indonesia, drafting are not centralized. Ministries who initiate the bills are responsible to serve the draft. The task of drafting is exercised by civil servant in the department. They are also in charge to conduct an empirical research for the purpose of the bill. Most of the time, the department held the research in collaboration with Academia in some Universities. In fact, it is not only academics that have access to the draft bills. Interest groups, non-governmental bodies and public organization are open to supply information, criticize and even demand a draft. After the bill passed through parliamentary

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<sup>90</sup> Seidman (n 26) 22-25

<sup>91</sup> Article 5 of the Constitution of The Republic of Indonesia 1945

<sup>92</sup> Article 20 of the Constitution of The Republic of Indonesia 1945

<sup>93</sup> Laws of The Republic of Indonesia No. 12/2011 on Legislative Drafting at article 18, prioritization considers Constitutional mandate; Legal demands; National Development Plan

deliberation and agreed by the legislative as well as the executive, the bill goes for assent by the head of the state.

To maximize the benefit of consolidation, again we should look back to the pointers of consolidation we have discussed previously. The process of bringing together numbers of legislation into a single format and logical order to get clearer structure can be exercised by the executive. Moreover we need to keep the advantages of consolidation process which is less time consuming and less debate because it does not require legislative authenticity. However, in terms of that consolidated text should clean from 'dead wood' in order to improve accessibility, of course minor changes to legislation is inevitable. When there are some changes done to the legislation it should be done by authorization from the legislative. Otherwise, it will breach the concept of democracy and representation. Therefore, legislative involvement in consolidation should be kept in proportion between the need to reduce the debate session and the need of validity of the process.

Legislative involvement would be best put in the beginning of the process of consolidation to determine the area of law to consolidate. This can be integrated in the annual legislative program as it also covers planning to amend, and to review. In the prioritization stages where the list of draft bill from both executive and legislative meets together the idea of consolidation is also possible to be explicated. To be more clearly, those steps are as the following. Firstly, at the preliminary stages arranging legislative program, the President initiates consolidation in particular area or in other words specify the scope to consolidate. Then the executive on that occasion sorting out; legislation that has already enacted; and the scattered amendment; also could be including new bill that is relevant to attach to the consolidation work. For this new bill, surely the executive should wait the parliamentary deliberation and assent before it is put in the consolidated list. Lastly, after the consolidation project rests in the legislative program the executive could start and lead the project.

The other alternative is the executive exercises consolidation project as part of their innovation in legal development plan. It is carried by the government likewise another welfare program. How could this be supervised? Supervisory of consolidation as part of governmental program comes under the authority of legislative body as manifestation of checks and balances<sup>94</sup> system. This alternative might be effective in terms of minimizing legislative involvement during the

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<sup>94</sup> Article 20A The Constitution of The Republic of Indonesia 1945, the representatives exercises legislative, budgeting and supervisory functions.

project. But, what can government do in this sort of consolidation will be limited merely to compile. For the purpose implementation of consolidation in Indonesia, this sort of alternative will be difficult to apply. I underline the term difficult to apply because of the fact that the paradigm of separation of power in Indonesia seems to be 'legislative heavy'. This is to emphasize that the Representatives dominate the work of legislating. But to let them consolidate is not a choice due to their capability to carry the task and that executive has more access to the implementation of legislation. Consolidating legislation in one format is quite new things for Indonesia. Consequently, in some degree legislative involvement is still needed.

Is there any other alternative out of the above? The answer to this question is of course yes. The work of consolidating can be carried simply by private publisher. Consolidation done by private publisher may be the most practical and easiest way. It may contribute to make legislation somewhat easier to access. However, by letting the private company carry this job, the government might not be aware of the essence of consolidation as part of simplification policy. Undoubtedly, if what we want to achieve is the improvements of access to legislation, consolidation would be a better policy choice.

1) Efficiencies arising from improved access by the public, librarians, the courts, the legal profession, members of Parliament, and other involved in the legislative process, to accurate and up-to-date official versions of legislation; 2) Improvements in the efficiency of the drafting process and the quality of draft legislation; 3) Improvements in the legislative process, for example, from the ability to produce versions of bills that show the effect of proposed amendments.<sup>95</sup>

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<sup>95</sup> Lawn (n 13)

## CHAPTER VI

### Conclusion

Legislation follows society. Societies are not static. Their values change dynamically and so must legislation. We are overregulated. Legislation loads must be managed. High volumes of legislation threaten the efficacy of legislation. The state's responsibility does not stop in providing legislation as society requires it. More than that, states should demonstrate real effort, by enhancing effectiveness through approachable legislation.

Improving accessibility of legislation by merely publishing new enactments in the statute book or via government website is not enough. While technological breakthroughs make the task of inventorying easier, it is still woefully inadequate. What we mean by improving accessibility is that legislation should, above all else, be easy to use. Legislation is easy to use when it is comprehensive and concise. They are not mutually exclusive. In this way, it is easier to find what rules exist and in what manner we should comply. *Secondly*, legislation is more accessible when it is easy to understand. By 'easy to understand,' we mean that amalgamating rules in such area they are related and put together in a logical order that is helpful for the user. *Thirdly*, accessibility of legislation become more complete if there is an effort from the government to keep the rules update. By keeping legislation vested in those criteria it seems that we undertake real effort to serve effectiveness and efficacy.

For the purpose of amalgamating rules in a single instrument, there are policy choices of codification and consolidation which can be exercised. In executing codification, we modify the law. Codification accumulates legislation in certain areas, reviews and repeals obsolete rules, then completes it with appropriate principles. They are all incorporated in a code which establishes a brand new scheme of laws. This sort of huge task seems to be very tough nowadays due to the fact that codification requires profound sources is time consuming, during which some legislation will have inevitably changed.

So, what about consolidation? Without oversimplifying the process of consolidation, this seems easier than codification. While codification guarantees a better regulation scheme,

consolidation might be merely the bringing together of volumes of legislation in a single format. Consolidation improves the form without distorting the 'playing field' and the society.<sup>96</sup> Within a single instrument and clearer structure, legislation is easy to use and easy to understand. As a means to tidy up scattered rules, consolidation is the best option.

This dissertation argues that consolidation is effective for achieving accessibility of legislation. Consolidation does not bring out new legal effects and does not carry any legal status in its format. This makes consolidation less time consuming and less debatable because legislative involvement is not necessarily needed to authenticate the compilation. The involvement of representatives might still be needed if consolidation includes minor changes, for example incorporating separated amendments, in order to preserve the concept of representative democracy.

All in all, by consolidating we simplify and reduce the volume of laws. As a means to improve accessibility of legislation, consolidation functions firstly as a prelude for codification and then for law reform.

In the context of implementing consolidation in Indonesian legislative system, it should be firstly 'nationalized'. So far, Indonesia does not take consolidation seriously as a technique to amalgamate legislation. Most of the time work of compiling is adjudged as a formidable and time consuming task. That is the reason why government tends to avoid the task and not put it on the legislative calendar. However, this does not mean consolidation is an alien to the system. Indonesia exercised it once when compiling Islamic family law for the purpose of providing interpretation guidance to the Islamic Court. Long before carrying out this task, Indonesia had two codes, civil and criminal law, which continue to be in force. Therefore, consolidation can very likely be implemented in the system.

Consolidation technique which can be transplanted to the Indonesian legislative system is the consolidation without changes. The most probable is up to the level of amalgamating legislation in such areas as well as attaching separated amendments to the original act. Even though further consolidation is carried out by the executive, it is important to take also legislative involvement into consideration. This is because consolidation demands the 'dead wood' be removed from valuable legislation. By involving the legislature, we keep balance between executive and legislative power.

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<sup>96</sup> Clive (n 61)

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Moreover, we want to promote consolidation to be part of a broader legal development plan and in the annual legislative agenda. In turn, this will force the legislature to review their work, referring back to other legislation. At the end, consolidation not only effective in improve access to the rules and reducing volume, it in turn contributes to better legislative policy in Indonesia.



## Bibliography

- Arnold-Moore TJ, 'Point-in-time publication of legislation (XML and legislation): Automating consolidation of amendments to legislation in common law and civil jurisdictions'  
<[http://www.frlil.org/IMG/pdf/2004\\_frlil\\_conference\\_tja.pdf](http://www.frlil.org/IMG/pdf/2004_frlil_conference_tja.pdf)>
- Asshiddiqie J, *Perihal Undang-undang* (Rajawali Pers 2010)
- Butt and Castle, *Modern Legal Drafting; A Guide to Using Clearer Language* (2<sup>nd</sup> edn, CUP 2006)
- Clive E, 'Thoughts From a Scottish Perspective on the Bicentenary of the French Civil Code' (2004) Edin L R 415
- Clive E, 'Current Codification Project in Scotland' (2000) Edin L R 341
- Cooper TM, 'The Common and The Civil Law—A Scot's View' (1950) 63 *Harvard Law Rev* 468
- Dick RC, *Legal Drafting in Plain Language* (3<sup>rd</sup> edn, Carswell 1995) 14
- Dickerson R, *Materials on Drafting* (West Publishing Co 1981) 391
- Donelan E, 'European Approaches to Improving Access to and Managing The Stock of Legislation' (2009) 30 (3) *Statute Law Rev* 147
- Eagleson RD, 'Efficiency in Legal Drafting' in David St L Kelly (ed) *Essays on Legislative Drafting; In Honour of J Q Ewens, CMG, CBE, QC* (Adelaide Law Review Association 1988)
- Eng S, 'Legislative Inflation and The Quality of Law' in Luc J. Wintgens (ed), *Legisprudence : A New Theoretical Approach to Legislation* (Hart Publishing 2002) 65
- Fauvarque-Cosson B, 'Modern Developments in French Codification' (2000) Edin L R 350
- Florijn NA, 'Quality of Legislation: A Law and Development Project' in J Arnscheidt, B van Rooij and JM Otto (eds) *Law Making for Development; Exploration into The Theory and Practice of International Legislative Project* (LUP 2008)
- Harnay S, 'Was Napoleon a benevolent dictator? An Economic Justification for Codification' (2002) EJM&E 237
- Harvey D, 'Public Access to Legislative Information and Judicial Decisions in New Zealand: Progress and Process' (2002) 4 *UTS L Rev* 105
- Indrati MF, *Ilmu Perundang-undangan I & II* (Kanisius 2007)

Student No: 1143158

Jowitt V, *Statute Law Revision and Consolidation*, Published by The Holdsworth Club of the University of Birmingham 1951

Karpen U, 'Improving Democratic Development by Better Regulation' in Constantin Stefanou and Helen Xanthaki (eds), *Drafting Legislation; A Modern Approach* (Ashgate 2008)

Lawn G, 'Improving Public Access to Legislation' (2004) 6 UTS L Rev 49, 60

Mahendra O, 'Harmonisasi Peraturan Perundang-undangan' (1 April 2010)

<<http://ditjenpp.kemenkumham.go.id/htn-dan-puu/421-harmonisasi-peraturan-perundang-undangan.html>>

Marsh N, 'Law Reform in The United Kingdom: a New Institutional Approach' (1971) 12 William & Mary Law Rev 263

Merryman JH and Perez-Perdomo R, *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America* (3<sup>rd</sup> edn, Stanford University Press 2003) 28

Miers and Page, *Legislation* (Sweet and Maxwell 1982)

Muyllé KJ, 'Improving the Effectiveness of Parliamentary Legislative Procedures' (2003) 24 Statute Law Rev (3) 169

Natabaya HAS, *Menata Ulang Sistem Peraturan Perundang-undangan Indonesia* (Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi 2008)

Richard-Clarke PT, 'Access to Justice: Accessibility' (2011) 11 Legal Information Management 159

Salim Z, 'Legislasi Semu (Pseudowetgeving)' (10 May 2011)

<<http://ditjenpp.kemenkumham.go.id/htn-dan-puu/1299-legislasi-semu->

Samuels A, 'Consolidation: A Plea' (2005) 26 (1) Statute Law Rev 56

\_\_\_\_\_, 'Repealing or Amending Legislation by Non-Legislative Means' in Constantin Stefanou and Helen Xanthaki (eds), *Drafting Legislation: A Modern Approach* (Ashgate 2008)

Sartor G, 'Open Management of Legislative Documents' in Constantin Stefanou and Helen Xanthaki (eds), *Drafting Legislation: A Modern Approach* (Ashgate 2008)

Seidman A, Seidman RB and Abeyesekere N, *Legislative Drafting for Democratic Social Change A: Manual for Drafters* (Kluwer Law 2001)

Steiner E, 'Codification in England: The Need to Move from an Ideological to a Functional Approach—A Bridge too Far?' (2004) 25 (3) Statute Law Rev 209

Student No: 1143158

Stevenson K and Harris C, 'Breaking the Thrall of Ambiguity-Simplification (of the Criminal Law) as an Emerging Human Rights Imperative (2010) 74 JCL (6) 516

Teasdale J, 'Statute Law Revision: Repeal or Something More?' (2009) 11 EJLR 157

Voermans W, 'Codification and Consolidation in the European Union: A Means to Untie Red Tape' (2008) 29 (2) Statute L Rev 65

\_\_\_\_\_, 'Styles of Legislation and Their Effects' (2011) 32 (1) Statute L Rev 38

Wells C, 'Codification of the Criminal Law – Part 4: Restatement or Reform' (1986) Crim L R 314

Xanthaki H, 'Editorial: Burying the Hatchet Between Common and Civil Law Drafting Styles in Europe' (2012) 6 (2) Legisprudence 133

\_\_\_\_\_, 'On Transferability of Legislative Solutions' in Constantin Stefanou and Helen Xanthaki (eds), *Drafting Legislation: A Modern Approach* (Ashgate 2008)

## **Constitutions**

The Constitution of the Republic of Indonesia 1945

## **Table of Legislations**

Laws of The Republic of Indonesia no. 12/2011 on Legislative Drafting

Laws of The Republic of Indonesia no. 32/2004 on Local Government

Laws of The Republic of Indonesia no. 1/1949 of Criminal Code

Laws of The Republic of Indonesia no. 4/2009 on Mineral and Coal Mining

Laws of The Republic of Indonesia no. 41/1999 on Forestry as amended by the Laws of The Republic of Indonesia no. 19/2004

Governmental Instrument no. 23/2010 on the Implementation of Mineral and Coal Mining Activities

Governmental Instrument no. 24/2010 on the Authorization of Forestry Activities

Instruction of The President of The Republic of Indonesia no. 1/1991 on the Compilation of Islamic Law

Presidential Instrument No. 5/2010 on National Development Plan 2010-2014