

**THE ROLE OF THE 'LEGAL RULE' IN INDONESIAN LAW:  
environmental law and *reformasi* of water quality management**

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## **ABSTRACT**

In examining the role of the 'legal rule' in Indonesian law, and in particular environmental law related to water quality management, this thesis questions the often expressed view that laws in Indonesia are sound, they merely fail to be implemented. It proposes that this appraisal of the situation does not take a sufficiently deep assessment and that a cause for non-implementation lies within the drafting of the laws themselves. It is argued that the ineffective system for environmental protection in Indonesia can be related to a failure to recognise the role of the 'legal rule' in environmental law.

A proposition presented in this thesis is that the arrangements for environmental law making in Indonesia lacks a strong rule foundation and, for this reason, it is not capable of producing shared understandings by lawmakers about producing and reproducing environmental law as legal sub-system. Another central proposition is that Indonesian environmental law has a form and style, which negates the role of the legal rule in environmental management and control.

Despite the changes brought by *reformasi*, the central position of the legal rule in environmental law and, indeed, the necessary rule foundation to the development of the legal system, has yet to achieve full recognition. If this situation is related to the system of water quality management and pollution control in Indonesia, it can be seen that environmental improvement will not be achieved until underlying issues concerning the structure, form and style of environmental law making are addressed.

## ACKNOWLEDGEMENTS

This thesis would never have begun without the prompting of Professor Ben Boer, in 1997, that there were some interesting developments in environmental law in Indonesia waiting to be written about. He introduced me to Indonesian environmental lawyers who became my initial frame of reference. Early on, Professor Koesnadi Hardjasoemantri discussed with me his ideas on the drafting of the *Environmental Management Act 1997* and provided me with access to his collection of environmental law materials. Professor Dr Siti Sundari Rangkuti, from the University of Airlangga, was also very encouraging and generous with her time in sharing her critical approach to the development of environmental law in Indonesia.

In the process of my research, the focus of the thesis altered to take into account the dramatic events that have unfolded in Indonesia since 1998. Throughout the time of writing, the Indonesian Centre for Environmental Law (ICEL) has been an invaluable resource. Discussions with Mas Achmad Santosa (the past Director) and various members of the team of idealistic and hard working lawyers were a source of inspiration in the early stages. I also met a number of officers within the Ministry of the Environment who were keen to discuss with me over the years the difficulties and dilemmas in working for change in environmental law in Indonesia, especially Rasio Sani, Jenni Muslim, R. Vivien Ratnawati, Nugraheni Hastuti and Inar Khsan Ishak.

I would also like to thank Bambang Adinugroho, the dedicated Secretary of the WATSAL program who, over a period in 2000-2002, spared time from his hectic schedule to discuss the latest developments in the water resources management reform programme.

During 2001-2002, through working with the environment program of the German Technical Aid Agency (*Deutsche Gesellschaft für Technische Zusammenarbeit*) (GTZ), I gained insights into changes in environmental management brought by the introduction of regional autonomy. I was fortunate to be offered a contract in 2001 by the Team Leader, Helmut Krist to undertake a gap analysis of environmental law in Indonesia. This work provided a broader perspective on the system of environmental law in Indonesia beyond the relatively narrow topic of the thesis.

I have received helpful criticism from Rosemary Lyster, my Associate Supervisor, who made useful suggestions on the structure of the thesis and the line of argument. She also challenged the presentation of a number of the rule concepts, particularly regarding the rule classifications and their application to the analysis of Indonesian legislation, which helped to clarify and refine my ideas. Professor Tim Lindsey, Director of the Asian Law Centre, who acted for a short period as an Associate Supervisor, provided encouragement for my approach. Professor Boer, my Chief Supervisor, has been a continuing source of support and guidance, particularly on the environmental law aspects of the thesis and in the final stages of completion.

I would like to thank my parents for their unwavering support for this venture, which has led me away from life in Sydney and finally, my husband Arief, without whom the thesis may never have been completed.

## LIST OF ACRONYMS

BAPEDAL	<i>Badan Pengendalian Dampak Lingkungan</i>	Environmental Impact Management Agency – disbanded in January 2002.
BAPEDALDA	<i>Badan Pengendalian Dampak Lingkungan Daerah</i>	Regional Environmental Impact Management Agency, established at the provincial and district level.
BAPPENAS	<i>Badan Perencanaan Pembangunan Nasional</i>	National Planning Agency
BOD	<i>Kebutuhan Oksigen Biologi</i>	Biological Oxygen Demand
COD	<i>Kebutuhan Oksigen Kimiawi</i>	Chemical Oxygen Demand
DAS	<i>Daerah Aliran Sungai</i>	Watershed
DPR	<i>Dewan Perwakilan Rakyat</i>	National Parliament/ House of Representatives
DPRD	<i>Dewan Perwakilan Rakyat Daerah</i>	Regional Parliament/ House of Representatives
DPS	<i>Daerah Pengaliran Sungai</i>	River basin
EIA		Environmental Impact Assessment
EMDI		Environmental Management Development in Indonesia (EMDI) Project
EPA		Environment Protection Authority (Australia) Environment Protection Agency (USA)
GBHN	<i>Garis-Garis Besar Haluan Negara</i>	Broad Outline of State Policy
GTZ	<i>Deutsche Gesellschaft für Technische Zusammenarbeit</i>	The German Technical Agency
HO	<i>Hinder Ordonnantie</i>	Hinderance Ordinance
IWRM		Integrated Water Resources Management
KepMen	<i>Keputusan Menteri</i>	Ministerial Decree
Keppres	<i>Keputusan Presiden</i>	Presidential Decree
MPR	<i>Majelis Permusyawaratan Rakyat</i>	People’s Consultative Assembly
PDAM	<i>Perusahaan Daerah Air Minum</i>	Provincial/District Public Company for Water Supply
Pedoman		Guideline

PERDA	<i>Peraturan Daerah</i>	Regional Regulation
PP	<i>Peraturan Pemerintah</i>	Government Regulation
PROKASIH	<i>Program Kali Bersih</i>	The Clean Rivers Program
REPELITA	<i>Rencana Pembangunan Lima Tahun</i>	Five Year Development Plan
UKL	<i>Upaya Pengelolaan Lingkungan</i>	Environmental Management Measure/Plan
UPL	<i>Upaya Pemantauan Lingkungan</i>	Environmental Monitoring Measure/Plan
UU	<i>Undang-undang</i>	Statute
UUD	<i>Undang-undang Dasar1945</i>	The 1945 Constitution of Indonesia

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## INTRODUCTION

The view is often expressed that the laws in Indonesia are sound but they fail to be implemented. The former President Abdurrahman Wahid was quoted as having stated on 1 May 2003:

You may well ask why I do not talk about the national legal system. My answer is simple. The existing system is already good, and so are the laws and regulations. But their application is not'.<sup>1</sup>

More specifically concerning water quality in Indonesia, it has been stated that the regulations

... provide a sufficient legal framework for water pollution control. However, for various reasons such as lack of resources, lack of capability, lack of political will and conflict between government agencies, this framework has in general not been implemented.<sup>2</sup>

Is it satisfactory to say that environmental legislation in Indonesia is sound but fails to be implemented or should we ask further questions about why it is not implemented? In relation to water quality management, this issue has assumed a certain urgency. It has been estimated that only 42 percent of Indonesians have access to clean drinking water.<sup>3</sup> The water quality of the rivers in most major cities in Indonesia is highly polluted, as can be seen by any casual observer. The black inky colour of water in the rivers and canals around Jakarta shows its anaerobic state. This situation continues despite laws covering water resources and environmental management.

This thesis aims to look more closely at the nature of environmental law in Indonesia, and water pollution law in particular, as it appears on the statute books and in the few occasions in which it has been interpreted and applied by the courts. The main objective of the analysis is to focus on three research questions, namely:

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<sup>1</sup> "Gus Dur proposes new political system" *Jakarta Post* (2 May 2003) 4.

<sup>2</sup> Patzer RA, *Environmental Law Compliance and Enforcement: Environmental Management Development in Indonesia Project (EMDI)* (Canada: Dalhousie Printing Centre, 1995) 4.

<sup>3</sup> State Ministry of the Environment *From Crisis to Sustainability: Paving the Way for Sustainable Development in Indonesia – Overview of the Implementation of Agenda 21*. Jakarta: State Ministry of the Environment, 2002, 41. Depending on the definition of 'clean', this figure is likely to be much lower.

- How can environmental law in Indonesian best be characterised in light of general jurisprudential analysis?
- Is environmental legislation on water quality management and pollution control adequate to achieve its purposes? If not, why not?
- Under what conditions can more adequate environmental law be generated in the *reformasi* era?

In posing these questions, it is not denied that failures in environmental management can be attributed to poor implementation of legislation arising from a lack of human or financial resources and/or weaknesses in legal institutions.<sup>4</sup> It is also not being suggested that it is sufficient to simply establish a system: such an approach would unrealistically reify the law. An effective system of environmental law will rely on the initiative of individuals within the system as well as a change in community attitudes. In addition, any environmental law system relies on the will of those wielding power to support decisions to protect the environment, often against powerful vested interests. However, a system needs to be orderly and methodical and cannot be overly reliant on the contingency that extraordinary people will be available to implement it.

These questions have been posed to discuss whether current legal arrangements provide adequate support for those, within both government and the community, who seek a change in environmentally damaging practices, in light of the low level of human and financial resources as well as political and economic conditions that do not prioritise environmental protection. Finally, in addressing these questions it may be possible to identify strategies that will contribute to a more effective system of environmental law in Indonesia in the future.

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<sup>4</sup> Weaknesses in legal institutions have been comprehensively documented in the study by Budiardjo, Nugroho, Reksodiputro (in cooperation with Mochtar, Karuwin and Komar) and CYBERconsult, *Law Reform in Indonesia – Diagnostic Assessment of Legal Development in Indonesia* (Jakarta: CYBERconsult, 1998).

## Academic Background

The thesis topic is located at the intersection of several academic areas namely environmental law and, in particular, concepts of water pollution control and management as they have developed internationally, Indonesian environmental law, Indonesian law more generally, the sociology of law and jurisprudence.

From the perspective of environmental law, the thesis looks at water pollution control and management in Indonesia in the context of developments in environmental law internationally. Indonesian environmental law texts have been written by Koesnadi,<sup>5</sup> Rangkuti,<sup>6</sup> Koeswadji,<sup>7</sup> Santosa,<sup>8</sup> Sembiring<sup>9</sup>, Silalahi<sup>10</sup>, Usman<sup>11</sup> and others. Where relevant these texts have been referred to; however, in writing the thesis, it was observed that whilst these texts often explain or interpret the content of environmental legislation in Indonesia, they do not seek to critique the system of environmental law in a fundamental way as is necessitated by the research questions of this thesis.

The features of the Indonesian legal system and its development within a historical context has been the subject of considerable legal scholarship in Indonesia as available in the writings of Indonesian academics and practising lawyers such as Sri Soemantri,<sup>12</sup>

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- <sup>5</sup> Koesnadi H, *Hukum Tata Lingkungan* (Environmental Law) (Yogyakarta: Gadjah Mada University Press, 7th ed., 1999).
- <sup>6</sup> Rangkuti SS, *Hukum Lingkungan dan Kebijakan Lingkungan Nasional* (Environmental Law and National Environmental Policy) (Surabaya: Airlangga University Press, 2nd ed., 2000).
- <sup>7</sup> Koeswadji HH, *Hukum Pidana Lingkungan* (Criminal Environmental Law) (Environmental Criminal Law) (Bandung: Penerbit PT Citra Aditya Bakti, 1993).
- <sup>8</sup> Santosa MA, *Good Governance and Hukum Lingkungan* (Good Governance and Environmental Law) (Jakarta: Indonesian Centre for Environmental Law, 2001).
- <sup>9</sup> Sembiring SN (ed.), *Hukum dan Advokasi Lingkungan* (Law and Environmental Advocacy) (Jakarta: Indonesian Centre for Environmental Law 1998); Sembiring SN, "Recognition of Standing in Environmental Litigation" (1996) Vol 1 No 1 *Indonesian Journal of Environmental Law* 79-89.
- <sup>10</sup> Silalahi MD, *Hukum Lingkungan – Dalam Sistem Penegakan Hukum Lingkungan Indonesia* (Environmental Law and Law Enforcement in Indonesia) (Indonesia: Penerbit Alumni, 2001)
- <sup>11</sup> Usman R, *Pembaharuan Hukum Lingkungan Nasional* (The Renewal of National Environmental Law) (Indonesia: PT Citra Aditya Bakti, 2003)
- <sup>12</sup> Sri Soemantri HR, *Bunga Rampai Hukum Tata Negara Indonesia* (Aspects of Administrative Law in Indonesia) (Indonesia: Penerbit Alumni, 1992); *Hak Uji Material di Indonesia* (Judicial Review in Indonesia) (Indonesia: Penerbit PT Alumni 2<sup>nd</sup> ed, 1997).

Manan,<sup>13</sup> Hadjon,<sup>14</sup> Asshiddiquie,<sup>15</sup> Ridwan,<sup>16</sup> Lubis,<sup>17</sup> Nasution<sup>18</sup>, Mahfud<sup>19</sup> and others. The approach taken in the thesis differs from these writers in that it tackles a narrow legal area but does so taking a detailed and critical approach that refers to jurisprudential analysis. A number of Indonesianist legal scholars such as Lev<sup>20</sup> and, more recently, Goodpaster,<sup>21</sup> Bouchier,<sup>22</sup> Burns,<sup>23</sup> Bedner<sup>24</sup> and Lindsey<sup>25</sup> have discussed developments in the post-Suharto era, *reformasi* aspirations and the rule of law in Indonesia which provides useful background.

In researching the thesis, it was observed that discussion of both the rule of law and good governance by Indonesian scholars rarely enters into a critique of the legal mechanisms

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- <sup>13</sup> Manan B, *Dasar-Dasar Perundang-Undangan Indonesia* (The Basis of Indonesian Legislation) (Indonesia: Penerbit IND-HILL Co, 1992); Manan B and Magnar K, *Beberapa Masalah Hukum Tata Negara Indonesia* (Various Issues in Indonesian Administrative Law) (Indonesia: Alumni, 1993)
- <sup>14</sup> Hadjon PM, *Perlindungan Hukum Bagi Rakyat di Indonesia* (Legal Protection for the People of Indonesia) (Indonesia: PT Bina Ilmu, 1987)
- <sup>15</sup> Asshiddiquie J, *Gagasan Kedaulatan Rakyat Dalam Konstitusi dan Pelaksanaannya di Indonesia* (Ideas on the Sovereignty of the People under the Constitution) (Indonesia: PT Ihtiar Baru van Hoeve, 1994).
- <sup>16</sup> Ridwan HR, *Hukum Administrasi Negara* (State Administrative Law) (Indonesia: UII Press, 2002)
- <sup>17</sup> Lubis TM, *In Search of Human Rights: Legal-Political Dilemmas of Indonesia's New Order, 1966-1990* (Jakarta: PT Gramedia Pustaka Utama, 1993).
- <sup>18</sup> Nasution BA, *The Aspiration for Constitutional Government in Indonesia: A Socio-Legal Study of the Indonesian Konstituante 1956-1959* (Jakarta: Pustaka Sinar Harapan, 1992).
- <sup>19</sup> Mahfud M, *Hukum dan Pillar-Pillar Demokrasi* (Law and the Pillars of Democracy) (Yogyakarta: Gama Media Offset, 1999).
- <sup>20</sup> Lev DS, "Between State and Society: Professional Lawyers and Reform in Indonesia" in Lev DS and McVey R (eds.), *Making Indonesia: Essays on Modern Indonesia in Honor of G. McT. Kahin* (USA: Cornell University South East Asian Program, 1996) 144-163; Lev DS, "Judicial Authority and the Struggle for an Indonesian Rechtsstaat" (1978) Vol 13 No 1 *Law and Society Review* 37-71; Lev DS, "Social Movements, Constitutionalism and Human Rights: Comments from the Malaysian and Indonesian Experiences" in Greenberg D, Katz SN, Oliviero MB and Wheatley SC (eds.), *Constitutionalism and Democracy Transitions in the Contemporary World* (USA: Oxford University, 1993).
- <sup>21</sup> Goodpaster G, "Rule of Law, Economic Development and Indonesia" in Lindsey T (ed.), *Indonesia: Law and Society* (Sydney: The Federation Press, 1999).
- <sup>22</sup> Bouchier D, "Magic Memos, Collusion and Judges With Attitude – Notes on the politics of law in contemporary Indonesia" Jayasuriya K (ed.), *Law, Capitalism and Power in Asia – The rule of law and legal institutions* (London: Routledge, 1999) 233-52; Bouchier D, "Positivism and Romanticism in Indonesian Legal Thought" in *Indonesia: Law and Society* Lindsey T (ed.), (Sydney: The Federation Press, 1999) 186-196; Bouchier D, *Lineages of Organicist Political Thought in Indonesia* (Melbourne: Ph.D Thesis, Department, Monash University, unpublished).
- <sup>23</sup> Burns PJ, *The Leiden Legacy – Concepts of Law in Indonesia* (Jakarta: PT Pradnya Paramita, 1999).
- <sup>24</sup> Bedner A, "Administrative Courts in an Executive-Dominated State: The Case of Indonesia" in Yong Zhang (ed.), *Comparative Studies on Judicial Review Systems in East and South-East Asia* (The Netherlands: Kluwer Law International, 1997) 183-210; Bedner A, *Administrative Courts in Indonesia – A Socio-Legal Study* (The Netherlands: Ph.D Thesis University of Leiden, 2000).
- <sup>25</sup> Lindsey T, "From Rule of Law to Law of the Rulers – to Reformation?" in Lindsey T (ed.), *Indonesia: Law and Society* (Sydney: The Federation Press, 1999) 11-20; Lindsey T, "Indonesia's *Negara Hukum*: Walking the Tightrope to the Rule of Law" in Budiman A, Hatley B and Kingsbury D (eds.), *Reformasi: Crisis and Change in Indonesia* (Melbourne: Monash Asia Institute, 1999) 363-383.

available in Indonesia to secure desired goals.<sup>26</sup> In this regard, the interaction of language and law, and the use of *Bahasa Indonesia* for the creation of legal rules in legislation, appears to be a problematic area in some areas of Indonesian law making.<sup>27</sup> Legal language is becoming a focus for legal discourse in Indonesia as reflected in the choice of this topic to launch the first edition of a legal journal *Jentera* (Wheel), in August 2002.<sup>28</sup> In 2003, legal language and languaging in Indonesia was addressed in a doctoral thesis by Massier, which became available too late to be taken into account but which has some parallels with the approach taken in this thesis.<sup>29</sup>

## **Theoretical perspectives and methodologies**

### *Historical perspective and methodology*

The nature of the changes that have taken place over the time of writing has required that the thesis be placed within a historical context. In this sense, the historical context is limited to the post-colonial period as the thesis is concerned with efforts since

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<sup>26</sup> This thesis does not take up issues related to legal drafting technique such as the structuring of a statute, writing legislative sentences, exceptions and provisos. In this regard, reference may be made to Seidman A, Seidman RB and Abeyesekere N, *Legislative Drafting for Democratic Social Change: A Manual for Drafters* (The Netherlands: Kluwer Law International, 2001).

<sup>27</sup> Arguments made here regarding environmental law do not necessarily apply across the board in Indonesian law, for example, procedural law contained in Act No. 8 of 1981 on Criminal Procedure (*Kitab Undang-undang No. 8 Tahun 1981 tentang Hukum Acara Pidana* (KUHAP)) contains concise and clearly drafted legal rules.

<sup>28</sup> *Jentera: Jurnal Hukum* (Wheel – Legal Journal) Vol 1 2002 published in Jakarta by *Pusat Studi Hukum dan Kebijakan Indonesia* (PSHKI) (Centre for Indonesian Legal and Policy Studies). See *Forum: Bahasa Hukum Indonesia: Krisis Bahasa di antara Pakem dan Frase* and the interview with Arief Sidharta (at 81-88). He stresses the importance of understanding the role of language in the Indonesian legal system (at 84). He notes the poor quality of legal drafting in Indonesia in terms of choice of words and grammatical structure (at 86) and recommends greater public participation in legal drafting (at 88). Marsillam Simanjuntak also interviewed in *Forum* (at 89-94), stresses the lack of well-constructed and grammatical *Bahasa Indonesia* in legislation (89-90). In his opinion, this weakness is widely acknowledged (at 90). He poses the question whether or not there is a living legal culture of written law in Indonesia (at 91). He says that whilst part of the problem arises from finding the appropriate vocabulary in *Bahasa Indonesia* (at 91), a more important problem lies in the failure to set out definite meanings and avoid vagueness. He identifies the primary problem as the lack of a legal culture that values written law, which he says will only come from increased law enforcement (at 93).

<sup>29</sup> From the available summary of the thesis, it is understood that Massier traces how, in the period of Guided Democracy (1959-1965), there was a breach with Dutch legal language and prevailing legal meanings. The foundations of law were affected by representatives of the leading legal community who were more susceptible to the language and texts of the political elite. When the New Order came into being, the legal community was replaced by divergent groups of lawyers in a world in which the position of law itself had become uncertain. There was heterogeneity in training, experience, views, and values, which expressed itself in a variety in language and terminology. According the Massier, the resultant heterogeneity and lack of clarity of legal language usage should ultimately be seen as the expression of a longing for a new unity of consciousness, a new legal community, and a new shared language:

<http://www.wetenschapsagenda.leidenuniv.nl/index.php3?m=2&c=23>

independence to develop Indonesian legal meaning. During the writing of the thesis, major social and political developments occurred in Indonesia. Preliminary research for the thesis began at the end of 1997, before the passing of *Act No. 23 of 1997 on Environmental Management*. At that time, there were great expectations of new provisions for public participation, legal standing for environmental organizations and class actions. Shortly afterwards, the fiscal crisis affected Indonesia and subsequent social upheaval led to the toppling of President Suharto in May 1998 and the beginning of *reformasi*. The introduction of the water resources management reform program funded by the World Bank followed these developments in mid-1999. Over this same period, there were four amendments to the Indonesian Constitution. Widespread regional disaffection and threatened secession by several regions in Indonesia led to the introduction of regional autonomy in January 2001. This radically altered the structure of government and arrangements for law making. In December 2001, as part of the reform program, a new environmental law on water pollution control and management was passed.<sup>30</sup>

To assess the significance of these developments, the thesis looks back to underlying concepts that were part of the development of the legal system in Indonesia at the time of Independence, during the early years of independence and during the period of the New Order. The work of others who have written about competing socio-legal conceptions in the debates during the drafting of the 1945 Constitution is referred to. Reference is also made to competing romanticist and positivist conceptions of Indonesian law as well as concepts such as the *integralistic state* that dominated during the New Order regime from 1966 to 1998.

#### *Jurisprudential perspective and methodology*

The primary perspective of this thesis is jurisprudential. In this regard, the methodology rests on an acceptance of the ideas put forward within the legal positivist tradition. Hartian legal positivism has been turned to for its explanation of the nature of law, the

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<sup>30</sup> The bulk of the research for this thesis was finalised in early 2003 and the thesis was submitted in August 2003. For this reason, there have only been a few references to developments after mid 2003.

legal rule and the concept of obligation.<sup>31</sup> It is suggested here that an appreciation of Hartian legal positivism is central to understanding the components of good governance and how to achieve the aspirations of *reformasi*.<sup>32</sup>

In particular, the Hartian depiction of a legal system as being constituted by the union of primary rules regulating conduct with secondary rules governing the recognition, change and adjudication of primary rules provides particular insights for law in Indonesia.<sup>33</sup> According to Hart, primary rules are rules that require human beings to do or to desist from doing certain things. They impose obligations and involve actions concerning physical movement or change.<sup>34</sup> Although primary rules can theoretically exist without secondary rules, to overcome the static nature of a system built entirely on primary rules, a legal system requires secondary rules.

The Hartian concepts are adjusted to focus on rule types commonly found in environmental law. In this way, the concept of the legal rule is used as a standard, measure or indicator for the discussion of the development of environmental law in Indonesia.<sup>35</sup> In relation to the concept of the 'legal rule', much work has been carried out by Twining and Miers,<sup>36</sup> Diver,<sup>37</sup> Baldwin,<sup>38</sup> Schauer<sup>39</sup> and Black.<sup>40</sup> The thesis refers to their work and applies it to rule formation in Indonesian environmental law.

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<sup>31</sup> Hart HLA, *The Concept of Law: With a Postscript Edited by Raz J and Bullock PA* (England: Clarendon Press Oxford, 2nd ed., 1994).

<sup>32</sup> A new version of legal positivism has developed in recent times as part of a wider political philosophy of democratic positivism. Known as ethical-legal positivism, it argues for clear and unambiguous legal rules that impose limits on government and retain power within the legislative forum rather than transfer power to the courts to shape law according to their own values and preferences: Campbell T, "The Point of Legal Positivism" (1998) Vol 9 *Kings College Law Journal* 63-87 at 79-81. A relationship between what is known as progressive constitutionalism and legal positivism has also been identified in the USA: Sebok AJ, "Misunderstanding Positivism" (1995) *Michigan Law Review* 93 2054-132.

<sup>33</sup> Hart, Note 31 at 98.

<sup>34</sup> *ibid.*, at 81.

<sup>35</sup> Twining has argued the need for "comparators", to provide a basis of comparison between legal systems under the rubric of comparative law, see Twining W, *Globalisation and Legal Theory* (London: Butterworths, 2000) 192.

<sup>36</sup> Twining W and Miers D, *How To Do Things With Rules* (London: Weidenfeld and Nicolson, 2nd ed., 1982).

<sup>37</sup> Diver CS, "The Optimal Precision of Regulatory Rules" (1983) 65 *Yale Law Journal* 65-109.

<sup>38</sup> Baldwin R, "Why Rules Don't Work" (1990) 53 *Modern Law Review* 321-337.

<sup>39</sup> Schauer F, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (USA: Oxford University Press, 1991).

<sup>40</sup> Black J, *Rules and Regulators* (England: Clarendon Press Oxford, 1997).

The significance of legislation is commonly seen to be a product of legal culture in Indonesia, as in many Southeast Asian countries. The thesis does not reject the importance of legal culture, a thorough investigation of which would require a sociological or anthropological analysis of the practices that make up the ‘living law’ in Indonesia;<sup>41</sup> however, such an approach is beyond the scope of this thesis. It has also not been possible to take a socio-economic approach, and trace the dynamics of how economic and social forces have influenced legal form, style and content in environmental law and, for this reason, there is no reference to custom or legislative history in environmental law. Rather, it was decided to undertake a formal analysis of law as it exists ‘on the statute books’ in Indonesia. In short, this thesis seeks to ‘take Indonesian statutory law seriously’.<sup>42</sup>

In particular, the following laws are analysed for rule content:

1. The Constitution of Indonesia 1945 (as amended)
2. Act No. 23 of 1997 on Environmental Management
3. Act No. 22 of 1999 on Regional Government
4. Government Regulation No. 25 of 2000 on the Authority of the Government and the Authority of the Provinces as Autonomous Regions
5. Government Regulation No. 82 of 2001 on Water Quality Management and Pollution Control

The analysis of Indonesian statutory law was carried out using the original *Bahasa Indonesia* version of all laws. Where statutory provisions have been referred to in the thesis, direct quotes are often used from a translated text. However, in discussing rule formation, no attempt has been made to interpolate Anglo-Saxon legal phraseology into the translation. As far as possible, the grammatical structure contained in the original is used in this discussion, even though it may not read as conventional legalese. This has

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<sup>41</sup> The study of ‘living law’ was recommended in relation to determining the extent of convergence of environmental law across Southeast Asia by Johnston DM “Environmental Law as ‘Sacred Text’: Western Values and Southeast Asian Prospects” in Johnston DM and Ferguson G (eds), *Asia-Pacific Legal Development* (Vancouver: UBC Press, 1998) 405-465 at 463. The conceptual conditions that make possible the practice of environmental law could be a fruitful area of analysis. The study of the rule of law as a cultural practice is discussed by Kahn PW, *The Cultural Study of Law – Reconstructing Legal Scholarship* (USA: University of Chicago Press, 1999) 34-40.

<sup>42</sup> This turn of phrase came to mind from Dworkin RM, *Taking Rights Seriously* (London: Duckworth, 1978).

been done to provide evidence for points being made about linguistic practices in *Bahasa Indonesia*. This approach presents difficulties where resort is only available to English translations, as the translated version often adjusts the expression to insert words and phrases that more closely accord with legislative drafting in the Anglo-American tradition.<sup>43</sup> It is part of the argument of this thesis that to appraise Indonesian legislation, the original version in *Bahasa Indonesia* needs to be considered.

### *The perspective of constitutional theory and legal sociology*

Another perspective that has influenced the direction of the thesis has been political or constitutional theory that sees the rule of law as the morally desirable means of regulating society. As the conception of law that represents the dominant mode of authority in most western systems, the rule of law has symmetry with legal positivism and Hart's descriptive concept of law.<sup>44</sup> In writing the thesis, a formal interpretation of the rule of law has been favoured: one that focuses on legal forms that can effectively guide government officials tasked with implementing the law as well as members of the public.

In considering the features of a modern legal system, the sociological tradition of Weber<sup>45</sup> and his depiction of different modes of authority provide relevant insights. There is a strong overlap between Weber's concept of rational legal authority, legal positivism and the concept of the rule of law.<sup>46</sup> There is also a relationship between the development of the rule of law and the formulation of legal rules. This insight is taken from a sociological analysis of law. Luhmann has described the evolution of law from formulations that are justifiable as a behavioural expectation or an ethical statement of a good policy goal, towards law that contains formulations that bring the constituent facts and legal consequences into an 'if X, then Y' relationship.<sup>47</sup> Weber before him traced the same

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<sup>43</sup> For example, in the translation of the Government Regulation No. 82 of 2001 on Water Quality Management and Water Pollution Control.

<sup>44</sup> As noted by Galligan DJ, *Discretionary Powers* (England: Clarendon Press Oxford, 1986) 60.

<sup>45</sup> Weber M, *Law in Economy and Society* (USA: Harvard University Press, 1966).

<sup>46</sup> Commonalities between the construct of the legal-rational state, the notion of modernity as it emerged in seventeenth century, legal positivism and the rule of law were drawn in a comparative study of Hobbes, Bentham and Kelsen undertaken by Lee K, *The Legal-Rational State* (England: Gower Publishing Company Ltd, 1990).

<sup>47</sup> Luhmann NA, *A Sociological Theory of Law* King E & Mackie M (trans.), Martin Albrow (ed.), (London: Routledge & Kegan Paul, 1985) at 174.

development away from substantive rationality towards formal rationality, which separates law and ethics and where significance in both substantive law and procedure is ascribed exclusively to operative facts, determined not from case to case but generically.<sup>48</sup>

### *Comparative law perspective and methodology*

A restricted comparative approach is taken in comparing the drafting of some legislative provisions. Occasionally, reference is made to statutory provisions in environmental law from Australia and the USA to indicate approaches that have been taken elsewhere in rule making. Reference is also made to German environmental legislation as a civil law system that uses a comparable framework law approach to legal drafting.<sup>49</sup>

As the writer is an Australian lawyer, it is likely that a comparative law perspective has unconsciously crept into the overall approach taken in writing the thesis. In an effort to gain more of an insider's understanding into the operation of environmental law in Indonesia, a range of material was referred to including government reports and journal articles. In addition, many informal interviews were conducted with Indonesian government officials working in the water and environment sectors, academics, lawyers from the private sector and non-government organizations, as well as consultants working in the field of environmental management and capacity building.

### **Summary of the thesis argument**

#### *The role of the 'legal rule'*

It is proposed that role of the 'legal rule' is central to answering the research questions. The concept of the legal rule is put forward as being a measure or indicator with which to characterise a legal system and to assess the adequacy of its component parts. The presence of legal rules explains how laws can guide the actions of government and behaviour of citizens and provide the level of predictability that is central to the rule of

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<sup>48</sup> Weber M, *Law in Economy and Society* (USA: Harvard University Press, 1966), chapter 8 especially 224-226 and chapter 11. Also, Roach Anleu SL, *Law and Social Change* (England: SAGE Publications: 2000) 24.

<sup>49</sup> The German government has an active program in water quality management in Indonesia implemented through *Deutsche Gesellschaft für Technische Zusammenarbeit* (GTZ). It includes the establishment of the first water quality information system based on a river basin.

law. The formulation of legal rules stands behind the concept of the separation of powers: once a legal rule is formulated by law-making agencies, using the deductive logic contained within the rule, it can be applied impartially and independently by the judiciary through the application of legal reasoning. It is also fundamental to creating what Luhmann has described as ‘structures of expectation’ that are necessary in managing an increasingly complex society.<sup>50</sup>

It is widely recognised that legal rules contain a certain logic. The basis for the concept of the ‘legal rule’ presented in this book is that it is a statement that can be reformulated into an ‘*if X then Y*’ proposition, irrespective of its original expression and, as such, operates in the same way as a conditional program. Normative vocabulary is also required as laws are universally agreed to be normative institutions. Legislative provisions that contain legal rules can be broken down into sets of interrelated unitary rules and analysed through deductive logic. The idea behind drafting legislation should be to create manageable units of legal rules that are capable of providing a basis for legal reasoning.

It is proposed in this thesis that an assessment of environmental law is helped by resorting to jurisprudential theory and, particular, the analysis of HLA Hart. He said that a legal system comes into existence through the union between primary rules of obligation regulating conduct and secondary rules governing the recognition, change and adjudication of primary rules.<sup>51</sup> In the thesis, this framework is adjusted slightly to focus on legislative rules on law making (the Hartian secondary rule of change); administrative rules that govern discretionary authority (a hybrid of the Hartian secondary rules of change and adjudication); and public regulatory rules relevant to regulation (the Hartian primary rule). Whilst Hart did not propound his concept of law in terms of Luhmann’s conditional program, his jurisprudential theory, which identifies primary and secondary rules as being fundamental to the existence of legal system, is complemented by this understanding of the legal rule.

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<sup>50</sup> Luhmann NA, *A Sociological Theory of Law*, King E & Mackie M (trans.), Martin Albrow (ed.), (London, Routledge & Kegan Paul, 1985) at 73.

<sup>51</sup> Hart, Note 31 at 98.

A proposition presented in this thesis is that the structure for environmental law making in Indonesia contains a weak rule foundation and, for this reason, obstructs shared understandings by lawmakers about producing and reproducing environmental law as legal sub-system. Another central proposition is that the content of Indonesian environmental law has a form and style that negates the role of the legal rule in environmental management and control.

If the provisions on administrative authority in environmental law are examined, it can be seen that they lack rule content. They are dominated by provisions that could be interpreted as permission-granting conferrals of legislative or administrative authority. Frequently, the expression is in the passive voice, which avoids allocating a specific actor. There is a lack of administrative rules to address respective roles and responsibilities for environmental management. Where obligations are imposed on government, imprecise words and vague expressions are used. There is also an absence of procedural rules to govern the manner of the exercise of administrative authority. Whilst there are frequent aspirational statements on integration and coordination, there are no procedural rules to indicate how these goals are to be achieved.

The strongest rules are found in the regulatory aspects of environmental law in Indonesia; however, here the rules suffer from an unlikely combination of a minimalist approach and unnecessary complexity. There are very few strong prohibitions, which are a stronger form of command than obligations. The obligations are of uncertain effect due to a lack of defined terms and vagueness in legal style. The most specific obligations, those on licensing and environmental impact assessment, are a blend of administrative and regulatory rules, which obscures their function and purpose.

Environmental law making follows a framework approach, which means that many provisions central to establishing an operative system for environmental protection are earmarked as subject matter for delegated legislation. When this occurs in government regulations, it means that operative provisions are often relegated to guidelines of an uncertain binding force. There is also a pervasive difficulty with linguistic structure. Legislation is suffused with vagueness, opacity and unnecessary complexity. Vagueness of expression arises from a lack of detail as well as resort to generic and evaluative terms devoid of specificity. Opacity is caused by a failure to define terms and the use of words

in *Bahasa Indonesia* that do not correlate to widely-recognised legal policy tools. Where terms are defined, the definitions suffer from a lack of specificity or concreteness. Sanctions provisions are marred by unnecessary complexity.

The case law considered in the thesis shows that the courts in Indonesia do not seek to demonstrate statutory construction. This situation may be partly attributable to poor legal drafting: stronger rule formation demonstrating a clear statutory intent is likely to require judges to display a stronger analysis in the interpretation and application of legal rules. At present, existing legislative provisions are wide open to interpretation with no boundaries or signposts to guide the application of legal logic. This undermines the development of common understanding about how to use *Bahasa Indonesia* in crafting rules for institutional purposes. The lack of predictability from the courts closes off an important avenue to establish core meanings to legal rules. It also obstructs the process of internalisation of legal rules whereby rules are absorbed by the community and transformed into social norms as the ‘right thing to do’.

#### *The research questions*

A brief summary of the findings on the research questions are as follows:

- How can environmental law in Indonesian best be characterised in light of general jurisprudential analysis?

If reference is made to the Hartian concept of law, dilemmas arise in seeking to characterise environmental law in Indonesia. It is arguable that the system of environmental law in Indonesia is not merely ‘ineffective’ or even ‘dysfunctional’ but is more accurately described as not being fully present: whilst some of the component parts have been created, it does not effectively amount to a legal system. The reason for characterising environmental law in Indonesia as being a ‘nascent’ legal sub-system can be found in the widespread lack of compliance with primary rules and the high level of uncertainty within the secondary rules that govern the creation of environmental law in Indonesia.

- Is environmental legislation on water quality management and pollution control adequate to achieve its purpose? If not, why not?

For environmental legislation to be adequate to achieve its purpose, it needs to be drafted in such a way as to support expressed policy goals. The argument put forward in this thesis is that environmental legislation on water quality management and pollution control in Indonesia may be sufficient to *permit* environmental protection but does not actively support environmental protection. This is due to the failure to recognise the central importance of the legal rule in the Indonesian legal system and the qualities that make up effective legal rules. It is suggested that environmental laws are inaccessible, not reasonably capable of conveying clear meaning to those who are expected to apply or comply with them, do not entail a specific level of compulsion and do not fully address the environmental problems to which the laws are directed.

- Under what conditions can more adequate environmental law be generated in the *reformasi* era?

It is argued that, despite the reform aspirations of the post-Suharto era, the central position of the legal rule and, indeed, the necessary rule foundation to the creation of a legal system, has yet to achieve recognition. This is apparent in the law establishing regional autonomy, which sets out the arrangements for environmental law making at each level of government in Indonesia. The new water pollution regulation produced in the *reformasi* of water resources management, *Government Regulation No. 82 of 2001 on Water Quality Management and Pollution Control*, perpetuates the legislative form and style that characterised the previously ineffective system of water quality management and control.

At a deeper level, it is suggested that a peculiar vision of the socio-legal order has been officially promoted in Indonesia, which is particularly problematic for the development of environmental law. This vision, which has been labelled variously as romanticist and organicist, prevailed at the time of independence and was adopted and reinforced by the government over the period of the New Order regime. It provided a vehicle for

sidestepping issues within society concerning power relations both between government and civilians and between the more powerful and less powerful sectors of society.

Environmental law must deliberately set out to address power relations in Indonesian society that hinder efforts to protect the environment. In its administrative law aspect, environmental law needs to guide decision-makers and guarantee legal accountability in government activities. At times, this will amount to a reapportioning of power in society towards those affected by environmental decisions. In its regulatory law aspect, environmental law must seek to change community attitudes and, where necessary, to provide the means to enforce legal prohibitions and obligations, sometimes against powerful interests in society. The failure to develop a clear concept of the role of legal rules in the administrative and regularity aspects of environmental law has enabled the system to ignore the issue of unbalanced power relations and, hence, has allowed the environment to be exploited by powerful sectors of society.

An awareness of how to craft strong legal rules within legislation will support the effort to address and alter power relations in society. The means to endow the legal system with greater authority and certainty need to be found. One such means is a re-examination of the use of *Bahasa Indonesia* in the structure, form and style of environmental law making. In turn, this would provide a more reliable basis for law enforcement, through which legal meaning is crystallised.

### **Structure of the thesis**

The first two chapters of the thesis are essentially introductory and set the stage for later discussion. Chapter 3 explores the possibility of a shift in the conception of law in Indonesia. Chapters 4, 5 and 6 concern jurisprudential analysis and the concept of the 'legal rule'. Chapters 7, 8, 9, 10 and 11 discuss Indonesian legislation and court decisions in environmental law. Chapter 12 presents some recommendations to support stronger rule-based law making.

## ***Chapter One - The Environmental and International Law Context for Water Quality Management and Pollution Control***

In the first chapter, the nature and extent of the environmental problems in water resources management are indicated along with a discussion of the concept of sustainable development and a presentation of the policy framework emerging internationally to implement integrated water resources management (IWRM).

## ***Chapter Two - The Political Context for Environmental Law Reform***

In chapter two, political change in Indonesia since the downfall of Suharto is briefly described as well as the decentralisation of government under regional autonomy. The aspirations of *reformasi*, such as good government are discussed in the context of *reformasi* of water resources management. It is pointed out that the task of reforming water resources management to implement IWRM is enormous, and it is made even more difficult in view of the rapid pace of political change in Indonesia in recent years. In the second half of the chapter, scholarship on the development of legal systems in countries such as Indonesia is discussed. In the face of difficulties in ascertaining environmental law's capacity to act as an instrument to change social behaviour and attitudes, it is suggested that a close look at the features of environmental law is required.

## ***Chapter Three - Shifting Visions of the Social and Legal Order***

Chapter 3 considers constitutional theory in Indonesia from a historical perspective beginning with a description of prevailing legal concepts at independence: the *Rechtsstaat*, the *integralistic state* and *Pancasila*. It goes on to explore the possibility that a fundamental shift is occurring in Indonesia, away from past mystifications towards a more rational concept of Indonesian law and law making.

## ***Chapter Four - The Minimum Requirements for a Legal System***

Chapter 4 goes forward from the discussion of constitutional theory in chapter 3, to look at the minimum requirements for the existence of a legal system in accordance with general jurisprudence. The Hartian idea that a legal system consists of the union of

primary rules regulating conduct and secondary rules governing the recognition, change and adjudication of primary rules is introduced. The recent critique of Hartian positivism by Tamanaha is also discussed. The underlying question is how to characterise the system of environmental law in Indonesia: is it an ineffective system, perhaps an almost wholly ineffective system, or is it more accurate to describe it as a system whose effective existence has not been demonstrated, i.e. a nascent system, a legal sub-system still in the making?

### ***Chapter Five - The Concept of a 'Legal Rule'***

Chapter 5 sets out the basis for a rule-based analysis of legislation. It begins by identifying the creation of laws that are capable of guiding both government and the public as being a common requirement of *Rechtsstaat* and the rule of law. It is suggested that such laws take the form of a conditional program and have an internal structure of logic that can be translated into an 'if X then Y' formulation. At this point, the concept of the 'legal rule' is introduced as possessing the same structure. The legal rule is categorised as falling into three rule types: the legislative rule (the Hartian secondary rule of change), the administrative rule (a hybrid of the Hartian secondary rules of change and adjudication) and the public regulatory rule (the Hartian primary rule).

### ***Chapter Six - Designing Rules for Institutional Purposes***

Chapter 6 goes on to explore difficulties in drafting legal rules in any country that arise from the open texture of language and the need for interpretation. It discusses the role of the courts as the leader of the 'interpretive community' involved in constructing the meaning of legal rules and presents the figure of a cycle of knowledge on the use of language for institutional purposes. It describes the dimensions of a legal rule: the position of a legal rule within the legal hierarchy; its linguistic structure; and the sanction that applies on the breach of a rule. The choices available in linguistic structure between precision/vagueness, simplicity/complexity and clarity/opacity are discussed. The means available to maximise the status of a legal rule are set out and the observation is made that status is particularly important where law is to act as an instrument of social change. Accountability in discretionary authority is explored and the suggestion is made that in delimiting areas for the exercise of discretion, rule dimensions need to be deliberately utilised to achieve policy goals.

### ***Chapter Seven – Rules For Making Environmental Law***

In chapter 7, it is shown that there is an absence of effectively drafted criteria of validity to guide the production of environmental legislation in Indonesia. The provisions conferring normative authority to each level of government to pass certain types of instruments are incomplete, non-specific and lack definition. The provisions that indicate the scope of normative power in terms of subject matter granted to each level of government are also inadequate. District government has been left in a legal vacuum, having been obliged to carry out environmental management without clear guidance on how to pass valid law. It is suggested that these are serious difficulties as common understandings are unable to develop about law making. This places the existence of environmental law as a legal sub-system in doubt.

### ***Chapter Eight - The National Environmental Law Framework***

Chapter 8 begins with a discussion of constitutional protection for the environment, including recent amendments to the Indonesian Constitution. It is argued that the Constitution does not provide a sufficient legal basis for management and protection of the environment. Next, the primary environmental statute in Indonesia, *Act No. 23 of 1997 on Environmental Management*, is reviewed to identify the rule types mentioned in chapter 5. It is shown that in relation to legal style there is heavy dependence on postponing law making to delegated regulations. The linguistic structure is dominated by vague expression, opacity and unnecessary complexity. In relation to legal form, it is noticeable that there is a lack of administrative rules capable of fostering good governance principles or clearly allocating responsibility for environmental outcomes. There is also a lack of prohibitions in public regulatory rules. At the end of the chapter, the rules within the Decree of the Minister for Home Affairs on the jurisdiction of regional environmental agencies are considered and found to have failed in clearly allocating roles and responsibilities for environmental management within the regions.

### ***Chapter Nine - Water Quality Management and Pollution Control***

In this chapter, *Government Regulation No. 82 of 2001 on Water Quality Management and Pollution Control* is reviewed. Ongoing issues concerning legal style and the rule dimensions of position and linguistic structure are noted. In many respects, it appears to be a ‘framework regulation’. The appropriateness of the extent of postponement of law making on aspects of water quality management and control to guidelines is questioned. The Regulation also suffers from continuing tendency to favour vagueness, complexity and opacity in the style of legal drafting. Observations are made about the lack of specificity in jurisdictional provisions and the lack of, or weaknesses in, substantive and procedural administrative rules. The public regulatory rules are analysed for clarity and effectiveness. Comparisons are made between administrative and public regulatory rules in the use of language to convey normativity. Finally, an assessment is made on how well the Regulation supports the goals of IWRM.

### ***Chapter Ten - Official Sanctions***

Chapter 10 is concerned with environmental obligations and what it takes to create a sense of having an obligation to protect the environment. This is a serious issue in the face of widespread non-compliance with environmental law in Indonesia. The role played by administrative and criminal sanctions and the capacity of existing rules to facilitate responsive regulation is considered. It is shown that jurisdictional, substantive and procedural provisions governing administrative sanctions lack detail at the national level, which is likely to undermine both responsive regulation and legal accountability. It is also shown that the provisions constituting criminal sanctions are both overly complex and lacking in detail. It is suggested that this is likely to deter enforcement agencies in carrying out enforcement and undermine reasoned-based judicial decision-making.

### ***Chapter Eleven - Community Sanctions***

Chapter 11 explores the idea that the community has a role in creating the social pressure necessary to generate the component of obligation currently absent in Indonesian environmental law. It will be shown that significant strengthening of community sanctions has occurred through the creation of the class action and the availability of legal standing for environmental organizations. However, in comparison to other

countries, the scope of community sanctions is still limited. Furthermore, obstacles arise from the linguistic structure of rules enforceable through community sanctions. The provision on strict liability suffers from opacity and a failure to explain how it is to be applied in Indonesia and the legal remedies remains confusing and incomplete. It is suggested that community sanctions give teeth to *reformasi* rhetoric on community empowerment and can assist in developing the internal aspect of the obligations so that protection of the environment is seen as ‘the right thing’ to do.

### ***Chapter Twelve - Conclusion***

The final chapter draws together the main ideas in the thesis, with some recommendations on factors that will lead to more effective law making focusing on issues related to legal structure, form and style. It also reflects upon the relationship between rationality in law making, reason-based judicial decisions and the creation of genuine legal rules in Indonesian law.

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## **CHAPTER TWELVE - CONCLUSION**

## **BIBLIOGRAPHY**