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Chasing the Elusive "Legal Rule" in Indonesian Environmental Law

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Abstract

Legislation can be considered from a formal perspective that focuses not on content but on the extent to which legal rules have been created. A legal rule has a basic underlying deductive logic of "if X then Y". The existence of legal rules is fundamental to the concept of the rule of law. However, the Indonesian *Act No 23 of 1997 on Environmental Management* and *Government Regulation No. 82 of 2001 on Water Quality Management and Pollution Control* consist primarily of principles and non-conclusive rules, with few near conclusive rules. This tendency is particulary striking in provisions on the exercise of public power and is likely to affect legal certainty and accountability. Greater attention needs to be given to formulating clear and precise legal rules that are capable of binding the government or community in accordance with a desired policy goal.

Key words:

Indonesia, rule of law, legal rule, environmental law

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Introduction

Part 4 of the General Elucidation of the 1945 Indonesian Constitution contains a curious statement. It says that "[c]ertainly, it is the nature of written rules to be binding. For that reason, the more flexible (elastic) those rules are, the better".[1] Such an understanding of legal rules seems to contain an inherent difficulty: a flexible rule is likely to be the subject of conflicting interpretations regarding the circumstances in which it will bind. Whilst this statement may be attributed to a desire to keep the new constitution relevant for the rapid social change anticipated to occur after independence, it raises a question as to whether it represents a basic attitude to legal rules more generally. In light of this background, this article explores the nature of the 'legal rule' and its place in Indonesian legislation with reference to Indonesian environmental law.[2]

In part one, reference is made to the rule of law to explain the author's preoccupation with explicit formulation of legal rules. In part two, the author discusses the difference between a legal principle and legal rule and draws on HLA Hart's distinction between a non-conclusive principle and a near conclusive rule. The essential components of a legal rule are also discussed in relation to the structure of legal rules and the importance of normative vocabulary. In part three, it is shown how difficult it is to locate near conclusive legal rules in Indonesian environmental legislation.

Finally, in part four, the author considers provisions in environmental legislation concerning government activities. The imposition of a public duty is distinguished from a grant of authority that serves as unconditional permission. The suggestion is made that provisions governing public power have a strong tendency not to be cast as legal rules at all or to be non-conclusive legal rules. This state of affairs shows that it is important to open up discussion about legislative drafting style in Indonesia as part of the effort to strengthen the rule of law and, more broadly, legal certainty.

1 *Memang sifat aturan yang tertulis itu mengikat. Oleh karena itu, makin "supel" (elastic) sifatnya aturan itu, makin baik.*

2 The extent to which patterns of legislative drafting identified are widespread, would be an interesting area for legal analysis. It may also be useful to compare linguistic practices in legislative drafting in different areas of Indonesian law, for example, commercial law, criminal procedural law and administrative law.

The Rule of Law and the "Legal Rule"

Many and Various Meanings of the Rule of Law in Indonesia

In Indonesia, the importance of the rule of law (*negara hukum*) has been acknowledged officially for many years. The New Order government elevated the concept of *negara hukum* by stating that the 1945 Constitution is the supreme written law in the hierarchy of legislation and, 'in accordance with the principles of *negara hukum*, each legislative product must be explicitly based upon, and have as its source, legislation in force at the higher levels' (*TapMPR/XX/1966*, Part II (A) para 3). *Negara hukum* was also mentioned in the first Five-Year Development Plan (REPELITA) of 1969/70, where the MPR described it as consisting of three basic principles:

a. formal and substantive legality
b. an independent judiciary
c. recognition and protection of fundamental human rights.

There was some encouragement of formal and substantial legality when, in 1970, the Supreme Court was given power to review legislation below the level of statute (*hak uji material*) to ascertain as part of an appeal whether there was a conflict with provisions contained in a higher law.[3] The passing of the Act on Administrative Courts in 1986, by which the courts were given the capacity to review administrative decisions, also significantly strengthened formal and substantive legality regarding administrative decision making.

However, it is well known that many aspects of the rule of law, namely respect for fundamental human rights and independence of the judiciary, were ignored under the New Order government. Probably the most disturbing violation of the rule of law was the mass killings, yet to be fully acknowledged and investigated, that accompanied the installation of the New Order government in 1965–1966.[4] There was also a failure to protect a wide range of human rights such as freedom of speech, freedom of assembly and no imprisonment without a trial.[5] In these circumstances,

3 Act No. 14 of 1970 on Judicial Authority (*Undang-undang No. 14 Tahun 1970 tentang Ketentuan-ketentuan Pokok Kekuasaan Kehakiman*) (Art. 26). This power was also mentioned in Act No. 14 of 1985 on the Supreme Court (*Undang-undang No. 14 Tahun 1985 tentang Mahkamah Agung*) (Art. 31).

4 See R. Cribb (ed) *The Indonesian Killings 1965–1966: Stories from Java and Bali, Second Edition, Monash Papers on South East Asia No 21* (Monash University, Melbourne: 1991).

5 See H. Thoolen (ed) *Indonesia and the Rule of Law – Twenty Years of 'New Order' Government: A Study Prepared by the International Commission of Jurists and the Netherlands Institute of Human Rights* (Frances Pinter (Publishers) Limited, London: 1987).

official pronouncements on support for the rule of law amounted to little more than its co-option as a catch phrase, to suit the purposes of the ruling elite.

Within academic circles, conflicting interpretations have arisen from a tendency to synthesise ideas from *Pancasila*, *Rechtsstaat* (the term mentioned in the Indonesian Constitution) and the rule of law.[6] According to Hadjon, the central point is not individual human rights but harmonious relations between the government and the people.[7] He says that '*negara hukum Pancasila*' has the following elements:

a) balanced relations between the government and the community based on the principle of agreement and harmony
b) a proportional relationship between state power or authority
c) support for resolution of disputes through negotiation and use of the court system as a last resort
d) balance between rights and obligations.[8]

Mahfud, rejects this view and argues for a more practical and less ambiguous approach that does not allow such broad scope for interpretation.[9] In contrast, Soemantri questions the implication of *Pancasila* ideology for *negara hukum*. He goes back to the part in the Elucidation of the Constitution that follows the provision on *Rechtsstaat*, which says that the system of government is a constitutional system in which authority is not absolute.[10] He concludes that this means that those who wield power within government must base their actions on legal norms and that the judiciary has the task of upholding the Constitution.[11]

During the New Order, another conception of *negara hukum* was adopted by some practising lawyers.[12] According to Lev, *negara hukum* was a powerful symbol for reform, a point of challenge and criticism of the New Order. Lev found that efforts to establish an Indonesian law state amounted to a challenge by the middle class as well as ethnic and religious minorities to patrimonial assumptions of political order.[13] As described by Lev, 'law movements'[14]

6 Mahfud shows how *negara hukum* has been interpreted differently by those writing on the topic, see M. Mahfud *Hukum dan Pillar-Pillar Demokrasi* [Law and the Pillars of Democracy] (Gama Media Offset, Yogyakarta: 1999) 138–145.

7 P. M. Hadjon *Perlindungan Hukum Bagi Rakyat di Indonesia* [Legal Protection for the People of Indonesia] (PT Bina Ilmu, Indonesia: 1987) 90.

8 Ibid at 85.

9 Mahfud note 6 above at 145–146.

10 H. R. Soemantri *Bunga Rampai Hukum Tata Negara Indonesia* [Aspects of Administrative Law in Indonesia] (Indonesia: Penerbit Alumni, 1992) 44.

11 Ibid at 47–48.

12 D. S. Lev "Between the State and Society: Professional Lawyers and Reform in Indonesia" in T. Lindsey (ed) *Indonesia: Law and Society* (The Federation Press, Sydney: 1999) 227–246 at 231.

> ... led persistent demands to subject political authority and common social and economic processes to limits defined by a body of conceptually autonomous rules and applied by a similarly autonomous legal system.

Ideas that became the mainstay of protest from the late 1960s to the 1990s were the confining of executive authority, the protection of private citizens and their interests, restoration of the separation of powers, judicial independence, judicial control over executive-bureaucratic authority and legal process in the political system overall.[15]

Towards a Formal Understanding of the Rule of Law

Given the range of interpretations that have circulated in Indonesia on the rule of law and *negara hukum*, it seems sensible to find common ground both within Indonesia and outside Indonesia. In the mid-twentieth century, Hayek provided one of the clearest and most powerful formulations of the ideal of the rule of law.[16] He said that:

> [s]tripped of all technicalities this means that government in all its actions is bound by rules fixed and announced beforehand – rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one's individual affairs on the basis of this knowledge.[17]

This approach is formal as it emphasises the importance of form rather than content. In a similar vein, Selznick stresses process rather than content when he says:

> [t]he essential element in the rule of law is the restraint of official power by rational principles of civic order .... Legality imposes an environment of constraint, of tests to be met, standards to be observed, ideals to be fulfilled .... Legality has to do mainly with how policies and rules are made and applied rather than with their content.[18]

The formal idea that the law and its meaning must be fixed and publicly known in advance of its application and that it binds those applying the law, as much as those in regard to whom it is applied, has become familiar. Unger has said:

13 D. S. Lev "Judicial Authority and the Struggle for an Indonesian Rechtsstaat" (1978) 13(1) *Law and Society Review* 37–71.

14 Ibid at 39. See also Lev on Legal Aid Bureaus [*Lembaga Bantuan Hukum*](LBH) in D. S. Lev "Social Movements, Constitutionalism and Human Rights: Comments from the Malaysian and Indonesian Experiences" in D. Greenberg, S. N. Katz, M. B. Oliviero and S. C. Wheatley (eds) *Constitutionalism and Democracy Transitions in the Contemporary World* (Oxford University Press, USA: 1993) 139–158

15 Lev note 12 above at 236–237.

16 According to J. Raz *The Authority of Law – Essays on Law and Morality* (Clarendon Press Oxford, England: 1979) 212.

17 F. A. Hayek *The Road to Serfdom* (Routledge & Keagan Paul, London: 1944) 54.

18 P. Selznick *Law, Society and Industrial Justice* (Transaction Books, New York: 1969) 5.

> In the broadest sense, the rule of law is defined by the interrelated notions of neutrality, uniformity, and predictability. Government power must be exercised within the constraints of rules that apply to ample categories of persons and acts, and these rules, whatever they may be, must be uniformly applied.[19]

More recently, in the context of the rule of law in Indonesia, Goodpaster has said:

> Rule of law systems, at least in ideal form, are characterised by widespread, general obedience to reasonably clear, enacted rules or authoritative interpretation of rules; in other words, rule-based behaviour.[20]

As described by Goodpaster, the existence of the rule of law will mean that citizens are aware of what will occur if they do or fail to do something. In this way, the law stands outside the activities of both government and citizens, who each have rights and obligations, and accordingly are equally bound by it. The law operates to create 'structures of expectation'[21] that guide the behaviour of officials and the activities of citizens.

This conception of the rule of law does not enter into the content of particular laws, fundamental rights or concepts of equality or justice. Taken literally, "the rule of law" means that the law should rule both the government and citizenry. However, to do so, the law must be capable of guiding the behaviour of its subjects: laws must be *capable* of being obeyed. Subjects must be capable of finding out what they are required to do and acting on it.[22]

At this formal level, the most basic requirement of *negara hukum* and the rule of law is that law contains rules that are fixed before their application and have a relatively certain meaning. This requirement explains how an independent judiciary can operate. The division between judicial, and legislative power and between judicial and executive power, allows lawmakers to devise policies that take into account political, social and economic considerations in accordance with democratic processes. At the risk of oversimplification, it can be said that once policies have been agreed by the executive, they are rendered into legal rules in legislation that bind citizens and government alike. The judiciary, as a separate body of authority, interprets and applies the law. As the rules are fixed beforehand and have a relatively certain meaning, the judiciary *can be* separate from the policy making branches of government and be free from outside influence.

19 R. Unger *Law in Modern Society* (The Free Press, New York: 1976) 177.

20 G. Goodpaster "The Rule of Law, Economic Development and Indonesia" in Lindsey above note 12 at 21.

21 Ibid. Goodpaster uses a phrase from N. A. Luhmann, *A Sociological Theory of Law*, King E & Albrow M (trans.), Albrow M (ed) (London, Routledge & Kegan Paul, 1985) at 73.

22 Raz note 16 above at 214.

The "Legal Rule" and the Rule of Law

At this point, the role of the legal rule within a formal conception of the rule of law becomes clearer.[23] The importance of an independent judiciary is bound up with the idea that legislation contains rules with an internal logic that can be applied by the courts through independent and reason-based decision making. This form of rule has a generalised statement of operative facts and a consequence attached to the fulfilment of those facts. There is a deductive logic which follows an "*if* X *then* Y" sequence that is identified by the courts in determining whether the operative facts have been fulfilled and then applying the consequence set out in the rule. The courts are *able* to be separate from the legislature and the executive, and to function independently, because laws contain this sort of rule. In its ideal form, a legal rule is drafted in such a way that the courts can first, determine whether the operative facts are made out and second, apply the pre-determined consequence.

Within a sociological analysis of law, Luhmann has described the evolution of law from formulations of behavioural expectations 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.[24] Weber before him traced the same development away from substantive rationality towards formal rationality where law and ethics are separated from each other and where significance in both substantive law and procedure is given exclusively to operative facts that are determined generically.[25]

As elaborated by Luhmann, law is no longer lodged in events themselves, but "only in the norm which serves the basis of legal evaluation of events."[26] Luhmann has argued that "modern" law imitates a decision-making program for the elaboration of collectively binding decisions. In that decision-making program, the general form of legal norms allows them to operate exclusively as conditional programs. The tendency towards the conditionalisation of legal norms is seen in the

23 A. Scalin "The Rule of Law as a Law of Rules" (1989) 56 *University of Chicago Law Review* 1175 at 1178–80 argues for rules over more loosely defined standards and multifactor balancing tests. However, R. H. Fallon "'The Rule of Law' As a Concept in Constitutional Discourse" (1997) 97(1) *Columbia Law Review* 1–56 takes a more sophisticated approach through the development of four ideal types of rule of law. He concludes that the rule of law needs to be understood as a concept of multiple and complexly interwoven strands (see 28–30). Whilst it may be incorrect to *rely* on rules, his reasoning does not deny the importance of legal rules to the rule of law.

24 N.A. Luhmann *A Sociological Theory of Law* E. King & M. Mackie (trans.), Martin Albrow (ed), (London: Routledge & Kegan Paul, 1985) at 174.

25 M. Weber *Law in Economy and Society* (Harvard University Press, USA: 1966), Art. 8 especially 224–226 and Art. 11. See also, S. L. Roach Anleu *Law and Social Change* (SAGE Publications: England: 2000) 24.

26 Luhmann note 24 above at 141.

expression of legal propositions as well as in the reasoning within judicial decisions. In this way, uncertainties that are involved in higher complexity can be managed more easily through conversion into "congruently expectable conditions".[27] As stated by Luhmann, the basic form runs as follows:[28]

> If specific conditions are fulfilled (if previously defined constituent facts are given), then a certain decision has to be made.

Luhmann sees conditional programs as having specific advantages for people living in complex social systems. He says that although it may remain uncertain whether or not particular factual behaviour will occur and whether a particular sanction will be imposed, the level of uncertainty is made bearable by adopting a form of "contingent insecurity", that is, by placing the contingency of behaviour and contingency of sanction into a selective if/then relation.[29]

What is Required to Formulate a Legal Rule?

The Distinction Between Principles and Rules

It is widely agreed that one of the defining features of law is that it is an institutionalised normative system.[30] As such, legislation is made up of normative statements. A normative statement guides behaviour by indicating that something 'ought' or 'ought not' be done.[31] This can be achieved by the formulation of legal rules or principles; however, only legal rules remove any element of optionality in deciding what 'ought' or 'ought not' be done. Ideally, it should always be clear whether a law has created a principle or a rule.

The formulation of legislative principles is an important aspect law making, particularly in a new area of law. For example, in environmental law a number of principles have been formulated in international environmental law instruments, which are then adopted in national statutes such as:[32]

27 Ibid at 174–175.
28 Ibid at 174.
29 Ibid at 175.
30 Raz observed '[m]any, if not all, legal philosophers have been agreed that one of the defining features of law is that it is an institutionalised normative system'; note 16 above at 105.
31 G. H von Wright *Practical Reason: Philosophical Papers 1* (Basil Blackwell Publisher Limited, England: 1983) 67–68.
32 These principles are taken from *The Protection of the Environment Administration Act* 1991 (NSW).

- inter-generational equity

  The present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations.

- the polluter pays principle

  Those who generate pollution and waste should bear the cost of containment, avoidance or abatement.

In western jurisprudence, there is a dispute about whether a sharp distinction can be drawn between rules and principles. According to Dworkin, a principle is "a standard that is to be observed, not because it will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality."[33] In comparison to a principle, according to Dworkin, rules are applicable in an "all-or-nothing fashion".[34] He said, "if the facts which a rule stipulates are given, then either the rule is valid, in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing to the decision."[35] In his view, principles do not set out legal consequences that follow automatically;[36] principles have a dimension of weight or importance, and so if one principle conflicts with another, its importance must be assessed.[37]

The distinction drawn by Dworkin between rules and principles provides a useful reference point to show that they operate in different ways. However, his representation of principles appears to be too narrow in the context of a new area of law making such as environmental law where the formulation of principles is directed towards identifying goals for changing behaviour. Hart rejected the sharp distinction drawn by Dworkin by saying that the difference between rules and principles is a question of degree: relative to rules, principles are broad, general, or unspecific; however, rules can also vary in their conclusiveness. He says that an important distinction is that a principle has an explanation or rationale that contributes to its justification.[38] Hart also differs from Dworkin in that he says a rule may have a dimension of weight and where rules conflict the more important rule will survive to determine the outcome.[39]

Hart suggests that a more reasonable contrast is between "a non-conclusive principle" and "a near conclusive rule". He says that in the former, any decision is

33 R. M. Dworkin *Taking Rights Seriously* (Duckworth, London: 1978) 22.
34 Ibid at 24.
35 Ibid.
36 Ibid at 25.
37 Ibid at 26.
38 H. L. A. Hart *The Concept of Law: With a Postscript Edited by Raz J and Bullock PA* (Clarendon Press Oxford, England: 1994) 260.
39 Ibid.

merely pointed to; however, in the latter the satisfaction of the conditions of application suffices to determine the legal result except in a few instances.[40] This arrangement may be depicted as follows:

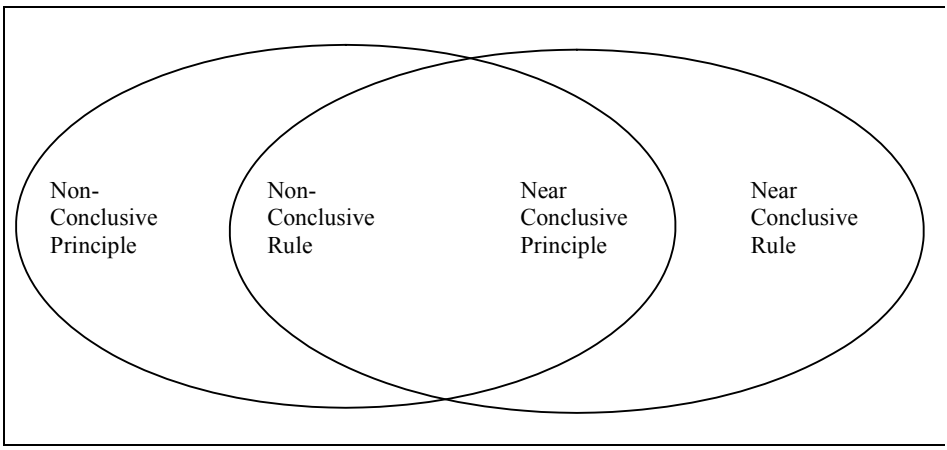

Diagram depicting principles and rules in relation to their conclusivity:

This diagram depicts the Hartian distinction between a non-conclusive principle and a near conclusive rule. However, it also identifies proximity between rules and principles where a rule is non-conclusive and a principle is near conclusive. Whilst optionality is an essential element of a principle, the weight and level of detail contained in a principle may increase its weight so that it resembles a rule. Conversely, a rule may be so broad, general or unspecific regarding the action that is required that it resembles a principle.

It is being suggested here that in reading legislation, the ability to distinguish between the expression of a legal principle and a legal rule is particularly important. The question that arises in Indonesian legislation is, can they be easily distinguished and, if so, how?

40 Ibid at 263. As Hart acknowledged, arguments from such non-conclusive principles are an important feature of adjudication and legal reasoning and his use of the word 'rule' is not meant as a claim that legal systems comprise only 'all-or-nothing' or near conclusive rules; at 263.

The '*if* X *then* Y' Logical Structure

As mentioned above, the logical structure of "*if* X *then* Y" is the essential structure of the "legal rule". Despite variations that appear in grammar and syntax, a legal rule always contains an "*if* X *then* Y" underlying structure.[41] It can always be analysed and restated as a compound conditional statement in the form of "*if* X *then* Y". According to Twining and Miers, the first part, "*if* X", which is known as the *protasis*, is descriptive as it indicates the scope of the rule by designating the conditions in which the rule applies. The second part, "*then* Y", known as the *apodosis*, is prescriptive and states whether the type of behaviour governed by the rule is prohibited, required or permitted. A normative expression may not be obviously formulated in this way; however, any expression that is designed to function normatively as a rule must be capable of being reduced, expanded, analysed or translated into this logical structure.[42]

An example of a simple rule would be, "[a] person who travels on a train without a ticket is guilty of an offence." The "*if* X ..." is the part that states "[i]f a person travels on a train without a ticket". It indicates the scope of the rule as applying to any person who travels on a train without a ticket. It is the factual predicate – the consequence will be predicated on proving that there was a person who travelled on a train without a ticket. It also provides the basis for the determination of the operative facts relevant in the application of the rule.[43] For example, the fact that the person had money in their wallet to pay for a ticket and intentionally chose not to buy a ticket, is not an operative fact as it is not stated in the "*if* X". The prescriptive "... *then* Y" part of the rule indicates the consequence of the rule, that is, "... that person has committed an offence." It can be seen that the consequence follows automatically once the factual predicate is made out, unless there are some provisos or exceptions stated in the rule.

Express Normativity in Commands and Authorisations

Most modern statutes contain statements of objectives, commands (obligations and prohibitions), permissions and supportive provisions. This arrangement can be

41 W. Twining and D. Miers *How To Do Things With Rules* (Weidenfeld and Nicolson, London: 1982) 137–8. See also G. H. von Wright GH *Practical Reason: Philosophical Papers 1* (Basil Blackwell Publisher Limited, England: 1983) 68.

42 G. Gottlieb G *The Logic of Choice* (Allen and Unwin, London: 1968) 40.

43 According to Twining and Miers, it should contain all the ingredients of the rule that could give rise to a question of fact in a particular case governed by the rule: the person or persons whose behaviour is governed by the rule (the agent); the type of behaviour involved (acts, omissions, activities); and the any condition under which the rule applies (for example, the absence of permission). In this way, all the ingredients that have a bearing on the scope of the rule should be stated. See Twining and Miers above note 41 at 138.

found in Anglo-American legislation in the common law tradition and statutes within the civil law tradition, such as in Indonesia. Legal rules provide normativity to the whole arrangement. Legal rules can have a complex structure including exceptions. At times, they build on permissions and rely on supportive provisions such as definitions and cross references (both within a piece of legislation and between statutes).

A key aspect of creating norms in legislation is the formation of commands (obligations and prohibitions) and normative authorisations. To do so, certain normative words are used such as shown below:

	Prohibited	**Obliged**
Words preceding	must not ...	must ...
words following	... is prohibited	... is required ... must be done

In the Anglo-American legislative drafting tradition, legal rules have been expressed using a variety of arrangements of syntax and grammar and, for this reason a distinction can be made between the notion of a legal rule and the formulation of the rule.[44] However, the Plain English language movement, has eroded much of the previous variety in legislative drafting. In particular, there is now general agreement on the choice of words to indicate normativity in legislation. It is now accepted that an obligation is indicated by the word 'must' and a prohibition by the words "must not".[45] By way of contrast, non-normativity or optionality, is indicated by the word 'may'.

Moving in a similar direction, as a result of *Act No. 10 of 2004 on Formation of Laws*, Indonesia has also set certain words to indicate normativity. [46] The use of the word *wajib* is now prescribed usage to indicate an obligation or duty. Another word, *harus*, which connotes that something is imperative has been confined to indicate that there is a condition to be fulfilled before something can be obtained (such as a

44 Ibid at 137–8.

45 Office of Parliamentary Counsel, Australia, Plain English Manual: <http://www.opc.gov.au/about/docs/pem.pdf> at 19.

46 Appendix, Chapter Three, Part B, 'Choice of Words and Terminology' Pts. 229–234. It can be seen that a wider range of words are used to indicate the fundamental distinction between a command and permission. Space has not permitted an examination of variants within Indonesian concepts of normativity, which derive from Dutch law and include behavioural norms (*norma tingkah laku*), determining norms (*norma penetapan*) and norms of authority (*norma kewenangan*).

licence). The word to indicate a prohibition is *dilarang* (is prohibited). Also, as a result of the Act, the words for permissions have been clarified. *Dapat* (may) is now prescribed to indicate the existence of a discretion. However, the word *berwenang* (to be authorised) can be used to indicate a grant of authority and *berhak* (to have a right) indicates that a person has a right to do something. It can be seen that similar trends are occurring across legal traditions but that in Indonesia there is still a greater variety of words to indicate normativity or the lack thereof.

An authorisation can also be normative, depending on how it is granted. An authorisation is a statement that makes it clear that something is positively permitted. It will only be normative where it grants permission to do something on the fulfilment of a condition(s). Authority granted to a public official will be normative where the official is able to exercise public power in certain situations or on meeting certain provisos. In this way, a conditional permission can constrain the exercise of public power and provide mechanisms for accountability. An authorisation concerning the public will be normative when permission is granted to do something that would otherwise be prohibited, on meeting certain conditions such as obtaining a licence. However, if no conditions are attached, the authorisation will not be normative and will essentially set out what may be done as an unconditional permission.

Identifying Legal Rules in Indonesian Environmental Legislation

Has a Legal Principle or a Legal Rule Been Created?

After reviewing a range of environmental legislation in Indonesia, it appears that there is a strong tendency to blur the distinction between the drafting of a principle and a legal rule. It is difficult to find provisions that are clearly identifiable as statements of principle through the use of the word "should" (*seharusnya*).[47] However, many provisions could read as either a rule or a principle. Many provisions are drafted without normative vocabulary, with the result that they could be interpreted as a principle. One example is the Constitutional basis for the protection

47 The author conducted a search of the word '*seharusnya*' through a CD compilation of environmental law made by the German Technical Aid Agency – GTZ in cooperation with the Ministry for the Environment. This compilation covers sectoral environmental law as well as law created by the Ministry for the Environment. On the odd occasion *seharusnya* appears in an Elucidation or a definition.

of Indonesia's natural environment (Art. 33(3)), which states "[l]and, water and the natural resources therein are controlled by the state and utilised for the greatest welfare of the people."[48] This provision could be a principle to the effect that the state *should* control and utilise land, water, and natural resources for the greatest welfare of the people and use its best endeavours to do so.

Another example is the article on environmental management in *Act No. 23 of 1997 on Environmental Management*, which states (Art. 9(2)):

> Environmental management is performed in an integrated manner by government institutions in accordance with their respective fields of tasks and responsibilities, the public, and other agents of development while taking into account the integratedness of planning and implementation of environmental management tools.

The provision on public participation could also be interpreted as a principle as it states (Art. 7):

1. The community has the same and the broadest possible opportunity to play a role in environmental management.
2. Implementation is carried out by:
   (a) increasing independence, community empowerment and partnership
   (b) growth of community capability and initiative
   (c) increasing community responsiveness in carrying out social supervision
   (d) providing suggestions
   (e) conveying information and/or report.

These provisions seem to merely describe that which occurs, or which ideally occurs. The normative word "must" (*wajib*) does not appear. As a result, before it can be interpreted as being normative, an obligation has to be implied into the provision. However, the style of legislative drafting makes it unclear whether a "should" or a "must" is intended – this distinction is important, as only a "must" clearly removes the element of optionality.

The Search for Commanding Words

As mentioned above, in the Anglo-American legal system, the use of the word 'must' expressly indicates that a positive obligation has been imposed. It would seem a good place to start to see where this word appears in *Act No. 23 of 1997 on Environmental Management*. It can be seen that the word *harus* only occurs peripherally[49] in the

48 "*Bumi, air, angkasa, dan kekayaan alam yang terkandung di dalamnya dikuasai oleh negara dan dipergunakan untuk sebesar-besarnya kemakmuran rakyat*'.

49 As mentioned, above note 46, the required practice since 2004 is to use the word *wajib*; however, until the passing of this Act, the word *harus* was also used to indicate an obligation.

Preamble and in the definition of environmental quality standards; however, it does appear in the Elucidation a number of times.[50] Most frequently *harus* appears in the General Section of the Elucidation, which does not relate to any specific operative provisions. For example, there is a passage that states:

> There are reciprocal relations between humans, the community and the environment, which must always be fostered and developed so that dynamic harmony, proportion and balance is maintained.

In relation to the operative provisions of the Act, the Elucidation imposes obligations through the use of *harus* in an number of areas such as licensing, environmental audits, where it says they "must be publicly available" (Art. 29(5)) and the requirements that must be met by NGOs before they will be granted legal standing.

An important passage is the elucidation of Article 18(3) on licensing, which states:

> The license to carry out a business and/or activity must assert the obligations associated with compliance to stipulations in environmental management, which must be implemented by the party responsible for a business and/or activity in carrying out their business and/or activity. For a business and/or activity which is obliged to make or implement an environmental impact analysis, the environmental management plan and monitoring plan which must be implemented by the party responsible for the business and/or activity must be included and clearly formulated in the license to carry out the business and/or activity.

It can be seen that this provision is poorly constructed in that it contains a number of significant rules that run on from each other in a confusing way.

Act No. 23 of 1997 on Environmental Management contains more provisions that use the word *wajib*; however, the exact nature of the obligatory activity is left unspecific. Often, delegated regulations are required to make the meaning conclusive. As a result, a single piece of legislation does not consist of self-contained rules but needs to be "pieced together" with regulations and other instruments lower down the legal hierarchy.

An example of an obligation is where it is stated that the government "must" (*berkewajiban*) carry out certain actions, namely (Art. 10):

(a) form, develop and increase awareness and responsibility of decision-makers in environmental management
(b) form, develop and increase the awareness of community rights and responsibilities in environmental management

50 Indonesian statutes invariably are drafted in two parts – one is the body of the Act and the other is the Elucidation, which contains a range of material ranging from general background, explanations of policy to additional legal rules. Each article in a statute is covered in the elucidation; however, if it is considered by the legal drafter that clarification is not necessary it will be simply stated that it is 'sufficiently clear' [*cukup jelas*].

(c) form, develop and increase partnerships between the community, business and the government in the effort to preserve environmental supportive capacity and carrying capacity
(d) develop and apply national policy for environmental management which ensures the maintaining of environmental supportive capacity
(e) develop and apply instruments of a pre-emptive, preventative and proactive nature in the effort to prevent decreases in environmental supportive capacity and carrying capacity
(f) exploit and develop environmentally sound technology
(g) carry out research and development in the environmental field
(h) provide environmental information and disseminate it to the community
(i) give awards to meritorious people or foundations in the environmental field.

The problem with these provisions is that whilst they impose obligations they are expressed very generally.

Another example of an obligation using the word *wajib* is the obligation on 'every person' to 'preserve the continuity of environmental functions as well as prevent and combat environmental pollution and damage' (Art. 6(1)). The consequence of this obligation is very broad. Everyone living in Indonesia is likely to be in breach, depending on its interpretation. A benefit from this style of drafting is maximum flexibility in its application; however, any attempt to enforce the obligation will be unpredictable - it may be necessary to prove that a person has failed either to preserve "the continuity of environmental functions" or to "prevent and combat environmental pollution and damage."[51]

A more tailored obligation that applies for environmental impact assessment (EIA) is (Art. 15(1)):

> Every plan of a business and/or activity that can give rise to a large and important impact on the environment must possess an environmental impact analysis.

This rule has a readily discernable "*if* X *then* Y" structure, as follows:

> If a plan of a business and/or activity can give rise to a large and important impact on the environment then it must possess an environmental impact analysis.

However, it does not state the subject of the obligation or what is intended by "plan of a business or activity". For this reason, the precise stage at which an EIA is required in the approval process is not stated. The rule is also uncertain in relation

51 It is worth noting that the definition of 'environmental pollution' is rather complex (Art. 1 (12)). It is "Environmental pollution is the entry or the entering into of living creatures, substances, energy, and/or other components into the environment by human activities with the result that its quality decreases to a certain level, which causes the environment not to be able to function in accordance with its allocation."

to its consequence. It cannot only mean that a business or activity must "possess" (*wajib memiliki*) an EIA. To be practical, it must mean that the EIA has been submitted to, assessed and approved by an authorised government agency. Whilst it may be intended to convey that the owner or operator of a business or activity is required to furnish an *approved* EIA to the licensing authority before receiving a licence, this is not stated explicitly.

Another obligation applies to the management of waste as follows to the effect that "[e]very party responsible for a business or activity must carry out management of waste produced by their business and/or activity" (Art. 16(1)). This provision has a slightly different scope as it is directed to "every party responsible" for a business or activity. The notion of responsibility is not explained. The consequence is also non-specific; for example, it is not clear what the objective of management of wastes is, or how it can be measured.

A similarly vague rule on hazardous and toxic waste has been formed to the effect that "[e]very party responsible for a business and/or activity must carry out management of hazardous and toxic materials" (Art. 17(1)). Again, it is not apparent how to assess the extent to which this obligation is being met. It is stated that the obligation applies to the production, transportation, distribution, storage, use and disposal of hazardous and toxic materials (Art. 17(2)) but no detail is given in relation to each of these activities.

The Search for "Must Not" Words

Act No. 23 of 1997 on Environmental Management only imposes four prohibitions. One is a prohibition is against the breach of environmental standards and another is a prohibition against waste disposal without a licence. The remaining two prohibitions relate to the importation of hazardous and toxic waste. This arrangement contrasts with some sectoral environmental legislation, where there are strong prohibitions. For example, in *Act No. 41 of 1999 on Forestry* there is a long list of prohibitions against a range of activities that may damage forests (Art. 50(3)). Other examples of strong prohibitions are found in *Act No. 5 of 1990 on Biological Natural Resources and their Ecosystems*. This raises a question why there are so few prohibitions in the only specifically environmental law statute?[52] This minimalist approach may be compared to the approach to environmental law in the USA, where it has been stated that "all the great laws are prohibitive and sweepingly so."[53]

52 A prohibition has the potential to be stronger than an obligation as it is often easier to identify what is *not* to be done.

Locating Legal Rules Governing the Exercise of Public Power

A Norm or Simply an Unconditional Permission?

Public power can be legislative, judicial or administrative (usually a combination of legislative and judicial power). Laws that confer public power have been called *power-conferring* laws. In setting up a system that will be implemented by government, authority needs to be apportioned between the various sectors and agencies of government. Power-conferring laws have a clear role in this regard – they set out who is to do what in the overall scheme of things. As power-conferring laws are not backed by sanctions, the question has arisen as to whether they are normative.[54] Hart argued that as power-conferring laws are concerned with activity that serves a social purpose (purposive activity) they are normative.[55]

However, in examining this issue further, Raz has identified some power-conferring laws that will not be norms, namely, *permission-granting* laws. Permission-granting laws state that a government official is permitted to (or may) carry out a certain activity or take a particular action.[56] A permission-granting law does not use an "*if* X *then* Y" structure unless it attempts to guide behaviour by imposing conditions. If a provision merely enables something to happen it can be regarded as an *unconditional permission*. Raz argued that such laws are not in themselves normative although they may have internal relations to normative laws.[57]

The word *may* shows that a provision in Anglo-American legislation is clearly permission-granting. As mentioned above, the *Bahasa Indonesia* equivalent is the word *dapat*. This word occurs in *Act No. 23 of 1997 on Environmental Management* in a number of situations. For example, in relation to environmental supervision it is stated that "[t]o carry out the supervision provided for in (1) above, the Minister may (*dapat*) appoint officials with authority to carry out supervision (Art. 22(2))". Other examples are found in the sanctions provisions (Art. 27), which state:

> (1) Sanctions in the form of revocation of business and/or activity licences may (dapat) be imposed upon certain infringements
>
> (2) The regional head may (dapat) submit a proposal for the revoking of a business and/or activity license to the authorised official

53 W. H. Rodgers "The Seven Statutory Wonders of US Environmental Law: Origins and Morphology" in R. V. Percival and D. C. Alevizatos (eds) *Law and the Environment* (Temple University Press, USA: 1997) 320–327 at 326.

54 J. Raz *The Concept of a Legal System – An Introduction to the Theory of Legal System* (Clarendon Press, Oxford: 1980) 168–169 and Hart note 38 above at 27–33.

55 Hart note 38 above at 39–42.

56 Raz note 54 above at 172.

57 Ibid at 174.

> (3) A party that has an interest may (dapat) submit an application to the authorised official to revoke a business and/or activity licence because their interests are adversely affected.

Also, in the section on class actions, it is stated that (Art. 37(2)):

> If it is known that the community suffers as a result of environmental pollution and/or damage to such an extent that it influences the basic life of the community, the government agency which is responsible in the environmental field may act (dapat bertindak) in the community's interest.

In each of these situations, the word seems to function as a grant of unconditional permission rather than a norm.

When an implementing government regulation was examined for its use of the word *dapat*, similar patters of legislative drafting were found. In *Government Regulation No. 82 of 2001 on Water Quality Management and Pollution Control*, it is stated that [c]entral government may (*dapat*) delegate its responsibilities to provincial or district government (Art. 6). It is also stated that central government (Art. 11(1)) and provincial government (Art. 12(1)) may (*dapat*) set more rigorous water quality standards than those set out in the Regulation. In addition, the management of waste may (*dapat*) be done through the development of integrated facilities and infrastructure for the management of household waste (Art. 43(4)) and may (*dapat*) be carried out in cooperation with third parties in accordance with existing legislation (Art. 43(5)). These provisions appear to act as *enabling* provisions; they enable government to embark upon certain actions or activities.[58] As such they appear to fall short of imposing express normativity.

The lack of certainty caused by this situation was shown in the case of *27 People v PT Vewong Budi Indonesia, PT Sinar Bambu Mas and PT Budi Acid Jaya,*[59] where the court interpreted the provision on class actions mentioned above as meaning that an environmental agency must be joined to a class action before it can be heard by the courts. In that case, a claim brought by a local community, who sought to bring a class action for environmental damage to their water resources, was rejected on a technicality. The court found that the plaintiffs were required to join the local environment agency in Lampung to the proceedings before the court could hear the claim. It also found that the environment agency had not fulfilled its supervisory functions as set out in Articles 22–24 in the Act. The decision in this case gives a contrary interpretation to the word *dapat*, which throws into doubt a linguistic basis (based on the choice of word – *dapat* or *harus/wajib*) for distinguishing when normativity is intended.

58 Another word used in the conferral of public authority are 'is authorised' [*berwenang*], which appears to be merely permission-granting. The allocation of responsibility [*bertanggungjawab*] is less clear as an allocation of responsibility could imply an element of obligation.

59 Medan District Court, Decision No. 04/Pdt.G/2000/PNM, 4 September 2000.

Where are the Conditional Permissions?

As mentioned above, a permission-granting provision can be contrasted with an authorisation that is conferred as conditional permission. The conditional permission is a particularly important kind of rule for the constraint of discretionary authority. In administrative law, behaviour is guided by conditional permissions; where administrative authority is exercised beyond the grant of power it can be annulled and, similarly, subordinate regulations can be invalidated if drafted for purposes beyond the grant of power. Whilst such an outcome does not amount to a sanction, it operates to strengthen normativity within provisions that confer public power.

The difficulty in Indonesian legislation is how to determine whether a grant of public power is a conditional permission? If legislation does not state something directly, interpretation will be required leading to uncertain results. An example is the Constitutional basis for the protection of Indonesia's natural environment mentioned above (Art. 33(3)) – is it a condition of the exercise of the government's power that it be exercised 'for the greatest possible public welfare'? In *Act No 23 of 1997 on Environmental Management* this provision is repeated – does it mean that the exercise of power that is not "for the greatest possible public welfare" is invalid? If so, how is "for the greatest possible public welfare" to be interpreted?

The Act goes on to state that (Art. 9(1)):

> The government determines national policies on environmental management and spatial management whilst always taking into account religious values, culture and traditions and the living norms of the community.

The words "whilst always taking into account", seem to indicate a condition on the exercise of the authority to determine national policies. The Elucidation states that "attention must (*wajib*) be given to the potential, aspirations, and needs along with values which emerge and develop in the community." This makes the condition more definite, but why it has been placed in the Elucidation rather than the statute itself? Furthermore, it leaves great scope for interpretation as to the meaning of "religious values, culture and traditions and the living norms of the community."

Why the Passive Voice?

A command or authorisation can be given in the active or passive voice. In an active voice, the subject will be an actor, whereas in the passive voice, the subject will be the patient and naming the actor can be avoided. A simple situation, which indicates the

difference between an active and a passive expression, is when a boy, who has broken a window whilst playing ball, is questioned by his mother. He may respond in the passive voice by saying, "the window broke". Alternatively, he may say in the active voice "I broke the window". When he says "the window broke" he avoids admitting that he (as the actor) broke the window. In legislative drafting, it is particularly important to identify an actor who is also the legal subject. The legal subject is the recipient of the obligation or permission and is the one who carries out the action. If the legal subject is not clearly stated, the rule will suffer from vagueness.

In *Bahasa Indonesia* the passive voice, rather than the active voice, is often preferred as being a more polite form of expression.[60] Whilst the legal subject can still be stated using the passive voice, the fact that it does not need to be stated can lead to its omission by accident or habit. There may be reasons for omitting the subject: the legal subject may be obvious, or anyone or not yet determined.[61] However, such reasons are not accepted as good practice in legislative drafting.[62] The legal subject should be clear and even if the identity can discerned, it should be stated directly. If the action can be carried out by anyone, this is something that should also be clearly stated.

For the legal effect of a rule to be made explicit, relevant factors will be:

- the construction: passive/active voice
- normative vocabulary: obligation/no obligation
- legal subject/no legal subject

The result can be reproduced in table form as follows:

ACTIVE VOICE

	Normative vocabulary	**Uncertain normative vocabulary**
Legal subject	Certain normativity with certain legal subject	Ambigious normativity with certain legal subject

60 J. N. Sneddon *Indonesian Reference Grammar* (Allen and Unwin, Australia: 1996) 254.

61 Ibid at 253.

62 A. Seidman, R. B. Seidman and N. Abeyesekere *Legislative Drafting for Democratic Social Change – A Manual for Drafters* (Kluwer Law International, London: 2001) 238.

PASSIVE VOICE

	Normative vocabulary	**Uncertain normative vocabulary**
Legal subject	Certain normativity with certain legal subject	Ambigious normativity with certain legal subject
No legal subject	Certain normativity with uncertain legal subject	Ambigious normativity with uncertain legal subject

The above table shows that the use of the passive voice, when combined with uncertain normativity, creates obstacles for formulating near conclusive rules.

A review of use of voice in *Government Regulation No. 82 of 2001 on Water Quality Management and Pollution Control* shows that the active voice is often used with expressly normative vocabulary in rules directed to the general public. The only instances where the passive voice is found are in relation to the use of government wastewater treatment facilities (Art. 24(1)) and in the procedural rule that requires a self-monitoring report be handed over to the Mayor every three months (Art. 34(3)).

In contrast, many of the rules concerning government activities are cast in the passive voice. The passive voice is found in the following rules:

- Water quality classification (non-normative, legal subject: government) (Art. 9(2))
- The establishment of more rigorous national water quality standards (non-normative, legal subject: Minister) (Art. 11(2))
- The establishment of water quality standards through the passing of a regional regulation (non-normative, legal subject: regional government) (Art. 12(2))
- The monitoring water quality (non-normative, legal subject: government) (Art. 13(1))
- The regularity of monitoring water quality (non-normative, legal subject: government) (Art. 13(3))
- Determining the status of water quality (non-normative, legal subject: government) (Art. 14(1))
- The determination of national wastewater quality standards with consideration being given to recommendations from relevant agencies (non-normative, legal subject: Minister) (Art. 21(1))
- The submitting of the inventory and sources of pollution to the Minister yearly (non-normative, legal subject: government) (Art. 21(3)).

Thus, in many instances, the passive voice is combined with ambiguous normativity. Whilst there is a legal subject, this legal subject is simply stated as "the government" or "regional government", rather than a particular government official who can be made accountable. This leads to a very uncertain result. The question that arises is – why is this so and does it reveal a reluctant attitude in formulating near conclusive legal rules concerning the exercise of public power?

Conclusion

In this article, it has been observed that when taken literally, "the rule of law" means that the law should rule both the government and citizenry and, that to do so, the law must be capable of guiding the behaviour of its subjects and government officials. At this formal level, the most basic requirement is that legislation contains rules that have a relatively certain meaning. Following Hart's approach, it has been suggested that it is useful to think of a legal system as being largely made up of principles and rules, with a basic contrast between a "non-conclusive principle" and a "near conclusive rule".

It has been shown that the style of legislative drafting in Indonesian environmental law often makes it difficult to discern whether a principle or a legal rule has been formed. It seems that one is most likely to encounter principles (both non-conclusive and near conclusive) and non-conclusive rules. The most common rule type is the obligation imposed on the community. However, when rules are drafted as obligations, the nature of the obligation is often left vague or general. Whilst prohibitions exist in some areas of sectoral environmental law, a minimalist approach to prohibitions has been taken in the primary environmental law statute, *Act No. 23 of 1997 on Environmental Management*.

The lack of near conclusive rules is particularly apparent in relation to provisions that govern the use of public power. In fact, in this aspect, legal rules are often absent. In the conferral of authority, there seems to be a preference for permission-granting provisions without any conditions attached. In addition, a notable feature of provisions concerning public power is the use of the passive voice combined with a very general description of the legal subject as 'the government' or "regional government" rather than a particular office holder.

This apparent preference for the drafting in a non-conclusive style is likely to obstruct the government's often expressed wish to foster the rule of law and legal certainty. For this reason, it is suggested that much closer attention needs to be given to the formulation of clear, precise and conclusive legal rules that are capable of binding either the government or the community according to the legislative intention.