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Akses terhadap keadilan: Sebuah pengantar tentang perjuangan Indonesia menjadikan hukum bekerja bagi semua orang [Access to Justice: an introduction to Indonesia's struggle to make the law work for everyone]

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**Akses terhadap keadilan:
An introduction to Indonesia's struggle to make the law work for
everyone**

Ward Berenschot and Adriaan Bedner

22 september 2009. Lanjar Sriyanto and his wife Saptaningsih and 10-year old son are driving on their motorcycle along a busy *district* road in Karanganyar, *Central Java*. They have visited their family for Lebaran and are now on their way home. Suddenly the car in front of them brakes. The car is too close, Lanjar cannot brake in time. As they crash into the car, Lanjar's wife falls off the motorcycle onto the other side of the road. She falls just in front of a Panther car that is coming with high velocity from the other direction. The Panther car hits Lanjar's wife with such speed that she dies on the spot.

Seven days later two men visit the house of Lanjar's family. They are the owner and the driver of the Panther car. Lanjar is away, but they talk to Saptaningsih's sister. They offer her 1,5 juta if she signs an agreement not to sue the two men for their role in the accident. The men leave with a signed letter. When, two days later, Lanjar goes to the police station to obtain his confiscated driving license, the police is no longer helpful: they yell at him and tell him that he will be jailed for killing his wife. That turns out to be no empty threat. On 9 december the police take Lanjar into custody. He is brought before a court, where he is told that is accused of criminal negligence causing the loss of life – an offense that carries a penalty of five years in prison. When Lanjar hears the accusation, he has no lawyer besides him, he has no idea how to defend himself against the accusations, and he is looking at the prospect of not only loosing his wife, but also his freedom.

This is the moment when Mohammed Taufiq hears about the case. This Solo-based lawyer decides to offer his services to Lanjar. He quickly finds out that the owner of the Panther Car was a member of local police force. It seems that he had used his contacts within the police to get Lanjar indicted in order to save himself from any accusations. On top of this there are indications that the police had also been extorting Lanjar, as he had been forced to pay one million rupiah to local officers to buy their 'cooperation'. With this story Taufiq goes to the press, and in early January Lanjar's story is all over the local newspapers¹. A facebook page is opened², there are demonstrations in front of the local court, and after the pressure forces the police to temporarily release him, Lanjar makes an appearance at the very popular 'Kick Andy

¹ See 'Istri Meninggal, Suami Dipenjara', Kompas 11 januari 2010; 'Kasus Lanjar, Polda JAteng belum temukan bukti setoran Rp 1 juta', Solo Pos 25 Januari 2010; 'Kejati Jateng Panggil Keluarga Lanjar', Kompas 17 januari 2010; 'dukungan untuk Lanjar' Kompas 11 Februari 2010; 'Sidan Vonis Lanjar Sriyanto, Kerabat Demo', Kompas 4 March 2010

² See <http://www.facebook.com/pages/BEBASKAN-LANJAR-SRIYANTOTANGKAP-PENABRAK-ISTRI-LANJAR/285803718834>

Show' on MetroTV in an item entitled 'Keadilan Sesat'³. The newspaper Kompas asks in an article "Apakah Lanjar akan diadili "demi hukum" atau "demi keadilan"?"⁴

On March 4 the court delivers its verdict, which seems to be a compromise between the demands of the prosecutors and the public outcry over the case: Lanjar is declared guilty of criminal negligence while at the same time the judge feels that his actions were due to force majeure. To the loud applause of Lanjar's assembled supporters, the judge decides that Lanjar could not be punished. Lanjar says he will not appeal the case or sue the state for the days he had to spend in jail: "Saya sudah capai dan akan kembali bekerja mencari nafkah untuk keluarga yang sempat tersita waktunya karena mengikuti kasus ini"⁵.

So was Lanjar sentenced 'demi Hukum' or 'demi keadilan'? Lanjar's experiences illustrate that justice is not merely about having just laws. Nor is justice only about having a police force and strong legal institutions. Whether justice is achieved depends on the law itself, how it is applied by legal institutions and to what extent the result corresponds to ideas about justice in society. Unfortunately, even if the law itself seems to be just, to many Indonesians it appears as an instrument to defend the interests of the rich and the powerful. In the context of a relatively inaccessible and corruptible justice system, the social inequalities within Indonesian society get translated into an unequal capacity to claim one's rights. It is not enough to be legally right: various other strengths – such as good connections ('backing'), money, legal awareness, knowledge of (police and court-) procedures, a capacity to mobilize people – are essential to successfully address an experienced injustice.

This means that, even apart from the substance of the law itself, Indonesians from lower strata of society are at a disadvantage when dealing with the justice system, since they are relatively poorly endowed with these capacities. For some people – particularly those with money, skills and contacts – the legal system is a tool to protect their interests, while for others – those without money, skills and contacts – it is an instrument used to infringe on their rights and property. In this case it seems that the owner of the vehicle that killed Lanjar's wife could make use of his contacts – as a member of the local police – to get Lanjar indicted for negligence and thus make him responsible for the death of his wife. With this indictment the owner of the vehicle could make sure that he would not have to pay compensation for the accident. The matter is not whether Lanjar was at fault or not: Lanjar had no knowledge of the law and therefore could not properly defend himself. Since he lacked influential contacts the police could easily extort money from him. As Lanjar was awaiting his trial in jail, it seemed that he would not be able to use the law to achieve justice as he was facing an opponent that had a much firmer grip on the law.

This book is about how common Indonesians go about seeking justice. It is full of stories about how people deploy the legal system – and how this sometimes differs from the official objectives underlying this system. A wide range of articles and case-studies – from struggles for labour rights in a plantation in East Java, the fight against a mining company in Maluku Utara, to the plight of migrant workers – aim to show that achieving

³ See <http://kickandy.com/theshow/2010/02/12/1793/1/1/PERADILAN-SESAT>

⁴ 'Istri Meninggal, Suami Dipenjara', Kompas 11 januari 2010

⁵ 'Dinilai Lalai, Lanjar Divonis Bersalah', Tempo interaktif, 4 maret 2010

justice is partly about adopting the right laws, but even more about ensuring that everybody can benefit equally from the existence of these laws. This book discusses the various obstacles poor and disadvantaged Indonesians face in their pursuit of redressing injustices, and it gives various reasons why the current operation of Indonesia's justice system(s)⁶ is still skewed against them.

At the same time this book is also full of examples of creative and indefatigable attempts of common Indonesians to achieve justice in the face of often overwhelming odds. It also discusses the new ways explored to pressurize the justice system in order to change the law or apply the laws even-handedly. This is the other side of Lanjar's story: his story suggests that, even when the justice system seemed predisposed against relatively powerless people like Lanjar, it is possible through demonstrations and media-attention to prevent (to a certain extent) a miscarriage of justice. The legal aid provided by pro-bono lawyers like Mohammed Taufiq or the mobilizational efforts of Lanjar's Facebook supporters seemed to have helped to make 'demi hukum' and 'demi keadilan' a bit more in line with each other. As Muhammed Taufiq put it: "Jelas jika tidak dibantu seorang pengacara Lanjar (...) ia tidak akan memperoleh keadilan. Jadi fungsi pengacara [...*what?*] respek terhadap keadilan. Karena keadilan milik semua organ, jika hukum hanya milik polisi, hakim dan jaksa."⁷

These initiatives to help Lanjar do not stand alone: in late 2009 the newspapers were full of protests against miscarriages of justice, provoking angry debates about the functioning of Indonesia's justice system. First there was the outrage over the case of Prita: after sending an email to friends complaining of the service of a public hospital, this 32 year-old mother of two children was charged with defamation and ordered by the court to pay 204 million rupiah as compensation. This court verdict provoked an unprecedented reaction: fueled by internet blogs and facebook activists, a 'coins for Prita' campaign got underway that managed to collect more than enough money to help Prita pay her fine. The court of appeal ultimately cleared her of all charges⁸. There was also the case of Nenek Minah, an old lady who in november 2009 was sentenced for a probational 45 days jail term for stealing three cacao fruits from a plantation⁹. This verdict contrasted sharply with the relatively light sentences in corruption cases involving billions of rupiahs, making even the justice minister feel embarrassed. And then there was the high-profile 'cicak vs buaya' struggle between the police force and the Public Prosecutor's Office (AGO) on the one hand and the anti corruption commission (KPK) on the other. The fabrication of evidence by prosecutors against KPK officials illustrated that the police and the AGO, two institutions central to maintaining the law, are mainly concerned with using it as a political tool to further their own interests.¹⁰ However, in the end not unlike the Prita case the 'buaya' lost out in the face of massive public

⁶ See below: the state justice system is just one of the available justice systems, as most conflicts are settled through non-state justice systems.

⁷ Personal communication with Mohammed Taufiq, 12-07-2010

⁸ 'The 'House Lizard' Vs The 'Crocodile', Tempo Magazine, No. 49/IX/August 04-10, 2009. David Jansen, 'Snatching Victory' in: Inside Indonesia, no. 100, Apr-June 2010.

⁹ 'Just Criticism, Unjust Defamation', Tempo Magazine, No. 18-19/X, January 05-11, 2010. 'People Power, Digital Style', Jakarta Globe, June 6, 2009.

¹⁰ 'An Irony of Justice in Indonesia: Old Lady Sued for Three Cacao Fruits', Kompas.com, 20-11-2009. See also 'Law minister, NGOs slam trial of grandmother for cacao theft', Jakarta Post, 21-11-2010. 'In Minah's Footsteps', Tempo Magazine, 12-18 January 2010

indignation. These events intensified the demands for a reform of the justice sector, and suggest that Indonesian civil society plays a crucial role in monitoring legal institutions and mobilizing public opinion when necessary.

While these particular cases all involved criminal justice issues, the problems are not limited to this field but involve civil and administrative matters as well. As we will briefly discuss below, this struggle for the reform of Indonesia's justice system is an old struggle which has seen many battles – battles that were often lost. This book hopes to broaden the current debate about the problems within the official justice system and to include the societal factors that lead people to perceive little of a link between 'law' and 'justice'. The main argument of this book is that in order to understand how a more just society can be achieved, attention should not only be paid to the formal laws, institutions and policies of the state's legal system, but also to the way *the access* to this legal system is skewed in favor of the privileged sections of society. As we will discuss more fully below, the concept of Access to Justice serves to highlight that the process of settling an injustice does not begin the moment a person enters a courtroom. The process of redressing an injustice starts even before one thinks about invoking a law, and involves overcoming various societal obstacles that in themselves have nothing to do with the law.

This book illustrates the importance of improving access for poor and disadvantaged Indonesians to avenues of redress with case studies dealing with injustices in four different fields: land, labour, environment and gender equality. These four areas cover some of the main areas of every-day struggles for justice in present-day Indonesia.¹¹ For each of these areas this book contains a general introduction of the general context and the issues involved in improving access to justice. Laurens Bakker discusses why disputes over land in Indonesia are so difficult to solve, Surya Tjandra how the fight for labour rights has changed over time. Adriaan Bedner explores the limitations of the litigation as well as mediation to settle environmental disputes, and Dewi Novirianti introduces the reader to the main challenges involved in fighting for gender justice. These general introductions are followed by case studies – two for each theme - of how common Indonesians struggle to address injustices they experienced. The stories and this book are a tribute to the creative, stubborn and sometimes heroic attempts of common Indonesians to overcome the hurdles on the way to justice and to thus contribute to a fairer society.

Access to Justice in Indonesia: a short history of an ideal

Even if an 'access to justice movement' is a relatively recent phenomenon in Indonesia, struggles for access to justice have been something of all times. In order to situate the current challenges of dealing with justice systems in Indonesia, we will first present a short historical overview of the development of Indonesia's state legal system. We will not go back too far, but start from the origins of modern Indonesia, which lie in the colonial state imposed by the Dutch.

When the Dutch established their first strongholds on Java and the Moluccas, their sole objectives were to establish a trade monopoly and to ensure that the spices and

¹¹ This four areas does not exhaust all the areas where access to justice is an issue: one can also think about struggles to address human rights violations, or struggles involving administrative law.

other goods they could sell in Europe were actually delivered. Gradually, this concern shifted from commerce to active exploitation, first by the local population under the guidance of the colonial state, later by Dutch entrepreneurs.

This had important consequences for the nature of the legal system introduced. As they had no wish to become engaged in 'native affairs' except for safeguarding their commercial interests, the colonial state introduced as little law and as few legal institutions as possible. This led to the imposition of a pluralist legal system based on ethnic categories (distinguishing between 'natives' and 'Europeans'), with each category ruled by its own law.

However, even the slight interference preferred by the early colonialists required adaptations to the native law and gradually an increasing number of laws was introduced which applied to the entire population. The most important among them is the Criminal Code of 1918 which is still valid today. Some new laws, however, only applied to the category of natives, thus adapting their 'customary' system, but not leading to any unification. In particular in the field of civil law legal pluralism continued to apply, with an intricate system of rules of reference in place for situations where Indonesians and Dutch (or Chinese) were engaged in business dealings together. Moreover, procedural criminal law offered far less protection to Indonesians and those equated with them than the code for Europeans, while they were also tried by different courts, some of which were far from independent.

An interesting shift took place during the first two decades of the 20th century, when the so-called 'ethical policy' became influential. This policy, which emphasised the importance of 'native welfare', did not lead to unification, but maintained the policy of non-interference – at least in civil law – in order to allow Indonesians to be ruled by the law and institutions of their own making (Furnivall 1944). It is debated whether under this system Indonesians could adequately protect their land against dispossessions by companies and the colonial government¹².

What is certain is that Indonesians could not control the legal system the colonial government had designed for them. The higher judges were all Europeans, and appeals by Indonesians were taken up by the European courts. In many cases poor Indonesians remained subject to the authority of their own officials from the local aristocracy, who could not be held accountable as they were backed up by the colonial state (Sutherland). Despite the protections in place, much land was alienated for establishing plantations and many workers were badly exploited. The victims of these practices found that the colonial legal system provided little protection against such abuses,¹³ even if slowly but gradually more rule of law elements were introduced.¹⁴ Those who did attempt to deal with this alien and incomprehensible legal system could hardly do so on their own; the remoteness of the state's legal system spawned a group of intermediaries, called '*pokrol*'

¹² According J.S. Furnivall, writing in the 1930's, the Netherlands Indies compared favourably with British colonies, notably Burma. Others, such as Lev and Breman (2010) take a far less positive view, but fail to address Furnivall's arguments. Accounts that are more positive about the colonial regime are Fasseur 1994, Sonius 1980, Tjiiook-Liem 2009, and Houben & Lindblad 1999 (about labour conditions on plantations). A thorough evaluation of how the legal system actually worked in practice is still lacking, the most in-depth study about the backgrounds to colonial legal policy is Burns 2004.

¹³ Stories of grievous encounters of Indonesians with the colonial legal system can be found in Pramoedya Ananta Toer's novels, such as *Bumi Manusia* or *Rumah Kaca*.

¹⁴ For the most thorough and nuanced overview so far see Tjiiook-Liem 2009, in particular the conclusion.

bambu', who could make a living by selling their limited knowledge of the colonial (and later post-colonial) legal system (Lev 2000: 143-161).

After independence, the independent Republic of Indonesia took over the colonial legal system almost in its entirety, but with one major change: nearly all of the traditional courts were abolished. This had disastrous effects, because the new state's courts had only a fraction of the capacity to manage the caseload that entered their dockets. In a few cases the traditional courts were even temporarily reinstated in order to overcome the main problems. Added to this organisational hardship was the rapid deterioration of the political situation in Indonesia, which put the legal system under increasing pressure. This process accelerated when the liberal Constitution of 1950 was replaced by the Constitution of 1945, which contained few guarantees for political rights and freedoms. President Sukarno was dismissive of the capacity of the law to bring about positive social change – in his words: 'you cannot make a revolution with lawyers' (Lev 2001: 172). As politicians asserted their control over the functioning of the judiciary, promotion and status within the judiciary became more a product of one's personal contacts and bureaucratic skills, rather than on the knowledge and mastery of the law (Pompe 2005). Sukarno's 'hukum revolusi' during his Guided Democracy became a random and unpredictable force, as personal influence, politics and money shaped the outcome of legal proceedings just as much as the written law did (Lev 2001: 305-321, Lindsey and Santosa 2008). The main brokers of 'justice' were the military and the remaining political parties, in particular the communist party, which just like the military preferred to take the law into its own hands.

The start of the New Order was abominable from a justice perspective, with hundreds of thousands of Indonesians (alleged) communists killed and thousands locked away in camps without any fair trial. Still, during the first few years of the New Order many jurists entertained the hope that the *Negara hukum* could be reinstated. At least the new regime managed to overcome some of the major difficulties in establishing and staffing courts over the country, but because of a lack of finances and suitable candidates the overall quality of the administration of justice dropped considerably. Worse still, the New Order gradually became more authoritarian in nature, with a bureaucratic system organised around corruption (Lindsey and Santosa 2008: 11). In such an atmosphere judges became even more subservient to political interests; the control of the Ministry of Justice over judicial appointments and transfers and the appointment of corrupt Supreme Court Chairmen undermined judicial autonomy. Individual ability and merit became increasingly irrelevant for a successful judicial career and the technical capability of Indonesian legal institutions declined. Corruption was rife as judges regularly 'sold' their judgments. (Pompe 2005, Bedner 2001, Lev 2007).

All of this led to a serious decline in respect for and trust in the ability of the judiciary to deliver justice. The most notorious case bearing testimony to this situation was the Kedung Ombo case, where the judges denied farmers proper compensation for the release of their land for a dam building project. In popular imagination the final judgment in 1994 became the symbol of judicial weakness and untrustworthiness. Justice seekers would turn to government officials or local strongmen with their grievances rather than follow the official routes.

In the New Order's analysis of the legal system at the time, they offered the Indonesian emphasis on compromise and harmony as a cultural explanation for the

random application of laws. According to Lev (2000: 188), “those who talk about rules as if they were absolute are likely to be considered obstructors, stubborn trouble-makers antisocial fools, or worse.” This was extremely worrisome in the light of the rampant human rights abuses during this period, as both the police and the army seemed – particularly in conflict areas – to be operating above the law.

It was during the early years of the New Order that the first official initiatives around Access to Justice emerged. In 1971 the Lembaga Bantuan Hukum (LBH) opened its doors in Jakarta. Founded by Adnan Nasution, this organization aimed to provide free legal advice or representation in court for those who could not afford them. LBH was an instant success, as a large number of clients flocked to its offices – LBH later expanded to other cities – to present their legal problems. Following LBH’s example legal clinics were opened by law students and lecturers in several universities and many NGOs were established that campaigned for improving the legal system in areas such as land, environment, labour, etc. In this manner the fundamentals for an Indonesian ‘Access to Justice movement’ were laid.

LBH saw its mission as going beyond providing legal assistance to poor Indonesians; Nasution envisioned that when disadvantaged Indonesians could take their cases to court, the societal structures behind deprivation and inequality could be changed. This idea was termed ‘structural legal aid’: “The injustices and oppression which we so often perceive in our society actually do not come solely from the behaviour of an individual who consciously abuses human rights, but mainly have their sources in the unbalanced patterns of social relationships. (...) This means that structural legal aid shall consist of a series of programs, aimed at bringing about changes, both through legal means and in other lawful ways, in the relationships which form the basis of social life, towards more parallel and balanced patterns” (Nasution 1985: 36). LBH acquired such a high profile through the cases it took up that, despite the revolutionary undertone of its thinking, the New Order decided to tolerate the organisation.¹⁵

The collapse of the New Order in 1998 generated unprecedented hope that, after decades of neglect, corruption and degradation, the legal system could be turned into a vehicle of positive social change. In the wave of various *reformasi* measures that restored Indonesia’s democracy, several new laws (such as the 1999 Forestry Law and the 2000 Trade Union Law) were adopted that at least in letter provided relief against the way the state and large companies had until then violated the rights of common Indonesians. One of the most important changes was the start of a sweeping programme of decentralisation, which delegated many of the powers held by the central government to the district level. This – at least in theory – would make those exercising these powers more accountable to their constituencies. The power of the army was curtailed and the Indonesian government, helped by large international donors such as the World Bank and the IMF, set about reforming its justice sector. These efforts came at the time of an international ‘Rule-of-Law revival’ (Carothers 1997): also beyond Indonesia the idea caught hold again that strengthening the institutions upholding the rule of law – the courts, the police, the public prosecutors, the legislative assemblies – is a crucial step towards democracy and economic development. Consequently large amounts of money were pouring in for training judges, improving law-making capacities, tackling corruption within the police, improving the efficiency and transparency at the courts, etcetera.

¹⁵ For more on the history of LBH, see Lev 2000: 283-305.

One decade later, both internationally and in Indonesia many consider the results of these initiatives as disappointing. The string of scandals involving judges, prosecutors and especially the police suggests that old ways are not mended easily, while the wisdom behind rule-of-law promotion efforts is increasingly being doubted. Many feel that such projects depart from (too) limited knowledge about how legal systems respond to reform measures (Carothers 2006). Some even doubt the possibility of effective rule of law development altogether (e.g. Tamanaha 2009). For Indonesia we can say that trust in most of the official legal system has not been restored.

Internationally, the critiques on rule of law development have paved the way for a renewed focus on a ‘bottom up’ approach to legal reform (see De Rooij 2007). It suggests that the focus on the improvement of legal institutions (‘top down’) is bound to benefit those who have the capacity to use the institutions, while it does relatively little for all those who never manage to take their cases to court. Consequently in international development circles the term ‘legal empowerment’ gained currency. Defined as “the use of legal services and related development activities to increase disadvantaged populations’ control over their lives” (Golub 2003: 3), legal empowerment tied both practically and conceptually into the earlier efforts to promote access to justice (see below for a discussion of these concepts). Legal empowerment has increasingly been promoted as an alternative for the ‘rule of law orthodoxy’ (Golub 2003: 3, Bruce 2007). Development agencies began to devote more energy to strengthening the capacity of common people to take recourse to formal or informal legal systems and around the world numerous projects focused on legal empowerment sprang up¹⁶. In 2008 this led to the establishment of a ‘Commission on Legal Empowerment for the Poor’ (CLEP), with various international public figures on board. Their report, *Making the Law Work for Everyone*, served to put legal empowerment firmly on the agenda of international development agencies¹⁷.

One initiative of this type in Indonesia, was the Worldbank’s ‘Justice for the Poor’ project. It combined providing legal services to the poor – such as networks of paralegals, relevant course material and trainings – with initiatives to influence policy making at the national level¹⁸. Almost simultaneously, the UNDP started its ‘LEAD’ program’ – Legal Empowerment and Assistance for the Disadvantaged – which likewise aimed to improve access to justice by promoting legal awareness and offering legal services in various provinces¹⁹. At the same time the earlier mentioned legal aid movement – and its network organization YLBHI – stepped up its pressure on the Indonesian government for more pro-poor legal reform. At the time of writing of this book a draft legal aid bill is waiting to be discussed by Indonesia’s national parliament²⁰. The national planning agency, Bappenas, contributed to these efforts by adopting a

¹⁶ For an overview of such projects, see the essays in Golub (ed) 2000 and Golub (ed) 2010), as well as Maru 2006.

¹⁷ For a critical discussion of the final report, see Stephens 2009.

¹⁸ For an overview of the project, see www.justiceforthe poor.or.id as well as Sage, Menzies and Woolcock 2010.

¹⁹ See <http://www.undp.or.id/humanrights-justice>. The Worldbank and the UNDP have not been the only development organizations active in this field; large organizations like Usaid and AusAid have also been supporting various initiatives in this field.

²⁰ This bill aims to improve the legal aid funding, as well as improving the legal status of legal aid providers

‘National Strategy Access to Justice’, a strategic plan which contains ambitious and potentially far-reaching measures to improve the provision of legal aid, strengthen local governance and improve the legal provisions in various fields. It depends on the willingness at various levels of government and within different sectors whether this strategy can actually be implemented, but as a statement of intent it is a remarkably positive signal.

As a result of these developments the focus and character of legal aid and legal empowerment has considerably broadened. In its early period the services of LBH in promoting access to justice in specific cases consisted mainly of providing representation in court. The staff of LBH received clients in their offices where they offered advice and, if needed, prepared to take a case to court. Since the 1990s the LBH offices also started training volunteers to become legal aid workers, sometimes called paralegals. They are individuals with some basic legal training (but without a law degree) who, by virtue of living close to possible clients, can help spread legal knowledge and help people deal with legal systems. Development agencies like the Worldbank and UNDP have adopted this approach. In Indonesia, where trained lawyers are scarce (and expensive) and transportation often is a hurdle, paralegals are an important tool to improve access to justice.

These latest developments suggest that Access to Justice initiatives have everything going for them: there is increased outside funding, the Indonesian government is stepping up its efforts and the media attention for failures of the justice system is creating public pressure. But much more is needed: the reach of the legal aid programs discussed above is still very limited²¹, the policy making on access to justice has hardly trickled down to local levels, and there are few indications that the police, courts and prosecution are improving their performance as a result from pressure from below. Below we will use a discussion of the ideas behind access to justice to highlight the various challenges that need to be addressed.

What is Access to Justice about: concepts and theory

The earliest uses of the concept of Access to Justice only focused on the obstacles that particularly poorer citizens faced when trying to access the courts (Cappeletti 1978, see also Bedner and Vel forthcoming). But for Indonesians Access to Justice involves a much broader set of challenges. While the importance of courts for redressing injustices has been consistently overestimated in western countries (e.g. Miller and Sarat 1981 for the US, Genn 1999 for the UK), in Indonesia the courts hardly play a role in this process anymore.

Most Indonesians settle issues informally through various mediation mechanisms, often involving local leaders or government officials. Such local, informal mechanisms for dispute mechanisms (often referred to as ‘secara kekeluargaan’) are generally preferred to the state courts because they are considered to be cheaper, faster and more satisfactory (UNDP 2007, Worldbank 2004 and 2008, Stephens 2003).

Furthermore, Indonesia has a strong tradition of legal pluralism, in the sense of multiple normative systems supported by more or less developed institutions to which

²¹ The legal aid clinics and the various LBH’s work mainly in cities, while both the programs of the World Bank and UNDP are at present limited to a few pilot villages.

people can turn. These include customary legal systems and religious ones, in particular Islamic (Bowen 2003, F. Benda-Beckman 2002, K. Benda Beckman 1984).. Thus, access to justice in Indonesia involves the access to both formal (state) and informal legal systems, and it concerns the application of more than one set of laws.

This informs our broad definition of Access to Justice: it refers to the ability of people, particularly poor and disadvantaged, to obtain proper treatment of their grievances by state or non-state institutions, leading to a redress of these grievances in accordance with human rights standards.²² This definition highlights that redressing an injustice can involve a wide range of non-state institutions and that the solution does not only have to be a judgment of a court or an adat council – it can also be the result of a process of mediation, a decision of government institutions or a simple agreement (see Bedner and Vel forthcoming). The reference to human rights standards sees in particular to the right to equality before the law and equal protection of the law without discrimination (see art. 7 of the Universal Declaration of Human Rights), but there are associated wider criteria to assess the quality of process of solving experienced injustices²³.

With this definition Access to Justice is closely related to the term ‘legal empowerment’. Originally, the emphasis of the two terms was different: the activities grouped under the term ‘legal empowerment’ focused on enhancing the capacities *of individuals* to make use of legal systems (“to increase the control that disadvantaged populations exercise over their life”, see Golub 2003: 3), while the term access to justice emphasised the need for *systemic changes* (in terms of the functioning of legal institutions and overcoming social inequalities) to allow individuals to successfully invoke the law. Recently, these two concepts have started to overlap: the definition of legal empowerment in the above mentioned CLEP report (“a process of systemic change through which the poor and excluded become able to use the law, the legal system, and legal services to protect and advance their rights and interests as citizens”, CLEP 2008:3) could also be used to refer to efforts to improve access to justice²⁴.

The focus on Access to Justice serves to criticize three common misconceptions in mainstream thinking about law. Firstly, the concept of Access to Justice serves as a reminder that the process of seeking justice does not start at the doors of the courthouse. The process of finding a remedy for a perceived injustice starts long before a lawyer or a judge applies the law to settle a case. As will be discussed more fully below, the process of seeking justice starts with the awareness of having suffered an injustice, and involves acquiring the necessary courage, knowledge, contacts, money (etc.) to address this injustice. This means that, in order to assess the capacity of the law to bring about a just society, one also has to study the process of seeking justice that takes place *before* an individual invokes the legal system. Central are questions about the interaction between

²² Another recent definition of access to justice is ‘Access to Justice is the ability of people to seek and obtain a remedy through formal or informal institutions of justice, and in conformity with human rights standards’ (UNDP 2007: 5). The Indonesian government defined Access to Justice in their National Strategy thus (Bappenas 2009): “Access to Justice means fulfilling the rights promised by the Indonesian Constitution and the universal principles of human rights. Citizens should know, understand, and be able to invoke their fundamental rights in formal and informal institutions – with the support of responsive complaint mechanisms – and this should allow them to improve their own social welfare.”

²³ For an discussion of these wider quality criteria, see Bedner and Vel (Forthcoming).

²⁴ For a discussion of different definitions of ‘legal empowerment’, see Golub 2010: 9-18 and Bruce 2007

the law and social structures: what are the obstacles individuals face when trying to deal with an experienced injustice? Do all citizens have a relatively similar capacity to address the injustices they experience? How do social inequalities – inequalities in terms of income, education, influential contacts, etc. – shape the outcome of disputes and legal processes?

Secondly, the concept of Access to Justice contains a critique of a formalistic idea of the application of the law: the idea that legal interpretation is merely the result of a mechanical, neutral application of the law. In this conception, the judges who apply the law are mere robots, who are free from outside influences and provide justice by mechanically applying the prescriptions of the law. By identifying the law with justice, such an approach to law refuses to evaluate court judgments on the basis of criteria of justice or equality, and such thinking leads to the conclusion that the adoption of just laws is enough to achieve a just society (Cappeletti 1992: 23). Any application of a rule to a case includes a moral judgment, a purely literal interpretation is simply impossible. But beyond this (important) theoretical point a cursory acquaintance with Indonesia's legal system suffices to know that in practice the idea of the 'purity' of the legal process is absurd, as personal convictions, corruption and (political) pressure routinely influences the course of justice. Therefore, the fiction is dangerous, as it serves to hide all these outside influences by positing the neutrality of the legal system. It is important to acknowledge that the legal system is an "inseparable and integrative part of the more complex social system, a part which cannot be artificially isolated from economic, ethnics and politics" (Cappeletti 1992: 25, see also Tamanaha 2001). The concept of Access to Justice can sensitize us to all these extralegal, sociological factors that shape the course of justice, in order to highlight the formulation and adoption of just laws is not enough to bring about a just society.

Thirdly, the concept of Access to Justice departs from a critique of the idea that the laws that make up a legal system are a mirror of the ideas of justice and morality that are present within society. This 'mirror thesis' (see Tamanaha 2001:) can be found in the work of many theoreticians of the law, for instance that of Lawrence Friedman, "Legal systems do not float in some cultural void, free of space and time and social context; necessarily, they *reflect* what is happening in their own societies. In the long run, they assume the shape of these societies (...)." (Friedman, quoted in Tamanaha 2001: 2).

Like the idea of the purity of the legal process, the idea of the law as a mirror of society – if used carelessly – is also a dangerous fiction. The laws that a country formulates and adopts indeed bear a relation to the norms and (moral) values present within society. But to see the law as a mirror of society as a whole is to neglect (or to purposefully obscure) the role that power plays in shaping a country's legal system. Not all groups and sections within society have a similar capacity to influence the process of law-making, even in a democracy as Indonesia. Skills, contacts and money are required to make your opinions being heard within the various legislative assemblies. In fact, laws are adopted by a relatively small elite whose interests and moral outlook are not necessarily shared by most Indonesians. As a result the legal system acquires a subtle bias against the interests and the ideas of fairness of the relatively powerless sections of societies, notably against poor and against women. For example, laws (particularly article 33 of the Constitution) that were intended to enable the Indonesian state to assume control over natural resources primarily serve the interests of the elites who stand to

profit from large plantations or large-scale mining (as similar laws served the colonial elites previously). Such laws do not necessarily correspond to the ideas of justice of the people who have been removed from their land (see Bakker 2009, Fuller Collins 2009). Similarly, one can wonder whether the numerous district regulations (*perda*) that arguably promote religious values by imposing dress codes on women or regulating their mobility at night (see Bush 2008), are a reflection of the convictions of the women concerned or a reflection of male dominance of the institutions that adopt these *perdas*. By emphasizing that laws not necessarily represent moral convictions of even a majority of the population, we can appreciate that the struggle for access to justice also sometimes involves an active engagement with existing laws and procedures.

When we study these questions and appreciate that a legal process does not start at the court, we can better understand why the ‘haves’ often benefit more from a legal system than the ‘have-nots’. This insight has led a number of socio-legal scholars to perceive the legal system mainly as a conservative force that does not challenge but rather reaffirms the inequalities within a society. In particular scholars associated with ‘Critical Legal Studies’ have pointed at the ways in which laws and legal systems seem to be neutral, but in fact are permeated by ideas that serve the interests of the privileged sections of society²⁵. The invocation of the law and the semblance of legality only serves to legitimize the existing inequalities within society. The law, in this view, is an instrument of the ruling classes to obscure and win the real struggle for political and economic inequality. CLS scholars therefore promote a radical ‘deconstruction’ of the law (meaning, basically, uncovering the biases and the power inequalities embedded in the law), rather than an effective engagement with it.

The demand for Access to Justice is fueled by a much more optimistic attitude towards the law. Initiatives to boost access to justice for the poor depart from the idea that the law, when accessible, can also become a force that can challenge social inequalities. The law is not necessarily an instrument of the ruling class; by boosting the legal capacities of disadvantaged citizens, the law can also become an instrument for them to gain more control over their lives and to address the prevailing inequalities within society. That is a central motivation behind the efforts to improve access to justice.

The Steps to Justice: Rolax as a framework for analysis

In order to understand the unequal capacities to settle experienced injustices, it is important to see how the process to address such an injustice starts long before a case ends up in court – if it ever does. The table below distinguishes, and briefly discusses, six different phases of the process of seeking justice. These phases are illustrated with examples from the case studies in this book. This table is based on the original Rolax model proposed by Bedner and Vel (forthcoming) which also incorporates insights from others (Anderson 2003, Felstiner e.a.1980, De Meene and Van Rooij 2008, UNDP 2004). The model is here slightly adjusted for the purpose of this volume. The purpose of this

²⁵ See for instance the essays in Caudill and Jay Gold 1995. A good example example is Belliotti, who argues in this book that “Law plays the fundamental role of preserving the status quo (...) As citizens further internalize the decrees of law, and come to accept these judgments as their own (...) the dominant ideology secures the “consent” of the oppressed in their own oppression. (...) Law is in part the instrument by which the disenfranchised become accomplices in their own subordination.” (Belliotti 1995: 14)

model is to unpack the process of seeking justice, and to show the challenges a justice seeker faces even before his or her case is dealt with by state or customary/religious authorities. Unpacking the process in this way helps to understand why many experiences of injustice never actually get addressed. As we distinguish these six different phases, we can see how each phase relates to different obstacles that a justice seeker faces.

The Steps to Justice

Phase:	What:	Example:	Obstacles:
1. Naming	An individual perceives a particular situation or experience to be injurious: instead of being 'natural' or 'deserved', a person defines a real-life problem as an injustice.	After years of socialization and seeing one's peers in a similar situation, an exploited poor labourer does not easily define low-wages or appalling working conditions as a problem (ch Widodo)	Being socialized to accept existing inequalities, lack of exposure, lack of awareness of one's rights
2. Blaming	An individual perceives this real-life problem to be caused by the actions (or lack of action) of others, and on this basis formulates a grievance.	A shrimp farmer realizes that the decreased haul of shrimp is not due to coincidence, but due to pollution caused by an oil company. (ch Rikardo)	Lack of knowledge, suppressing a grievance out of a feeling of powerlessness and lack of capacity to address the grievance.
3. Claiming	The justice seeker voices this grievance in terms of an injurious transgression of a particular normative or legal framework (eg. Adat, state or Islamic), and demands a remedy for this transgression.	A fired factory worker uses knowledge about labour law to claim that his dismissal was illegal and that the factory owner should be punished for this. (Ch Surya)	Lack of legal knowledge Lack of capacities to formulate one's grievance in the terms of the available (legal) framework The stigma or shame involved in making a conflict public
4. Accessing a Forum	The justice seeker is able to express his grievance and claim before a forum (a state court, adat council, village head, etc) that can help him or her to obtain a remedy.	Migrant workers working abroad face difficulties to address the abuse and exploitation they face as they do not know where to take their grievances (ch. Dewi)	Lack of financial capacity to bear cost involved. Lack of contacts. Lack of knowledge about procedures. Distrust of legal institutions.
5. Handling	The chosen forum deals with the grievance by applying applicable norms in an impartial, timely and consistent way	If the appointed mediator sides for monetary reasons with a large plantation, the victims of the expansion of the plantation cannot successfully get compensation (ch. Jacq)	Corruption within the police and the courts. Contradictory, overlapping and vague legal framework. Bias (e.g. against the poor or women) within formal and informal justice system. Power imbalances (in terms of status, money, skills or contacts) can help stronger party to influence proceedings.
6. Enforcing	The justice seeker obtains a redress	Even when judges of the	Lack of mechanisms to enforce

	for his grievance as the (court / adat council / other authority) judgment or agreement is implemented	pengadilan agama have ruled that alimony should be paid, the divorced women often find it difficult to get their ex-husbands to pay the alimony (ch. Stijn)	the judgment. Power imbalances (in terms of status, money, skills or contacts) can help stronger party to avert implementation of the judgment.
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The phases of *naming* and *blaming* highlight that the awareness of having suffered an injustice - and subsequently blaming someone for this injustice - is not so straightforward as it seems. The awareness of an injustice needs to be developed: when an individual from early age onwards has been accustomed to a situation – say, appalling working conditions or ethnic discrimination – this person might come to see this situation as a normal ‘fact of life’. It might be only after, for example, meeting similar people who do not suffer from these conditions, or after hearing about rights or (religious) norms about equality and fairness, that an awareness of a violation of one’s rights can develop. This naming of a particular experience as injurious or unjust is the first step needed to transform an everyday situation, event or problem into a process of seeking justice. The second necessary transformation is the attribution of blame to someone. The injustice will not necessarily provide a reason for action if there is no other person, group or organization that is perceived to be responsible for this injury. This is not so straightforward as it may sound: often the victim lacks the knowledge to know who or what caused the injurious experience, and often there are powerful sociological and psychological processes at work that suppress the attribution of blame. Particularly when power relations are very uneven, an individual may feel more comfortable suppressing any feeling of having suffered an injustice by the hands of someone else. When he or she lacks the capacity to address this experience and feels such an attempt will be fruitless, it can be more comfortable to (unconsciously) suppress such feelings of injustice, rather than being constantly reminded of one’s powerlessness.

So it may only be after an individual feels he has enough skills and capacities to stand a change that he or she converts the grievance into a *claim*. A claim is a demand to change the present situation perceived to be injurious: this could be a demand for compensation, a demand for punishment of the perpetrator, a demand for changed behaviour, etc. The crucial aspect of this phase is that in order to make a claim a grievance needs to be ‘rephrased’ or ‘translated’ in terms of a broader legal or normative framework. In order to convince the adversary or an authority – that could be a judge, but also the police, a village head, or customary leaders – that the claim is valid, the injurious experience should be presented as more than unpleasant or damaging – this experience should be presented as a transgression of a prevailing norm. In other words, a particular experience needs to be ‘framed’ in the language of a particular normative or legal framework²⁶.

This translation of an injustice into a justifiable claim is again not straightforward, and involves a strategic exploration of the available legal repertoire: a justice seeker needs to formulate his or her claim in a way that stands the highest chance of being

²⁶ There is an interesting literature on the role of framing in influencing public discourse and perception that is useful to interpret how a particular experience is translated into a particular legal or normative discursive framework, see the work that Goffman (1974) inspired.

successful. One can invoke different laws and norms, and in Indonesia also different legal systems - customary law, state law and Islamic law – to underpin a claim: a choice for a particular law or legal system influences how a particular claim needs to be phrased in order to be successful. While formulating this claim, a justice seeker thus has to consider which institution or person should be dealing with this claim. Depending on the situation a justice seeker may take this claim to various fora: to a state court, to customary leaders, to the village head, to a religious court, etcetera. He or she can even decide to engage in ‘forum shopping’ and address different fora. The choice for a forum requires the weighing of many different factors, such as the cost and energy involved (e.g. village mediation being cheaper and faster than the courts), the required knowledge and capacities (e.g. the court-procedures being perceived as intimidatingly complex (World Bank, 2008)), but also the kind of solution to be expected (as state, customary and Islamic laws differ on many issues) and the capacity of a particular forum to enforce a solution (e.g. whether a village head can make sure both parties live up to an agreement). This choice shapes the particular way a claim is formulated: the grievance will be formulated in terms of the legal framework that the chosen forum adheres to.

The chapter of Tjandra in this book offers a good example of how strategic calculations influence the way a particular grievance gets ‘framed’: after having been fired for organizing a strike, factory workers decided that they would not be successful to appeal the dismissal through Disnaker (the district-level department in charge of managing industrial relations, which the workers perceived to be partial) or the industrial relations court, but instead opted to take the factory owner to the criminal court by claiming that the dismissal was a breach of the 2000 Trade Union Law. The result of this strategic choice was that the factory owner was jailed, but the procedure could not undo the dismissal. Another example can be found in the chapter on the struggle against the gold mining in Maluku Utara: it was only after villagers heard from outside activists about the usefulness of presenting land to be *adat* (customary) land, that their claim for compensation from the company was phrased in terms of the company’s encroachment of *adat* land.

After having thus formulated a claim, this claim (if it is rejected by the adversary party) needs to be presented before a forum that has the authority and capacity to provide a solution. A justice seeker needs to be able to *access a forum* and make this forum listen to, and to act upon, his or her claim: the police needs be willing to register a case, a village head should be available to mediate a conflict, the court should hear a case. This fourth phase was a central concern in the early activism on access to justice in western countries – and with LBH in Indonesia as well – as in this phase the disadvantages of poorer citizens are most clearly visible: it takes money, influential contacts and also considerable skills to take successfully a case to court or another forum – all of which poorer citizens lack. Accessing a forum can appear to be a daunting task: it is scary and difficult to present one’s case before strangers, the police might be prejudiced, various clerks and middlemen might try to extort money in order to ‘smoothen’ the process, it is difficult and expensive to find a lawyer, etc.. As we will explore in more detail below, the result of these disadvantages generally is that poorer citizens have a more limited choice: as going to the police and the court is generally too expensive and complex, their best bet is to settle their grievance through more local and informal mediation mechanisms (World Bank 2008, UNDP 2007).

Moreover, the disadvantages of poorer citizens have not ended when the chosen forum – local mediation through the village head, an adat council, or a state court – finally *handles* the case. The handling of a case – the application of a normative framework (eg customary or state law) to adjudicate the claim – is easily influenced by non-legal factors. The courts are not always neutral - judges in the courts have regularly shown their willingness to be swayed by money and political pressure. For example, after managing to take an environmental dispute to court, the victims of pollution have rarely succeeded in winning a case against powerful companies (see Nicholson 2008). Similarly, non-state mechanisms – such as the mediation efforts of a village head or a *tokoh adat* - are not immune to the prevailing local power imbalances (see World Bank 2008 and McLaughlin and Perdana 2010). For example, as these informal mechanisms are usually dominated by men they often display a bias against women (see World Bank 2008: 44-48). Secondly, often the legal framework applied to settle a case is inadequate: as we will explore in more detail below, vague provisions or contradictions between existing laws about important issues like land or natural resources limit the capacities of poor villagers to protect their property.

The last phase in this process of addressing an injustice, the *enforcement* of the remedy proposed by a court or another forum, is no less important than the previous steps. Even after managing to reach an agreement or obtaining a favorable court ruling, a justice seeker can not be sure that the other party will actually abide by this solution. Still in this phase a more powerful party can convince local authorities or the police to suspend the implementation of a ruling, and sometimes these authorities simply lack the means to enforce a ruling. As for example Van Huis discusses in his chapter, even after a religious court orders an ex-husband to pay alimony or child allowance to his ex-wife, there are generally few ways to make a husband do so – even if in cases of poor people the reason often is that the husband has no money at all.. Again in this phase the limitations of the available legal systems and the power-imbalances between disputing parties conspire to obstruct the efforts to settle an injustice.

The obstacles for access to justice in Indonesia: the issues

On the basis of the above distinction of the different aspects of seeking justice, we can now identify some of the main obstacles that Indonesians face when seeking to deal with an injustice. As a preview to the case studies that will be discussed in this book, we can highlight three recurring types of obstacles for the access to justice.

a. Access to Justice and knowledge

Surveys have repeatedly shown that Indonesians have a relatively limited awareness of the rights that are granted to them by law (UNDP 2007: 52; Asia Foundation, 2001: 81) and thus limited knowledge of how the law might be employed to deal with an injustice. There are good reasons for this, as state law is not very often invoked in daily life: many Indonesians have never really had any dealings with the Indonesian justice system as they prefer to solve disputes through local mechanisms, and they are hesitant to approach a system that seems alien, corrupt, and unpredictable. But a result of this dependence on local (non-state) mechanisms is that bigger, non-local issues can appear hard to solve: even if they have a basic understanding of their rights in general, many people lack the

knowledge of how these can be invoked effectively, or in other words, their grievances are not translated into a legal claim. Illegal practices such as pollution, land grabbing, corruption (etc.) often simply persist because of the limited legal knowledge of those who suffer from these practices. This limited legal literacy leads to a dependency on intermediaries: there is a quite diverse group – ngo's, paralegals, individual case brokers ('makelar kasus' or *markus*²⁷) – who play an active role in helping people acquire legal knowledge and, if need be, present their case. As D'Hondt's chapter in this book for example illustrates, this lack of legal knowledge made villagers in Maluku Utara dependent on the support from outside NGO's.

The case studies in this book thus provide further evidence that the spread of legal knowledge and the building of 'legal awareness' – through trainings, paralegals, legal clinics, or a 'labour school' – can really help people to take up everyday injustices. As some of the labour cases as well as the land cases illustrate, initiatives of individuals and organizations to create awareness of rights and to spread information about procedures, have an empowering effect: the simple act of spreading legal knowledge can embolden people to translate their grievances into legal claims. As factory laborers in Jember and plantation workers in Sumberwadung heard about their rights - through the internet and through a labour school - they acquired the confidence to claim better working conditions. This newly acquired legal knowledge was the spark that inspired the factory laborers and plantation workers to start a lengthy battle to claim their rights.

b. Access to justice and power

The outcome of the process of seeking justice is not just shaped by the available laws, but also by the prevailing relations of power within a society. Those who have power – whether in the form of money, contacts or status – can in multiple ways stifle, distort or obstruct an inconvenient complaint or claim from a less powerful party.

In order to highlight the impact of power differentials on the process of seeking justice – and to understand where these power differentials come from – it is important devote a few words to 'power' entails and the sources of power. In the very brief space available here, we can use the work of the French sociologist Pierre Bourdieu to highlight some of the forms that 'power' can take. Bourdieu can be called a 'reproduction theorist', as a lot of his work is devoted to the question how inequalities within a society are maintained and reproduced over time. Social inequalities, Bourdieu highlighted, take on forms that go beyond a difference in income. He distinguished four main 'species of capital' to highlight existing power differentials between people: economic capital (monetary or material possessions), social capital (contacts with useful individuals), cultural capital (primarily, the possession of various forms of knowledge, including the legal knowledge discussed above) and symbolic capital (prestige and social honour). Power, defined here as the capacity to influence the behavior of others according to one's wish, is build up by acquiring these forms of capital.

²⁷ The present outcry over the functioning of *markus* goes back to the negative stigma of *pokrol bambu* during colonial times discussed by Lev (2001: 143-161): while there were and still are many Indonesians that feel that they cannot successfully deal with the State's justice system without the help of intermediaries like *Markus* or *pokrol bambu*, this dependence goes hand in hand with resentment towards those who exploit this dependence.

In his various books Bourdieu uses these four main species of capital to show how social inequalities reproduce themselves: how an individual from a privileged family can go to elite schooling (thus acquiring cultural capital), avail of useful contacts with other elites (social capital) and bank on his or her family's status (symbolic capital) in a way that enables him or her to obtain an elite-level position with much more ease than someone from a less privileged family. Societal structures – such the educational system, economic relations, control over the government, etc. – thus ensure that these forms of capital are concentrated in the hands of elites. They can use this power to maintain the societal structures that privilege them: that is how social inequalities are reproduced. It is important to emphasize that these forms of capital are not the same everywhere: the exact form that these species of capital may take, and the value that people attach to them, are a product of the society in which an individual lives²⁸.

These different species of power will be useful to interpret the case studies in this book, in particular to understand how power differentials within a society translate into an unequal capacity to benefit from the legal system(s). Privileged citizens do not just have a higher income, they also have more influential contacts (social capital), they have acquired the skills and knowledge to argue for their case (forms of cultural capital) as well as a higher social status (symbolic capital). The unequal distribution of various forms of capital limits the capacity to access justice in all the phases discussed above: a more powerful individual can use his contacts, status and money to intimidate an adversary (so that no complaint is voiced), prevent a police case from being registered, manipulate a village mediation process, bribe a judge, avert the enforcement of a judgement, etc. We will encounter such examples throughout this book: how plantations workers are threatened with PHK if they voice their complaints (economic dependence), how original inhabitants are losing their struggle for land in central Sulawesi as they lack the necessary contacts (social capital) to get the support of the police and politicians, how adat leaders in Sumba can use their hereditary status (symbolic capital) to make poor farmers accept the encroachment of a large plantation company, how the lack of legal knowledge prevented plantation workers from protesting working conditions for many years, how the economic dependency of women on husbands and employers prevents them from reporting abuse or sexual violence. In particular we will see throughout this book how important social contacts are: as in Lanjar's case above, having contacts within the police, judiciary or the bureaucracy often increases one's capacity to use the law to one's advantage²⁹.

This is why social-legal scholars have argued since long that the capacity of the legal system to bring about social change is limited, since throughout and even before the

²⁸ This very rough and brief discussion of Bourdieu's use of the concept of capital hardly does justice to the subtlety of his work. In particular it needs to be emphasized that the content and value of these species of capital are, in Bourdieu's conception, not fixed qualities, but itself a product of the ever changing structure of relations between individuals. Bourdieu's work aims to overcome the dichotomy between structure and individual agency, as he invites us to constantly think back and forth between individual behaviour and social structures: the goals that individuals set themselves are produced by and produce the structure of relations in which this individual leads his life, the strategies that he employs are shaped by and shape the power imbalances embedded in his social environment. For more on Bourdieu's work and his concept of 'capital', see particularly Bourdieu and Wacquant 1992, Bourdieu 1986, Jenkins 2002.

²⁹ The importance of influential contacts was also highlighted in a study on conflict resolution in china, see Michelson 2007

legal process the ‘haves’ have various advantages over the ‘have nots’. Or, formulated in a more optimistically: the challenge of improving access to justice involves immunizing the legal process from being influenced by power differentials. As Golub (2006: 166) put it, “Legal empowerment is about power even more than it is about law”.

c. Access to justice and legal certainty

But the content and character of the available laws and regulations are not irrelevant to the struggle for access to justice. The case studies in this book suggest that a third cluster of obstacles relates to the legal uncertainty created by the vague and contradictory nature of a number of important laws, or an interpretation of them by the authorities and the judiciary that goes against the interests of ‘common people’. Particularly problematic is what is often referred to as ‘egosektoralism’. In this case it means that various departments are only interested in applying their ‘own’ legislation and fail to take into account the legislation created by other departments. The same applies to a somewhat lesser extent to various levels of government. As the case studies about particularly land and environmental justice illustrate, the unclarity and contradictions of applicable laws play into the hands of stronger parties. The complexities and incompleteness of Indonesia’s land regime are a prime example: the half-hearted recognition of communal land rights, the contradictions between various laws related to land, and the limited registration of land (see particularly Fitzpatrick 1997, 2008) ensure that common Indonesians can still hardly take recourse to the law to protect their individual or communal properties, while the state and large companies can continue to exploit this situation to gain profitable control over large tracts of land. The case study in this book about land in central Sulawesi shows that this legal uncertainty can furthermore lead to serious communal conflicts. Environmental disputes can provide similar examples: the mining company NHM in North Maluku benefited from the lack of clarity about the validity of business permits as well as the contradictory rules about recognizing communal land rights; their influence in Jakarta enabled NHM to get dispensation for their open-pit mining as well as their encroachment on communal land. This arm-pulling was facilitated by contradictions between mining regulations and the 1999 forestry law. Unclear rules on providing evidence in pollution cases and a judicial interpretation of them that has been skewed against those suffering from this pollution have made it almost impossible for them to win a case for compensation (Bedner 2007, Nicholson 2010).

The recurring theme here is that legal uncertainty benefits the more powerful party: the indeterminacy and unclarity of existing laws, or the absence of implementing regulations, creates opportunities for powerful individuals and companies to use their money and influence to get authorities to tolerate their practices. Weaker parties cannot exploit this ‘wiggling space’ in the same way: the indeterminacy of existing laws enlarges the impact of social inequalities on the outcome of legal procedures. The struggle for access to justice thus also involves a struggle to tackle the legal uncertainty that Indonesia’s citizens face. This problem is exacerbated by the lack of capacity of the juridical system to produce and systematise legal interpretation. Judgments are seldom published, judges refuse to recognise the binding nature of judgments that are actually published, and legal scholarship generally fails to reorder and discuss the legal materials available in a way that helps create legal certainty (Pompe 2005, Bedner 2001).

This situation is extremely difficult to overcome, not only because of a ‘legal culture’ that has acquiesced in the current situation, but also because there are people who benefit from it. Businessmen can thus acquire, for example, permissions for their plantations, mines or oil-wells in areas that are protected by environmental regulations. Similarly, these legal uncertainties enable bureaucrats and politicians to make money, since it gives them the necessary maneuvering space to smoothen a legal process for any client that is willing to pay a hefty fee. This implies that improving existing legal frameworks does not just entail drafting the right law or policy, it also involves engaging in a political struggle with vested interests. As a recent study of state-society dynamics in Indonesia illustrates, the weaknesses and incapacities of the Indonesian state are to a certain extent due to the fact that there are so many politicians and bureaucrats who, through extensive patronage networks, benefit from the incapacities of the state (Van Klinken and Barker 2009, see also Schulte Nordholt and Van Klinken 2007). In that sense the struggle for Access to Justice is closely related with efforts to increase the voice of marginalized and disadvantaged groups within Indonesian politics.

In his recent book *The Idea of Justice* Nobel-prize winner Amartya Sen makes a passionate plea to stop basing our approaches to justice on theorizing about what legal institutions and rules would *ideally* look like. Instead, he argues for adopting a much more realistic and pragmatic approach: Sen urges us to think about promoting justice in terms of defining and identifying the small steps that need to be taken in order to make *existing* legal systems a little bit more just. A central element in this approach is to take into account the different capabilities that people have to achieve what they want to achieve: “Justice cannot be indifferent to the lives that people can actually live. (...) Institutions and rules are, of course, very important in influencing what happens, and they are part and parcel of the actual world as well, but the realized actuality goes well beyond the organizational picture, and includes the lives that people manage – or do not manage – to live” (Sen 2009:18). That is also what Access to Justice is about: as the lives that people like Lanjar live – or for that matter, the owner of the Panther car – shape their capacity to deal with Indonesia’s legal institutions, the essays in this book have been written with the hope that Indonesia’s legal systems will be made more responsive to the varied capability that Indonesians actually have to make use of these legal systems.

Bibliography

- Anderson, M. R.
 2003 'Access to Justice and Legal Process: Making Legal Institutions Responsive to Poor People in LDC's', Brighton: IDS Working Paper 178, Institute of Development Studies.
- Asia Foundation
 2001 'Citizens' Perception of the Indonesian Justice Sector', Jakarta: Asia Foundation.
- Bakker, L.
 2009 *Who Owns the Land? Looking for Law and Power in Reformasi East Kalimantan*. PhD Thesis, Radboud University.
- Bappenas
 2009 'National Strategy on Access to Justice', Jakarta: Ministry of National Development Planning.
- Bedner, A.
 2007 'Towards Meaningful Rule of Law Research: An Elementary Approach'.
- Bedner, A. and Vel, J.
 Forthcoming 'RoLax: An analytical framework for empirical research on Access to Justice', *Law, Society and Development*.
- Belliotti, R.
 1995 'The Legacy of Marxist Jurisprudence', in: D. Caudill and S. J. Gold, (eds.), *Radical Philosophy of Law: Contemporary Challenges to Mainstream Legal Theory and Practice*
 New Jersey: Humanities Press.
- Benda-Beckmann, C. E. v.
 1984 'The broken stairways to consensus Village justice and state courts in Minangkabau', in: C. E. v. Benda-Beckmann, (ed.). Dordrecht: ICG Printing BV - Dordrecht.
- Benda-Beckmann, F. v.
 2002 'Who's Afraid of Legal Pluralism?', *Journal of Legal Pluralism* 47.
- Bourdieu, P.
 1986 'The Forms of Capital', in: J. Richerdson, (ed.), *Handbook of Theory and Research for the Sociology of Education*. New York: Greenwood Press,
<http://econ.tau.ac.il/papers/publicf/Zeltzer1.pdf>.
- Bourdieu, P. and Wacquant, L.
 1992 *An Invitation to Reflexive Sociology*. Cambridge: Polity Press.
- Bowen, J.
 2003 *Islam, law, and equality in Indonesia: an anthropology of public reasoning*. Cambridge: Cambridge University Press.
- Bruce, J.
 2007 'Legal Empowerment fof the Poor: from Concepts to Assessment', in, USAID, Washington.
- Bruce, J.
 2007 'Legal Empowerment of the Poor: From Concepts to Assessment', USAID.
- Bush, R.
 2008 'Regional sharia Regulations in Indonesia: Anomaly of Symptom?', in: G. Fealy,

- (ed.), *Expressing Islam: Religious Life and Politics in Indonesia*. Singapore: Institute of Southeast Asian Studies.
- Cappelletti, M.
1992 'Access to Justice: Theory and Programme for Reform', *The South African Law* 109: 22-39.
- Cappelletti, M. and Garth, B.
1978 'Access to Justice - The Newest Wave in the Worldwide Movement to Make Rights Effective ', *BUFFALO LAW REVIEW* 27: 181-292.
- Carothers, T.
1998 'The Rule of Law Revival', *Foreign Affairs* 77: 95-106.
- Carothers, T.
2006 *Promoting the Rule of Law Abroad: In Search of Knowledge*. Washington: Carnegie Endowment for International Peace.
- Caudill, D. and Steven Jay Gold, ed.
1995 *Radical Philosophy of Law: Contemporary Challenges to Mainstream Legal Theory and Practice*. New Jersey: Humanities Press.
- Commission on Legal Empowerment (CLEP)
2008 'Making the Law Work for Everyone: Report of the Commission on Legal Empowerment for the Poor', New York: UNDP.
- Duni, J.
2005 'NGO's, Social Movements and paralegal extension in North West Cameroon: from clientelism to citizenship at the margins', in, *Paper prepared for the Conference 'Winners and Losers from rights-Based Approaches to Development*, University of Manchester, 21-22 February 2005.
- Felstiner, W. L. F., Abel, R. L. and Sarat, A.
1980 'The Emergence and Transformation of Disputes: Naming, Blaming, Claiming' in *Law and Society Review* 15.
- Fitzpatrick, D.
1997 'Disputes and Pluralism in Indonesian Law', *Disputes and Pluralism in Modern Indonesian Land Law* 22 Number 1: 173 - 212.
- Fuller Collins, E.
2009 *Indonesia Dikhianati*.
- Galanter, M.
1974 *Why "Haves" come out ahead: Speculations on The Limits of Legal Change*. Buffalo: Faculty of and Jurisprudence State University of New York at Buffalo.
- Galanter, M.
1974 'Why "Haves" come out ahead: Speculations on The Limits of Legal Change', *Law & Society Review* 9: 95-160.
- Goffman, E.
1974 *Frame analysis: An essay on the organization of experience*. London: Harper and Row.
- Golub, S., ed.
2000 *Many Roads to Justice: The Law-Related Work of Ford Foundation Grantees Around the World*: The Ford Foundation.
- Golub, S.
2003 'Beyond the Rule of Law Orthodoxy: The Legal Empowerment Alternative',

- Working paper 41, Carnegie Endowment for International Peace Rule of Law Series.*
- Golub, S.
 2006 'The Legal Empowerment Alternative', in: T. Carothers, (ed.), *Promoting the Rule of Law Abroad: in Search of Knowledge*. Washington: Carnegie Endowment for International Peace.
- Golub, S., ed.
 2010 *Legal Empowerment: Practitioners' Perspectives*. Rome: IDLO.
- Jenkins, R.
 2002 *Pierre Bourdieu*. New York: Routledge.
- Klinken, G. v. and Barker, J., eds
 2009 *State of Authority. The State in Society in Indonesia*. Ithaca: Cornell University Press.
- Lev, D.
 1985 'Colonial Law and the Genesis of the Indonesian State', *Indonesia* 40: 57-74.
- Lev, D.
 2000 *Legal Evolution and Political Authority in Indonesia*. London: Kluwer Law.
- Lev, D.
 2000 *Legal Evolution and Political Authority in Indonesia: Selected Essays*. The Hague: Kluwer Law International.
- Lev, D.
 2007 'State and Law Reform in Indonesia', in: T. Lindsey, (ed.), *Law reform in developing and transitional states* London: Routledge.
- Lindsey, T.
 2008 'Law and Society'.
- Lindsey, T. and Santosa, M. A.
 2008 'The Trajectory of law reform in Indonesia: A short overview of legal systems and change in Indonesia', in, *Indonesia: Law and Society*. Sydney: The Federation Press.
- Maru, V.
 2006 'Between Law and Society: Paralegals and the Provision of Justice Services in Sierra Leone and Worldwide', *The Yale Journal of International Law* 31.
- McLaughlin, K. and Perdana, A.
 2010 'Conflict and Dispute Resolution in Indonesia: Information from the 2006 Governance and Decentralization Survey', Jakarta: World Bank.
- Meene, I. v. d. and Rooij, B. V.
 2008 'Access to Justice and Legal Empowerment: Making the Poor Central in Legal Development Co-operation', Leiden: Research & Policy Notes, Leiden University Press.
- Michelson, E.
 2007 'Climbing the Dispute Pagoda: Grievances and Appeals to the Official Justice System in Rural China', *American Sociological Review* 72: 459-485.
- Nasution, B.
 1985 'The legal aid movement in Indonesia: Towards the Implementation of the Structural Legal Aid Concept', in: H. M. Scoble and L. S. Wiseberg, (eds.), *Access to Justice: Human Rights Struggles in South East Asia*. London: Zed

- Books.
- Nichelson, D.
 2009 *Environmental Dispute Resolution in Indonesia*. Leiden: KITLV Press.
- Nordholt, H. S. and Klinken, G. v., eds
 2007 *Renegotiating Boundaries: Local Politics in Post-Suharto Indonesia*. Leiden: KITLV Press.
- Pompe, S.
 2005 *The Indonesian Supreme Court: A study of Institutional Collapse*. Ithaca: Cornell University Press.
- Rooij, B. v.
 2009 'Bringing Justice to the Poor: Bottom-Up Legal Development Cooperation', *Working paper, available at <http://ssrn.com/paper=1368185>*.
- Sage, C., Menzies, N. and Woolcock, M.
 2010 'Taking the rules of the game seriously: mainstreaming justice in development, The World Bank's justice for the poor program', in: S. Golub, (ed.), *Legal Empowerment: Practitioners' Perspectives*. Rome: IDLO.
- Sen, A.
 2009 *The Idea of Justice*. London: Penguin Books.
- Stephens, M.
 2003 'Local Level Dispute Resolution in Post-reformasi Indonesia: Lessons from the Philippines', *Asian Law* 5: 213-257.
- Stephens, M.
 2009 'The Commission on Legal Empowerment of the Poor: An Opportunity Missed', *Hague Journal on the Rule of Law* 1: 132-157.
- Tamanaha, B.
 1995 'The Lessons of Law-and-Development Studies', *The American Journal of International Law* 89: 470-486.
- Tamanaha, B.
 2001 *A General Jurisprudence of Law and Society*. Oxford: Oxford University Press.
- UNDP
 2004 'Access to Justice: Practice Note', www.undp.org/governance/docs/Justice_PN_English.pdf.
- UNDP
 2007 'Justice for All? An Assessment of Access to Justice in Five Provinces of Indonesia', Jakarta: UNDP.
- World Bank
 2004 'Village Justice in Indonesia: Case Studies on access to justice, village democracy and governance', Jakarta: World Bank.
- World Bank
 2008 'Forging the Middle Ground: Engaging Non-State Justice in Indonesia', Jakarta: Available at www.justiceforthe poor.or.id.