How lawyers win land conflicts for corporations: Legal Strategy and its influence on the Rule of Law in Indonesia

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How Lawyers Win Land Conflicts for Corporations:
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The supreme benevolence does something,
Yet some things remain undone.
The Law does something,
And leaves much to be done.
The Ritual acts,
And when no one cares,
It raises arms and uses force.

When Tao is lost, there is Virtue
When Virtue is lost, there is Justice
When Justice is lost, there is Ritual
Ritual is the shell of Truth,
The beginning of Chaos.

(Excerpt from personal translation of Tao Te Ching verse 38)

How Lawyers Win Land Conflicts for Corporations

Legal Strategy and its Influence on the Rule of Law in Indonesia

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Preface

'Having a meeting with him is like seeing a magician. He is there to grant your wishes, but you should not know how.' – A client describing his lawyer, Jakarta 2013.

In 1906, Houdini the magician published a book titled *The Right Way to do Wrong*, intending to inform the public on the 'real thoughts and feelings of the denizens of the world of police and courts' in early 20th century America. The book is a collection of short stories on performing tricks and cons.

Much like magicians, the criminals described in Houdini's book are not desperate or lazy. They are creative and sometimes possess skills that, at best, make others eyewitnesses. They do not act alone. They have assistance: wives who make things happen in the background and the larger *familia* who practice with them, knowing their secrets, tricks, assets, and limits.

This book shares Houdini's motives to help the readers to be able to detect the tricks and cons to protect themselves from them. It further aims to present the weaknesses of the Indonesian legal system to aid the reader in reforming it.

Table of Contents

Introduction

Commercial lawyers

The past 30 years have seen a steady increase in publications about lawyers and the role they play in legal systems. Where the traditional jurisprudential view has considered them mainly as facilitators of court procedures, the more recent socio-legal literature has shown how lawyers are involved in a variety of ways in shaping the legal system and how they exercise considerable influence on legal process in- and outside of courts. Not only are they gatekeepers – controlling access to courts and other legal institutions – but as an organised profession with a considerable degree of autonomy they also are political actors.

Sociological interest in what is often called 'the legal profession' goes back quite a long time, to the early days of legal sociology when the first 'socio-legal' publication about lawyers in the US appeared (Cohen 1916). This study addressed the question whether legal practice is a profession or a business and it already acknowledged the political significance of lawyers. Over the years researchers have added many other perspectives on lawyers and their practices, addressing the role lawyers play in reproducing inequalities between parties to a dispute (Galanter 1974, 2006), changes to their professional ideals (e.g. Kronman 1993; Nelson and Trubek 1992), and the prestige they gain by representing powerful organisations (Heinz, Nelson, Sandefur & Laumann 2005).

For many years studies about lawyers mainly focused on the US and most of the seminal articles in the field are from well-known American law and society scholars. By contrast, the more recent literature has expanded its geographical scope to include lawyers from all regions across the globe and also pays attention to those working transnationally. This is reflected in two key publications on the legal profession, which appeared in 1988 and in 2020 (forthcoming) and endeavour to provide a comprehensive overview of private lawyering around the world. While the volumes published in 1988 included 22 jurisdictions, those that will appear in 2020 have expanded to include 46 ones.

The present surge in literature about lawyers in many different jurisdictions indicates that they are important actors across the civil and common law divide. While their role in common law jurisdictions traditionally has been more pronounced, scholars have now recognised their significance in civil law jurisdictions (cf. Abel 1988:40-42). Lawyers play an important role in transforming disputes in any type of jurisdiction. They control whether

problems will be converted into social, legal, or political disputes, which makes them critical actors as transformation agents (Menkel-Meadow 1985; Felstiner, Abel & Sarat 1980). They translate the language of law to help their clients understand the rules and they transform the objectives of their clients into legal actions; they predict the outcome of cases and thus shape the probability that a client will start legal proceedings; they resolve disputes through negotiation without accessing the courts; and they educate their clients on the legal system more generally (Barclay 2004:10; Mnookin and Kornhauser 1979). As repeat-players who have intimate knowledge of a particular legal field and its interpretations, some lawyers litigate not only for a specific case or client, but also for changing the rules to influence outcomes of future cases. This means that they also represent an independent force within litigation (Galanter 1974). In these ways lawyers to a large extent determine how the legal system works.

An important characteristic of lawyers is that they can test the limits of the legal system. They are in a position to gauge how far they can go in using the law for their purposes without breaking the rules or ethical codes. This is an important professional task they perform, which contributes to promoting the integrity of the legal system: by indicating the system's loopholes and weaknesses lawyers' practices point the way to reparation and improvement (LoPucki & Weyrauch 2010:84-6).

However lawyering is not only a professional activity geared towards making the legal system work, but also a 'business of managing uncertainties' for clients (Flood 1991). It is important to recognise the tension between these two objectives. In order to 'produce' the certainties their clients desire lawyers may be tempted to cross ethical boundaries or even transgress legal rules.[1] It can even make them engage in corruption, for instance by bribing judges to control the outcome of cases (Tamarkin 1984; Hualing 2007). Lawyers are professionally in an optimal position to act as brokers, which may also include brokering in judicial corruption. Because they can efficiently cultivate and maintain connections with judges from their repeated encounters with them, lawyers can reduce the transaction costs connected with bribery (Li 2017). Moreover, as middlemen between judges and litigants, they can offer their services of legal representation and corruption brokerage in a single package.

No studies that I know of have looked at this tension between the lawyers' professional role and 'law as a business' in a legal system where legal uncertainty and corruption are deeply engrained and what this means for the role lawyers' play as 'brokers'. The present study is a contribution to fill this gap. It looks at lawyers in Indonesia, a country where the legal system indeed offers few certainties and which is known for its corruption (Baker 2013; Butt 2008; Lindsey 2006; Pompe 2005; Bedner 2001). In

1 A good example is the Enron scandal, where lawyers were key players in concealing the corporation's losses and debts by structuring transactions and creating financial contracts (Rhode and Paton 2002).

exploring this tension I will consider how commercial lawyers test legal rules under conditions of legal uncertainty and corruption, what strategies they use in doing this, and how does this impacts on the legal system?

It is the particular context of uncertainty and corruption which sets my study apart from those that have addressed similar questions.[2] Obviously, the legal system in which lawyers operate is of major influence on their practice. As already mentioned, lawyers try to provide as much certainty as they can and apply various strategies to this end (Francis 2004). However in a country like Indonesia they are constrained by a legal system that is inefficient, uncertain and rife with corruption.[3] These conditions make it difficult for lawyers to provide certainty for their clients.[4] They are dependent on judges whose decisions are hard to predict and they are under pressure from clients to dodge their professional responsibilities.[5] Once lawyers have yielded to engage in corruption to influence legal procedure it is in their interest to keep the substantive legal rules vague. In this way they are in a position to provide certainty on other than legal grounds to a party seeking their services. These dynamics foster a self-perpetuating system of legal uncertainty (cf. Bedner 2016). A major objective of this study is to test what this situation means for the practice of lawyers in Indonesia and the other way round.

There are only few studies about commercial lawyering in Indonesia and none of them have looked specifically at lawyers as brokers within the legal system. Dan Lev (1976; 1972) was the first to write about the subject, exploring the colonial origins of the legal profession and how these affected post-colonial practice, while Dezalay and Garth (2010) have examined how lawyers in Asia served colonial states and at the same time facilitated resistance against them. Their case study on Indonesia discusses the rise of "elite lawyers" who benefited from Soeharto's crony capitalism, but does not address the actual practices on the ground nor their effects on the legal system.

These practices and their effects are central to this study. In examining Indonesian lawyers, their strategies, and how they test – and transgress –

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2 While there are many studies about lawyers, only few scholars have addressed the issue of how and under what conditions do lawyers not only test but also transgress legal rules, what strategies they use in doing this and how does this impact on the legal system. Some examples are: a study by Macaulay (1966) about automobile manufacturers and their dealers, by Rubin and Bailey (1994) about how product liability disputes benefit tort lawyers, and by Galanter (2006) about how artificial persons or organizations get their ways by using law and courts.

3 Although the World Justice Project reported improvements in 2014 in their Rule of Law Index Report, the Report also ranked Indonesia amongst countries with the most serious law enforcement and judicial corruption problems.

4 In some respect it resembles the conditions lawyers in China have to face (e.g., McMorrow 2010), or even lawyers in Nazi Germany (e.g., Jarausch 1990), or lawyers operating in the setting of organized crime in Naples' suburbia (Holden & Tortora 2007).

5 Article 4(c) Indonesian Lawyers' Code of Ethics prohibits lawyers to guarantee outcome of cases to their clients.

ethical boundaries and the rules of the legal system, I focus on commercial lawyers involved in cases concerning land development and property business. I use 'lawyers' as a generalized term for the various informal and professional titles in Indonesia indicating private practitioners.[6] The lawyers in this study represent corporations that operate in the world of trade and business. Their principal objective is to make money. They are the group of legal practitioners in Indonesia that have been least studied.[7]

Land development and property business

I have chosen land development and property business as the specific field of law to examine commercial lawyers' practice, because Indonesian land law is particularly known for problems with legal certainty (e.g. Bedner 2016; Fitzpatrick 1997). The point of departure for land tenure in Indonesia is that the state is sovereign over all land within its territory (Bedner 2001:184). People can obtain different formal land rights from the state, for different purposes; upon registration they receive a land certificate that means formal recognition of their right. However, until the present much land has remained unregistered and the process of registration has led to innumerable disputes.[8]

An extensive number of studies have dealt with these problems of registering land and the original issuance of title[9], but few have paid to what happens after the land has been registered. Perhaps surprisingly, private

6 The common term for lawyers in Indonesian is *pengacara*, which is derived from *acara*. *Acara* means program, event, agenda, and procedure. The prefix *peng-* is added to describe the actor of the verb. Therefore, in Indonesian, a lawyer is someone who performs a procedure. Other words used for lawyers in Indonesia are *advokat* and *penasehat hukum*. *Advokat* is from the Dutch word *advocaat*, and *penasehat hukum* means legal consultant. In the early period of the New Order (between the 1960s and 1980s), lawyers registered with the Ministry of Justice could call themselves *advokat*, and those who did not could only call themselves *pengacara*. However, the term mattered mostly for prestige, since lawyers were allowed to practice regardless of registration (Lev 1992: 27).

7 In contrast to public interest lawyers (e.g. Lindsey & Crouch 2013; Crouch 2011; Lev 2011).

8 See for instance https://www.thejakartapost.com/news/2019/02/14/agrarian-ministry-hikes-land-registration-target.html. Last accessed, 4 December 2019.

9 For instance, see Parlindungan, AP. (1990), *Pendaftaran Tanah di Indonesia*, 2nd ed. Bandung: Mandar Maju., Hardjono, A social assessment of the Land Certification program, Indonesian Land Administration Project, World Bank Jakarta 1999; Hermit, 2004, *Cara memperoleh sertifikat tanah hak milik, tanah negara dan tanah pemda* (Bandung: Mandar maju); Larson, Land Registration & Cadastral systems tools for Land information and management (New York: Longman Scientific & Technical, 1995), Effendie, *Pendaftaran Tanah di Indonesia dan Peraturan Pelaksanaannya*, Second edition (Bandung: Alumni, 1993); Smeru (2002), An Impact evaluation of systemic land titling under the land administration project (LAP), Jakarta, Smeru Research Institute; Soerodjo, I. (2003) *Kepastian Hukum Pendaftaran Hak atas tanah di Indonesia,* Arkola, Surabaya. For an overview of the incompatibilities of 'modern' Basic Agrarian Law with adequate land certification, see Fitzpatrick (1997).

disputes about registered land are as abundant as those about unregistered land. These disputes about registered land mainly concern land transfer and the registration of encumbrances. In the transactions concerned land titles are objects of a private business deal, but at the same time they are subject to public regulations regarding the limits and uses of titles. [10] In practice this means continued involvement of state agencies in disputes concerning land transactions, in particular of the National Land Agency (*Badan Pertanahan Nasional*)[11]. As a result land-related disputes are prominent not only in the dockets of Indonesian courts, but also in those of guardian institutions such as the Ombudsman[12] and the National Human Rights Commission (*Komnas HAM*)[13].

These disputes occur in a situation of booming real-estate business. In major cities, developers keep building higher towers and more residences, and urbanization is rapidly spreading. Many apply for mortgages from banks to buy housing units[14], and those with extra income are investing in land and buildings, collecting rent – envisioning great financial returns in the future. This puts a lot of pressure on the market and increases the stakes of those who get embroiled in land disputes. This combination of market pressure with legal loopholes and uncertainties provides fertile ground for lawyers to develop strategies in the twilight zone between legality and illegality.

One of the main characteristics of property business is the need to use the legal system as a way of securing investments. It means that this business requires formal procedures, specifically in situations involving releasing rights or fulfilling obligations: in sales, purchases, rents, and uses of the property. For actors such as developers and prospective buyers, legal certainty about land or buildings is a prime element to pay attention to before they make an investment. Moreover, besides the gains that property

10 Government Regulation No. 24/1997 defines objects of land registration as: *Hak Milik* (ownership), *Hak Guna Usaha* (HGU or title to cultivate state land), *Hak Guna Bangunan* (HGB or title to building), *Hak Pakai* (title to use), *Hak Pengelolaan* (right to manage), *tanah wakaf* (land that has been given for religious purposes), *Hak milik atas Satuan Rumah Susun* (Condominium/apartment ownership), and *Hak Tanggungan dan tanah negara* (state land).

11 National Land Agency (Badan Pertanahan Nasional or NLA) is a government body that has the authority to manage and govern land in Indonesia. With Presidential Decree No. 17/2015, they are referred to as the Ministry of Agraria and Spatial Planning/National Land Agency. Before this, they were not a ministerial body and answered directly to the President.

12 Land is the subject of the most reported problems to Ombudsman (Ombudsman Annual Report 2018, p. 14).

13 The majority of cases at Komnas HAM are complaints toward corporations that hold rights over wide areas of land. See https://www.komnasham.go.id/files/20181126-kertas-posisi-penyelesaian-konflik-$AINDB.pdf. Last accessed, 2 December 2019.

14 KPR Kredit Pemilikan Rumah is similar to mortgages in the United States.

development can bring, the property business is also attractive for speculative trading.[15] Speculative traders treat investments like a game, and they are willing to take risks, especially when the gains promised by developers are high. In summary, land disputes in Indonesia occur in a highly volatile socio-economic field.

Land Litigation

Land litigation in Indonesia concerns disputes where the ultimate object is a formal right over a parcel of land. Parties usually bring cases to the court to determine the status of the land concerned (i.e., who is the legitimate holder of title) or about the basis of the title. The purpose of the claimant is to gain formal recognition by the state and documentation supporting it.

In Indonesia, the system of land registration does not offer full protection to the person who registered a plot. Anyone who thinks that he or she has a stronger claim may start court proceedings, and if the court upholds the claim, the ownership is registered according to the court decision (Parlindungan 1991:34). To avoid disputes, Government Regulation No. 24/1997 requires parties who have not registered a land transfer to file their claims within five years after the original certificate that serves as evidence of the registration was issued.[16] However, this limitation does not have the intended effect, because courts still accept claims concerning accuracy of the information stated in the certificate or the process of its issuance (Sutedi 2011:196). This means that the holder may be sued at any time, which seriously undermines legal certainty for the landholder.

While those involved in land disputes are usually looking for quick solutions, land litigation is often lengthy and exhausting. In big land cases, corporations that want to avoid the perils of lengthy court cases recur to the services of lawyers with a reputation of not only knowing the law and legal procedure, but also of having good connections and of mastering the practical strategies required to win this type of cases. Many corporations holding a stake in such litigation are prepared to use any method to win them. One particular feature of the Indonesian legal system is that in practice it allows lawyers to bring claims concerning one single case before multiple bodies. These range from general courts (*Peradilan Umum*) and administrative courts (*Pengadilan Tata Usaha Negara*, henceforth PTUN) to state auction offices (henceforth *Kantor Lelang*), auction houses (henceforth

15 Speculative trading is commonly done in corporate land deals, usually on a large-scale known as 'land grabbing'. These deals bet on rising global land values: 'investors put their money in land, as they might put it in gold, works of art, British Petroleum shares or pork-belly futures.' See especially White, B., et al. (2012): The new enclosures: critical perspectives on corporate land deals, The Journal of Peasant Studies, 39:3–4, 619–647.

16 Article 32(2).

Balai Lelang)[17], notaries, PPAT[18], NLA, and police.[19] This plurality of fora makes litigation of land-related issues a lengthy and expensive process.

The Field of Property Development: Gift-giving, Rent-seeking and Corporate Structures

Many actors involved in property development and land transactions are not hesitant to bend or violate the law when this will help them in their ventures. Businesses give financial support to politicians in order for them to obtain office, expecting that they will give their signatures in licenses and permits for the businesses later on. In this way, political positions are used as kind of commodity by the officials (Sanusi 2009). During Soeharto's New Order, it was widely believed that in order to obtain official signatures in commercial contracts, one had to pay 'upeti' (a 'tribute') of 10% from the contract price (McLeod 2000).[20] While currently the informal rules have become less straightforward, such illegal practices are still widespread and often involve commercial lawyers.

Gift-giving practices are typical for Indonesian social and political life, which has often been analyzed in terms of patronage and clientelism (e.g. van Klinken 2009, Simandjuntak 2012, van Klinken & Berenschot 2018). There are many terms in use for gift-giving as a socio-economic transaction. *Upeti*, as I mentioned above means a tribute, originally given to gods and kings (Suhardiman & Mollinga 2017). Another term, often used by judges, is *rezeki* (Bedner 2001:228), which means a blessing from a superior. Perhaps most common is the term *pungli*, which refers to arbitrary levies imposed by those holding power on those who depend on them. Such power holders can be district heads who only issue permits in exchange for a 'gift' or judges who only type up their judgments after having received 'compensation'.

In the more developed part of business ethnic Chinese are particularly prone to be the victim of these rent-seeking practices. They are economically powerful, but politically they are a vulnerable minority (Chong 2015, Koning 2007, Mackie 1991). For protection from extortion, they often join forces with Indonesian officials. Over time, this 'collaboration' may develop

17 Both *Kantor Lelang* and *Balai Lelang* can issue minutes of auction that will be used to register the Deed of land transfer and can auction off the Mortgage Deed (henceforth *Hak Tanggungan*). *Balai Lelang* are privately-run, with officers qualified in its area to commence an auction.

18 PPAT are similar to notaries in that they also make authentic deeds. PPAT are specialized in making deeds in connection with the status of rights to land. They provide evidence of legal action concerning certain pieces of land that will then be the basis for registering the change to the juridical data caused by the legal action. This is regulated by Government Regulation No. 37/1998.

19 For instance, through allegations of fraud and embezzlement regarding investments in land development.

20 This belief is reflected into the nickname 'Madame 10%' given to the wife of President Soeharto, Tien Soeharto.

into a form of business organization, often referred to as 'Ali-Baba'.[21] Ali refers to the mostly Muslim officials, and Baba to Chinese businessmen. With the combined advantage of political and trading networks, some Ali-Baba corporations have grown to become the largest businesses in Indonesia. Although in principle they are based on informal ties, commercial lawyers play a central role in these partnerships as 'experts' as they provide the legal framework in which these ties are embedded. In some cases commercial lawyers also play a more active role in the transactions between the Ali-Baba partners.

Several studies about Indonesian corporations have highlighted how they protect and develop themselves, paying particular attention to the Ali-Baba form I mentioned above. In their study on Salim Group, one of the largest corporate group in Indonesia and an ethnic Chinese family business, Dieleman and Boddewyn (2012) found how corporate organizational structures are used to avoid tax, hide ownership, and manage Salim Group's connections to different 'Alis'. Salim Group structures its companies in such a way that they are protected from adverse effects of their ties with officials. They group different companies to different officials, so one official is not tied to another. In this manner the official cannot become a liability, misappropriate resources and spread damage to the entire organization.

Corporations, Corporate Structure and Title to Land

This research uses the term corporations to refer to a company or a set of companies in a group structure. There are different types of company ('PT'[22]), classified by the source and owner of capital and shares[23], and by whether it is private or public.[24]

According to Indonesian law, a company ('PT') cannot hold ownership (*Hak Milik*). They can only hold title to cultivate land (HGU), title to a building (HGB), or title to use land (*Hak Pakai*). The limitation that companies cannot obtain land as full property (*Hak Milik*) looks appropriate for

21 This was originally a policy implemented under the cabinet of Ali Sastroamidjojo in the 1950s to 'Indonesianize' the economy, encouraging more indigenous Indonesians (*orang Indonesia asli*) and remove foreign (Dutch) influence in businesses, particularly for import licenses (Lindblad 2002).

22 *Perseroan Terbatas*, a business organization similar to Limited Liability Company. In Indonesia, such an organization is regulated by Indonesian Company Law (Law No. 40/2007, commonly known as 'UUPT').

23 The PT could be local, joint venture, or foreign direct investment ('PT. PMA'). PT. PMA requires more capital compared to local and joint venture companies, subject to areas of business that are allowed in government's investment list, most recently regulated in Presidential Regulation No. 44/2016. In addition to UUPT and other various regulations, PT PMA is regulated in Law No. 25/2007 about Investments.

24 Public PT (PT. Tbk) means that the company is listed on the stock exchange. There are lots of regulations involved in establishing and maintaining a PT. Tbk., e.g., regulations by Bursa Efek Indonesia (Indonesian Stock Exchange—IDX), auditors, and BAPEPAM-LK (Indonesian Capital Market Supervisory Agency).

avoiding land-grabbing and limiting expropriation. However, these titles are granted for long periods of time, from 30 to 95 years, with an option for extension. Any PT can also hold *Hak Tanggungan* (a deed to guarantee a loan by mortgaging the title to land),[25] and investors can buy shares of the PT whose name is listed in the *Hak Tanggungan* deed. In this way, the investor gets the benefit of holding economic interest over land through first lien.

Aside from this limited right to hold land, corporations generally enjoy more advantages and less liability compared to natural persons. As artificial persons, they have a specific legal form and enjoy a certain degree of immunity, e.g. immunity from criminal punishment. Furthermore, their form also grants them privileges that make them more powerful than wealthy natural persons. These advantages and liability structures mean that research about corporations will involve layered and structured obligations and relationships (Galanter 2005, 1974; Yngvesson 1985).

The Legal Framework in Corporate Litigation

In order to understand land litigation and the role of commercial lawyers in such litigation one needs to be aware of the complexity of Indonesian land law. A wide variety of legal fields inform the practice of corporate litigation involving land. Lawyers often invoke not just land law and commercial law provisions, but also those from other areas of law such as criminal and tort law.

Given this complexity it is difficult to provide a clear overview of the relevant legal framework. The 'ego-sectoral-ist' (Arnscheidt 2003:54) nature of institutions that deal with land title and disputes does little to ameliorate the unpredictable character of practice. There is a tendency for each government department to have its own laws and regulatory framework for internal and external management. This specialization is not coupled with effective communication—not even in cases where several departments are working on the same subject area, for instance between the NLA and Ministry of Forestry. This fragmentation of bodies of law seriously undermines the legal certainty for those involved in legal disputes over land.

Corporate litigation regarding land involves many actors, including judges, plaintiff(s), defendant(s), lawyer(s), notary(/ies), and land administration official(s), who also make their own internal decisions, with each being supervised by different institutions. This network of actors with different relations suggests a more complex social logic in dispute resolution than the archetypical triad from Shapiro (1986), which consists of two

25 *Hak Tanggungan* as a land title differs from other titles in that it can be used to obtain loans or credit. *Hak Tanggungan* can be used as collateral or credit guarantee for ownership (*Hak Milik*), title to cultivate state land (HGU) and title to a building (HGB). *Hak Tanggungan* has to be registered in the National Land Agency (Badan Pertanahan Nasional) by a Notary specifically authorized to document and record legal actions regarding a certain parcel of land. They are called Land Deed Officers (Pejabat Pembuat Akta Tanah, henceforth PPAT).

disputing actors and a decision-maker/judge. The practice of lawyers and law firms is linked to all of these actors and reflects this complexity of the legal-administrative framework applicable to litigation about land.

I Conceptual and theoretical framework

Legal Strategy

An important concept in this book to discuss the practices of corporate lawyers is strategy. Strategies are actions, tactics, maneuvers, plans, and methods for achieving one or more desirable goals. They require performing actions different from the possible activities of rivals or performing similar activities in different ways (Porter 1996:61). Strategies are about shaping the future (McKeown 2012). Strategies are not always well-considered and explicit, but may also be tacit and pre-reflective (Swartz 1997:70).

Legal strategy refers to the decisions actors take on how to deal with the legal system's constraints and opportunities to further their commercial objectives. Some legal strategists seek to break the law in a manner that avoids the associated penalties (LoPucki & Weyrauch 2010:45). Litigation opens a wide window of opportunities to manipulate the legal system. Moreover, when the process of challenging the legal system's opportunities and constraints occurs through a judicial forum and relies on experienced actors who are usually concerned with the rules that will govern similar future cases, it is expected that there will be heavy expenditure towards rule-development (Galanter 1974). The process is expected to change the rules of legal procedure, as articulated by practice.

Legal Strategy and Litigation Behavior

Since around the 1960s, scholars have been attempting to explain litigation behavior. Miller and Sarat (1980), Felstiner, Abel, and Sarat (1980), Merry and Silbey (1984), and other socio-legal scholars have articulated how and why disputes come about, what happens in disputes and litigation, and how this can be explained. Gilson and Mnookin (1994) have analyzed disputing through agents and relationships between opposing lawyers, as well as reasons and strategies for lawyers to settle or exacerbate conflicts. Kritzer (2001) has studied litigation behavior in relation to lawyer's fees, and Johnson (1980) has analyzed how lawyers decide how much time to devote to which clients and which cases.

There is a vast literature about dispute processing and legal profession besides the aforementioned works by socio-legal scholars. However, as pointed out by Wilkins (in Sarat et al. 1998:68), most of the research shares a presumption that the typical lawyer-client interaction is between a dedicated and skilled solo practitioner and an unsophisticated individual client. Moreover, by far most studies discuss litigation behavior in the US context.

Only a handful of scholars have also looked at litigation involving more sophisticated clients. Macaulay (1985) has studied business and contracts, how and why contracts are used (or not used) and how this connects to the management of exchange relationships. Galanter (1974) has taken a closer look into what happens in litigation and provided a typology of parties, legal services, institutional facilities, and rules. In addition he has explained legal strategy implicitly through strategies for reform and reform's implication for the role of lawyers. Macaulay and Galanter provide important insights on the role of continuing relationships in business (contracts) and law and how this influences the choice for particular strategies, which are relevant for this research in the context of Indonesia.

In 1980, the Law and Society Review published a special issue on dispute processing and civil litigation (Vol. 15:3-4), which serves as a milestone on ways to think about disputes and methods to study them. More recently in 2010, the American Business Law Journal issued an issue with a similar focus,[26] although it took a more economical or strategy-oriented approach compared to the Law and Society Review's socio-legal perspective. Nevertheless, the topics are more or less the same: decision-making processes in law and how they affect outcomes.

These ideas by Law and Society scholars have been adopted in legal strategy theory, but the latter has another focus than the dispute processing literature. The older socio-legal scholarship, some are mentioned above, tend to focus on the 'not-haves' or the OS (one-shotters), while legal strategy theory focuses on the 'haves' and the RPs (repeat-players); usually those with capital, i.e., businessmen, CEOs, lawyers, and corporations.

Drawn from a business perspective about legal astuteness as a competitive advantage, the study of legal strategy is an emerging discipline (Bagley 2010; Siedel 2000). It promotes awareness and understanding of law as a part of business strategy, making a compelling argument that law is more than a force that constrains managers and their firms, but can be turned into a tool to their advantage (Bagley 2010). This insight is key to the theoretical framework in this research. While developed in the context of the Unites States, I argue that it is equally relevant in Indonesia. Within legal strategy studies, different scholars have taken three different approaches to the subject:

1) Managerial Approach: The managerial approach views legal strategy as a legal policy in a corporate setting. It suggests that business people need to make themselves familiar with the law in order to be able to use it as a resource to implement an advance strategy to manage or avoid risk. Driven by the broad concept of resources, the managerial approach sees the use of the law as potentially creating a competitive advantage with as the ultimate goal to outperform rival companies through legal astuteness (Bird 2010).

26 American Business Law Journal, Volume 47, Issue 4, 2010.

2) Judicial Approach: Focusing on litigation and the relationship between the law, judges, and legal strategy, LoPucki and Weyrauch (2000), authors of *A Theory of Legal Strategy*, seek to explain what lawyers do when they strategize. They start by explaining two views of the law, conventional and strategic, arguing that the strategic view captures the reality of the legal process while a conventional view misses it. In the conventional view, actors either follow the law and seek maximum advantage under it or they violate the rule and accept the consequences (Williams 1998). However, LoPucki and Weyrauch's legal strategists seek to avoid, manipulate or violate the law in a manner that avoids the penalty as well. They provide a typology of activities that they refer to as 'legal strategy', and ultimately argue that the law is always malleable. Nonetheless they add a normative twist by arguing explicitly that legal systems should be redesigned consciously to minimize strategic opportunities. They emphasize that legal outcomes are the products of complex human interactions that cannot be drawn only by 'written law', just as one cannot predict the outcome of a game of chess by knowing the rules of the game and the position of the pieces, but without knowing who is playing. Finally, they analyze how the outcomes of legal strategy trigger responses from judges and/or lawmakers that lead to legal change.

3) Normative Approach: The normative approach to legal strategy focuses on the misuse of norms and explores the conditions or circumstances that create the opportunity for legal strategy development. These opportunities are *hazy law* (i.e., undetermined law because of its imprecision), *crazy law* (i.e., legal incoherence, contradictory, or conflicting law), *accidental law* (i.e., law that produces an unwanted effect), and *malleable law* (i.e., law whose substance can be easily altered).

Rather than conflicting, these three approaches are analytically complimentary (Masson & Shariff 2011). They underlie the existence of various strategies based on normal uses and misuses of the law, they aid us in noticing these strategies, and they help lawmakers redesign the law in such a way that they minimize opportunities for its manipulation. Moreover, they allow us to to keep the lawyers as the central actor, but by offering tools for considering their relations to managers (business actors), courts and judges, and for analyzing how lawyers use or do not use the rules, this approach promotes a more comprehensive analysis.

Legal strategy in Indonesia

As already mentioned, all of these approaches derive from an American perspective on business and despite similarities, there are also major differences with Indonesia. An important one is that settlement strategies are very different in the United States compared to most other legal systems

because of the procedure of *discovery* (determining evidence in litigation). In the American legal system, there is compulsory discovery, which compels disclosure of all facts, even disadvantageous ones (e.g., Cooter & Rubinfeld 1994).[27] Because of its important role in steering the litigation, this obligation to reveal facts in discovery becomes a strong motivation for settlement, especially for litigants that want to avoid disclosure of certain business strategies or vulnerabilities (LoPucki and Weyrauch 2000).

In Indonesia, the process is quite different. Discovery is performed when a plaintiff has brought his/her case to a court, and to a large extent it is the judge who performs the discovery during trials. At this stage, a settlement between the parties is no longer possible, unless the judge approves it by issuing a separate decision.

To discuss legal strategy in Indonesia and its peculiarities, we have to focus on the actors involved in the strategy and what motivates them to perform certain legal actions. There are two major actors in these processes: company executives acting for 'artificial persons' (corporations, associations, and governments) and lawyers. None of them are personally liable for the outcome of disputes: a corporation's representation (e.g., legal counsel, CEOs, and managers) and lawyers are agents for their employer's (i.e., a company's) interests. The relation between these actors is often complex. Personal and employer interests might overlap or contradict, which is determined by social and legal settings within the corporations (employer-employee relationships), in lawyer-client relationships, and to some degree, in lawyer-lawyer relationships. As we will see later in this study, it is important to look into both social and legal settings of corporations and lawyers when trying to understand how legal strategies work.

Research on the Indonesian Supreme Court *(Mahkamah Agung)* by Pompe (2005), the Indonesian Administrative Court *(Pengadilan Tata Usaha Negara)* by Bedner (2001), and Wilson's theory of how government agencies operate (1989) serve as points of departure in understanding how factors, such as management and training, shape the functioning of institutions, such as courts and the National Land Agency, that more indirectly influence legal strategy and that are particular to the Indonesian context.

An important general difference between the Indonesian and the US context concerns social relations. In Indonesian society, family, community and bureaucracy are intertwined (cf. Riggs 1964), and I already discussed the prevalent practice of gift-giving earlier in this chapter. Related problems are lack of regulatory effectiveness, excessive bureaucracy, delays, corruption, and inconsistent application of the law (Mowbray 2004:244). These socio-legal aspects are of major importance in understanding legal strategy by lawyers in Indonesia.

27 United States Federal Rules of Civil Procedure 26(b)(1).

Rule of Law, Legal certainty and Lawyers' Ethics

An important overarching concept in this study is Rule of Law. Ideas about Rule of Law constitute the core of the ideological context in which commercial lawyers operate, while at the same time its meaning is shaped by the same lawyers and other actors in the legal system. Rule of Law is a legal and political concept to which there is no single definition, but arguably it consists of different elements which can be grouped into three categories: procedural, substantive, and controlling mechanisms (Bedner 2010).

This research is mainly about procedural elements of Rule of Law, in particular about formal legality. Formal legality is not just concerned with the use of rules as an instrument of state action but with the quality of these rules – whether they are clear, certain and applied equally (Tamanaha 2004:99; Bedner 2010:56). Formal legality can to a large degree be equated to legal certainty. Legal certainty is about predictability; having legal certainty means a situation where those with proper knowledge of the law have the ability to gauge what a judge will decide in a particular case.

In their practice, lawyers should be guided and constrained by Rule of Law. The International Bar Association has enacted International Principles on Conduct for the Legal Profession, defining lawyers around the world as 'professionals who place the interests of their clients above their own, and strive to obtain respect for the Rule of Law'.[28] Lawyers are special agents, having not only duties as representatives of their clients, but also as representatives of Rule of Law. In this capacity they are rewarded with protection and independence, such as from governments and from their clients (as stated in the Basic Principles of the Role of Lawyers enacted by the United Nations in 1990); and the profession is regarded as a 'noble' profession.[29]

Nevertheless, in many places the practice of law has become an unscrupulous business and lawyers in the US increasingly view law in an instrumental fashion, as no more than a means to an end (Tamanaha 2006:55). Much literature on the legal profession is skeptical about the ethical scruples of lawyers in the world of business and markets. Levin & Mather (2012) observe that even good US lawyers apply ethics narrowly, only to the very minimum of what the rules state. Suchman (1999) found that ethics are relevant even in the US elite litigators' world, but only narrowly, as professional rules that are not in good condition.

The instrumental view of law as no more than a tool to achieve certain practical ends seriously threatens Rule of Law as an ideal (Tamanaha 2006). It creates the danger of the system degrading into rule *by* law while using the rhetoric about Rule of Law as an ideological smokescreen.

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28 For elaboration on these principles, see Chapter 2.

29 Indonesian Ethics Code for Advocates emphasizes this as "officium nobile" and puts lawyers in the same position as other 'law enforcers' such as judges and prosecutors.

This research focuses on lawyers in Indonesia as a group of individuals who know how to provide a degree of certainty to their clients in the absence of clear predictable rules, and who know how to conduct commercial transactions in the midst of sporadic application of rules. This research does not contest that there is a danger in the instrumental view of law as argued by Tamanaha, but it recognizes that empirically for most lawyers in Indonesia legal knowledge is a technical instrument. At the end of this book, after having presented lawyers' practices and after having analyzed what their consequences 'on the ground' are, I will consider what this means for the condition of Rule of Law in Indonesia.

II Research questions

This study will be guided by the following research questions:

1) What strategies do lawyers develop and follow in corporate litigation about land, and what factors shape their choices?

2) Why do parties – informed by their lawyers – choose litigation in conflicts about land, and what are the types of disputes commonly encountered in corporate litigation?

3) What is the relationship between corporate litigation practices and: a) the professional attitudes of lawyers and b) legal development in Indonesia?

4) How does the practice of corporate litigation relate to the condition of the Indonesian legal system generally, in particular in terms of formal legality, and more broadly to Rule of Law?

III Methodology and research notes

This research started developing in 2011 when I decided to move away from lawyering practice. I had been an associate and personal assistant to a 'family' lawyer[30] in Jakarta since 2009. The most important reason for the move was that I felt that after two years of legal practice, I was not gaining any new knowledge about Indonesian law or making a useful contribution to the development of the rule of law. Obviously, such a contribution is not the main task of lawyers. However, I expected that there would be certain ideals that I could promote, which turned out not to be the case.

30 Lawyers who operate as fixers but with more powerful and complex means. See Chapter 2.

I started to examine certain deficiencies of Indonesian law. I noted down my observations and as a lawyer and assistant, I attended as many meetings with clients and counterparties as I could. At that moment, I did not have any concrete research topic. I only knew that for the sake of knowledge, the practice of law by the 'haves' (Galanter 1974) in Indonesia needed to be understood.

Thus, I unintentionally performed a kind of participant observation throughout my lawyering career. I was observing legal practice as an actor, not spectator. I follow Bourdieu's view on defining practice (1990; 2001; 2003). According to him, practice is an embodied logic put into actions by actors as 'strategic improvisers who respond dispositionally to the opportunities and constraints offered by various situations' (Swartz 1997:100), meaning that actors are conditioned physically, normatively, and cognitively in their scope of actions and margins of maneuver. Practitioners are not often aware of why they do certain things, especially when they look back and try to describe or explain what they did to an outsider. Therefore, being a detached observer is insufficient for understanding the urgency of actors' decision-making. This is why I needed to be reflexive and to try to be objective in addition to participant observation.[31]

To turn the participant observation into genuine research, I moved to Leiden in early 2013 to become a PhD researcher at the Van Vollenhoven Institute (VVI). At VVI, I was encouraged to look into land, which is one of the institute's foci of study. Combining these interests, I chose to focus on legal practices regarding the buying and selling of the rights to own or develop land, which requires licenses or approval from the state. This focus offered me an excellent opportunity to contribute to one of the main themes of VVI and pursue my interest in corporate lawyering.

My previous participant observation provided me with foreknowledge about a particular type of lawyer and law firm's practice. It involved meetings between lawyers, clients, and their counterparties and opposing counsels. I dealt with notaries, business acquaintances and political, administrative, and judicial connections. I drafted contracts and explained the meanings of statutes, litigation procedures, and outcome chances to clients, as well as—the most difficult part—why they lost in court. I managed lawyers' fee invoices alongside abrupt business trips to Singapore and Hong Kong for note-taking and general assistance. Such observations were not enough since there was a danger of creating a black swan theory: the possibility that my findings were only found in one particular firm.

To avoid this, when I started my research, I first looked into information that would be available to anyone. I looked into the published decisions of the Indonesian Supreme Court. Selecting cases required creativity, as their database was rather disorderly. At the start, I was confronted with massive numbers of cases, although I found I could narrow my search by going

31 Bourdieu refers to this methodology as *participant objectivation* (2001).

directly to the registrar's page of the court's website (https://kepaniteraan.mahkamahagung.go.id/perkara/) and filter cases by inserting *PT*[32] at the 'Parties' name' column. Chapter 1 explains further selection methods, as well as an overview of corporate litigation. I also used media reports, financial and annual institutional reports (issued by, e.g., banks, companies, the Supreme Court, Ombudsman, *Komnas HAM*, *LBH*), and attended professional seminars.

To complete and crosscheck the findings and assumptions from participant observation, I went back to Jakarta in early 2014 to conduct interviews with lawyers. I could interview 48 lawyers, whom I selected by distinguishing between two distinct practices. First, those who have positive views about 'family' lawyers, either because they work as such or they admire them, and secondly, those who have negative views and consider that kind of practice to be 'dirty'. I selected interviewees from these two sides. I complemented these by interviewing clients of these lawyers whom I could access: bankers, company representatives, and businessmen in private equity, or 'investors' as I will refer to them in this book.

I also interviewed three Supreme Court judges, two District Court judges, a court registrar, a KPK investigator, three NLA officials, an administrator, and the head of an Indonesian bar association whom I selected based mainly on whom I had access to.[33] These were relatively formal, intensive interviews that were semi-structured and lasted between one and four hours. There were also shorter interviews that occurred with limited privacy in-between seminars and conferences, in the courthouses' hallways, restaurants, and hotel bars.

Before conducting any interview, I created an interview guide that included a proto-case with assumptions of expected answers and follow-up questions (Annex 1). A few of the more general questions I asked during interviews were about the interviewees' opinions about the development of Indonesian law, their personal reasons or motivations for becoming a lawyer, and what a good lawyer was to them. I asked about their career development, why they changed firms, the most difficult case they had handled, what the most difficult time in their career was, and, to get an idea of their personal background and attitudes, about their hobbies, their families, and their religion.

I decided to take notes instead of recording the interviews because I wanted interviewees to be as open as possible. To create an atmosphere of mutual trust, I always told the interviewees (or agreed) at the start of the interviews, to give them an overview of my findings after the interview to

32 PT is short for *Perseroan Terbatas*, which means the result would only focus on cases that have at least one company involved.

33 The district court judges, registrar, and KPK investigator were handling a corruption case of a lawyer, and the NLA officials are in charge of handling land disputes at the main office of the Ministry of Agraria and Spatial Planning/National Land Agency in Jakarta.

which they could add suggestions and clarifications. Note-taking proved to be strategic.[34] I noticed that the interviewees usually got encouraged to elaborate on a specific topic when I was writing something in my notebook. I also used note-taking as a moment to pause and allow the interviewee time to say more or clarify their statements.

At the beginning of the interviews, I introduced myself as a PhD researcher from Leiden University and maintained this position throughout the interview. One of the most remarkable observations during the interviews was the following: Usually, interviewees would speak in exalted terms about the law and assert that they were idealists. Towards the end of the interview, however, when they learned (by asking me questions) that I worked for the 'family' lawyer, they quickly changed their tone, assuming that I understood their kind of practice. They would then disclose more details of what they actually *did* in practice. In doing so, they showed that they realized that certain practices (which they initially concealed) were illegal or wrong, or at least perceived as wrong by the general public and society.

The next thing I tried to find out was the kinds of social capital lawyers have at their disposal, which plays a more important role than legal skill and often clashes with or violates professional norms. For this, I needed to know my interviewees' network, so I asked them about their peers' work, their opponents in lawsuits, and their co-plaintiffs or co-defendants, as well as their opinions concerning the widely-alleged existence of a judicial mafia.

Reflexivity and ethical concerns

Writing down my findings proved to be ethically difficult. Positioning myself as an insider in Indonesian lawyering and as an outsider in international academia, or vice-versa, has remained a disorienting position. Reflecting on my experiences and findings came with a 'transgression that takes on the air of treason' (Bourdieu 2003:283), which means that while writing, I had a feeling of disloyalty to my colleagues in Jakarta.

As a lawyer, I had to distinguish the legal from the illegal, looking primarily and subjectively from the perspective of my clients or employer. By contrast, my obligation as a researcher and author is to find and present genuine scientific objectivity. I had to distance myself from my subject, yet I also had to realize how my role affected my subject, as well as viewing myself as a subject in my research. Therefore, the methodology I used for this thesis needed to be reflexive, i.e., a method that removed my 'lawyerly bias'. I had to realize the effects and limits of my experience in my professional universe(s). During the research, I had to shift frequently from being

34 I was only asked once why I did not have a recording device ready. The interviewee even took the lack of any visible recording technology (such as a tape recorder or a camera) as an offense and claimed that I was not a real researcher unless I 'recorded' him.

a researcher at the Van Vollenhoven Institute; an institute mostly dealing with the poor, the marginalized, and victims, to being a lawyer in Jakarta researching the elite or the perpetrators.

Removing judgment was not easy for a lawyer who was trained to use normative labels such as 'corruption' or 'justice'.[35] The objective of this study was to understand processes and attitudes. To do this properly, I needed to take a sufficiently detached standpoint. Extended time in Leiden was crucial for this, as it aided me in relinquishing my role as an actor and switching from the perspective of a participant (lawyer) to an observer (socio-legal scholar).

In the end, this methodology allowed for me to show how deals are made and negotiated, how favors are won and useful 'friends' are made, and what steps are taken when problems emerge by the objects of this research: elites who are unapologetic in the name of progress, development, and the accumulation of wealth.[36]

IV Structure of the book

This book is structured according to the litigation process. The first chapter is an overview of the issue and shows the types of cases and parties involved, what legal arguments they bring to courts, and the legal reasoning and decisions the courts provide. Chapter 2 paints a detailed picture of lawyers as the most important actors in using and developing the legal procedures explained in Chapter 1. Chapter 2 analyses lawyers' habitus, their field, and their professional relationships. Chapter 3 illustrates the types of cases explained in Chapter 1. To understand why cases come about, one has to understand the business practices of developing land in Indonesia, how businesses are organized, how contract relationships are formed and carried out, and what rules are applied when these relationships were in distress. Chapter 4 shows the strategies lawyers use before, during, and after litigation, what follows litigation, and how enforcement is performed. The book concludes with an analysis of the Rule of Law condition in Indonesia and offers suggestions to form policies and give recommendations for legal reform

35 In fact, two dichotomies are being conflated here: actor versus scholar and normative versus empirical research.

36 Mistakenly perceived as *kesejahteraan* or *kemakmuran* (prosperity). In this, they meant the prosperity of their group, not the noble notion of *kesejahteraan masyarakat* (prosperity of the people) or *kemakmuran bagi seluruh rakyat Indonesia* (prosperity for all Indonesian citizens).

1 Overview of Corporate Litigation about Land in Indonesia (Courts Paving the Way for Legal Strategy)

Before we can address the role lawyers play in land litigation, we have to realize that in Indonesia, just like in most developing countries, problems concerning land development, including land use, are difficult for the government to regulate. There are lots of issues involving people, companies, government agencies, and other interest groups (Otto & Hoekema 2012:4). The following story shows a typical scenario involving land development and problems concerning it that are often encountered in Indonesia.

It was a rainy Sunday night in Jakarta, and I was on my way to dinner at an area in North Jakarta that is well-known for its constant flooding and traffic jams. As I was entering the area via a highway, the first I thing noticed was a distinct sewer-like smell. A 'Mega Mall' was right in front of me, and there were endless rows of restaurants and square-shaped shophouses, amidst and despite the smell.

This area used to be a swamp. In 1960, the government decided the area was to be 'closed' to construction because the location was prone to flooding. This predicted risk proved true, as the land surface kept sinking and people had to rely on water pumps and embankments that were barely holding back the ocean tide. Buildings are at least two meters above the streets, and bigger houses are built even higher. However, a corporation somehow gained licenses to build in the area, and now it is now thriving with recreation, residences, and industry.

I remember the same sewer-like smell in my hometown, Makassar, where I used to jog along the beach that was lined with food stalls, a social place for people to enjoy the breeze and watch the sunset. However, a corporation obtained a license to build in that area as well. Construction started on the beach, the air got dirty, and the developer relocated the food stalls forcefully to a designated courtyard. Land was reclaimed along the coastline. A road was built to connect the reclamation area with the beach, bypassing protesting fishers and shrimp farmers who were occupying around 2 km of coastline. Each time I drove along that new road with my windows closed, the same smell still crept inside my car.

When talking about corporations and their land dealings in Indonesia, this is probably a common story. In every step of the development process, some relationships are prone to disputes. The government may not agree to give a license, or the landholder (or the seller) may not deliver on their promise. The National Land Agency may refuse or take a long time to issue or transfer a land certificate or refuse to put it in their database. There may be problems in the process of clearing the land; there may be squatters, landholders, or even other legitimate owners.

After gaining control of the land, there may be problems with obtaining proceeds from income derived from the investment. There may not be buyers who want to build their houses in the new area, and the company can be in trouble with its creditors. Buyers might stop paying installments. Hence, another set of problems arises because of non-payments or non-deliveries. The clashes in these relationships are the likely causes of litigation. The relationships are also linked to and shaped by the development of this litigation process.

Courts in Indonesia have the formal power to define and shape relationships between the state and citizens. However, they have a reputation for being dysfunctional, corrupt, and unable to enforce the law and deliver 'justice' (Butt & Lindsey 2010:189-192). As I will show, there are structural problems in the legal procedure underlying corporate litigation (as it has developed in practice) that make it extremely difficult to resolve cases. In this chapter, I will look into why corporations still use the courts despite this situation, what the outcomes of the litigation are, how they can be explained, and what the consequences are for the legal system.

I started my search on the Supreme Court website, where the court decisions are supposed to be accessible. The Supreme Court in Indonesia is the highest tribunal and has the authority to decide questions of law, not facts.[1] The Supreme Court receives appeals (for cassation) from all courts in Indonesia, from first instance and appeal courts. The first instance courts are separated into General Courts, Administrative Courts, Religious Courts, and Military Courts.[2] The General Courts consist of regular civil and criminal procedures, and Special Court procedures.[3] Appeals against Administrative Court decisions are submitted to High Administrative Courts.[4] Appeals against General Court decisions are submitted to High

1 Aside from serving as the highest tribunal in Indonesia, the Supreme Court has the authority (Law No. 5/2004) to review regulations that are of a lower tier than laws enacted by parliament. Legal issues adjudicated by the Supreme Court include whether or not a regulation violates the public interest, conflicts with higher regulations or laws, and whether or not the making of the regulation sufficiently followed prevailing laws and regulations. This adjudication is significant because the laws enacted by parliament usually have implementing regulations that are more specific. Between 2003 and 2007, the Supreme Court received 175 requests to review regulations. To date since 1997, the Supreme Court recorded 595 decisions to review regulations. This authority is significant in relation to land litigation because it revises regulations that give authority for taking certain actions regarding the status of land, e.g., regional regulations acknowledging that *adat* communities gain formal rights to land. I found 53 cases registered concerning this authority, with companies as the litigants, but only one of the decisions is published.

2 Religious and Military Courts are not relevant in this study, as Religious Courts handle individual disputes on Muslim family and inheritance matters, and Military Courts handle disputes about military personnel.

3 Special Courts are Juvenile Courts, Human Rights Courts, Industrial Relations Courts, Commercial Courts, Fishery Courts, and Corruption Courts.

4 Administrative Courts are in each regent capital or cities. High Administrative Courts are in each provincial capital.

Courts, and appeals against Special Court decisions are submitted directly to the Supreme Court without going through a second instance court.

The Supreme Court also has the authority to re-examine its own decisions through a Review procedure. The Supreme Court will do a Review if the Court accepts new evidence that has never been examined, or if the court acknowledges an error made by the judge in deciding the cassation.[5]

1.1 Types of Cases

To investigate how corporations litigate, first, I had to figure out what kinds of disputes they bring to courts, what laws are applied, and how courts interpret these laws. I searched for cases involving companies before and up to 2013 and found that only a small number of decisions were published on the website.[6]

Table 1.1. Supreme Court cases involving companies

Year registered	Number of cases	Number of available decisions
2013	2548	-
2012	2680	87
2011	2469	476
2010	2540	1001
2009	2137	719
2008	1784	463
2007	1814	387
2006	1156	270
2005	823	163

5 For more about this Review procedure, see this chapter's section 2 about the appeal procedure.

6 A member of the court reform team informed me that all decisions are supposed to be published. However, it was not surprising that not all decisions were published yet, because I based my search on the year the cases were registered, not decided, so cases might still be ongoing. However, I accessed the website again at the end of 2014 and received the same result, although the number of cases registered in 2013 increased from 470 to 2548.

I then reviewed cases from 2012, but they were not representative since only Special Court cases were uploaded, and there were only a few of them.[7] Next, I tried to find cases by subject matter: civil cases, criminal cases, and administrative cases. Special Civil cases were still the majority.[8]

Table 1.2. Available Supreme Court decisions involving companies (by subject)

Year registered	AG[9]	MIL[10]	PID[11]	PID SUS[12]	PDT[13]	PDT SUS[14]	TUN[15]
2011					14	462	
2010					100	891	10
2009	3				148	513	55
2008	2				121	235	105

Based on this result, I decided to review all cases registered in 2009 for two reasons. First, it is the most recent year that provides a somewhat balanced number between Civil Cases, Special Civil Cases, and Administrative Cases. Second, I handled a number of those cases when working as a lawyer, which not only provided me with first-hand knowledge of them, but also enabled me to better understand what happened in other, similar case. Altogether, this has enabled me to provide an in-depth analysis in the next chapters.

I reviewed all 719 decisions from cases registered in 2009 using the keyword 'land' and found 131 cases. Industrial relations disputes still dominated the special civil cases, but there were also 14 bankruptcy cases concerning land. 20 cases out of 131 only concerned requests for seizure (*sita jaminan*)[16] of land pending the court's decision. The court did not decide these requests but summarily dismissed them.

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7 I reviewed all 87 cases and noticed that all of them are *Pdt.Sus* cases (*Perdata Khusus*, or Special Civil cases). The vast majority of these cases (90%) are about Industrial Relations Disputes or employee-employer relationships. Of these 87 cases, only 3 cases discussed land in the context that the employee asked the court to guarantee confiscation of the employer's land and building. In all 3 of these cases, the Supreme Court sided with the employees by ordering the employer to pay the employee's salary, compensation, and damages, but rejected the requested guaranteed confiscations without mentioning the reasoning.

8 The decision numbers of these cases are marked *Pdt.Sus* (e.g., Decision No. [number] [K/PK]/*Pdt.Sus*/[year]). It stands for *Perdata Khusus*, meaning special civil cases from a Special Courts procedure, either Industrial Relations or Commercial Court. K stands for *Kasasi* or cassation, and PK means *Peninjauan Kembali* or Review.

9 Cases from Religious Courts.

10 Cases from Military Courts.

11 Criminal cases from General Courts

12 Criminal cases from Special Courts' procedure, see footnote 3 above.

13 Civil cases from General Courts

14 Civil cases from Special Courts' procedure, see footnote 2 and 3 above.

15 Cases from Administrative Courts.

16 *Sita jaminan* (or literally seizure as a guarantee) is an injunction to freeze an asset pending a court decision. Article 227 HIR regulates *sita jaminan*.

For this reason, I was left with 101 decisions. To analyze these decisions, I created a table summarizing 10 aspects: (1) the parties, (2) the main objectives of the claim, (3) events according to the Plaintiff, (4) the legal basis of the claim, (5) events according to the Defendant, (6) the defense, (7) the first instance court decision, (8) the appeal court decision, (9) the Supreme Court decision, and (10) the core problem of the dispute.

To summarize the core problem of the dispute, I focused on the events according to the Plaintiffs and Defendants and summarized (in a sentence or two) the substance of and reasons behind their arguments. The decisions revealed that cases of land litigation can be grouped into four main categories: (1) different understandings between parties about the agreements or the amount of debt created by the agreement, or the willingness or inability to carry out the agreements, (2) bad relations between neighbors regarding rights and use of property, (3) unclear land borders, and (4) the failure of the National Land Agency to maintain proper records of land transfers.

In the next part, I provide further details about these categories by describing what these cases consist of to identify characteristics of and problems with corporate litigation involving land in Indonesia.

1.1.1 Parties

Most of the cases involve multiple Plaintiffs and Defendants. I found three types of parties: natural persons (individuals and collectives), companies, government agencies, and notaries. Natural persons and companies can be Plaintiffs, Defendants, or Co-Defendants, but government agencies and notaries are always Defendants or Co-Defendants.

Natural persons can be divided into two sub-categories: (1) individuals claiming to have legal rights to land or being the heirs of land rights or (2) a village community or a group of farmers, joining together under their own names or acting as a *yayasan* (foundation) or *perkumpulan* (informal group). If they operate as a village community, they give power of attorney to the *Kepala Desa* (village head).

There were 49 cases initiated by natural persons. These cases were about land ownership, and the plaintiffs based their claims on the history of land ownership. They claimed to be entitled to land rights because of their family's relationship with the previous rights holder or to prioritize to register the land under their name because they had been occupying it for a long time. These 49 cases involved 6 cases where the claimants were village communities (with 3 of those granting power of attorney to their village head), 8 where the claimants alleged to be the heir to land rights, 2 where the claimants were an informal group, 1 where the claimant was a foundation, and 1 where the claimant was the head of a foundation.[17]

17 However subtle, this could affect the concept of agency and property.

Companies involved in land litigation can be divided into three categories. First, companies and banks managed by the government:[18] PT. Pertamina, PT. Perkebunan Nusantara, PT. Pelabuhan Indonesia, PT. Bank Mandiri, and PT. Bank Negara Indonesia. Second, private banks and third, private companies and publicly listed companies (PT. Tbk.). There were 52 cases where the claimants were companies. The cases show that when the companies are claimants, the majority of defendants are also companies or natural persons alongside companies.

The government agencies and officials involved are the Ministry of Forestry, Ministry of Law and Human Rights, the Governor, *Bupati* (Regent), and the National Land Agency. Notaries and notaries/PPAT[19] are also involved.

Parties to the disputes can take on different roles, including the following:

1) *Penggugat* (Plaintiff), *Tergugat* (Defendant), or *Turut Tergugat* (Co-Defendant): Usually, there are several Plaintiffs and Defendants in a case. Plaintiffs and Defendants can be natural persons or companies. The notary and the government, particularly the head of the National Land Agency's office in the district where the land or certificate in dispute is located or issued, often join defendants. The parties are referred to as *Pembanding* (Appellant) and *Terbanding* (Appellee) in High Court, and *Pemohon Kasasi* (Cassation Applicant) or *Termohon Kasasi* (Cassation Respondent) in the Supreme Court.

2) *Pelawan* (motion applicant) and *Terlawan* (motion respondent): Parties are referred to as *Pelawan* and *Terlawan* in a case that results from an earlier procedure called *verstek*. *Verstek* means that the judge delivered a decision without the presence and involvement of the Defendant.[20] The Defendant can challenge this *verstek* decision regarding the original case by applying for a procedure called *verzet*. *Verzet* can be filed within 14 days after the *verstek* decision has been 'sufficiently informed'.[21] *Verzet* is filed to postpone the enforcement of the *verstek* decision. Appeals to the High Court and Supreme Court, and requests for Review by the Supreme Court can be filed against *verzet* decisions. This search found 6 cases started by a *Pelawan*.

18 These are for-profit companies that do not receive any state facilities and its employees are not civil servants.

19 PPAT or *Pejabat Pembuat Akta Tanah* are notaries who specialize in drafting and legalizing deeds concerning land.

20 Even though the judge is obligated to go through the procedures in taking measures to ensure the Defendant is informed about the case (Article 125 HIR).

21 Article 129 HIR/153 RBg.

3) *Pembantah* (third party opposition) and *Terbantah*: When the first instance injunction is from a procedure called *derden verzet* (third party opposition), the parties are called *Pembantah* and the responding party is *Terbantah*. This procedure allows a third party who suffered damages because of a first instance court decision[22] to file a lawsuit against the Plaintiff and Defendant. Appeals to the High Court and Supreme Court, as well as requests for Reviews by the Supreme Court, can be filed against the decision. I found 3 cases started by a *Pembantah* to contravene a court seizure of land.

4) *Penggugat Intervensi* and *Tergugat Intervensi* (Plaintiff and Defendant in Intervention): *Intervensi* is a procedure with the later involvement of a third party.[23] The third party, which is referred to as either Plaintiff or Defendant in Intervention, can be involved in a claim through three kinds of possible conditions: (1) *voeging*, a third party submission of a claim to support a Plaintiff or Defendant, (2) *tussenkomst*, a third-party submission of a claim for its own interests, and (3) *vrijwaring*, when a Defendant forces a third party to be involved in a claim with a request to the court (e.g., when a Plaintiff claims to a Defendant to pay certain debts but the Defendant alleged that another party has an obligation to pay instead of the Defendant). There are 9 cases involving Plaintiffs or Defendants in Intervention, 6 of which are Administrative Court cases.

The types of parties show different ways that natural persons engage in collective actions, and the different roles parties have in disputes. Moreover, the cases were not only started by corporations wanting to acquire land, but also by natural persons who try to fight the corporations.

1.1.2 Objectives

In all of the cases I examined, the objectives of the parties were to get control of the land and to be compensated for the other party's actions. There were 21 cases where the party already had control of the land and needed to secure it legally. In all of the cases, parties asked for compensation of 'material and immaterial' damages. Material damages include loss of property and money. Immaterial damages include loss of 'good name', reputation in society, 'thoughts' and psychological distress (i.e., the inability to think about anything other than the case), lawyers' fees, and '*pengurusan*'[24] fees. Parties sought to be compensated for these damages with money and property.[25]

22 Article 379 Rv. is sometimes referred to in this practice.
23 Article 279 Rv. is sometimes referred to in this practice.
24 '*Pengurusan*' means handling, managing, or taking care of.
25 There are two cases where the Plaintiff asked for an apology through the media, but the court did not discuss the request.

In practice, parties try to achieve these objectives by trying to get a court decision about the validity or invalidity of evidence or transfer of land rights, and if there is already a decision in place, by trying to postpone or enact the decision.

1.1.3 Standing to Sue/Legal relationship

Plaintiffs are required to prove their legal relationship[26] with the Defendant to have standing to sue.[27] In Administrative Courts, the Plaintiff has to prove that the administrative decision caused them to suffer damages.[28]As a way to prove the legal relations that caused damages, the Plaintiffs explain the history of their landholding and how land certificates should have been issued under their name. The basis for their issuance argument is that they have been controlling the land, they should have had priority as the party with the closest family connection to the previous landholder, or they have worked to clear the land.[29]

The same goes for cases before General Courts, although there, Plaintiffs try to prove their entitlement through agreements, deeds and letters, court decisions (both ongoing and previous), and police reports[30] that are related to the damages.

In the cases I examined, 9 defendants argued that they had no legal relationship with the plaintiff, and the first-instance court approved the arguments in 2 cases. The first case involved a legal representative filing the case as a plaintiff where he had no direct interest himself.[31] The second involved a plaintiff claiming there were damages suffered by an entire neighborhood, but the plaintiff filed the lawsuit on his own, without involving the neighborhood.[32]

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26 This means that they have to prove that they have a legally protected interest in the case, which should be defended by providing evidence of a legal relationship.

27 'Lawsuits should be filed by parties who have a legal relationship' (Supreme Court Decision MA 249 K/Sip/1971).

28 Article 53(1) Law No. 51/2009 jo. Law No. 9/2004 jo. Law No. 5/1986 about Administrative Courts states, 'Anyone of a civil legal entity who feels that its interests are being violated by an Administrative Decision can file a written claim to a court with authority which consists of their demand for the Administrative Decision to be cancelled or invalidated with or without demand for repayment of damages and or rehabilitation.'

29 This is usually the argument to challenge HGU.

30 Police reports are about alleged fraud (Article 378 KUHP), embezzlement (Article 372 KUHP), defamation, trespassing and destruction of property.

31 Decision No. 11 K/Pdt/2009.

32 Decision No. 3054 K/Pdt/2009.

1.1.4 Claims

In Administrative Court cases, a request to suspend an administrative decision can be made until there is a final decision because the law on Administrative Courts states that a claim will not prevent the implementation of the administrative decision unless the Plaintiff can prove that they will suffer damages as a result.[33]

In both General and Administrative Court cases, there are several different types of claims, each asking the court to decide on different matters:

- *Provisional claim*: This is a decision about a temporary action for the interest of one party before a final decision is made. For example, a decision containing an order that one party stop developing the land in dispute. In provisional claims in general courts, parties also ask the court for seizure. There are three different kinds of decisions about court seizure: to 'freeze' the object until a final decision is made (*sita jaminan*), to return the object of claim to a party, and execution of seizure order (*sita eksekusi*).
- *Merit of the case*: Here, parties ask the court to decide on the subject matter of the case, which is to declare whether or not a party has done a certain action, declaring whether or not the basis of a legal relationship (in the form of contracts, agreements, or certificates) is valid, or which party is entitled to certain actions or damages.
- *Payment of material and immaterial damages, payment of debt and interest, and for dwangsom*: These are payments to be made if the court-ordered action is not performed by a party.
- *Uitvoerbaar bij voorraad*: Parties also ask that the decision be enforced immediately even though a means of appeal might be available.[34] This decision is crucial when it concerns court seizure, as it determines the legal holder of the land until the court decides otherwise.

As we can see in the next section, there are a significant number of cases before the Supreme Court only involving attempts to enforce court orders, indicating inefficiency regarding appeals, which I will explain further in section 2 of this chapter.

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33 The request for suspension can even be declined if it concerns administrative decisions for development in the public interest (Article 67(4)(b) Law No. 5/1986).

34 180(1) HIR.

1.1.5 Issues

The claims involved the following issues:

Land certificates versus transfers of historical rights	(23)
Loan with land as collateral:	(21)
Non-payment of debt	2
Different understandings of the amount of debt	4
Creditor did not issue loan after loan documents are signed	1
Debt is not due but creditor auctioned off the collateral	3
Loan documents are falsified	1
Creditor refused to receive repayment of loan	2
Restructuring:	
a) Loan changed hands without knowledge of debtor	3
b) Loan changed hands with knowledge of debtor	1
c) Asset/collateral changed hands	2
d) Request for restructuring	2
Attempt to enforce or contest a court order[35]	(13)
Land transfer is not 'free' and 'clear'[36]:	(12)
Sale and purchase	9
Land from *eigendomverponding*[37]	3
Licenses[38]	(9)
Corporate governance	(3)
Share transfer	1
Disagreement in the company about who has the right to the land	1
Whether an asset is the company's asset or the personal asset of a director	1
Process of land clearing	(8)
Status and process in obtaining land certificates[39]	(6)
Overlapping land certificates	(1)
Non-payment of rent	(2)
Environmental concerns	(1)
Relationship between neighbors	(2)

As we can see, the most common issue (23 cases) was about competition between historical rights and its transfers versus land certificates issued by the National Land Agency. Land certificates were affirmed by the court in 17 cases (74%). This means that the courts considered the land certificates to be stronger evidence compared to other sources of land rights. On the other hand, fighting a land certificate in court may actually pay off.

35 Court orders include enforcement of seizure orders, another first instance court order, or Supreme Court orders related to land control.

36 It means that the rights to transfer land were presented as undisputed, but in fact they were not.

37 This is a tax certificate from the colonial period used as proof of land rights. The practice could have originated from Article 2(1) of Staatsblad 1917 No. 754, which states 'Taxables are persons with rights over items mentioned in Article 1', while Article 1 explained the persons taxable are those with ownership ('*hak milik Bumiputra* or *hak eigendom*').

38 Mining and plantation licenses, license for construction of building (*Ijin Mendirikan Bangunan*) and location permits.

39 Disputing the validity of land certificates issued by the NLA.

1.1.6 Legal basis

The legal basis in the Administrative Court cases I examined was the general principle of proper public administration. Parties relate violations of this principle to violations of other regulations (e.g., being inaccurate[40], not free of corruption, collusion, and nepotism,[41] and violating legal certainty and carefulness[42]). The courts deal with disputes about the issuance of land rights by the NLA, and about the validity of land certificates, location permits, and decisions regarding the location of land procurement. The latter involves questions about whether or not the certificate was made falsely, i.e., whether formal requirements were met.

In the case search, I found that the interpretation of what constitutes an administrative decision is unusually broad. It includes notarial deeds concerning companies, such as Articles of Association and its amendments as a result of General Shareholder Meetings (RUPS), because they were registered by the Ministry of Law and Human Rights.

In Special Civil Court cases, bankruptcy procedures are the legal basis, where the object of the dispute is a debt that has to be proven to be 'valid and simple'.[43] This is a rather subjective criterion, and the existence of the case itself (defendant's objection) could be an indication of the debt not being 'valid and simple'.

In General Courts, the legal bases ranged more broadly, from the action and performance of state officials (i.e., whether corruption was involved in the issuance of certificates) to allegations of notaries and notaries PPAT putting false information in an authentic deed.[44] Only 2 General Court cases referred to specific articles of law instead of claiming that another party performed an unlawful act. These cases claimed tort or breach of contract. There are 41 cases clearly mentioning tort (as Perbuatan Melawan Hukum, which is regulated by the Civil Code[45]) while 10 mentioned breach of contract.[46] 2 General Court cases[47] used police reports in civil cases about defamation and related the defamation to damages under tort law.

Citizens could sue the government under tort law if officials made an administrative error. As a result, officials become overly careful with formal requirements and would not do something that is out of routine. Failure to include relevant government bodies can be grounds for a defendant to argue that the case is '*kurang pihak*' (lack of parties). Failure to identify exact

40 Decision No. 190 K/TUN/2009 and No. 10 PK/TUN/2009.
41 By referring to Law No. 28/1999. Decision No. 15 PK/TUN/2009
42 Decision No. 145 PK/TUN/2009.
43 Article 8(4) of Law No. 37/2004 explains that this condition means that there are at least two creditors, that the debt has been due and payable, and that those can be proven simply.
44 Article 266 Indonesian Criminal Code.
45 1365 Civil Code.
46 1243 Civil Code.
47 2494 K/PDT/2009 and 2822 K/PDT/2009.

names of government agencies in a claim can even cause the defendant to argue that the case is *error in persona*, making a claim inadmissible. However, this did not often happen: out of 22 cases where the defendants argued for rejection because the claims were *kurang pihak* and *error in persona*, courts affirmed the inadmissibility in only 3 cases.[48]

1.1.7 Defense

As I just mentioned, there are various arguments available to defendants for requesting the claim be inadmissible. This procedure is referred to as submitting exceptions (*eksepsi)*. *Eksepsi* were brought forward by the defendant in all the cases I examined. If the court approved the claim(s) on *eksepsi*, the court would issue a 'NO' decision, short for *niet ontvankelijk verklaard* in Dutch, meaning that the case was formally inadmissible. There are 20 cases (out of 101 decisions I examined) where first instance courts rendered this kind of decision.

There are many types of *eksepsi*. First, defendants argue about jurisdiction, whether the court where the lawsuit is brought is the proper forum for the case, which is referred to as *eksepsi kompetensi*, or an exception regarding competence. There are two kinds of *eksepsi kompetensi*: absolute and relative. In relations between District Courts, Administrative Courts, and Religious Courts, these two *eksepsi kompetensi* are interpreted as (1) absolute: whether a case should be filed in another type of judiciary (whether it is Administrative Courts, General Courts, Special Courts, Religious Courts, or Military Courts) or (2) relative: whether a case should be filed in another area of the district court's jurisdiction.

When there is more than one party, the general rule of thumb is that the Plaintiff can choose the area of one of the defendants.[49] If the location of the defendant is not known, the jurisdiction follows the location of the Plaintiff or the object of dispute.[50]

There are various kinds of *eksepsi* besides *eksepsi kompetensi*. The following are most commonly used:

- '*Error in Persona*': an argument that the Plaintiff filed a claim to the wrong person. In civil cases, the argument is that the Defendant is not the party causing—or should not be responsible for—damages. In administrative cases, it is about which agency has the legal power to decide about whether or not to cancel the Administrative Decision.
- '*kurang pihak*': there is an interested party not included, most commonly a notary or an NLA official.
- '*Error in obyekto*': the land in dispute is not described correctly, or refers to the wrong plot. It usually applies to non-urban land because plaintiffs

48 Decision No. 2654 K/Pdt/2009, No. 70 K/Pdt/2009, No. 948 K/Pdt/2009.
49 118 (1) and (2) HIR.
50 118 (3) HIR.

did not explain the location sufficiently, such as not including (or including incorrectly) markers or neighboring borders.
- '*Res Judicata*' or '*Ne bis in idem*' or '*gezag van de gewijsde*': a person or legal entity cannot be accused of the same (unlawful) action if a court has delivered a final and binding decision. In some cases, this *eksepsi* is also argued in civil and administrative cases under the reason that bringing the same claim violates the principle of legal certainty.[51]
- '*Obscuur libel*': when the bases or reasons of the claim (*posita*) are not in conjunction with what is being asked for (*petitum*), the claim must be rejected for vagueness. This was argued in most of the cases I studied. The prevailing opinion amongst judges and jurists now is that an unlawful act[52] (*perbuatan melawan hukum* or tort) cannot be combined with breach of contract[53] (*wanprestasi*, i.e., failure to fulfill an obligation) in a single claim, not even as alternatives. The claim would be considered vague and have to be refused. I will elaborate on this further in this chapter, in section 1.2.4 about legal reasoning.
- Premature claim: a defense arguing that the Plaintiff has not yet suffered any damage.
- Expired claim: the time limit to file the case has passed.[54] This is more commonly used in Administrative Court cases, which has a strict time limit of submitting a claim within 90 days after the administrative decision is issued.

In Indonesia, there is a common practice that parties do not need to disclose what is not beneficial for their position, and what is not denied by a Defendant does not need to be proven by the Plaintiff.[55] This means parties would include every possible defense, even if it does not apply to their case. I will explain the consequence of this practice later in this chapter, in section 3 (the nature of discovery).

1.1.8 Court decisions

There are three kinds of first instance court decisions: the claim is granted, rejected, or declared inadmissible. The claim is declared inadmissible if there is a flaw in how the legal procedure was followed, in which case the claim could be submitted again at a later time.

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51 The Supreme Court further circulated a letter (Circular Letter No. 3/2002) about how to handle cases about ne bis in idem principles. The Supreme Court chairman Bagir Manan suggested to all the heads of courts to properly implement the principle for certainty and to avoid contradictory decisions.

52 1365 Civil Code.

53 1243 Civil Code.

54 There are various regulations about this, also in Bankruptcy Law. It is used mostly in administrative court cases because the time limit is very short: 90 days.

55 The origin of this belief could be traced to a seminal book by Subekti, *Hukum Pembuktian* or Law of Evidence (1975:14).

An appeal court can either uphold or overturn a first instance court decision. When an appeal court overturns a decision by a first instance court, it will cancel or revise the first instance court decision, and deliver its own judgment. The appeal court will not return the case to the first instance court unless the case file is incomplete. Even then, the appeal court can perform its own examination (Sutantio & Oeripkartawinata 1979:125). The Supreme Court can accept or reject an appeal for Cassation, or declare it inadmissible. There are 46 cases where the appeal court upheld the first instance court decision, and the Supreme Court rejected the Cassation request. Like the appeal court, when the Cassation is accepted, the Supreme Court can cancel or revise the appeal court decision and deliver its own judgment. In the cases I analyzed, the Supreme Court accepted only 16 cases for Cassation out of 101. This shows that the Supreme Court does not often revise lower courts' judgments, meaning there is at least a degree of consistency in outcomes.[56]

I found 28 cases where the National Land Agency was on the same side as a company. The companies, together with the National Land Agency, won 23 of those cases, totaling over 80%. They lost the case to natural persons in only 1 case.[57] In this case, there was a land certificate (*Hak Milik* or certificate of ownership) issued by the NLA pursuant to a Sale and Purchase Deed, which canceled a previous *Hak Milik* owned by the deceased father of the plaintiff. The mother claimed to have never known of such a sale. The court agreed with the plaintiff.[58] There is also only one case where the National Land Agency was on the side of a natural person and opposed a company.[59] The case was not decided in their favor. This means that when companies manage to join forces with the NLA, they are almost unbeatable in court.

In all the decisions, there was sparse legal reasoning provided by the courts concerning what makes a party more entitled to land rights than another. There is also a high probability that corporations will win land entitlement over another if the corporation manages to have the NLA on its side.

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56 Roughly 15%, similar to what was found by Bedner regarding Administrative Courts appeals (2008:240).

57 Decision No. 22 PK/Pdt/2009. Coincidentally, this anomaly is about the location I mentioned in the story at the beginning of this chapter.

58 Hj. Najmiah Muin, the defendant (together with the company PT. Gowa Makassar Tourism Development or GMTD and the NLA) who purchased the land pursuant to the Sale and Purchase Deed, is an infamous 'land player' in Makassar. She is known to have paid farmers and smallholders who did not have formal land rights in exchange for their signatures in Sale and Purchase Deeds, which she would then use to claim formal land rights (land certificates) through the use of police, the NLA, and courts. It was a result of this practice that the natural persons (the farmers she 'purchased' the land from) could win the case. Hj. Najmiah Muin allegedly provided funds for bogus investment schemes by a 'miracle worker' and died after ingesting some 'magic water' given by him. <https://nasional.tempo.co/read/808774/kisah-korban-dimas-kanjeng-yang-sudah-bayar-rp-200-miliar/full&view=ok> <https://www.thejakartapost.com/academia/2016/10/14/dimas-kanjeng-and-modernity-challenged.html> last accessed 28 January 2019.

59 Decision No. 1810 K/Pdt/2009. The company is PT. Bank Panin, Tbk.

1.2 Problems concerning Indonesian Legal Procedure

The judicial system in Indonesia is regulated in Law No. 48/2009 about Judicial Power.[60] This law established that the courts in Indonesia are under the Supreme Court.[61] It also regulates the required characteristic of judges,[62] how they are appointed, how and why they can be dismissed, their oversight, and most notably, that litigation should be 'simple, fast, and low-cost.'[63] In this section, we will take a closer look at the extent civil procedure lives up to these expectations.

The Dutch colonial government introduced legal procedure in 1848 which is still applied today, along with other sources. Understanding the problems and weaknesses of legal procedure, particularly civil procedure, requires historical knowledge about its enactment.

Short history of Indonesian legal procedure

In the colonial era, the residents of the Netherlands-Indies were divided into two legal classes: the Europeans and the Indonesians.[64] To file legal complaints, the court for Europeans was different from the court for Indonesians.[65] Hence, the legal procedures also differed between the courts.

The applicable civil code for Europeans was the *Burgerlijk Wetboek* (hereinafter referred to as BW) and the Commercial Code (*Wetboek van Koophandel*). The rules of civil procedure were regulated by *Reglement op de Burgerlijke Rechtsvordering* (hereinafter referred to as Rv). In 1846, a Dutch jurist named H.L. Wichers was instructed by the colonial government to draft a unified set of legal procedures[66] that would be applied to the Indonesians (Supomo 1958:5). There were various reactions to the draft provided

60 Law No. 48/2009 jo. No. 4/2004 jo. No. 35/1999 jo. No. 14/1970. The law about judicial power stated that 'judicial power is the power of the free state to perform the judiciary in upholding the law and justice based on *Pancasila* and the 1945 Constitution, for the establishment of Indonesian *rechtsstaat* (*Negara Hukum*)'.

61 Article 25(1). Article 29 established the Constitutional Court, which has jurisdiction to review Indonesian laws enacted by parliament against the 1945 Constitution, dissolve political parties, resolve disputes between government institutions, and resolve disputes concerning the results of public elections. The Court also has the jurisdiction to decide, at the request of the House of Representatives, on the dismissal of the President and Vice President.

62 Judges have to investigate, follow, and understand the values of law and the living sense of justice in society, to have integrity and a flawless personality, and to be honest, just, professional, and experienced in the law (Article 5(1) and 5(2)).

63 Article 4(2) Law 48/2009.

64 They were previously referred to as *Bumiputera*, the indigenous Indonesians. This classification changes and varies over time, but these are the two distinct classes because of the clear division of legal procedure. There were also unsettled debates about how to classify other occupants of the Netherlands-Indies who are not Europeans and not Bumiputera, e.g., the Arabs and the Chinese.

65 For Europeans: *Raad van Justitie* and *Residentiegerecht*. For Indonesians: *Landraad*.

66 This includes administrative, civil, and criminal procedures.

by Wichers: some agreed while others thought it was over-simplified.[67] Those who disagreed wanted rules about mergers, securities, *interventie* (Dutch term for a third party's involvement in a dispute), and Review procedures as regulated in the Commercial Code and Rv to be added to the draft. As a compromise, Wichers added a clause to the draft *Herziene Indisch Reglement* (hereinafter referred to as HIR), stating that if there are necessary rules that are not found in HIR, Rv can be applied.

The HIR was then enacted as a 'carefully calculated try-out,' leaving it open to be discarded later on (Supomo 1958:8). HIR was only applicable to courts in Java and Madura. For courts outside Java and Madura, there was an even more simplified legal procedure called the *Rechtsreglement Buitengewesten* (hereinafter referred to as RBg) (Tresna 1970:12-13).

The legal classification of residents in the Netherlands-Indies, vis-à-vis the applicable rules for civil procedure, underwent a number of changes following Japanese power changes and during the decolonization war. In 1951, the Republic of Indonesia enacted an emergency law to unify legal procedures, although it omitted Rv and only mentioned HIR and RBg.[68] With the elimination of the court for Europeans, Supomo, a renowned Indonesian jurist and the first Minister of Justice of the Republic of Indonesia, assumed that Rv was no longer applied for civil procedure, and many other Indonesian jurists have restated this opinion.[69]

As part of the struggle for independence from the Dutch and nationalist pride, Indonesian jurists declared that Rv could be applied only as long as it was the judges' 'own invention', without actually using clauses in Rv (Supomo 1958:12). In the same spirit, the Indonesian Supreme Court in 1963 issued a Circular Letter declaring that the Civil Code (BW) only served as a guide and was no longer binding.[70] Due to this nationalism denouncing 'colonial' legal codes, the new government failed to unify legal procedures to regulate businesses, an area that has always been about relationships and interactions between legal-classes of Netherlands-Indies residents and later on the Republic of Indonesia.

We also have to keep in mind that all of these sources of legal procedures are in Dutch; the skill to translate or interpret this language to Indonesian has kept declining amongst legal scholars, causing a decline of unified interpretation of the codes along with it (Massier 2008). The criminal procedure was nationalized with the enactment of the *Kitab Undang-Undang Hukum Acara Pidana* (Criminal Procedure Code) in 1981. The effort to enact a new Civil Procedure Code, however, has never materialized.[71] The civil

67 The Governor-General stated that the draft should be in conjunction with the level of intelligence of the Indonesians.

68 Emergency Law No. 1/1951.

69 Amongst others, Subekti, Sudikno Mertokusumo, and Wirjono Prodjodikoro.

70 Circular Letter No. 3/1963.

71 BPHN (a legal development body under Ministry of Law and Human Rights) proposed a draft in 1967.

procedure still comes from various sources, and the lists of sources vary among legal scholars.[72] Collectively, those sources include:

a) Laws:
   - Emergency Law No. 1/1951, which states that the prevailing civil procedure in Indonesia is divided in two: HIR for Java and Madura, and RBg for outside Java and Madura
   - Rv
   - Book IV of BW about evidence and time limitations
   - Law No. 4/2004, amended by Law No. 48/2009 about Judicial power
   - Law No. 1/1974 about Marriages
   - Law No. 14/1985, amended with Law No. 5/2004 and Law No. 3/2009 about the Supreme Court. This law regulates appeal procedures, and according to its regulation and supervision authority, the Supreme Court issues Circular Letters, which have served as important sources of legal procedure[73]
   - Law No. 2/1986 about General Judiciary
   - Law No. 5/1986 about Administrative Courts
   - Law No. 7/1989 about Religious Courts
   - Other laws with elements of civil procedure, e.g., bankruptcy, intellectual property, and arbitration laws

b) Case law[74]
c) *Kebiasaan*, i.e., habit or customs or practice
d) International treaties
e) Doctrine

This historical development brings to mind an important question about decisions of Indonesian jurists to abandon 'colonial' legal heritage for the sake of nationalism during independence movement. There are several obvious steps of downgrading. From Commercial Code and Rv, to become HIR and RBg with an open clause referring to Rv, and then to abandon Rv altogether and rely on judges' 'own invention'. Why did the Indonesian jurists chose to use HIR, a set of rules enacted by the colonial government with the assumption that Indonesians do not have enough intelligence as the Europeans? The consequence is that the clauses in Commercial Code and Rv that were left out around two hundred years ago reflects weaknesses in legal procedure today; on issues of jurisdiction, appeals, nature of discovery and legal reasoning of judges.

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72 See, e.g., seminal works by Supomo, Subekti, Soesilo, Sudikno Mertokusumo, Tresna, Retnowulan Sutantio, and Yahya Harahap.

73 The scope of these Circular Letters was gradually broadened, serving as authoritative statements on the law, even substantive law. For more, see Pompe (2005: 265–274).

74 Referred to as *yurisprudensi*, from the Dutch word *jurisprudentie*, which means previous court decisions, precedence, or case law.

1.2.1 Jurisdiction

As mentioned under the section on defense, there are two kinds of jurisdiction regarding a court's competence to hear a case: absolute and relative. A plaintiff can submit that the first instance court in which they are filing a claim has jurisdiction on several grounds: (1) the domicile of the Defendant, (2) the domicile of one of the Defendants (if there are several), (3) the Plaintiff's domicile (if they do not know the Defendant's), (4) the domicile of the main debtor, (5) at the location of the land as an immovable object, or (6) at a previously agreed upon jurisdiction stated in a written document.[75]

This division of absolute and relative competency creates split and sometimes overlapping jurisdictions, which results in inefficiency. A party can—and in some cases, have to—go to all kinds of forums separately for each legal question they want to ask in a dispute. In a civil procedure before the general court, the claimant can only seek damages in the form of monetary compensation, while in the Criminal Procedure, the court mainly renders jail-time for the accused. The court could also impose fines, but it is not a possible replacement for jail-time. In cases regarding land, there is an added administrative court procedure. If a plaintiff does not get a result they want in the administrative court, they could go to the general court, and vice versa.

In the case analysis, I found 34 cases where other proceedings existed, and 5 cases where parties submitted their claims to both district and administrative courts, alongside reports to the police. Related proceedings can be submitted later, or a plaintiff can use the favorable result to go to another forum as evidence to strengthen their argument. This second type relates to issues about evidence, which I will discuss further in the next section.

In most cases, the fundamental issue is about entitlement to property, but resolving this may involve different courts. For instance, both general courts and administrative courts have the authority to cancel land certificates. To give an example, a Plaintiff goes to a general court using a land certificate as evidence to ask the court to declare the Plaintiff's entitlement to land. Meanwhile, the Defendant claims to have rights from inheriting the land. While the case in a general court is ongoing, the Defendant goes to an administrative court, asking the administrative court to cancel the Plaintiff's land certificate. The Defendant can then go back to the general court, claiming that the Plaintiff's certificate is no longer valid. This condition would not create any complications if the district court proceedings were postponed until the administrative court decision. However, this is not the case in practice.

The results of this practice are contradictory judgments and parties being able to challenge court decisions repeatedly. Continuing the illustration above, presume that the general court decides that land indeed belongs

75 Articles 118, 125, 133, 134, and 136 HIR.

to the Plaintiff. However, an administrative court decides that the Plaintiff's land certificate is invalid and canceled. Parties then have to appeal both the general court decision and the administrative court decision. Moreover, they can use one of the decisions to eventually file for Review, making the legal procedure extremely complicated and inefficient. This illustration also shows that parties can keep challenging a court decision by simply going to another forum, or by raising another specific legal issue.

Let us again take an example from the illustration above. The Plaintiff asks the district court to seize the land ("freezing the asset") pending the court decision, which ideally should be done in a process similar to a summary injunction, which is known in Rv as *kort geding*. *Kort geding* could serve as an important coordination procedure between courts, but it is not recognized in HIR. Theoretically, a judgment from a provisional claim, which HIR recognizes,[76] could be applied for this purpose, but the Supreme Court declared that the enforcement of such injunctions should be approved by the Supreme Court first.[77] The application of what is intended to be a quick way to safeguard an asset pending a court decision rather results into a long process. Combining this fact with the requirement that only "legally binding decisions" (referred to in practice as *inkracht*. See further explanation in the next section) could be enforced results into an extreme efficiency. This also means that parties who have the Supreme Court's "approval" for such summary injunctions then have the interests to drag the "actual" court process as long as possible as a way to keep their claim to the land under dispute.[78]

1.2.2 Appeal procedure

The provisional claim I mentioned above is referred to as a request to render a decision *uitvoerbaar bij voorraad* (the Dutch term for provisional decision), which means that the decision can be enforced pending appeal. *Uitvoerbaar bij voorraad* is no longer requested only in provisional claims; it is becoming an important enforcement clause that Plaintiffs ask in all cases. This is one example of how legal procedure applied in practice is not consistent with regulations, particularly procedures regulated in Supreme Court Circular Letters (Pompe 2005:239).

Another example of this inconsistency is the timing for appeal. The law states that the time limit to file an appeal is 14 days from the announcement of a decision if the parties are present, or 14 days after the decision was received by a party who is not present.[79] Parties are allowed (but are not required) to submit a memorandum of appeal[80] any time before the high

76 Article 180 HIR.
77 Supreme Court Circular Letter No. 4/1965.
78 During participant observation I encountered several court cases concerning disputes over ownerships of parcels of land that have been going on for about 70 years.
79 Article 46, Law No. 14/1985.
80 Article 199 (1) RBg, Supreme Court Decision No. 663 K/Sip/1971 and No. 3135 K/Pdt/1983.

court decides the case.[81] The 14 day requirement is the same when filing cassation to the Supreme Court. However, a memorandum of cassation has to be submitted by the Cassation Applicant within 14 days, and the Respondent is given 14 days since receipt of the memorandum of cassation to file its response.[82] In practice, this has become a waiting game, used by the parties to delay the time limit for appeal. A party who feels that they would not win the case will not be present at the day when the judges announce their decision, leaving extra time to strategize. Furthermore, because there is no time limitation for submission of the memorandum of appeal and there is a possibility to delay receipt of the memorandum of cassation, parties have ample room to negotiate with the court registrar[83] about the procedure and timing of their appeal.

An additional example of the inconsistency is the reality of the term 'final and binding'. A final and binding decision is referred to as *inkracht* (from the Dutch *in kracht van gewijsde)*, meaning all the means of appeal have been exhausted, either by time expiration or by undergoing all stages of appeals from a first-instance court to an appeals court and the Supreme Court. In practice, only such final and binding decisions are enforceable. However, there is still a Review[84] procedure. Cases can be subject to a Review for several reasons, e.g. if there is newfound evidence.[85] There is no time limitation for finding new evidence, only that the Review has to be submitted within 180 days after the finding.[86] In practice, the Review procedure causes certain disputes to never end.[87]

In sum, the weaknesses of the appeal procedure have become '[…] a handy delaying tactic for litigants who used it not because they expected to win, but because enforcement would be stayed thereby and the opposing

81 Supreme Court Decision No. 39 K/Sip/1973.

82 Article 47, Law No. 14/1985.

83 Court registrars have the task of informing parties of court decisions, sending and receiving appeal and cassation announcements between parties and the courts, and generally performing the courts' administrative functions, even to the extent of enforcing a court decision.

84 The review procedure is not recognized in HIR and RBg, only in Rv, known as *request civiel,* but is regulated by Law No. 14/1985.

85 Reasons for Review include (Article 67 Law No. 14/1985, jo Supreme Court Regulation No. 1/1982): 1) If a decision was based on a deception or misrepresentation of the opponent which are discovered after the case has been decided, or based on evidence which is declared fake by a criminal court; 2) If after the case has been decided, there are letters as evidence found which are decisive in nature that were not found when the case was being examined; 3) If a claim which was not made is granted or if more than what was claimed is granted; 4) If the same court (or in the same instance) decides the same issues for the same parties with the same basis in a contradictory manner; 5) If there has been an issue which is part of a claim that has not been decided or considered; 6) If there is a judge's error or a real mistake in a decision.

86 Article 69, Law No. 14/1985.

87 In the case studies, I found 18 Review decisions, 13 of those were rejected by the Supreme Court, 4 were approved, and 1 was declared inadmissible.

party might abandon the case as a result' (Pompe 2005:240). In chapter 4, I will explain the use of appeal as a delaying tactic in more depth.

1.2.3 The nature of discovery

Discovery is applied in most common law systems or adversarial models of civil procedure. Simply put, discovery is a process for disclosure of facts between parties. As I have explained above, in Indonesia, parties do not need to disclose what is not beneficial for their position, and what is not denied by a Defendant does not need to be proven by the Plaintiff (e.g., Subekti 1975:14). This should lead to an efficient procedural order, but in practice the result is quite the contrary. Defendants try to use any opportunity to deny even potential arguments from the Plaintiff, meaning arguments that the latter may not even bring forward.

Another issue we encounter in procedural practices relating to discovery is the admissibility of evidence. This is determined by evidentiary law, which contains rules about what kinds of evidence can be admitted in court, how they can be obtained, their relevance and strength, and the rules of procedure that govern their admission. In Indonesia, a major issue with evidence in cases concerning land is that not all land is registered. The strongest pieces of evidence submitted in this study are land certificates (*Sertifikat Hak Milik, Hak Guna Usaha,* and *Hak Guna Bangunan*). These are challenged by historical explanations about land control and supporting documents, such as *girik*,[88] or acknowledgments or declarations from authorities (e.g., the release of land rights from district heads, village heads, and regents[89]). They can also be challenged by agreements, deeds of land transfer (Sale and Purchase Deeds[90] and Mortgage Deeds[91]), or reports of court seizure.[92] Settlement deeds[93], previous or other court decisions, police reports, and licenses (e.g., location permits and building permits) can also be used to challenge them. When there is no land certificate, the issue is which party has the clearest and most continuous historical explanation about land control and the relevant supporting documents.

According to prevailing procedural laws, evidence consists of letters or other written evidence, witness statements, speculations, confessions, and statements made under oath.[94] The Indonesian Criminal Code lists witness testimony, expert testimony, letters, instructions[95], and the accused's testimony.[96] These codes, however, only list what is considered as evidence

88 Proof of tax payment of uncertified land.
89 *Surat Pelepasan dan Penyerahan Hak Atas Tanah.*
90 *Akta Jual Beli.*
91 *Akta Pemberian Hak Tanggungan.*
92 B*erita Acara Sita.*
93 *Akta Perdamaian* or *Akta van dading.*
94 Referring to Articles 164 HIR, Article 284 RBg and Article 1866 Civil Code.
95 *petunjuk*, can also mean advice, clues, and suggestions.
96 184(1) Criminal Procedure Code.

without regulating what determines the credibility and weight of evidence, except for one in the Civil Code explaining that the value of evidence in an authentic deed is perfect and binding.[97] There is no further explanation about which authentic deed would prevail over another authentic deed when there are various kinds submitted in court. Nevertheless, this lack of evidence regulation is in line with an inquisitorial system, where the rules of evidence are less strict in constraining the judges (Parisi 2002).

However, the role of judges in the evidentiary procedure is affected by a dualism. According to Rv, judges should be passive, while according to HIR, judges should be active (Supomo 1985:18).[98] The latter means judges should actively look for evidence even though it is not presented to them by the parties. It also means that in a situation where there are overlapping and contradictory evidence, judges have to examine all of these pieces of evidence presented. At the same time, judges should be passive in the sense that they should only decide what is claimed by the parties (e.g., Mertokusumo 1982:10). These are two very confusing and conflicting roles. On the one hand, judges should be actively looking for material truth,[99] while on the other hand, judges are supposed to only decide on what is presented to them by the parties.[100]

Furthermore, from the case analysis, I found that lawsuits rarely have real results, as the cases circle back to issues regarding a particular item of evidence presented in court. The action of filing a lawsuit itself, for instance, is used as evidence for damages in terms of emotional distress later on in a new case. Cases also originated out of attempts to enforce a court decision, and new parties emerge as protestors against the enforcement. A practice has arisen where police reports are used as evidence in civil cases. The use of police reports likely occurs because the interpretation of what is an 'authentic deed' is very wide and includes court decisions, letters, and reports from authorities. Additionally, this procedure also contributes to uncertainty regarding Review Procedure for cassation judgments. Court decisions can be used as 'newfound' evidence to re-open the case for Review,[101] which results in cases never actually being resolved, but a mere practice of canceling each other's evidence in courts.

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97 1870 Civil Code and 285 RBg. Although Article 1871 further provides an exception that the binding effect only concerns the main content of the deed, not everything that is mentioned in the deed.

98 This is stated in various clauses of HIR, e.g., Article 119 and 132 HIR, giving authority to judges for providing advice to the parties about legal procedure.

99 Referring to the principle of *rechtsvinding* and the independency of judges. The law on Judicial Power stated broader obligations for judges: *menggali* (meaning to dig, though in a figurative meaning, as the term *menggali* is a process of searching or discovery), to follow, and to understand the 'living' value of law and sense of justice in society (Article 5(1) Law No. 48/2009).

100 Under principle of *ultra petita* or *ultra vires*. Also referring to Articles 178 (3) HIR and 67(c) Law No. 14/1985.

101 Article 67(b) Law No. 5/2004.

1.2.4 Legal reasoning

In the 85 (out of 101) cases rejected by the Supreme Court, the reasoning provided is that the case was a request for assessing evidence regarding the acknowledgment of a fact (*'penilaian hasil pembuktian yang bersifat penghargaan tentang suatu kenyataan'*) instead of assessing whether or not the *judex facti* made an error in applying the law.[102] The term *judex facti*[103] refers to the panel of judges of the first and second instance, and the term *judex juris* refers to Supreme Court judges because they only examine the application of law. However, the Supreme Court judges rarely discuss the rules and their application in their decisions. For example, the considerations of the Supreme Court in all of the cases rejected for cassation only consist of four short paragraphs.[104] This is not an issue as long as lower courts provide sufficient reasoning in the previous decisions. However, these are mostly equally short, and the Supreme Court does little to clarify what it actually agrees with when it overturns lower courts decisions.

The cases show that arguments about rules and the way they are applied are only made in the claim or request and defenses part of the court decisions, which are naturally drafted by the litigants or their legal representation (i.e., lawyers). To give an example, Defendants seek to defeat the Plaintiffs' argument by alleging that the claim is vague because of the 'obscurity' between tort and breach of contract as the basis of the claim. They support this claim by citing previous Supreme Court decisions. Only in a single case[105] did the Supreme Court judges declare that combining tort and breach of contract in one claim does not cause the case to be vague. The judges decided that such a belief is '… too formalistic and stiff, because the difference between tort and breach of contract is only gradual in nature, […] that the civil law principle lies in the obligation of the parties to present their [legal] facts to the judges, but judges should decide the law on those facts.'[106]

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102 Reasons for Cassation are: whether or not (1) judexfactie has jurisdiction or exceeded their authority in examining cases, (2) made an error in applying the law or violated law and regulations, and (3) negligent in fulfilling the requirements regulated by law and regulations (Article 30 Law No. 14/1985 jo Article 30 Law No.5/ 2005 jo Article 30 Law No.4/2004).

103 Spelled interchangeably between *judex facti* and *judex factie*.

104 First, that the judex facti did not make an error in applying the law. Second, that the judex facti decision is not contrary to the prevailing laws and regulations. Third, a statement about the payment of court costs. Finally, as a formality, that it has considered the laws concerning judicial power and the Supreme Court.

105 2863 K/Pdt/2009. The judges presiding were HarifinTumpa (at that time also the chairman of the Supreme Court), I Made Tara and Muchsin.

106 Through this statement, the Supreme Court acknowledges the obligation for the judges to 'find the law' and provide legal reasoning in their decisions. In Indonesia, this is regulated with Article 5(1) Law No. 48/2009. See also footnote 99. This obligation is in line with current civil procedure in the Netherlands, which is stated in Article 25 Wetboek van Burgerlijke Rechtsvordering (Dutch Code of Civil Procedure). Based on conversation with Prof. Nieuwenhuis, 12 January 2015. I am grateful for the kind assistance from Dr. Jeroen van der Weide in finding and explaining the article to me.

There are several reasons why legal reasoning is limited: insufficient time due to caseloads[107] (which I further explain below), judicial reluctance to write more because of the specious argument that the civil law tradition does not require elaborate judgments, and corruption (e.g., Bedner 2016; Butt 2018). Additionally, the important possible cause but needing more exploration is the judges' lack of skills in legal reasoning and legal writing.[108]

Use of foreign languages

Another problematic characteristic of legal procedure is the lack of clarity of legal terminology. This problem starts with Dutch as the historical legal language, which was then forcefully changed to Indonesian by the Japanese regime (Massier 2008:160).[109] This caused disorientation for Indonesian jurists who were used to speaking and reading Dutch. Most importantly, the HIR and the Civil Code are originally in Dutch, a language with specific legal vocabularies, making the translation to Indonesian difficult. Indonesian jurists use different translations of Dutch legal terms since an authoritative translation was never made, resulting in inconsistent interpretations, an area that should again be filled by judges' legal reasoning. Nowadays, the problem of foreign language in legal terminology is not limited to issues with the Dutch language. English legal concepts are becoming more dominant as the language of legal practice, despite attempts to counter its influence.[110] For instance, it is increasingly common to write contracts in English, particularly in the practice of corporate transactional lawyers, and this raises problems when the contracts reach Indonesian courts. This problem has been exacerbated by a law about the national flag, language, emblem and anthem (Law No. 24/2009), in which some articles require that contracts should be written in Indonesian.[111]

107 According to their annual report, in 2013 the Supreme Court received 22.449 cases. By the end of the year, there were 13.830 cases that were still being processed. There were only 38 judges in the Supreme Court.

108 A further study of judges' education and training is needed to confirm or deny this possibility.

109 'In 1942, the Japanese prohibit use of foreign language, particularly Dutch or English and only allowed Indonesian to be used in public services and civil service jobs, it was even prohibited at homes. This was followed by complete restructure of law schools and closing of colonial courts, transferring all jurisdiction to *Pengadilan Negeri* (formerly *Landraad*), where only Malay was recognize to be the legal language. This was seen as an important step to be taken for nationalization and independence from the Dutch.' For more see Massier (2008).

110 Contracts are mostly drafted in English and create problems when they reach Indonesian courts. To control this, Law No. 24/2009 was enacted, requiring contracts to be written in Indonesian (Article 31 and 32).

111 Article 31 and 32 Law No. 24/2009

(Non-)Use of precedent

When referring to previous court decisions, lawyers in their memorandums refer to *yurisprudensi.* The Supreme Court periodically publishes a series of books called 'The Supreme Court *Yurisprudensi*'. Judges rarely refer to it, but litigants and lawyers sporadically use them to support their arguments.

Between efficiency and quality

Aside from their scarce use of precedents, judges have continued to produce barely reasoned decisions. The question is why this is the case and what the consequences are.

An important reason has to do with the type of scrutiny the courts are under. Since 2004, the supervision of judges is carried out by the Supreme Court and the Judicial Commission.[112] There have often been conflicts between the two institutions.[113] Both the Supreme Court and the Judicial Commission can dismiss judges if they breach the ethical code or the code of conduct,[114] e.g., because of corruption. They can also criticize judges for producing bad decisions. The standard of what is a good decision, however, is rather ambiguous.

Courts are criticized for being slow and inefficient in case management. As a result, they concern themselves with proving otherwise. It is the courts' major goal to be quicker in delivering decisions and reducing the backlog of cases.[115] To achieve this, the Supreme Court has instructed judges to use standardized templates in drafting their decisions.[116] These electronic templates are the way for courts to 'perform modernization in case management'.[117] A working group was formed to draft and make these

112 The Judicial Commission has the authority, according to Law No. 22/2004 as amended by Law No. 18/2011, to (a) oversee and supervise judges' conduct; (b) receive reports from citizens in connection with violations of the Judges' Ethical Code and Code of Conduct; (c) perform a close verification, clarification, and investigation of reports alleging violations of the Judges' Ethical Code and Code of Conduct; (d) decide on the validity of reports alleging a violation of the Judges' Ethical Code and Code of Conduct; (e) to take legal or other steps against an individual, group, or legal entities who undermine the judges' honor and nobility.

113 See for instance, conflict between the Supreme Court and Judicial Commission in a corruption case http://www.tempo.co/read/news/2013/09/21/063515422/Kasus-Sudjiono-Timan-KY-Belum-Terima-Salinan-PK and general issues on institutional coordination http://www.hukumonline.com/berita/baca/hol14143/mahkamah-agung-vs-komisi-yudisial.

114 See a joint decision by the Supreme Court and the Judicial Commission No. 047/KMA/SKB/IV/2009 or No. 02/SKB/P.KY/IV/2009 at http://bawas.mahkamahagung.go.id/bawas_doc/doc/kode_etik_hakim.pdf. Last accessed: 4 February 2018.

115 See Supreme Court Annual Reports and Blueprint for Reform of the Judiciary.

116 Supreme Court Letter No. 44/KMA/SK/III/2014.

117 Blueprint for Reform of the Judiciary 2010–2035 p. 40, also stated by Supreme Court Registrar https://badilag.mahkamahagung.go.id/seputar-ditjen-badilag/seputar-ditjen-badilag/atasi-kelambanan-minutasi-kepaniteraan-ma-lakukan-elektronisasi-template-putusan-184. Last accessed 4 February 2018.

templates uniform,[118] then the Supreme Court issued instruction letters to implement them.[119]

The following is the template for civil cases at first-instance courts:

Considering, that based on report by the Mediator dated …, the effort for reconciliation was not successful;

Considering, because of that, examination of the case was continued with reading of claim which content is sustained by the Plaintiff;

Considering, that against the Plaintiff's claim, the Defendants delivered their response which in essence is as follows:[10]...

Considering, that all matters consisted in minutes of hearings of this case, to concise this decision, is deemed included and inseparable part of this decision;

Considering, that the parties have declared that they do not have any further submission and requested a decision;

ABOUT LEGAL CONSIDERATION

Considering, that the intent and purpose of the Plaintiff's claim is in essence about ...;[11]

Considering, that because it has been acknowledged or at least it was not denied, so according to the law it shall be deemed to be proven these matters ...;

Considering, that the disputes between the parties are about ...;

Considering, that based on the abovementioned things, the Panel of Judges needs to first take into account...;[12]

Considering, that based on Article 163 HIR/283 RBg, Plaintiff is obliged to prove the abovementioned things;

Considering, that Plaintiff in strengthening his/her claim has submitted evidences in form of Exhibit P-1 to P-… and Witnesses who are 1…, 2…, ;

Considering, that from the evidences submitted by Plaintiff which are letter evidences P-… about… and P-… about … and Witness … who essentially stated … and Witness … and Expert Witness …. who essentially is in the opinion that...;[13]

Considering, that from the evidences submitted by Plaintiff in its relation to each other, Plaintiff could not prove its claim;

Considering, that therefore the Plaintiff's claim has to be rejected and the Panel of Judges need not consider evidences submitted by Defendant;

Considering, that because the Plaintiff's claim has been rejected, the Plaintiff has to be ordered to pay court costs;

Pursuant to Article ...Law No ... Year ...about... and other related regulations;[14]

[10] Copy-paste Defendant's response including *eksepsi*
[11] Consists of substance of the claim
[12] Consider first the things that are the essence of dispute
[13] Judge's consideration about Plaintiff's evidence
[14] Mention article from the law about procedure and also substantive law which is the basis of approval or rejection of the claim

Page 2 of 3 Civil Case Decision No. …/Pdt.G/20../PN…

118 Instruction Letter No. 181/KMA/SK/XI/2011 and then No. 123A/KMA/SK/VII/2013.

119 For Supreme Court decisions, Instruction No. 155 /KMA/SK/XII/2012. For all court decisions, No. 44/KMA/SK/III/2014.

In their application, following these templates has become a requirement for writing a *good* decision because other requirements of a good decision, such as passing a judgment that achieves a proper balance between justice, legal certainty, public purposiveness and the like, are too ambiguous and time-consuming to use as standards for holding judges accountable. The templates make it easier for judges to write their decisions without explaining their reasoning. As long as they follow the templates, the decision can be regarded as *good* and *correct* (*'baik dan benar'*)

Furthermore, by copy-pasting Defendant's response as we can see at the footnote 10 of the template, judges are not required to write their own understanding of the events explained by the plaintiffs and defendants before rendering their legal consideration. Hence, in the pursuit of efficiency, this method of writing court decisions using templates rather results into producing decisions that only answer legal questions on the periphery: they leave little room for judges as lawmakers and allow judges not to elaborate their findings and reasoning.

1.3 Procedural justice in the pursuit of truth?

Indonesia is a country with a civil law tradition. The legal procedure in civil law countries uses an inquisitorial system, which is oriented towards the pursuit of truth by balancing procedural and substantive justice (cf. Jolowics 2003). Judges decide whether a case has been 'proven'.The inquisitorial characteristics of Indonesian civil procedure are evident in the way they deal with fact-finding and evidence. These characteristics are reflected in few and flexible rules and procedures in the admission of evidence.[120] This leads to a system where judges can admit basically any evidence, but usually they rely heavily on written evidence.

Indonesian legal procedure is further characterized by 'fractures' as a result of two competing forces: continuity versus nationalism. The civil procedure as an in-between product is being pulled in one direction to follow the legal heritage of the Netherlands-Indies, and in another direction to build new practice in the spirit of nationalism by denouncing the Dutch legal tradition. Some particular elements from the legal heritage are moreover interpreted in novel ways that deepen the fractures. For instance, in their claims, Plaintiffs always include the principle of *ex aequo et bono*. In Indonesia, this principle is now interpreted to mean that '*if the panel of judges has a different opinion, we request a* just *decision*' instead of its original use that only applied to determining the amount of compensation for damages or another monetary obligation. This new interpretation contradicts HIR, which states that judges should not grant more than what is requested,

120 An adversarial system would have stricter rules and procedures.

and not grant what is not requested.[121] This clause in HIR is generally interpreted broadly, in the sense that judges become passive in finding the law.

Another problem is that the goal of having simple, fast, and low-cost judicial procedures is being materialized improperly. Court fees are indeed cheap, as low as Rp. 500.000 for a Supreme Court case, but the consequences of inefficient and uncertain legal procedure make practice expensive and complicated. The judicial process is hard to predict, and the lack of legal reasoning makes the question about who has the stronger or more legitimate claim on land hard to determine – for instance whether it is the party who works on /cultivates the land, the person who inherited the land, or the person who spent capital on the land.

This table summarizes the current deficiencies of civil procedure:

Characteristic of legal procedure	Practice	Consequences
Evidence: – overlapping and contradictory evidence (multiple sources of land rights) – admittance of irrelevant evidence	lack of due process slow	Inefficiency
Format of decisions	Lack of legal reasoning	Uncertainty
Unclear language	Philosophical, not pragmatic	
Scattered rules of civil procedure	Over-reliance on doctrines	

The inefficient and uncertain civil procedure creates wide opportunities for deploying all kinds of legal strategies, with scattered rules causing laws to be hazy, crazy, accidental, and malleable (cf. Masson & Shariff 2011). In the next chapter, I will focus on the lawyers as the actors who use those opportunities.

121 Article 178(3) HIR and Supreme Court Decision No. 29K/Sip/1950).

2 The Illusion of Prestige: Business and Politics of Lawyers in Indonesia

The lawyer calmed down as soon as we landed in Singapore. He was slouching, his shoulder down while gazing through the car window. He took the time to sit down for lunch. His meetings were creative and rational, sharing and discussing technical knowledge on law and finance with CEOs and accountants. 'I always relax when I'm here,' he said, probably because he did not have to be constantly on edge, not thinking about another trick he could pull from his sleeves, like in his meetings in Jakarta.

As we have seen from the previous chapter, lawyers play the active role that judges should in legal interpretation. They practice law by educating clients and translating the language of the law, predicting outcomes and resolving disputes (cf. Barclay 2004). Lawyers bridge citizens and the legal system, and society and the law. They monopolize this representational role in judicial proceedings. Lawyers have certain duties and responsibilities towards clients, alongside a certain degree of autonomy. This autonomy is awarded to the profession to uphold and promote the law and the idea of justice. The duties and privileges are similar globally, with principles and standards internationally enacted by organisations such as the United Nations and the International Bar Association.

Chapter 1 explained the lack of clear rules regarding legal procedure, determined instead largely by practice. This chapter serves to understand the structures underlying this practice. I will argue that how lawyers perform different roles in operating the legal system, and their use and invention of strategies make them the most dominant actors in shaping the development of the legal system and legal procedure.

The following questions guide my argument: How much independent judgment do lawyers have to practice in the absence of legal certainty? What guides their decisions? What is the role of normative ethical framework and is it being enforced? What kinds of professional relationships do they have and how do they use these relationships in practice?

This chapter answers these questions by explaining the role and functions of lawyers in Indonesia, their background, training, and education, and the imbalances between their beliefs and the rules about professional duties and responsibilities. It will describe how law firms are a key arena where lawyers form their professional ideology (cf. Nelson & Trubek 1992) and how firms establish their image to attract certain kinds of clients. It will also describe how lawyers conduct their relationships inside the firm, with lawyers from other firms, and with clients, notaries, judges, police, prosecutors, and bar associations.

There is a rich array of research on private lawyers in the United States and United Kingdom (e.g., Moorhead 2014; Heinz & Laumann 1982; 2005; Abel 2003; Nelson & Trubek 1992; Galanter & Palay 1991) and research on lawyers and their ethical dilemmas from having corporate clients (e.g. Bagust 2013; Jonas 1987). Some research has also focused on private lawyers in China (e.g., Thornton 2008; Liu 2006; Lo & Snape 2005; Zongling 1993; Zheng 1988; Gayle 1978). Dezalay and Garth (1997) presented the role of lawyers and their social capital in business. Studies of Indonesian private lawyers cover pre-*reformasi* periods well.[1] That coverage was part of Daniel Lev's work, one of the most productive socio-legal scholars on Indonesia. After his passing in 2006, researchers have paid little attention to private lawyers, focusing instead on cause lawyering and legal aid.[2]

2.1 Role and Functions of Lawyers

During colonial times in 1928, the first law school opened in Batavia to fill posts in *landraad* (courts for natives) and to assist European judges, with the rationale that native Indonesians are more capable of relating with native litigants and defendants (Massier 2008: 79-85). However, the role of lawyers remained ambiguous for many years.

The 2003 Law on Lawyers was the first statute that regulated the role of lawyers in Indonesia, enacted 58 years after the declaration of independence. Before that, references about lawyers or "legal advisor/consultant" are mentioned in various regulations since 1947.[3] The Law on Lawyers states that '[l]awyers are people with a profession to give legal service, in and outside of courts […]'.[4] It includes the enactment of a Code of Ethics, an Advocates' Council, and a new Bar Association. It also includes registration and discipline, supervision, rights and responsibilities, remuneration, responsibility to provide legal aid, foreign lawyers, and attributes of a lawyer.

The Indonesian Constitutional Court has detailed the role of lawyers as 'to give legal consultancy, legal assistance, perform power of attorney, represent, accompany, defend and conduct other legal actions for clients' legal interest in and outside of courts. The role of lawyers outside of courts

1 Reformasi is a period starting in 1998 after the fall of Soeharto.

2 See work by Crouch and Tim Lindsey. It has to be noted that a number of socio-legal scholars completed an unfinished work of Daniel Lev after his passing and published a biography of Yap Thiam Hien in 2011. See Lev (2011).

3 See footnote 12 and 13 below.

4 Art 1(1) Law No. 18/2003.

has given meaningful contribution for empowerment of society [sic] and national legal reform, including settling disputes outside of courts.'[5]

The International Bar Association (IBA) prescribes a set of principles of professional conduct to lawyers around the world. These international principles are quite general, as assessing the criteria for imposing liability, sanctions and disciplinary measures are left to local bar associations. In Indonesia, only PERADI is active in building a relationship and cooperation with the IBA, and since even PERADI is now split in three associations, this likely applies to only a single 'branch' of PERADI (see section 2.2.1 below).

There is a clash between the international principles by the IBA and the Indonesian Code of Ethics regarding the role of lawyers in defending clients' interests. The international principle states "a lawyer shall treat clients' interests as paramount, subject always to there being no conflict with the lawyer's duties to the court and the interests of justice, to observe the law, and to maintain ethical standards".[6] While the Indonesian Code of Ethics place lawyers above their clients. The preamble of the Indonesian Code of Ethics states that lawyers are law enforcers ("penegak hukum") who are at par with other law enforcers[7], and it is an honor profession ("officium nobile"). In the Indonesian Code of Ethics, the prestige of lawyers is preserved more than its role as legal service providers. Lawyers in Indonesia shall be "honest and responsible in carrying out their profession, both to the Client, the court, the State or the community, and especially to themselves". Additionally, the Indonesian Code of Ethics provides several clauses not only allowing lawyers to reject clients or cases[8] but requiring them to do so[9] because in their role as lawyers, they are "free and independent" (Art. 3(c)). In sum, while the international normative framework put the interests of clients paramount, in Indonesia, lawyers are most responsible to themselves and to their own conscience ("hati nurani" (Art. 3(a)).

The Indonesian Code of Ethics describes the role of lawyers by using morally normative words such as polite, honest, and respectable. This is comparable to the condition of the unclear rules of legal procedure I mentioned in the previous chapter. When the boundaries about 'duties to the court' and 'observing the law' are unclear, putting clients' interest paramount to those could mean using the lack of clarity for the clients'

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5 See Constitutional Court decision No. 26/PUU-XI/2003, on whether lawyers are protected from civil and criminal prosecution only inside of courts, or also when performing their work outside of court. The Constitutional Court revised Article 16 of the Law on Lawyers (No. 18/2003) to read that lawyers cannot be civilly or criminally prosecuted while performing their professional duties and responsibilities in good faith while defending their client's interest both in and outside of courts.

6 Principle 5 of IBA International Principles on Conduct for the Legal Profession.

7 Police, prosecutors and judges.

8 Article 3(a) of Indonesian Lawyers' Code of Ethics.

9 Article 4(g) of Indonesian Lawyers' Code of Ethics uses the word "must". "Lawyers must reject cases that they believe to having no legal basis".

advantages. Therefore maintaining ethical standard should be paramount to protecting clients' interest in Indonesia.

Despite the 2003 Law on Lawyers and the Code of Ethics, the profession is still viewed with disapproval and suspicion. A joint study by USAID, the Asia Foundation, and PSHK found that lawyers value government recognition over society's trust (Kadafi 2001: 96-99). The study found that half of the respondents disagreed that lawyering is an honorable profession, because professionals did not meet their expectations (as enforcers of justice, defenders of the weak, and bridges between society and the legal process), seemingly focused instead on being willing to do anything to win, being money oriented, distorting facts, and playing with the law (Kadafi 2001: 267-270). These findings resonate with the dilemmas between zealously defending clients and maintaining ethical conscience I mentioned above. This lack of trust towards lawyers, added with the civil procedure's inefficient and uncertain characters analysed in the previous chapter, leads to a general distrust of the legal system. This chapter will also make apparent that the internal competition between lawyers is another major cause of the distrust of the profession, competition that the media widely exposes.

2.2 Organization of Lawyers

In the colonial era, Indonesian lawyers were a small group of accomplished and independent professionals. They were Javanese aristocrats trained in the Netherlands and devoted to the Dutch institutions and codes.[10] Possessing skill and status, they became the most actively involved actors in forming the national government after independence (Lev 1976:134). However, many of them left private practice for this purpose, which made the already small number of lawyers decline even further.[11]

Over the years, the autonomy of the profession has constantly been challenged along with the unstable political climate and ambiguity about the profession's function. The significance of the profession fluctuated along with regulations enacted about the judiciary, in which references about lawyers were only symbolic. The profession was implicitly referred to as 'a representative who is given authority' in the 1947 law about appellate courts in Java and Madura. This law was enacted to replace Japanese[12]

10 'Well-educated and self-confident as they have to be, to join a profession dominated by the Dutch. They criticized adat (customary) law and traditional authority, and their métier remains the codes written for Europeans. However, they refused to work for colonial government, being nationalists but not nativists, they were sensitive to tensions between public authority and private rights' (Lev 1992:4; 2011:108–10).

11 The first law school in Indonesia (Jakarta, then Batavia) was a late investment of the Dutch colonial government and it only opened in 1924. For an overview of the importance of lawyers' political capital, see Dezalay & Garth (2010).

12 Law No. 20/1947 was to replace Osamu/Sei/Hi/No. 1753.

regulations of the judiciary, then replaced by emergency law No. 1/1951, which was enacted to unify the judiciary in Indonesia. Despite the newly established national legal system, the existence of the profession remained ambiguous as it was only based on scattered references in various laws.[13]

During the 1950s, the judiciary's autonomy increasingly came under pressure, until it plummeted in 1965 with Law No. 13/1965, which gave power to the president to intervene in judicial processes. In the first years of the New Order, the autonomy of the judiciary seems to have increased. Various judiciary regulations were issued but were undermined by clever appointments made by Soeharto. Nevertheless, by contrast, lawyers gained more political significance because of the association of lawyers' (PERADIN) role in defending civil rights[14]. The number of lawyers grew along with economic growth because of increased foreign and domestic commerce (Lev 1992:5). The right of citizens to seek legal assistance from a lawyer was first recognized by Law No. 14/1970.[15]

However, this upward movement did not last long. Lawyers' associations were put under government supervision through the law on civil organizations.[16] Subsequently, the New Order government initiated the first national assembly of all lawyers to be unified into one association,[17] *Ikatan Advokat Indonesia* (IKADIN).[18] The autonomy of the profession as an institution declined even further with Law No. 2/1986, which appointed the Heads of District Courts to supervise lawyers, even in day-to-day operations.[19] This process of a government-driven establishment of IKADIN was the start of separating and grouping the Indonesian bar association(s), a topic we will return to later in this chapter.

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13 Other laws with references to the profession are: Law No. 1/1950 about the Supreme Court, which refers to 'defender' in Article 42, Law No. 19/1964 amended with Law No. 14/1970 about Judicial Power, which outlines entitlement to legal assistance, Law No. 13/1965 amended with Law No. 14/1985, which describes 'legal advisor are those who give legal advice in connection with court procedure', Law No. 1/1981 or Criminal Code, which regulates rights to a lawyer and how to be connected to a lawyer, Law No. 2/1986 about General Courts, which acknowledges the existence of a legal advisor in giving legal assistance to defendants. References to the profession were also issued by the Supreme Court and Ministry of Law in various letters.

14 YLBHI (Legal Aid Foundation) was founded with support from PERADIN in this period.

15 The law uses the term *penasehat hukum*, or legal consultant.

16 Law No. 8/1985.

17 Before IKADIN, there were at least 10 bar associations.

18 Some lawyers claimed they are forced to do so. Interview with Frans Winarta, February 2014.

19 One of Indonesia's famous defense lawyer, Adnan Buyung Nasution, clashed with judges about this concept during a high-profile case concerning General Dharsono, which triggered the issuance of the Supreme Court Decree No. KMA/005/SKB/VII/1987 about Procedure of Supervision, Enforcement and Defense of Lawyers, which significantly reduced lawyers' autonomy by putting them as subordinates of courts and the government. Further, it was used as a basis for claims against lawyers regarding contempt of court.

Even though there were several laws enacted regarding the judiciary in the late 1980s and 1990s, they only sporadically refer to lawyers.[20] These laws did not bring any change to the profession's condition, except for Law No. 8/1995, which defines 'legal consultants as legal experts who give legal opinions and are registered with Indonesian Capital Market Supervisory Authority' (*Otoritas Jasa Keuangan* or OJK, previously *Badan Pengawas Pasar Modal* or BAPEPAM). The role and organization of consultants, not *pengacara*, were explained for the first time.[21]

In the *reformasi* era, the struggle to define the profession's significance and autonomy has continued. After many complaints of lawyers being the *enfant terrible*[22] amongst other legal professions, a three-year process started during Abdurrahman Wahid's presidency to both regulate lawyers and acknowledge their profession. To this end, Law No. 18/2003 about lawyers (advocates) was enacted.[23]

The law requires that all practicing lawyers take an oath of office. Before the law was enacted, registration had never been a requirement to practice law. To be able to take the oath, law graduates have to be members of a bar association.[24] This requirement jumpstarted the significance of license and registration for lawyers, and entering a bar association became a serious issue.

2.2.1 Struggle for the Indonesian Bar Association(s)

The idea of professionalism has been discussed at great length in the literature on the legal profession. Bar associations commonly regulate lawyers' behavior as professionals. Their practice is made exclusive by requirements to enter the profession, enhancing status, and restricting internal and external competition (Abel 1989; 2011). The professional regulation, along with its regulatory bodies, should guarantee independence from the

20 Law No. 5/1986 about Administrative Court, Law No. 7/1989 about Religious Court, Law No. 3/1993 about Juvenile Court, Law No. 31/1997 about Military Court, and Law No. 4/1998 about Bankruptcy.

21 To be registered at OJK, they have to be a member of Himpunan Konsultan Hukum Pasar Modal (Capital Market Legal Consultant Association).

22 The term *anak bawang* (the child who is always being picked last) is invariably used for this purpose.

23 This was also driven by a Letter of Intent signed between the Indonesian government and the International Monetary Fund (IMF). One clause asserts that all lawyers practicing in Indonesian courts are to have licenses and a uniform ethics code. To carry out this clause, the government formed a team to draft the law, led by Prof. HAS Natabaya (chairman of Badan Pembinaan Hukum Nasional) and Adnan Buyung Nasution (a well-respected human rights lawyer), with representations from a number of lawyers' associations, such as IKADIN, Asosiasi Advokat Indonesia (AAI), Ikatan Penasehat Hukum Indonesia (IPHI), dan Asosiasi Konsultan Hukum Indonesia (AKHI). The team concluded its task in September 2000 by submitting the draft law to the House of Representatives (DPR) through letter No. R.19/PU/9/2000.

24 Article 3(1) and 30(2) Law No. 18/2003.

government and promote the lawyerly quest for the advancement of civil rights. Another point of attention in scholarly literature is the accountability of the profession towards clients and the lack of effective self-regulation, which is often said to be underdeveloped, even in countries with well-established legal professions, such as the United States and Germany (e.g., Fortney 2012; Rhode 2011; Abel 2011).

In Indonesia, organizing the legal profession has always been difficult. Before independence, the small number of lawyers was organized in an association called *Balie van Advocaten,* which predominantly had Dutch members. The informal Indonesian bush-lawyers[25] organized themselves into Persatuan Pengacara Indonesia in 1927. There is no record about lawyers' organization before that (Kadafi 2001:362-365).

The first national attempt of lawyers to organize started after independence with the establishment of PERADIN in 1963 as a national association to unite all Indonesian lawyers. PERADIN was politically strong and advocated constitutionalism and the rule of law. President Soeharto recognized PERADIN one year after he came into power.[26] With support from the regime, the tide was favorable to make PERADIN the sole bar association in Indonesia.

However, this did not materialize. PERADIN continuously challenged the authoritarian government and in 1978 declared itself a 'struggle organization'[27], driving some members to leave and set up a new association (Lev 2008:51). Lacking support from the regime, the idea for PERADIN to become the single bar association also subsided. To weaken PERADIN, in the early 1980s, the government initiated a strategy designed first to absorb PERADIN and smaller organizations into a single national association, IKADIN, and then to impose official disciplinary control over the entire profession (Lev 2008:62). Supreme Court Chairman Mudjono, Ministry of Law Ali Said, and Attorney General Ismail Saleh proposed this unified organization (Lev 2008:63). Despite pressures from these powerful government officials, PERADIN and other associations refused to disband and submerge themselves completely in IKADIN. Instead, they engaged in a slow battle

25 Known as *pokrol-bambu*, they were active in the legal profession but had limited legal education.

26 PERADIN was appointed by the military in 1966 through *Surat Pernyataan Bersama Menteri Panglima Angkatan Darat selaku Panglima Operasi Pemulihan Keamanan dan Ketertiban (Pangkopkamtib)* to defend the alleged perpetrators of G 30S PKI movement. Together with this appointment, PERADIN was declared as the sole custodian of all lawyers in Indonesia.

27 They declared a pledge to defend human rights, to pursue the struggle to establish truth, justice and law, to promote democracy, clean government, and an independent judiciary based on Pancasila, to fight for representative bodies that truly serve the people's interests, to obey the advocates' code of ethics, to defend the weak and the poor, to oppose all arbitrariness and oppression, and to be open to all criticism and correction from any quarter (Album Kongres V, 97–98, in Lev 1992:20).

with the government for control of the organization. Harjono Tjitrosoebeno, the chairman of PERADIN, was appointed as the first chairman of IKADIN.

When IKADIN was to appoint a new chairman following Tjitrosoebeno's term, there was a protest from Gani Djemat and Yan Apul, board members of IKADIN Jakarta, who disputed the method of voting. With support from the then Minister of Law, Ismail Saleh, Djemat and Apul's group walked out in the middle of the election procedure and established AAI (*Asosiasi Advokat Indonesia*) (Nasution et al. 2004:29)

There is little information on what happened with the merging and separating amongst lawyers between 1998 and the 2003 Law on Lawyers. Although seven bar associations signed a Code of Ethics in 2002,[28] this period perhaps saw a deeper division between public interest or cause lawyers and commercial lawyers. Many lawyers who were active in the reform movement became disillusioned by the result of their efforts in overthrowing the New Order government to achieve social justice (Lindsey & Crouch 2013). On the other hand, many commercial lawyers viewed this period as an opportunity. The Commercial Court that was required by the same IMF reform package as the 2003 Law on Lawyers was just in its infancy, as it opened just months after Soeharto resigned. Referring to this new arena, some lawyers claim that they did not have to seek work, particularly from foreign and national corporations,[29] so perhaps commercial lawyers were quite comfortable, while cause lawyers were still laying low in anticipation of the upcoming Law on Lawyers.

With the 2003 Law on Lawyers, a committee was formed temporarily to establish a single and unified bar association within two years.[30] A lawyer named Sudjono[31] was the chairman of the committee with the support from Supreme Court Chairman Bagir Manan.[32] From this committee,

28 This is the Code of Ethics enacted together with the 2003 Law on Lawyers. Seven out of eight founding associations signed this Code of Ethics. Indonesian Sharia Lawyers Association (APSI) did not sign the code. See the eight associations in footnote 36 below.

29 In a conference organized by lawyer Hotman Paris, a number of lawyers claimed that '*the crisis of1998 was heaven, since there were 'so much money that [they] almost did not have to do anything to get it*'. Jakarta, 9 September 2014.

30 The committee is called *Komite Kerja Advokat Indonesia* or KKAI.

31 Sudjono was the lawyer appointed to defend Xanana Gusmao, the former leader of the East Timor independence movement, from charges brought by the Indonesian government for rebellion and secession under the Indonesian Criminal Code (Articles 106 and 110). This appointment was controversial since other lawyers were denied access to visit Xanana when he was under custody, and he originally refused to be represented by any Indonesian lawyer (see Human Right Watch report Vol.5 No. 8, April 1993, p.12. https://www.hrw.org/sites/default/files/reports/INDONES3934.PDF. Last accessed: 19 October 2018).

32 During my interviews I found another claim that because Sudjono passed away before the 2003 Law on Lawyers, Otto Hasibuan as the General Secretary went on to become the head of 'the bar association' mentioned in the law. PERADI was essentially only a name change from KKAI to strengthen the position of Otto Hasibuan as the new chairman.

eight bar associations merged and established PERADI.[33] However, they merged with a disclaimer that the eight 'founding' associations continued to exist, even though the authority of drafting, examining, supervising, and dismissing lawyers on the basis of ethics was moved to PERADI.

This harmony did not last long. A newly established association KAI challenged the authority and legitimacy of PERADI, while PERADI insisted that the establishment of KAI was illegal because the time limit to set up a bar association (under the 2003 Law on Lawyers[34]) had passed. Several lawyers started KAI because of PERADI's alleged corruption and for expelling Todung Mulya Lubis, a prominent lawyer who also had a stint in legal aid activism.[35] The battle then continued on issues about recognition and unification, with involvement of the Supreme Court[36] and lawsuits filed before the Constitutional Court.[37]

The dispute was brought ahead by a Letter issued by Supreme Court Chairman Harifin Tumpa,[38] stating that there should only be one bar association and that before the dispute would be resolved, the Heads of High Courts should not swear in new lawyers, due to the concern of violating the Law on Lawyers[39].

The Supreme Court claimed that the letter was a result of inquiries and confusion by the Heads of High Courts. They were in a difficult position because when they swore in KAI members, PERADI would file a lawsuit against them, and when they did not swear them in, they received threats from KAI.[40] Violent incidents also occurred with KAI protestors when PERADI was to inaugurate new lawyers, demanding that KAI members should also be sworn in because they are as eligible as PERADI members. KAI went to the parliament in an effort for the letter to be canceled but with little success.[41] Only after the chairman of the Supreme Court was sued for

33 Ikatan Advokat Indonesia (IKADIN) Chairman: Otto Hasibuan, Asosiasi Advokat Indonesia (AAI); Chairman: Denny Kailimang, Ikatan Penasihat Hukum Indonesia (IPHI); Chairman: Indra Sahnun Lubis, Himpunan Advokat dan Pengacara Indonesia (HAPI); Chairman: Jimmy Budi Harijanto, Serikat Pengacara Indonesia (SPI); Chairman: Trimedya Panjaitan, Asosiasi Konsultan Hukum Indonesia (AKHI); Chairman: Frederik BG Tumbuan, Himpunan Konsultan Hukum Pasar Modal (HKHPM); Chairman: Soemarjono Soemarsono, Asosiasi Pengacara Syariah Indonesia (APSI); Chairman: Taufik CH.

34 The Law gives a two-year time limit from when the law was enacted to establish a bar association. This is described in Article 32 Law No. 18/2003.

35 On the grounds of conflict of interest related to a big dispute regarding ownership of the biggest sugar plantation in Indonesia.

36 Issuance of Circular Letters No. 52 and 89, amongst others.

37 See summaries of the cases in the Appendix.

38 SEMA No. 052/KMA/V/2009.

39 Article 28 Law No. 18/2003.

40 https://news.detik.com/berita/d-1683709/kai-perkarakan-ketua-pt-bila-enggan-sumpah-pengacaranya. Last accessed 22 February 2019.

41 https://www.hukumonline.com/berita/baca/lt4e6ef72418da1/kai-adukan-ketua-ma-ke-dpr Last accessed 22 February 2019.

tort by KAI at the Central Jakarta District Court[42] and the Jakarta Administrative Court[43] did the Supreme Court issued a letter revising its opinion.

Not only did PERADI receive attacks from KAI, but cracks also appeared internally. In early 2015, PERADI was to elect a new chairperson, replacing their first and ten-year-long chairperson, Otto Hasibuan.[44] A few names emerged as candidates for this position,[45] and PERADI commenced a national assembly ('*Musyawarah Nasional*') to elect a new chairperson.[46] The lawyers again could not agree on the method of voting and three candidates each declared to be the new chairperson of PERADI: Fauzi Hasibuan, Juniver Girsang, and James Purba. Otto Hasibuan decided to postpone the national assembly, causing an uproar among Juniver Girsang's supporters, who claimed that Otto could not accept him as the newly elected chairperson.[47] This was followed by a media battle in major newspapers, television, and websites. In the newspapers, various announcements were published[48] declaring that the chairperson Fauzi Hasibuan had been elected, followed by a number of rebuttal announcements. At the time of writing, the three PERADIs still exist.

Months before the PERADI chairman issue arose, a draft of a new law on lawyers was discussed by the parliament. The new law would have established a *Dewan Advokat National* (National Advocates Board) to supervise and uphold the code of ethics, and parliament would have selected the members of the Board. Questions on whether Indonesia should have a unified bar association or multiple bar associations emerged again. Some senior lawyers who were members of PERADIN supported the establishment of the Board. They blamed their separation on the New Order government and past traumas of government interference.[49] They were concerned

42 KAI asked for, amongst others, fifty billion rupiahs in damages. They claim that 75% of the amount was for a donation to victims of natural disasters in Merapi, Mentawai, and Wasior. The district court and the appeal court did not grant the request. Decision No. 557/Pdt.G/2010/PN.Jkt.Pst and No. 198/PDT/2016/PT.DKI.

43 Decision No. 120/G/2010/PTUN-JKT.

44 Otto Hasibuan was the previous chairman of IKADIN.

45 Juniver Girsang, Luhut Pangaribuan, Fauzi Hasibuan, Hasanudin Nasution, Jamaslin James Purba, Humphrey Djemat, and Irwan Muim.

46 The national assembly in a hotel convention hall in Makassar resulted in a standoff. Lawyers were shouting and pushing each other, requiring the local police's assistance to neutralize the situation. https://nasional.tempo.co/read/653488/munas-ricuh-peradi-pecah-jadi-tiga-kubu Last accessed 13 February 2019.

47 All of the candidates declared that all Indonesian lawyers needed to be united, although they did not agree on the method of voting. One side wanted voting to be done through each representative's offices throughout Indonesia. Otto Hasibuan established these representative offices. Another side wanted a 'one man one vote' method.

48 These newspaper announcements all used PERADI's letterhead. Over the internet, two PERADI websites have emerged, one using the long-standing web address of www.peradi.or.id with Fauzi Hasibuan as its chairperson, and the other using the web address of www.peradi.org with Juniver Girsang as its chairperson.

49 Interview Frans Winarta February 2014.

that a unified bar association would only provide means for a government to control lawyers, as occurred during the New Order era.[50]

On the other hand, lawyers under the umbrella of PERADI strongly disagreed with the proposal and responded to this draft law by demonstrating in the streets with black robes they usually wear in court.[51] In response to the demonstrations, parliament then stopped the discussion, stating that they could not reach a consensus.

According to Lev (1992:27), the advocates' inability to organize adequately or to impose discipline was the result of a lack of government interest in regulating the profession. Current development has proven that this is not the case. After regulating the profession with the 2003 Law on Lawyers, the inability to organize and discipline lawyers has instead escalated, with fierce clashes amongst lawyers, and between lawyers and the government. However, Lev (in Lindsey 2008) was accurate in his analysis when he placed lawyers as the actors between state and society. This dilemma and the divided opinions on whether lawyers are part of the state or the guardians on behalf of the society in facing the state is reflected in how frequent the Law on Lawyers has been submitted to the Constitutional Court to be reviewed.[52]

2.3 Becoming a Lawyer: Training and Certification

There are approximately 13.000 law graduates in Indonesia each year, many of who wish to become lawyers.[53] After the establishment of PERADI, these law graduates flocked to take the bar exam to get their licenses. In 2014, PERADI claimed that their membership was 26.000 and 6.000 more were waiting to be sworn in. [54] This is because modern Jakarta law firms require PERADI licenses from applicants.[55]

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50 They filed a case before the Constitutional Court to voice this concern (Constitutional Court Decision No. 66/PUU-VIII/2010).

51 Kompas 24 September 2014. Tolak RUU Advokat, Peradi Unjuk Rasa di Bundaran HI (Refusing the Draft Law on Lawyers PERADI stages a demonstration at the HI roundabout).

52 By the time of writing there were more than 20 petitions. See summaries of the cases in the Appendix.

53 This number is an approximation based on information from law lecturers and news reports. The last research conducted was in 1999 by the World Bank through a private law firm ABNR, titled Diagnostic Assessment of Legal Development in Indonesia, World Bank Project IDF Grant No. 28557, Reformasi Hukum di Indonesia, Jakarta: Cyberconsult, 1999.

54 There are a number of other bar associations and the number of their members are unknown. It is also unknown whether these numbers are consolidated from other bar associations, since PERADI was (and claims to still be) the unification of eight bar associations.

55 Hadiputranto Hadinoto and Partners, Soewito Suhardiman Eddymurthy Kardono, Lubis Santosa Maulana, and Dermawan and Co, to name a few.

Training on the job is a crucial aspect of becoming a lawyer in Indonesia, as studying law in Indonesian universities does not give law students the skills required for practice. In university, the teaching methods consist mostly of lectures while teaching materials consist mostly of codes, lacking a focus on Supreme Court decisions. Students are rarely given chances to observe court procedures. They only learn black letter law, making them removed from issues in society, as they are not taught about social, economic, political, or philosophical values in those codes, and they do not have the skills for working in legal institutions later on.

As a result, law graduates only have an abstract understanding of law and justice. They also lack the crucial ability to write a consistent and logical legal opinion or memorandum (ABNR 1999:50-51). Those with opportunities to study abroad do so to strengthen their ability in English, a skill widely required to work in modern Jakarta firms. By studying abroad, they also have the opportunity to communicate with the international legal community and to read newer and more advanced materials (ABNR 1999:149). Target countries to study law are the Netherlands, the United States, Singapore, and Australia.

To become members of a bar association in accordance with the 2003 Law on Lawyers, law students need to hold a *Sarjana Hukum* (Bachelor of Law) degree, which is only given by Indonesian universities, causing most lawyers to only study abroad for their master's degree. This is not easy for most candidates, because studying abroad is expensive. When they are already practicing, they have to choose between pursuing their career and advancing their legal knowledge. Only a handful of law firms give them the opportunity (and sometimes funding) to go abroad and study.[56]

To qualify to be a member of a bar association, law graduates need to pass the bar exam, for which they must take a professional course. Most candidates follow courses by a private firm called Faizal Hafied & Partner Education of Law, which has been approved by PERADI and IKADIN.[57] Some law firms also provide the course, such as OC Kaligis & Associates. The course involves lectures by practitioners on the role and function of lawyers, the Indonesian judicial system, professional ethics, and procedural laws, with a mock exam or 'try-out'. The certificate given upon completion of this course is needed to apply to take the bar exam.

The bar exam consists of around 200 multiple choice questions on the ethics code, the roles and functions of Indonesian lawyers, as well as civil, criminal, religious, industrial, and administrative court procedures. The exams also have two 'essay' questions: one to draft a Power of Attorney, and the other to draft a court claim. The majority of points can be gained by correctly performing all formalities, such as submitting the address of the parties, fulfilling the stamp duty, and so on. The strength of the argument

56 When they receive their degree, they have to work at the firm that gave them funding for some time (or a loan), or they simply have to resign.

57 www.fhp-edulaw.com. I cannot confirm why IKADIN is still involved in this.

or writing and reasoning ability in the lawsuit does not give significant points. Furthermore, the mock case is quite simple and remains the same each year.[58]

After passing the bar exam, law graduates have to do at least two consecutive years of internships at a law firm.[59] They then need to pass 'verification' by PERADI.[60] The procedure to be sworn in, because of the disputes between bar associations I explained above, is a negotiation process between a bar association and the Head of a High Court. Therefore, there is no set time and place for this swearing-in ceremony. Only when the Head of a High Court agrees to commence the ceremony will it be announced in the PERADI website or newspapers. Desperate to be sworn in to be able to practice law independently, this uncertainty drives the 'candidate lawyers' to make fake identification cards at the location of the next swearing-in ceremony because they never know when and which High Court will agree to do the next ceremony. Even at the start of practicing law, lawyers are almost forced to do something that is not entirely 'legal'.[61]

Currently, practicing lawyers have to hold an 'Advocate Card', which is a form of identification. The bar association[62] issues this card, and litigating lawyers often need to show it in court.[63] Theoretically, the corporate lawyers who do not go to court would not need such identification, but even signing a letter on behalf of their clients exposes them to the risk of being accused of incapability by their opponent. In the next part, I will discuss different types of lawyers according to their practice.

2.4 Types of Lawyers and Law Firms: Between stoic law-abiders and goal-oriented players

Lev classified Indonesian lawyers into four types: informal mediation, notaries, bush-lawyers, and advocates, referring to corporate lawyers existing in a 'comfortable commercial stratosphere' (Lev 1996). Since then the notaries and advocates have remained in the same position. However, only advo-

58 From year to year, the mock case was usually about a dispute on sale and purchase of property: a car or a house.

59 Article 3(1)(g) Law No. 18/2003.

60 Only when their names have been on the 'verified' list can candidate lawyers register to be sworn in at the High Court of their domicile. PERADI's status was quite secure from 2010–2014 and it then required candidates to submit reports of a summary of at least six civil cases and three criminal cases they had observed during the internship as part of the verification requirement. KAI did not require this.

61 Based on the author's own experience.

62 There is an identification number on this card, which contains a code identifying which of the eight founding organizations it originated from (see footnote 33). This information is guarded by PERADI. Interview with PERADI's data manager, 2015.

63 However, a clause stating criminal liability for acting as a lawyer without a license (Article 31 Law No. 18/2003) has been annulled by the Constitutional Court (Decision No. 006/PUU-II/2004).

cates and lawyers who do not handle litigation can exist in this 'comfortable stratosphere'. Litigation is messy and dirty, sometimes in a literal sense. Court buildings do not have adequate facilities (e.g., parking is outsourced) and some court buildings do not have clean toilets.[64] The inefficiency of the hearing schedule exacerbates this. Lawyers have to wait for hours before a hearing can start, and sometimes it will be canceled altogether. Aside from delay strategies, this happens more often because of lack of proper management by the court and lack of professionalism by the judges. These frustrations push law graduates to seek to avoid courts altogether, allowing the idea of working as corporate lawyers to pull them even more.[65]

Therefore, to explain the current typology of lawyers more accurately, I have to deviate from Lev's classification. The primary reason is that before the 2003 Law on Lawyers, two kinds of legal representatives concerned themselves with litigation: bush-lawyers and advocates. What makes them different is formal education, registration, and the kinds of clients whom they represent (Lev 1996:145). By requiring *all* lawyers to have formal education and be licensed and registered, the 2003 Law on Lawyers practically dissipated Lev's bush-lawyers. Nowadays, the practice of litigation itself draws a thick line separating the types of lawyers, as it requires different skill sets.

Most lawyers in Indonesia now are somewhere between 'professionals' and 'fixers' (Kouwagam & Bedner forthcoming), resembling the 'brokers' of routine civil litigation in the US (Kritzer 1990). I refer to 'professionals' as corporate transactional lawyers, as they do not usually practice litigation. 'Professionals' who practice litigation commercially are the exceptions, and they are all from modern firms. They are law-abiding, and even though the rules are often unclear, they focus on following them to the letter.

Another group of lawyers has a different orientation and capital. They are 'fixers' or 'problem-solvers', using the law as a means to an end or even break it to achieve their goals. Fixers operate in the grey areas of law, in business and politics, presenting themselves as experts in manipulating the justice system in order to 'get things done'. They enjoy considerable autonomy from clients and have different views about professional ideals and ethics. 'Brokers', which constitute the majority of Indonesian lawyers, strive to abide by the rules like professionals, but they are still goal-oriented, and sometimes bend the rules for their clients.

I will illustrate lawyers in Indonesia according to their area of practice (corporate transactional and litigation) and law firms according to two types (traditional and modern firms).

64 Some judges will go as far as building a toilet inside their chambers with money from their own pocket. Interview with a former judge JMT.

65 Interview with LW, IM.

2.4.1 Corporate transactional lawyers and Litigators

Traditionally, Indonesian lawyers as civil law advocates were like the English barrister, formally concerned almost entirely with litigation. Drafting documents, e.g., articles of incorporation, contracts, and wills, was managed by the notary (Lev 1976:135). These tasks are less of a notary function today. As commercial transactions began growing more complex, lawyers also started to take on the role of drafting legal documents. I refer to such lawyers as corporate transactional lawyers. If the legal document is drafted by their clients—who are businessmen with their own in-house counsel—their role is also to check whether or not the legal document is in accordance with Indonesian law. By contrast, the practice of litigators is almost exclusively concerned with legal procedures.

I will further explain the differences between litigators and corporate transactional lawyers through five criteria: attitude towards clients and other lawyers, knowledge of the law, qualities, approach, and remuneration and involvement in legal education.

2.4.1a Corporate transactional lawyers

Corporate transactional lawyers in Indonesia are a similar group to that ascribed to lawyers in other countries in a globalized legal profession. They are usually part of a modern law firm, and they do not go to court. They are known to receive significantly higher income compared to all other legal professions, sometimes even in US dollars (ABNR 1999:49). They practice highly specialized areas of law and do not delve into other areas. These specializations are in accordance with their relevancy in the country's economy and areas of law related to foreign investments, such as natural resources, plantation businesses, and manufacturing.

They mainly assist clients in commercial transactions, expect their clients to know why they are coming to them, and co-operate with clients on the details of legal documents they draft for them. With a highly specialized nature of practice, their knowledge of law is in depth for researching detailed rules and regulations of a certain area of business. In a commercial transaction, they also do 'due diligence' for their clients, researching the legal details, the companies involved, and the credibility and legality of the transaction. Hence, clients need corporate lawyers mainly for legal research and drafting.

For these, the quality required from corporate lawyers is to be meticulous. The analysis that corporate lawyers use is technical, one that presumes the black letter law will work as it is written. According to corporate transactional lawyers I interviewed, the problems are not in law but in enforcement.[66]

66 Interview MI, GR, FS.

The remuneration transactional lawyers receive is mostly in US dollars, with salaries ranging from USD$800 to USD$10,000 per month. These estimates do not include their annual and performance bonuses. The annual bonus is at least two months worth of salary, while the performance bonus is calculated by the hours they bill. For clients, transactional lawyers are paid on an hourly basis. Associates charge between USD$70 to USD$500 per hour, and partners charge between USD$425 to USD$1000 per hour.[67] They usually estimate how many hours they expect to work on a certain case and draft an engagement letter, as well as a fee proposal before they start working. Clients rarely pay the bill for the total number of hours the lawyers spend working. Most of the time, the lawyers will give 20% to 50% discounts to their clients.[68]

Corporate transactional lawyers are usually members of the Capital Market Legal Consultant Association (HKHPM), which is a prerequisite for being able to issue Legal Opinions for publicly listed companies.[69]

By way of contributing to legal education and building their public image, corporate lawyers provide lectures and training in universities and government offices[70] and write in the type of legal journals that are partly commercial and partly academic (i.e., they only explain the practice and black letter law) as a means of promotion.[71]

2.4.1b Litigators (brokers and fixers)

There are only a handful of commercial litigators who are 'professionals' since most professional litigators choose to remain in cause lawyering (see, e.g., Lindsey & Crouch 2013; Crouch 2011; Lev 2011). Here, I will focus on the majority of litigators who are brokers or fixers.

Litigators are the contrast of transactional lawyers in almost every respect. Unlike corporate transactional lawyers, litigators are very vocal in the media. Litigators have competitive attitudes towards other lawyers, and to some extent towards their clients, stating that the clients are their 'worst enemies' (see the next section of this chapter about professional relationships).[72]

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67 Approximation from various interviews and observation up to 2014.

68 Interview GO, TE, AS.

69 Indonesian Financial Services Authority (OJK) would only receive legal opinions from the members of HKHPM (OJK Regulation No. VIII B. 1/2011).

70 Foreign lawyers are required to do this by the Ministry of Law and Human Rights in order to obtain a work permit.

71 Firms need to pay a fee ranging from USD$2500 for a paragraph to USD$25,000 for a full profile of their article to be included in a legal publication. The amount varies by page length and the position of article (whether it is in the spotlight of the 'practice journal'). See, e.g., the International Financial Law Review (published by EuroMoney Institutional Investor PLC), International Comparative Legal Guide (published by Global Legal Group), and reviews published by Law Business Research LTD.

72 Interview with LC, OS, AS, DK.

Unlike corporate transactional lawyers who are very open to giving opinions about how the law is, litigators always speak highly of the law but avoid talking about their practice, often followed with assurances (to me) that their only job is to defend their client to the best of their abilities. They often add, as an afterthought, that they do so 'as far as it is in accordance with the law'. In reality, they are known to defend clients blindly[73] by using any possible means (ABNR 1999:40). They do so by approaching judges, playing golf with prosecutors and police.[74] They apply the idea of zealous advocates too far, highlighting the weak disciplinary mechanism in place, which will be discussed further in this chapter.

Furthermore, quite often, there are incidents of litigators in court aimlessly attacking and mocking their opponents. This suggests that they are unable to make sound logical legal arguments, and instead often speak just for the sake of arguing. By way of example, in a hearing at an Administrative Court, a fixer stated to an opposing counsel that he was ugly and bald and that he was corrupt with no self-value.[75]

Unlike transactional lawyers, litigators are the only ones who know the nuts and bolts of legal procedure. They also practice criminal law and know their way around enforcement, some of them using extra-legal means such as employing *preman* (thugs)[76] or maneuvering their way into forcing certain actions on their opponents with threats. Their network is their best quality.

Litigators' approach towards practice and the way they analyze cases is highly strategic. When they are supposed to talk about the law and the idea of justice, they make a speech about what they think should be, then relate it to a case they are handling. They also publish announcements and use the media to make sure these speeches are known to the public, looking to influence judges when they read about cases they are adjudicating in newspapers.[77] They research the character and weaknesses of judges, which newspapers they are reading, whether they have mistresses, whether they need money for their sick child, and change judges' opinions by influencing them outside of court unilaterally. They approach the court

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73 The expression *membabi buta* was used, which is translated as blindly, disregarding everything else, or uncontrollable.

74 Interview FW, PM.

75 At a hearing at the Jakarta Administrative Court dated 14 November 2013, Hotman Paris stated to the counterparty's lawyer, 'you used to wear sandals, now you wear nice shoes and you are being served when you go to weddings. People bow to you. You have no self-value, people's ideals change when they get paid'. This is a rather hypocritical statement since Hotman Paris is known to flaunt his wealth in the media. In an interview published by the New York Times, he stated that 'no lawyers are not corrupt' (23 April 2010).

76 During one of my interviews, there was a *preman* present in the room. The interviewee (KG) mentioned that the person was sent by [the name of a famous *preman*].

77 They strategically time these announcements and news, paying the newspapers for the announcements and have familiar journalists who will publish their story.

registrar to know how far their case is progressing, and they hang around the courthouse and police station to research potential clients. In other words, to find out whether an 'attractive'[78] lawsuit has been filed, then find the defendant's contact. When they contact the defendant, they will try to convince this potential client to hire them because they 'always win'[79]. This potential 'client' could also include lawyers from modern law firms needing assistance with litigation,[80] as I will explain further in Chapter 4.

The salary of a litigator ranges from Rp. 2,500,000 to 30,000,000 per month (USD$200-$3000),[81] far less than corporate lawyers. However, they receive yearly bonuses, and some of them receive a percentage of fees when they win a case. They charge their client a discretionary 'professional fee' to smooth their way with public officials. Instead of writing a detailed engagement letter to clearly define their scope of work and obligation to their clients, they keep these details vague, unlike corporate lawyers. Their responsibilities are only stated in the Power of Attorney. They have professional responsibilities only when a Power of Attorney is signed. Before that, they are free to talk to the opposing party, testing the waters. It is to no surprise that litigators are referred to as *makelar*[82] *kasus* (intermediaries for cases), and as part of the judicial mafia (see Butt and Lindsey 2011).

2.4.2 Modern and traditional firms

There are three possible law firm models in Indonesia: (1) a sole proprietorship or a collection of lawyers without any formal institution, (2) a firm, and (3) a civil partnership.[83] The most common model is a firm, the only model that has its own legal entity, making it similar to a company. A firm requires a notarial deed of establishment and an article of association.

Indonesian law firms have increased rapidly in size. In 1999, 75% of law firms only had one or two partners, and not more than 15 members (ABNR 1999:43). Nowadays, modern firms have approximately 15 partners and up to 108 associates. Asian Legal Business publishes yearly rankings of the biggest law firms in Indonesia.[84] In 2014, they were as follows:

78 Meaning that large amounts of money or high value objects are at stake.
79 Interview LC, HM.
80 For example, Capital Profile, a commercial legal and market research publication, listed his wins in an article, which is then sent to corporate lawyers [copy with the author].
81 Data from observations and interviews up to 2014.
82 *Makelar* is from the Dutch word *makelaar*, meaning 'agent'.
83 Also referred to as *maatschap*, a firm based on a co-operation agreement (Article 1618 of Indonesian Civil Code).
84 We have to keep in mind that members of traditional firms are often not listed. This does not necessarily mean that traditional firms are smaller in size.

2014 Rank	Change from 2013 Rank	Firm	Partners	Associates	Total fee-earners
1	+1	Ali Budiardjo, Nugroho, Reksodiputro	15	73	106
2	–1	Hadiputranto, Hadinoto & Partners	16	75	93
3	=	Assegaf Hamzah & Partners	16	63	89
4	=	Hanafiah Ponggawa & Partners	11	56	70
5	=	Lubis Ganie Surowidjojo	9	55	64
6	=	Soewito Suhardiman Eddymurthy Kardono (SSEK)	6	45	63
7	+2	Makarim & Taira S.	11	42	57
8	NEW	Makes & Partners	4	40	44
9	–1	Soemadipradja & Taher	8	31	42
10	–3	Mochtar Karuwin Komar	6	29	38
11	NEW	Melli Darsa & Co	5	30	37
12	–2	DNC Advocates	N/A	N/A	28
13	NEW	Ginting & Reksodiputro	4	19	27
14	NEW	Widyawan & Partners	5	17	24
15	NEW	Susandarini & Partners	3	13	22

Modern firms are institutionalized and apply the Cravath management system, meaning its lawyers have clear hierarchical positions: they have partners, associates, and paralegal or legal assistants. Partners are responsible for bringing in clients and leading a case (Galanter & Palay 1991:9-11). The establishment or modernization of firms started soon after the Law on Foreign Investment was enacted by the New Order regime.[85] Ali Budiardjo, Nugroho, Reksodiputro was the first modern law firm, with Freeport as its first client (Dezalay & Garth 2010:221). The model of Indonesian modern law firms follows the American model, which can probably be explained from the fact that the founders of the first generation of modern law firms graduated from American universities (Dezalay & Garth 2010:65).

Modern firms are mostly composed of transactional lawyers. A number of these firms only recently delved into litigation, per the request from their clients for a 'cleaner' legal process, one reason being that they are subjected to the American Foreign Corrupt Practices Act.[86] However,

85 http://www.hukumpedia.com/ahmadassegaf/besar-itu-perlu-sejarah-perkembangan-kantor-advokat-modern-di-indonesia; https://www.hukumonline.com/berita/baca/lt55e410bde081b/sekelumit-sejarah-law-firm-modern-di-indonesia

86 Interview MI, HS.

they prefer dispute resolution through arbitration instead of litigation.[87] If they have to go to litigation, the policy on litigation practices is different between modern and traditional firms. Modern firms accentuate litigation practice that is free from corruption, believing that once they do their best in drafting and responding to claims, the case will be out of their hands for the judge to decide. This is contrary to traditional firms, where control of litigation is the main policy.

The first distinction between modern and traditional law firms lies in technology. Modern law firms are more advanced in the use of communication technology and data management, which is also needed to facilitate hourly billing. This has a significant impact on practice, as having communication technology makes co-operation within the firm easier.

The second distinction is between firm structures. The most distinct aspects of the traditional firm structure are that modern firms often co-operate with foreign or international firms, have equity partners, and have foreign lawyers, tax consultants, and accountants. Traditional firms are usually a one-person operation, meaning that the name found usually manages everything from handling cases to budgets.

The third distinction is in the hiring process of new lawyers. Modern firms look for good grades and co-operation characteristics, of not wanting to always be ahead of others and not being competitive.[88] By contrast, traditional firms look for those who have or can cultivate personal relations with police officers, prosecutors, judges, politicians, and court registrars. Lawyers from traditional firms are usually hired on the spot without following any hiring procedure[89] and do not have a written employment agreement. Lists of lawyers in traditional firms are rarely published, unlike modern firms with their advanced uses of websites as promotional and informational tools.

Modern firms put up an image of professionalism: that they are efficient, have high credibility, and a good reputation. They advertise themselves on ranking websites for networks of international law firms such as LEGAL 500 and AsiaLaw, while traditional firms accentuate an image of winning cases in court.

Fee structures for clients also differ between modern and traditional firms. Modern firms charge hourly or fixed fees, while traditional firms charge lump-sum, success fees and only rarely charge hourly fees. Modern firms have websites and promote themselves in international legal journals

87 To give an example, Lubis Ganie Surowidjojo stated in its 2011 litigation report: 'In formal court litigation the parties have no control over the appointment of the judges who will hear the case or the applicable civil procedures law. In arbitration the parties can determine the applicable procedures and can, to a certain extent, control the appointment of the arbitrator(s) who will handle the proceedings.' One of the partners, Kiki Ganie, is a senior member of Badan Arbitrase Nasional Indonesia (BANI).

88 Interview with partners LW, SG.

89 This (lack of) procedure is apparently the same in LBH. See Pangaribuan (2016:186-7).

and business publications. Traditional firms do not concern themselves with these, but some appear in a televised weekly 'Indonesian Lawyers Club' talk show, where they talk (or more often, argue extensively) about cases and current legal issues. Modern firms commence yearly sports competitions amongst themselves, called *Pertandingan Persahabatan Antar Konsultan Hukum* (Friendly Competition between Legal Consultants), with games ranging from cheerleading to tug of war, while traditional firms sponsor golf outings with police officers and judges.

Lawyers in modern firms are organized into specialized practice areas, while traditional firms are more generalist. The most important distinction for this research is that modern firms do not take cases about land disputes, they do not practice criminal law, and they very rarely handle cases in the Administrative Court, making these three areas of law the exclusive domain of traditional firms. Instead, modern firms practice in an area of law they refer to as 'project finance', which is basically about managing all aspects of land transactions aside from litigation and enforcement.[90]

2.4.3 Premier league fixers: 'Family' lawyers

One select group of fixers constitute a class of their own. The firms they lead are fully dependent on their personal image and networks and offer a 'boutique, one-stop service'. As mentioned above, the most common form of law firms is similar to those of companies. Like companies, there is no regulation preventing a lawyer from opening multiple offices. They are allowed to do so as long as they report it to the bar association.[91] Some *'family' lawyers* operate so-called 'satellite firms' and can mobilize an army of lawyers in other countries where their clients are active, such as Singapore and Hong Kong. For their satellite firms, the *'family' lawyers* use their associates' name in the notarial deed of establishment. The offices have different addresses and phone numbers. In every respect except for funding and control, these satellite firms are different entities from the 'central firm'. The salaries of satellite firm members come from the central firm, and the office is just an empty room. The actual places of work of the 'satellite' firms are in the central firm. With this system, they can manage to represent several parties in the same case, thus evading the professional code of ethics.

These *'family' lawyers* are entrepreneurial, serving the two roles of litigators and corporate transactional lawyers interchangeably. For them, the ends justify (almost) any means. In this sense, they are no different from common fixers, but their means are more powerful and complex. Their main practice areas are land disputes, tax, antitrust, securities, and real estate development. They delegate certain work (e.g., drafting contracts) to employees and

90 Interview with IA, AM.
91 Elucidation of Article 5(2) Law No. 18/2003 on Advocates.

rarely go to court. Instead, they 'fix' licenses, design complex (sometimes shady) financial transactions, and 'resolve problems'. They see their clients as business partners, often taking a financial stake. These lawyers often refer to themselves as 'the lawyer of [a client's] family'.[92] Their clients are not corporations but individual heads of family corporate groups, mostly Chinese-Indonesian businessmen active in construction and natural resource exploitation. For anything that concerns the law, these businessmen will contact their *'family lawyers'*.

2.5 Professional relationships

Professional relationships are at the centre of the majority of lawyers' business. These relationships also serve as their capital. The following are the findings on how lawyers conduct these professional relationships.

Between lawyers and their clients

Lawyers, like doctors, have a fundamental dilemma of professional responsibility that they share, which is whether they should impose on their clients their preferred way of handling a case or to try their best to give opinions and explain the risks and consequences for the client to make their own decisions.

Before being faced with this dilemma, lawyers need to find out what their clients really want. This is not often as clear, especially in litigation about land, as it tends to be highly emotional.[93] The initial interview between a lawyer and client is tense and often conducted in an interrogative manner. This dilemma is, therefore, closely connected with how lawyers and clients manage exchanges of information.

Lawyers from traditional firms keep power to themselves by limiting their client's access to information. They do not disclose how they work. According to Flood (1991), this is a way for lawyers to manage uncertainty in their work. However, this goes so far in Indonesia that it undermines the professional responsibility of lawyers.

Furthermore, this information limit creates a gap of impunity and the attitude of being enemies of their client. By way of illustration, a litigator stated, 'I always make my clients write their story to me and sign it with a stamp duty. Sometimes I even notarize this affidavit. First of all, I will only represent someone if I believe he is right. This document proves that. It also keeps me safe to both the client and in front of the law. If it turns out the client is lying, and they are guilty, I have the affidavit to protect myself in

92 This term 'advokat keluarga' was also referred to in one Supreme Court decision I reviewed for Chapter 1, no. 741PK/PDT/2009.

93 This is not the case when both the plaintiff and defendant are companies. Interview South Jakarta District Court Registrar and Judge Suprapto. August 2015.

front of the law and I can also prove myself in front of the client.'[94] Nevertheless, this way of practice is not surprising, as we learned in Chapter 1 about how evidence is handled in Indonesian civil procedure.

Lawyers from traditional firms also limit information because it is seen as a tactic. They need to withhold information about their network because it is seen as capital, as an asset and trade secret. They only meet clients to discuss things they cannot discuss on the phone, afraid of being taped or recorded by their opponent or the government. They rarely talk on the phone since there is no need to collect billable hours.

On the other hand, litigators from modern firms gladly give all the power to their clients, citing communication and full disclosure as the most important way of keeping their practice free from corruption, giving clients the power to hire another lawyer, who will be the fixer if the clients want to do otherwise.[95] The fixers keep all power to themselves by giving their clients no information about their work. This attitude of 'helping' or 'granting wishes' for the client follows the notion that lawyers are independent, a 'noble profession'[96] and has to be respected, placing them as agents who can be more powerful than their principals.

Between transactional lawyers and litigators

Relationships between lawyers in modern firms differ greatly from such relationships in traditional firms. In traditional firms, lawyers rarely spend time with each other, and when they do, they mostly discuss things other than work. They call and instant message each other as the main form of communication. They rarely use email. The unclear structure makes competition fiercer as their position can change informally and rapidly. In modern firms, lawyers work in a closed room together, doing due diligence or drafting legal documents, making dynamic co-operation crucial to the job, as mentioned above.

Lawyers from different firms have the dynamics of a rivalry or playing a game of hot potato. In transactional relationships, they are accommodating but still make sure they do the proper investigation and do not take words at face value. Litigators seek to work together with corporate transactional lawyers, suggesting that it is to draft contracts from the perspective of enforcement. However, they also look down on one another. Corporate

94 Interview DK.

95 This is the same pattern described by Lev: 'Daniel Lev's discussion of lawyers in Indonesia makes the point that when informal or even illegal operations are called for in the course of a case, a more explicit division of labor develops between advocate and client outside the court. While formal legal matters are attended to by the advocate, illegal work is left to the client or his underground counsel, usually a professional or ad hoc fixer' (Lev 1973 in Morrison 1974).

96 Officium nobile: see Law No. 18/2003.

transactional lawyers allege that litigators are corrupt,[97] and litigators allege corporate lawyers steal money from clients by overcharging and wasting time.[98] As one litigator stated in an interview, 'corporate lawyers always say that their job is to avoid litigation, that is why they draft this long useless contract, wasting their clients' time and money, but when asked about litigation, they said they do not want to do or be near to that practice. Well, how can you avoid something you do not understand?'[99]

Modern firms which started to include litigation as one of their practice areas (as explained in section 2.4.2 above) have a withdrawal policy, depending on the reputation of the lawyer counterpart. They perceive that they 'have to play a different game' if they go against a known broker or fixer and prefer to withdraw from the case.[100]

These indicate that transactional lawyers and litigators know each other's practices well, but try to avoid working together as much as possible. At best, they treat each other with distant respect.

Lawyers with notaries

Lawyers see themselves as consumers of notaries. They need the notaries to formalize the contracts they draft into deeds. Other than being in a 'normal' professional relationship where the independence of both parties is maintained, lawyers and notaries are either in a commercial relationship (being a *langganan,* i.e., a customer, subscriber, or shop one frequents), or they are in an employer-employee relationship, as notaries are often hired to work in law firms.

Lawyers familiarize themselves with the character of notaries they frequent. They classify notaries by their reputation and price. Lawyers say notaries have two types of reputations: those who are 'brave' in that that they are willing to legalize unconventional deeds,[101] and those who are famous because they have an established practice and have served numerous clients.

97 They refer to litigators as '*lawyer gang macan*' (literally: tiger alley lawyers), implying that it is not prestigious. When interviewed, they do not know where the terms came from. I traced the closest reference to a name of an alley in Jakarta that was filled with rows of illegal gambling houses and brothels. Interview DD, KS.

98 Normatively speaking, this attitude violates lawyers' principle of conduct on maintaining highest standard of integrity towards colleagues (see for instance International Bar Association Principles on Conduct for the Legal Profession Chapter 2, and Indonesian Lawyers Code of Ethics Articles 3(d) and 3(h)).

99 Interview BR.

100 Interview Fikri Assegaf and Frans Hendra Winarta.

101 Sometimes this means backdating deeds.

Litigators with judges

A judge cannot be a practicing lawyer at the same time.[102] The Lawyers' Code of Ethics states that a judge can be a lawyer, but they are not allowed to handle cases from their former courthouse for at least three years after they resign from the courthouse.[103]

Like with notaries, brokers and fixers made themselves aware of the character of judges, knowing their opinion on moral issues and values in society, enabling them to construct a targeted influential argument. Judges claim they have 'good relationship' with lawyers but claim to avoid spending time with them, 'because it is an ethic violation'.[104] Some lawyers do not reciprocate this view. Brokers and fixers in particular claim they keep personal relationships with judges, visiting judges' homes frequently to talk about cases (which without involvement of the counterparty is a clear violation of Code of Ethics[105]) and give 'support' to judges.[106]

Litigators with police/prosecutors

Litigating lawyers often perceive themselves as ATM machines in the eyes of police officers, presuming that police officers will treat them like one when they are working on a criminal case.[107] Some lawyers think of police officers as *peliharaan*, the Indonesian word for a pet. They vet these police officers and the police officers feel indebted to them.[108]

Litigating lawyers have similar kinds of relationships with prosecutors, but compared to police officers, prosecutors are considered to be more committed to delivering what they have agreed to with the lawyers. Lawyers favor approaching prosecutors over police officers because the *Kejaksaan* (Prosecution Service Offices) is considered to be more efficient and clearly organized. In a single case, dealing with a prosecutor is a one-to-one issue. By contrast, when dealing with police officers, many will claim to have authority over the case.[109] The nature of these relationships goes against the Code of Ethics, which requires lawyers to behave with respect to other legal professions as equals.[110]

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102 Elucidation of Article 31(2) Law No. 48/2009 about Judicial Authority.
103 Article 8 Code of Ethics.
104 Interview Supreme Court judge.
105 Articles 7(c) and 7(d).
106 Interview LC, OS, AR, AS, HM.
107 'They always come back for more [money].' Interview PM, AR, AS.
108 Interview PR, PM, VK, AR, AS.
109 '*mereka lebih satu pintu*' (they are more 'one-door' (compared to police officers)). Interviews OS, AS, PR, PM, VK, LB.
110 Preamble of the Code of Ethics and Article 8(a).

Lawyers and academics

Indonesian legal procedure recognizes 'legal expert' witnesses, who are retired judges and scholars invited by either a plaintiff or defendant to court hearings to give expert testimony on the law on behalf of either of them. These expert witnesses will give their opinions and even interpretations of law by siding with the party who invited them. Many retired judges went on to pursue this 'legal expert' witness profession.[111] They write books that they can refer to, as a way of portraying themselves as academics after retirement.

Carrying out such (corrupt) relationships does not mean that lawyers are not faced with ethical dilemmas in their practice. It is quite the opposite. Lawyers in Indonesia are very well versed of what is required of them in terms of professional and ethical conduct, together with the risks for violating them, which will be discussed in the following section. One argument to make from their side, is that as long as the demand from clients still exist for lawyers who are willing to put aside their ethics requirements, for instance to guarantee outcome of cases and fixing problems rather than resolving them, some lawyers (especially those newly started practicing) have to meet the demands to be able to survive.[112] Another argument is why not make an example and abandon the corrupt practice altogether. This means avoiding litigation and Indonesian courts. Only transactional lawyers are able to do this (only writing contracts and opinions and performing due diligence) while maintaining their business, and those who are reflexive enough mournfully stated that in that case, they 'might never be fully a Lawyer, rather just a part of it'.[113]

2.6 Liabilities from violating ethical frameworks

The authority of a bar association is important in supervising and controlling lawyers. However, having multiple bar associations competing for this authority means lawyers who get sanctioned (for instance by revocation of license) in practice can obtain a license from another bar association. The non-functioning of the bar associations in this aspect is making profes-

111 One testimony in court could go as high as USD$5000 in 2009.

112 In my interviews, when asking about why they are willing to perform unethical conducts, I repeatedly found remarks such as 'I will not do this anymore once I'm more senior', 'while we are young we can still be brave', or 'I need to do this first to make a name for myself, then I will turn to a clean practice once I have a permanent client'. Interviews TM, IM, LC, DK, LB, AR, AS.

113 Interviews TE, LW.

sional liability a distant, yet more severe risk.[114] Lawyers do not concern themselves with the risk of losing their license to practice, but they could be criminally prosecuted for corruption.

Based on data from the Jakarta High Court in 1996, there has never been any case involving revocation of a license due to a lawyer's misbehavior (Kadafi 2001:160). There was a one-year suspension of Adnan Buyung Nasution by the Ministry of Justice (now Ministry of Law and Human Rights) upon the recommendation of the Supreme Court in 1986, which was the relevant procedure before the 2003 Law on Lawyers. Since that law's passage, this function is performed by the Advocates Ethics Board (Dewan Kehormatan Advokat).[115]

In 1999, a modern law firm, Dermawan and Co was reported by its client as having a conflict of interest at the South Jakarta District Court. I could not find the outcome of this proceeding. In 2001, another modern law firm, Hadiputranto, Hadinoto and Partners was sued by its client for unlawful action by allegedly settling a case without the client's permission.[116] South Jakarta District Court found that the plaintiff did not prove this case.[117] In 2013, Ali Budiardjo, Nugroho, Reksodiputro (ABNR), a modern law firm and the largest in Indonesia, was also sued by its client for malpractice, by allegedly drafting an incomplete legal opinion that caused losses for their client. The lawyer for the client in this lawsuit stated that the relationship broke when ABNR failed to respond to their client's concern 'in a sincere manner'.[118] Again, the South Jakarta District Court found in favor of the law firm. In these three cases, all modern firms were sued institutionally by their clients under the civil procedure for monetary damages, and the court found in favor of the firms.

This is in contrast to lawyers from traditional firms, who are usually sued personally, albeit while acting in their professional capacity, under corruption charges for bribing judges,[119] court staff,[120]and police officers.[121] The courts found them guilty in each of those cases. I will discuss two of

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114 Liabilities from violating Code of Ethics are supposed to be enforced by an Ethics Board, and the procedure is prescribed in the code but it is hard to assess the actual procedure and outcomes because the hearings are closed. Furthermore, the appointment and authority of the board to judge a case itself become the fighting ground with the groupings of lawyers into different associations. PERADI data manager in an interview in 2015 stated that there were approximately two ethics hearings per week at PERADI headquarter in Jakarta, but he had no information about hearings in regional offices.

115 Article 7, 8(1) and 26 Law on Lawyers (18/2003) and Code of Ethics Article 9 to 21.

116 https://www.hukumonline.com/berita/baca/hol3902/gary-l-powell-hhp-menyelesaikan-perselisihan-tanpa-seijin-kliennya. Last accessed 22 February 2019.

117 https://www.hukumonline.com/berita/baca/hol4042/hhp-tak-terbukti-lakukan-perbuatan-melawan-hukum. Last accessed 22 February 2019.

118 Interview BM.

119 Harini Wijoso, Adner Sirait, Yagari Bhastara, Otto Cornelis Kaligis.

120 Tengku Syaifuddin Popon, Mario Bernardo, Yagari Bhastara.

121 Haposan Hutagalung, Lambertus Palang Ana.

these cases, which are connected to the independency of lawyers: the cases of Mario Bernardo and Otto Cornelis Kaligis.

Mario Bernardo, a partner at a traditional firm (Hotma Sitompul & Associates) was arrested by the Corruption Eradication Commission in July 2013 for allegedly giving money to a Supreme Court staff member, to be distributed to Supreme Court Judges who were presiding over a case he was handling. Both Mario and the Supreme Court staff were found guilty of corruption. However, Hotma Sitompul was not charged. Clients admitted to giving money for 'taking care' of the case, but the clients were free from prosecution.

This case contrasts with that of Otto Cornelis Kaligis, who was charged with corruption as a result of his associate's action. OC Kaligis, as he is known, is one of the most senior lawyers in Indonesia, and a lot of Indonesian litigators have been trained or have worked in his office. He had handled several controversial cases and clients who have high political profiles, e.g., the late President Soeharto when he was accused of corruption after his presidency ended, and the Golkar Party,[122] one of the biggest political parties in Indonesia.[123] He was also the Head of Counsel in the National Democrat Party[124] and filed a lawsuit against PERADI.[125] In July 2015, his associate was caught bribing judges and a court registrar in Medan. OC Kaligis was quickly charged as well because his associate claimed that Kaligis had instructed him to attempt the bribery.[126] In this case, the client was a government official (the Governor of North Sumatra) and was also charged. One of the lawyers associations, *Asosiasi Advokat Indonesia* or AAI, having close to 150 lawyers, jumped to his defense. During every hearing, around 20 to 30 lawyers from AAI were representing him. He was found guilty and sentenced to five and a half years in prison.[127]

In sum, this shows that modern law firms are institutionally liable and that the plaintiffs sought sanctions in the form of monetary damages. There has not been a case in which the court has sanctioned a modern firm. By contrast, in traditional firms, lawyers have been found personally liable and guilty through criminal prosecution. The claims for criminal prosecution

122 Golkar was one out of three political parties during the New Order.

123 A dispute inside Golkar about who should be the chairman of Golkar: Agung Laksono or Aburizal Bakrie. He won the case in the Administrative Court on behalf of Agung Laksono.

124 The Head of Counsel has the authority to solve internal conflicts in the party.

125 Decision No. 148/Pdt.G/2014/PN.Jkt.Brt was about conflict of interest in his ethics hearing. The case is related to Decision No. 159/Pdt.G/2014/PN.Jkt.Brt about dispute over representation of a client (Nazaruddin) in a corruption charge by the Corruption Eradication Commission (KPK).

126 Interview with KPK officials.

127 He filed an appeal, which resulted in an increase of imprisonment to 7 years (Decision No. No.14/Pid/TPK/2016/PT.DKI), then he filed a cassation which resulted again in an increase of imprisonment to 10 years (Decision No. 1319 K/Pid.Sus/2016), then he filed a Review and the Supreme Court reduced the sentence by 3 years from the previous decision (Decision No. 176 PK/Pid.Sus/2017).

do not come from the lawyers' client, but government officials, notably the Corruption Eradication Commission ('KPK'). This means that while lawyers insist on being considered professionals capable of self-regulating, they are not doing well, resulting in the emergence of another means of control using criminal law. In other words, by squandering their own independence, lawyers are subjecting themselves to harsher liability.

2.7 Conclusion

This negative development of having some types of lawyers who will use their (illicit) relationships with other "law enforcers" for their advantage is not recent.[128] In turn, the lack of a unified front from lawyers undermines their ability to provide protection from the government and other (powerful) citizens. Lawyers' own internal competition prevents them from providing the protection, and the lack of this unified front—whether in the form of single or multiple bar association(s)—to oversee their own norms or ethics makes them more vulnerable to other more severe means of control (e.g., by the KPK).

This condition is a push factor for lawyers to move away from litigation, with globalization as a pull factor for traditional firms to change into modern firms. However, while the latter may comply with all ethical standards in their transactional practice, when it comes to litigation, these firms often rely on the brokers and fixers to which they refer their clients. These push-pull factors compartmentalize: making one impersonal and specialized, and the other relational and generalized. The practice regarding land is divided accordingly, with modern firms practicing its financial aspect, and traditional firms practicing the aspects of dispute and enforcement.

The independence of lawyers from their clients and the government is necessary to uphold the law and promote the idea of justice. In the United States' context, it was found that lawyers value prestige with work that is 'professionally pure', so they are drawn to work for the rich and powerful because of the legal purity and complexity of such work (Heinz & Laumann 2005:81). Compared to the two extremes of lawyers I found in this chapter, the prestige described by Heinz and Laumann exists in a chimerical form in Indonesia. One extreme is the corporate transactional lawyers who follow the rules and draft contracts even though these will be irrelevant in disputes. They manage to appear prestigious by being 'professionally pure'. On the other extreme are the fixers, who value power per se -not prestige from serving the powerful- in the form of being able to provide a kind of certainty. In the middle, there are the brokers who are pulled from one extreme to the other.

128 Ko Tjay Sing, a lawyer who joined Besar Mertokoesomo, the first law firm established in colonial Indonesia (Lev 2011:67), had observed this during his practice. Interview with his son, Ko Swan Sik, 24 August 2016. Ko Swan Sik was an associate in his father's firm.

Nevertheless, there is another kind of prestige that is overlooked by most of these commercial lawyers. It is the ability and willingness to defend clients who are poor and disadvantaged for the sake of social and political principles such as equality and government accountability.[129] This contribution of lawyers to redistributive social change depends upon the organization and culture of the legal profession (cf. Galanter, 1974). Now a few firms contribute part of their revenue from powerful clients for legal education and research.[130] Unfortunately, the brokers and fixers who handle litigation about land will represent non-wealthy clients only when they have the opportunity to receive a part of the proceeds from the litigation, which will be discussed further in the following chapters.

129 Obviously, there are also public interest lawyers or cause lawyers in Indonesia, although it is not the focus of this study. See footnote 2.

130 For instance, Assegaf, Hamzah and Partners and Lubis, Ganie, Surowidjojo by establishing Jentera Law School and Hukum online.

3 Buying Opportunities, Selling Dreams[1]

Not long ago, economists predicted that Indonesia would become one of the world's new economic giants, possibly becoming one of the 'MINT' countries: Mexico, Indonesia, Nigeria, and Turkey.[2] During the past decade, investment banks have been advocating investment in the Indonesian market to benefit from the sharp rise in Indonesia's domestic consumption. There is also an emerging urban middle class, which demands better living conditions and is willing and able to pay for them. To facilitate investments, the Indonesian government has opened the market to private developers (Dieleman 2011).

On the other hand, Indonesia appears to be neither an easy nor safe place to do business. The World Bank's 'Doing Business' report[3] ranks Indonesia 114th out of 189 countries in the general ease of doing business. Indonesia is even lower when it comes to enforcing contracts, ranking 172nd.[4] Investors face other challenges, including registering property, navigating the inadequate land administration system, and dealing with a lack of infrastructure.

This combination seems to indicate that Indonesia conforms to the common investment pattern of high opportunities that come with high risks.[5] However, if investors can overcome the difficulties inherent in doing business (i.e., enforcing contracts and dealing with the legal-administrative system), the Indonesian market combines highly lucrative investment opportunities with comparatively low risks. In other words, experienced

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1 I would like to express my gratitude to Prof. Stewart Macaulay for his extensive comments and suggestion on an earlier draft of this chapter.

2 The term MINT was developed by economist Jim O'Neill, who previously invented the term BRIC countries (i.e., Brazil, Russia, India, and China). http://www.bbc.com/news/magazine-25548060. Last visited: 15 November 2015.

3 A report comparing business regulations in 189 economies. World Bank. 2014. Doing Business 2015: Going Beyond Efficiency. Washington, DC: World Bank. DOI: 10.1596/978-1-4648-0351-2.

4 According to the Global Benchmark Complexity Index 2015 report published by the TMF Group, Indonesia is the second most complex country in the world in terms of compliance. The TMF Group assists companies in doing business in various jurisdictions. http://www.tmf-global-compliance.com/. Last accessed: 28 April 2016.

5 In fundamental principles of finance, there is a positive correlation between returns and risks. The competitive nature of the market maintains this equilibrium. See Brealey, R. A., Myers, S. C., & Marcus, A. J. (2015). *Fundamentals of corporate finance* (8th ed., pp. 356–385). New York, NY: McGraw-Hill.

investors or repeat-players may have a disproportionate advantage because the playing field is not level.

In 2012, two developments made investments in Indonesia even more attractive.[6] First, Fitch Ratings, Inc.[7] again categorized Indonesia as an investment grade country. Second, the Indonesian parliament passed a land acquisition bill designed to make land for development projects easier to acquire, including for projects to build satellite cities or new towns, malls, and the infrastructure surrounding them. This is also expected to facilitate the issuance of licenses for plantation and mining.[8]

The 2012 enactment of the Land Acquisition Law is an important development, which allows companies to acquire land under the reasoning that it will facilitate the country's economic development and thus prosperity for the people. However, the law has some shortcomings, as I will further clarify in this chapter. I will show the practice repeat-players perform in acquiring land and reducing the risks involved in doing business in Indonesia by dealing effectively with the legal-administrative system and reveal the underlying cause of disputes that may arise from 'doing business'. This chapter will first illustrate the typical land acquisition mechanism for urban development, how businesses are organized, the business culture and surrounding legal framework, and how the repeat-players form and perform contract relationships.

3.1 Typical process and organization of land acquisition for urban development projects

Land acquisition for urban development projects in Indonesia can involve different kinds of purposes. Theoretically, the legal procedures for these different purposes depend on whether the project is meant for a public interest (e.g., construction of roads and schools) or commercial interests (e.g., most housing developments, shopping malls, factories, and offices). Also, theoretically, a government can only enforce its eminent domain power on landholders in cases of public interest, rather than commercial interest. The Land Acquisition Law for development in the public interest

6 These developments are seen as 'gifts'. Credit Suisse, 2012. Indonesia Market Strategy. Asia Pacific/Indonesia, Equity Research, Investment Strategy. Copy with the author. These kinds of reports are only distributed to clients of investment banks. See also UBS Investment Research at www.ubs.com/emresearch.

7 A statistical credit rating organization designated by the United States Securities and Exchange Commission, whose authority stems from its regulation and enforcement of capital market rules (e.g., the Foreign Corrupt Practices Act), is considered by companies in Indonesia, especially those which are publicly listed and (quasi)state-owned.

8 For Palm Oil plantations see The World Bank Group Framework and IFC Strategy for Engagement in the Palm Oil Sector, 2011. http://www.ifc.org/wps/wcm/connect/159dce004ea3bd0fb359f71dc0e8434d/WBG+Framework+and+IFC+Strategy_FINAL_FOR+WEB.pdf?MOD=AJPERES.

(hereinafter Land Acquisition Law or Law No. 2/2012) intended to follow this principle by stating that it is to provide 'an efficient and humane, democratic, and just mechanism in order to acquire land to facilitate development.'[9]

However, laws and regulations (including the Land Acquisition Law) governing government land-takeovers 'for public purposes' are too malleable. Bakker and Reerink (2015) found that the meaning of public purpose and the variety of actors allowed to acquire land are too broad, the actors including public (governmental) institutions,[10] quasi-public corporations,[11] and private companies. The later Presidential Regulation confirms this, as it went even further by allowing private companies to be the drivers of the land acquisition process.[12] Additionally, Bedner (2016) found the law to be too constraining for landholders, with access to a grievance mechanism being so time-limited[13] as to decrease the opportunity[14] for people to access and utilize it.

In addition to the points made by Bedner, Bakker, and Reerink, this law is potentially problematic because people may be criminally prosecuted under it if they receive compensation and the evidence of the land right they presented is invalid, while in theory the evidence could retroactively be invalidated by a competent official.[15] This indicates an opportunity for

9 Preamble (b.) of Law No. 2/2012.

10 Such as Ministries and Provincial, Regency, or City Governments.

11 These are for-profit state corporations, which are divided into three types under Law No. 19/2003 on State Corporations: (1) *Perusahaan Perseroan*; limited liability company with 51% of its shares are owned by the government, (2) *Perusahaan Perseroan Terbuka*; limited liability company with publicly listed shares, and (3) *Perusahaan Umum*; owned fully by the government with no issued shares.

12 Presidential Regulation No. 148/2015 added the definition of institutions which need land and can drive the process of land acquisition with '[…] business entities having authority based on agreements from state institutions, ministries, non-ministerial state institutions, provincial government, regent/city government and State-owned Institutions/State-owned Corporations having special task from the government to provide infrastructure for public purpose.' Before the presidential regulation, this was only possible if a private company had the controlling interest in a quasi-public corporation.

13 Articles 23–39 of the Land Acquisition Law describe four relevant time limits: (1) 14 or 30 days to file a lawsuit at a first instance court against land acquisition decisions, (2) 30 days for the first instance court to take a decision, (3) 14 days to appeal directly to the Supreme Court (without going through an appeal court), and (4) 30 days for the Supreme Court to give its final decision. This does not mean that the land acquisition process will be suspended during this time. It is possible to request a suspension by the court, but as we have seen in Chapter 1 (with the confiscation and injunction procedure), the process is not an expedited one.

14 This is compared with previous ministerial and presidential regulations concerning land acquisition for public interests, e.g., Ministry of Interior Regulation No. 15/1975, Presidential Decrees No. 55/1993, No. 36/2005, and No. 65/2006.

15 Landholders are responsible for the legality (*keabsahan*) of their evidence of land rights (Art. 41(4)) and are criminally liable if it is later found that the evidence was falsified (Art. 41(6)).

government to limit citizens' rights.[16] Therefore, it is important to know how much protection is provided by having a land certificate (which is the government's acknowledgment of land rights) when a more powerful party (e.g., the government, wealthier citizens, and corporations) wants to acquire the land, regardless of purpose. Moreover, what if there is a different 'owner' than the one who controls or occupies the land? Whose 'legal interests' are being protected?

I investigate these questions by considering actors in development projects. How do they obtain the projects? What makes a development project succeed (e.g., houses and roads are built) or fail (i.e., the project remain an idea)? What causes the failure?

As I will show in the description of the typical business model below, in practice, it is not the intention of development (whether it is to build infrastructure to improve welfare or to build commercial spaces to be leased or sold for profit) that differentiates the process of acquiring land. Instead, the differentiation comes from the (economic) opportunities and risks the land development project entails.[17]

3.1.1 Business model / process in acquiring land

The process of acquiring land for both public and commercial interest projects depends almost solely on whether the land intended for a development project has been registered or not, as that is where the difference of cost, complexity, and players involved is found. The typical business model of land acquisition projects involves four groups of players: local business people, regional heads,[18] property developers, and investors.

Non-registered land

State registration formalizes land rights. If land is not registered, the state has not recognized land rights in relation to that parcel. If land targeted for a development project has not been registered, local business people collaborate with regional heads to obtain permission and support to take control of the plot. This can happen at a very early stage when developers associate themselves with candidates running for election on a *quid pro quo* basis (for more, see Mietzner 2011). The candidate for regional head includes a land

16 The practice of facilitating corporate land acquisitions has happened before. During an argument about what was to happen to fuller *eigendom* (European-based rights) in relation with the 1875 *vervreemdingsverbod*, which would have prevented European enterprises from acquiring land with *adat* rights, the government responded by enacting Emergency Law No. 21/1952, prescribing a new form of 'extraordinary corporation', which could hold either European or *adat* land rights. See Lev (1965).

17 The data used for this chapter is from my participant observations, and interviews with land developers, bankers, and investors in land development projects.

18 Regional heads refer to the Mayor, District Head, and Governor.

development project as a part of their 'vision and mission, regardless of whether it is for a public interest or commercial purpose. When they are elected, the new regional head proposes to the Regional Representative Council (*Dewan Perwakilan Rakyat Daerah* or DPRD) that the project become part of the development plan[19]. There is no funding formally required at this stage, only support from their constituents at the Regional Representative Council to approve and include the project in the spatial and budget allocation (see also Moeliono 2011).

If the local business people have not been able to secure a relationship with the regional head before an election, they will need the service of a broker. These brokers[20] are lower-rank officials who have access to the regional head, or a private 'professional' middleman with experience in navigating a government institution.

Exchange relationships need to be formalized or made into a *legal* form, to be able to set out the terms and conditions of the relationship and to allow the possibility—however minimal—of enforcing the agreement. The relationship between local business people and regional heads cannot be direct, as the regional heads are public officers and are not allowed to enter into contracts in return for electoral campaign funding or promise to allocate non-registered land (considered state land) for urban development projects.[21] In other words, business people try to put this illicit arrangement in writing to have something on paper that creates a sense of obligation. Even though it is not legally enforceable, it can be useful as a tool for bargaining or blackmailing. A written agreement is beneficial for the business people but poses risks for the regional head or brokers, so whether or not the agreement is made in writing depends on the bargaining power between them.

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19 There are two kinds of development plans: (1) *Rencana Pembangunan Jangka Panjang* (Long-term Development Plan), which is planned for 20 years, and (2) *Rencana Pembangunan Jangka Menengah* (Mid-term Development Plan), which is planned for a 5 years.

20 A broker is used in every stage of land acquisition process; from licenses, land clearing, and certification. They are referred to in Indonesian as *calo* or *makelar,* which means middleman. They are officials from NLA office, state officials and relatives of those. They are known to be unprofessional in the sense that they are not bound by any ethics code or institutional regulations, making them non-hesitant to do everything necessary to gain profit. See Badan Pembinaan Hukum Nasional, 1993. Analisa dan evaluasi hukum masalah Calo dalam jual beli tanah. Proyek Pusat Perencanaan Pembangunan Hukum Nasional, pp. 9–12.

21 A report by Indonesian Corruption Watch states that more than half of all parliamentarians are serving as directors, commissioners, or business owners; all positions involving potential conflicts of interest. The report does not include parliamentarian family member businesses of the Parliament members' family. Indonesia Corruption Watch, 2015. Hasil Penelitian Potensi Konflik Kepentingan Anggota DPR RI 2014–2019. http://www.antikorupsi.org/id/doc/hasil-penelitian-potensi-konflik-kepentingan-anggota-dpr-ri-2014-%E2%80%93-2019. Last accessed: 22 February 2016.

After the private exchange relationship between local business people and local authorities has been established, the land development project needs to be made public. However, the government needs to provide legitimacy for its choice to appoint the local company for the project. This is a delicate task, as too much transparency regarding the collaboration could result in allegations of corruption later on. The most common approach is for the government to announce a tender. This is now done electronically through websites called *Layanan Pengadaan Secara Elektronik* (Electronic Procurement Service), which state the terms and conditions of participating in the bidding process. The tender mechanism has loopholes. From the government's side, the tender can be designed to have a very particular bidding arrangement and arbitrary requirements to limit competition for the benefit of the target cooperation company. From the target company's side, it can involve other 'shadow bidders' making the process seem fair and equitable. The 'shadow bidders' are shell corporations or special purpose vehicle companies owned and controlled by the local business people or their relatives.[22]

After winning the tender, the company enters into a written contract (often called *Perjanjian Kerjasama* or Co-operation Agreement) with the government. At that point, the government recognizes the company's control over developing the land.

Registered land

If land is registered, it means that the NLA has issued a land certificate over that plot, giving a legal entity the right to own, lease, use, manage, build, or cultivate it.[23]

For local and national companies, it is simpler to acquire registered land than unregistered land because it is instantly ready to be offered to investors and they do not have to deal with the complexity of bureaucracy (as we have seen previously). In most cases, the land will not be sold, but the investors will arrange mergers and acquisitions with the company whose name is stated on the land certificate[24] by obtaining a stake in the company and making the company part of the investor's subsidiary or purchasing the company's controlling shares. This is less costly than having to pay for procedures of transferring and registering land under a new name.[25]

22 For special purpose vehicles in the Indonesian real property market, see Watanabe, Masakazu. 1998. New Directions in Housing Finance. International Finance Corporation, pp. 113–126. http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2002/02/16/000094946_02020504015422/Rendered/PDF/multi0page.pdf#page=121. Last visited: 24 November 2015.

23 These rights are those that the umbrella agrarian law (Law No. 5/1960) recognizes.

24 This does not necessarily mean that the company has physical control over the land.

25 Interview BT, JK, LC, ES, SK, MA, OS.

Land clearing

Before the property developer can start implementing the project or building, there are usually people that they need to remove who are living on the land targeted for development. Officially speaking, clearing land or removing people means that the property developer is buying the plot from the people. These people are usually farmers or the urban poor with semi-permanent or permanent houses, and they may not have a land certificate (i.e., they may not have registered their land) (see also Reerink 2011).

Land developers (companies) cannot legally own non-registered land. Land has to be registered before it can be developed. Occupied non-registered land has to first be acquired by a citizen (through registering their landholding with the National Land Agency) or by the government (through a process called release of rights, i.e., *pelepasan hak*).[26] The process is regulated by the Land Acquisition Law,[27] which states that the government can only acquire land because of public interest and defines what kinds of development are considered to be in the public interest (e.g., 'social and public facilities and green public spaces'[28]). The Land Acquisition Law states, '[l]andholders *must* release their land for development after compensation is given or based on a final and binding court decision'.[29] To fulfill the requirement of giving compensation, in practice, a land developer will often leave a sum of money for the court (through a consignment).

Furthermore, a local government can acquire land for development without referring to the Land Acquisition Law.[30] The local government can still acquire registered land (rights recognized by the government) by arguing that because the government has decided (with a decision letter (*Surat Keputusan*) issued by a regional head)[31] that the land is to be cleared for development, people occupying the land and refusing to vacate are acting against the law and are mere squatters without rights. This announcement works as a scare tactic in bargaining compensation with landholders.

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26 For the release of rights, the company has to first obtain an *ijin lokasi*. There also exists a Hak Pakai (right to use), but the Hak Pakai cannot be used as an encumbrance to receive bank loans.

27 Law No. 2/2012.

28 Article 10(l) Law No. 2/2012.

29 Article 5 Law No. 2/2012.

30 The government have used Temporary Law No. 51/1960, which mentions no compensation scheme for land clearing. See, e.g., Jakarta Bukit Duri land clearing case. http://www.hukumonline.com/berita/baca/lt581b6d7028065/korban-gusuran-gugat-uu-larangan-penggunaan-tanah-tanpa-izin. Last accessed 26 February 2019.

31 Articles 19 (6) and 21 (6) Law No. 2/2012 give authority to the regional head (provincial head/governor) to determine locations of development plots in the public interest and make final decisions on whether or not land development project will be carried out.

When the land is registered, a development company will just find the entity listed in the land certificate and acquire land directly from them, making the land clearing payment more straightforward and the risks more manageable (i.e., decreasing the unpredictability of funding or overpaying). There are fewer parties to deal with, and the whole procedure of acquiring land for a 'public interest' can be bypassed.

To start the development of a project, normally a joint co-operation with a big Jakarta property development company[32] will acquire a large amount of capital to clear the land and fund construction. This co-operation is either a joint venture (where the local company that won the tender sets up a new company with the big property developer) or joint operation agreement. I encountered sale and purchase agreements (of land, shares, or entities holding rights/licenses), forms of transfer (such as trust, *cessie*,[33] and BOT[34]) or joint operation (KSO[35]), and joint ventures.

Clearing both registered and non-registered land requires a lot of funding.[36] The purpose of funding ranges from compensating and reimbursing those moving to (in cases of forced land clearance) renting bulldozers, negotiating with the 'squatters', and paying enforcement personnel. This is rather tricky, as there is no threshold for how much funds they will require. It will depend on the requests by local leaders, and on the parties needed in the land clearing process, which are a local task force (*Satuan Polisi Pamong*

32 These are companies listed in the Indonesian Stock Exchange (IDX). The property and real-estate companies listed include: Agung Podomoro Land, Alam Sutera Realty, Bekasi Asri Pemula, Bumi Citra Permai, Binakarya Jaya Abadi, Bhuwanatala Indah Permai, Bukit Darmo Property, Sentul City, Bumi Serpong Damai, Cowell Development, Ciputra Development, Ciputra Property, Ciputra Surya, Duta Anggada Realty, Intiland Development, Duta Pertiwi, Bakrieland Development, Megapolitan Developments, Fortune Mate Indonesia, Gading Development, Gowa Makassar Tourism Development, Perdana Gapuraprima, Greenwood Sejahtera, Jakarta International Hotels, Jaya Real Property, MNC Land, Lamicitra Nusantara, Eureka Prima Jakarta, Lippo Karawaci, Modernland Realty Ltd., Metropolitan Kentjana, Metropolitan Land, Metro Realty, Nirvana Development, Indonesia Prima Property, PP Property, Pakuwon Jati, Ristia Bintang Mahkotasejati, Roda Vivatex, Pikko Land Development, Danayasa Arthatama, Suryamas Dutamakmur, and Summarecon Agung, Sitara Propertindo. Building construction companies listed include: Acset Indonusa, Adhi Karya (Persero), Nusa Konstruksi Enjiniring, Jaya Konstruksi Manggala Pratama, Nusa Raya Cipta, PP (Persero), Total Bangun Persada, Wijaya Karya (Persero), and Waskita Karya. Industrial estate companies listed include: Bekasi Fajar Industrial Estate, Puradelta Lestari, Kawasan Industri Jababeka, Lippo Cikarang, Mega Manunggal Property, and Surya Semesta Internusa. Source: www.idx.co.id. Last visited: 9 November 2015.

33 Assignment Deed, interpretation into practice from Indonesian Civil Code Article 613–624.

34 Build, Operate, and Transfer. A model commonly adopted between a state institution (owner of land) and an investor seeking to develop the land and eventually return it to the owner. See Soerodjo (2016)).

35 *Kerjasama Operasi*. Ibid.

36 This often comes from a provincial government's budget. For example, Jakarta Legal Aid Foundation reported that 96% of the sources of funding for land clearing in Jakarta come from provincial government budgets (Januardy et al. 2016:22).

Praja or *Satpol PP*) and police officers,[37] and in most cases,[38] also the national army.[39] Although it is rare for the national army to take action, a couple of personnel are usually standing by on the day of the land clearing, to show enforcement power to the people.[40]

Having a land certificate (i.e., land rights having been registered with the state) should provide authority to the landholder on whether or not to transfer their land rights, which means tenure security for the landholder. Ironically, in this case, the security of tenure is actually reduced when the land is registered because it is easier for investors to acquire the land. When the state has not recognized land rights (i.e., when the land is not registered), the plot is less favorable or not attractive enough for the developer or businesses to acquire through funding because the process is perceived to be complicated, expensive, and unpredictable.

Funding the construction

Once the land has been cleared, there are two ways to get funding for construction on the plot of land. The two sources of funding are (1) financial institutions or individual investors, and (2) direct consumers. Financial institutions or individual investors provide funding (capital) through investment banks, hedge funds, and private equity.[41] Direct consumers are middle-class people who have money to buy a house or enough disposable income to invest in a second home and rent it out. Basic Agrarian Law states that only Indonesian citizens are allowed to own land and limits the time foreigners are allowed to hold and use land.[42]

A syndicated loan scheme is used to get funding from financial institutions and foreign investors. In this scheme, the land certificate, along with shares of the company that holds the land rights will be put under collateral in the form of a mortgage certificate (*Sertifikat Hak Tanggungan*) to a security agent. A global real-estate valuation company will do a valuation of the project.[43] An issuer will use the result of the valuation to raise funds from financial institutions, which will purchase notes or bonds (i.e., the total loan

37 See the involvement of national police, e.g., in the Bukit Duri case http://megapolitan.kompas.com/read/2015/08/20/12305601/Pemerintah.Tak.Mau.Ganti.Rugi.karena.Kampung.Pulo.Tanah.Negara.

38 Interview JK, PR, BT.

39 The role of the national army in land clearance is significantly reduced compared to the New Order era. See development of this practice and relationship between the army, state, and land clearance processes in Davidson (2015).

40 LBH Jakarta report (Id) also states that civil servants from Public Utilities Maintenance (*Penanganan Prasarana dan Prasarana Umum*) and *Dinas Kebersihan* (Sanitary Agency) are also often involved.

41 Interview BT, ES, LC, SK, AL, and participant observations. For an overview about hedge funds and private equity, see Stowell (2010).

42 Article 26(2) BAL.

43 E.g., Colliers, Jones Lang LaSalle, and Knight Frank.

amount diversified into small parts) from the issuer, who often also acts as an underwriter.[44] The issuers/underwriters of notes/bonds are financial institutions that arrange the transaction or provide a larger part of the loan. They will offer share prices to their distribution networks and set an interest rate. A security agent is an institution with the authority to enforce the use of collateral (i.e., liquidate land rights) when the loan is not performing. The mortgage certificate is registered in the name of the security agent who also governs the management of the loan. Security agents are usually international investment banks such as HSBC, Credit Suisse, and Bank of America Merrill Lynch. The security agent also has the duty of dispersing and managing cash in the loan, although it can be a different financial institution in one scheme, depending on the scheme's complexity. The more complex a loan scheme is, the more specific a financial institution's role is in managing and governing an investment scheme through contract relationships.

To get funding from the consumers, the developer will create a building plan with a projected image of their expected results, advertising dreams such as happiness, comfortable living, a 'green' environment, and an image of a family. These projected images take the form of flyers and brochures distributed in malls, with big letters advertising low down payments and low interest for the public to purchase individual house units, apartments, or office space, and to start paying installments by way of signing a PPJB.[45] The collection of the down payment and installments will then be used to fund the construction. Consumers are aware of this scenario, and look for a reputable developer to invest their 'dream' in, because of risks that the project could be unfinished, which has happened quite often.[46]

The loan scheme for consumers usually goes as follows: consumers subscribe to a loan from a bank to purchase the (unfinished) house, which serves as collateral for the loan. This loan program is a banking product called KPR (*Kredit Pemilikan Rumah* or House-owner Credit). Consumers usually subscribe to a local bank (i.e., a state bank or private bank), which are often appointed by the developer. Sophisticated consumers will look

44 An underwriter is an entity that administers the issuance and distribution of securities in the form of equity interest over land from an issuer.

45 PPJB or *Perjanjian Pengikatan Jual-Beli* is a notarial deed signed between an intended seller and purchaser, promising a sale of property before actually selling and buying the property. The actual sale and purchase, or transfer of property, will be through the signing of a Sale and Purchase Deed (AJB or *Akta Jual Beli*).

46 There are a number of cases for this. There are even concerns that developers are only selling brochures without having any intention to build the land development project. Complaints include apartments not being delivered even though they have been paid for in full, not being ready for occupation even though the due date has passed, houses not being built on time, and bad construction quality (Kompas, 29 November 2015 p. 12). As a result, how-to and tip books about investing in and safely buying real-estate are widespread in Indonesia. For instance: Benny Lo. 2012. *Jangan Beli Properti sebelum baca buku ini!* (Don't buy property before you read this book!), VisiMedia.

into two things to make sure that the project will be realized: the developer's reputation and financial situation.[47]

As we can see from this model, the products investors buy are not the land itself, but a claim over income from rights and uses to the land in the form of shares or investment products.[48] In these transactions, there are several relationships involving different players with different roles. It is, therefore, useful to know how these relationships are organized in Indonesia.

3.1.2 Business organization

To understand how business is organized in Indonesia, first, we have to understand how different actors gain access to business activities. Actors need to access two kinds of networks through which they may obtain projects. These interconnected networks are the state officials' network and business people's network. State officials use connections and skill to provide services to businesses, while business people use money alongside connections and skill.

During the New Order, the term 'Ali-Baba' was used to describe the organization of big businesses in Indonesia. The term implies that businesses in Indonesia involved either political backing or the army ('Ali'), in charge of licenses and ensuring a politically smooth operation, and Chinese-Indonesian business people ('Baba') who brought capital, trading networks, and business skills into the organization.[49] With these combined strengths, contracting with Ali-Baba companies provided little security for other (smaller) companies, since enforcing contracts through courts was

47 Consumers determine a developer's reputation by word of mouth and relate it to the reputation of banks that disburse the KPR, usually in cooperation with the developer. They gather information at project launching events, check the SIPPT (i.e., that the development project has fulfilled spatial planning requirements), check the land certificate for certainty that the developer already controls the land, and that the company name is already in the land certificate. As a pre-litigation strategy for consumers, they can go to *Badan Penyelesaian Sengketa Konsumen* (Consumer Dispute Settlement Body) by using Law No. 8/1999 about Consumer Protection and Law No. 1/2011 about Housing and Residential areas.

48 Stakes over certified land are bought and sold through a secondary market, through buying a stake in a mortgage certificate or *Hak Tanggungan*. There, a stake is removed from politics, since government participation is not needed in the transaction, and proceeds go to a 'hidden' investor (beneficial owner). To fix this, since February 2015, all financial transactions by governmental institutions are being monitored through the World Bank's SPAN (*Sistem Perbendaharaan dan Anggaran Negara*) system. See http://www.worldbank.org/in/news/press-release/2015/11/11/indonesia-centralized-database-of-government-financial-transactions-improves-budget-spending-and-accountability. Last accessed: 12 December 2018.

49 For police, it is referred to as a parman economy (*partisipasi teman*), i.e., the hidden flow of gifts, capital, and other commodities from ethnic Chinese capitalists that is channeled to police officers (Baker 2013).

largely pointless. The 'Ali' could ensure socio-political backing and influence enforcement agencies (Antons 2007:12).[50]

The Chinese-Indonesian businesses grew so immensely with the Ali-Baba system that it became a 'Chinese problem' (e.g., Tan 1991; Mackie 1991).[51] Ethnic Chinese have specific cultural traits that remain strong despite attempts from the New Order to assimilate and acculturate them to become 'Indonesian'. These cultural traits still govern the way they do business today, namely the use of personal networks (*guanxi*), Confucian work ethics, and ethnic affinity (Koning 2007:129). Relationships in the business people's network, involving mostly Chinese-Indonesians, are centered in family and are thus exclusive of other ethnicities.[52] The Chinese-Indonesian business people stay in a closed network centered on family relationships.

I mentioned at the beginning of this section that the business people's network requires money alongside connections and skill. Where there is no foreign investors or a syndicated loan, capital for land development projects can only be inherited or obtained through family relationships; through marriages or by being a 'family friend'. Family friends belong to the inner circle of the most powerful members of the family. They may be friends, relatives, classmates, or neighbors. They became close to all members of the family and are permitted to attend family functions, such as weddings, funerals, and other life events. To become a family friend requires 'good *bibit, bebet,* and *bobot*[53]'. *Bibit* (i.e., seed, as per the literal translation) means pedigree and the person's family status. *Bebet* means the kind of social environment and connections a person has, and *bobot* (i.e., literally translated as weight) means their education and skills. Essentially, in this context, there has been a close or long relationship where lots of trust has been built, which makes the relationship equivalent to a family relationship.

The main idea of *reformasi* was the elimination of corruption, collusion, and nepotism. Even though the roles of political backers were reduced after *reformasi*, there are still lots of politicians and previous army generals owning or holding stakes in big corporations (Schwarz 1999; McLeod 2000; Antons 2007). Business relationships have also become more secure as methods of coercion become riskier and less probable. The focus has shifted from Soeharto's crony capitalism to a wider network of capitalist oligarchy,

50 This model of mixing government and private business interest is not new. For example, in colonial times, the director of Deli Company in East Sumatra (incorporated in 1869), Jan Theodoor Cremer, was also the Minister of Colonial Affairs (Lindblad 1996:220).

51 Chinese-Indonesians were only a very small minority (roughly 3%) yet had a major grip on economy and businesses, making them the target of resentment by indigenous Indonesians.

52 In the 1990s, Chinese-Indonesians controlled about 80% of all corporate assets, 160 out of 200 largest enterprises in Indonesia, and every reported billionaire was Chinese-Indonesian (Yeung 1999:104).

53 The term originated from Javanese and was commonly used throughout Indonesia. Personal communication with linguist Nazarudin, 5 June 2016.

which includes alliances between the leading politico-bureaucratic and capitalist families (Robison and Hadiz 2004; 2013). However, now, the political and military backers need to appear to have a 'legal', formalized role in business relationships. This condition raises the importance of contracts for regulating relationships and as reference points for operations.

Meanwhile, the capitalist families remain in a culture of close-knit groups centered on family relationships, and they govern the dominant form of economic structure (Redding and Whitley 1990:85). For example, Mochtar Riady (born Lie Mo Tie), the founder and Chairman of one of the largest land developer company, Lippo Group, is the brother-in-law of Mu'Min Ali Gunawan,[54] the founder of Panin Group, which runs one of Indonesia's largest banks in the housing credit business, Panin Bank. Panin Group also runs an insurance and securities house. Mochtar Riady's daughter is married to Tahir, who owns Mayapada Group and is an 'advisor' to Army General Moeldoko.[55]

Families own 95% of businesses in Indonesia. In family businesses, there are wider opportunities to structure complex organizations of companies while still keeping full control and power over the business, e.g., by putting a relative's name as the controlling shareholder of a company but retaining actual company management with the beneficiary owner (i.e., the head of the family).[56]

The culture of collaboration between politico-bureaucrats with capitalist families is still visible in how businesses are organized in Indonesia. Even though there is no longer as clear a division between political and economic power as before, the organization of business relationships remains the same. One party provides the majority of funding while the other is expected to fulfill an obligation or task (e.g., provide licenses and expertise) for the benefit of both. Business people need state officials to get projects going, but they cannot interact directly with one another.

During the New Order, this interaction was easy. The most visible example is the relationship between President Soeharto and a Chinese-Indonesian businessman Lim Sioe Liong. After *reformasi,* their relationship was heavily criticized, and there were widespread demonstrations aimed at

54 I was able to find this out by tracing names from various newspaper obituaries and wedding invitations.

55 TNI installs tycoon Tahir as advisor. http://www.thejakartapost.com/news/2014/09/19/tni-installs-tycoon-tahir-advisor.html Last accessed 19 September 2014.

56 In 2014, PricewaterhouseCoopers issued its seventh survey on family businesses globally and also issued a specific report on Indonesian family businesses. According to the report, in family businesses and business groups, decision-making is more efficient. However, complexities can create inefficiencies. Professionalism in running this type of business organization is also a key concern. PriceWaterhouseCoopers. Survey Bisnis Keluarga 2014, Indonesia. http://www.pwc.com/id/en/publications/assets/indonesia-report-family-business-survey-2014.pdf. Last visited: 10 November 2015. (See also Wijaya 2008; Arifin 2003).

eliminating corruption, collusion, and nepotism. State officials are supposed to act for the good of the public. They are not supposed to have relations with business people because it will lead the public to believe that the state official is in the businessman's pocket; the New Order problem remains fresh in the public's memory. This makes it more difficult for State officials and business people to enter into relationships. Both business people and State officials are aware of this problem, which is why they hide their relationships by forming companies and having the flow of money go through subsidiaries, to make their transactional relationships indirect and hide that money is passed from business people to State officials. Their relationship becomes transactional instead of being based on the rules of office that should govern them.

To hide these relationships, business people and State officials need a broker who can bridge their networks and manage their contractual relationships. In between these two networks, the local business people usually act as a broker since they are already in a close relationship with their local or regional officials. Commercial lawyers are another category of brokers who supported the bridge between these two networks, as they are the ones who can create business forms that can be used to hide ownership and create a barrier to make a direct relationship seem indirect. For this purpose, the transactions are performed under the guise of a company. 'Nobody is buying land using their personal name nowadays,' was a common statement I heard during my interviews.[57]

Commercial lawyers need to structure business transactions that serve dilemmatic functions; legitimizing transactions and managing connections but hiding ownership and providing opportunities to avoid taxes.[58]

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57 The statements are from lawyers and managers in firms that are active in acquiring a claim to properties under dispute by acquiring shares in clients' companies, or contracting with clients for part of the land or a certain percentage of the land purchase price as the lawyers' fee as a way to fund the dispute for the law firm, a topic we will return to in Chapter 4.

58 Buying land using a company is more tax efficient. In a direct (personal name) sale and purchase transaction of land, the seller needs to pay 5% of the transaction value as income tax, the buyer usually pays 5% of the transaction value as transfer tax, and potentially another 10% VAT. These were reduced to 2,5% in 2016 by Government Regulation No. 34/2016. However, the implementation is still debatable since the regulation states that it is only applicable to taxpayers whose main occupation is transferring land and/or building (Article 2). However, if the transaction is using a company (buying shares in a company that holds the land title), the buyer is only subjected to 0,1% tax to none for shares of public listed companies and 25% of capital gain for shares of private companies. Even though 25% seems to be a higher number than 5% + 5%, it is 25% from profit (capital gain) instead of 10% from transaction price, meaning that the actual amount of tax for buying land through purchasing company shares is significantly lower than buying land rights directly to the personal owner. Additionally, a private company can be listed in the capital market first, making it a public listed company to avoid the 25% tax.

Creating a complex business group structure serves these functions (Dieleman & Boddewyn 2011), a structure for selling and buying land, and creating or holding a stake in land development projects.

The situation suggests that the business activities concerning land acquisition for development are exclusive and have a close-knit structure. Relationships are complex, tangled, and rife with conflicts of interest. Part three of this chapter will analyze whether that is why it is hard to enforce contracts in Indonesia or whether there are other reasons. What does breaching contracts entail, and how do repeat-players operate and deal with risks? Does the law provide any remedy to level the playing field?

3.2 Corporate governance

The process and organization described above show that business activities regarding land acquisition do not only concern land laws, but laws regarding business management, which focus on creating, maintaining, and enforcing agreements. Corporate governance involves rules and principles to ensure that corporations function and compete effectively and ethically. These rules and principles regulate stakeholder and corporate rights and responsibilities and include procedures for decisions in corporate affairs. Here, 'company' refers to a single entity and 'corporation' refers to the wider structure of corporate or financial groups containing one or more entities (i.e., companies and natural persons) engaging in financial activities.

As we will see from the brief overview of the legal framework on corporate governance below, laws on corporate governance are quite comprehensive. Besides these laws, all institutions have their own detailed regulations and are also subjected to sectoral regulations governing specific areas of business. For example, some corporate lawyers specialize in manufacturing but do not know about mining. Others only know how to register patents but do not know what to do in an Initial Public Offering.[59] The variety of regulations stems from 'ego-sectoral-ism' (Arnscheidt 2009), i.e., where each government institution strives to be the most powerful and most authoritative in their own sector, which in turn creates overlapping or conflicting rules. It is hard for a general practitioner (litigator) to keep up (let alone comply) with these regulations because they are very industry specific. This makes the practice (of corporate lawyers) exclusive and over-specialized. These overly detailed rules combined with the vague civil and criminal code makes practice hard to predict.

59 Interview MI, HS.

Indonesian Company Law and Investment Law

For almost 150 years, companies in Indonesia were regulated by the Commercial Code (*Kitab Undang-undang Hukum Dagang* or KUHD), originating in the Dutch era with *Staatsblad* 1874-23 until some clauses were changed in 1971. Twenty-four years later, Law No. 1/1995 about the Limited Liability Company (*Undang-undang Perseroan Terbatas,* hereinafter the 1995 Company Law) was enacted as an independent regulation, not part of the allegedly outdated Indonesian Commercial Code and Indonesian Civil Code. The 1995 Company Law was meant to unify company regulations and to follow business and economic development. Its main goal was to protect the interests of investors and shareholders by giving rights to minority shareholders to commence Shareholder Meetings (RUPS): a procedure required for making binding decisions concerning a company.[60] It classified two types of shares: shares with and without voting rights.[61] Before this, shares came with the voting rights of 'one man one vote'.[62] The law also gave rights to any shareholder to file a lawsuit against the company in a district court, if a company action caused them to suffer personal losses.[63] This means that since the enactment of the 1995 Company Law, investors with equity interests but without controlling or regulatory power over the company were protected. In other words, the law gave investors the ability to intervene in decision-making when it caused them losses.

In 2007, the 1995 Company Law was replaced with Law No. 40/2007, and the Capital Investment Law (Law No. 25/2007) was enacted. Before this Capital Investment Law, there were two separate laws regulating investments by source of capital. Foreign Capital was regulated by Law No. 1/1967 and National Capital was regulated by Law No. 6/1968. The Capital Investment Law merged the two sources of capital into one law and now provides 'conveniences' [64] for investors concerning land titles and licenses.

A company is defined under the current 2007 Company Law as a legal entity with limited shareholder liability, having an independent legal status and ability to enter into contracts in its own name. Indonesian companies have a two-tiered system where there is an executive board and a supervisory board. Companies may sue and be sued, and may issue shares and bonds. The capital structure is divided into three: (1) a minimum of Rp. 50.000.000- in authorized capital or Rp. 10.000.000.000- in foreign investment companies, (2) paid-up capital, and (3) issued capital, 25% of which must be from the company's authorized capital. The 2007 Company Law

60 Articles 66 and 67 Law No. 1/1995. See also Articles 71,73, and 74.
61 Articles 46 and 72 Law No. 1/1995.
62 Article 54 KUHD as changed by Law No. 4/1971.
63 Article 54 Law No. 1/1995.
64 Articles 21 and 22. The Constitutional Court (Decision No. 21-22/PUU-V/2007) annulled the ability for investors to apply up front for the maximum length of time provided to hold land title without having to apply for extensions, although the Court kept the 'conveniences'.

regulates that issued capital must be paid-up.[65] Before this, a shareholder could technically be indebted to the company for their unpaid shares.[66]

Properties such as land, building, and machinery can also be a form of capital[67] through a procedure referred to as *inbreng*, which means a capital injection of goods. When the object is land, *inbreng* is similar to a sale and purchase in terms of applicable taxes,[68] and the land title has to be registered under the name of the receiving company. Before *inbreng* (as compared to a sale and purchase), an appraisal needs to determine the value of the land, which opens an opportunity for the company to have a lower valuation, which in turn subjects them to lower taxes.[69]

State-owned corporations are also subject to Company Law because of their form as limited liability companies, and they are also bound by Law No. 19/2003 about State-Owned Corporations. The Company Law has weaknesses. One of the key weaknesses is that it does not regulate group companies or subsidiary companies, so relationships within a company group remain subject to the vague Indonesian Civil Code, as I will explain below.[70]

Laws and oversight on business and banking practices

In lending and borrowing money, companies and corporations are subjected to banking and financial regulations, namely Insurance Business Law,[71] Law No. 5/1999 about the prohibition of monopolistic practices and unfair business competition, and the Law on the Indonesian Central Bank.[72] In 2004, a law on the Deposit Insurance Corporation was also established[73].

65 Article 33(1) Law No. 40/2007.

66 Personal communication with Aditya Prabowo, lawyer June 2016.

67 Article 34 Law No. 40/2007.

68 See footnote 58 above.

69 There is a safeguard mechanism that requires the *inbreng* to be announced in a newspaper, although this is not effective since parties could take certain measures for the announcement to remain undetected (e.g., publishing it in an obscure newspaper with small font).

70 In the Netherlands, this is regulated in Book II of Dutch Civil Code. I am grateful to Dr. C. de Groot who pointed this out to me.

71 Law No. 2/1992.

72 Law No. 23/1999, which was revised with Law No. 3/2004.

73 Law No. 24/2004 was enacted at approximately the same time as Bank Indonesia's approval to merge three banks, which led to a case that serves as an example of laws enacted to facilitate specific political and economically significant deals: The Bank Century case. The case was politically significant in that the government decided to bail out the bank following the 2007 financial crisis. The case was related to allegations of corruption and caused the then-popular Minister of Finance, Sri Mulyani Indrawati, to leave her post and an inquiry into the Governor of Bank Indonesia, Boediono, who later became the Vice President. See Kimura, Ehito. 2011. Indonesia in 2010, A Leading Democracy disappoints on Reform. Asian Survey, Vol. 51 No. 1, pp. 186–195 and von Luebke, C. 2010. The Politics of Reform: Political Scandals, Elite Resistance, and Presidential Leadership in Indonesia. Journal of Current Southeast Asian Affairs, 29(1), 79–94.

The actual Indonesian name of the law is the Law on *Lembaga Penjamin Simpanan* (literally translated as the law on an entity guaranteeing savings), which is in accordance with its purpose of establishment. 'The Deposit Insurance Corporation' (as the World Bank reports[74] refer to it) functions similarly to the American Federal Insurance Deposit Corporation, which is the body handling failing banks[75] and meant to guarantee the public can withdraw money from their accounts.[76]

A number of bodies were established to, e.g., oversee and enforce violations of these laws. These bodies include the Corruption Eradication Commission (Law No. 31/1999, which was revised by Law No. 30/2002), the Commission for Supervision of Business Competition (Law No. 5/1999), and the Center for Reporting and Financial Transaction Analysis (or PPATK, with Law No. 25/2003), which analyses, reports, and enforces the law on money laundering (Law No. 15/2002).

The Indonesia Financial Services Authority (*Otoritas Jasa Keuangan* or OJK) has the regulatory and supervisory function for financial services activity in banking, capital market, and non-bank financial institutions. OJK was established by Law No. 21/2011, replacing the functions of the Capital Market and Financial Institutions Supervisory Agency (*Badan Pengawas Pasar Modal dan Lembaga Keuangan*, known as *BAPEPAM-LK*).[77] The OJK can also establish regulations in the financial services industry.[78] It is led by a Commissioner Board who are elected by the parliament based on nomination by the President.[79] In 2015, OJK issued a regulation establishing its authority to investigate and criminally prosecute in the jurisdiction of the

74 See, e.g., World Bank, 2010. Improving access to financial services in Indonesia at http://www.bi.go.id/id/perbankan/keuanganinklusif/berita/Documents/World%20Bank%20Report%20-%20Improving%20Access%20to%20Financial%20Services%20in%20Indonesia.pdf. Last accessed: 9 June 2016.

75 The Bank of Indonesia decides which kinds of banks are considered failing banks, and the deciding committee consists of the Minister of Finance, Bank Indonesia, and the Deposit Insurance Corporation.

76 Deposit Insurance Corporation law was then revised in 2009 with Law No. 7/2009.

77 Together with International Finance Corporation of World Bank Group, they published the first edition of the corporate governance roadmap and manual in 2014. The roadmap was designed to strengthen corporate governance in Indonesia, and to bridge internationally recognized best practices with local laws, codes and regulations (IFC. Indonesia Corporate Governance Manual. First Edition. http://www.ifc.org/wps/wcm/connect/64185f0042cc3ab0b145fd384c61d9f7/Indonesia_CG_Manual_Feb2014.pdf?MOD=AJPERES. Last visited: 10 November 2015, and Factsheet, The Indonesian Corporate Governance Roadmap and Manual. http://www.ifc.org/wps/wcm/connect/acd25a0042e8cf29af60ef384c61d9f7/CG+Roadmap+and+Manual+Factsheet.pdf?MOD=AJPERES. Last visited: 17 November 2015).

78 Article 8 Law No. 21/2011.

79 Article 11(1) Law No. 21/2011.

financial service sector, which is an important but new regulation, so it is currently unknown how it works in practice.[80]

The 1995 Company Law granted the District Court oversight authority, which the 2007 Company Law moved to the Ministry of Law and Human Rights. The law also includes registration and compliance mechanism for companies, changed the classification of companies, and described corporate governance in more details. The 2007 Company Law referred to a series of government regulations needing to be enacted, detailing the procedures of corporate actions, such as regulations about mergers and acquisitions. The Law regulates the compliance relationship between a company and the government. It also regulates the relationship within a company, such as the obligation to shareholders and its Board of Directors and Commissioners, what qualifies as the company's liability, and which liability is the personal liability of its Board or shareholders. The Company Law states that a company is a legal entity established out of an 'agreement'. Because of this, a company needs to have more than one shareholder, and it has to fulfill the conditions required for the validity of an agreement, which are regulated by the Civil Code.[81]

Thus, since the Company Law does not regulate group and subsidiary companies and despite claiming to be separate from the outdated Indonesian Civil Code, most contractual relationships remain subject of the Civil Code.

Indonesian Civil Code

The Indonesian civil code regulates relationships between parties and the principles of their rights and obligations. It is important to note that there is no authoritative translation of the Indonesian civil code, which is from the Dutch colonial *Burgerlijk Wetboek voor Indonesie (Staatsblad No. 23/1847)*, or Civil Code for Indonesia. The Supreme Court in 1963 declared that the civil code will only serve as guidance and should be regarded only as a

80 OJK Regulation No. 22/POJK.01/2015. This is a rather important authority since the 1995 Capital Market Law (Law No. 8/1995) is the only law that explains what constitutes a conflict of interest, meaning OJK could theoretically also investigate and prosecute parties with conflict of interests. The law defines the meaning of 'affiliated party' as those with '*(a) family relationships out of marriage and descendants until second generation, horizontally and vertically; (b) relationships with employees, director or commissioner; (c) a relationship between two companies in which one or more members of Board of Director or Board of Commissioners are the same; (d) a indirect and direct control relationship between companies and a party; (e) relationships between two controlled companies, directly or indirectly, by the same party; or (f) relationships between a company and the majority shareholder*'.

81 An agreement is valid if there is (1) consent of the individuals who are thereby bound (Bw.28, 1321v.), (2) capacity to conclude an agreement (Bw. 1329v.), (3) a specific subject (Bw. 1332v.), and (4) an admissible cause (Bw.1335v.; Civ. 1108). In other words, an agreement requires agreement (*overeenkomst*), competence (*bevoegdheid*), fixed subject matter (*onderwerp*), and permissible cause (*geoorloofde oorzaak*).

document describing one group of unwritten laws.[82] In practice, different Indonesian translations of the civil code are still being used, though lawyers perceive it as a source of uncertainty and opportunity.[83]

This uncertain status and lack of authoritative translation create an attitude of taking all precautions to promote an impression of certainty, even though it is unnecessary. For example, people create and legalize documents with notarial deeds so that they have a better chance of being found valid if contested (see more examples in Chapter 4). This means that the practice surrounding the Civil Code is inefficient, and enforcing the Civil Code is ineffective against those with capital.

The Civil Code consists of four books: the first about *orang* (person(s)), the second on *barang* (objects, often referred to as law on property), the third about *perikatan* (the word is from *ikat*, which means to bind[84]), and the fourth about *pembuktian dan daluwarsa* (evidence and expiry).

In 1983, a workshop was commenced with the support of the Ministry of Justice to codify the civil code. The codification program was part of the government's five-year development plan (*PELITA IV*).[85] The workshop prioritized the codification of *perikatan* (see the discussion about obligations in section 3 of this chapter) because it claimed to be the most necessary (and the most 'neutral') legal foundation for economic development, facilitating both national and international agreements.[86] However, codification never occurred.

Indonesian Criminal Code and Criminal Procedure Code

As previously mentioned, there are a lot of criminal clauses in the legal framework of corporate governance. The Indonesian Criminal Code, like the Civil Code, is from the Dutch colonial era of *Wetboek van Strafrecht voor Nederlandsch-Indie*, which was enacted with *Staatsblad* No. 732/1915 but was never officially translated. However, unlike the Indonesian Civil Code, the Indonesian Criminal Code was made into law or recognized by the Indonesian government in 1946 with Law No. 1/1946.

82 Supreme Court Circular Letter No. 3/1963.

83 Interview with AS, OS, DK, AR. During participant observation, I found that lawyers keep copies of different Civil Code books published by different publishers for their reference. For example, Dikti and Hukumonline provide different versions online. jdih.ristekdikti.go.id/v0/?q=system/files/perundangan/16221176582.pdf and https://www.hukumonline.com/pusatdata/downloadfile/lt5243d51900ee3/parent/17229. Last accessed 26 February 2019.

84 '*per- … -an*' creates an abstract noun that indicates the process of performing the action to which the verb refers.

85 See Badan Pembinaan Hukum Nasional, Lokakarya Hukum Perikatan Nasional, Badan Pembinaan Hukum Nasional, Departemen Kehakiman, Jakarta Timur, 1983.

86 Id p. 7

The Criminal Procedure Code or *Kitab Undang-undang Hukum Acara Pidana* popularly known as KUHAP was enacted in 1981, which declares that the colonial procedural code HIR (*Het Herziene Inlandsch Reglement* or *Staatsblad 1941 No. 44*), Emergency Law No. 1/1951, and all its related regulations were void.[87]

The articles which are most used in the context of corporate governance are those on the crimes of fraud[88] and embezzlement.[89] A person (e.g., a director of a company) transferring money to another person or legal entity can be accused of fraud and embezzlement, especially when the legal basis of the transfer (such as sale and purchase agreements and shareholder resolutions) is void. This means that the person who signs a transfer document is criminally liable for their (contractual) action.[90]

Corporate governance in Indonesia is centered on 'self-dealings' and conflicts of interest, which observers can see as problems of unprofessional management and opportunistic or incompetent employed managers (cf. Fitzpatrick 2004). However, at the heart of it, corporate governance in Indonesia concerns problems in social and private contractual relationships between government institutions and officials, and its beneficial owners and family-owned conglomerates.[91] There are many specialized rules surrounding business practices, but the foundation of these rules, the Civil Code, and legal procedures are ineffective in regulating business relationships. This shows that parties do not have many limitations in shaping and managing their relationships as they wish. How do parties manage and structure these business and contractual relationships? Are there other (informal) rules that make parties perform their agreements? What does successful collaboration look like? What causes the failure of land acquisition and development projects? Why is it hard to enforce contracts in Indonesia?

87 Since then, a number of attempts have been made to revise both the Criminal Code and Criminal Procedure Code by forming working groups and ongoing discussions in parliament, but the 1946 Criminal Code and 1981 Criminal Procedure Code remain valid, despite some articles being revised or annulled by the Constitutional Court.

88 Article 378 Indonesian Criminal Code.

89 Article 372 Indonesian Criminal Code.

90 During participant observation, I found numerous cases—and strategies—based on this.

91 This is following Fitzpatrick's account in Businesses in Indonesia: new challenges, old problems / edited by M. Chatib Basri and Pierre van der Eng, 2004, Tinkering around the edges: inadequacy of corporate governance reform in Post-crisis Indonesia, pp. 178 – 190. However, I disagree with narrowing the problems to, as Fitzpatrick puts it, the 'interaction between institutional corruption and family-owned conglomerates.'

3.3 Causes of disputes in business relationships

Disputes start with project distress, which happens when a development plan (e.g., land development) cannot continue to the next phase or cannot be completed. Project distress is part of a causal chain of events. It leads to the financial distress of a company or corporate group, meaning that a company is unable to fulfill its obligations, which can lead to restructuring and bankruptcy.[92]

In a land development project, there are different interests derived from different relationships. For example, a dispute can stem from a party being unable to perform their obligations because of a conflict of interest. In this situation, the party is combining multiple interests into one transaction or obligation. Santen (2010:82-86) distinguishes three kinds of relationships: *corporate relationships*, meaning relationships involving a company and parties that belong to the structure of the corporate group, *commercial relationships*, meaning relationships with parties that are contracting with the company from outside the corporation, and *public relationships*, meaning relationships with the government, courts, and pressure groups such as NGOs and the media. For Santen,[93] this *public relationship* is not commercial. I found this to be different in Indonesia. A *public relationship* in the Indonesian context may still be commercial, even though the actors with whom the company is in a relationship with also have the role of being public officials. When either or some of these relationships become difficult, they become the source of project distress.

Distress in *corporate relationships* can be caused by disagreements between shareholders, and between shareholders and management. It happens largely because the beneficiary (shareholders or investors) loses control over the 'manager', i.e., someone appointed to manage the company such as directors and commissioners or someone who is posing as such but does not perform actual management or oversee the company's operations. Company Law states that the Board of Directors can act for and on behalf of a company in and outside of court.[94] There is no educational or professional requirement for joining a Board of Directors or Board of Commissioners, which leads some company owners to appoint a straw person to avoid civil

92 See, e.g., Stijn Claessens, Simeon Djankov, Leora Klapper. 2003. Resolution of corporate distress in East Asia, Journal of Empirical Finance, Volume 10, Issues 1–2, pp. 199–216 and Clark and Ofek. 1994. Mergers as a Means of Restructuring Distressed Firms: An Empirical Investigation. Journal of Financial and Quantitative Analysis Vol. 29, No. 4.

93 Santen's analysis was based on Dutch, German, and British laws concerning legal and economic monitoring of financial distress.

94 Article 1(5) Law No. 40/2007. Although the capacity to act for and on behalf of a company is prescribed in UUPT, the Articles of Association can regulate the processes and details of the representation (Article 98(2) Law No. 40/2007). It is important to note that a director can issue power of attorney for anyone to represent them without prior approval from other management members or through a Shareholder Meeting.

and criminal liability.[95] An example of disagreement is when this straw person refuses to sign a legal document (such as a Power of Attorney or transaction documents) at the request of the beneficiary.

Transactions to acquire land normally involve exchanges of money in return for land title. However, from the business model and organization explained above, a contractual relationship for land acquisition is not the exchange of land for money, but the exchange of services to provide land title for money. By service, I mean the service of public officials arranging or producing licenses and registrations for land acquisition.

The second cause of disputes derives from the informal rules of behavior that establish hierarchies between parties. The obligation to respect elders, employers, *bapak* (fathers), or patrons may prevent parties from making rational plans, and from gauging the ability of the counterparty to perform obligations. The embedded hierarchy prevents parties from further asking the dominant parties to explain what they mean, and the obligation to be subservient prevents the dominated parties from speaking their mind.

Furthermore, it is not clear what acting in good faith means. The principle of fairness in doing business is referred to as *cengli*.[96] In an Indonesian dictionary, *cengli* is described as 'as it should be', reasonable, or honest.[97] This refers to a kind of win/win situation. If both parties behave with *cengli*, they will expect to profit from the relationship. Alternatively, failed relationships in business are often described as the other party not being *cengli*.[98] In other words, they are not truthful, not acting on their promises, and making inaccurate offers. The application of *cengli* is emotional and relational. For example, even though a contract is due, it is not *cengli* to demand payment when the debtor is in mourning. This is the Indonesian business culture of good faith.

In practice, *cengli* often serves as a guide for the concept of good faith.[99] However, it is currently too undefined and ambiguous when distress arises,

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95 Article 93(1) states that 'anyone who are capable in performing legal action can be appointed except those whom within 5 (five) years before the appointment (a) has been declared bankrupt; (b) a member of the Board of Directors or Commissioners of a company which is bankrupt; or (c) criminally convicted of actions which causes state monetary loss and/or related to financial sector.' Furthermore, although UUPT regulates that management should be independent, companies practice this requirement only as a form of compliance, not to actually manage or monitor the company. Siregar & Utama. 2008. Type of earnings management and the effect of ownership structure, firm size, and corporate-governance practices: Evidence from Indonesia, The International Journal of Accounting, Volume 43, Issue 1, pp. 1–27.

96 The word might originate from the Confucian concept of *jen* and *li* (see, e.g., Wei-Ming Tu, 1968 and Chew and Lim, 1995).

97 Pusat Pembinaan dan Pengembangan Bahasa (Indonesia). 1989, Kamus besar bahasa Indonesia / tim penyusun kamus, Pusat Pembinaan dan Pengembangan Bahasa Departemen Pendidikan dan Kebudayaan: Balai Pustaka Jakarta.

98 Or *bo cengli.*

99 The formal legal term of good faith is *itikad baik*. Alternatively, bad faith is referred to as *itikad buruk*.

and there is no body of case law to help explain the meaning of *cengli* in particular situations. This is a problem, especially where there is no common profit since it triggers different expectations about outcomes, and the parties are free to change their minds. This situation indicates that when parties make a contract, it is as if they are performing a ritual, where certain procedures (traditions) cannot be clarified or changed.

Socio-legal scholars have observed that distress in contracts is caused by differences in interpretation and outlook (foreseeing, gauging) (Macaulay 1963), customs and behavior (Merry 1992; Dari-Mattiacci & Defains 2007).[100] Macaulay (1963:56) explained that in the United States, contracts play a minor role if problems arise. In Indonesia, this goes even further because the importance of interpersonal relations far outweighs (business) rationality and prevents parties in (contract) negotiations to express the (business) rationality and consider potential risks and losses.

Additionally, violating obligations could mean different things because what is referred to as 'obligations' is vague. Is it the obligation to be subservient to the older (or more dominant) party in a relationship, or the obligation to provide what is promised in a written contract? This condition further suggests that there is little equality in contract law, and brings us back to a question about the role of lawyers. When parties hire lawyers to negotiate, write, or enforce contracts, do they level the playing field or do lawyers follow the same informal rules?

Obligations: Lost in translation or strategies in translation?

According to Indonesian Company Law,[101] a person (shareholder) is not personally liable for the *perikatan* (obligation) their company makes.[102] This law is the foundation of limited liability in Indonesia. However, there is long-term confusion about the term *perikatan.* Massier (2008:219) found that this term is understood in two different ways by jurists depending on their existing knowledge of Dutch. These two schools of thought are separated into whether the legal scholar understood *perikatan* as *verbintenis,* which is a Dutch concept of obligations, and *perikatan* as a stand-alone Indonesian term.

According to the Indonesian Civil Code, *perikatan* occurs if obligations arise either from an agreement or from law to provide something, perform, or not perform an action (Articles 1233 and 1234 Indonesian Civil Code or *Kitab Undang-Undang Hukum Perdata* or Civil Code). A *perikatan* which arises out of agreements or contracts occurs 'when one or more persons bound themselves into an agreement with another person' (Article 1313 Civil

100 See, e.g., Merry (1992:209–226) who painted a picture about disputing neighbors and their fundamental disagreements, sourced from different lifestyles. Also, consider an illustration of disputes arising out of two different customs about the right of way in 17th-century Italy (Dari-Mattiacci and Deffains 2007).

101 Law 40/2007.

102 Article 3 Law No. 40/2007.

Code), and a *perikatan* which arises out of law occurs as a legal consequence of a certain action, or when regulated by law (Article 1352 Civil Code). This means that *perikatan* according to the Civil Code are obligations arising from relationships notwithstanding the source of the relationship: out of 'law', which makes it a subject of Tort Law, or out of agreements, which makes it a subject of Contract Law.

Satrio, an Indonesian legal scholar whose books are widely used in law schools throughout Indonesia, states that *perikatan* is a part of or the content of an agreement (Satrio 1992:3). By citing Pitlo, a Dutch legal scholar on the subject of *verbintenissenrecht* (or *Verbintenis* Law), Satrio (1992:16) mistakenly understood that *perikatan* in Book III of the Civil Code is merely about assets, wealth, or property relations. Kusuhamidjojo (2015:11) citing Satrio, states that *perikatan* and contracts are the same; the only difference between the two being whether an agreement is written or unwritten.

Many Indonesian jurists agree that *perikatan* is only a subject of Book III of the Civil Code, which they regard as an 'open system,' meaning that it can be set aside as parties wish (e.g., Satrio 1992:3; Setiawan 1987:11). Under this line of thought, they argue that the whole Book III of the Civil Code can also be declared as non-binding under the principle of freedom of contract, which entails freedom *from* contract.

Consequently, law students are taught that Book III can be set aside and serves only as non-binding guidance.[103] This thought develops from a misinterpretation of Subekti's seminal book. Subekti is a famous legal scholar and previous Head of the Supreme Court. In his book *Hukum Perjanjian* (Subekti 2002:13), he explained that Contract law is an open system because the Civil Code is meant to fill the gap of a lack of consideration by parties to the contracts they have written. If something is not regulated in the contract, Book III is applicable. However, this actually means that Book III serves as a minimum standard of contract. Even though parties are allowed to regulate their relationship differently from what is stated in Book III, it is not to be disregarded or declared inapplicable.

Moreover, both articles about tort and breach of contract are in Book III, which means that according to some, they are free to set aside articles on tort. However, other legal scholars argue that it is not possible to set aside tort because of 'azas' or principle.[104] These conflicting interpretations cause unclear conditions in determining whether a party is defined either as guilty of tort (Article 1365 Indonesian Civil Code) or breach of contract (*wanprestasi*).

Currently, *perikatan* as understood as the more established concept of Dutch *verbintenis* is diminishing together with the generation of jurists who were trained and educated during colonial times. Discussions about *perikatan* only emerge nowadays when there are disputes on whether a party

103 This originated from an interpretation of the Dutch legal term *aanvullendrecht*, which literally means additional law, described by Indonesian legal scholars in their books (e.g., Satrio 1993).

104 Interview OS.

shall be found liable for tort or breach of contract. The questions are merely about which kind of *perikatan* the party in question shall be bound by, assuming that there is always a form of *perikatan*. The meaning and concept of *perikatan* itself, however, are no longer discussed.

According to the principle of freedom to contract, all *perikatan* can arguably be declared non-binding, meaning that anyone is free to make contracts and set out their terms and conditions '*as long as it does not violate laws, prevailing regulations, norms and public order and by observing requirements for validity of agreements*.'[105] The confusion surrounding the concept and meaning of 'law' in *perikatan* (i.e., is it civic duty, customs, norms, religious values, public order, or all of those?) and the concept of *perikatan* itself enables the making of contracts or clauses in an agreement void or voidable, allowing parties to escape their obligations.

This confusion is useful for lawyers. It means that they have a wider range of arguments to use depending on their client's situation. They claim that an agreement has to be both valid and enforceable, or due and payable. Even though a contract is due, both creditor and debtor can claim that it is not enforceable or payable because it was not performed in good faith,[106] which is an exceedingly abstract concept. The closest explanation of good faith in the Civil Code states it is a 'permissible cause'[107] for an agreement to be valid, but in the Indonesian translation of the code, it is referred to as the Islamic term of *halal*.[108] The vagueness of this concept makes enforcing an agreement extremely difficult.

Furthermore, attempting to enforce an agreement may be difficult because it causes disputes about different interpretations of the agreement, which are originated from different interpretations on *how* the agreement should have been performed. This is prevalent, for example, in contracts in English. Contracts drafted in English have to be translated into Indonesian by a 'sworn translator'[109] before being submitted to a court. This translation can be crucial for the court's later interpretation.[110]

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105 Article 1338(1).

106 Article 1338 Civil Code

107 Article 1336 states: 'In the event that no cause is specified but that there is an existing permissible cause, or if there is a permissible cause other than the one specified, the agreement shall be valid.' 'Permissible' is translated from the Dutch word *geoorloofde*.

108 Related articles are Articles 1335, 1336, and 1337. Other than halal, 'kesusilaan' and ketertiban umum are also mentioned, which are vague. For more about the Islamic term of halal, see Y. Qaradawi. 1997. The Lawful and the Prohibited in Islam, Al-Falah Foundation, Cairo. pp. 6–10.

109 The sworn translator has to pass a qualification examination commenced by Universitas Indonesia and the Governor of Jakarta. If they pass the examination with grade A, they can be sworn in by Jakarta's Governor.

110 Because of the importance, it is common practice to have a lawyer translating the contracts, and the 'sworn translator' will add their stamp. This is beneficial for both the lawyer and the translator, as the lawyer can choose which words to use and the translator does not have to work for their fee, which is usually calculated based on the number of pages translated.

Translation strategies are used not only when translating contracts into Indonesian, but also when citing articles in the Civil Code. As I mentioned before, the Civil Code is originally in Dutch, and an authoritative translation does not exist. Lawyers admitted that they use the translation that is most beneficial to their cause in their briefs and pleas, but claimed that discussions in the courtroom have never reached that level. For example, when citing the first part of Article 1365 of the Civil Code, which regulates tort, there are two different translations:

1) *'Tiap perbuatan yang melanggar hukum dan membawa kerugian kepada orang lain, […]'*, i.e., 'Every action which violates the law and brings damages to another, […]'; and
2) *'Tiap perbuatan melawan hukum yang membawa kerugian kepada orang lain […]'*, i.e., 'every action against the law bringing damages to another.'

These two versions (there may be many others) seemingly are not very different, but the effect is actually crucial. The first version implies that an action violating the law alone would not be sufficient to be called *perbuatan melawan hukum* (an unlawful act or tort). Where the word 'and' is used in the article, there also have to be damages to another. The second version implies automatic cause and effect; that every action violating the law always brings damages to another. The last part of this article concerns consequences in terms of repayment of losses or damages.

These slightly different translations provide potential arguments about whether or not one should repay losses or damages and under what condition. What if they caused damages but did not violate the law? What if they violated the law but did not cause damages? These are the kinds of fundamental questions that should emerge more in courtrooms and be developed through judicial reasoning in court decisions.

3.4 Conclusion: The nightmare of enforcing agreements

This chapter has shown that tenure security or the lack of it is a moot point in land market transactions. Whether or not land is certified, the investors can acquire it, but the procedure is rife with conflicts of interest and prevailing informal rules. Acquiring non-certified land is more complex than acquiring certified land. This makes certified land more attractive for investors, and in turn, reduces tenure security for the (formal) landholders.

There are many business practice regulations, but they are ineffective at preventing illicit relationships between government or public officials ('Ali') and businessmen ('Baba'). Conflicts of interest are rampant in these relationships, and personal relationships and networks are more important than other rational and impersonal standards such as equality and fairness. They reflect the conditions of a 'prismatic' society, where family and community influence bureaucratic decision-making (cf. Riggs 1964), and

the dominant character of *guanxi*, which is a value structure holding social networks the most important in doing business, requiring gift-giving and reciprocity (Dawis 2009:78, Koning 2007:129, Tan 2000). This means that the law is applied differently to some than to others, and strong informal rules function as obstacles against enforcing contracts.

These strong informal rules are supported by the vagueness of the Civil Code and reinforce hierarchical relationships between parties. Negotiations are guided by best-case scenarios emphasizing a common profit between contracting parties. The resulting lack of planning means that consequently, even a small obstacle in a land development project can turn into a nightmare. Because of the dominance of personal relationships and networks, socio-legal research into the requirements of behaving in such networks (such as *cengli* as described in section 3.3) and its application is needed in order to find out how some contracts get performed and others are not. Contracts are not about performing a single act, but a sequence of interrelated actions. If one of these actions is not performed, it affects the entire constellation of the land development project.

Tensions and dilemmas between the overly detailed, sometimes overlapping, and conflicting rules of corporate governance, with overly broad and ambiguous underlying rules that are supposed to govern party and practitioner behavior and conduct are creating a dichotomy of practices between non-litigating and litigating lawyers. The transactional (non-litigating) lawyers focus on the technical rules and draft contracts in-line with the overly detailed, sometimes overlapping and conflicted black-letter laws, and the ambiguity of the underlying rules allows *brokers* and *fixers* to retain their practice.

The dichotomy generates three opportunities for strategies in avoiding obligations: (1) setting aside contracts when the contract is not favorable by instead using tort law, but parties can also (2) set aside the forum (i.e., the authority of courts or judicial decisions), and even (3) set aside law by utilizing and interpreting articles in the ambiguous Civil Code. The vague translation of the Civil Code sustains informal rules, e.g., by requiring a *halal* cause for a contract to be valid, which is a distortion of 'permissible cause' to one of religious concept. The courts have interpreted what constitutes an unlawful action (tort) too broadly and allowed the use of it as a defense against breach of contracts (*wanprestasi*). Furthermore, there is no established precedent or case law to guide parties about how to behave in good faith, specifically in performing contracts.

In Chapter 1, I described a kind of forum shopping in commercial land disputes that addresses all potentially available forums rather than choosing the most favorable one. Even then, there are still opportunities to set all the results aside even after using all of the available forums; creating a condition of extreme inefficiency.

The inability to rely on the private law of contracts and torts pushes parties to use criminal law, which in turn makes the 'game' of acquiring and investing in land more ferocious. It creates an uneasy and unsafe business

environment, as the World Bank describes it, but at the same time constitutes a free business environment. As many lawyers put it, it is 'like doing business in a jungle.' This situation is problematic for a well-functioning market, yet it is sustained because of the opportunity to use the system for manipulative strategies. We will see more of those in the next chapter.

4 Pre-Litigation, Litigation, and Enforcement Strategies

This chapter focuses on strategies for acquiring land to derive income from land title or tenure. It shows how lawyers and their clients are using or avoiding the legal system for this purpose, how lawyers influence the process of litigation and its outcome, and what the role of legal knowledge is.

Most of the data in this chapter were collected through four years of participant observation in a 'family' lawyer's[1] firm. Lawyers are central actors in developing strategies when it comes to acquiring land. Therefore, the focus on strategies used by lawyers will provide the most comprehensive and varied description of strategies and the availability of tactics, compared to focusing on another actor. My account may not be exhaustive, but I do think that this chapter covers these strategies and provides a useful point of departure for further research in law, society, and governance.[2]

The goal of this chapter is to present the various strategies lawyers perform and what is needed for their performance. I try not to make a distinction between which strategies are legal and within ethical and normative boundaries, and which strategies overstep or even blatantly violate them. Many of the strategies discussed are unethical, not only because they use illegal means but because they are used in a way transforming the rules and the legal system into something other than what was intended (cf. LoPucki & Weyrauch 2010:85).

The chapter roughly follows a chronological order of land disputes. It begins with (1) 'pre-litigation strategies'. These are strategies designed and implemented before going to court to negotiate effectively regarding land entitlement or to expose one's bargaining power. The latter refers to actions that convey to the opponent that one can actually win the case when it comes to litigation. (2) 'Litigation strategies' are strategies performed once disputes become lawsuits to control the outcome of the lawsuits, and (3) 'Enforcement strategies' are strategies for dealing with a decision, which can include enforcement or making the decision unenforceable. In other words, how to 'creatively comply', or evade the decision while maintaining the appearance of compliance.[3] I chose to use this structure because the strategies are linked to these phases of litigation, even if a strict division cannot be made.

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1 Discussed in Chapter 2.

2 I also provide comparisons from literature on international and globalized legal practice.

3 See, e.g., McBarnet, D. (1991). Whiter than White Collar Crime: Tax, Fraud Insurance and the Management of Stigma. The British Journal of Sociology, 42(3), 323–344.

4.1 Pre-Litigation strategies

Establish a favorable position

Even before there is a sign of contest or after land has been cleared of constructions and vegetation,[4] developers mark the area of the vacant land to reinforce their control over it. The marking of territory is pre-emptive. It serves two different purposes: it makes future claims easier, such as registering and splitting or merging land area in land certificates[5] and prevents the cleared area from being occupied (again). This is by putting up boundaries (e.g., by using patok, i.e., poles, pegs, signs), fences, and brick walls, by building stalls (warung) selling cigarettes and food items, and by setting up security checkpoints (pos satpam). The warung and pos satpam will serve as shelters for personnel employed to guard the area. In other words, parties have to 'squat' on their land before they can build more permanent buildings or start working on development projects.[6]

When entitlement to land is being disputed, i.e., several parties are claiming to own the land, parties prepare for litigation by considering the timing for the procedure, the budget, and the opponent's ability. Timing or tempo[7] is about whether and how fast one should bring the dispute to litigation. This is because being outrun by the opponent and ending up as a defendant significantly limits the strategies. To find out when to bring the dispute to litigation, parties need to have the ability to gauge whether negotiation is reaching a deadlock.

Negotiations are performed using the rhetoric of achieving the goal of *sama-sama senang*, i.e., that both parties have to be pleased.[8] They are performed as pleasant meetings at dining tables, filled with nice metaphors and rhetoric such as brotherhood and trust, but this attitude quickly sours when parties gauge that the negotiation will not result in a deal.

The next important aspect is the budget. Lawyers see 'middle class' people as the worst opponents since they cannot be paid off or reasoned with.[9] As stated by a lawyer: 'the hardest opponents are mid-level compa-

4 There are various legal bases for this. For instance, it could be that the NLA has issued a land certificate under their name, or based on the receipt of tax payments, such as *eigendomverponding* and *girik*. For the process of land clearing, see Chapter 3.

5 For example, to be sold as *kavling*, i.e., ready-to-build sections of land.

6 When the area is not developed for a long time, these personnel sometimes refuse to move from the area.

7 Bourdieu (1980:81) explained tempo as structurally inseparable from practice, '*practice is inseparable from temporality, not only because it is played out in time, but also because it plays strategically with time and especially with tempo*'.

8 Also referred to as *sama-sama cuan*, meaning that both parties receive profit. A kind of win/win situation.

9 Perhaps this is because they feel that their livelihood is being disturbed. In my observation I encountered expressions such as '*we are only doing work*', '*we are only trying to feed [ourselves/our family]*', and '*we only want to please [others/God].*'

nies or middle-class people. For companies or people without money or lower class, you just need to pay them off. Elites or large companies care more about reputation or larger business goals, so you still have the opportunity to reason with them. But this middle class is the most dangerous, because they have the money and they do not care about reputation.'[10]

'Middle class' opponents are likely willing to spend their entire capital when the negotiations are over, acting unpredictably to assert that they are protecting their own interests. This is out of an attitude of not wanting to become the loser, and out of honor or *harga diri* (self-value or self-worth).

Moreover, engaging parties with little capital in litigation is not beneficial, which is why a dispute is often not brought to litigation: the cost is higher than the possible gain. There are two exceptions. First, if going to litigation is for shaming or revenge. In other words, a case is submitted to court to make someone's life difficult.[11] Second, if the goal of litigation is to claim ownership by undermining the opponent's basis of ownership (e.g., notarial deeds and land certificates) or by canceling the legitimacy of transaction documents (i.e., contracts).

It is also important to measure the opponent's ability. This depends on what kind of lawyer the opponent has. Therefore, I will first explain what to consider when engaging lawyers.

4.1.1 Engage both cooperative and combative lawyers

Lawyers are either cooperative or combative towards an opponent, and these attitudes reflect how clients want the dispute to end (Gilson & Mnookin 1994). These attitudes do not necessarily lawyers' ethical conditions, although the combative feature is likely to be found in brokers and fixers. In Chapter 2, I explained that for clients, good lawyers are people who 'get things done'. Three skills are the most important for this: 1) knowledge of banking and financial law to structure transactions, 2) the ability to incorporate different norms or ideals by citing religious scriptures and invoking customary rules[12] in their arguments, and 3) *jago sogok* (literally champion in bribing) which actually means ingratiation (Jones 1964) rather than the narrower bribing, which I will explain further below.

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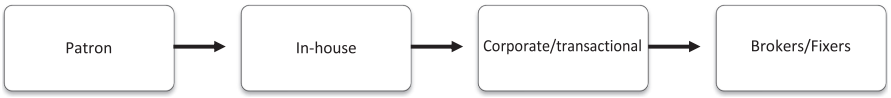
10 Based on observation of an initial meeting between a litigator and a potential client at the litigator's office.

11 See Chapter 2 about professional relationships between lawyers and clients. Additionally, in Chapter 1 (case studies) we have seen a number of parties who state that they cannot think about anything but the lawsuit. Some described how their thoughts are so fully occupied with the lawsuit that they are unable to hold a job, so they claimed for repayment of loss. I want to note that I have found no expert testimony (e.g., from a psychologist) regarding this in any of the case studies. Perhaps it is more common in criminal law, although it is outside the scope of this research.

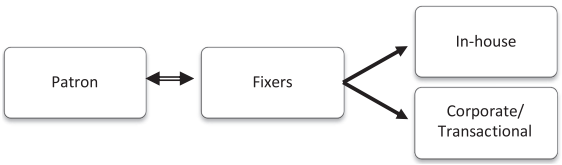
12 They refer to *kebiasaan, adat, aturan, tata cara, mekanisme*.

Determine the executive of a case

Before developing litigation strategies, lawyers and clients have to determine and agree who has the duty to invent strategies and the right to instruct others to put the strategies into actions. Furthermore, most of the strategies—especially pre-litigation strategies—are only feasible with certain structures developed by lawyers and their clients. As seen in Chapter 3, about 90% of businesses in Indonesia are family businesses, which means that lawyers in this study seldom have to protect an individual's interest(s) and instead handle the wider business group or family. I found different command chain structures. In the first one, the lawyer is expected to receive a command. It is illustrated as follows:



Most lawyers prefer the second type,[13] where they work closely with the patron, who is the beneficial owner, the *pater familias*, the oldest male in the family, the person running the business, the founder of a company group, the *chief*, or the head of a club or group association.[14] In this model, the patron and lawyers develop the strategies together. They work as equals and use in-house lawyers and transactional lawyers only for 'corporate and commercial communications', such as issuing internal letters to be later used as evidence, to send letters on behalf of the company,[15] and to issue legal opinions to appease investors.



13 This is required by 'family' lawyers. They base this requirement on lawyers' independency and professionalism. Interview with LC, EY, IS.

14 These are clubs whose membership is based on subscriptions, contributions, or invitations based on *bibit, bebet, bobot*, such as PERPIT (Perhimpunan Pengusaha Indonesia Tionghoa) and HIPMI (Himpunant Pengusaha Muda Indonesia). Further research on these clubs is important because the leader can regulate procedures on business negotiations amongst the members.

15 According to an interview with a transactional lawyer, this includes fabricating the background of license issuance by drafting communications between clients and government institutions to be signed together with the licenses. Interview with KS.

This model provides the benefit of having a fixer as the Chinese wall between the executive of strategies (patron and fixer) and subordinate or the service giver (in-house and transactional lawyers).[16] In this model, fixers also act as a kind of bridge of information between the patron and the service-giving lawyers they employ and have the power to instruct them in the name of the patron or client.

Pay attention to image

Clients select particular lawyers because they bring with them a certain image. In this manner, they can show to their opponent what their objective is or intimidate them.[17] The image concerns the size and reputation of firms, who will issue letters/opinions/notices/*somasi*[18] (I will refer to these generally as letters). When the letters are to be presented to banks for a loan, big international firms known to consist of corporate or transactional lawyers are important, as they have the image of being free from corruption. A different image is required when the letters are submitted to court officials, as they determine the attitude of court officials. This is an image of being powerful and having the means to carry out the claims made in the letters.

In litigation, lawyers also act as spokespersons of companies[19] who handle crisis communications strategies and in turn, affect the company's image.[20] Any litigation has to be disclosed in a company's—particularly a publicly listed company's[21]—annual reports.[22] The annual reports affect the company's performance in terms of stock prices. This makes having both a 'cooperative lawyer' and 'combative lawyer' important. The former is hired as a front or 'formal' representative to communicate or negotiate (usually a 'professional' lawyer) with, e.g., investors, the *OJK* (Financial Services Authority), and financial news media (e.g., Bloomberg), while the latter is free to make deals.

16 This is notably different from what research on corporate lawyers has found in more developed jurisdictions, such as the United States and United Kingdom.

17 Professional litigators and transactional lawyers would withdraw from a case if the opponent is a known fixer and recommend the client engage another fixer to level the playing field. Interview with Fikri Assegaf and Frans Hendra Winarta.

18 Notice or summons, see *Somasi* below.

19 The Power of Attorneys I encountered include the authority of the lawyers to answer questions and make statements in relation to the dispute.

20 See, for example, Carney, A & Jorden, A. 1993. Prepare for business-related crises. *The Public Relations Journal* 49.8:34.

21 OJK Circular Letter no. 30/SEOJK.04/2016. Otherwise, companies are bound by accounting standards issued by Ikatan Akuntan Indonesia (Indonesian Association of Accountants), which states that all litigation, particularly that effecting companies' financial condition have to be disclosed.

22 For example, in their 2014 annual reports, PT. Ciputra Development Tbk. (CTRA) reports no cases, PT. Lippo Karawaci Tbk. (LPKR) reports 25 cases, Summarecon Agung reports 8 cases, and PT. Bumi Serpong Damai Tbk. (BSDE) listed no 'significant' cases.

Moreover, some companies (e.g., companies with foreign shareholders and oil and gas companies) have a general rule that prohibits the use of certain types of lawyers,[23] but this rule does not always work in practice. Parties who want to hire fixers manage to circumvent this rule. For example, in-house legal counsels from oil and gas companies operating in Indonesia have to follow BpMigas[24] regulation[25] about employing 'external legal counsels' who have to be 'clean' or have the image of not being corrupt.[26] The 'external legal counsels' are usually required for litigation, but they are free to further outsource their services to another lawyer.[27]

4.1.2 Know the opponent

To be able to gauge the ability of their opponents, (prospective) litigants and their lawyers spend many hours exchanging knowledge about their opponents: who the opponents are associated with and whether or not they have a powerful backer.[28] For this, clients hire all kinds of consultants, referring to these consultants as '*Business Prevention Department*' or *BPD*.[29]

The consultants referred to as BPD include different kinds of 'service provider' organizations. These include highly professional accountants[30] who provide financial reports, *corporate/transactional lawyers* who provide legal opinions, '*NGOs*' for organizing masses and performing studies,

23 This is pursuant to United States' Federal law, the Foreign Corrupt Practices Act of 1977 (or FCPA) 15 U.S.C. § 78dd-1, et seq. FCPA is known primarily for two of its main provisions: one that addresses accounting transparency requirements under the United States' Securities Exchange Act of 1934 and another concerning bribery of foreign officials. This is according to interviews with corporate lawyers. Clients fear being in American courts and being scrutinized by their home enforcement bodies. For example, in 2014, the Japanese Marubeni Corporation pleaded guilty under FCPA for bribing an Indonesian state-official and had to pay a fine of USD$88 million. Marubeni Corporation and its joint ventures were also suspended by the Japanese International Cooperation Agency (JICA) from competing for procurement contracts for 9 months.

24 BpMigas is a government-appointed institution that was authorized to guide and supervise contractors in Co-operation Contracts for 'exploration, exploitation and marketing of oil and gas'. The Constitutional Court Decision No. 26/PUU-X/2012 declared BpMigas unconstitutional. The President then transferred the authority to the Ministry of Energy and Mineral Resources, but the regulation is still referred to at the time of interviews in 2014 and 2015.

25 Surat Keputusan BpMigas Pedoman Tata kerja 028/PTK/XII/2007 about Utilizing Lawyers/Legal Consultants Services by Contractors with Co-operation Agreements.

26 Not corrupt meaning unwilling to bribe judges and strictly referring to black letter law.

27 Interview with an in-house counsel of BpMigas, 17 September 2015.

28 Also referred to as *dekking*. See Lindsey (2006:30–32).

29 After a lengthy interview with an investor/shareholder, he dismissively stated 'with disputes just consult the BPD', which is apparently a well-known term in the banking and finance community. Interview SK.

30 Professional accountants include PwC, KPMG, and local accounting firms registered with OJK. See http://www.ojk.go.id/akuntan/. Last accessed, 17 July 2017.

seminars, and conferences,[31] and advisors who are mysterious and sometimes outrageous (more so than fixers). For example, some advisors present themselves as having psychic abilities.[32]

This kind of advisor provides information about relationships, and whether or not to engage in a relationship with another without disclosing his or her contacts and sources. They build their reputation by having true predictions.[33] Advice from these advisors is important in considering whether or not to handle a case. Most parties would prefer to avoid handling disputes that could escalate out of their control, e.g., gaining media attention or becoming politically significant.[34] This is usually measured by the (potential) involvement and ranking of parties who also hold a public position.

In serious disputes, BPDs are important because the opinions they issue for the litigants shield the litigants against accusations or claims from opponents and authorities. This can include a tax advisor's opinion saying that he has checked the company's tax liability and that there is none left or a corporate/transactional lawyer's opinion that the transaction the company is doing does not involve any legal violations. The weight of these opinions depends completely on the reputation of the entity that issues it.

4.1.3 Build and use social capital

Chapter 2 described professional relationships and hiring behavior[35] and chapter 3 described getting projects that they are based on long-term trust relationships. This means that 'corruption' in Indonesia involves not only

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31 During one of my interviews, a representative from Salim Group (May 2014) stated that they '*couldn't trust researchers* [to be independent]' since the group '*pay a lot of those* [researchers] *as well, for example LIPI*'. LIPI or Indonesian Institute of Sciences is an institution formed by state regulations, which claims to be the first, biggest, and best research institution in Indonesia. LIPI has authority to, for example, use and conserve flora, fauna, and the environment, and monitor all scientific publications in Indonesia.

32 Often referred to as 'orang pintar' (clever person). The advisors refer to their advisees by saying: '*his career will skyrocket soon*', or '*this guy has jail in front of him*', or '*you see, this guy has bad luck with him (referring to a reporting about a judge being arrested for corruption) because his nose is bent, like [your client] A, you have to be careful with him.*'

33 I found that one of the 'psychic' political advisors is known to hang around the inner circle of the Cendana family, which means he was just conveying to the lawyer what he had seen and heard in his network and from his contacts.

34 For example, in the Bank Century bail-out dispute, lawyers refused to handle a case concerning the procedure of issuing an arrest warrant to a foreign national. They were unwilling to fall out of favor with the National Police force and risk being the cause of damage to the (inter)national reputation of the institution. Rafat Ali Rizvi, an investor accused of fraud and money laundering in the Bank Century case, claimed he reached out to almost all top-of-the-bill litigators in Indonesia, but none of them wanted to file a rebuttal on his behalf. He was then sentenced *in absentia.* He subsequently filed a lawsuit against the Indonesian Government at ICSID Case No. ARB/11/13.

35 For example, employing children of police officials, public prosecutors, and court officials' family members to join the lawyer's firm.

bribing or a simple *quid pro quo* scenario but also the larger concept of ingratiation (Jones 1964). Ingratiation involves behaving towards someone to gain something or to achieve a certain goal. The goal might be in someone's favor and generally include building and collecting social capital. Ingratiation works as long as it is sufficiently concealed. If someone knows they are being ingratiated, they are less likely to be in favor of, or to fulfill the goal of the ingratiator (Smart 1993).

Know who manages favors

Because it is based on long-term exchanges, ingratiation needs a longer thread of analysis: by considering kinship, similarities in ethnicities, hometowns, and previous training and postings. Knowledge of public administration is also needed to be able to see patterns of career development to know who will have more potential to be useful in the future. By way of illustration, a lawyer stated, '*don't think I become this good [of a lawyer] because I give bribe to judges, no, never. All I did was to be in their favor, so they trust me. So far, the most illegal thing I did was teaching them how to watch porn from their mobile phones*'.[36]

This extends the concept of bribing to something similar to *guanxi* in China (e.g., Li 2010; Smart 1993). A favor as an object of exchange is referred to as *hutang budi* (debt of favor/duty) and *balas budi* (return of favor/duty). Invoking *balas budi* or *hutang budi* means that someone owes a favor to another, which has to be paid out of a duty of loyalty. This relationship is close, long-lasting, personal, and emotional; akin to that of *anak buah* (child/apprentice) and *bapak* (father) (van Klinken 2014:21-2; Nas 1991).

Family-based networks are known to exist in the Supreme Court, at least in the Javanese old boy network (Pompe 2005:389). The Indonesian bureaucracy has been characterized by *bapakism* (e.g., Rademakers 1998; Jackson 1980; Geertz 1961) for many years. This means *bapak* is the owner of wisdom who can instruct the *anak buah* to follow him, or do something for him without any objections or questions. What is often overlooked in this insight about family (as an organizational unit) is *ibuism*, while the *ibu*s (mothers) actually hold economic power and influence the wellbeing of the household. They also extend social capital by networking[37] and trading.[38]

This means that there is a kind of division of labor. *Bapak* is the holder of status (authority and prestige), and *ibu* (mother/woman) is an internal manager who is in charge of internal financial affairs and exchanges of

36 Interview with OS.

37 With 'organisasi istri,' such as Dharma Wanita.

38 They buy and sell jewelry, clothing items (bags and shoes), and land (houses). It is a common rule in bankruptcy that the bankrupt asset (boedel) of an individual does not involve clothing. This perhaps could explain behaviors of the wives in buying expensive bags and shoes, sometimes jewelry, although it could not be regarded as 'clothing', as their personal investments. Therefore, research into the market of these goods would perhaps reveal issues regarding political finance and transactions.

favors (Carey & Houben 1987:23; Djajadiningrat-nieuwenhuis 1987:44-46; Suryakusuma 1996:102). Therefore, it is necessary to realize the roles of wives in effectively ingratiating or invoking *balas budi* or *hutang budi* on the target.

Support amenable judges[39]

Ingratiation is a dominant method in determining the position and career development of civil servants and public officials.[40] Before filing a lawsuit, lawyers assess which judges they might have to deal with. If possible, they will wait until their favorable judge is on the bench. This possibility concerns the career movement of judges, or *mutasi*,[41] which could be influenced through connections with the judge's superior (the head of the district/high court and Supreme Court), who decides whether and when a judge is moved from one area to another. This is why certain judges' wives also (try to) influence decisions on *mutasi*.

Mutasi could include promotion or demotion. In Indonesia, demotion can include a civil servant moving to another position with a raise of their rank or echelon, or to a position with low income or being unfavorable for their career advancement. For example, *mutasi* from being a chairman of Manado's Administrative Court to being a vice-chairman at Jakarta's Administrative Court is not considered a demotion (Bedner 2001:206). *Mutasi* was implemented to disseminate national and state law throughout the archipelago, but it has turned into an important force of patronage and an effective instrument for granting and withholding favors (Pompe 2005:124).

4.1.4 Have a broad Power of Attorney and vague legal opinions

Formally, Power of Attorney has to be 'specific' to be submitted in court,[42] which should mean that the proxy is only given authority to act on specific actions as stated in the Power of Attorney. In practice, this requirement is fulfilled by stating the word *KHUSUS* (literally: specific) at the beginning of the Power of Attorney, even though the actual content is not really specific. For instance, it is common that the Power of Attorney have substitution rights, and the authorized actions are broad, such as '*the Proxy is given the right to take any legal actions necessary to protect and defend the rights and interests of the principle*'.

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39 According to data from KPK (Corruption Eradication Commission), there are 14 judges charged for corruption. https://acch.kpk.go.id/id/statistik/tindak-pidana-korupsi/tpk-berdasarkan-profesi-jabatan. Last accessed, 29 May 2017.

40 Judges are also part of the civil service.

41 Regulated by Supreme Court Circular Letter (SEMA) No. U.P.1/8038/1968 and No. U.P.3/6711/1969.

42 Supreme Court Circular Letter No. 6/1994.

The approach is similar to drafting legal opinions. Lawyers are not allowed to promise the outcomes of litigation, although at the same time they have to manage their clients' expectations. Moreover, their opinions on the prospect of the outcome are often required as a guarantee to the investor, creditor, or parent company, or to fulfill a company auditor's requirement.[43] This dilemma is resolved by using vague words such as 'most likely', 'probably', 'the evidence shows a strong legal basis', and the like. In these manners, lawyers prevent having to respond to clients' wishes and at the same time having the freedom to handle a case as they like.

4.1.5 Structure assets and financial transactions

This process of structuring assets and designing financial transactions is referred to by practitioners as Legal/Financial engineering. It involves meetings where lawyers assess the possibilities of (financial) risks and arrange the (transaction) structure of legal entities to facilitate legal strategies.

How to finance litigation

Lawyers, particularly brokers and fixers usually require two types of fees: (1) a professional fee, which could be by hourly, success-based, or on a lump sum basis, and (2) a 'disbursement' fee, which can be billed from time to time by the lawyers to the clients. This disbursement fee is what the lawyers claim to be paid 'to process the lawsuit', which essentially means paying public and court officials. A disbursement fee is also often referred to as 'operational costs.'[44]

Funding could come from the client company, which usually have a 'fighting fund'[45] allocated for disputes, or from a third-party funder. These third-party funders are companies specialized in giving loans[46] to fund litigation and who have an interest in the outcome of the litigation, i.e., will receive a portion of the settlement.[47]

In Indonesia, some lawyers are keen to finance litigation themselves to enjoy any prospective profit. Lawyers could be disguised as a 'third-party funder' by being a shareholder of the landholding company. They do this by entering into contracts in the form of pledges, transfers, *cessie* (assignment), or trusts against a certain percentage of shares in the company. The more difficult the case is, the higher the percentage set by lawyers. This means that a lawyers' position is raised from being a service-giver to a client

43 For example, Ernst and Young required this from the Marubeni Corporation regarding litigation against the Sugar Group companies.

44 This is negotiated in a comparative manner based on the value of the object in dispute. It is similar to the situation in China, as found by Li (2010:49).

45 This term is commonly used to refer to money raised to finance a political campaign.

46 Such as for bail-out and opt-out systems in the United States.

47 In the United States and United Kingdom's legal system, this is a concept connected to class action and also to manage a class action.

to becoming the client's business partner. This kind of relationship is rife with conflicts of interest and what other authors have referred to as insider trading.[48]

Implement legal and financial engineering

Legal and financial engineering means structuring assets and transactions by considering the legal and financial risks. There are two purposes for this: either finding the assets of opponents or hiding one's own assets.

Parties hide assets rigorously as a defense strategy, not just against another claimant of the asset, but also against authorities that could oblige them to pay for licenses or taxes. One of the most efficient ways for creditors to gain possession of the collateral (almost always a land title) is through a bankruptcy petition.

To file bankruptcy against a debtor, Bankruptcy Law in Indonesia requires two or more creditors. It could be tricky for a creditor to find another since debtors often hide their assets in other pseudo-companies or under someone else's name (a nominee).[49] Creative methods are required to find this second (and third, and so on) creditor, e.g., obtaining a debtor's tax return. Furthermore, to know how to find assets, parties need to know how to hide assets. This is by developing a transaction scheme referred to as legal and financial engineering.

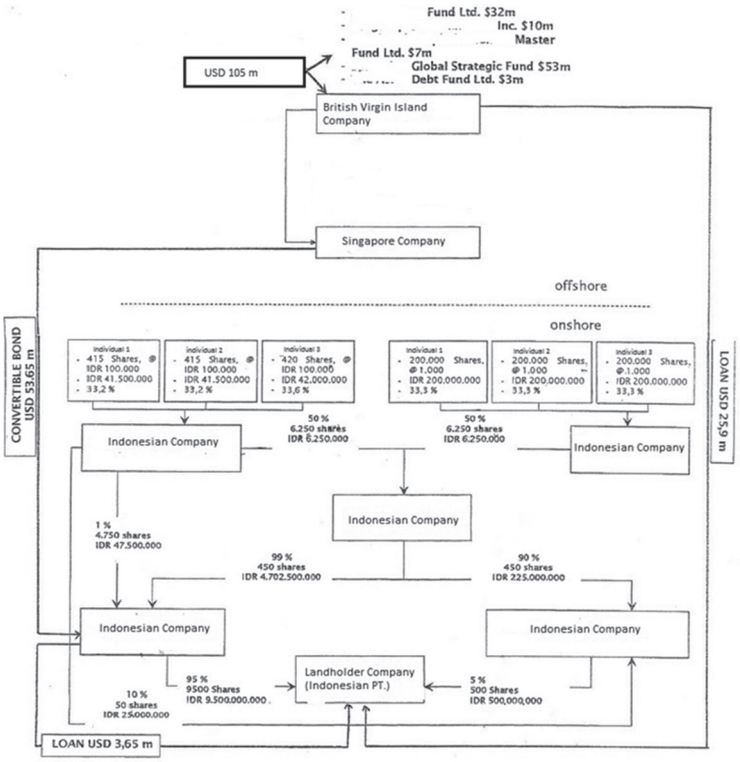
Legal and financial engineering is a process of designing and structuring transactions and relationships of companies in a group by the future litigants and their lawyers.[50] It has many purposes. These include tax planning, protecting the patron/beneficial owner by creating barriers between relationships, hiding assets, or protecting the value of the company during litigation. It also includes designing how a lawyer's fee would be transferred, as fees increasingly take the form of shares (of land or a percentage of company ownership). The point of this process is also to make lawyers and clients gain the same understanding about what they have to perform and who will perform the transaction. The scheme of transactions is

48 Discussions about third-party funding and insider trading are still underdeveloped in Indonesia, unlike in other jurisdictions, where discussions ranged from the economics to ethical aspects of litigation funding by accountants, jurists, and political and social scientists. For example, Johnson (1980) has argued in favor of putting lawyers' motivation in relation to their fees in the equation to understand and predict the economic consideration of litigation. In 2015, Leiden University commenced a conference that discussed topics surrounding third-party litigation funding. The conference was attended by practicing lawyers, in-house counsels, academics, law firm representatives, and litigation funding companies.

49 An investigation about why this practice is popular could be based on the history of Chinese-Indonesians and the development of the political economy, particularly policymaking. See for instance, Mackie, J. (1991). Towkays and Tycoons: The Chinese in Indonesian Economic Life in the 1920s and 1980s. Indonesia, 83–96 and Lindsey, T., & Pausacker, H. (Eds.). (2005). Chinese Indonesians: remembering, distorting, forgetting (No. 61). Institute of Southeast Asian Studies.

50 See some examples in Flood and Skordaki (2009).

complex, even though parties try to make it as simple as possible. The scheme is usually developed together by parties and lawyers, and is made visible in a diagram such as follows:



Source: participant observation.

Making the scheme visible (usually drawn on a white board while parties and lawyers are developing the scheme) is useful for parties and their lawyers to also consider the (legal and financial) risks and possibilities involved in moving the assets around. Another important consideration is to make sure the shares value of the company is not disturbed while going to litigation. In other words, parties need to keep control of the market value of their company.[51]

51 This activity is performed and supported by some stock brokers and appraisers who are usually private (accounting) firms. Stockbrokers could manipulate the value of stocks in the capital market by doing a series of bogus transactions. Without the involvement of the stockbroker, one way of controlling the value of a company is by doing inbreng. Inbreng is the term for the capital injection of goods. This means including objects such as land, buildings, or machinery as part of the capital of a company. As a strategy, inbreng is used to control the registered value of those objects in the company (accounting) book. Appraisers could either put a high value on the object to raise capital, or a low value to save on tax. Tax is charged by the percentage of the sale or purchase value (see Chapter 3 footnote 58). This allows parties to control the (value of) shares and stocks of a company while in litigation.

Know how financial market operate

Ultimately, banks or other financial institutions would do the actual performance of a contract. This means that they will be the ones who transfer funds from one legal entity to another. Thus, it is important to know how banks operate, how to give an instruction, and who has to sign it. In other words, it is important to know what it takes to transfer a large sum of money, sometimes across multiple jurisdictions or countries.

There are a number of banking terms that parties need to be familiar with. The most important ones are MT103 and T+(number). MT103 is an electronic message derived by the banking system specifically for international transfers. It serves as a proof of transaction. When a party has sent MT103 to another, it means they have already instructed the banks to transfer (or made an electronic transfer) to the fund. Funds could already be seen in the destination account, although this depends on the expected T+(number). T+(number) means the expected number of days for the settlement to be complete after the transaction date. It is usually Transaction date + 1, 2, or 3 days (for example, T+3) until settlement. This number depends on how the international banking system operates, including capital markets. For instance, the United States Securities and Exchange Commission regulated[52] T+2 for settlement of transactions.[53]

Having these kinds of esoteric knowledge is particularly important for the performance of contracts. Knowing about timing is essential in some contracts as part of specific performance. By way of illustration, one sale and purchase contract could be entered into with a motivation to obtain funds to pay a debt or pay for another transaction. This means there is a kind of potential domino effect. If one contract performance is not fulfilled on time, it could lead to another (financial) crisis.

4.1.6 Contract drafting strategies

Contracts vary in different degrees and evolve along with the complexity of transactions or the number of stakeholders and the specificity of their claims and liability. However, there are two competing views about what a 'good contract' means. Lawyers in modern firms think that short and concise contracts are 'sloppy work'. According to them, it is better that a contract be long and cover everything, although they realize that when it comes to enforcement, it will not be useable. On the other hand, litigators think that the practice of making long and elaborate contracts is a waste of the clients' time and money.

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52 This is quite dominant since transactions with US dollars usually need to be 'cleared' through capital markets such as the New York Stock Exchange (NYSE). For clearing, settlement systems such as Euroclear (see www.euroclear.com) are important.

53 Before 2017, this was T+3. https://www.sec.gov/news/press-release/2017-68-0. Last accessed: 18 April 2018.

Several Indonesian lawyers recommended that contracts should always be drafted from the perspective of enforcement. For contracts to be enforceable, transactions should be simple and clear enough to be recognizable in Indonesian courts. Additionally, they recommended that they be drafted in Indonesian. Contracts in English, which are favorable and familiar to investors, allow for too much uncertainty about their translation and consequently, their interpretation by Indonesian courts.[54]

These competing views, one for a long comprehensive contract, even though it may not be enforceable, and the other for a short, simplified but enforceable contract reflect the parties' competing ideals. With comprehensive contracts, lawyers (and their clients) hope that contracting parties would behave as the contracts have stated, while for the latter, lawyers (and their clients) expect to use courts to force their counterparty to comply in the future.

Avoid Indonesian courts

Lawyers in Indonesia, particularly the corporate transactional lawyers, seek to waive the authority of Indonesian courts in deciding disputes over contracts as they prefer to bring disputes to arbitration or another jurisdiction outside Indonesia. They do this by including a clause in contracts waiving the applicability of Articles 1266 and 1267 Civil Code.[55] These articles would have given Indonesian courts the authority to decide whether obligations in contracts are void.[56]

This practice raises some questions: First, what is a breach of contract if parties are free to void their obligation? Second, if the Articles are set aside, does it mean that a party in a contract has the authority to interpret the contract themselves? Cancellation of a contract can be used to avoid obligations in the contracts. For instance, a creditor/seller could always claim

54 Evans, Rachel. 2010. The only way to enforce. *International Financial Law Review* http://www.iflr.com/Article/2633920/The-only-way-to-enforce.html.

55 Article 1266: A void condition is deemed to have been included in reciprocal agreements, in case a party does not fulfill his obligations. In such cases, the agreement is not void by law, but voidance must be requested before the Court. The request must also be made, even though the conditions of voidance concerning the nonfulfillment of an obligation are included in the agreement. If the conditions of voidance are not included in the agreement, then the judge, considering the situation, upon the defendant's request, has the discretion to fix a timeframe to fulfill such obligations, but such a timeframe may not exceed one month.
Article 1267: The party against whom the obligation is not fulfilled may opt to compel the counterparty to fulfill the agreement where such fulfillment is still possible, or demand the termination of such an agreement, with the compensation of costs, damages, and interests.

56 A contract could be cancelled if it does not fulfill a contractual validity requirement. The requirements are that there be 1) an agreement between parties, 2) capabilities of parties in agreement, 3) specific subject matter, and 4) *halal* cause (Article 1320 - 1337 KUH Per.).

that a debtor/buyer is not paying their debt (purchase price) in the way the seller interpreted how the debt should be paid. With this reason, the seller could claim back the object of the transaction (usually land). This is used when the seller realizes that the land is worth more than the purchase price.[57]

Waiving Articles 1266 and 1267 is also used to gain the ability to expedite confiscation of land rights that are guarantees/collaterals *(Hak Tanggungan*[58]*)* in a contract. By using these clauses, it creates a possibility for creditors to 'directly' confiscate land under collateral.[59] However, rather than expedite the process by avoiding courts, this results in inefficiencies because the debtor or the land rights holder will still file a *perlawanan* (rebuttal) before the courts, a process which will be discussed alongside enforcement strategies below.

This means that the attempt to avoid Indonesian courts is almost impossible when a land title is the object of a transaction. It just extends the 'legal technical' argument and increases uncertainty.

Buy/sell land without transfer of title

When a transfer of property is intended only as an investment, i.e., the buyer does not intend to develop the land but rather looks for another buyer who will buy it again for a profit, the name is not changed in the land certificate. This is for efficiency. Costs of registering are high, so the land transfer is only performed by signing a PPJB (*Perjanjian Pengikatan Jual Beli* or Sale and Purchase Agreement), and will execute AJB (*Akta Jual Beli* or Deed of Sale and Purchase) with the final buyer.

The difference between PPJB and AJB is that PPJB is only a commitment of the seller that they will sell (to the buyer for the agreed price), and a promise from the buyer to pay the purchase price to the seller. PPJB is not the actual sale and purchase, or transfer of property. This must be done through the signing of an AJB, which has to be notarized by a Notary/PPAT to be binding. The AJB then should be submitted to the NLA within 7 working days to change the name of the titleholder in the land certificate. The process of changing the name of the titleholder is called *Balik Nama*, literally translated as the 'switching of name'. According to interviews, *Balik Nama* is usually a straightforward process with very minimal risk

57 I found one case with precisely this 'strategy' in mind during participant observation. Seller regrets having to have sold her land and is suing the buyer for breach of contract under the reason that although the buyer have paid for the land in full, he did not pay it in the precise way of installments stated in the sell and purchase agreement.

58 For a brief explanation about *Hak Tanggungan* (mortgage title), see the Introduction chapter on corporate and land law.

59 Article 6 and 20(1) Law No. 4/1996 about Mortgage over Land and objects related to land.

of interference. Lawyers have not encountered any case in which the AJB has been signed, but *Balik Nama* could not be processed, as this means the Notary/PPAT had made a mistake in issuing the AJB and could be personally responsible and criminally charged, causing Notaries/PPATs to be extra careful before they issue an AJB.

Backdate

Backdating legitimates an action that has been performed. For example, if a party is being sued for embezzlement, they will craft a backdated sale and purchase contract to legitimize the transfer of funds or assets from A to B. Backdating can also be used as a method of settlement. For example, if A and B agree to backdate an agreement/contract, it can override or cause a court decision to be irrelevant.

4.1.7 Protect the real patron

To prepare for a lawsuit, it is important that a patron/beneficiary does not become liable as a result of the lawsuit. This could be performed by way of structuring assets and financial transactions as I explained above. Additionally, the following strategies are used to avoid possible liabilities by hiding the true owners/beneficiaries of companies.

Replace the director

Members of the Board of Directors have to represent companies in court[60] and have the possibility of being personally liable for actions taken by the company.[61] However, there is no minimum education requirement in Company Law (UUPT) for the member of the Board of Directors and Board of Commissioners.

The Board of Commissioner has the power to dismiss the director(s) (1) temporarily for 30 days by sending a letter, continued by commencing a RUPS,[62] which will either decide to cancel or confirm the dismissal. If a RUPS is not commenced, the director in question will be back to function normally after 30 days.[63] Alternatively, (2) if the director is also a majority shareholder, the Article of Incorporation has to be amended with an Extraordinary RUPS ('RUPS-LB'). If the quorum is not met after the third RUPS-LB, an injunction could be requested from the Head of the District Court.[64]

60 Article 98(1) Law No. 40/2007.
61 Article 95(4) Law No. 40/2007.
62 See Shareholders' Meeting as a forum below.
63 Article 106 Law No. 40/2007.
64 Article 86 Law No. 40/2007.

Members of the Board of Commissioners cannot be responsible for (the lack of) supervision and as long as they can prove that: '(1) they have carried out their supervision in good faith and prudence in the interests of the Company and in accordance with the Company's purpose and objectives; (2) they do not have any direct or indirect personal interest in the actions of management of the Board of Directors which caused the losses; and (3) they have given the Board of Directors advice to prevent the arising or continuing of losses.'[65]

Thus, in terms of the law, the Board of Commissioners has more authority and less responsibility compared to the Board of Directors. This explains why the real patrons or beneficiaries often sit on the Board of Commissioners instead of on the Board of Directors.

Establish another legal personality

To avoid risks of a counterclaim, it is useful for lawyers to create another legal personality other than the main firm, or for clients to use a 'shell' company in litigation. In chapter 2, I explained about satellite firms. Lawyers often form teams or entities similar to satellite firms with names that seem like a CSO for moral activism or cause lawyering,[66] such as 'defender for democracy' or 'protector of international justice,'[67] while the team actually works for a specific case or client. Establishing another legal personality has the benefit of making it easier to manage litigation costs and funding, avoid conflict of interest, and portray lawyers as litigating for an ethical cause instead of profit, increasing sympathy from judges and outsiders.

Establish standing

Only the formal holder of land (an entity with the name stated in the land certificate) has the legal standing to sue; that is, they have to show that they have an interest in the outcome of the dispute. This could be complicated if the name in the certificate is that of a big international bank or a holding company that is reluctant to be involved in a lawsuit.

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65 Article 114(5) Law No. 40/2007.

66 Traditionally, this was the field of NGOs and legal aid institutions, not of for-profit commercial lawyers. For more, see Sarat and Scheingold (1998).

67 For example, they use Tim Pembela Demokrasi Indonesia specifically for filing a single claim (on behalf of Sanusi Wiradinata against Lucas). By contrast, they use Tim penasehat hukum Advokat Cinta Tanah Air (Legal consultant team ACTA) to file a claim against Jakarta Governor Basuki Tjahaja Purnama, and use Tim Advokasi Jakarta Bersih (Advocate Team for Clean Jakarta) and Tim Advokasi Bhinneka Tunggal Ika (Bhinneka Tunggal Ika Advocacy team) to defend the Governor.

These banks/holding companies act as 'arrangers' in a complex transaction or syndicated loan scheme. They hold the land title and in turn have the power to 'arrange' the complex transaction by performing transfers,[68] while the actual shares/interests over the land or the creditors remain anonymous to those who are not involved in the syndicated loan. As a fixer put it, 'parties in land dispute cases are usually just 'fronting'. The interest to land has been sold to multiple investors behind the curtain. The fronting is just a vehicle to share profit if they win.'

To establish standing, lawyers have to be able to establish and explain the interest of a party even though the interest is remote. They do this by simplifying the complex investment scheme for outsiders and judges.

4.1.8 'Certify' evidence

When preparing for litigation, the lawyers will commence due diligence and documents will be prepared in preparation for submitting them to the court. Certified/legalized documents serve as stronger evidence in courts compared to uncertified ones, while deeds[69] are deemed to be the strongest form of evidence. For documents to be made into deeds, they need to be legalized by a notary.[70]

There is an odd train of thought applied to the certification of copied document, such as certificates and contracts. In practice, it is not technically the contents of the certificates or contracts that are being certified to be included as evidence in litigation, but rather the stamp duty[71] on them. The reasoning is that the Central Post Office issues the stamp duty, so the Central Post Office has to certify it by putting its 'original' stamp over the (copied) stamp duty. This practice is referred to as *nasegelen*.[72]

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68 In a land dispute case, an arranger sometimes refuses to submit lawsuits in cases of disagreement between shareholders on when to sell the land. A case in point involved a land dispute in Sidoarjo with HSBC as the arranger.

69 *Akta Otentik* or Authentic Deed, is defined in Article 1868 of the Indonesian Civil Code, which states, 'An authentic deed is one which has been drawn up in a legal format, by or before public officials who are authorized to do so at the location where this takes place.'

70 There are three kinds of documents/letters for use as evidence: ordinary letters, authentic deeds, and *akta bawah tangan*. *Akta bawah tangan* (Article 1874 Civil Code) means that the document/receipt/letter was not drawn up in front of an official (notary) but the signatory is legalized by the notary, meaning that the signature on the document is authentic. The strength of the evidence can be similar to an authentic deed if the signatory also acknowledges that it is their signature on the document/receipt/letter (Article 1875 Civil Code).

71 Elucidation of Article 2(1)(a) of Law No. 13/1985.

72 Or *nazegelen*. Originated from Supreme Court Circular Letter No. 1/1963 (or No. 640/P/1937/M/1963) about guidance for making decisions, paragraph C.

Source: https://mitracipagantimember.wordpress.com/2015/01/28/contoh-fotocopy-akta-yang-terlegalisir-di-kantor-pos/

4.1.9 Increase chance by using many forums and test dominance of one forum against another

Due to jurisdiction problems mentioned in Chapters 1 and 3, parties have many dispute resolution forum options. The choice depends on which forum will have the highest possibility of meeting the party's goal or objective. My research showed that players choose the forum whose legal procedures—i.e., the rules of the game—are the most removed from black letter laws, even if the forum provides the least predictability.[73] This points to Commercial Courts, which are also subjected to district court procedures, giving a lot of discretionary power to the *kurator*/manager of the bankrupt estate.[74] This is related to the fact that unclear procedures allow lawyers to have more freedom in managing the litigation process. In other words, having control is more important than having (legal) certainty.

Administrative Courts are perceived to have the smallest gap because they have their own legal procedure, although these were the least predictable when they were newly established (Bedner 1997:279-299). In the middle are civil and criminal procedures (in district courts).

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73 This is a result derived from my interview question: *'which legal procedure is the most removed from law than actual practice?'* To refer to legal procedure, I had to interchangeably use the term jurisdiction, *hukum acara* (procedural law), *proses beracara* (process of procedure), or *aturan main* (rules of the game).

74 For an overview of the establishment and causes of failure, see Halliday and Carruthers (2009:193-6, 196-210)

The following are the various forums and causes of action available:

Shareholders' meeting (RUPS)

There are two kinds of Shareholders' Meeting: Annual (*RUPS*) or Extraordinary (*RUPS-LB*) Shareholders' Meeting, which can be commenced at any time by the shareholders or the Board of Commissioners.

The Article of Association (*Anggaran Dasar*) is supposed to regulate relationships in the company, and decision-making procedure in a company.[75] A Shareholder's Meeting is needed to amend the Article of Association, and a quorum has to be met. If the Board of Directors and Board of Commissioners ignore the shareholders' request for the Meeting, the shareholder can submit an application to the district court of the company's domicile to oblige the Board of Directors and Board of Commissioners to be present at the court-ordered Shareholders' Meeting. This court-ordered shareholders' meeting is a strategy to be used when the Board of Directors and Board of Commissioners are not under the control of a shareholder or if they have been inactive.[76]

Lawyers refer going to the meeting as going to war. By way of example, a lawyer who just came back to her office after a meeting stated, 'thankfully we managed to postpone the RUPS. Some of the shareholders supporting our clients did not show up. Their car tires were found flat at their office parking lot.'[77] It was to prevent shareholders that are known to be in the opposition from attending the RUPS or voting in the RUPS. Lawyers must be able to be quick and at the edge of their seats at all times during the meeting to object to and question their opponent, for instance by inquiring about the validity of a Power of Attorney of an attendee representing a shareholder. This practice is similar to the pre-trial conference in the United States legal system.

National Land Agency

The NLA has its own dispute resolution mechanism to be used before having to go through litigation. It is a mediation process which involves three steps: (1) '*gelar*' (or 'spread' in English, i.e., opening all the data for all parties to assess) *internal*', which involves internal NLA officials where they analyze their records related to a land dispute, (2) '*gelar external*', where NLA invite the disputants, and an NLA official acts as the leader

75 Changes in Articles of Association have to be legalized by a Notary and certain changes require approval from the Minister of Law and Human Rights. Article 21(2) Law No. 40/2007.

76 The court can set the meeting's agenda, the timing for notices, the number of attendants required, designate the chair of the meeting, and they can do so with or without being bound by the provisions of UUPT or the articles of association.

77 Interview UG.

of the *gelar*, (3) mediation, which involves NLA officials, disputants, and a certified mediator. If a consensus is reached, the result will be made into a Reconciliation Deed and registered at district court, which will ideally make the consensus binding and executable. However, the registration in the district court still needs to be in a form of a decision by the court (*penetapan*), which means it is similar to going through litigation.

Administrative Court

Lawyers generally avoid Administrative Courts because there is not much leeway available.[78] The Administrative Courts' procedure is perceived as the most predictable. However, the Administrative Court has exclusive jurisdiction to decide on a dispute regarding decisions made by a governmental body. This means, in land disputes, lawyers need to use Administrative Courts to request changes to land certificates because they are issued by the NLA, and thus need to register the change of status accordingly.

Commercial Court: Bankruptcy and Suspension of Payment[79]

In the commercial court system, there are two options to pursue: a mechanism for Suspension of Payment (PKPU), which can be commenced by either the debtor or creditor, if they foresee the inability of the debtor to pay their debt, and the creation of a composition plan, which needs approval from a district court judge. I found in my observations that this process is often abused to 'whitewash' a company's debt[80] or for a creditor to capture land as collateral instead of getting repayment.[81]

A bankruptcy petition could also be filed against a debtor in order to halt the transfer of land title by the debtor.[82] However, to have legal standing as a bankruptcy petitioner, the debt or obligation (stated in the contract(s)) must be proven 'simply'. There also have to be two creditors or more. It becomes tricky if the plaintiff is the sole creditor, or if another creditor does not want to litigate. Then, lawyers will have to be 'creative' in finding another creditor, to the extent that lawyers 'create' another creditor

78 On the other hand, weaker parties often do not get the opportunity to bring their cases to the Administrative Court because they are not aware of their position (not being informed about the administrative decision) before the time limit to bring the case to an Administrative Court already expired (90 days since the issuance of administrative decisions).

79 Law No. 37/2004.

80 For instance, if a debtor doesn't want to pay, they can use this process after hiding their asset (using "legal and financial engineering", as described above) or cooperating with a creditor.

81 A creditor would try to avoid getting paid (through various reasons, such as citing the wrong account number or method of payment, etc.) and then file bankruptcy to obtain the collateral (land rights) when the value of land is greater than the debt.

82 Article 34 Law No. 37/2004.

themselves, for example by transferring the plaintiff's debt to multiple companies owned by the lawyer, and the companies then 'pose' as creditors.[83]

Moreover, in any bankruptcy process, the petitioning party could propose the *kurator* who will be in charge of managing the bankruptcy estate to the court. Currently, lawyers who are active in commercial courts are also active as the chairmen or founders of a professional association of *kurator*, which operate like bar associations.[84] Through an internal mechanism of proposing the *kurator*, the lawyers maintain a certain control over bankruptcy cases.

Commercial court cases enjoy an expedited procedure for appeal because they do not have to go through a high court, only directly to the Supreme Court,[85] and Supreme Court has to give its decision within a prescribed timeframe, by the latest 60 days since the Supreme Court receive the request.[86]

Arbitration

Indonesia has a long-standing arbitration association, formed long before the Law on Lawyers in 2003. However, BANI (*Badan Arbitrase Nasional Indonesia* or Indonesia National Arbitration Body) is used less than arbitration bodies in Singapore[87] and Hong Kong.[88] During my research, I did not encounter any case being handled by BANI. Nevertheless, arbitration in Singapore and Hong Kong is expensive and does not have any enforcement effect. An investor even jokingly referred to it as '*like polygamy, too much hassle without extra reward*'.[89]

Arbitration in Indonesia is practiced only by a handful of corporate transactional lawyers. While arbitration are considered a field of transnational business justice which is 'dealing in virtue' (Dezalay & Garth 1996), it works somewhat like banks. They give out decisions regarding credits, debts and loan repayments based on technical calculations and an important subject of future research, particularly on the emergence of specialized professions in facilitating arbitration procedure.[90] The most notable are

83 See also footnote 48 and 49 above.
84 Currently there are three associations, all established by lawyers with their own firms: HKPI (Himpunan Kurator dan Pengurus Indonesia) by Tandra & Associates, AKPI (Asosiasi Kurator dan Pengurus Indonesia) by James Purba & Partners, and IKAPI (Ikatan Kurator dan Pengurus Indonesia) by Lucas, SH & Partners.
85 Article 11(1) Law No. 37/2004.
86 Article 13 Law No. 37/2004.
87 SIAC (Singapore International Arbitration Centre).
88 HKIAC (Hong Kong International Arbitration Centre).
89 Interview with AL.
90 See also the 21st Century T-shaped lawyers. https://www.americanbar.org/publications/law_practice_magazine/2014/july-august/the-21st-century-t-shaped-lawyer.html. Last accessed: 8 June 2017.

the litigation accountants (related to litigation funding above).[91] These accountants' reports and analyses are the most important evidence used in arbitration proceedings.

General Court:

1) *Criminal law.* Criminal law is the most effective mechanism for intimidating opponents. It entails 'real' risks, such as travel bans, imprisonment, and being on an Interpol Red Notice list,[92] which means someone is considered an international fugitive. It is not the business that is under attack, but someone's life and reputation. To use criminal law in this manner, complaints to the police usually consist of fraud or embezzlement,[93] and the police will commence a *gelar,* which will decide whether or not to continue the investigation. To use criminal law, the party needs to make a deal with the police or public prosecutor. This is concerning choosing which article of law the police or prosecutor would use to indict the opponent and the corresponding sanction. The law on electronic information and transactions (Law No. 19/2016, previously Law No. 11/2008) is increasingly in use because of its Article 45, which provides a wider scope for negotiating in this manner since it provides '*imprisonment and/or fine*' as sanctions.[94] From the perspective of the suspects or defendants, the aim is for the police to stop their investigation. For this, the police have to issue an *SP3* (*Surat Perintah Penghentian Penyidikan* or Letter for Termination of Investigation). When an *SP3* cannot be issued, defendants would try getting a *P19*, meaning the public prosecutor would return the investigation file to the police because it is incomplete. A criminal case becomes alarming when a *P21* is issued, meaning that the investigation has been completed and the case is to be forwarded to a court, although a *P19* could be issued again. Public prosecutors could also issue an instruction to stop a case, although it is less common. This is referred to as SKPP (*Surat Ketetapan Penghentian Penuntutan* or Ordinance for Termination of Prosecution). These acronyms refer to the corresponding forms.

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91 Virtually in almost every international arbitration and litigation conferences, they will attend and/or present their idea of business. See for instance FTI Consulting.

92 The Indonesian National Police has the authority to enlist someone in the Interpol Red Notice. https://www.interpol.int/INTERPOL-expertise/Notices/Red-Notices

93 Although generally avoided, it is also possible to file a complaint under Anti-Corruption law to the police or directly to the public prosecutor. Anti-corruption is the jurisdiction of a special Corruption Eradication Commission (*Komisi Pemberantasan Korupsi* or known as KPK).

94 Articles 45(1–5) and Article 45A(1–2) and 45B consists of articles about distributing electronic information in a tortious manner.

In 2016, the Supreme Court issued a regulation on the adjudication procedure for corporate crimes.[95] The penalty includes imposing a fine on the corporation. If the fine is not paid, it can be substituted with jail time. Those liable for and on behalf of corporate conducts include the (broadly-phrased) 'management' (Article 1(10)).[96] The regulation is still new, so further research is required on what actions cause a person to be criminally liable.

2) *Escape obligations by nullifying the contract.* Criminal law could also be used to nullify the contract. The police report is submitted to district courts as the basis of annulment or voidance with an allegation that it did not fulfill requirements of a valid contract. This could bring the contract or deed to be *cacat hukum,* or 'legally flawed' and not binding. *Cacat hukum* could be declared if formal requirements of entering into contracts or creating a deed are not fulfilled. There are several uncertainties that are generated from the uncertain status of the Indonesian Civil Code regarding these requirements, e.g., whether a spousal agreement is needed for entering into a contract.[97] Because these uncertainties have never been tested by the courts, drafting contracts results in highly formalized practices and particularly concern notaries,[98] since they are criminally liable for creating a deed.[99]

3) *Tort or Breach of Contract.* The rule of thumb is not to imply both tort and breach of contract together in one suit, because the court could reject it as *obscuur libel* (see Chapter 1).[100] The strategy for using one or the other involves deciding whether or not a contract will be used. Breach of contract is used when there is a written contract that benefits the interests of the plaintiff. Tort is referred to as an unlawful act (*Perbuatan*

95 Supreme Court regulation (PERMA) No. 13/2016.

96 'Pengurus adalah organ korporasi yang menjalankan pengurusan korporasi sesuai anggaran dasar atau undang-undang yang berwenang mewakili korporasi, termasuk mereka yang tidak memiliki kewenangan untuk mengambil keputusan, namun dalam kenyataannya dapat mengendalikan atau turut mempengaruhi kebijakan korporasi atau turut memutuskan kebijakan dalam korporasi yang dapat dikualifikasikan sebagai tindak pidana.'

97 These are usually established by the practice of notaries or PPAT. For example, before being able to purchase a house, a prenuptial agreement is required for Indonesian citizens who are married to a citizen of another country. This is under the reasoning of avoiding risks of the 'foreigner' having a claim over the land, should there be a divorce or death.

98 Lawyers could hide behind their 'professionalism' by relating it to their independency. They could draft contracts or deeds without being a signatory, and so not be liable for them.

99 This usually occurs through allegations of falsifying information in an authentic deed, which is a criminal offence under Article 266 Indonesian Criminal Code. See also Chapter 1 about the nature of discovery.

100 In opinions delivered by, e.g., Supreme Court judges Subekti and Harifin Tumpa.

Melawan Hukum literally meaning an act against the law) and *wanprestasi* being a breach of contract. *Perbuatan Melawan Hukum* is broader than *wanprestasi* as it also involves acts that violate regulations other than law, such as norms and customs.[101] It is used when the contract is not in favor of the claimant.

4) *Apply Article 1917.* The principle of *nebis in idem* is originally only applicable in criminal/public law, not civil/private law. It is similar to double jeopardy, meaning no similar cases should be adjudicated twice. However, the principle in its broad sense is also used by applying Article 1917 of the Indonesian Civil Code, which states '*The authority of a court of law does not extend beyond the subject of the judgment. In order to invoke such authority, it shall be required that the case which has been heard shall be the same; that the claim is based upon the same grounds, and is made by and against the same parties having the same relationship*'.

4.1.10 Somasi (summons)

Disputing starts with the sending out of letters of *somasi*. *Somasi* is a procedure established by practice based on an interpretation of the Indonesian Civil Code.[102] Essentially, it involves warning letters being sent as notifications to fulfill an obligation or perform an agreement. *Somasi* letters are usually sent two or three times. It includes a warning and a time limit given to solve the issue, e.g., giving three working days to transfer payment. The second and third *somasi* are used to show that the due date stated in the first *somasi* has not been met. This means the parties receiving the *somasi* are not cooperating, and the right to pursue litigation has been established.

When receiving *somasi*, the best way is to avoid signing a receipt, not to respond so parties can still deny receiving the *somasi*, or include a counterclaim when responding. This is because a receipt or responding shortly could imply an acknowledgment of debt or lack of performance.

4.1.11 Drafting and filing complaint/lawsuit

There are three important aspects to fulfill when drafting a lawsuit. First, make sure every interested party is included to avoid the risk of having the lawsuit rejected during *eksepsi*,[103] e.g., under the principle of *Error in*

101 Opinion of the Head of the Supreme Court Wirjono Prodjodikoro (Prodjodikoro 1953).

102 Article 1238 sets the condition of default of a debtor only after they have received *surat perintah* (orders, instructions). It states, 'The debtor shall be deemed in default, either by an order or other similar deed, or pursuant to the obligation itself, where such obligation stipulates that the debtor shall be in default, upon failure to deliver within the stipulated time period.' The reasoning is that the debtor's obligation to pay damages does not occur immediately when the debtor is negligent. There has to be a declaration of negligence by the creditor that is conveyed to the debtor (Article 1238 and 1243 Civil Code).

103 See *Legal Basis* in Chapter 1.

Persona,[104] which also applies to lawsuits that do not include all of the interested parties. As found in Chapter 1, it is crucial to include the notary (PPAT) and the NLA official in lawsuits concerning land title.

Second, the lawsuit has to have a proper headline. Following the proper 'procedure' of a particular claim (knowing what precise vocabulary to use in a claim, e.g., when requesting *penetapan* or *putusan*[105]) is already a win by itself. The court registrar (*panitera*) is the first gatekeeper for this. *Panitera* can use formality reasons for refusing claims, e.g., saying that the claim uses a wrong term, even if this is not the case. For this, lawyers would approach and consult the Head of the Courts[106] and cooperate with the *panitera* even before submitting their claim.[107]

Third, the narrative of the claim (*posita* and *petitum*) has to be simple and understandable so it can appeal to judges who are unfamiliar with the complex web of contracts that usually involve long-term business transactions between numerous parties from various countries. This is an important skill that lawyers must have since they have to simplify the complexity into a straightforward and relatable story. Lawyers have to make clear why their client is right, and the opponent is wrong, and why the client is entitled to damages.[108]

4.2 Litigation strategies

In pre-litigation strategies, timing about how fast one should bring the case to court is important. Being outrun by the opponent and ending up as a defendant limits the strategies one can employ. In litigation strategies, parties influence the timing of the procedure to negotiate and show their power. They manipulate the timing by delaying hearings or expediting them. By showing how judges react and decide on their request for delaying and expediting the hearings, parties show their power to the opponent regarding eventually influencing the outcome of the case.[109]

104 See also *Defense* in Chapter 1.

105 See enforcement strategies below.

106 Either the Head of the District Court (Ketua Pengadilan Negeri or KPN), Head of the High Court (Ketua Pengadilan Tinggi or KPT), or Head of the Supreme Court (Ketua Mahkamah Agung or Ketua MA). This is because they are responsible for implementation of case administration at their respective courts (PERMA No. 7/2015).

107 Panitera can also inform lawyers about which judges would be assigned to examine the case. In the Supreme Court, this used to be the task of the court secretary. The position used to be held by Nurhadi, who resigned in July 2016 after being investigated by the KPK (https://news.detik.com/berita/d-3384116/mantan-sekretaris-ma-nurhadi-kembali-diperiksa-kpk and http://www.thejakartapost.com/news/2016/08/05/supreme-court-official-accused-safeguarding-multiple-cases.html).

108 Often, lawyers would use overarching principles such as *itikad baik* (good faith), *kepastian hukum* (legal certainty) and *pemerintahan yang baik* (good governance) to avoid having to really explain a transaction scheme (which could reveal that their client is also at fault).

109 Moreover, prolonging litigation is also a strategy to drain the counterparties' resources.

However, there is a limit to this negotiation tactic of delaying and expediting hearings. After the defendant has submitted their response (*jawaban*) against the claim made by the plaintiff, it is not possible for the plaintiff to withdraw their claim or lawsuit without the defendant's agreement, and there is no out-of-court settlement. Settling is possible, although a Settlement Deed (referred to as *Akta van Dading*[110]) has to be 'legalized' by the judge and made into a *penetapan* (court decision/injunction). This procedure is referred to as *dading*.[111]

Planning the timing surrounding the month of Ramadhan is one of the most important considerations for lawyers. This is because approaching the month, the costs of the procedure will be higher because people need more money to throw parties, but will yield few results because the work pace is slower, making dealings more difficult. Lawyers will either aim to obtain a decision before the start of Ramadhan or postpone any action until after the month.[112]

Basic litigation procedure

Even though there are many small variations of the course of litigation, the basic procedure is as follows. The court convenes in each step.

In administrative and civil district court cases, a plaintiff will (1) submit a *gugatan* (claim) containing *posita*[113] (the basis of the claim), *petitum* (what the plaintiff asks the court to grant), and *provisi* (a request for performance while the case is ongoing). The defendants are allowed to (2) give a *jawaban* (response), which often contain a *rekonvensi* (counterclaim(s)). The plaintiff could (3) respond to the *jawaban* with a *replik*, and the defendant could (4) respond to the *replik* with a *duplik.* Then there will be two or three (5) hearings on evidence and witnesses, followed by (6) a hearing of *kesimpulan* (conclusions from both parties), and lastly, (7) the reading of the decision. The decision can be appealed to the court of appeal (High Court).

Procedures on special district court cases (commercial court) are shorter, without *replik* and *duplik.*[114] An appeal goes directly to the Supreme Court.

110 A procedure interpreted from Article 130 HIR.

111 *Dading* is considered *inkracht* (legal and binding), meaning that no appeal is allowed, and that only an extraordinary appeal or judicial review (*peninjauan kembali*) is possible (See *Appeal Procedure* in Chapter 1).

112 Some firms prefer to close the office for one or two months to save costs. This is because people claiming to be representatives of judges, policemen, and prosecutors often come to their offices to ask for a 'donation'.

113 Lawyers often confuse this with *petita*, the possible plural form of *petitum* in Latin.

114 In special district court cases, particularly bankruptcy, parties are more constrained to play on *time*, since there are various limitations prescribed by laws and regulations on the procedure. For instance, for disputes concerning shareholder meetings (RUPS), timing for actions are regulated in Articles 79 to 86 of the Indonesian Company Law.

4.2.1 Tactics in court

Hire influential expert witnesses

There are two kinds of witnesses in Indonesian litigation: (1) witnesses of fact and (2) expert witnesses. The odd thing in this system is that expert witnesses are usually *legal* experts, who testify about their opinion on how to interpret laws or legal principles. The best expert witnesses are former Supreme Court judges, as their testimony carries more weight for the judges (ex-peers) because of their seniority.

Witnesses of facts in corporate land litigation are usually officials from the National Land Agency, government officials (for instance *camat* or district heads), or notaries/PPAT, who will testify according to the position of the office that they hold.

Witnesses are provided by the parties. In other words, the parties pay them for testifying. This means that they are not neutral; they present either on behalf of a plaintiff or defendant.[115]

Keep recordings

One of the tasks of the junior lawyers in a case is to make audio and video recordings of hearings, particularly when it is the reading of the decision. The records serve three purposes: (1) as proof in case the written decision is not the same as the pronounced decision, (2) to announce the decision in the public media, and (3) to consider follow-up strategies.

4.2.2 Tactics outside court

Use the media

Parties use the media for various reasons. First, to find information about the enactment of new laws and regulations. Second, to monitor the reporting about cases and the condition of companies, such as bankruptcy, the auctioning of land, shareholder meetings (*RUPS*), and other various legal actions that have to be announced to the public by an OJK requirement. Third, to manipulate judges through the reporting of an ongoing case.

For the first two reasons, all major newspapers are monitored. This is the task of juniors and interns at law firms, who would be the first ones at the office reading all the newspapers and creating a summary in the form of newspaper clippings for their superiors to read. On the other hand, parties who are forced to announce certain legal actions could choose to hide the required publication within the most obscure newspaper.

115 Compare this with issues regarding hot-tubbing in articles about the UK and Australian legal systems. For example, see Yarnall, M. A. (2009). Dueling scientific experts: Is Australia's hot tub method a viable solution for the American judiciary. Or. L. Rev., 88, 311.

Influencing judges' opinions through the media is important in a system without a jury. The question is which media the lawyers should use for this. Lawyers will try to find out which newspapers judges (and courts) subscribe to and which magazines are lying around their offices.[116] For publishing *their* stories, parties would hire journalists, and if they take the form of an opinion or advertisement, there are rates for these set by publishing companies.[117]

Arrange demonstrations and mass mobilization

To influence media reports, parties also fund demonstrations. They would hire someone who could 'provide a lot of bodies'[118] to stand around at the location of demonstrations, carrying banners. By demonstrating directly in front of the courthouse, it could be used to intimidate judges during a hearing, or inside the courtroom to create disorder.[119]

Monitor cases

In managing their clients' expectations, lawyers make sure that they prepare a reaction plan. Knowing what to expect, the possibilities they could explore, and having response strategies would make clients comfortable (see legal/financial engineering above). For this, it is important to know the exact stage of a case. Lawyers (particularly *fixers*) refer to this as 'monitoring'. It is an investigation to find out at which 'hand' the case is currently at, so they could tell their client that, e.g., the docket has been numbered, Judge A is reading it right now, or two out of three judges have read it. Parties could engage a lawyer specifically for monitoring. It does not necessarily mean that the lawyer would represent the parties at court hearings.

4.2.3 Appeals[120]

There are normally no hearings at the appeal stage, whether in the High Courts or the Supreme Court. Lawyers can request hearings at the High

116 Some try to access their electronic devices.

117 This is according to the amount of space it requires. I have heard of one billion rupiah (around USD$95,000 at the time of writing, February 2018) per half a page in major newspapers, and at least five times more for time slots in a major television channel. I also encountered a political party's magazine editor who was offering to sell a slot in the magazine so a lawyer could put his name as the 'legal consultant' of the magazine as a way to give a donation.

118 Interview with an investor, December 2016.

119 During my participant observation, some hearings kept on being postponed because there were 'lots of people demonstrating'. Eventually, the lawyers claim some '*preman* came with pick-up trucks and barged into the courtroom' (hearings at Sidoarjo District Court in 2010).

120 See also Chapter 1 on appeal procedure.

Courts, but this is rare.[121] One reason for this is if there is a witness whose testimony has not been heard.

To lodge an appeal, parties submit memorandums (memorandums or counter-memorandums of appeal or cassation). These have to be submitted within two weeks since the court delivers the judgment or memorandum or counter-memorandum to the party/opponent. Since this limitation only starts from the point of delivery, parties can manipulate the timing of the appeal or cassation by cooperating with court officials to delay the delivery. However, this practice is becoming more difficult because it requires the cooperation of court registrars, who are increasingly afraid of being charged for corruption by the KPK.

4.2.4 Securing certainty of winning litigation

Bedner (2001: 238) distinguishes three ways that money or *rezeki* (good luck) influences litigation: the absolute and relative jurisdiction, the duration of litigation, and the decision-making process. This concerns the latter. However, successfully giving bribes to judges does not automatically mean the party will get their favorable decision. To be certain of winning by giving a bribe is still a delicate matter.

Assuming that their opponent would also bribe judges, parties usually have to guess the amount of money (as part of the *jago sogok* skill I mentioned) that they give to judges. This amount has to be enough to 'outbid' their opponent. It means that this first approach is as uncertain as a silent auction. It bears the risk of the opponent 'bidding' more, and the party may end up losing. Securing the certainty of winning often means securing certainty of the amount a party *should* 'bid'. This is only achievable by asking the judges how much the 'bid' should be to secure the winning. I found in my interviews that being certain of winning or having the judge give the favorable decision will be more expensive than the silent auction. This is because my interviewees said that there would be an '*auction-like bargaining*'[122] with the judge acting as an auctioneer. Moreover, to have some of my interviewees know about this procedure means it has happened before and confirms speculations made by Bedner (2001:237).

Parties could also pressure a judge to render a decision in their favor by going through the judges' superiors. This could be the *ketua* or chairmen of courts, or anyone who could influence the development of the judge's career,[123] e.g., by deciding on their *mutasi* (see section 1.3 above). This is also why there is a belief that senior judges who are about to retire would be

121 Interview PM.

122 *Tawar-menawar seperti lelang*. Interview GL, JN, MA.

123 Previously, the Ministry of Law and Human Rights had a role, but since *reformasi*, this court management authority was transferred fully to the Supreme Court. This was also the task of the court's secretary.

more independent because they could deviate from the superior's wishes or instructions.[124]

In this game of winning at any cost, the play is so 'dirty' that the standard of what is good is lowered. Many interviewees claims that their firm is (morally) better because even if they do try to influence judges outside of courtrooms, they '*do not ever threaten judges or policemen.*'[125] They also do not handle adultery or drug cases, even if the client is a judge, policeman, or prosecutor and even if handling the case could allow them to later ask for favors.[126]

4.3 Enforcement strategies

A formal copy of the court judgment is needed for enforcement. Usually, lawyers have to pay unofficial fees for it, even in the case of their client.[127] Ideally, enforcement or the performance of a court decision should be implemented by the party being instructed according to the decision. However, parties do not always comply. The enforcement or performance of court decisions, or *eksekusi*, is mostly regulated in Articles 195 to 224 HIR[128]. There have been problems with HIR from the start as I have discussed in Chapter 1, and it has never been redressed.

In practice, enforcement is a separate procedure. Parties (winning parties or parties who have an interest in the performance of the court decisions) have to submit a request to the court to issue a *penetapan*. It is referred to as *penetapan*, not *putusan* (decision/order) because it is technically a result of a unilateral petition process. *Penetapan* can also be issued for seizures and injunctions, especially in the beginning of a dispute, to make sure the opponent does not transfer or build a permanent building on the land under dispute.

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124 I also have to note that in Indonesian society, this 'superior' also includes the superior's representatives: their 'assistants' who are entrusted to be the intermediaries, such as wives, housemaids, drivers, bodyguards, or bag carriers. It was also mentioned by Rafat Ali Rizvi regarding the Bank Century case, that a 'bag carrier' called Didong was the principal intermediary in carrying instructions and bribes.

125 They claimed, '*Hotman* [the name of an infamous fixer] *is worse because he would provide them with women and cash-in the favor with threats, for example that he would tell their wives or their superior'.* Hotman Paris has a talkshow in which he demonstrates his ability to buy people (women) with money and objects. The show has received a warning from Komisi Penyiaran Indonesia, a commission in charge of regulating broadcasts. See http://www.kpi.go.id/index.php/id/umum/38-dalam-negeri/34248-warning-untuk-program-hotman-paris-show-di-i-news-tv. Last accessed, 21 February 2018.

126 Four fixers claimed in various interviews that even if they can and they do influence judges outside courtrooms, they do so as far as it concerns giving money and conveniences, such as cars, houses, and drivers. They '*don't do adultery and drug cases, even if the client is someone important and s/he begs for us to take their case. Only dirty lawyers do that'.*

127 See also Bedner 2016, footnote 85.

128 About HIR, see Chapter 1, short history of Indonesian legal procedure.

The authority for *eksekusi* is at the first instance court or district court, and can only be performed by an instruction from the head of the district court.[129] This system has two characteristics: (1) when it comes to enforcement, the head of a district court has more authority than the Supreme Court, yet the Supreme Court is authorized to supervise them and decide about the advancement of their career, and (2) even though a case has reached a decision from the Supreme Court through lengthy appeals and cassation processes, when parties seek enforcement, they have to go back to a district court to seek a *penetapan*. During which, any 'interested' parties can file a rebuttal (*perlawanan*[130]), which in practice may mean the start of an entirely new process as we have seen in Chapter 1. On the other hand, any *penetapan* is considered as *inkracht*, which means it could only be appealed through a judicial review (*peninjauan kembali*). Himawan (cited in Bedner 2001:216) observed that this is an administration of justice in five instances: district courts, high courts, Supreme Court, judicial review, and *eksekusi.*

Winning scenario: Self-enforcement

In theory, there is a possibility for the self-enforcement of court decisions. The Law on Mortgage of Land regulates that creditors can enforce their rights by selling land through public auctions,[131] and by claiming that a contract/deed has executorial power as *grosse akta*,[132] which avoids and limits court involvement so enforcement can be performed more efficiently (Pompe 2005:240-242). In practice, this often fails[133] and courts could order (and have) that the *eksekusi* be voided/canceled if performed without permission from the court.[134]

129 Referring to HIR and Article 54 and 55 Law No. 48/2009.

130 See also Chapter 1 about parties and above about self-enforcing structures.

131 Article 6 UU HT. Some fixers have their own auction house or have *anak buah* at state auction offices. Land as collateral under *grosse akta* could be enforced (sold through) private auction houses, which makes it easier for the fixers instead of having to go through state auction offices (KPKNL), which is required when performing an auction as per a court decision.

132 This is because of an interpretation of Article 224 HIR, that a document containing 'irah-irah', which means a sentence as the heading of the document declaring 'Demi Keadilan Berdasarkan Ketuhanan yang Maha Esa' or when the HIR was drafted: '[*atas titah raja*]' is enforceable as grosse akta.

133 See, for instance, KPPU case in Davis, JR (2008) The Competition Commission: A new kind of player in Indonesia's Legal System, in Lindsey, T, Indonesia: Law and Society, Federation press. p. 636–670.

134 This practice started in the 1980s by Ketua Muda Perdata (head of civil cases) Prof. Z. Asikin Kusumah Atmadja, SH and have also been decided with note No. VII/1988/Perdata, February 1988, which was attached to Supreme Court Decisions No. 1520K/Pdt/1984, 31 Mei 1986 and No. 3021 K/Pdt/1984, amongst others. It was under the reasoning that the 'irah-irah' was also overused as a contract heading for complicated transactions.

Another interim way of self-enforcing is to publish the court decision (whether *putusan* or *penetapan*) in major newspapers, thus giving a warning to potential buyers of the land under dispute.

Losing scenario: Postpone enforcement and deflect the effect of the decision

There are other means aside from filing a rebuttal to avoid *eksekusi*. Parties can file an appeal, or file a new claim in another forum.[135] There is also a possibility to make the court decision irrelevant by transferring the asset away from entities subject to the court order, although it is difficult, and under a bankruptcy situation, it might require cooperation with the *kurator*. Parties could also create another claim over the land under dispute, e.g., by backdating a rental agreement of the land.

4.4 Conclusion: A business of favors

In this chapter, I have presented the real condition of legal reasoning in terms of what influences court procedures and decisions in Indonesia. At first glance, many of the strategies seem similar to lawyers' practice globally, and could be considered regular requirements for lawyers to defend their client 'zealously', such as knowing how to draft contracts and court claims in the strongest and most convincing way possible. However, some strategies transgress all ethical norms, for instance backdating contracts. Even though we can still justify these strategies with an appeal to lawyers' obligation to protect clients' interests, these strategies take this obligation too far that it undermine the consistency of the legal system. The strategies discussed do show that the condition of the legal system in Indonesia is not good, because it provides too much leeway for lawyers to use the legal system as they wish (cf. LoPucki & Weyrauch 2010).

Nevertheless, this chapter showed that legal knowledge has a role, even though it is being used as a means to an end. This is a small but positive development compared to the finding by Bedner (2001:241-2) that actors (in that case the lawyers he interviewed) assume legal knowledge does not play a role at all because of the dominance of corruption in the legal system.

In addition to using the weaknesses of the legal system, repeat players use the structural advantages that are already in place not only to influence the content and meaning of the law (Talesh in Galanter 2014:iv), but also to bend and transform reality into legal facts that will serve their goals. In Indonesia, this structural advantage is dominant in the form of social capital or loyalty to others.

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135 For example, a case about ownership of a sugar plantation in Lampung has resulted in at least 7 cassation and 5 judicial review decisions in 2008, 2009, 2011, 2012, 2013, 2015, and 2018 (see Mahkamah Agung docket on Marubeni Corporation et al v. PT. Sweet Indolampung et al.).

Repeat players accumulate social capital through ingratiation, which requires concealment for it to be successful. Furthermore, since social capital is related to enforcing obligations and trusts, its usefulness is uncertain until one tries to use it (Bourdieu 1986; Smart 1993). These characteristics of concealment and uncertainty are then reflected in the nature of litigation. Because of the dominance of these deemed-to-be illicit and illegal personal relationships and networks, litigation further becomes a mere show. Its development remains behind the curtain and creates a gap of knowledge concerning procedural law.

This condition suggests that access to litigation and legal enforcement is disproportionate towards the dominant groups, who can derive profit from the use of social capital while the dominated groups have to sell their knowledge and skills to gain economic capital (Bourdieu 1986:85). Moreover, this characteristic is sustainable for the dominant groups, and they influence others to act correspondingly, pushing the *brokers* to act like *fixers*. In other words, the most dominant actors constituting the legal system deeply distrust it, creating a devil's circle of litigation without resolution. This instrumental view of the law is undermining the development of the rule of law (Tamanaha 2006), which will be analyzed further in the conclusion of this book.

5 Conclusion

Throughout the chapters of this thesis, we have seen which strategies are available to lawyers and how they use them to win land conflicts for corporations. The strategies described are made possible by the condition of the field in which land transactions are conducted, and by the specific social, cultural, and economic system in which they are embedded. The findings indicate that lawyers working in Indonesia are confronted by two conditions in particular: the way in which business transactions are conducted, and the fact that the Rule of Law is not well entrenched. This chapter will present the main research findings and go more deeply into the influence of lawyers on the legal system. It will further discuss what the findings mean for the condition of the Rule of Law in Indonesia and finally provide some suggestions for improvements.

Commercial lawyers in Indonesia

Commercial lawyers in Indonesia do not constitute a single profession. They can be classified into different types, based on their areas of practice. These areas of practice are associated with different professional attitudes. The first type is corporate-transactional lawyers who exclusively draft contracts, perform due diligence and write legal opinions. They have a similar practice as corporate lawyers globally. They feel and behave as the elite of the profession, and pretend to be morally superior to the second type of lawyers whom they consider as unprofessional and corrupt.

This second type of commercial lawyers are litigators, who almost exclusively practice in the world of courts. They possess intimate knowledge of legal procedure, and in their practice they often transgress legal and ethical boundaries. The litigators are the only group of lawyers who know the ins and outs of legal procedures in Indonesia, and unlike their corporate-transactional counterpart, they do not escape the Indonesian legal system by turning to courts in other jurisdictions or to arbitration. Therefore, they have a much more direct influence on the development of Indonesia's legal system.

Litigators can be divided into two groups. The majority resemble the 'brokers' of routine civil litigation in the US, which have been described as intermediaries between their clients and the courts (Kritzer 1990). The brokers prefer to observe the law but will push boundaries to gain clients and build reputation. The other group of litigators are 'fixers'. They use law as a means to an end and will not hesitate to break the law to achieve

their goals. Fixers operate in the grey areas of law, in business and politics, presenting themselves as experts in manipulating the justice system in order to 'get things done'. They enjoy considerable autonomy from clients. A select number of fixers call themselves 'family lawyers' or the 'lawyer of the [client's] family'. By 'clients' they mean the individual heads of family corporate groups active in construction and natural resource exploitation. The 'family lawyers' could be labeled A-list fixers.

It is mainly litigators, and 'fixers' in particular, who determine the public image of commercial lawyers in Indonesia. They frequently appear on television and in newspapers, where they represent those clients who are public figures – or because they have been caught for bribing judges. This image contributes to the high level of public distrust towards all commercial lawyers in the country (cf. Kadafi 2001).

Findings about corporate litigation concerning land and what we learn from them about the legal system

This study found that the most common legal issue in corporate litigation concerning land is the contestation of land certificates as evidence of ownership by other means of proving rights to land. The second most common issue is about loans with land rights as collateral. Finally, there is a significant number of cases in administrative courts contesting the legality of land certificates by questioning the procedure followed by the National Land Agency in issuing these certificates.

Looking at the practice of commercial lawyers, this study focused in particular on litigation concerning land involving repeat-player organizations. There are two kinds of repeat-player organizations: corporations and government institutions. Corporations consist of land developer companies and their subsidiaries and contractors, while the main government institution is the National Land Agency (NLA). Corporations enjoy certain advantages over natural persons by owning a veil of protection from risks and liabilities for their human principals and beneficiaries as a result of their legal form. Governments are also artificial persons. Grossman, Kritzer and Macaulay (1999) suggested that governments have an additional advantage as they can shape litigation process through their policies and actions, giving them a kind of inherent advantage as a repeat-player. The findings in Chapter 1 confirm this argument, demonstrating that corporations having the government (NLA) on their side are almost unbeatable in litigation against other corporations.

Parties choose litigation because it provides them an opportunity to obtain formal rights to land in a way that allows them -through the services of lawyers- to control the outcome and manage the risks involved. Courts can confirm the legality of land certificates and instruct notaries and the National Land Agency to cancel them, or issue new ones. It means that the parties who win a case can use the court decision as evidence of rights to land and cancel their opponents' basis of land rights.

In many business transactions, land developers have to deal with situations where other than just the official rules apply. Social hierarchy plays an important role in transactions. The obligation to respect the said hierarchy, such as being subservient and loyal to *bapak* (fathers) or patrons, prevent parties from assessing the ability of the counterpart in a transaction to actually perform its obligations. Personal relationships take priority over rational and impersonal ideals in contracting, and commercial lawyers who draft and enforce the contracts also operate according to these unwritten rules. As a result, contractual mechanisms for resolving problems become vague and unreliable.

On top of this, formal legality is not well-developed in Indonesia's legal system. Rules are often very general in nature and they are not applied equally. The Indonesian Civil Code was drafted more than 150 years ago and has not been updated consistently by new legislation or case law. There are barely codified rules on civil procedure. This situation promotes the use of informal rules. These in turn reinforce hierarchical relationships between contracting parties. This has two negative consequences. First, when things go wrong, disputes become personal. It is no longer a matter of rational reasoning, but one of hurt feelings and conflicting ideas about ethical behavior. Second, the legal system poses few constraints on lawyers' strategies. The legal system provides too much leeway for lawyers to use it as they wish (cf. LoPucki & Weyrauch 2010). This condition confirms the argument that there is a lack of autonomy of the law in Indonesia (Bedner 2016).

Strategies of lawyers

The key focus in this thesis has been on the strategies lawyers develop to make their clients win a case. It has shown that the main factor shaping lawyers' choice of strategies is opponent-oriented: they look first and foremost at what kind of networks opponents and their lawyers have, and whether or not the government is engaged in a dispute.

There are many weaknesses in legal procedures that lawyers manipulate and exploit in their strategies. One weakness is that they allow the submission of overlapping and contradictory evidence in the form of multiple sources of land rights as well as irrelevant evidence. Another is that litigants report their opponents to the police and submit a copy of the report to the court in civil disputes regarding land ownership. Even though that kind of evidence should be rejected in civil disputes, it has an impact on the outcome.

One way in which lawyers provide a kind of certainty for their clients is by capturing the timing of the litigation process through their relations in the court. For example, lawyers and the corporations they represent can gain a lot from being able to merely postpone a hearing. Within a week they can then transfer the assets in dispute to another company in their group, rendering the eventual court decision irrelevant. The relations used in

manipulating litigation processes are often established over time. Lawyers do not candidly bribe judges in order to get a favorable decision, rather they make judges feel indebted by the long-term trust relationships they have established. To build these relationships, lawyers (particularly fixers) give gifts and facilities such as drivers, cars, and houses to judges and their families. On this basis judges are bound to reciprocate when they are asked to, in a process that is similar to *guanxi* in China (e.g., Li 2010; Smart 1993). This leads to a situation where personal relations override legal considerations. Those lawyers who have the strongest relations will be the most successful in their practice.

These kinds of illicit strategies are sustained by the prevalence of the relational way of doing business I have mentioned above, and a culture of service intrinsic in values regarding personal relationships in Indonesia. The values, such as loyalty and being subservient to a patron, is a result of the type of education and the required behavior in institutions in Indonesia (e.g., Tidey 2016; van Klinken 2014:15-23; Pisani 2013). This patronage or kin relationship (*hubungan kekeluargaan)* constitutes the framework which determines how lawyers develop their strategies.

5.1 Influence of lawyers on the legal system

On different types of lawyers and legal reform

Their being involved in litigation or not produces the main divide in lawyers' professional attitudes and ethics. Corporate-transactional lawyers handle only financial aspects of land development such as structuring financial transactions and drafting contracts. They refuse to handle enforcement of contracts, which they outsource to litigators. Litigation about land is perceived to be a 'dirty' business, not prestigious but it can be a highly profitable business if lawyers are prepared to transgress legal and ethical boundaries.

Litigation also determines lawyers' stratification. In Indonesia, lawyers obtain prestige in a different way than what was found by Heinz, Nelson, Sandefur and Laumann (2005) in the Unites States. Lawyers in the United States gain prestige by doing work that is complex and 'professionally pure'. They are drawn to rich and powerful clients (often corporations) because only those can provide that kind of work. In Indonesia, what matters to many litigating lawyers (particularly brokers and fixers) is not serving the rich and powerful in order to get interesting cases, but having the power to control litigation processes and courts. By contrast, the corporate-transactional lawyers gain prestige from keeping their practice "pure" by avoiding and outsourcing litigation to the former type of lawyers.

Corporate-transactional lawyers identify as elite lawyers and they have a dominant place in analysis about lawyers and globalization (e.g. Dezalay and Garth 2010). Some scholars have argued that this is insufficient to

provide a full picture of how lawyers' practices, economic development, and globalization influence one another. For this purpose "local" lawyers and firms must be included in the analysis (e.g. Munger 2012, Liu 2013). This thesis fully supports that view. It has shown how in Indonesia some of the locally oriented fixers are more powerful than the "elite lawyers" in influencing the legal, economic and to some extent the political system through their use and manipulation of law. Not taking the former into account means that one misses an important actor in the bigger picture of the relations between lawyers, economic elites and state officials.

On influencing the condition of the legal system

Almost all lawyers I interviewed for this study distrust legal procedure. Those who litigate try to control its outcome by manipulating the system, while those who don't actively avoid Indonesian courts. This belief in the unlikeliness of obtaining an objective judicial decision is a danger to the Rule of Law because it can precipitate a self-fulfilling prophecy of its collapse (cf. Tamanaha 2006:234-237).

From society's perspective, lawyers' image determine this belief. When rules are vague, overlap or contradictory, lawyers have more control and authority over its use. They have more freedom to choose which rules to use and to suggest their interpretations to clients and judges. Their outlook on cases and how they handle litigation shape their image in society, especially conflicts regarding large area of land which are often in the media's spotlight in Indonesia. In order for lawyers to contribute to the development of Rule of Law in Indonesia, they need to first rebuild their image in society. This is by adhering to a higher standard of professional obligation and maintaining clearer conscience of un-/ethical behavior than lawyers in countries with more legal certainty in place.

5.2 Condition of the Rule of Law found in this study

The research shows how law can be used as a weapon against individuals by the repeat-players (either corporations, organizations, or government agencies), which are hardly subject to restraints (cf. Tamanaha 2004:8). This is typical for a situation of rule *by* law. In order to move the system closer to the rule *of* law, formal legality needs to be improved. There has to be less overlap and more precision and coherence in legislation, fewer possibilities for avoidance, fewer rules in favor of the powerful, and more guarantees for the weaker parties. I will discuss this in more detail in the last sections of this conclusion, but first I will discuss what this study has found as evidence to sustain the above claim.

5.2.1 Tort and contract claims are insufficient in initiating a level-playing field

Chapter 1 demonstrated how lawyers replace the role of judges in legal reasoning, as courts commonly adopt their legal arguments in their decisions without any further comments. However, this does not always lead to legal clarity.

Chapter 1 found that tort or breach of contract claims are often declared inadmissible by Indonesian courts for being vague. This is no wonder, as it is unclear what legislation and courts define as tortuous acts. The social and religious norms which also define tort and causes invalidity of contracts in the Civil Code, such as whether an act or an agreement is not *halal* (not permitted, an Islamic term), violates *kesusilaan* (decency), or goes against *ketertiban umum* (public order) have never been elaborated through case law.

Lawyers draft the contracts that become the objects of disputes and thus provide the foundations for a case. The concern in contract law scholarship is about having the contracting parties—even when they are strangers, and their relationship is impersonal—perform what they promise, if necessary through a legal system that can force them to do so. There are different views in the scholarly literature on how this can be achieved. Cooter (2008) argues that formalistic rules will work better than flexible standards if professionals fall short on quality. Macaulay (1963) takes a different standpoint by taking into account the existence of informal rules and long-term trust relationships between business actors. He argues that legally enforceable contracts alone will not create trust and make long-term continuing relationships unnecessary, and instead he suggests that the goal of the legal system should be to recognize and legitimize compromise rather than vindicating rights (Macaulay 1994).

This research shows that in Indonesia repeat-players are able to avoid their obligations through the use of lawyers instead of compromising, and when they do go to court, they usually win. This demonstrates that an analysis on contract law and reliance on contracts has to include courts as an actor in the equilibrium and that we need to pay attention to the practice of judging.

According to Tamanaha (2006), in their consciousness, judges are either rule-bound or purpose-oriented. He argues that to avoid having judges who are so pragmatic that they manipulate legal rules to achieve a certain goal (even though the goal is noble), judges have to be consciously rule-bound (Tamanaha 2006: 241-5).

The question is whether this suggestion if of universal application. Tamanaha aims at judges operating within the context of the United States' legal system. By contrast, this research found that Indonesian judges are overly concerned about being rule-bound, but in fact hide their pragmatic consciousness behind a formalistic approach. The prescribed format of court decisions intended to have judgments meet the criteria of being 'good and correct' and to ensure that judges are rule-bound (Chapter 1) has an

unintended consequence: it releases them from the obligation to develop legal reasoning. Thus formalism becomes a smoke screen to hide what really goes on in the practice of litigation.

5.2.2 Corruption as a façade covering legal uncertainty and incoherent principles for economic development

This research has shown that using (illicit) relationships as strategies is not as simple as may first appear. Bribery is not just 'quid pro quo', but about long-term trust relationships and exchanges of favors, similar to *guanxi* in China (e.g., Li 2010; Smart 1993). Lawyers supplement their knowledge of the law and legal procedures with personal relationships and networks to provide a kind of predictability in litigation. However, this predictability goes straight against the Rule of Law since it relies on power differentials, and means security only for the powerful (von Benda-Beckmann 2018:90).

A similar arrangement can be found in the 'Ali-Baba' (Ali: politico-bureaucrats, Baba: businessmen) relationship, which is a dominant form of co-operation in Indonesian business ventures. The Ali-Baba relationship is as close as if those involved were family members. A business venture by an Ali-Baba partnership can only be successful when this personal relationship is strong, underlining once again the relational notion of contracting (Macaulay 1963; 1994). From this perspective, the effort to uphold the Rule of Law is a threat to the relational – and therefore exclusive- way of doing business that has served the repeat-players well.

The corruption inherent in the Ali-Baba and other relational structures obscures and thrives on the incoherence of the legal rules or procedures. While it seems natural to focus on the problem of corruption to improve legal certainty, it will not solve the underlying causes of legal uncertainty and the lack of protection the land registration system currently offers (cf. von Benda-Beckmann 2018:89). Chapter 2 has shown how many litigators have been prosecuted by the Corruption Eradication Commission (KPK), yet the practice and the legal uncertainty have remained. While corruption should not remain unaddressed, more attention should be paid to addressing the incoherency of legal rules and procedures.

At an even deeper level lies the question whether in a country like Indonesia legal certainty can replace loyalty in promoting economic development. Legal certainty here is a notion representing global, impersonal modernity, while loyalty is the personal, local, *kebiasaan* (custom) that is a character of a 'prismatic' society; where family and community influence bureaucratic decision-making (Riggs, 1964). Loyalty in practice often overrides formal legal norms, driving the transaction into the realm of the illegal. In order to remedy this, the legislator and courts must first incorporate social norms into legal norms in such a way that they can provide the basis for contracts that are in conformity with the relational reality of Indonesian business.

5.2.3 Rejecting the Netherlands-Indies' legal heritage has resulted in a commercial litigation practice that relies on rituals

Ritual is a rule-governed action that is repeated on special occasions and valued by the performer while lacking a clear idea of what it is about (Parkin 2015). Rituals are hard to change or argue against. They are characterized by adherence to forms and symbols, inflexible patterns of performance, and they force others to perform similar activities without meaning, or with a meaning that is hard to explain. In other words, the performance of ritualized behavior is often compulsory despite an absence of evidence about their efficacy (Smith and Stewart 2011).

Through a historical overview and analysis of the current condition of legal procedures in Indonesia, this research has shown that unclear language and scattered rules of civil procedure have resulted in a formalistic practice. There is a gap in the development of legal procedure because nationalist/independence movements called for legal procedure to be detached from its 'colonial' sources. During the enactment process of legal procedures for Indonesians (HIR), rules about mergers, securities, *interventie* (a Dutch term for a third party's involvement in a dispute) and review procedures were left out (see Chapter 1 section 1.2). The lack of these rules creates major problems of legal certainty and the practice of commercial litigation suffers the consequences.

Additionally, the status and applicability of the more general rules about contracts and torts – which can potentially serve as a foundation to develop more specialized rules (such as on mergers, securities, *interventie* and review procedures above) are ambiguous. On top of this, when they refer to these codes judges and lawyers demonstrate little understanding of the meaning and system of clauses, due to the diminishing knowledge of the Dutch language and legal context (Massier 2008). This would not matter provided that jurists develop new, coherent rules, but for structural reasons this has not happened The uncertainty of these rules is masked by rituals, for instance by establishing requirement for lawyers to memorize legal procedures to pass the bar exam (see Chapter 2 section 2.3).

This lack of formal rules is linked with a culture of formalism or *legism:* the belief – reflected in practice – that (written) statutory rules are the single genuine source of law and that they need little interpretation.[1] This provides the 'haves' with the opportunity to use 'empty' normative arguments in their favor (cf. Bourdieu 2003:84-5). It will be clear that this situation is a far cry from the Rule of Law.

1 This is different than legalism, which largely means the view or attitude of relying on law and rules (e.g. Shklar 1986:1-8, Posner 2009:21)

5.3 Policy suggestions and further research

Lawyers are not the only actors responsible for improving the current condition of Rule of Law in Indonesia. This research has provided highlights of how particular rules are being exploited amidst the ambivalence of foundational, more general rules. It shows that lawyers perform their strategies with the involvement (or manipulation) of judges. Sustainable legal reform requires the involvement of the judiciary and legal education. The following will propose specific steps to promote Rule of Law in Indonesia and will offer some suggestions for further research projects.

5.3.1 Policy suggestions:

- *For lawyers: Establish a unified force of discipline*

Chapter 2 has explained why there are competing, 'syndicalist' (Abel & Lewis 1988:40-2) bar associations in Indonesia. My suggestion does not concern having multiple or single bar associations, which is the issue being disputed by lawyers. I am not concerned so much about the control of entry into the profession, as has been discussed globally in the literature on the legal profession and in Indonesia through cases at the Constitutional Court about the 2003 Law on Lawyers. I am more concerned about the exit from the profession. Chapter 4 has shown that disciplining individual lawyers would not be enough because the *anak buah* (child/apprentice) can do the bidding on behalf of the *bapak* (father) even if the *bapak*'s license to practice is revoked. This means that there is a need to discipline the firms as well. This disciplining force needs to be *the only one* to prevent firms and lawyers from moving to another organization in order to evade disciplinary measures. Penalizing firms and lawyers moreover creates a full-circle of incentive: lawyers need integrity to be employed in a firm in the future, and for the firm to remain operating, it needs to employ lawyers with integrity.

- *For judges: Legal reasoning has to be developed in conjunction with the codification of civil procedure*

During colonial times in the Netherlands-Indies', colonial rule over native Indonesians was exercised in separate courtrooms by 'institutionalized uncertainty' or keeping laws undefined, procedures vague, and networks informal (Ravensbergen 2018). The party that benefited from this uncertainty was the colonial government. Precisely to change this situation, the civil procedure code for Indonesians was denounced after independence. However, in practice this situation has allowed the wealthier and more powerful parties and lawyers to develop customary procedures that serve their interests. This means that in order to promote more equality between parties civil procedural rules need to be restated.

There is a need for knowledge of what civil procedural rules are being used and how. Only in that manner can we ascertain how and whether the rules are being manipulated. The procedures that need particular attention concern legal status of documents used as evidence in litigation, how to submit the documents, and what constitutes an 'authentic' deed (*akta otentik*).[2] Regarding the 'authentic' deeds clarification is needed on whether they must be issued by a notary or any public officials, and which kind of 'authentic' deeds have the most evidentiary value.

Judges should provide reasons in their written decisions, particularly about who and why one is entitled to land rights over others. Furthermore, in disputes regarding contracts or tort, judges should prioritize decisions or sanctions that order specific performances instead of imposing monetary damages (cf. Cooter 2008). Lastly, the principle of simple, fast, and affordable (*biaya ringan*) judicial process[3] should not be leading in cases between corporations. Instead, courts should focus on effectiveness and integrity. To ensure that the courts are accessible, court fees and costs should instead be customized depending on the income of litigants.

5.3.2 Further research

- *Socio-legal research into the adat of ethnic Chinese Indonesian business people.*

It is important to know *adat* law to get the fuller picture about Indonesian law and its development, and all of the research regarding Indonesian law, land, and culture. Having mentioned this, I want to direct the attention to the fact that there is a lack of knowledge about the current *adat* of ethnic Chinese Indonesian business people.

- *Socio-legal investigation into the use of normative clauses in litigation*

The development of rule of law without its substantive elements, such as subordination of all law and its interpretations to fundamental principles of justice and protection of individual rights and liberties (Bedner 2010) can be detected and prevented by investigating the use of moral allegations in litigation. This includes the use of clauses with normative content such as *itikad baik* (good faith) and *korupsi* (corruption). The questions of what actions constitute violations of normative clauses and what actions fulfill the requirement and stand within the boundaries of such clauses need to be answered.

2 Case law regarding interpretations of Articles 1867 – 1894 Civil Code.
3 Article 2(4) Law No. 48/2009.

5.4 Final remark

There is a different notion about individualism in Indonesian society compared to western societies. This was reflected in *hukum adat*, where individuals are first and foremost, members of society, with all the obligations this entails (Supomo 1978:10). However, with modernization, this situation has been changing in one where business-like, transactional, or *zakenrelaties* have become dominant (Supomo 1978:27).

The resulting disparity between 'individuals' as known in *hukum adat* and in 'modern' laws is highlighted when it concerns corruption. Actors are considered corrupt when they are concerned about their own interests, and they achieve individual gains by using and sacrificing the 'social' and the 'public'.[4] However, in Indonesia – like in many societies in developing countries – many engage in corruption as the only means of escaping poverty, for instance by being able to pay for the education and healthcare for their children (a theme in several novels, see e.g. Lubis 1968, Toer 1950). Corruption then is committed for moral reasons, albeit for 'private', family survival as opposed to 'public' reasons, such as *keperwiraan*[5] and other socio-bureaucratic goals. Most actors are aware that what they are doing is considered corrupt,[6] but they still do so under the reasoning that it is a form of self-sacrifice for the good of their family, not for individual gain. This shows a need to (re)consider the concept of personal autonomy (and consequently agency) in 'modern' laws.

We have seen in this book that this disparity between the modern 'individualist' and the traditional 'communitarian' also applies to land rights. Traditionally, land rights have social functions for communities and families. Rights to land are the most important asset of a family or communities. If they are to be transferred away, it is for the benefit of the family, not for an individual. For example, when the oldest male inherits land, it comes with the obligation of taking care of his younger siblings. There is a nature of caring for[7] and helping each other that exists throughout Indonesia, even though the degrees differ (Supomo 1978:21-2). This 'care' or 'help' is binding, meaning that someone who received it from a person should reciprocate in the future (Supomo 1978:25).

With modernization, this reciprocity that in the past was limited to family and community relations is now becoming more transactional, and even then, we still see the long-term continuing relationships involving

4 The law (Articles 2 and 3 Law No. 31/1999) defines corrupt acts as any actions of enriching oneself, another, or a corporation that can harm state finances and economy.

5 From the word *perwira*, meaning officer. Prefix *ke-an* is a characterization. *Keperwiraan*, or having the character of a (dignified) official is described as the counter character as oppose to corruption in Toer's book (1950).

6 Also for some actors in this research.

7 For a discussion on care and how obligations define the self, see, e.g., the works of Prof. David Engel.

reciprocity. It is easy to take a moral high ground and claim that reciprocity *is* corruption, but if we look from the perspective of performing a duty of care, it is much harder to condemn all exchanges that transgress the line of the legal system as corruption. For this reason, perhaps even the litigators in this study should not be considered as morally corrupted as they are currently seen by most observers of the legal system.

Annex 1

Interview Guide

These interviews will be used to answer research questions 2 and 3:

2. Why do parties choose litigation?
3. What strategies do parties and their lawyers developed and follow in corporate litigation about land and what factors shape their choices?
   Interviews will also make research data more reliable and representative.

Target Interviewee

Group 1: litigators, judges, bureaucrats.
Group 2: corporate lawyers, shareholders, directors, managers, bankers.

Methodology

The interview will be semi-structured. Structure will be established by providing a hypothetical proto-case, where all the elements of real life cases discussed in the research will be included. Known from my experience, the target interviewees are known for their vileness and agility, and this affects my position as a female researcher. Group 1, the lawyers and judges will mostly be befuddled about being interviewed by a Chinese-Indonesian woman about their practices. When they are comfortable, it could cause them to exaggerate about their achievements or winnings, or they could immediately look down on me. Group 2, the users of Group 1 will be more approachable, as they mostly will have western-oriented idea of professionalism. It is important for me as researcher to keep the balance of maintaining distance and appear trustworthy and unassuming.

Proto-case Outline

There is a complex series of litigation about land between two companies. This started by one party receiving loan from the other party.
The loan is secured by collateral in the form of land certificate and/or *Hak Tanggungan*.
The loan is a complex financial product involving banks and investment firms, with a series of contracts, agreements, facilities, transfer.
As a result, the amount of debt and receivable changes time-to-time, depending on capital market or foreign exchange rate.
The debtor went into default, or be made default.. (Expect a response about this)
There are three ways this interview will be directed depending on the interviewee's answer:

– Route 1: Financial planning.
  This answer will be expected from Group 2.
  The interview will be moved towards executing the collateral.
– Route 2: Restructuring (PKPU)
  This answer will be expected from Group 1.
  The next hypothetical facts would be:
  The parties have difficulty on agreeing about the amount of debt. Restructuring is not approved by creditors.
– Route 3: Bankruptcy and/or Litigation

Group 1 will most likely move to this Route.

The next hypothetical facts would be:
Lawyer will file for bankruptcy to South Jakarta District Court.
Some of the loan agreements are made in Singapore or English law.
The trade activity involving the loan is also complex so amount of debt is difficult to assess.
Collateral is not in physical control of either party. There are squatters and farmers settlement at the location.
The person in charge of the debtor company is personally enriched by the loan without doing his/her obligation.
The series of litigation I mentioned before involves general court about the loan or validity of loan documents, Police report against the director and/or shareholder of the company for fraud and/or embezzlement, and in Administrative Court about the land certificate.
One or more of the decisions are contradictory at the same level, or in different levels of appeal.
The creditor company decided to auction off the asset.
They try to go to Balai Lelang to prepare the auction.

Questions

The questions posed will be what would they do when they are faced with those facts and about their opinion /values on their strategy. I will also propose a strategy to assess how willing they are to use the strategy.
Sample of the questions would be:
What is your expected outcome from this investment? Why did you choose to be involved in this project? What made you decide to fund this project?
Why do you think they cannot agree about price? How will you solve this?
If you were the lawyer, what would you do?
Do you think you can somewhat control the outcome of this? Would you mind if I ask how?
What will you take into account in this approach? What is the potential caution/problem according to you?
Why did you want to become a lawyer?
What do you think about going to litigators? How do you select them?
Do you think the creditor can execute *Hak Tanggungan*? If not, how hard would it be for them? What would you do?
Do you think that the approach to go through Balai Lelang is good? Why don't you go straight to KPKNL? What if you cannot find a buyer?
What is the case that define your career?/What is the biggest case you have handled?
What is a good lawyer according to you?
What do you do when you are not working?

Annex 2

Cases in Constitutional Court on Law 18/2003 about Lawyers

Case No.	Petitioner	Issue	Constitutional Court's opinion
019/PUU-I/2003	Bar association/ NGO (Civil Society) Private individual(s)/ Governmental institution	– Whether graduates from military and police school are allowed to be an advocate (independency (from the state))	– To be an advocate, everybody has to resign from civil service (*pegawai negeri*), therefore they will be independent even though they are graduates from military and police school.
		– Whether minimum age requirement (25 years old) to be an advocate should be upheld.	– Upheld. Practical and comparative age calculation.
		– Whether to add criminal sanction for hindrance of advocates' rights.	– Not every clause should immediately include its sanction.
		– Whether or not to add APHI (a lawyers' association) in the eight associations mentioned in the law as the interim association to carry out duty and authority of a Bar Association.	– APHI not added. The process was not discriminative and the law does not limit inclusion to only the eight associations.
006/PUU-II/2004	Private Individual(s) – university lecturers	– Whether individuals without an advocate license can act like an advocate.	– Article 31 limited access to justice which is a component for a *negara hukum* (rule of law). Requirement about who can represent someone in court should be regulated in Civil Procedure.
		– Whether or not universities which give legal services (litigation and non-litigation) to public are still able to conduct the role.	– Article 31 was annulled by the court, allowing universities and NGO(s) to provide legal aid as a citizens' and human rights.
067/PUU-II/2004	Private Individual(s) – lawyers from legal aid organization	Which body (the supreme court, the government, or bar association) shall have the supervisory function towards advocates?	– Bar Association should have the supervisory function of advocates. Government and other institutions can still monitor advocates through the Bar Association.

Case No.	Petitioner	Issue	Constitutional Court's opinion
009/PUU-IV/2006	Private Individual(s) – lawyers and staff from a private law firm	Whether the rights and obligations of advocates and legal consultant should be the same.	Petitioner misinterpreted Article 32 and do not have legal standing.
015/PUU-IV/2006	Private Individual – law graduate from a private law firm	– Whether the eight bar associations mentioned in the law as the interim associations had expired in 2005, making any activity relating to their duties and power are not legally binding. – Whether the establishment of Bar Association (Peradi) in accordance with Advocate bills.	The applicant have no legal standing because any decision would not affect her/him.
014/PUU-IV/2006	Private Individual(s) – lawyers, members of a bar association (Ikadin)	– Whether single bar with the enactment of Peradi as Bar Association, a contrary to the principle of freedom of association. – Whether 'multi bar' (Bar Association) system more precise than 'single' bar to accommodate the principle of freedom of association.	– Eight organizations mentioned in the law that they still have authority, out of official authority of Peradi, to draft ethics code, examination, oversight and dismissing lawyers. – 'Single Bar' system is in line with Advocate bill because the bill give advocate equal position with other law enforcer as an independent state organ.
101/PUU-VII/2009	Private Individual(s) – law graduates	– Whether it is obligatory for advocates to be sworn in before carrying their profession. – Whether the oath taken by advocates from KAI is valid or not after the issuance of Supreme Court letter No. 052.	The obligation to be sworn in should not be an obstacle for advocates to do their profession, because laws should not hinder anyone's right to seek work and decent livelihood. Although it is irrational that the ceremony has to be performed in High Court, it is considered constitutional because advocates are formal law enforcer/profession, and it is to protect clients from abuse. High Court must perform the swearing in ceremony notwithstanding which bar association the advocates come from within 2 years since the decision is announced. If the dispute between bar associations is still not resolved, it shall be brought to General Court.

Case No.	Petitioner	Issue	Constitutional Court's opinion
66/PUU-VIII/2010	Private Individual(s) – lawyers, members of a bar association (PERADIN)	Plaintiff provided historical analysis claiming that single bar (IKADIN) was an idea to silence lawyers who actively challenged the government. – Whether with the implementation of single bar contravenes with the principle of pluralism and the principle of freedom of association. – Whether single bar system limit the right of person to choose bar association in accordance with their aspirations. – Whether bar association(s) formed after 2 years as mandated by Law on Lawyers should be recognized.	– The petition nebis in idem with Constitutional Court decision number 014/PUU-IV/2006 – It is possible there are other bar association(s) which do not implement the authorities of Peradi – The choice on Single Bar Association is not contrary with constitution.
71/PUU-VIII/2010	Private Individual(s) – lawyers	– Whether advocates who are members of KAI can perform its duties in courts. – De facto, there are 3 bar associations which consider themselves as valid Bar Association, i.e. Peradi, KAI, and Peradin. Whether the establishment of Peradi as Single Bar Association is legitimate according to the law. – Whether KAI and Peradi are legitimate bar associations according to the law. – Whether the refusal of request for swearing in ceremony by the head of Supreme Court submitted Peradi and KAI are illegal. – Whether 'single bar' system is more compatible than 'multi bar' to accommodate the interests of bar association(s).	The petition *nebis in idem* with Constitutional Court decision number 014/PUU-IV/2006

Case No.	Petitioner	Issue	Constitutional Court's opinion
26/PUU-XI/2013	Private Individual(s) – lawyers	Whether advocates who are performing their task in good faith can not be prosecuted in civil and criminal as mentioned in the Law on Lawyers and law on legal aid (Law No. 16/2011) also applies for advocates who are performing their duties outside of court.	A person giving legal services (advocate or not advocate) can not be prosecuted (either in civil or criminal law) when they are giving legal aid.
103/PUU-XI/2013	Private Individual(s) – lawyer, owner of a law firm	Whether special education as a prerequisite to be an advocate held by bar association can only conducted by Peradi or can also be conducted by other institutions with background in law.	Special education as a prerequisite to be an advocate is held by a bar association as an effort to improve the quality of the profession. There is a possibility for organizations other than Peradi to organize the special education as long as it is under the control of the bar association (as mandated by law).
40/PUU-XII/2014	Private Individual(s) – lawyers	– Whether advocates who passed bar examinations organized by KAI can do their duties in courts even though they are not sworn in by a High Court. – Whether the Supreme Court is discriminating by ordering High Court not to swear in advocates who are not from Peradi. – Whether Supreme Court is acting contrary to Constitutional Court Decision No. 01/PUU-VII/2009.	The petition expired because Plaintiff did not attend hearing.
140/PUU-XII/2014	Private Individual(s)/ Lawyer	Whether the Constitutional Court is authorized to determine time limitation for petition (45 days)	According to Constitutional Court Decision No. 27/PUU-VII/2009, 16 June 2010, the time limitation for petition is 45 days after being published in state gazette of the Republic of Indonesia.

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Summary

Indonesia enacted the Law on Lawyers including its Code of Ethics only 58 years after its proclamation of independence, and only as a larger part of reform of commercial laws. The Law was a requirement agreed between the Indonesian government and the IMF in order for Indonesia to receive a "reform package" from the IMF after the 1997 Asian financial crisis. This financial crisis resulted in President Soeharto's resignation and the so-called period of Reformasi: a movement to eradicate corruption, collusion and nepotism, rampant in Soeharto's New Order, including inside the Indonesian legal system.

Despite the Reformasi, researchers have found that little has changed in the corrupt practices in the legal system, particularly in the judiciary. The anti-corruption movement continues to be the center of attention, and a Corruption Eradication Commission (KPK) has become one of the most prominent institutions in Indonesia. However, there is not much scholarly research on other actors in the legal system than the judiciary and on the role they play in the legal system, including its corrupt practices. This thesis takes on this challenge and looks into the world of Indonesian elite lawyers, how they operate, and what their influence is on the legal system.

In Indonesia the term "elite lawyers" not only refers to lawyers engaged in international, high-income corporate practice, but also to those lawyers who manage to influence the legal, economic and to some extent the political system through their use and manipulation of law. This very important group has been missing in research about the role of law in economic development and globalization in Indonesia.

Lawyers in Indonesia can be divided into different groups, serving different clienteles, doing different work and pursuing different kinds of ideals . What unites them is that they all have to deal with dilemmas resulting from a disparity between two worlds, one globalized, 'modern' law and legal practice with its rational impersonal approach and ideals, the other the local, traditional world of relationality. This thesis analyzes the actions they perform in order to win land rights for corporations and how they use the legal system for this purpose. It shows how certain groups of lawyers not only deploy the weaknesses in the law, but supplement their strategies with the social capital they have obtained in the form of relations of loyalty with judges, court registrars, policemen and prosecutors. The thesis examines how such practices influence the condition of the Rule of Law in Indonesia.

Chapter 1 gives an overview of corporate litigation and how courts accommodate lawyers' strategies by compromising quality in order to meet public demands for efficiency. It locates problems in procedural law, particularly civil procedure. Chapter 2 provides an in-depth analysis of lawyers in Indonesia, how the profession has developed, the training and certification of lawyers, their failure to organize and self-regulate, as well as the compartmentalization in extremely diverging practices, some oriented towards playing along the official rules and ideals of the legal system but evading Indonesian courts, and others oriented towards manipulating the rules. These practices have stunted lawyers' contribution to legal development.

Chapter 3 discusses the typical model of land acquisition by corporations, how land developers are organized, and in what regulatory environment they operate. It then explains the causes of disputes in business relations, notably the confusion concerning the relation between contract law and tort law due to misinterpretations and diverse opinions of jurists. This has resulted in serious problems with the enforcement of agreements. Chapter 4 analyzes the strategies lawyers use before and during litigation, and the strategies related to enforcement.

The findings highlight three main aspects of the condition of the Rule of Law in Indonesia which need special attention for legal reform. First, parties to disputes are not equal before the law and bringing contract or tort claims to the courts does not level the playing field. Second, the issue of corruption indicates the incompatibility of current social norms in business and bureaucratic decision-making on the one hand and law, which is supposed to be rational and impersonal on the other. The lack of clarity of the rules of legal procedure (particularly civil procedure) reinforces this problem. Third, the endeavor to 'free' laws from colonial sources has resulted in an ambiguous status of the general rules on contracts and torts found in the Civil Code. The result is a commercial litigation practice that has many features of a ritual and that is only understandable to lawyers and repeat-litigants, who therefore hold an interest in maintaining the status quo.

As a result of this condition, there is a wide grey area of practices that may be considered unethical but that are not illegal. The thesis argues that we need a rethinking of the kinds of behavior that are considered professionally unethical for lawyers. This thesis posits that when the degree of legal uncertainty in a particular country is high, lawyers (including corporate transactional lawyers) must adhere to stricter ethical standards to promote the rule of law.

To improve legal certainty, reform need not only come from lawyers, but also from judges. Judges need to provide sufficient legal reasoning in their judgments, specifically by explaining their understanding of the facts and why they came into such decisions. This should be accompanied by a codification of civil procedure. For this codification, further research into the existing rules of conduct is still needed.

Samenvatting (Summary in Dutch)

Hoe advocaten geschillen over grond winnen voor bedrijven: juridische strategieën en hun invloed op de rechtsstaat in Indonesië

Pas 58 jaar na het uitroepen van de onafhankelijkheid werd in Indonesië een Wet op de Advocatuur, met daarin een Ethische Code, aangenomen. Deze wet reguleert de rol van advocaten en vormde een onderdeel van de hervorming van handelswetgeving. Deze wet vloeide voort uit een eis van het IMF, waaraan Indonesië moest voldoen om na de Aziatische financiële crisis in 1997 in aanmerking te komen voor leningen. Deze financiële crisis leidde tot het gedwongen aftreden van president Soeharto en tot de zogenaamde periode van Reformasi: een periode van hervormingen van de overheid om corruptie, collusie en nepotisme uit te roeien. Deze drie kwamen veelvuldig voor onder de Nieuwe Orde (Orde Baru) van Soeharto, ook binnen het Indonesische rechtssysteem.

Onderzoekers hebben vastgesteld dat de Reformasi echter weinig verandering heeft gebracht in de corrupte praktijken in het rechtssysteem, met name in de rechterlijke macht. De anticorruptiebeweging staat nog steeds in het middelpunt van de belangstelling en een Commissie tot Uitroeiing van Corruptie (KPK) is een van de meest prominente instituties van Indonesië geworden. Er is echter nauwelijks wetenschappelijk onderzoek gedaan naar andere actoren en hun rol bij de corruptie binnen het rechtssysteem. Dit proefschrift gaat deze uitdaging aan en onderzoekt de wereld van Indonesische elite-advocaten; hoe zij functioneren en wat hun invloed is op het rechtssysteem.

In Indonesië verwijst de term 'elite-advocaten' niet alleen naar goedverdienende advocaten die zich bezighouden met een internationale commerciële praktijk maar ook naar advocaten die in staat zijn om het rechtssysteem, het economische systeem en tot op zekere hoogte ook het politieke systeem te beïnvloeden door hun gebruik en manipulatie van het recht. Deze zeer belangrijke groep ontbreekt in eerder onderzoek naar de rol van het recht bij de economische ontwikkeling en globalisering in Indonesië.

In Indonesië kunnen advocaten worden onderverdeeld in verschillende groepen die voor verschillende soorten cliënten werken, verschillende werkzaamheden verrichten en verschillende idealen nastreven. Wat hen verenigt is dat ze allemaal om moeten gaan met dilemma's die het gevolg zijn van een ongelijkheid tussen twee werelden: aan de ene kant een geglobaliseerde wereld met 'moderne' wetgeving en rechtspraktijk, met een rationele, onpersoonlijke benadering en idealen en aan de andere kant de lokale, traditionele wereld die is gebaseerd op relaties. In dit proefschrift wordt een analyse gemaakt van de activiteiten van advocaten om rechten

op grond voor bedrijven te verwerven en hoe zij het rechtssysteem hiervoor gebruiken. Er wordt aangetoond hoe bepaalde groepen advocaten niet alleen de zwakke plekken in de wet weten te benutten, maar hun strategieën aanvullen met het sociale kapitaal dat zij hebben verworven in de vorm van loyaliteitsrelaties met rechters, de politie en aanklagers. In dit proefschrift wordt onderzocht hoe zulke praktijken de toestand van de rechtsstaat in Indonesië beïnvloeden.

In hoofdstuk 1 wordt een overzicht gegeven van rechtszaken tussen bedrijven en hoe rechtbanken tegemoet komen aan de strategieën van advocaten door kwaliteit op te offeren om te voldoen aan de publieke vraag om efficiëntie. In dit hoofdstuk wordt geconstateerd dat er allerlei problemen in het procesrecht zijn, met name in civiele procedures.

In hoofdstuk 2 wordt een diepgaande analyse gegeven van de advocatuur in Indonesië; hoe het beroep van advocaat zich heeft ontwikkeld, de opleiding en certificering van advocaten, hun gebrek aan organisatie en zelfregulering, alsmede de compartimentering in zeer uiteenlopende praktijken. Sommige daarvan volgen de officiële regels en idealen van het rechtssysteem maar proberen de Indonesische rechtbanken te vermijden, terwijl andere gericht zijn op het manipuleren van de regels. Deze factoren hebben de bijdrage van advocaten aan de ontwikkeling van het recht belemmerd.

In hoofdstuk 3 wordt het typische model voor het verwerven van grond door bedrijven beschreven, hoe landontwikkelaars zijn georganiseerd en in welke regelgevende omgeving zij opereren. Vervolgens worden de oorzaken van geschillen in zakelijke relaties toegelicht, met name de verwarring over de relatie tussen verbintenissenrecht en recht inzake onrechtmatige daad die het gevolg zijn van misinterpretaties en uiteenlopende meningen van juristen. Dit heeft geleid tot ernstige problemen bij de uitvoering van overeenkomsten.

In hoofdstuk 4 wordt een analyse gegeven van de strategieën die advocaten gebruiken voor en tijdens een rechtszaak en van hun strategieën met betrekking tot de uitvoering van rechterlijke beslissingen.

De bevindingen wijzen op drie belangrijke aspecten van de toestand van de rechtsstaat in Indonesië die belangrijk zijn bij rechtshervorming. Ten eerste zijn partijen bij geschillen niet gelijk voor de wet met als gevolg dat bij het indienen van vorderingen wegens wanprestatie of onrechtmatige daad er geen sprake is van een gelijk speelveld. Ten tweede wijst het probleem van corruptie op de onverenigbaarheid van de huidige sociale normen in het bedrijfsleven en bureaucratische besluitvorming enerzijds en de wet, die verondersteld wordt rationeel en niet persoonlijk te zijn, anderzijds. De onduidelijkheid van de regels met betrekking tot juridische procedures (met name civiele procedures) versterkt dit probleem. Ten derde heeft de poging om wetten van hun 'koloniale' oorsprong los te maken geleid tot een dubbelzinnige status van algemene regels inzake contracten en onrechtmatige daad in het Burgerlijk Wetboek. Het resultaat hiervan is een procesvoering die veel kenmerken heeft van een ritueel en alleen

begrijpelijk is voor advocaten en partijen die veelvuldig procederen – en er belang bij hebben om de status quo te handhaven.

Als gevolg van deze situatie is er in Indonesië sprake van een groot grijs gebied van juridische praktijken die als onethisch kunnen worden beschouwd maar niet illegaal zijn. In dit proefschrift wordt betoogd dat er een heroverweging noodzakelijk is welk gedrag van advocaten als professioneel onethisch moet worden beschouwd. In dit proefschrift wordt gesteld dat wanneer de mate van rechtsonzekerheid in een bepaald land hoog is, advocaten (inclusief bedrijfsjuristen) aan strengere ethische normen moeten worden onderworpen om op die manier de rechtsstaat te bevorderen.

Om de rechtszekerheid te verbeteren, moet de hervorming niet alleen vanuit advocaten komen, maar ook vanuit rechters. Rechters moeten in hun uitspraken voldoende juridische argumenten geven, met name door uit te leggen hoe zij de feiten interpreteren en waarom ze tot hun beslissing zijn gekomen. Daarnaast zou er een codificatie van de burgerlijke rechtsvordering moeten plaatsvinden. Voor deze codificatie is nader onderzoek naar de bestaande gedragsregels noodzakelijk.

Ringkasan (Summary in Bahasa Indonesia)

Bagaimana pengacara memenangkan konflik lahan untuk perusahaan: strategi hukum dan pengaruhnya terhadap prinsip negara hukum di Indonesia

Walaupun sesudah Reformasi di Indonesia, para peneliti menemukan cuma sedikit perubahan dari praktek-praktek korupsi di dalam lingkup peradilan, terutama pengadilan. Gerakan anti-korupsi berlanjut menjadi pusat perhatian, dan Komisi Pemberantasan Korupsi telah menjadi salah satu institusi yang paling menonjol di Indonesia. Tetapi tidak banyak riset akademik mengenai para aktor di dalam sistem hukum Indonesia kecuali pengadilan dan peran yang mereka miliki terhadap sistem hukum tersebut, termasuk praktek-praktek korupsi. Tesis ini mengambil tantangan tersebut dan melihat ke dalam dunia pengacara elit Indonesia, bagaimana mereka beroperasi, dan apa pengaruh mereka terhadap sistem hukum Indonesia.

Di Indonesia, istilah "pengacara elit" tidak hanya mengacu kepada para pengacara yang terlibat dalam praktek korporasi internasional dan berpenghasilan tinggi, tetapi juga kepada para pengacara yang dapat mempengaruhi sistem hukum, ekonomi, dan juga politik dengan menggunakan dan memanipulasi hukum. Kelompok yang sangat penting ini selama ini hilang dalam penelitian tentang peran hukum dalam pembangunan ekonomi dan globalisasi di Indonesia.

Pengacara di Indonesia dapat dibedakan menjadi bermacam-macam kelompok, mempunyai klien yang berbeda-beda, mengerjakan pekerjaan-pekerjaan yang berbeda, dan mengejar idealisme-idealisme yang berbeda. Yang menyatukan mereka adalah fakta bahwa mereka semua harus mengatasi dilema-dilema yang muncul dari dua dunia yang berbeda; yang satu dunia global, yang hukum dan praktek hukumnya 'modern' dengan pendekatan dan ideologinya bersifat rasional dan impersonal. Dunia yang satunya adalah dunia lokal, tradisional dan relasional. Tesis ini menganalisa tindakan-tindakan yang mereka lakukan untuk memenangkan hak atas tanah untuk perusahaan, dan bagaimana mereka menggunakan sistem hukum untuk tujuan tersebut. Tesis ini menunjukkan bagaimana sebagian kelompok-kelompok pengacara bukan hanya menggunakan kelemahan-kelemahan dan celah-celah hukum, tetapi menambahkan strategi-strategi mereka dengan *social capital* yang telah mereka bangun berupa relasi-relasi kesetiaan dengan para hakim, panitera, polisi dan jaksa. Tesis ini membahas bagaimana praktek-praktek tersebut mempengaruhi kondisi negara hukum di Indonesia.

Bab 1 memberi gambaran mengenai litigasi korporasi dan bagaimana pengadilan mengakomodasi strategi-strategi pengacara dengan berkompromi pada kualitas untuk memenuhi efisiensi yang menjadi tuntutan publik. Ditemukan masalah-masalah dalam hukum acara, terutama acara

perdata. Bab 2 menyediakan analisis mendalam tentang pengacara di Indonesia, bagaimana profesi tersebut berkembang, pelatihan dan sertifikasi pengacara, kegagalan mereka dalam berorganisasi dan mengatur diri sendiri, juga kompartementalisasi menjadi praktek-praktek yang sangat berbeda, sebagian berorientasi kepada bermain sesuai aturan dan idealisme sistem hukum yang resmi tetapi menghindar dari peradilan Indonesia, dan sebagian berorientasi kepada memanipulasi aturan. Praktek-praktek tersebut telah menghalangi kontribusi para pengacara terhadap perkembangan hukum.

Bab 3 mendiskusikan model khas akuisisi lahan oleh korporasi, bagaimana pengembang lahan terorganisir, dan dalam lingkungan regulasi seperti apa mereka beroperasi. Bab tersebut kemudian menjelaskan alasan-alasan sengketa dalam hubungan bisnis, terutama kebingungan mengenai hubungan antara hukum kontrak (wanprestasi) dan perbuatan melawan hukum yang disebabkan oleh banyaknya salah tafsir dan pendapat ahli hukum yang bermacam-macam. Hal ini telah menyebabkan masalah serius tentang pelaksanaan dan pemenuhan perjanjian-perjanjian. Bab 4 menganalisa strategi-strategi yang digunakan pengacara sebelum dan selagi litigasi, dan strategi-strategi sehubungan dengan penerapan.

Temuan-temuan dalam tesis ini memperlihatkan tiga aspek kondisi negara hukum Indonesia yang memerlukan perhatian khusus untuk reformasi hukum. Pertama, para pihak yang bersengketa tidak sama kedudukannya di mata hukum dan berperkara mengenai wanprestasi atau perbuatan melawan hukum tidak meratakan kedudukan mereka. Kedua, masalah korupsi mengindikasikan adanya ketidakcocokan norma sosial dalam pengambilan keputusan bisnis dan birokratik di satu sisi, dan hukum yang seharusnya rasional dan impersonal di sisi lainnya. Ketidakjelasan aturan hukum acara (khususnya acara perdata) memperkuat masalah ini. Ketiga, usaha untuk 'membebaskan' hukum dari sumber-sumber kolonial telah menghasilkan status yang ambigu atas aturan-aturan umum mengenai kontrak dan perbuatan melawan hukum di dalam Kitab Undang-undang Hukum Perdata. Hal ini selanjutnya menghasilkan praktek litigasi komersil yang mempunyai banyak karakter yang seperti ritual, dan hanya dapat dimengerti oleh para pengacara dan orang-orang yang sering berperkara, yang karenanya mempunyai kepentingan untuk mempertahankan status quo.

Karena kondisi tersebut, ada area abu-abu yang luas mengenai praktek-praktek yang dapat dianggap tidak etis tetapi tidak melanggar atau melawan hukum. Tesis ini berargumen bahwa kita perlu berpikir kembali tentang macam-macam tingkah laku yang dianggap tidak etis secara profesional untuk para pengacara. Tesis ini berpendapat bahwa jika tingkat ketidakpastian hukum di suatu negara tinggi, pengacara (termasuk pengacara korporat dan non-litigasi) harus membangun kesadaran etika yang lebih kuat untuk ikut mempromosikan prinsip negara hukum.

Untuk meningkatkan kepastian hukum, perubahan tidak cuma perlu datang dari sisi pengacara, tetapi juga dari hakim. Hakim perlu memberikan

alasan hukum (*legal reasoning*) yang cukup dalam putusan-putusannya, khususnya dengan menjelaskan pengertian mereka tentang fakta-fakta dalam suatu perkara dan bagaimana mereka mencapai keputusan-keputusan tersebut. Ini harus dibarengi dengan kodifikasi hukum acara perdata. Untuk kodifikasi ini, masih diperlukan penelitian lebih lanjut tentang aturan perilaku yang ada.

Curriculum Vitae

Santy Kouwagam obtained a bachelor degree in law from Universitas Hasanuddin in her hometown Makassar. She went to the United States in 2007 to further study law and obtained a master's degree in law (LL.M) cum laude from the University of Pittsburgh. There she studied law by practicing it under the supervision of Prof. Harry J. Gruener at the university's Family Law Clinic, and spent most of her time in the courthouse. After her studies in Pittsburgh, she went back to Indonesia to work at a private commercial law firm in Jakarta. In 2012 she came to Leiden Law School of Leiden University, and started her PhD research at the Van Vollenhoven Institute while still working remotely for the firm. From her work at the firm, she gained experiences in handling cross-border disputes and commercial transactions, and the drive to contribute to the development of the Indonesian legal system by writing this book. She is the founder of Stichting Socio-Legal Consulting, a non-profit organisation providing legal aid for individuals and companies with ties to Indonesia.

In the range of books published by the Meijers Research Institute and Graduate School of Leiden Law School, Leiden University, the following titles were published in 2019 and 2020:

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