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

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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;

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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

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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).