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

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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.