



MONASH University
Business and Economics

Workplace and Corporate Law Research Group

Working Paper No. 19

September 2012

**EVOLUTION OF THE CORPORATE FORM IN INDONESIA: AN EXPLORATION
OF LEGAL INNOVATION AND STAGNATION**

Petra Mahy

The Workplace and Corporate Law Research Group (WCLRG) is a research concentration within the Department of Business Law & Taxation, Faculty of Business & Economics, at Monash University. It has been in operation since March 2008, having previously operated as the Corporate Law and Accountability Research Group (CLARG) since November 2005.

WCLRG invites the submission of papers for publication in its Working Paper Series. Submissions on workplace relations and employment law, labour market regulation, corporate governance, corporate social responsibility, and the intersections between labour law and corporate law are welcomed. For details, go to:

<http://www.buseco.monash.edu.au/blt/wclrg/working-papers.html>

EVOLUTION OF THE CORPORATE FORM IN INDONESIA: AN EXPLORATION OF LEGAL INNOVATION AND STAGNATION

Petra Mahy*

Abstract

This paper examines in detail the long historical evolution of the company form and company law in Indonesia from the colonial period through to the present. The paper engages with existing research on the evolution of corporate law and explanations for the differences between patterns of legal innovation in origin and transplant countries. This research finds some 'legal origins' effects in the ways that Indonesian company law has developed, but that patterns of change have been significantly different to that of its former coloniser, the Netherlands. Other mechanisms of continuity and change are observed including the impacts of 'colonial legal history' and of informal modes of business regulation.

1. Introduction

Discussion of the historical development of company law in Indonesia almost inevitably remarks on the fact that the law remained unaltered for almost 150 years after the corporate form was first introduced by the Dutch Commercial Code in 1848.¹ The scant 21 articles in the Commercial Code that enabled and lightly regulated the limited liability company, together with the largely ignored 1939 ordinance which established an indigenous joint stock company, survived until 1995 when a new and far more detailed company law was finally introduced. Some amendments to the company law were most recently made in 2007. Indonesia also now has a non-mandatory Code of Good Corporate Governance which was first introduced in 1999 and has since been amended a couple of times. Indonesia has thus undergone comparatively little innovation over time in its formal company law.²

* Dr Petra Mahy is a Research Fellow in the Department of Business Law and Taxation, Monash University, Australia. This paper forms a part of a larger research project studying the comparative development of labour law and company law in the Asia-Pacific region: Australian Research Council Discovery Project (DP1095060) titled 'Legal Origins: The Impact of Different Legal Systems on the Regulation of the Business Enterprise in the Asia-Pacific Region'. The Chief Investigators on the project are Professor Richard Mitchell (Monash University), and Professor Ian Ramsay, Associate Professor Sean Cooney and Professor Peter Gahan (The University of Melbourne). I additionally thank Andrew Rosser and Matthijs de Jongh for assistance with sources, and Benny Tabalujan and David Linnan for advice. Any errors are the responsibility of the author.

¹ See, e.g., BENNY TABALUJAN, *INDONESIAN COMPANY LAW: A TRANSLATION AND COMMENTARY* 18 (1997); Sudargo Gautama, *Recent Developments Concerning Investment in Indonesia (with Special Reference to the New Company Law 1995)*, 1 SING. J. INT'L & COMP. L. 117, 130 (1997); RACHMADI USMAN, *DIMENSI HUKUM PERUSAHAAN PERSEROAN TERBATAS [DIMENSIONS OF LIMITED LIABILITY COMPANY LAW]* 2 (2004).

² For comparison, see the countries covered in: Katharina Pistor, Yoram Keinan, Jan Kleinheisterkamp & Mark D. West, *Evolution of Corporate Law: A Cross-Country Comparison*, 23 U. PA. J. INT'L ECON L. 791 (2002)

There has been increased interest in the last decade and a half in trying to understand different patterns in company law around the world and explaining how this diversity has developed. There has also been additional interest in the character of company law and its effects in Asia since the Asian Financial Crisis of 1997–98, which was largely attributed to poor corporate governance in that region, including in Indonesia.³ Some provocative and influential research in the late 1990s contended that the particular family that a legal system belongs to, that is whether it is of common law or civil law origin, has long-term effects on the development of company law.⁴ This ‘legal origins’ argument, based on comparative quantitative measures of legal protection of minority shareholders, concluded that common law countries have higher levels of shareholder protection which encourages investment and in turn results in greater market capitalisation. This research has inspired further comparative quantitative studies of corporate law,⁵ as well as a great deal of critical responses based around arguments that politics, economics, culture and colonial histories play important roles in determining the path of company law development in particular jurisdictions, and may override any legal origins effects.⁶

The legal origins argument was based on quantitative ‘point in time’ methodology which made assumptions about historical trajectories (path dependencies) of legal development, and raised interest in tracing continuity and change in company law style and substance through

[hereinafter Pistor et al.]; and in the related work: Katharina Pistor, Yoram Keinan, Jan Kleinheisterkamp & Mark D. West, *Innovation in Corporate Law*, 31 J. COMP. ECON. 676 (2003). All the countries studied by Pistor et al. (France, Germany, UK, US, Spain, Chile, Columbia, Japan, Israel and Malaysia) have had statutory rates of change over time greater than Indonesia.

³ For examples of post-Asian Financial Crisis studies of corporate governance in Asia, see: Simon Johnson, Peter Boone, Alasdair Breach & Eric Friedman, *Corporate Governance in the Asian Financial Crisis*, 58 J. FIN. ECON. 141 (2000); Demetra Arsalidou & Margaret Wang, *Difficulties with Enforcing Western Standards of Corporate Governance in Asia*, 16 EUR. BUS. L. REV. 329 (2005); Stijn Claessens & Joseph P.H. Fan, *Corporate Governance in Asia: A Survey*, 3 INT’L REV. FIN. 71 (2002); CORPORATE GOVERNANCE AND FINANCE IN EAST ASIA: A STUDY OF INDONESIA, REPUBLIC OF KOREA, MALAYSIA, PHILIPPINES AND THAILAND (Juzhong Zhuang et al. eds., 2001).

⁴ The ‘legal origins’ hypothesis originated with the work of La Porta et al. See, Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Schleifer & Robert W. Vishny, *Legal Determinants of External Finance*, 52 J. FIN. 1131 (1997); Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Schleifer & Robert W. Vishny, *Law and Finance*, 106 J. POL. ECON. 1113 (1998).

⁵ See, e.g., John Armour, Simon Deakin, Priya Lele & Mathias Siems, *How do Legal Rules Evolve? Evidence from a Cross-Country Comparison of Shareholder, Creditor and Worker Protection*, 57 AM. J. COMP. L. 579; Helen Anderson, Michelle Welsh, Ian Ramsay & Peter Gahan, *The Evolution of Shareholder and Creditor Protection in Australia: An International Comparison*, 61 INT’L & COMP. L. Q. 171 (2012).

⁶ See, e.g., Mark J. Roe, *Legal Origins, Politics and Modern Stock Markets*, 120 HARV. L. REV. 460 (2007); John W. Cioffi, *Legal Regimes and Political Particularism: An Assessment of the “Legal Families” Theory from the Perspectives of Comparative Law and Political Economy*, 2009 BYU L. REV. 1501 (2009). See further the original authors’ response to criticisms of the legal origins theory: Rafael La Porta, Florencio Lopez-de-Silanes & Andrei Schleifer, *The Economic Consequences of Legal Origins*, 46 J. ECON. LIT. 285 (2008).

time. Some leading research in this area is by Katharina Pistor and colleagues (2002, 2003).⁷ This study examined the evolution of corporate law in four origin and six transplant countries from the time of its introduction through to the early 2000s. It used a set of open-ended legal indicators covering core areas of corporate law including existence of the company, governance structures and corporate finance. The study was based on an analysis of developments in statutory law. The selected countries of ‘origin’ in the study, that is, countries representative of ‘the most influential legal systems in the world’,⁸ were France, Germany, England and the United States.⁹ The remaining six countries studied; Chile, Columbia, Israel, Japan, Malaysia and Spain, were selected as representatives of countries which had received their corporate laws either directly or indirectly from one of the origin countries.¹⁰

Pistor et al. observed distinctly different patterns of statutory company law change between the origin and transplant countries. Their discussion begins with the early evolution of the conditions of entry (corporate existence) in the four origin countries. The important initial role of the state to control entry and to grant limited liability to companies was noted. The discussion then observed that with the gradual relinquishing of the state’s role, ‘key control rights’ concerning the existence of the corporate form, its governance and its finance arrangements in some countries shifted to corporate controllers. It was noted that in England, control across all three categories of corporate law indicators lay predominantly with shareholders, whereas in the US most control was vested in the directors of the corporate body. In the two continental European countries, Germany and France, control rights continued to be determined more by legal prescription.

How these ‘control rights’ were allocated in each system had ‘implications for the *flexibility* of the corporation to be able to respond to a changing environment’.¹¹ In jurisdictions where control rights were mandatorily allocated, as occurred in the civil law jurisdictions, fewer legal innovations were observed. In the more flexible systems of the common law countries,

⁷ Pistor et al., *The Evolution of Corporate Law*, *supra* note 2; Katharina Pistor, Yoram Keinan, Jan Kleinheisterkamp & Mark D. West, *Evolution of Corporate Law and the Transplant Effect: Lessons from Six Countries*, 18 WORLD BANK RESEARCH OBSERVER 89 (2003). A related work is Pistor et al., *Innovation in Corporate Law*, *supra* note 2.

⁸ Pistor et al., *supra* note 2, at 794.

⁹ Pistor et al. treat the US as an origin country because, although it received its legal system as a transplant from England, since the late eighteenth century it has developed sufficiently independently to classify it as an origin jurisdiction.

¹⁰ Pistor et al., *supra* note 2, at 794.

¹¹ *Id.*, at 829.

particularly where control resided with management, complementary governance devices tended to emerge to protect shareholders, including ‘exit rights’, judicial protection and securities regulation. The degree of flexibility of a system, Pistor et al. argue, offers a more robust explanation for the superior economic performance of common law countries compared to civil law countries than those arguments that place emphasis on the differences in rules of minority shareholder protection. In other words, they contend that ‘good’ company law is that which displays a comparatively high rate of incremental innovation over time.

Pistor et al. then demonstrate that transplant countries show quite different patterns of legal development from those of origin countries. In other words, notwithstanding the implications of some of the work grounded in legal origins, the authors’ argument is that even within similar legal families, the evolution of corporate law in transplant countries will not necessarily follow the same path as that of its relevant country of origin.¹² The path of company law evolution may be affected by its legal reception in the borrowing country, and the responses of various actors including law makers, legal agents and the law’s ultimate users.¹³ How this process unfolds, how the participants learn to deal with the new law, and the extent to which they develop institutions which are complementary to it, may all impact upon the law’s adaptability to its environment.

Pistor et al. find that while there are some features of legal origins which have influenced the evolution of corporate law in the six transplant countries (for example, the initial legal conditions established for the creation of corporate entities and some legal family-based differences in the degree of flexibility in the law), overall those countries have tended to follow their own, different, trajectories of development. They observed two distinct patterns in transplant countries. Firstly, some, such as Israel, Malaysia and Japan, displayed lengthy periods of legal ‘lethargy’ or ‘stagnation’ despite substantial economic developments. The authors suggest this pattern is due to formal law being unresponsive to political and economic change and to a process of creative destruction and reinvention of corporate law having not taken hold. The second pattern observed is ‘erratic change’, where, in countries such as Spain and Columbia, the law was to some extent responsive to socio-economic changes but bold rather than incremental moves often led to unintended consequences and further reactionary laws. Further, due to this lack of adaptation in corporate law in transplant countries, in

¹² Pistor et al., *supra* note 2, at 797.

¹³ *Id.*

general terms they correspondingly have had little recourse to the set of alternative control devices which have evolved in the US and England as complements to managerially-controlled corporate flexibility.¹⁴ Overall, the authors conclude that legal transplants ‘cast a long shadow on legal institutions’,¹⁵ although they note that some of the transplant countries have recently shown some signs of developing independent processes of adaption in their corporate laws.

Pistor et al.’s framework thus predicts that formal company law in transplant countries will either stagnate or experience erratic change particularly in earlier periods of its development, and that rates of innovation will have greater impact on the character of the law compared to any residual influence of ‘legal origin’. Although Pistor et al.’s insights have been influential, it appears that there have not been any directly inspired historical studies of company law in other jurisdictions based on their framework.¹⁶ There is a need for more empirical evidence relating to Pistor et al.’s framework and to the variety of mechanisms through which transplant systems may borrow and modify their corporate laws.¹⁷

This paper aims to test Pistor et al.’s propositions in relation to Indonesia. Firstly, this paper presents a law-centred account of the long historical evolution of the corporate form in Indonesia within its economic and political history context, and where possible, it also provides a description of the outcomes of the various laws and how they have been used. It aims to uncover reasons for the pathway(s) that Indonesian company law has taken and in particular how it has come to have so few formal law changes. The paper generally adopts the methodology and insights of Pistor et al., but includes much more detail in this one country study than is employed in their comparative work. It extends the analysis to some factors that

¹⁴ *Id.*, at 858-859.

¹⁵ Pistor et al., *Evolution of Corporate Law and the Transplant Effect*, *supra* note 7, at 94.

¹⁶ Works that have noted with approval Pistor et al.’s insights regarding company law change include: Randall Morck & Lloyd Steier, *The Global History of Corporate Governance: An Introduction*, in *A HISTORY OF CORPORATE GOVERNANCE AROUND THE WORLD: FAMILY BUSINESS GROUPS TO PROFESSIONAL MANAGERS* (Randall Morck ed., 2005); JOHN S. GILLESPIE, *TRANSPLANTING COMMERCIAL LAW REFORM: DEVELOPING A ‘RULE OF LAW’ IN VIETNAM* (2006); Mathias M. Siems, *Shareholder Protection Around the World (Leximetric II)*, 33 *DEL. J. CORP. L.* 111 (2008); Afra Afsharipour, *Corporate Governance Convergence: Lessons from the Indian Experience*, 29 *NW. J. INT’L L. & BUS.* 335 (2009); F. A. Gevurtz, *The Globalization of Corporate Law: The End of History or a Never-Ending Story?* 86 *WASH. L. REV.* 475 (2011).

¹⁷ Simon Deakin, *Legal Origin, Juridical Form, and Industrialisation in Historical Perspective: The Case of the Employment Contract and the Joint Stock Company*, 7 *SOC.-ECON. REV.* 35, 52-53 (2009). *See also* ROB McQUEEN, *A SOCIAL HISTORY OF COMPANY LAW: GREAT BRITAIN AND THE AUSTRALIAN COLONIES 1854-1920* 14 (2009) (noting that there are few historical studies of the dispersal of the limited liability corporate form around the world as it occurred through colonisation or through trading links with imperial powers).

fall outside their identified core areas of formal corporate law and to informal mechanisms of business regulation. The paper finds that the evolution of formal company law in Indonesia largely fits the first of the two patterns of company law development in transplant countries observed by Pistor et al., that is, it has displayed a remarkably long period of legal stagnation.

Indonesia may be very broadly classified as belonging to the French civil law family, but this is complicated by a number of factors. The foundations for Indonesia's legal system were laid down during the colonial era when many Dutch laws and concepts were imported. However, many elements of Indonesia's legal system inherited from the Netherlands Indies did not correspond directly with the system in the Netherlands.¹⁸ In particular, the race-based plural legal system instituted by the Dutch colonial regime had repercussions over a lengthy period of time. *Adat* (customary law and practices) and Islamic law continued to apply to large sections of the population in certain private law matters. Classifying Indonesia as a civil law heritage country has been further complicated by some more recent transplants of common law-type concepts and practices such as the appointment of non-career (*ad hoc*) judges and allowance of dissenting judgements in the newly established specialist courts.¹⁹

Indonesia received its original company law as a direct copy of the Dutch Commercial Code and since then has clearly experienced a very long period of legal stagnation with only relatively recent evidence of a greater level of adaptability to varying political and economic circumstances. Indonesia's formal company law has not tended to follow the pattern of change undertaken in the Netherlands, although there are still discernible vestiges of its Dutch inheritance including a tendency towards mandatory regulation rather than allowance of flexibility. Although, as noted above, the case of Indonesia broadly fits the pattern observed by Pistor et al., the more detailed historical approach used in this paper reveals a number of critically important additional aspects to its formal company law development. These include the consequences of the long process of dismantling the inherited race-based plural legal system, the roles that political and economic ideologies have played in decisions about company law reform, competing emphasis placed on reform of the laws regulating

¹⁸ See Daniel Lev, *Colonial Law and the Genesis of the Indonesian State*, 40 *INDONESIA* 57 (2000). (demonstrating that what Indonesia inherited was 'Dutch colonial law' and not just 'Dutch law' with particular reference to the plural legal system).

¹⁹ See Gary F. Bell, *Indonesia: The Challenges of Legal Diversity and Law Reform*, in *LAW AND LEGAL INSTITUTIONS OF ASIA: TRADITIONS, ADAPTATIONS AND INNOVATIONS* 262 (E. Ann Black & Gary F. Bell eds., 2011) (giving a general account of the plural legal system in Indonesia and the recent introduction of specialist courts).

cooperatives and state-owned enterprises (SOEs), and aspirational nation-building aspects of Indonesia's company law. The case of Indonesia suggests that Pistor et al.'s dual categorisation of 'origin' and 'transplant' countries is too general. Understandings of patterns of company law development in 'transplant' countries should be refined to take account of post-colonial and developing economy status. The effects of colonial legal history as well as 'legal family' may be highly determinative of company law development. Company law may play other roles in such countries beyond enabling the corporate form and allocating control rights, and there may be additional factors, other than the original transplant, which impact on company law development through time.

The paper then moves a further step beyond Pistor et al.'s focus on statutory law by paying particular attention to the wide gap between law and practice in Indonesia and the development of some 'autonomous' forms of business enterprise outside formal legislation. This additional analysis further highlights the non-regulatory roles that company law has played in Indonesia and allows discussion of the relationship between formal law and more informal modes of business regulation. While Indonesia's formal company law experienced such a long period of stagnation, other informal mechanisms arose independently to fill at least part of the regulatory vacuum. That is, innovation was occurring outside the formal law. The case of Indonesia suggests, therefore, that informal modes of business regulation should also be carefully considered in historical approaches to company law development, particularly in developing countries where formal law may play lesser roles than in developed economies. This supports the argument made above that more nuanced understandings of 'transplant' countries as a category in relation to company law change is needed in order to take account of the varying roles for both formal law and informal regulation in postcolonial/developing countries.

2. The Historical Evolution of Company Law in Indonesia

The Indonesian archipelago's interaction with Dutch colonial powers began with the arrival of a company – one of the first great limited liability companies in the world. The United Dutch East India Company (VOC) traded in the Indonesian islands from 1602 to 1796 and eventually muscled out English and Portuguese competitors for the trade in spices and other products. The VOC's primary aims were pioneering trade networks and the security of its

trading posts. It originally adapted to the existing political and economic system and simply creamed off levies and tributes from the top of local hierarchies, but over time it established a legal and administrative regime that supported its trade monopolies. Private enterprise by VOC merchants was forbidden, although corrupt officials carried on lively side businesses.²⁰ The VOC was disbanded due to bankruptcy in 1799 and its role in the Indies was assumed by the Dutch Government, which eventually imposed colonial government on most parts of the Indonesian archipelago, although its influence in some areas outside Java was weak. Save for a short period of British governance (1811–1816), the Dutch retained control up until the Japanese occupation during World War II. Indonesian nationalists declared Independence in August 1945 as soon as the Japanese departed, and after eventually winning the War of Independence against the returning Dutch forces, Indonesia became a fully independent state in 1949.

2.1 The Dutch Commercial Code, 1848

The first company law to have effect in the Netherlands Indies was the Dutch Commercial Code.²¹ It came into force on 1 May 1848 together with a suite of other new legislation including the Dutch Civil Code and General Provisions on Legislation that established the race-based pluralist legal system in the colony.²² Redrafted Napoleonic Codes had come into force in the Netherlands in August 1838.²³ The Concordance Principle generally presumed that Netherlands law would be extended to its colonies, and a commission was appointed in 1839 to plan for the introduction of the Civil and Commercial Codes to the Netherlands Indies. However, one important question to be decided was the position of *adat* (customary law) under the proposed introduction. European merchants argued that the new legislation should apply to the indigenous population as this would improve legal certainty and promote business expansion. In the end, the argument that extending European law to the indigenous population might lead to discontent or revolt won out, and the Commercial and Civil Codes

²⁰ Justus M. van der Kroef, *Colonial Continuity in Indonesia's Economic Policy*, 14 AUSTL. OUTLOOK 5, 6 (1960).

²¹ In the Dutch this is the *Wetboek van Koophandel*. It was directly accepted in the Netherlands Indies via *Staatsblad* no. 23/1847.

²² JOHN BALL, *INDONESIAN LEGAL HISTORY 1602-1848* 223 (1982).

²³ E. J. J. VAN HEIJDEN & W.C.L. VAN DER GRINTEN, *HANDBOEK VAN DER NAAMLooZE VENNOOTSCHAP NAAR NEDERLANDSCH RECHT [HANDBOOK OF THE LIMITED LIABILITY COMPANY IN NETHERLANDS LAW]* 10-14 (1946). Despite earlier drafts that attempted to make the Codes more 'Dutch' in orientation, the Codes of 1838 were quite consistent with their Napoleonic predecessors. Hence, the Dutch Commercial Code of 1838 was essentially a French origin transplant. *See*: R.C.H. Lesaffer, *A Short Legal History of the Netherlands*, in *UNDERSTANDING DUTCH LAW* 31, 57 (H.S. Taekema ed., 2004).

were only applied to Europeans in the colony. *Adat* law, in all its variations across ethnic groups, was to continue to be valid for all indigenous private law matters.²⁴ Later changes were to bring Chinese and other ‘Foreign Orientals’ under the European Codes.

The Commercial Code contained a sparse 21 articles (arts. 36–56) relating to the limited liability company (*Naamloze Vennootschap (NV)*).²⁵ These articles set out requirements for government permission for incorporation, established the division of corporate capital into shares and provided that the company should specify a limited lifespan with the possibility of extension. The Code provided that the company would be managed by directors, with or without the oversight of a Board of Commissioners, and provided that directors would not be personally liable to third parties for company contracts. Directors were required to produce annual reports and report if a loss was made of more than 50% of the capital. If a loss of more than 75% of the capital occurred then the company was to be automatically dissolved. Shareholders were limited to six votes at general meetings in companies with 100 or more shares or to three votes in companies with fewer than 100 shares. The Code contained little else beyond these basic principles and hence only intervened in company governance in a confined set of circumstances. This generally accords with Pistor et al.’s observation that original company laws, in both civil and common law jurisdictions, were merely enabling with little further regulation.²⁶

The Commercial Code was introduced in the Netherlands Indies during the *Cultuurstelsel* or Cultivation System period and hence there was little immediate impact in terms of formation

²⁴ BALL, *supra* note 22, at 197-207. See CARL-BERND KAEHLIG, GESELLSCHAFTSRECHT IN INDONESIA: AUTONOME UND NATIONALE GESELLSCHAFTSFORMEN [COMPANY LAW IN INDONESIA: AUTONOMOUS AND NATIONAL COMPANY FORMS] 277 (1986) (describes Aceh, Bugis and Minang *adat* business forms and finds that they were mainly characterised by product and profit sharing, an absence of company assets, limited duration and often with one active and one or more passive partners). Dutch commentators tended to dismiss those *adat* forms as being inadequate in how they dealt with the issue of legal personality, see, e.g., Jb. Zeylemaker Jzn, *Indlandsche Rechtspersonen [Native Legal Persons]*, 23 KOLONIALE STUDIEËN 207 (1939).

²⁵ In addition to the limited liability company a number of other business forms were made available (at the time only to Europeans) through the Dutch Codes. Book III of the Civil Code provides for the *maatschap* (*perserikatan perdata*) which is a contractual partnership usually used for a single business endeavour where the partners act under their own names. The Commercial Code (Chapter III, arts 16-18) also established the *firma*, an unlimited partnership where each partner has full liability and business is conducted under a trade name. Finally, the Commercial Code (art. 19) also established the *Commanditaire Vennootschaap (CV)*, a variety of *firma* which is a limited partnership of ordinary and silent partners, where only the ordinary partners bear personal liability. The CV in particular continues to be very popular for small and medium sized businesses in Indonesia (at least for those that choose to have a form of legal entity status rather than operating informally) due to it being quite easy to establish.

²⁶ Pistor et al. *The Evolution of Corporate Law*, *supra* note 2, at 802, 814.

of local companies. The Cultivation System was established in 1830 in order to bring rapid financial returns to the Netherlands. Farmers in Java were given a choice of paying a land tax of produce or to allot a percentage of their land to export crops, especially coffee and sugar, to be sold at fixed prices. This was a colonial state system of exploitation which actively discouraged private sector involvement.²⁷ All private exploitation of minerals and oil was also precluded and private shipping also restricted by the monopoly of the Dutch import and export agency, the Nederlandsche Handel-Maatschappij (NHM).²⁸ Only a handful of other colonial companies including the Javasche Bank operated during this era.²⁹ There was some incorporation activity in the late 1850s and 1860s,³⁰ and by 1870 there were 23 banking and insurance companies and eight transportation companies in the Netherlands Indies.³¹

The Netherlands Indies economy was opened to private foreign investment in 1870. This 'Liberal Policy' coincided with the Dutch colonial regime's expansion of power beyond Java into the Outer Territories and led to the introduction of capital intensive plantation agriculture particularly on Sumatra's East Coast.³² This liberalisation of the colonial economy brought the limited liability company into more widespread use in the Netherlands Indies. Incorporation into limited companies was the means for initial flows of foreign, mainly Dutch, investment into the colony. From the 1870s, dozens of companies were incorporated each year, and after 1896 the numbers grew to more than 100 each year, reaching a peak in 1910

²⁷ J. A. M. Caldwell, *Indonesian Export and Production from the Decline of the Culture System to the First World War*, in *THE ECONOMIC DEVELOPMENT OF SOUTHEAST ASIA: STUDIES IN ECONOMIC HISTORY AND POLITICAL ECONOMY*, 72, 73 (C. D. Cowan ed., 1964). Although note that the Cultivation System did allow some private capital formation as government sugar contractors, retired government agents and private agency houses were able to expand into areas that the colonial state was not interested in, see Robert van Niel, *The Legacy of the Cultivation System for Subsequent Economic Development*, in *INDONESIAN ECONOMIC HISTORY IN THE DUTCH COLONIAL ERA* 67, 86 (Anne Booth, W.J. O'Malley & Anna Weidemann eds., 1990).

²⁸ Caldwell, *supra* note 27, at 74. The NHM was founded in 1824 by the King primarily to be the import and export agency for the Netherlands throughout the world, but particularly for the Netherlands Indies.

²⁹ Von J. N. F. M. à Campo, *Strength, Survival and Success. A Statistical Profile of Corporate Enterprise in Colonial Indonesia 1883-1913*, 1 *JAHRBUCH FÜR WIRTSCHAFTSGESCHICHTE* 45 (1995); John O. Sutter, *Indonesianisasi: An Historical Survey of the Role of Politics in the Institutions of a Changing Economy from the Second World War to the Eve of the General Elections* 87 (1959) (unpublished Ph.D. dissertation, Cornell University).

³⁰ À Campo, *supra* note 29, at 46.

³¹ *Id.* at 48-49.

³² The plantation system on Sumatra's East Coast was generally financed by companies based in the Netherlands rather than in the Netherlands Indies. These companies would employ a salaried plantation manager. Profits were made through cheap land and labour, and from 1880, the Coolie Ordinances, with penal sanctions for workers who breached their contracts, supported this profiteering. One of the first companies incorporated under the Liberal Policy was the Deli Maatschappij in 1869 which was established to exploit the new planting opportunities on Sumatra's East Coast. It was backed by the NHM. This was followed by the establishment of many small tobacco firms, but many of these went bankrupt in 1891 when the tobacco market collapsed. See ANN LAURA STOLER, *CAPITALISM AND CONFRONTATION IN SUMATRA'S PLANTATION BELT, 1870-1979* 16-17 (1985).

when 326 new corporations were founded.³³ Many of these companies were short-lived, while others grew to become permanent institutions in the colony.³⁴ There were 2,400 incorporated companies in the Netherlands Indies in 1914. This number increased to around 3,700 in 1920 and then declined due to the Great Depression to 2,800 in 1930, and to fewer than 2,200 in 1940.³⁵ Data from 1930 show that corporate activity in the Netherlands Indies was dominated by Dutch corporations with headquarters in the Netherlands. These held 70% of registered equity, compared to 14% of Netherlands Indies firms. Some 4% of corporations were owned by ethnic Chinese, and British owned companies held almost 10% of the total.³⁶ Indigenous owned companies were very rare.³⁷ Corporate activities in the colony were supported by the establishment of a small securities exchange in Batavia in 1912. This closed during the First World War but was revived in 1925 with additional exchanges in Surabaya and Semarang.

The applicability of the Commercial Code to the Chinese population had implications for the use of the NV form during the colonial era. As noted, originally the Commercial Code was only applied to Europeans. The Commercial and Civil Codes were extended to the Chinese population in Java in 1855³⁸ as a way of protecting Europeans in their commercial transactions with the Chinese traders who were considered to have questionable business practices.³⁹ However, this extension was apparently not strictly enforced.⁴⁰ While some Chinese traders saw the benefits of limited personal liability, and used the European business form to their advantage, registration of Chinese companies was uncommon.⁴¹ Chinese

³³ À Campo, *supra* note 29, at 47.

³⁴ J. THOMAS LINDBLAD, FOREIGN INVESTMENT IN SOUTHEAST ASIA IN THE TWENTIETH CENTURY 71 (1998).

³⁵ J. THOMAS LINDBLAD, BRIDGES TO NEW BUSINESS: THE ECONOMIC DECOLONIZATION OF INDONESIA 22 (2008).

³⁶ *Id.*, at 22.

³⁷ See Maarten Kuitenbrouwer & Huibert Schijf, *The Dutch Colonial Business Elite at the Turn of the Century*, 22 ITINERARIO 61, 63 (1998) (stating that only 0.8% of companies in the Netherlands Indies in 1902 were Indonesian owned). Note that there is some ambiguity about this data given that indigenous businesses did not officially have access to the NV form under the Commercial Code until 1917. It may that this data refers to companies formed by those indigenous people who had been equated with European legal status under an 1871 law.

³⁸ *Staatsblad* no. 79/1855.

³⁹ Charles A. Coppel, *The Indonesian Chinese: "Foreign Orientals", Netherlands Subjects, and Indonesian Citizens*, in LAW AND THE CHINESE IN SOUTHEAST ASIA 133 (M. Barry Hooker ed., 2002); P. TJIOOK LIEM, DE RECHTPOSITIE DER CHINEZEN IN NEDERLANDS-INDIË, 1848-1942 [THE LEGAL POSITION OF THE CHINESE IN THE NETHERLANDS INDIES], 137-138 (2009).

⁴⁰ Daniel Fitzpatrick, *Chinese Family Firms in Indonesia and the Question of 'Confucian Corporatism'*, in LAW AND THE CHINESE IN SOUTHEAST ASIA 150, 161 (M. Barry Hooker ed., 2002).

⁴¹ W.L. CATOR, THE ECONOMIC POSITION OF THE CHINESE IN THE NETHERLANDS INDIES 54 (1936).

businesses instead frequently utilised their own customary business form – the *kongsi*.⁴² *Kongsi* existed in various local forms with different types of liability. They were often informal partnership and cooperative-type companies. The law of 1855 also provided for the formalisation of the *kongsi* through registration of their internal contracts with the local district court. This was aimed at ensuring that real debtors within the *kongsi* could be identified.⁴³

Most Chinese firms were relatively small and in the services sector,⁴⁴ but there were some exceptions, including the Kian Gwan sugar and trading company formed in Semarang in 1863, firstly as a *kongsi* and later as an NV.⁴⁵ Kian Gwan rivalled the leading Dutch trading firms in the colony and went on to become the longest enduring Chinese company in Indonesia.⁴⁶ There is evidence that those Chinese firms incorporated as NV still tended to function as family associations dominated by one chief founder, and that the provisions of the Commercial Code were often breached. In particular, there was little division between personal and business capital.⁴⁷ Further formalisation of the *kongsi* was undertaken in 1927 in order to clarify the extent of liability of members.⁴⁸ At that time the *kongsi* was deemed by law to be a partnership with joint and several liability, and provision was made for their conversion into *firma*.⁴⁹ Consequently, the NV form with its limited liability became far more attractive to Chinese businesses.⁵⁰

The partnership and company business forms under the Dutch Codes were not made available to indigenous Indonesians until 1917.⁵¹ This is discussed further in Section 2.4 below in

⁴² *Id.*, at 51. *Kongsi* (also spelt *gongsi* or *kongsie*) were Chinese associations found throughout Southeast Asia. The term covered a range of organisations from business partnerships to clan and regional associations and even triad or ‘secret’ societies. Most *kongsi* were institutions in which members could pool labour or capital towards some economic objective such as a mine, plantation or trading voyage.

⁴³ Nono Anwar Makarim, *Companies and Business in Indonesia 70-71* (1978) (unpublished Ph.D. dissertation, Harvard University Law School).

⁴⁴ LINDBLAD, *supra* note 35, at 73.

⁴⁵ J. Panglaykim & I. Palmer, *Study of Entrepreneurship in Developing Countries: The Development of One Chinese Concern in Indonesia*, 1 J. SOUTHEAST ASIAN STUD. 85 (1970).

⁴⁶ LINDBLAD, *supra* note 34, at 75.

⁴⁷ CATOR, *supra* note 41, at 62; and Makarim, *supra* note 43, at 95. *See also* the discussion in Section 4 below for further mention of the *kongsi*.

⁴⁸ *Staatsblad* no. 129/1927.

⁴⁹ *See supra* note 25 regarding the *firma* and other partnership forms in the Dutch Codes.

⁵⁰ *See* Makarim, *supra* note 43, at 89; J.A. Rubenkoning, *Eenige Beschouwingen over het recht van de kongsie in Nederl.-Indie* [Some Reflections on the law of the *kongsi* in the Netherlands Indies], DE NAAMLÖÖZE VENNOOTSCHAP 132 (15 August 1924); L. Gotzen, *Het Nederlandsch-Indische Handelsrecht en de Chineesche Naamlooze Vennootschappen* [The Netherlands Indies Commercial Law and the Chinese Limited Liability Companies], DE LOCOMOTIEF, 24 April 1924, 25 April 1924, 26 April 1924, and 28 April 1924.

⁵¹ *Staatsblad* no. 12/1917.

relation to the Indigenous Joint Stock Company. It should also be noted that the 1920s saw the development of state-owned enterprises laws in the Netherlands Indies.⁵²

2.2 The 1928 Amendments to the Commercial Code in the Netherlands

In 1928, the Netherlands updated its Commercial Code articles on the limited liability company for the first time,⁵³ but the Netherlands Indies did not follow suit. This lack of action marked a significant fork in the path of the development of company law between the Netherlands and its most economically significant colony. In the Netherlands, from around the 1860s the Commercial Code was widely criticised. In particular, the requirement to obtain royal assent for incorporation was seen as restrictive. The sparse 21 articles had also failed to set out the divisions of power within the company, shareholders' obligations to pay in their capital or the extent of personal liability of company founders, directors and commissioners. There were almost no protections for shareholders and creditors.⁵⁴ During the last quarter of the 19th century a number of company bankruptcies occurred in the Netherlands that were related to the theft of company funds by managers and subsequently the lack of investor protection in the Commercial Code became a matter of public concern. From 1871 various pledges and proposals for reform were put forward by Ministers in response to these criticisms but were each withdrawn due to disagreement among drafters and inability to progress through Parliament. A new, more comprehensive, company law was eventually enacted in 1928 after a long process of consultations and drafting committees.⁵⁵

The 1928 amendments to the Commercial Code produced 120 articles compared to the 21 of the old. Most of the new provisions were mandatory. They were based on four principles:

⁵² The *Indische Comptabiliteitswet* (Netherlands Indies Public Accounting Law) of 1925 (*Staatsblad* no. 448/1925) enabled companies that were owned and operated by government departments such as printing presses but these were usually not commercial (note that earlier versions of this law were introduced in the 1860s). Then the *Indische Bedrijvenwet* (Netherlands Indies State Enterprises Law) was passed in 1927 (*Staatsblad* no. 419/1927) which was used for the creation of some public utilities including in the mining, agriculture and railways sectors. See J. Panglaykim, *Some Aspects of State Enterprises in Indonesia*, in *PEMIKIRAN DAN PERMASALAHAN EKONOMI DI INDONESIA DALAM SETENGAH ABAD TERAKHIR* 66 (Hadi Soesastro ed., vol. 2, 2005).

⁵³ *Staatsblad Nederlands* no. 216/1928 (came into force on 1 April 1929). Following the framework of Pistor et al., *supra* note 2, this comparatively long delay in updates occurring in the Netherlands company law might also be attributed to the fact that it too was a transplant, having been largely adopted from the French model. However, it is outside the scope of this paper to discuss this possibility given the focus on Indonesia.

⁵⁴ VAN HEIJDEN & VAN DER GRINTEN, *supra* note 23, at 14; Abe de Jong & Ailsa Röell, *Financing and Control in the Netherlands: A Historical Perspective*, in *A HISTORY OF CORPORATE GOVERNANCE AROUND THE WORLD: FAMILY BUSINESS GROUPS TO PROFESSIONAL MANAGERS* 467, 471 (Randall K. Morck ed., 2005); A. van Oven, *One Hundred and Fifty Years of Dutch Commercial Law*, 30 *NETH. INT'L L. REV.* 187, 195 (1983).

⁵⁵ VAN HEIJDEN & VAN DER GRINTEN, *supra* note 23, at 15-21.

preventative government monitoring, transparency of internal organisation, division of powers including the obligation to publish full annual accounts, protection of capital against excessive payouts to shareholders, and strengthened liability of founders, management and directors.⁵⁶ The new law largely addressed the problems with the old version of the Commercial Code, although it maintained the requirement for state approval for company formation.⁵⁷ Despite its strengths, there were still a number of objections to the amended version – it had failed to distinguish between public and private companies and it did not establish remedies for minority shareholders. On the other hand, companies that had preferred the flexibility of the old version of the Code objected to the strengthened liability of management and to the obligation to publish accounts.⁵⁸

There is mixed evidence as to why the changes of 1928 were not also adopted in the Netherlands Indies by the colonial administration.⁵⁹ The Concordance Principle generally presumed that Netherlands law would be extended to its colonies, but the principle was selectively applied and there was often a gap of many years before laws were copied across.⁶⁰ It was reported in 1939 that the Volksraad expected to consider a draft ordinance in the following year to amend the Commercial Code articles on the NV to make them concordant with the law of the Netherlands.⁶¹ Most likely this intention was eventually overtaken by the outbreak of the Second World War. However, it is curious that in 1940 other updates were made to the Commercial Code to follow the Concordance Principle, specifically to the second book on maritime law.⁶² This occurred less than six months after the Netherlands had updated this law, which suggests that this had greater urgency than reform of the articles on the NV. Makarim (1978) conjectured that the failure to follow the lead of the Netherlands may have been due to the absence of a similar public movement for company law reform in

⁵⁶ De Jong & Röell, *supra* note 54, at 472.

⁵⁷ Van Oven, *supra* note 54, at 195.

⁵⁸ De Jong & Röell, *supra* note 54, at 472.

⁵⁹ Two sources note that the exact reason for the failure to follow the Netherlands pattern is unknown: Makarim, *supra* note 43, at 374, and R. SUKARDONO, HUKUM DAGANG INDONESIA [INDONESIAN COMMERCIAL LAW] 129 (1981).

⁶⁰ For example, in the Netherlands, the whole third book of the Commercial Code on bankruptcy was abolished and a new bankruptcy law enacted in 1893 to replace it (which came into effect in 1896). The Netherlands Indies eventually followed suit with a law passed in 1905 and enforced in 1906.

⁶¹ *Wet op de N.V.'s: Eisch der Concordantie [Law on Limited Liability Companies: The Concordance Principle]*, DE INDISCHE COURANT, 21 July 1939, at 1.

⁶² *Wetboek van Koophandel: Wijziging Voorgesteld [The Commercial Code: Amendments Proposed]*, DE INDISCHE COURANT, 9 January 1940, at 1; *Handelingen Volksraad, Zittingsjaar (Sitting Year) 1939-1940, Onderwerp (Draft) 105*. The Netherlands law was (Nederlands Staatsblad no. 204 of 16 September 1939).

the colony.⁶³ However, it should be remembered that at the time the majority of companies doing business in the Indies were incorporated and headquartered in the Netherlands and so would have come under the 1928 reforms in any case. It is also possible that policy-makers, perhaps in their role of supporting colonial enterprise, preferred the flexibility and simplicity of the older version of the Code. The fact that some minor incorporation procedure amendments were made to the Netherlands Indies Commercial Code articles on the NV in 1937⁶⁴ and 1938⁶⁵ also supports the possibility that a deliberate choice may have been taken not to follow the law reforms of the Netherlands.

2.3 The 1939 Law on the Indigenous Joint Stock Company

The Netherlands Indies also went its own way in 1939 when the Volksraad enacted a special ordinance creating the *Inlandsche Maatschappij op Aandeelen* (IMA) or Indigenous Joint Stock Company.⁶⁶ This was a company form for indigenous Indonesians only which was simple and inexpensive to establish (no notarial deed was required) and conferred limited liability on shareholders. The IMA had a shorter lifespan (30 years unless granted an extension) compared to the NV (usually 75 years), and had restrictions on the ownership of land (75 ha of land or 25 ha of rice paddy).⁶⁷ The IMA was originally restricted to Java and Madura, and the IMA could not own land outside those two islands, but these restrictions were lifted in 1942.⁶⁸ The IMA was also required to submit financial reports twice a year to the court that originally gave it permission to incorporate. The law also set out detailed procedures for company registration and what components had to be included in the founding

⁶³ Makarim, *supra* note 43, at 374.

⁶⁴ *Staatsblad* no. 572/1937. This amendment enabled the Governor-General to delegate the authority to give permission for incorporation to the Director of Justice.

⁶⁵ *Staatsblad* no. 276/1938, art. II(16). This amendment removed the restriction that NVs had to be ‘trading companies’ (*handels-onderneming*) so that they could then carry out any type of business.

⁶⁶ *Staatsblad* no. 569/1939. This law came into force on 1 February 1940 (*Staatsblad* no. 717/1939). The word ‘*Inlandsche*’ or ‘native’ was often replaced with ‘*Indonesische*’ following Independence. It has also often been referred to in Indonesian as *Maskapai Andil Indonesia* (MAI). For further discussion of the content of the IMA law, see: P. G. A. K. VOLTEN, MASKAPAI ANDIL BOEMIPUTERA (IMA): KETERANGAN DAN OERAIANJA [THE INDIGENOUS JOINT STOCK COMPANY (IMA): ITS EXPLANATION AND COMMENTARY] (K. St. Pamoentjak trans., 1940); SYBRANDUS VAN DER BIJ, DE WETTELIJKE REGELINGEN VAN DE RECHTSPERSOONLIJKHEID BEZITTENDE PRIVAATRECHTELIJKE INLANDSCHE VEREENIGINGEN IN NED. INDIË [THE LEGAL REGULATION OF THE LEGAL PERSONALITY POSSESSED BY PRIVATE LAW NATIVE ASSOCIATIONS IN THE NETHERLANDS INDIES] (1942); SUKARDONO, *supra* note 59, at 197-239; Makarim, *supra* note 43, at 156-161.

⁶⁷ This is significant particularly because NVs, being part of the European legal sphere, were not allowed to own native land at all (*Staatsblad* no. 179/1875), although NVs could obtain heritable leases (*Staatsblad* no. 118/1850).

⁶⁸ *Staatsblad* no. 13/1942. This amendment was passed on 10 January 1942, just as the Japanese invasion of the Netherlands Indies was beginning. These changes came into force on 1 February 1942 (*Staatsblad* no. 14/1942).

articles – purpose, founders, details of share capital and so on. Thus, the colonial state retained far more control of the IMA than it had over the NV. This law was also considerably more detailed on internal management issues than the Commercial Code. It had sections on the general meeting of shareholders, roles and responsibilities of board members, shareholder voting rights and procedures, bookkeeping and winding-up. A board of commissioners was optional. A further significant difference was that the IMA incorporated some elements of the cooperative society form,⁶⁹ in that directors and commissioners had to be shareholders themselves, proxy voting was only permitted if proxy was given to another shareholder, and no shareholder, regardless of numbers of shares held personally or by proxy, could have more than 12 votes or more than 1/3 of the voting rights. Contracts made by the IMA, including contracts of employment, were to follow *adat* law.

The IMA was a unique legal construct and there does not appear to have been any close equivalent elsewhere. The enactment of this law needs to be understood in the context of the race-based plural legal system in the Netherlands Indies, the introduction of the ‘Ethical Policy’, changing colonial thinking about the place of indigenous Indonesians in the colony’s society and economy, and the rising nationalist movement. This all occurred against the economic backdrop of the relatively prosperous 1920s, followed by the Depression and the sudden disastrous plunge in the prices of Indonesia’s main exports (rubber, sugar, coffee and tobacco). Protectionist limits on imports were introduced in 1933 which triggered a boom in manufacturing in Java.

In 1901 the Dutch colonial regime had instituted a new ‘Ethical Policy’ in its approach to native Indonesians. This was a less exploitative approach (at least in theory) aimed at the ‘uplifting of the indigenous peoples’. This change triggered a debate regarding the plural legal system in the Netherlands Indies. Some prominent *Ethici* such as Conrad van Deventer⁷⁰ argued for the abandonment of pluralism and for the emancipation of the

⁶⁹ See Zeylemaker, *supra* note 24 (referring to these ‘cooperative elements’ within the IMA); and, M. SJAFELI, BAGAIMANA MEMAKAI MASKAPAI ANDIL INDONESIA UNTUK PEMBANGUNAN EKONOMI NASIONAL [HOW TO USE THE INDONESIAN JOINT STOCK COMPANY FOR NATIONAL ECONOMIC DEVELOPMENT] 32 (1952) (saw the IMA as falling somewhere between the cooperative and the NV limited liability form in terms of size, the need for members to know and trust each other, and the extent of members’ participation in management).

⁷⁰ Conrad Theodore van Deventer (1857-1915) wrote the essay *Een Eereschuld* (A Debt of Honour) in 1899, which is credited with initiating the ‘Ethical Policy’. Van Deventer and his wife are also remembered for the role they played in the development of the Kartini schools and other educational institutions for girls in Java.

indigenous population by assimilating them into European law.⁷¹ They saw *adat* as being incapable of fulfilling the needs of the twentieth century and as perpetuating legal uncertainty. In opposition were Cornelis van Vollenhoven, Professor of law at Leiden University, and his stable of *adat* law scholars who argued for the preservation of *adat* law as being the right and natural system for indigenous society. They were opposed to unification but not to codification of *adat* and spent quite a lot of time and effort in compiling volumes of *adat* law. Van Vollenhoven was particularly concerned with the protection of customary property rights against business and the state. Van Vollenhoven's group gained the upper hand and was able to block moves in 1904 and 1923 that intended to unify civil law in the Indies along European lines.⁷² Thus, the plural legal system, and the position of *adat* within it, was preserved, and from 1927 Dutch colonial legal policy was characterised by 'enlightened dualism'.⁷³

This debate was particularly concerned with the effects of the colonial legal system on the native economy. Colonial commentators, particularly the influential J.H. Boeke,⁷⁴ saw a dual economy where native Indonesians were not involved in modern trade, but were passive and stagnant.⁷⁵ There was awareness that the expectations of the Liberal period had not been realised – native Indonesians had failed to copy the pattern of Western enterprise. The European company form was not offered to indigenous Indonesians until 1917 when a law was passed permitting indigenous Indonesians to voluntarily submit themselves partially or fully to the Commercial and Civil Codes,⁷⁶ but few took this opportunity to take advantage of the limited liability company form.⁷⁷ Indigenous businesses 'often chose modes of

⁷¹ Coppel, *supra* note 39, at 136.

⁷² JOHN BALL, *INDONESIAN LAW AT THE CROSSROADS: COMMENTARY AND MATERIALS* 1.19 (1996); David Bouchier, *Positivism and Romanticism in Indonesian Legal Thought*, in *INDONESIA: LAW AND SOCIETY*, 94, 97 (Tim Lindsey ed., 2nd ed, 2008).

⁷³ BALL, *supra* note 72, at 1.22. Although note that the Criminal Code was unified across racial groups in 1915 (*Staatsblad* no. 732/1915), but a later attempt to unify criminal procedure failed.

⁷⁴ Julius Herman Boeke (1884-1944) wrote his PhD dissertation in 1910 on the 'dual economy' of the Netherlands Indies before going to the colony where he became an economic advisor and eventually head of the cooperatives service.

⁷⁵ This argument held considerable power at the time although was essentially wrong; indigenous business during the colonial era included cigarette companies, banking, textiles and small scale manufacturing (LINDBLAD, *supra* note 35, at 33). Particularly outside Java, there was substantial merchant activity occurring between Dutch, Chinese and indigenous traders all often beyond government control (Peter Post, *Formation of the Pribumi Business Elite in Indonesia, 1930s-1940s*, in *JAPAN, INDONESIA AND THE WAR: MYTHS AND REALITIES* 87, 90 (Peter Post & Elly Touwen-Bouwisma eds., 1997)).

⁷⁶ *Staatsblad* no. 12/1917.

⁷⁷ Makarim, *supra* note 43, at 145.

incorporation that were not fully compatible with European business law'.⁷⁸ Meanwhile, Dutch companies almost never employed Indonesians or Chinese in their top echelons.⁷⁹

Endless debates occurred among colonial officials as to whether there needed to be a conscious effort to encourage economic enterprise among the native population, how to overcome the factors which hampered integration,⁸⁰ and also how to protect the indigenous farmer from exploitation and loss of land by capital owners, particularly the Chinese.⁸¹ Sentiments in favour of indigenous Indonesians were balanced against a strong industrial lobby in the Netherlands that wanted preference given to Dutch capital in the colony and a market for Dutch products.⁸² By the mid-1920s, Javanese nationalist intellectuals, particularly under the leadership of Dr Soetomo,⁸³ were also pressuring the colonial government to stimulate indigenous involvement in the modern economy.⁸⁴

The movement to bring indigenous Indonesians into the economy initially saw the cooperative form as the appropriate legal tool for change. J.H. Boeke was integral to the passing of a native cooperatives law in 1927. The earlier cooperatives law of 1915,⁸⁵ which was a direct copy of the 1876 law in the Netherlands, was judged to be unsuitable for the native population.⁸⁶ The 1915 law made the cooperative difficult and expensive to establish given the requirements for a notarial deed, to have articles of association in Dutch and to obtain consent for its establishment from the Governor General.⁸⁷ In 1920, a Commission

⁷⁸ LINDBLAD, *supra* note 35, at 33. See also VERSLAG VAN DE COMMISSIE VOOR INLANDSCHE RECHTSPERSONEN INGESTELD BIJ BESLUIT VAN DEN GOUVERNEUR-GENERAAL VAN NEDERLANDSH-INDIË VAN 14 MEI 1929 NO. 4X [REPORT OF THE COMMISSION ON NATIVE LEGAL PERSONS INSTALLED BY ORDER OF THE GOVERNOR-GENERAL OF THE NETHERLANDS INDIES ON 14 MAY 1929] (1931) [hereinafter VERSLAG VAN DE COMMISSIE VOOR INLANDSCHE RECHTSPERSONEN] (documenting a number of native businesses and associations that were not using any form of Dutch 'legal personality').

⁷⁹ Sutter, *supra* note 29, at 95-96.

⁸⁰ ANNE BOOTH, *THE INDONESIAN ECONOMY IN THE NINETEENTH AND TWENTIETH CENTURIES: A HISTORY OF MISSED OPPORTUNITIES* 290 (1998).

⁸¹ *Id.*, at 291.

⁸² BOOTH, *supra* note 80, at 290.

⁸³ Dr Soetomo (1888-1938) was a medical doctor educated in the Netherlands. On his return to the Netherlands Indies he developed his interests in the social and economic welfare of indigenous Indonesians and founded the *Indonesische Studieclub* in Surabaya in 1924. This was converted into *Persatuan Bangsa Indonesia* (Indonesian Unity Party) in 1931 and then merged with another leading nationalist group, Budi Utomo, to form *Partai Indonesia Raya* (Great Indonesia Party) (Parindra) in 1935.

⁸⁴ Post, *supra* note 75, at 96.

⁸⁵ *Staatsblad* no. 431/1915.

⁸⁶ J. H. BOEKE, *THE EVOLUTION OF THE NETHERLANDS INDIES ECONOMY* 153 (1946).

⁸⁷ M. ISKANDAR SOESILO, *DINAMIKA GERAKAN KOPERASI INDONESIA: CORAK PERJUANGAN EKONOMI RAKYAT DALAM MENGGAPAI KESEJAHTERAAN BERSAMA* [DYNAMICS OF THE

was formed under Boeke to look into the question of a more suitable approach, and this resulted in the passing of the ordinance on native cooperatives in 1927.⁸⁸ For Boeke, ‘at last the right legislative path was found’.⁸⁹ Boeke knew that he was imposing a Western concept on the native population and felt that the solution to its success was in tailoring it to local requirements. The ordinance was ‘simple and positive in design and adapted to native concepts of law’.⁹⁰ It was only for native Indonesians, was less expensive, did away with notarial deed requirements and articles of association could be in a local language. It also provided that native cooperatives would follow *adat* contract law.⁹¹ This ordinance did have some ‘ephemeral success’⁹² in supporting Indonesian traders and the numbers of cooperatives being formed increased during the 1930s.⁹³ Cooperatives were also supported by nationalist movement organisations and gained a particular champion in the future Vice-President Muhammad Hatta. In 1933, a further law on cooperatives was passed following updates made in the Netherlands.⁹⁴ This replaced the earlier 1915 law which still only applied to Europeans, and thus the pattern of having dual economic laws for natives and Europeans was continued.

Although some cooperatives were being established, colonial government officials came to the realisation that Indonesian businesses were actually more interested in making profit than conforming to the ‘cooperative ideal’.⁹⁵ In 1929 the Governor General installed a Commission on Indigenous Legal Persons led by Prof. Mr. J.B. Zeylemaker,⁹⁶ to advise the government on the feasibility of giving legal personality to indigenous associations generally, and indigenous joint stock companies in particular, and to consider what interests would be affected by doing so. This move was specifically triggered by requests from the nationalist

INDONESIAN COOPERATIVE MOVEMENT: FEATURES OF THE PEOPLE’S ECONOMIC STRUGGLE IN ACHIEVING PROSPERITY TOGETHER] 46-48 (2008).

⁸⁸ *Staatsblad* no. 91/1927. See: J.H. BOEKE, STELSEL EN INHOUD VAN DE REGELING INLANDSCHE COOPERATIEVE VEREENIGINGEN (STBL. 1927 NO. 91) [SYSTEM AND CONTENT OF THE NATIVE COOPERATIVE ASSOCIATION REGULATION] (1927) (an explanation in Dutch and Malay of the details of the native cooperative law of 1927).

⁸⁹ BOEKE, *supra* note 86, at 153.

⁹⁰ *Id.*

⁹¹ Art. 3(2) of the *Staatsblad* no. 91/1927 on Native Cooperatives (which read that agreements/contracts made by the cooperative were to follow native civil and trade law).

⁹² Sutter, *supra* note 29, at 102.

⁹³ *Id.*; SOESILO, *supra* note 87, at 48-50.

⁹⁴ *Staatsblad* no. 108/1933.

⁹⁵ BOEKE, *supra* note 86, at 156. See also David Henley, *Custom and Koperasi: The Cooperative Ideal in Indonesia*, in THE REVIVAL OF TRADITION IN INDONESIAN POLITICS: THE DEPLOYMENT OF ADAT FROM COLONIALISM TO INDIGENISM 87 (Jamie S. Davidson & David Henley eds., 2007) (discussing the ‘cooperative ideal’ and how the concept travelled through time in Indonesia from its beginnings in the 1920s).

⁹⁶ J. B. Zeylemaker was Professor of commercial law at the Law School in Batavia. He arrived in the Netherlands Indies in about July 1926.

Indonesische Studieclub in Surabaya and its establishment of the first indigenous bank, Bank Nasional Indonesia, in 1929. This bank was incorporated as an NV but encountered various problems caused by the plural legal system when it attempted to operate within the ‘native legal sphere’.⁹⁷

The Commission researched the rising native trading and industrial class and the business forms being used and consulted various groups in Java and Madura on whether an indigenous legal corporate form was needed. The Commission itself split over this question, although it eventually fell in with the view that modern legal mechanisms were needed to promote economic activity among the indigenous population because such mechanisms would not arise naturally within *adat* law.⁹⁸ The Commission submitted a draft law to this effect in 1931, but it took another eight years to be enacted.⁹⁹ Initially the proposal was opposed by the sugar industry which saw the law as a threat — it feared the creation of large estates which could challenge existing interests. Other commentators also feared that indigenous companies would buy up land and exploit small farmers.¹⁰⁰ During the 1930s, the calls for limited liability from indigenous business groups continued to grow¹⁰¹ and the damage to the sugar industry during the Depression lessened that industry’s power to oppose it.¹⁰² To allay concerns about possible dispossession of farmers, the draft law was amended to include the restrictions on land ownership¹⁰³ and the limit to 30 years lifespan.¹⁰⁴

Some colonial authorities had great expectations that the IMA would prove useful,¹⁰⁵ and there was certainly interest among the indigenous business community at the time.¹⁰⁶

⁹⁷ VAN DER BIJ, *supra* note 66, at 34-35.

⁹⁸ VERSLAG VAN DE COMMISSIE VOOR INLANDSCHE RECHTSPERSONEN, *supra* note 78, at 8; Zeylemaker, *supra* note 24.

⁹⁹ The IMA law was part of a suite of legislation passed on indigenous legal persons in 1939. *Staatsblad* no. 570/1939 gave legal personhood to registered ‘native associations’ and *Staatsblad* no. 571 provided for judicial winding-up of native legal entities. These two laws were also the result of the efforts of the 1929 Commission on Native Legal Persons.

¹⁰⁰ Zeylemaker, *supra* note 24, at 210.

¹⁰¹ BOEKE, *supra* note 86, at 153-157.

¹⁰² Zeylemaker, *supra* note 24, at 210; Makarim, *supra* note 43, at 160.

¹⁰³ The original recommendation of the Commission on Native Legal Persons was that the IMA would be restricted to 50 *bouws* of land, but could own more with permission of the Governor General. In the final version of the law this was changed to a restriction to 75 hectares of dry land or 25 hectares of wet rice paddy. See Zeylemaker, *supra* note 24, at 211 (who thought this change was more psychological than real as it allayed the fears of lawmakers, but there was a loophole that allowed greater landholdings if a licence was granted).

¹⁰⁴ BOEKE, *supra* note 86, at 157. Discussion of the changes was recorded in the proceedings of the Volksraad: Zittingsjaar 1938-1939, Onderwerp 159 (Sitting Year 1938-1939, Draft 159) and Zittingsjaar 1939-1940, Onderwerp 22 (Sitting Year 1939-1940, Draft 22).

¹⁰⁵ BOEKE, *supra* note 86, at 157.

However, the IMA was little used. The outbreak of the Second World War occurred before it could be much tested, and following Independence most indigenous entrepreneurs chose the NV form despite the fact that the IMA was cheaper to establish.¹⁰⁷ Post-Independence policies would require businesses to use the NV form in order to contract with the government.¹⁰⁸ The NV was seen as more international in style and probably as being less tainted by colonial paternalism. The NV also had none of the ‘cooperative’ type restrictions of the IMA such as the need for directors to be shareholders. Another reason for the lack of take-up of the IMA was that incorporation procedures via courts rather than through a notary actually became more difficult due to judges being busy with other work. The ‘notary-minded’ legal culture that had developed also resulted in the Ministry of Justice often receiving applications for IMAs via notaries, which would then have to be returned with instructions to apply via a judge.¹⁰⁹ Makarim (1978) was able to locate only four IMAs still in business in Java and Madura and a small cluster of about 20 small market banks in Bali using the IMA form,¹¹⁰ and apparently only a few IMA companies continued to exist into the 1990s.¹¹¹ Formally, the dualism of having both the Commercial Code articles on the NV and the separate IMA continued until both were superseded by the 1995 Companies Law.¹¹²

¹⁰⁶ See Sutter, *supra* note 29, at 105-106 (cites the future Vice-President Muhammad Hatta as suggesting that investors would buy shares in IMAs not because they sought large profits from such a company but because they saw ‘spiritual ties’ in the IMA that did not exist in the NV). See also SJAFEI, *supra* note 69, at 33 (recommended the use of the IMA for Indonesians who were more ‘advanced’ than average villagers and wanted to run small companies or agricultural companies that needed the right to own land). The publisher Balai Pustaka produced a Malay translation of the IMA law in 1940 in an effort to promote it – see VOLTEN, *supra* note 66.

¹⁰⁷ Makarim, *supra* note 43, at 160; Daniel Lev, *The Lady and the Banyan Tree: Civil Law Change in Indonesia*, 14 AM. J. COMP. LAW 282, 286 (1960).

¹⁰⁸ Makarim, *supra* note 43, at 170; Anni Abbas Manopo, *Masalah PT (Perseroan Terbatas) di Indonesia Sekarang [Current Problems of the Limited Liability Company in Indonesia]*, in SIMPOSIUM PEMBAHARUAN HUKUM DAGANG NASIONAL, TANGGAL 10-12 NOPEMBER 1980, DI YOGYAKARTA 85, 87 (Badan Pembinaan Hukum Nasional, 1984).

¹⁰⁹ Hajati Suroredjo, *Masalah Pembaharuan Hukum Dagang [Problems of Commercial Law Reform]*, in SIMPOSIUM PEMBAHARUAN HUKUM DAGANG NASIONAL, TANGGAL 10-12 NOPEMBER 1980, DI YOGYAKARTA 34, 40 (Badan Pembinaan Hukum Nasional, 1984).

¹¹⁰ Makarim, *supra* note 43, at 171.

¹¹¹ Benny Tabalujan, *The New Indonesian Company Law*, 17 U. PA. J. INT’L ECON. L. 883, 885 (1996).

¹¹² It seems that some later discussion regarding reforming the IMA law to fit changing circumstances did occur. See Suroredjo, *supra* note 109, at 39 (noting that a workshop on the topic of the IMA was held in Padang, West Sumatra on 13-14 May 1980 organised by the West Sumatra Provincial Development Agency).

2.4 Independence, Legal Unification and Economic Ideology

Following Independence, the path of Indonesia's company law was largely a consequence of provisions in the different Constitutions (1945 and 1950) and the ideology that they expressed.¹¹³ The 1945 Constitution concentrated power in the hands of the executive and its drafters explicitly rejected the inclusion of individual rights. The 1950 Constitution, despite intentions that it would be quickly revised, provided the basis for the period of parliamentary democracy which lasted up until 1959 when President Sukarno declared a return to the 1945 Constitution. Although the two Constitutions were radically different in the political systems that they respectively established,¹¹⁴ they contained essentially similar provisions regarding the continuation of colonial law and the ideological basis for economic policy.

Both Constitutions provided that all colonial laws would continue to be valid until explicitly replaced. National leaders had little option on this point but to avoid a legal vacuum. However, the formal continuation of the race-based plural legal system was at odds with the desire for a new egalitarian system where all persons were to be treated either as citizens or non-citizens.¹¹⁵ The Commercial Code was still formally only valid for Europeans and those indigenous Indonesians who declared themselves subject to it. The 1950 Constitution (art. 102) called for codification of civil and commercial law, but many debates were had around how to change the old legal order to fit the new ideology, and whether the law, particularly private law, should be unified on European lines or on *adat*.¹¹⁶ *Adat* was seen by many nationalists as a symbol of a uniquely Indonesian identity and history and was idealised in opposition to the memory of imposed colonial rule. On the other hand, with so many different ethnic groups possessing their own *adat* rules, choosing one above the others would have caused ethnic divisions during a time when the new nation was still fragile.

Contract and commercial law were seen as the easiest prospect for unification as there would be little imposition on *adat* practices and it would apply only to those who voluntarily

¹¹³ Note that there was also the very short-lived Federal Constitution of 1949.

¹¹⁴ For an explanation of the differences between the two Constitutional systems, see Bouchier, *supra* note 72.

¹¹⁵ Although note that legal and social discrimination against Chinese Indonesians was to continue for decades past Independence.

¹¹⁶ For examples of this debate, see ST. K. MALIKUL ADIL, PEMBAHARUAN HUKUM PERDATA KITA [REFORM OF OUR CIVIL LAW] (1955); KO TJAY SING, KODIFIKASI AND UNIFIKASI HUKUM PERDATA DAN DAGANG [CODIFICATION AND UNIFICATION OF CIVIL AND COMMERCIAL LAW] (1958).

engaged in business activities.¹¹⁷ Unification of commercial law was also seen as desirable in order to protect indigenous Indonesians from Chinese business practices.¹¹⁸ Even so, no legislative resolution of this complex problem was found and in practice it became an accepted principle that Indonesians became automatically subject to the Commercial Code whenever they engaged in transactions covered by it. That is, the formal requirement to ‘submit’ to the Code according to the 1917 law was ignored.¹¹⁹ The concept of ‘internationality’ was also generally used to justify the retention of the Commercial and Civil Codes.¹²⁰ It should be noted that there was never an authoritative Indonesian translation of the Dutch Codes, although there have been unofficial translations in circulation.¹²¹ In practice, the NV was renamed in Indonesian as the *Perseroan Terbatas* (PT).¹²²

Both the 1945 and 1950 Constitutions provided that ‘economic affairs are to be organised as a joint effort based on the family principle (*azas kekeluargaan*)’.¹²³ Although the 1945 Constitution was principally drafted by Soepomo,¹²⁴ this particular article is partly attributed to Vice-President Muhammad Hatta who was known for his championing of cooperatives and an economy primarily based on collectivist ideals that would reflect the already existing modes of social organisation of Indonesian village life. Hatta was convinced that cooperatives could compete with international (Dutch) corporations.¹²⁵ Many other politicians at the time shared this view that capitalism was not suited to Indonesia.¹²⁶ Most

¹¹⁷ SING, *supra* note 116, at 17.

¹¹⁸ Lev, *supra* note 107, at 288.

¹¹⁹ BALL, *supra* note 72, at 4.12.

¹²⁰ Lev, *supra* note 107, at 303.

¹²¹ For the Commercial Code, there was the Englebrecht system translation of 1960 and then a new set of translations in 1989 published by private publisher Ichtjar Baru van Hoeve (also using the Englebrecht system). The Commercial Code in Indonesian is *Kitab Undang-Undang Hukum Dagang (KUHD)*. For a more general discussion of the shift from Dutch to Indonesian as the language of law in Indonesia, see AB MASSIER, *THE VOICE OF THE LAW IN TRANSITION* (Michaela Wouters trans., 2008).

¹²² There does not seem to have been a legal rule that required the change in name from *Naamloze Vennootschap* (NV) to *Perseroan Terbatas* (PT), although the term PT was certainly in use by the early 1950s.

¹²³ Art. 33 in the 1945 Constitution and Art. 38 in the 1950 Constitution. This article survives in the current amended version of the 1945 Constitution.

¹²⁴ Soepomo (1903-1958) completed his PhD at Leiden University under Cornelis van Vollenhoven. Following Independence he served twice as Minister of Justice. He was an expert in *adat* law and the 1945 Constitution was largely based on his ‘integralistic’ view of the state, see Bourchier, *supra* note 71 (discussion of Soepomo’s role in the drafting of the 1945 Constitution). Muhammad Hatta (1902-1980), also educated in the Netherlands, was more democratic-minded than Soepomo but nonetheless supported the ‘family principle’ for economic policy.

¹²⁵ MAVIS ROSE, *INDONESIA FREE: A POLITICAL BIOGRAPHY OF MUHAMMAD HATTA* 58, 118 (2010).

¹²⁶ Anne Booth, *Government and Welfare in the New Republic: Indonesia in the 1950s*, 34 *ITINERARIO* 57, 65-66 (2010).

saw a strong role for the state in coordinating the economy and undertaking large projects¹²⁷ while the people engaged in cooperatives. The idea of the cooperative was to resonate through time and unite Indonesian political elites despite rarely being successful in actually facilitating entrepreneurship.¹²⁸ Two cooperatives laws were passed in this era¹²⁹ and a sequence of national congresses on cooperatives was also held during the late 1940s and 1950s.¹³⁰ Arguably, the collectivist ideology of this era and its manifestation as a focus on cooperatives at least partly explains the lack of attention paid to company law reform.

The parliamentary democracy era of the 1950s was generally characterised by a series of unstable coalitions, political in-fighting and little opportunity for significant law reform.¹³¹ The legal and political uncertainty of this time did not, however, significantly hamper use of the corporate form. Many indigenous entrepreneurs had benefited from the Japanese occupation and seizure of Dutch companies,¹³² and in the early 1950s there was a surge in the launching of new indigenous businesses. The Commercial Code NV/PT form was taken up by many indigenous entrepreneurs following independence – it was seen to represent modernity and prestige.¹³³ For example, Achmad Bakrie turned his trading company into an NV in 1952.¹³⁴ The *benteng*¹³⁵ program of the 1950s also encouraged the formation of companies that were quickly set up to take advantage of import licences. In 1953, when abuses of the program were discovered¹³⁶ it became a formal requirement to establish a limited liability company.¹³⁷ A 1953 national business directory listed 4,200 incorporated companies of which approximately 40% of trading firms and 33% of manufacturing firms

¹²⁷ Article 38 of the 1950 Constitution also provided for state domination of important sectors of the economy.

¹²⁸ Henley, *supra* note 95, at 87; Robert C. Rice, *The Origins of Basic Economic Ideas and their Impact on 'New Order' Policies*, 19 BULL. INDON. ECON. STUD. 60, 63-65 (1983).

¹²⁹ Law no. 179/1949 and Law no. 79/1958.

¹³⁰ SOESILO, *supra* note 87, at 57-65.

¹³¹ Tim Lindsey & Mas Achmad Santosa, *The Trajectory of Law Reform in Indonesia: A Short Overview of Legal Systems and Change in Indonesia*, in INDONESIA LAW AND SOCIETY 2, 8 (Tim Lindsey ed., 2nd ed., 2008).

¹³² Post, *supra* note 74, at 104.

¹³³ KAEHLIG, *supra* note 24, at 282; Lev, *supra* note 107, and the references at *supra* note 116.

¹³⁴ The Bakrie group is now one of the largest conglomerates in Indonesia. It is headed by Aburizal Bakrie who was Coordinating Minister for Peoples Welfare 2004-2009, is now Chairman of the Golkar Party and will likely be a Presidential candidate in 2014.

¹³⁵ The *benteng* (fortress) program was aimed at breaking the dominance of Dutch firms by reserving the import of certain goods to indigenous entrepreneurs.

¹³⁶ See Jaspar van de Kerkhof, *Indonesianisasi of Dutch Economic Interests, 1930-1960: The Case of Internatio*, 161 BIJDRAGEN TOT DE TAAL-, LAND- EN VOLKENKUNDE 181, 193 (2005) (describing how the program had many problems including corruption and the use of Indonesian straw men by Chinese and Dutch companies to evade the restrictions and ultimately failed in its aims).

¹³⁷ Makarim, *supra* note 43, at 165.

were indigenous.¹³⁸ A small securities exchange was established in 1952 in Jakarta,¹³⁹ but it collapsed in the late 1950s with the general economic malaise caused by the nationalisation of Dutch companies.¹⁴⁰

2.5 Sukarno's 'Guided Democracy'

It was primarily ideology and the 'supremacy of politics over economics'¹⁴¹ that inhibited substantive law reform, including company law reform, during Sukarno's 'Guided Democracy' years. Parliamentary democracy ended when martial law was declared in 1957, and was completely dismantled in 1959 when Sukarno unilaterally reinstated the far less democratic 1945 Constitution. During Sukarno's Guided Democracy regime authority and power were increasingly concentrated in Jakarta. President Sukarno was the symbolic source of authority supported by the army. Political parties were marginalised and NGOs lost their access to government. The legal system began to collapse and judges became open to bribes.¹⁴² Guided Democracy leaders tended to articulate ideology rather than positive law,¹⁴³ and the laws passed were often pieces of symbolic revolutionary rhetoric rather than having strictly regulatory aims.¹⁴⁴

At the Round Table Conference in The Hague in 1949, Indonesia had agreed to allow Dutch companies to continue to operate in independent Indonesia. This ensured the continued dominance of Dutch firms in the Indonesian economy during the early 1950s.¹⁴⁵ This dominance ended abruptly when the bitter conflict over sovereignty in the remaining Dutch territory of West Irian (West Papua) prompted Sukarno to forcibly acquire all Dutch companies in Indonesia in 1957. Labour unions were induced to take over Dutch companies, but union power was quickly replaced by military supervision. The nationalisation law of December 1958 formalised the takeovers.¹⁴⁶ Most Dutch nationals were quickly expelled

¹³⁸ LINDBLAD, *supra* note 35, at 89.

¹³⁹ Established by a Decree in late 1951 and Emergency Law no. 15 of 3 October 1952.

¹⁴⁰ See DAVID C. COLE & BETTY F. SLADE, *BUILDING A MODERN FINANCIAL SYSTEM: THE INDONESIAN EXPERIENCE* 148 (1996). See also Section 2.6 below for further mention of the development of Indonesia's stock exchange.

¹⁴¹ Kian Wie Thee, *Indonesia's Two Deep Economic Crises: The Mid 1960s and Late 1990s*, 14 J. ASIA PACIFIC ECON. 49 (2009).

¹⁴² The Basic Law on Judicial Powers (no. 19/1964) permitted the President to intervene in court cases.

¹⁴³ David K. Linnan, *Indonesian Law Reform, or Once More Unto the Breach: A Brief Institutional History*, in *INDONESIA LAW AND SOCIETY* 68, 75 (Tim Lindsey ed., 2nd ed., 2008).

¹⁴⁴ Lev, *supra* note 107, at 289.

¹⁴⁵ Kerkhof, *supra* note 136, at 189.

¹⁴⁶ Law no. 86/1958 on Nationalisation of Dutch-Owned Companies in Indonesia. See generally, Jasper van de Kerkhof, *'Colonial' Enterprise and the Indigenization of Management in Independent Indonesia and Malaysia*,

from Indonesia. The outcomes of the nationalisation program were disastrous, resulting in worsening inflation and currency depreciation. Along with Sukarno's refusal to heed expert advice and 'utter neglect of sound economic policies',¹⁴⁷ the nationalisation program eventually led to the economic crisis of the mid-1960s.

From the basis of the newly acquired Dutch enterprises, the Sukarno Government promoted the state enterprise sector and actively discouraged the private sector.¹⁴⁸ The regime aimed to create a socialist 'unitary public sector economy' with Indonesian features, and to restrict the role of Chinese businesses.¹⁴⁹ The State-Owned Enterprises Law of 1960 attempted to unify the various existing categories of SOE.¹⁵⁰ The goal of SOEs was not necessarily profit but was part of prevailing ideology about a just and prosperous society.¹⁵¹ There was also further, mostly unsuccessful, promotion of cooperatives. The early 1960s saw the growth in membership and power of the Indonesian Communist Party (PKI) which, among other objectives, promoted workers' and farmers' cooperatives.

At this time, there was some continuing discussion of the position of the Commercial Code set within debates around unification and codification of Indonesian law.¹⁵² The Civil and Commercial Codes were certainly seen as outdated and as vestiges of the colonial regime,¹⁵³ and national policy statements of the time indicated that *adat* should be the basis for uniform laws.¹⁵⁴ The Institute of National Legal Development (LPHN) was formed in 1958 and reconstituted in 1961.¹⁵⁵ A committee was formed by LPHN in around 1961 headed by commercial law expert Professor Soekardono with the task of reviewing the entire Commercial Code, including the limited liability company articles. The results of this

in INDONESIA ECONOMIC DECOLONIZATION IN REGIONAL AND INTERNATIONAL PERSPECTIVE 175 (J. Thomas Lindblad & Peter Post eds., 2009). More specifically, *see*, J. Thomas Lindblad, *The Economy of Decolonisation in North Sumatra*, *in* INDONESIA ECONOMIC DECOLONIZATION IN REGIONAL AND INTERNATIONAL PERSPECTIVE 87, 97-98 (J. Thomas Lindblad & Peter Post eds., 2009) (giving an account of the nationalisation of the Deli Maatschappij).

¹⁴⁷ Thee, *supra* note 141, at 49.

¹⁴⁸ Rice, *supra* note 128, at 64.

¹⁴⁹ Thee, *supra* note 141, at 54; Robert Fabrikant, *PERTAMINA, A Legal and Financial Analysis of a National Oil Company in a Developing Country*, 10 TEX. INT'L L. J. 495, 495 (1975).

¹⁵⁰ Law no. 19/1960 on State-Owned Enterprises. *See also* Fabrikant, *supra* note 149, at 497.

¹⁵¹ Fabrikant, *supra* note 149, at 499.

¹⁵² *See generally* Lev, *supra* note 107.

¹⁵³ SING, *supra* note 116, at 21.

¹⁵⁴ *See* MPRS Decree no. II/1960, Appendix A, no. 35 (which stated that national law should be based on *adat* so far as it did not impede the development of a just and prosperous society).

¹⁵⁵ In Indonesian this was the *Lembaga Pembinaan Hukum Nasional* (LPHN). *See, generally*, June S. Katz & Ronald S. Katz, *Law Reform in Post-Soekarno Indonesia*, 10 INT'L LAWYER 335 (1976), and, June S. Katz & Ronald Katz, *Indonesia's National Law Development Centre: A Potential Model for Developing Countries*, 12 INT'L LAWYER 443 (1978).

committee were not published until 1968, after Sukarno's reign had come to an end.¹⁵⁶ This draft aimed to 'create a commercial code based on Indonesian national identity and the spirit of *Pancasila*¹⁵⁷ that was also capable of being used in international (trade) relations'. This draft Code reproduced the existing legal entity forms from the Dutch Commercial Code, but with some changes and the addition of cooperatives. For limited liability companies the draft contained considerably more detail on establishment, division of power between directors, commissioners and shareholders, and on winding up (57 articles in total). Notably, article 83 of the draft required directors and commissioners not only to heed the interests of shareholders but also the interests of the Indonesian people as a whole. This draft was never formally enacted, as is discussed further in Section F below.

In the meantime, in 1962, Minister for Justice Dr. Sahardjo (1959-1963), unilaterally declared that the Codes were no longer to be regarded as strict written codifications but merely as a record of customary conventions which could be used as guidelines by courts.¹⁵⁸ There was some hostility towards this move within the LPHN and among judges.¹⁵⁹ The Supreme Court then mitigated this move in Circular Letter no. 3 of 5 September 1963 which stated that not all provisions in the Codes were to be regarded as invalid – only specific articles that contravened the Constitution,¹⁶⁰ and hence the Commercial Code continued to be generally valid. In 1965 another committee was suddenly formed by the Ministry of Justice to draft a law on *Gotong-Royong*¹⁶¹ limited liability companies which would in essence forbid the use of majority voting rules and instead only use deliberation and consensus (*musyawarah* and *mufakat*) to reach decisions. This did not eventuate due to intervention by other ministers at

¹⁵⁶ LEMBAGA PEMBINAAN HUKUM NASIONAL, RANTJANGAN UNDANG-UNDANG TENTANG KITAB UNDANG-UNDANG HUKUM DAGANG [DRAFT LAWS ON THE COMMERCIAL CODE] (1968). The foreword to this publication by the Caretaker Head of LPHN, J.C.T. Simorangkir, noted that this draft had been given to the Minister for Justice and to the National Legislature. It seems to hint that the LPHN was frustrated by the lack of action, and hoped that the publication in 1968 would 'be useful'.

¹⁵⁷ *Pancasila* are the five philosophical principles of the Indonesian state. In brief, they are: belief in one God, just and civilised humanity, the unity of the territory and people of Indonesia, democracy and social justice.

¹⁵⁸ See also Sahardjo, *Pidato Wakil Menteri Pertama Dalam Negeri/Menteri Kehakiman Sahardjo, S.H. pada Malam Resepsi Pembukaan Seminar Hukum Nasional di Istana Negara pada tanggal 11 Maret 1963* [Speech by First Deputy Minister for Interior Affairs/Minister for Justice Sahardjo at the National Law Seminar Opening Reception Night at the State Palace on 11 March 1963], in SERBA SERBI LPHN/BPHN 139 (J.C.T. Simorangkir ed., 1980).

¹⁵⁹ Lev, *supra* note 107, at 292; Linnan, *supra* note 143, at 75.

¹⁶⁰ Sudargo Gautama, *An Overview of the Indonesian Legal System (With Special Reference to Foreign Investments)*, in BUSINESS & INVESTMENT LAWS IN INDONESIA, PROCEEDINGS OF THE FIRST INDONESIA-SINGAPORE LAW SEMINAR (26-27 February 1993).

¹⁶¹ *Gotong-Royong* may be defined as 'mutual assistance'. It was an ostensibly Javanese *adat* concept borrowed into state discourse and was particularly used by President Sukarno to evoke ideas of tradition and to promote obedience to authority. See John Bowen, *On the Political Construction of Tradition: Gotong Royong in Indonesia*, 45 J. ASIAN STUD. 545 (1986).

the time.¹⁶² One of the final pieces of legislation enacted before the coup of September 1965 was a law on cooperatives.¹⁶³ This law positioned cooperatives as being a revolutionary tool and prescribed that cooperative management should reflect ‘revolutionary progressive strength’.¹⁶⁴

2.6 The Suharto Era and the 1995 Company Law

Sukarno’s rule ended after the so-called attempted Communist Coup of September 1965. Then little-known General Suharto came to power in the aftermath of the coup and there was a drastic change in economic ideology from leftist to rightist. This new regime was proclaimed as the ‘New Order’ – it was essentially autocratic, with extreme concentration of power in the executive and only a thin veneer of democratic practices exercised through the executive- and military-dominated National Legislature.

Despite repeated recognition of a need for change, Indonesia’s first major company law reform was not passed until 1995 during the late New Order regime. According to Linnan (2008), it is an enduring mystery as to exactly why the autocratic Suharto regime failed for so long to overturn out-dated colonial laws, including the company law articles in the Commercial Code.¹⁶⁵ Many unanswered questions remain because it was, and is, almost impossible to determine how policies were made and exactly which interests were involved.¹⁶⁶ Legislative drafting was carried out behind closed doors and was not generally released to the public.¹⁶⁷ Indonesian bureaucratic agencies tended not to communicate with each other very well and often did not know when another department was drafting a new law.¹⁶⁸ Despite these uncertainties, the following general story of the lead up to the 1995 law can be pieced together from various sources.

¹⁶² Suroredjo, *supra* note 109, at 36.

¹⁶³ Law no. 14/1965 on Cooperatives.

¹⁶⁴ SOESILO, *supra* note 87, at 70.

¹⁶⁵ Linnan, *supra* note 143, at 68.

¹⁶⁶ ADAM SCHWARZ, *A NATION IN WAITING: INDONESIA’S SEARCH FOR STABILITY* 85 (2nd ed., 2004).

¹⁶⁷ See Manopo, *supra* note 108, at 88 (who noted that as an academic in the Law Faculty of the University of North Sumatra he had never seen a copy of the draft company law despite having made many requests to the Department of Justice).

¹⁶⁸ Bruce A. Markell, *A View from the Field: Some Observations on the Effect of International Commercial Law Reform Efforts on the Rule of Law*, 6 *IND. J. GLOBAL LEGAL STUD.* 497, 501 (1999).

In the turmoil of the late 1960s, under the aegis of the International Monetary Fund (IMF), the New Order regime quickly implemented measures to support large-scale foreign investment for natural resource exploitation. In return for international rescheduling of its debts, Indonesia agreed to reduce Sukarno's legacy of emphasis on the state-owned sector and to encourage private, particularly foreign, investment.¹⁶⁹ This change in economic and industrial policy was designed by a team of mostly US-trained technocrats appointed by Suharto. In the first year of Suharto's Presidency, three pivotal laws were passed; Law no.1/1967 on Foreign Investment,¹⁷⁰ Law no.5/1967 on Forestry, and Law no.11/1967 on Mining. The Foreign Investment Law included the requirement that foreign companies wanting to invest in Indonesia should incorporate a new Indonesian-domiciled company.¹⁷¹ Although not a legal obligation, it was accepted in practice that businesses organised under the Domestic Investment Law of 1968 also had to use the NV company form.¹⁷²

There was at least nominal emphasis on black letter law reform during the early years of the New Order.¹⁷³ The Five Development Year Plan (*Repelita*) of 1969–1974 recognised the importance of the rule of law and the need for law reform to achieve development, and the second *Repelita* of 1974–1979 called for legal renewal, codification, and unification.¹⁷⁴ The company law was not reformed during that short period of opportunity in the late 1960s but a new cooperatives law was passed.¹⁷⁵ At that time there was an imperative to remove quickly the communist revolutionary connotations that were included in the 1965 cooperatives law and return the cooperative form to having an economic and not a political function. But this focus on the cooperative form is also at least partly explained by the ongoing power of the cooperatives ideal in Indonesian political philosophy.¹⁷⁶ Suharto himself liked the idea of

¹⁶⁹ Nonetheless, state-owned enterprises continued to play an important economic role in the Suharto era. Through Law no. 9/1969 on SOEs the Suharto regime tried to streamline the many different types of SOEs that were formed during the Dutch colonial and the Sukarno eras into just three types of SOEs; *Perusahaan jawatan* (departmental agency), *perusahaan umum* (public corporation), *perusahaan perseroan* (state corporation, which was based on the NV company form). It was intended that this law would reduce SOE dependency on government budgets, to encourage profit making and facilitate a reduction in the public sector through privatisation.

¹⁷⁰ The foreign investment law would be amended several times and various pieces of implementing legislation were also passed which affected its scope. The foreign investment law also had requirements for staggered divestment of shares to Indonesian owners.

¹⁷¹ Law no.1/1967 on Foreign Investment, art. 3. There was also a requirement that most foreign investors form a joint venture with Indonesian partners (this was not a requirement for banks or some mining companies and could be waived in other cases).

¹⁷² Law no. 6 of 1968 on Domestic Investment. See also Charles Himawan, *Highlights on the Company Law of Indonesia*, 15 MALAYA L. REV. 139, 139 (1973).

¹⁷³ Lindsey & Santosa, *supra* note 131, at 10.

¹⁷⁴ BALL, *supra* note 72, at 9.5.5 and 6.7.

¹⁷⁵ Law no. 12/1967 on Cooperatives.

¹⁷⁶ Henley, *supra* note 95; Rice, *supra* note 128.

cooperatives, but the New Order did not follow the earlier thinking of Hatta who had argued for the cooperative form to be used for large enterprises.¹⁷⁷ The early New Order view was that big business should be under government control while the ordinary people were to be satisfied with the small sector economy. The regime would go on to give sustained encouragement to rural and village level cooperatives (KUDs) despite the lack of any great success.¹⁷⁸

A further contributing factor to the emphasis on cooperatives rather than on companies was that it was thought that time was needed for a thorough revision of the entire Commercial Code¹⁷⁹ (recalling that cooperatives were never part of the Code). During the New Order there was still some continuing argument between different schools of thought over whether to adopt *adat*¹⁸⁰ or Western law in specific areas of law.¹⁸¹ Nonetheless the status of the Civil and Commercial Codes was re-established – in other words, there was further retreat from former Minister Sahardjo’s views on the validity of the colonial codes, and judges began to cite the codes as having the full force of the law.¹⁸² In December 1968, the LPHN held its second national law seminar. At that event a workshop with leading commercial law experts including Professor Sukardono discussed the existing Draft Commercial Code (as drafted by the LPHN during the Sukarno years, see Section 2.5 above) and concluded that more work was needed to be done to refine its principles and language. Particular articles in the draft were identified as being no longer appropriate since the end of the Sukarno regime.¹⁸³ This draft Commercial Code was revised at least once more during the 1970s. Makarim (1978) noted that while it was generally influenced by Dutch law, the draft Commercial Code included requirements that articles of association contain the aim of contributing to the raising of the Indonesian standard of living and that directors were to be attentive to the interests of the masses. It also required a minimum of five persons to establish the company

¹⁷⁷ Rice, *supra* note 128, at 64-65.

¹⁷⁸ M. Dawam Rahardjo, *Development Policies in Indonesia and the Growth of Cooperatives*, 23 PRISMA 3 (1981).

¹⁷⁹ Suroredjo, *supra* note 109, at 39.

¹⁸⁰ See Bourchier, *supra* note 71, at 101 (arguing that despite being ostensibly focussed on modern economic development the New Order was still strongly influenced by romantic thought on *adat*).

¹⁸¹ See BALL, *supra* note 72, at 5.15.

¹⁸² *Id.*, at 5.11.

¹⁸³ *Kesimpulan Seminar Hukum Nasional II di Semarang tgl 27-30 Desember 1968 tentang Hukum Dagang [Summary of National Law Seminar II in Semarang on 27-30 December on Commercial Law] and Rumusan Hasil Komisi Hukum Dagang Seminar Hukum Nasional II [Formulation of Results of the Commission on Commercial Law at National Law Seminar II]*, in SERBA SERBI LPHN/BPHN 217-233 (J.C.T. Simorangkir ed., 1980).

and the board of supervisors was authorised to participate in management.¹⁸⁴ This draft was to be eventually abandoned in favour of a single company law rather than a revamped Commercial Code, as is discussed further below.

Foreign investment was strong throughout the 1970s and natural resources revenues, particularly from oil, were the main engine for Indonesian economic growth. This growth was successfully exploited by Suharto and his family and cronies for rent-seeking.¹⁸⁵ The rent-seeking activities of the New Order elite included granting rights to natural resource exploitation and designation of mandatory ‘indigenous’ partners for foreign investors. Foreign investors tended to turn a blind eye to such practices but were, however, frustrated with the Commercial Code and the legal uncertainties and business risks that it created.¹⁸⁶ In 1971, an amendment to article 58 of the Commercial Code on shareholder voting rules was passed due to foreign investor pressure.¹⁸⁷ The Commercial Code had mandated a six-vote limit regardless of percentage of shareholding – a system which protected minority shareholders. Foreign investors were unhappy with this voting limit as it impaired their ability to control joint ventures,¹⁸⁸ and a compromise solution was found allowing individual companies to choose whether to adhere to the old voting system or adopt the one-share-one-vote principle. It is clear from the elucidation to this amendment that it was intended to be a stop-gap measure to fulfil an immediate need while a revision of the law on companies and partnerships was undertaken.¹⁸⁹

The wording of the 1971 amendment also indicated that focus had shifted from revising the entire Commercial Code to separately drafting a new company law.¹⁹⁰ This was most likely due to the urgency placed on company law reform to bring it into line with other legislative

¹⁸⁴ Makarim, *supra* note 43, at 375-376. See also Appendix II in Makarim for the text of this draft.

¹⁸⁵ See Ross McLeod, *Government-Business Relations in Soeharto's Indonesia*, in REFORM AND RECOVERY IN EAST ASIA 148 (Peter Drysdale ed., 2000) (characterising the rent-seeking of the Suharto era as a ‘franchise’ where rent-seeking power was spread down through the bureaucracy and military).

¹⁸⁶ Murray Clapham, *Some Difficulties of Foreign Investors in Indonesia*, 6 BULL. INDONESIAN ECON. STUD. 73 (1970); Dipak Dasgupta & David Mead for the World Bank, *Indonesia: Priorities for Commercial Law Reforms for Private Sector Development* (29 June 1990, report no. 8763/IND).

¹⁸⁷ Law no. 4/1971 on Amendment to Article 54 of the Commercial Code.

¹⁸⁸ CHARLES HIMAWAN & MOCHTAR KUSUMAATMADJA, *SURVEY OF INDONESIAN ECONOMIC LAW* 47 (1973); Clapham, *supra* note 186, at 74.

¹⁸⁹ See Suroredjo, *supra* note 109, at 39. The 1969 SOE law (Law no. 9/1969) also noted that a review of the Commercial Code was being awaited.

¹⁹⁰ SUDARGO GAUTAMA, *KOMENTAR ATAS UNDANG-UNDANG PERSEROAN TERBATAS YANG BARU (1995) NO.1 PERBANDINGAN DENGAN PERATURAN LAMA [COMMENTARY ON THE NEW LIMITED LIABILITY COMPANY LAW (1995) NO.1 COMPARISON WITH THE OLD LAW]* 3 (1995) (mentions that this shift resulted in all the earlier work on Commercial Code drafts becoming redundant and that they ‘drowned’ beneath the emphasis placed on the new separate company law).

changes particularly the Foreign Investment Law. By the late 1970s, in addition to the LPHN Commercial Code draft, a separate company law draft produced by the Ministry of Justice was also in circulation (initiated by Minister Mochtar Kusumaatmadja).¹⁹¹ This draft was called the ‘Wiersma Draft’ for a Professor of law at Leiden University who had some input into it.¹⁹² According to Makarim (1978) this draft was more strongly inspired by Dutch company law than the LPHN Commercial Code draft and it was certainly more detailed.¹⁹³ Notably it contained provision for a Dutch style court investigation of the company, but it also provided that some supervisors were to be appointed by the government rather than by shareholders.

Usman (2004) relates how the Ministry for Justice draft was traded between bureaucratic departments and stalled at various points, and it was not until 1994 that the President gave permission for the draft to be put to Parliament.¹⁹⁴ Meanwhile, a Capital Market Regulator (BAPEPAM) was initially set up in 1976, and the Jakarta Stock Exchange was re-established in 1977, but remained largely stagnant until 1989. There was little investor confidence due, at least partly to the weakness of the underlying legal framework.¹⁹⁵ There was recognition of this weakness and there were some ultimately unsuccessful attempts to rectify this during the early 1980s. The Institute of National Legal Development (the LPHN was renamed as the BPHN in 1974) held a symposium on renewal of national commercial law in Yogyakarta in November 1980. The opening speech by the Minister for Justice (Mudjono) recognised the need to update the Commercial Code – ‘the Dutch have updated theirs but we have not.

¹⁹¹ Mochtar Kusumaatmadja (1929-) was educated at Harvard, Yale and University of Chicago law schools. Returning to Indonesia after the end of Sukarno’s reign he became Professor of law at Padjadjaran University in Bandung, where he instituted legal education reforms and directed the Survey of Indonesian Economic Law project (1972-74). He was Minister for Justice from 1973 to 1978. He favoured the idea of law as a tool for development and as Minister revived the LPHN/BPHN. See Katz & Katz, *Law Reform in Post-Sukarno Indonesia*, *supra* note 154; BALL, *supra* note 72, at 5.23, 6.13.

¹⁹² It is unclear exactly, but this may have been Klaas Wiersma (1917-1993) who was Professor of civil and notarial law at Leiden University and also variously a Government Minister and Judge of the Dutch Supreme Court.

¹⁹³ See Makarim, *supra* note 43, Appendix I for text of this draft. Note that there were major updates to Dutch company law in the early 1970s involving transfer of the entire matter on legal persons in the Commercial Code to the Civil Code. Six laws were passed which dealt with revision of the right of enquiry into a company’s business, regulations relating to a company’s annual accounts, adaptation to the first EEC directive, introduction of the *Besloten Vennootschap* (BV) – private companies with limited liability, modification of the structure of the large NV and large BV. The additional supervisory board also made compulsory in these amendments. For further details, see Van Oven, *supra* note 53).

¹⁹⁴ USMAN, *supra* note 1, at 9-13.

¹⁹⁵ COLE & SLADE, *supra* note 140, at 159.

Times have moved on'.¹⁹⁶ Later, in 1985, the Dutch government funded some law reform efforts in Indonesia and under this program there were unsuccessful attempts to rewrite the commercial and criminal codes entirely.¹⁹⁷

At this time the oil price was high and the state had ready access to resources; hence mobile investors' threats were not particularly constraining on policy-makers.¹⁹⁸ The group of Western-educated technocrats recruited in the late 1960s were still influential but did not seriously threaten President Suharto's power.¹⁹⁹ However, the collapse of the oil price in the mid-1980s resulted in Indonesia becoming more vulnerable to foreign demands to open up the economy,²⁰⁰ and this gave greater space for the technocrats to exercise substantial influence over economic policy.²⁰¹ The technocrats initiated deregulation of the banking industry, capital market reform and trade and investment policies, and these measures resulted in growth of the private sector and particularly benefitted large corporations.²⁰² It did not, however, lead to company law reform, most likely due to power struggles between the liberal economic reform-minded technocrats and the more conservative, Dutch-oriented approaches of the LPHN/BPHN and the Ministry of Justice.²⁰³

In the meantime, the regulatory gaps left by the lack of company law reform were being at least partly filled by the Ministry of Justice which was regulating the content of articles of association when companies were given approval to incorporate.²⁰⁴ For example, in the 1960s and 1970s, the Ministry of Justice allowed companies to be formed with a single board of directors, but, without any announcement of a policy change, in the early 1980s began only

¹⁹⁶ Mudjono, *Pidato Pengarahan Meteri Kehakiman [Direction Speech by the Minister for Justice]*, in SIMPOSIUM PEMBAHARUAN HUKUM DAGANG NASIONAL, TANGGAL 10-12 NOPEMBER 1980, DI YOGYAKARTA (Badan Pembinaan Hukum Nasional, 1984).

¹⁹⁷ Linnan, *supra* note 143, at 79.

¹⁹⁸ ANDREW ROSSER, *THE POLITICS OF ECONOMIC LIBERALISATION IN INDONESIA: STATE, MARKETS AND POWER* 42 (2002).

¹⁹⁹ McLeod, *supra* note 185, at 156.

²⁰⁰ Lindsey & Santosa, *supra* note 131, at 10.

²⁰¹ ROSSER, *supra* note 198, at 39.

²⁰² SCHWARZ, *supra* note 166, at 80.

²⁰³ Andrew Rosser, *Coalitions, Convergence and Corporate Governance Reform in Indonesia*, 24 *THIRD WORLD QUART.* 319, 320 (2003); SCHWARZ, *supra* note 166, at 74; Linnan, *supra* 143, at 72, 80.

²⁰⁴ See Robert N. Hornick & Mark A. Nelson, *Foreign Investment in Indonesia*, 11 *FORDHAM INT'L L. J.* 724, 735 (1988); Kartini Muljadi, *Company Law in Indonesia*, in *COMPANY LAW AND PARTNERSHIP LAW IN SELECTED ASIAN COUNTRIES: CHINA, HONG KONG, INDONESIA, JAPAN, KOREA, MALAYSIA, SINGAPORE* 69 (Christian Salbaing ed., 1986), Gary W. Christian, *Liabilities of Directors and Commissioners Under the New Indonesian Company Law*, in *THE INDONESIAN COMPANY LAW '95. AN IN DEPTH ANALYSIS OF SIGNIFICANT FEATURES & KEY LEGAL, FINANCIAL AND OPERATIONAL IMPLICATIONS OF THE NEW COMPANY LAW FOR BUSINESS IN INDONESIA* (1995).

allowing companies with a dual board structure with a Board of Commissioners.²⁰⁵ From the mid-1980s, the Ministry also rejected articles of association that permitted bearer shares (with unregistered ownership) because this was a popular way of evading restrictions on foreign ownership.²⁰⁶ Other occasional written (especially in the form of *surat edaran* or circular letters) and verbal guidance also emanated from the Ministry of Justice.²⁰⁷ Further, it seems that companies themselves were also making modifications to their practices to fit modern conditions. When drafting their articles they were including changes they saw as valuable even if not required to do so by the Commercial Code.²⁰⁸

The early 1990s saw a number of high profile company scandals in Indonesia which generated political settlements rather than legal action or legislative reaction. For example, in December 1990, it was discovered that the CEO of Bentoel, a large Chinese family-owned *kretek* (clove cigarette) manufacturer, had been grossly defrauding the company. Closer scrutiny then revealed that fraud and negligence, family squabbles and complaisant shareholders had all contributed to the company's dire financial situation. It had large debts to both Indonesian and foreign banks all of which had failed to notice the mismanagement. There was also some indication that other high profile political figures were implicated in the fraud. The company was bailed out by new owners and the foreign creditors were prevented from pursuing their claims through the courts.²⁰⁹ In another example in 1990, Bank Duta announced huge foreign exchange losses. Only one of the company officers was prosecuted and there was no action against the public accountant. The major controlling shareholders, three foundations (*yayasan*²¹⁰) all chaired by President Suharto, made a 'pure gift' of USD 419 million to bail out the bank, against all principles of corporate financing.²¹¹ The early 1990s nonetheless saw the beginnings of merger and acquisition activity and the initial development of related BAPEPAM rules.

²⁰⁵ T.A.H. Azwar, *Pandangan dan Pemikiran Masalah Perusahaan Berkaitan Dengan Hukum Perseroan [Views and Thoughts on Company Problems Connected to the Limited Liability Company Law]*, in SIMPOSIUM PEMBAHARUAN HUKUM DAGANG NASIONAL, TANGGAL 10-12 NOPEMBER 1980, DI YOGYAKARTA 104, 104 (Badan Pembinaan Hukum Nasional, 1984).

²⁰⁶ Austin I. Pulle, *The New Company Law of Indonesia*, 17 COMPANY LAWYER 122 (1996).

²⁰⁷ T. Mulya Lubis, *PMA dan UU PMA: Harapan dan Kenyataan [Foreign Investment and the Law on Foreign Investment: Hopes and Realities]*, 11 HUKUM DAN PEMBANGUNAN 335, 336 (1981).

²⁰⁸ Dasgupta & Mead, *supra* note 186, at 29.

²⁰⁹ For more details see SCHWARZ, *supra* note 166, at 66-70.

²¹⁰ See Part 4.3 of this paper for discussion of the *yayasan* as a business entity.

²¹¹ See Benny Tabalujan, *Why Indonesian Corporate Governance Failed – Conjectures Concerning Legal Culture*, 15 COLUMBIA J. ASIAN L. 141, 150-152 (2002).

A World Bank report in 1990 reviewed Indonesia's company laws and the existing LPHN and Ministry of Justice drafts and recommended substantial reform of company and capital market regulation.²¹² It particularly found that the drafts were overly regulatory (overly patterned on Dutch law) and suggested that this would inhibit private sector growth. Following this report, in 1992, USAID funded the 'Economic Law and Improved Procurement Systems' (ELIPS) Project to modernise Indonesian law. ELIPS brought in international legal experts, sponsored seminars and supported the drafting and dissemination of a new banking law,²¹³ capital markets law²¹⁴ and the 1995 company law.²¹⁵ The company law draft was introduced in the National Legislature in May 1994 and then went through a committee process and was passed into law in March 1995. The parliamentary process resulted in a small increase in detail in the law but the underlying principles remained substantially the same. Interestingly, the legislature records show no mention of the role of ELIPS or other foreign pressure in the development of the draft.²¹⁶

The 1995 company law²¹⁷ overturned articles 36–56 of the Commercial Code and the 1939 Indigenous Joint Stock Company law. It was formally based on the 'family principle' of article 33 of the 1945 Constitution, but this appears to have been merely a formality and there was no real attempt to apply this principle to the new law.²¹⁸ The 1995 law was clearly underpinned by the idea that the purpose of the corporation is maximisation of shareholder

²¹² Dasgupta & Mead, *supra* note 186.

²¹³ Law no. 7/1992 on Banking.

²¹⁴ Law no. 8/1995 on Capital Markets.

²¹⁵ Law no.1/1995 on Limited Liability Companies, which came into effect on 7 March 1996. For further accounts of the ELIPS project and its activities, see: *Indonesia Needs New Business Laws*, JAKARTA POST, 9 December 1993, at 1; NORMIN S. PAKPAHAN, HUKUM PERUSAHAAN INDONESIA: TINJAUAN TERHADAP UNDANG-UNDANG NO. 1 TAHUN 1995 TENTANG PERSEROAN TERBATAS [INDONESIAN COMPANY LAW: ANALYSIS OF LAW NO.1 OF 1995 ON THE LIMITED LIABILITY COMPANY] (1995); BALL, *supra* note 72, at 7.104; Checchi and Co Consulting, *Economic Law and Improved Procurement Systems Project Final Report* (submitted to US Agency for International Development, Jakarta, July 1998); Linnan, *supra* note 143.

²¹⁶ Details of the National Legislature (DPR) debates of the 1995 Company Law are available in two large volumes: SEKRETARIAT JENDERAL DEWAN PERWAKILAN RAKYAT REPUBLIK INDONESIA, PROSES PEMBAHASAN RANCANGAN UNDANG-UNDANG REPUBLIK INDONESIA TENTANG PERSEROAN TERBATAS [THE PROCESS OF DISCUSSION OF THE DRAFT LAW OF THE REPUBLIC OF INDONESIA ON LIMITED LIABILITY COMPANIES], (volumes I & II, 1996).

²¹⁷ For a detailed translation and explanations of the content of the 1995 company law, see TABALUJAN, *supra* note 1.

²¹⁸ There was quite a lot of discussion of the need to have the 'spirit' of the 1945 Constitution reflected in the company law during the National Legislature debates, particularly as the 1993 Broad Guidelines for State Policy (*Garis-Garis Besar Haluan Negara*) required colonial law to be replaced with legal products based on the spirit of *Pancasila* and the Constitution. However, see Agus Sardjono, *Azas Kekeluargaan Dalam UU Perseroan Terbatas [The Family Principle in the Limited Liability Company Law]*, 28 HUKUM DAN PEMBANGUNAN 29 (1998) (pointing out that the one-share-one-vote principle overrides the requirement in the law to reach decisions by consensus (*musyawarah* and *mufakat*), an important element of the philosophy behind the family principle, and hence arguing that the family principle was not truly integrated into the 1995 company law).

value and the suggestions of wider societal objectives in the earlier drafts were abandoned. With 129 articles, the new law was much more comprehensive than the old. Many of the conventions of modern company law were covered including minority shareholder protections, although a comparatively high degree of state control was maintained. Incorporation required a minimum of two promoters, minimum capital and the approval of the Minister. The US influence on the drafting process resulted in provisions on piercing the corporate veil and new sections on mergers and acquisitions that appeared to be based on US concepts.²¹⁹ A number of Dutch concepts were also retained or formalised – the establishment of a Board of Commissioners was made compulsory and the law provided for a civil law-type judicial investigation of the company. A derivative action was permitted but was only able to be initiated by a shareholder with one tenth or more of the shares. The law required that capital increase and decrease could only occur with shareholder approval. For capital decrease, the law additionally required Ministerial approval and creditors to be informed. Overall, the 1995 law followed the civil law pattern of being highly mandatory with little scope for the reallocation of control rights by interested parties. Ministerial decrees in 1996 also established standard forms of articles of association,²²⁰ which limited individual company choice of rules.

The 1995 law was welcomed by influential Indonesian commentators²²¹ but had little time to take effect before the Asian Financial Crisis hit two years later. Many analysts have argued, with hindsight, that the new law was inadequate to the task of overcoming Indonesia's entrenched corporate and banking sector problems.²²²

2.7 The Asian Financial Crisis and the Post-Suharto Reform Era

Change in Indonesian company law following the fall of Suharto in 1998 was triggered by the Asian Financial Crisis. Indonesia was one of the countries most affected by the crisis. It

²¹⁹ See Henri Gunanto, *The Impact of U.S. Law Propositions on Indonesian Commercial Law*, 29 LOY. L. A. L. REV. 1047 (1996).

²²⁰ TABALUJAN, *supra* note 1, at 274 (noting also that a further series of implementing legislation was contemplated), however this never actually eventuated.

²²¹ See, e.g., *Newly Passed Law on Limited Liability Companies Hailed*, JAKARTA POST, 11 February 1995, at 8 (citing prominent lawyer and human rights activist Todung Mulya Lubis as praising the law for being more comprehensive and as providing a more certain legal framework); *Expert Warns on Minority Shareholders Protection Law*, JAKARTA POST, 12 July 1995, at 9 (citing leading commercial lawyer Kartini Muljadi as welcoming the minority shareholder protections provided by the new law).

²²² See, e.g., Daniel Fitzpatrick, *Corporate Governance, Economic Crisis and the Indonesian Banking Sector*, 9 AUSTRAL. J. CORP. L. 178 (1998).

has been widely argued that corporate governance laws and practices were contributing factors to the causes of the Asian Financial Crisis and the varying levels of economic damage experienced in the different countries.²²³ In Indonesia more specifically the crisis was attributed to the long consequences of deregulation in the mid-1980s, poor corporate governance and critical problems with the banking sector which permitted huge unsecured loans merely on political recommendations.²²⁴

Following the crisis and Suharto's downfall, Indonesia embarked on a period of major political and democratisation reforms involving a 'rush to law'.²²⁵ Much of this legal reform was prompted by international pressure. Prior to his resignation, Suharto had been forced to call in the IMF, and the IMF pushed deregulation harder and faster. Later, from 1998 to 2000 almost every piece of national legislation passed was dictated by the IMF through the conditions attached to its bailout of the Indonesian economy. The National Legislature (DPR) passed 67 laws in less than two years, many liberalising and deregulating both politics and the economy and others setting up new governance institutions and courts. The IMF-led reforms were based on the Post-Washington Consensus model for developing countries with its emphasis on 'governance'.²²⁶ Economic law reform efforts included new laws on bankruptcy,²²⁷ banking, anti-monopoly, consumer protection, trade secrets, trademarks and copyright.²²⁸ Not all of the new laws were purely based on US/common law concepts; the new bankruptcy law, for instance, retained much of its Dutch heritage.²²⁹

Indonesia's commitments to the IMF also led to the formation of the National Committee for Corporate Governance (NCCG) in August 1999. This Committee was given the task of

²²³ See, e.g. Johnson et al, *supra* note 3; Stijn Claessens, Simeon Djankov & Lixin Colln Xu, *Corporate Performance in the East Asian Financial Crisis*, 15 WORLD BANK RES. OBSERVER 23 (2000).

²²⁴ See, e.g., Fitzpatrick, *supra* note 222; YASAYUKI MATSUMOTO, FINANCIAL FRAGILITY AND INSTABILITY IN INDONESIA (2007); Shalendra D. Sharma, *The Indonesian Financial Crisis: From Banking Crisis to Financial Sector Reforms*, 71 INDONESIA 79 (2001).

²²⁵ Daniel Fitzpatrick, *Indonesian Corporate Governance: Would Outside Directors or Commissioners Help? in INDONESIA IN TRANSITION: SOCIAL ASPECTS OF REFORMASI AND CRISIS* 293, 302 (Chris Manning & Peter van Dierman eds., 2000); William A. W. Neilson, *The Rush to Law: The IMF Legal Conditionalities Meet Indonesia's Legal Culture Realities*, in PROSPECTS FOR LAW REFORM IN POST-SOEHARTO INDONESIA 4 (Drew Duncan & Tim Lindsey eds., 1999).

²²⁶ Lindsey & Santosa, *supra* note 131, at 12-13.

²²⁷ For discussion of the reform of Indonesia's bankruptcy law, see Timothy Lindsey, *The IMF and Insolvency Law Reform in Indonesia*, 34 BULL. INDON. ECON. STUD. 119 (1998); Stacy Steele, *The New Law on Bankruptcy in Indonesia: Towards a Modern Corporate Bankruptcy Regime?* 23 MELBOURNE U. L. REV. 144 (1999);

²²⁸ Hikmahanto Juwana, *Reform of Economic Laws and its Effects on the Post-Crisis Indonesian Economy*, 18 THE DEVELOPING ECON. 72 (2005).

²²⁹ David K. Linnan, *Insolvency Law and Institutions in Indonesia*, in INSOLVENCY LAW IN EAST ASIA 355, 355 (Roman Tomasic ed., 2006).

drafting a corporate governance code and was provided with assistance from the World Bank. An initial Good Corporate Governance Code was submitted late in 1999 and was revised in 2000, 2001, and 2006.²³⁰ The Code was intended to be a 'reference point' and did not impose mandatory rules. It generally adopted the OECD Good Corporate Governance principles and included recommendations on independent commissioners and audit, nomination and remuneration committees. Some of the major principles from the Codes, including use of audit committees and independent commissioners, have been formalised for listed companies through Jakarta Stock Exchange listing rules and BAPEPAM regulations, although there are still problems with implementation of these.²³¹ Sector specific governance codes were also passed for SOEs in 2002 (with support of the ADB), banking in early 2004 and insurance in 2006. The private sector itself has also undertaken various initiatives to improve corporate governance in Indonesia.²³²

The IMF's May 2000 Letter of Intent also demanded reform to the company law and the company registry. The revision process was delayed due to the logjam in the National Legislature (DPR) and to differences of opinion among those drafters who wanted fundamental changes and those who only wanted cosmetic changes.²³³ Eventually, a draft prepared by the Ministry of Human Rights and Justice came before Parliament in October 2005 and went through the committee process in February 2006.²³⁴ Consultations were held with various interests groups including BAPEPAM, business groups, law and business

²³⁰ The 2006 update in Indonesia followed the update to OECD good corporate governance principles in 2004 and the name change and widening of the scope of the National Committee for Governance (with Public and Corporate sub-committees) also in 2004.

²³¹ Jakarta Stock Exchange Rule 1.A (in its various incarnations established by JSE decisions: KEP-315/BEJ/06/2000, KEP-339/BEJ/07/2001, Kep-305/BEJ/07-2004), BAPEPAM Circular Letter (SE-03/PM/2000), BAPEPAM Rule IX.I.5., Lampiran Keputusan Ketua Bapepam KEP-29/PM/2004 (Setting up and Operating Guidelines of the Audit Committee). See Daniel Fitzpatrick, *Tinkering Around the Edges: Inadequacy of Corporate Governance Reform in Post-Crisis Indonesia*, in BUSINESS IN INDONESIA: NEW CHALLENGES, OLD PROBLEMS 178, 184 (M. Chatib Basri & Pierre van der Eng eds., 2004) (arguing that the requirement for independent commissioners is inadequate because of the small number required and because there is a lack of complementary provisions on voting, appointment and quorum requirements. Arguing also that audit committees have not of themselves increased transparency).

²³² Amin Wibowo, Robert Evans & Mohammad Quaddus, *Internal Corporate Governance and Organisational Performance: Evidence from Indonesia*, 15 J. CONTEMP. ISSUES BUS. GOV. 95, 97 (2009) (listing private sector initiatives as including: Forum for Corporate Governance in Indonesia (FCGI), Corporate Leadership Development in Indonesia (CLDI), the Indonesian Institute for Corporate Directorship (IICD), Indonesian Directors and Commissioners Initiative, the Indonesian Institute of Independent Commissioners, KADIN Corporate Governance Task Force, and the Indonesian Institute for Corporate Governance).

²³³ Paul H. Brietzke, *Governance and Companies Law in Indonesia*, 2 ASIAN LAW 193, 197 (2000).

²³⁴ See K. HARYANTO, *POLITIK HUKUM DALAM PEMBAHARUAN UNDANG-UNDANG PERSEROAN TERBATAS: PERGULATAN EKSEKUTIF, LEGISLATIF & KORPORAT* [THE POLITICS OF LAW IN THE RENEWAL OF THE LAW ON LIMITED LIABILITY COMPANIES: THE STRUGGLE OF THE EXECUTIVE, LEGISLATURE AND CORPORATE SECTOR] (2007).

faculties from leading Indonesian universities and the NGO Business Watch Indonesia.²³⁵ By this time the direct influence of the IMF was waning and a second US-funded ELIPS project, which had intended to work on company law revisions, was diverted to post-September 11 preoccupations with criminal law and anti-money laundering.²³⁶

In 2007, an amended version of the 1995 law was passed.²³⁷ In the end the 2007 law was presented as an update to bring it into line with other related legislation and to support good corporate governance efforts and hence not as a total overhaul.²³⁸ It retained most of the basic concepts of the 1995 law, including its formal affirmation of the Constitutional ‘family principle’, but generally increased the level of detail in articles and sub-articles. New additions in the 2007 law included that companies can have an unlimited lifespan, for creditor objection to mergers, provisions for the calling of extraordinary shareholder meetings and tightening of the discretion of the Minister on permission to incorporate. The new law also allowed the Board of Commissioners to temporarily dismiss directors, and gave further definition of directors’ duties and when a director will not be held liable for company losses.

Two further changes in the 2007 law introduced elements not usually found in Western company law and which fall outside Pistor et al.’s emphasis on core areas of corporate law. Firstly, with this law (art. 74) Indonesia became the first country in the world to make Corporate Social Responsibility (CSR) a mandatory legislative requirement for resources companies rather than being based solely around voluntarist principles. This move appears to have been motivated by the rise of the CSR movement in Indonesia since the early 2000s and then a particular confluence of political and civil society interests that wanted greater control of large foreign and domestic companies.²³⁹ It was opposed by Indonesia Business Links (IBL) and many other individual companies who argued that mandatory CSR, understood mainly as the delivery of community development benefits, amounted to another tax which

²³⁵ *Id.*, at 84-85.

²³⁶ Program Pasca Sarjana Fakultas Hukum, Universitas Indonesia, Final Report: Contract No. PCE-I-00-98-00016-00 Task Order 821 Indonesia Economic Law, Institutional and Professional Strengthening (ELIPS II) Activity (October 2004).

²³⁷ Law no. 40/2007 on Limited Liability Companies. Enacted and came into force on 16 August 2007.

²³⁸ Andrew Rosser & Donni Edwin, *The Politics of Corporate Social Responsibility in Indonesia*, 23 PAC. REV. 1, 11 (2010); HARYANTO, *supra* note 234.

²³⁹ Rosser & Edwin, *supra* note 238 (explaining the details of the different interests involved in promoting the article on mandatory CSR in the 2007 law). It is tempting to draw a link between the introduction of this CSR requirement in the 2007 law and the attempts in the earlier post-Independence drafts of the Commercial Codes to give companies wider social objectives. However, it is clear that this innovation was very much set within the context of the rise of CSR discourse in Indonesia in the 2000s and current political objectives and that there was no reference made to those earlier drafts.

could trigger capital removal from the country and would also create more opportunities for corruption. Once the law was passed, these business interests lodged an appeal in the Constitutional Court to have Article 74 declared unconstitutional, but lost the case.²⁴⁰ Although a piece of implementing legislation on this CSR requirement was passed in 2012,²⁴¹ there are yet to be any strong sanctions for resources companies who fail to carry out their CSR responsibilities which suggests that corporate power may have reasserted itself at the central level. In the meantime, a new trend is emerging with many districts across Indonesia beginning to pass their own regional laws on CSR.²⁴²

Secondly, the 2007 law introduced the *Syariah* Supervisory Board (*Dewan Pengawas Syariah*) as an additional board for all *syariah* companies (art. 109), that is those companies that adhere to Islamic business principles. This board consists of one or more *syariah* experts accredited by the *Majelis Ulama Indonesia* (Council of Indonesian Ulama) and appointed by the general meeting of shareholders. Its function is to advise the directors and monitor company activities to ensure compliance with *syariah* principles. Committee debates on the 2007 law show that it was the United Development Party (PPP)²⁴³ representatives who pushed for the inclusion of the *syariah* supervisory board in the 2007 law and insisted that it should not form a powerless committee.²⁴⁴ The records indicate that there was not any particular opposition to this suggestion from other parties. This development follows from the introduction of requirements for *Syariah* Supervisory Boards in *syariah* banks in 1992²⁴⁵ and generally increased regulation of Islamic banking in Indonesia since 1998.²⁴⁶ The Jakarta

²⁴⁰ *Id.*, at 6.

²⁴¹ Government Regulation no. 47/2012 on Social and Environmental Responsibility of Limited Liability Companies.

²⁴² For reference to this trend see: *LSM Nilai Perda CSR Jadi Lahan Baru Korupsi* [NGO says Regional CSR Laws are a New Arena for Corruption], ANTARA NEWS.COM, 13 February 2012; Wandu P. Simanullang, *Menyoal Perda CSR* [Questioning the Regional CSR Laws], HARIAN ANALISA.COM, 29 November 2011.

²⁴³ The United Development Party (*Partai Pembangunan Persatuan*, PPP) was the only Islamic party permitted during Suharto's New Order. The party has generally been in decline since then as it has been in competition with many other newly formed Islamist parties. PPP is generally a moderate Islamic party although has been going through an identity crisis due its drop in support. The National Legislature discussions on the 1995 Company Law indicate that the PPP faction had suggested a *Syariah* Board but this was not accepted at the time. See SEKRETARIAT JENDERAL DEWAN PERWAKILAN RAKYAT REPUBLIK INDONESIA, *supra* note 215, v. II, at 1884.

²⁴⁴ Transcripts of National Legislature (DPR) Committee discussions (*Risalah Rapat Panitia Khusus Rancangan Undang-Undang tentang Perseroan Terbatas*) 22 June 2006 and 6 March 2007.

²⁴⁵ Government Regulation no. 72/1992 on Banks Applying Profit Sharing Principles. See Tim Lindsey, *Between Piety and Prudence: State Syariah and the Regulation of Islamic Banking in Indonesia*, 34 SYDNEY L. REV 107, 114 (2012).

²⁴⁶ Lindsey, *supra* note 245; Umar Juoro, *The Development of Islamic Banking in the Post-Crisis Indonesian Economy*, in EXPRESSING ISLAM: RELIGIOUS LIFE AND POLITICS IN INDONESIA (Greg Fealy & Sally White eds., 2008); Hikmahanto Juwana, Yeni Salma Barlinti & Yetty Komalasari Dewi, *Sharia Law as a*

Islamic Index (JII) was initiated on the Jakarta Stock Exchange in 2000 and various related regulations have since been passed.

Overall, the 2007 law retained the mandatory civil law style of the earlier law of 1995 in the sense that parties are not given much scope to redistribute control rights. The smaller, incremental adjustments made, and the introduction of those new elements into the law, suggest that a greater degree of adaptability to changing political and economic circumstances has finally developed in Indonesia's company law reform processes, although it is difficult to predict whether this marks the beginning of a lasting trend.

3. Legal Origins, and Innovation and Stagnation in the Evolution of Indonesia's Formal Company Law

As outlined in the introduction to this paper, Pistor et al. in their comparative study of corporate law across origin and transplant countries found that transplant countries were likely to display some ongoing effects of 'legal origins' but that their rates of innovation tend to be significantly different to those of origin countries. They observed that transplant countries tend to either experience long periods of stagnation or erratic change in company law. This occurrence, they argue, is due to formal law in transplant country legal systems generally being unresponsive to political and economic change. This account of the long historical development of company law in Indonesia, a transplant country, broadly supports Pistor et al.'s framework as it relates to patterns of stagnation, but the mechanisms for innovation and causes of stagnation are found to be rather more complicated due to features of Indonesia's legal and political history. This suggests that Pistor et al.'s category of 'transplant countries' needs further refinement to take account of colonial and postcolonial legal history, the degree to which countries received their entire legal system as a transplant as well as their company law, and the specific challenges found in developing economies particularly weak rule of law.

System of Governance in Indonesia: The Development of Islamic Financial Law, 25 WIS. INT'L L. J. 773 (2008).

3.1 What evidence is there of Dutch heritage and 'legal origins' in Indonesia's formal company law?

As demonstrated in Part 2 of this paper, as with the development of Indonesia's legal system as a whole, formal company law change has occurred as a series of layered transplants,²⁴⁷ mainly with a base of Dutch law with some US/Western type concepts added much later. The Dutch Commercial Code introduced in Indonesia in 1848 certainly had very long lasting effects first and foremost by virtue of the fact that the substantive articles on the limited liability company remained in force for so long. Dutch company law concepts, such as the use of the Board of Commissioners, have also remained an integral part of Indonesian law even beyond those reforms in 1995 that were influenced by the World Bank and the US. Dutch heritage has also been evident in the ongoing Dutch law orientation of many Indonesian lawyers long past Independence. Although Indonesia did not directly follow law reforms in the Netherlands, for an extended period of time Dutch law remained the first and most obvious reference for consideration in the development of new legal models. There was ongoing consciousness of the fact that the Netherlands had long ago updated its laws while Indonesia had failed to do so. However, in the 2007 law there appears to have been little if any reference to Dutch models, the focus having shifted to refinement of the existing law and importation of OECD corporate governance principles. Thus, the degree of reference to the origin country has waned as the law has become more adaptive to domestic needs.

As Pistor et al. demonstrated, transplant countries tend to follow the basic regulatory style of the countries from which they adopted their law. For a long time Indonesia retained the civil law system emphasis on codes and the notion that law on a particular subject matter should be exhaustively covered in one code. Courts have played little to no role in company law development in Indonesia. Civil law heritage also tended to result in mandatory/prescriptive use of legislation where there is little space for parties to reallocate decision-making rights within the company. This is true of Indonesia which has maintained a state-dominated and highly regulatory civil law approach to its company legislation. There is very little scope in the legislation for shareholders to opt out of the governance rules and arrange the company

²⁴⁷ See Andrew Harding, *Comparative Law and Legal Transplantation in South East Asia: Making Sense of the "Nomic Din"*, in ADAPTING LEGAL CULTURES (David Nelken & Johannes Feest eds., 2001) (noting that layers of transplants are typical of the way South East Asian legal systems have developed).

according to their own requirements. The use of standard articles of association particularly limits this scope. This tendency towards mandatory regulation persisted despite the efforts in the early- to mid-1990s of the World Bank and the US-funded ELIPS project to push Indonesian policy makers towards adopting more flexible company laws. In this respect, some ‘legal origins’ effect is evident in Indonesia’s company law.

However, as Pistor et al. predicted, it is in rates of change that Indonesia has greatly differed from its legal origin country. Indonesia essentially experienced almost 150 years of no major alteration to its central company law despite significant political and economic developments that alerted policy-makers to the need for change. In contrast, the Netherlands undertook substantial company law reforms in 1928, the early 1970s and other more recent reforms in response to home-grown conditions (although this is also comparatively few changes perhaps reflecting the fact that the Netherlands too received its company law as a transplant from the French). Indonesia did not replicate the changes in the Netherlands and also took a far longer period of time to begin to demonstrate a greater level of responsiveness in its company law to political and economic developments – a process which has occurred to some extent in the years following the Asian Financial Crisis. It may be that part of the reason Indonesia displayed a more exaggerated pattern of stagnation than the other transplant countries studied by Pistor et al. is because it is essentially a transplant of a transplant, and there were fewer legal updates in the Netherlands that might have inspired imitation in Indonesia particularly during the colonial era.²⁴⁸

It should also be recalled that what Indonesia inherited was not Dutch law as such, but Dutch colonial law. In particular, the complex and unwieldy race-based plural legal system put in place during the Dutch colonial regime certainly had long repercussions past Independence including in Indonesia’s company law. One product of that plural system, the 1939 Indigenous Joint Stock Company Law, was effectively ignored as law users chose the NV company form that they preferred for its ‘international’ connotations. Nonetheless, Indonesian law makers struggled for a long time to reconcile the plural legal underpinnings of the laws inherited from the Dutch colonial regime with the new nation-state that they wanted to create. The ongoing influence of the plural legal system in Indonesia may be better

²⁴⁸ In contrast British colonies such as India and the Straits Settlements more regularly followed updates to the UK Companies Act. See RADHE SHYAM RUNGTA, *THE RISE OF BUSINESS CORPORATIONS IN INDIA 1851-1900* (1970) (describing the history of company law in India during the colonial period).

characterised as a colonial legal history effect rather than ‘legal origins’ or ‘legal family’ *per se*.

3.2 What factors have generated innovation in Indonesia’s formal company law?

The main innovations in Indonesia’s company law over its history have involved significantly different sets of political and economic interest groups, ranging from indigenous entrepreneurs and colonial policy-makers behind the 1939 law, to the foreign investors who pushed for the 1971 amendment to voting rules, and the international mobile investors and technocrats involved in the 1995 law. The 2007 law was initially driven by the IMF conditions on its post-Asian Financial Crisis bailout of the Indonesian economy, but the contents of the law largely reflected shifts in domestic interests. It is notable that there were policy-makers or other parties involved at some point in each of the 1939, 1995 and 2007 company laws who shared the goal of ‘social and economic engineering through law’ – colonial policy-makers, USAID and the ELIPS project, and the IMF. These were all ‘outside’ players in the sense that they were not direct users of the company law.

Strengthening of institutional legal capacity was in some evidence for the 1995 law (through the US sponsored ELIPS project and its assistance with drafting), but was far more apparent in the 2007 law which was enacted under the new parliamentary processes introduced in Indonesia in the early 2000s. It was these more democratic procedures that probably enabled the greater degree of adaptability to changing domestic political and economic circumstances evidenced in the 2007 law.

Company law reform is often triggered by financial crises in different jurisdictions,²⁴⁹ and crisis has certainly played a role in Indonesia. The smaller corporate crises in the early 1990s did not result in immediate legal reforms but were settled politically, and it took the influence of the Asian Financial Crisis on the whole economy to eventually bring about change to Indonesia’s company law.

²⁴⁹ For example, the collapse of Enron and the resulting Sarbanes-Oxley Act of 2002 in the United States has generated much academic analysis, *see, e.g.* CURTIS J. MILHAUPT & KATHARINA PISTOR, *LAW AND CAPITALISM: WHAT CORPORATE CRISES REVEAL ABOUT LEGAL SYSTEMS AND ECONOMIC DEVELOPMENT AROUND THE WORLD* (2008), at Ch. 3; Larry E. Ribstein, *Market vs. Regulatory Responses to Corporate Fraud: A Critique of the Sarbanes-Oxley Act of 2002*, 28 J. CORP. L. 1 (2003); John C. Coffee Jr., *A Theory of Corporate Scandals: Why the USA and Europe Differ*, 21 OXFORD REV. ECON. POL’Y 198 (2005).

It is also clear from the evidence presented here that company law reforms in Indonesia, or attempted reforms, have also been aimed at keeping up appearances as much as, or even more than, the felt need to regulate the activities of companies in a different way. Post-independence company law drafts were motivated more by the desire to modernise and Indonesian-ise the inherited colonial legal system than to necessarily change corporate practices. The 1995 company law and the post-Asian Financial Crisis adoption of the OECD corporate governance principles also seem to have been at least partly driven by the need to keep up appearances, to symbolise modernity, and to meet international legal standards. This role for company law falls outside the Pistor et al. framework with its emphasis on core functions of corporate law although the ‘signalling’ function of company law has been noted in more recent work.²⁵⁰

3.3 What factors have inhibited change in Indonesia’s formal company law?

Pistor et al.’s explanation for long periods of legal stagnation observed in transplant countries is that formal law tends to be unresponsive to political and economic change and to a lack of process of creative destruction of law. This explanation holds broadly true for the long period in which Indonesia’s company law did not change. The detailed historical study of Indonesia undertaken here has revealed that there have been many and changing reasons for this lack of reform, most of which can be linked to the incapacity of the system to adapt to changing domestic circumstances. Indonesia’s legal system has been beset by ongoing institutional problems, including the enduring effects of the colonial plural legal system. However, leftist political and economic ideologies, particularly during the 1950s and 1960s, also promoted alternative business forms apparently at the expense of company law reform.

Firstly, as noted, it took the Netherlands itself some 90 years to amend its Commercial Code articles on the NV, which meant that during Indonesia’s colonial period there was only the one update that might have inspired change. It is then largely unexplained as to why the colonial regime failed to follow the reforms undertaken to the provisions on the NV in the Netherlands in 1928 and the Concordance Principle. It is clear that the colonial legislature had the capacity to pass the required reform as evidenced by other contemporaneous revisions of the Commercial Code, but either the imitatory machinery was simply too slow or policy makers deliberately chose not to follow the lead of the origin country.

²⁵⁰ See MILHAUPT & PISTOR, *supra* note 249, at 34-35.

Then, following Independence, the felt requirement to revise the Commercial Code as a whole rather than a section at a time inhibited change. This civil law inheritance of emphasis on codes proved too difficult an endeavour for legal drafters in the newly independent nation with its weak institutional legal drafting expertise and the overriding political imperatives of the time. Legal drafters were unable to move quickly enough to bring draft laws all the way to enactment as regimes and objectives changed around them. The desire to graft indigenous Indonesian concepts such as *musyawarah* and *mufakat* (consensus decision-making) and *gotong-royong* (mutual assistance) onto the Dutch company law foundations also proved too difficult and held up the reform process. The difficulties with the Commercial Code were compounded by the complexity of the plural legal system inherited from the Dutch colonial regime and the impossibility of unravelling it to the satisfaction of all interest groups. This indicates a colonial ‘legal history’ effect on company law stagnation in Indonesia that is distinct from that of ‘legal family’.

During the New Order, despite repeated recognition that company law reform was needed, change was stymied through bureaucratic infighting and the clash in priorities between the US-trained economist technocrats and the Dutch law oriented legal drafters in the Ministry of Justice. The need for formal law change was postponed through the actions of the Ministry of Justice in controlling articles of association through the incorporation process. Later, in the post-Suharto era, difficulties with the logjam of bills in Parliament and the far greater role for civil society in law-making held up reforms. Indonesia has also been generally characterised by almost a total lack of shareholder or public activism with regards to company law – probably due to concentrated shareholding and general public apathy with regards to formal law, although this has changed somewhat in the post-Suharto era. This lack of demand for law reform by law users is clearly a further factor behind Indonesia’s long period of stagnation.

In Pistor et al.’s paper the company form is assumed to be ideologically neutral and as the natural vehicle for business organisation. However, political and economic ideology has played a significant role in formal commercial law reform in Indonesia. The shifting policy emphasis on the role of the private sector in the economy was a further factor in the stagnation of Indonesia’s company law. Indonesian policy-makers initiated change in other related areas of law when there was the political will to do so, which suggests that ‘inability of the legal system to innovate’ was not the whole story. The dominance of leftist ideology during the post-Independence and Sukarno years produced a decided preference for

cooperatives and SOEs as legal forms for economic development. Both the cooperatives law and the state-owned enterprises law went through a number of major legislative changes during the period that company law was essentially stagnant. The following table of major legislative reforms in the three areas of law demonstrates this more clearly:

Table 1: Major Legislative Changes in Company, Cooperative and State-Owned Enterprises Laws in Indonesia

Company Laws	Cooperatives Laws	SOE Laws
1848 (S. 23/1847)	1915 (S. 431/1915)	1927 (S. 419/1927) ²⁵¹
1939 (S. 569/1939)	1927 (S. 91/1927)	1955 (Law no. 12/1955)
1995 (Law no. 1/1995)	1933 (S. 108/1933)	1960 (Law no. 19/1960)
2007 (Law no. 40/2007)	1949 (S. 179/1949)	1969 (Law no. 9/1969)
	1958 (Law no. 79/1958)	2003 (Law no. 19/2003)
	1965 (Law no. 14/1965)	
	1967 (Law no. 12/1967)	
	1992 (Law no. 25/1992)	
	[2012] a draft law is currently under discussion	

This is not to say that the cooperatives and SOEs laws were necessarily successful as legal vehicles for economic development, but that formal law reform in these areas was simply given higher priority than company law reform at particular junctures in Indonesia's history. This possibility of choice of alternative business forms is rarely acknowledged in the academic debates around company law development.

3.4 Is There Evidence of 'Complementary Control Mechanisms' in Indonesia's Company Law?

Pistor et al. found that complementary control mechanisms, or additional protections for shareholders, including exit rights, judicial protection, tend not to have developed in transplant countries due to lower levels of adaptability and limited scope for experimentation. In Indonesia, with its state-dominated and highly mandatory style to its formal company law there has certainly been little opportunity for experimentation, although some of these mechanisms have nonetheless been created. Prior to 1995, the Ministry of Justice was making changes through the incorporation process, but this was aimed more at state control than at developing shareholder protections. In the 1995 law, some of the mechanisms listed by Pistor et al. were introduced, including shareholder appraisal rights in the case of mergers,

²⁵¹ For the sake of general comparison, this refers to the *Indische Bedrijvenwet* of 1927 (*Staatsblad* no. 419/1927), and not the *Comptabiliteit Wet* of 1925 (*Staatsblad* no. 448/1925) which also enabled some state-owned enterprises but was used less often than the *Indische Bedrijvenwet*. See *supra* note 52.

shareholders' right to a derivative action against company management, and the ability to request a judicial investigation of the company. These mechanisms were introduced not through experimentation but by transplant of international notions of best practice, and there has been little evidence of their use in practice.²⁵²

Pistor et al. find that securities regulation, another form of complementary control mechanism, has made important recent advances in some transplant countries.²⁵³ This is generally true of Indonesia, which although it saw the establishment of earlier stock exchanges, securities regulation really only began to develop in the 1990s and has since been strengthened following the Asian Financial Crisis. There is now a body of listing rules and BAPEPAM regulations which are updated more regularly than Indonesia's formal company law.

The evidence for Indonesia hence generally substantiates Pistor et al.'s predictions on the lack of development of complementary control mechanisms in transplant countries. However, while not 'complementary' in the formal law sense intended by Pistor et al., it is clear that informal modes of company regulation, particularly based around family hierarchies, have been very important in Indonesia. The following section extends the discussion of formal company law development in Indonesia to consider the role of informal regulation.

4. The Corporate Form in Reality in Indonesia and Further Perspectives on Legal Innovation and Stagnation

For Pistor et al. a high rate of incremental innovation in corporate law is a strong factor in determining the efficacy of law in supporting economic development. Conversely, low rates of company law innovation may hamper capital development. To this point, the analysis has dealt primarily with the changes in the statutory company law in Indonesia. This followed the approach adopted by Pistor et al. in their comparative study (although they did recognise its limitations).²⁵⁴ However, Indonesia has been plagued by 'rule of law' deficiencies with lack of enforcement, corruption, weak legal institutions, low expectations of courts, and

²⁵² See Fitzpatrick, *supra* note 222, at 5 (noting that at the time (1998) there was no published case of a shareholder suing a company director, although compilations of cases at the time were sketchy). A search of *Mahkamah Agung* (Indonesia's highest court) reported decisions (since 2007) appear to indicate some increased use of the courts by shareholders, but there are no available statistics on this.

²⁵³ Pistor et al., *supra* note 2, at 859.

²⁵⁴ Pistor et al., *supra* note 2, at 795.

bureaucratic decision-making has long been able to trump law on the books.²⁵⁵ Indonesia also has a vast array of non-statutory mechanisms for social and economic regulation which generally affect larger proportions of the population than is reached by formal law. Law in Indonesia has tended to be contingent on circumstances, and forum shopping between state law, *adat* and Islam,²⁵⁶ or avoiding courts altogether has been common.²⁵⁷ It is also clear that confidence in the importance of formal law has waxed and waned over time through the various post-Independence regimes and then into the post-1998 reform era and its ‘rush to law’. Although not studied extensively, there is existing literature relating to both the lack of effectiveness of Indonesia’s formal company law and to the development of business entities outside the formal law system.

Recognition of the importance of informal modes of business regulation, especially in developing countries, is not, of course, a particularly new insight. Milhaupt and Pistor (2008), for example, note that law is not the only mechanism that regulates economic activity and some countries have thriving economies without being underpinned by the rule of law. Further, the existence of informal rules and non-legal governance mechanisms may affect the demand for formal law.²⁵⁸ In other words, if law users are content with informal modes of regulation then they are unlikely to lobby for formal law change.

The following discussion presents evidence of the effectiveness of Indonesia’s formal company law, the role of bureaucratic directives, the development of autonomous business forms and regulation in the informal sector, and discusses how this material contributes to understanding the evolution of company law in Indonesia. This evidence raises questions about the emphasis on formal law innovation in Pistor et al.’s analytical framework as it particularly relates to developing countries. Restricting the scope of analysis to *formal* company law in these countries may result in overlooking the importance of the relationship

²⁵⁵ See, e.g., Simon Butt & Tim Lindsey, *Judicial Mafia: The Courts and State Illegality in Indonesia*, in THE STATE AND ILLEGALITY IN INDONESIA 189, footnote 8 (Edward Aspinall & Gerry van Klinken eds., 2011).

²⁵⁶ For accounts of forum shopping in Indonesia, see JOHN BOWEN, ISLAM, LAW AND EQUALITY IN INDONESIA: AN ANTHROPOLOGY OF PUBLIC REASONING (2003); Keebet von Benda-Beckmann, *Forum Shopping and Shopping Forums: Dispute Processing in a Minangkabau Village in West Sumatra*, 19 J. LEGAL PLURALISM 117 (1981); Erman Rajagukguk, *Legal Pluralism and the Three-Cornered Case Study of Women’s Inheritance Rights Changing in Lombok*, in LEGITIMACY, LEGAL DEVELOPMENT AND CHANGE: LAW AND MODERNIZATION RECONSIDERED 213 (David K. Linnan ed., 2012).

²⁵⁷ David K. Linnan, ‘Reading the Tea Leaves’ in the Indonesian Commercial Court: A Cautionary Tale, but for Whom? in NEW COURTS IN ASIA 56 (Andrew Harding & Penelope (Pip) Nicholson eds., 2010) (noting the tendency of private parties to avoid the courts in Indonesia particularly during the New Order era).

²⁵⁸ MILHAUPT & PISTOR, *supra* note 249, at 11; Curtis J. Milhaupt, *Beyond Legal Origin: Rethinking Law’s Relationship to the Economy – Implications for Policy*, 57 AM. J. COMP. L. 831, 835 (2009).

between practice and formal law change and the existence of innovative substitutes for formal law. It also suggests that Pistor et al.'s category of 'transplant' countries is too wide to wholly encompass the differences between developing and developed countries and the degree to which informal regulatory mechanisms exert influence on the path of company law development in different countries.

4.1 The Effectiveness of Formal Company Law in Indonesia

It has long been noted that company practices in Indonesia have diverged considerably from the law on the books. Such comments are quite consistent across older studies of company law²⁵⁹ and in the mostly post-Asian Financial Crisis 'corporate governance' literature.²⁶⁰ Older studies observed that the law was used to enable company formation and enhance social status but rarely had much regulatory influence on internal management procedures.²⁶¹ These studies note that companies have been primarily established to attract credit and government contracts rather than to accumulate capital. Company and private funds were often mixed with directors and shareholders often preferring to pay debts out of their own pockets rather than allow the company to go bankrupt, and management practices rarely followed legal procedures.²⁶² Kaehlig (1986) went so far as to argue that Western company law in Indonesia was useless because it did not accord with practice and hence should be abandoned.²⁶³

The corporate governance literature on Indonesia has emphasised the high degree of concentrated ownership of companies, retained family control of listed companies, and the close interrelationship between favoured businessmen (often of Chinese descent) and the state under the Suharto regime.²⁶⁴ Concentrated family ownership increased during the 1980s.²⁶⁵ Claessens et al. (2000) calculated that more than two-thirds of publicly listed

²⁵⁹ CATOR, *supra* note 41; Makarim, *supra* note 43; KAEHLIG, *supra* note 24; S. Pompe, *Small Enterprises and Company Law in Indonesia: A Study of the Limited Liability Company in Indonesian Commercial Practice*, 148 BIJDRAGEN TOT DE TAAL-, LAND- EN VOLKENKUNDE 67 (1992).

²⁶⁰ Tabalujan, *supra* note 211; Rosser, *supra* note 203; Fitzpatrick, *supra* note 225; Rajeswary Ampalavanar Brown, *Indonesian Corporations, Cronyism and Corruption*, 40 MOD. ASIAN STUD. 953 (2006); World Bank and IMF, Report on Observance of Standards and Codes, Corporate Governance Country Assessment, Republic of Indonesia, August 2004.

²⁶¹ Pompe, *supra* note 259, at 72; KAEHLIG, *supra* note 24.

²⁶² Pompe, *supra* note 259; KAEHLIG, *supra* note 24; CATOR, *supra* note 41 (on Chinese companies in the Netherlands Indies).

²⁶³ KAEHLIG, *supra* note 24, at 284. Kaehlig's findings are also summarised in Pompe, *supra* note 259.

²⁶⁴ Fitzpatrick, *supra* note 222.

²⁶⁵ Rosser, *supra* note 202, at 334.

companies in Indonesia were in family hands while only 0.6% were widely-held.²⁶⁶ Indonesia's conglomerates, despite their size and diversity, have been primarily run as family businesses with family members often appointed to positions on the boards of directors and commissioners.²⁶⁷ Tabalujan (2002) indicated several instances where members of family-owned companies acted to aid another family member and even accepted punishment in order to save face when there was no legal basis for it.²⁶⁸ Due to the post-Asian Financial Crisis law reforms, Indonesia has been awarded improving scores on comparative corporate governance indicators.²⁶⁹ Certainly in the post-New Order era there has been some weakening of old political patronage networks due to the decentralisation of power to the regions and an increase in watchdog and civil society activities.²⁷⁰ However, analysts have generally been quite sceptical that the post-Asian Financial Crisis law reforms, especially where they involve transplantation of Western concepts, will bring about true change to practices.²⁷¹ There are still many problems with weak law enforcement in the Indonesian system generally, and there is yet little evidence of radical changes to the underlying ownership structure or to family control of listed and private companies in Indonesia.

It is clear on this evidence that the links between formal company law and corporate practice have been tenuous in Indonesia, and that this trend is true across differently sized businesses and through different historical periods. Pistor et al. point to the lack of responsiveness of formal law reform to political and economic reality in transplant countries. This is certainly true, but effectiveness of the law must also be acknowledged as a critical element in developmental pathways in countries with weaker formal legal systems. If there is little expectation that the law will be effective then it is more unlikely that law-users will demand formal law change. If informal regulation (such as kinship ties) can provide sufficient trust in business arrangements, again, there will be a lower demand for law reform.

²⁶⁶ Stijn Claessens, Simeon Djankov & Larry H.P. Lang, *The Separation of Ownership and Control in East Asian Countries*, 58 J. FIN. ECON. 81, 103 (2000).

²⁶⁷ Rosser, *supra* note 203, at 334; Yuri Sato, *The Salim Group in Indonesia: The Development and Behaviour of the Largest Conglomerate in South East Asia*, 31 DEVELOPING ECON. 408 (1993).

²⁶⁸ Tabalujan, *supra* note 211.

²⁶⁹ World Bank and IMF, Report on the Observance of Standards and Codes (ROSC), Corporate Governance Country Assessment, Republic of Indonesia, August 2004 and April 2010.

²⁷⁰ See Christian Chua, *Capitalist Consolidation, Consolidated Capitalists: Indonesia's Conglomerates between Authoritarianism and Democracy*, in DEMOCRATIZATION IN POST-SUHARTO INDONESIA 201 (Marco Bünte & Andreas Ufen eds., 2009).

²⁷¹ See, e.g., Fitzpatrick. *supra* note 225; Fitzpatrick, *supra* note 231; Rosser, *supra* note 203.

Acknowledgement of the historical weaknesses in company law enforcement also reinforces the evidence for the argument made above that formal law change in Indonesia has often been for appearances sake, and that formal company law has played aspirational, symbolic or signalling²⁷² roles often tied up with the goal of supplying legitimacy to the state. That is, formal law appears to play other roles alongside any true regulatory aims whether or not wholly intended by law makers. This certainly falls outside Pistor et al.'s framework with its focus on core areas of corporate law and the allocation of control rights within the company.

4.2 Bureaucratic Directives

A focus on legislation may overlook the role of bureaucratic directives in economic regulation, particularly where the state is dominated by the executive and the legislature is weak. Bureaucratic decisions may substitute for, or override, formal laws. Particularly during the New Order period, much of Indonesian commercial regulation resided in government policy and not in formal written laws.²⁷³ This included the use of Ministerial Decrees, circular letters and also commonly bureaucratic decision making without any formal public announcement. As noted above in Section 2.6, during the New Order era, prior to the passing of the 1995 company law, the Ministry of Justice at least partially filled the regulatory vacuum in company law by controlling the content of articles of association of new companies. In doing so, the Ministry was postponing the need for formal company law reform, and was doing so in a way that was responsive to changing circumstances without being hampered by legislative hurdles. This example indicates that innovation may be occurring elsewhere even when the formal law on the books remains unaltered.

4.3 'Autonomous'²⁷⁴ or Non-Formal Law Types of Business Form

The mismatch between formal law and practice in company law in Indonesia has also occurred with the emergence of different business forms outside the law on the books. These entities have developed with varying degrees of formality and linkages with bureaucratic and notarial practices.

²⁷² See MILHAUPT & PISTOR, *supra* note 249, at 34-35.

²⁷³ Timothy C. Lindsey, *Paradigms, Paradoxes and Possibilities: Towards Understandings of Indonesia's Legal System*, in ASIAN LAWS THROUGH AUSTRALIAN EYES, 90, 101 (Veronica Taylor ed., 1997).

²⁷⁴ Term adopted from KAEHLIG, *supra* note 24.

There were originally *adat* business forms,²⁷⁵ although these were generally dismissed by Western commentators as failing to formalise legal personhood and the liability of members.²⁷⁶ As noted in Section 2.1 above, the Chinese *kongsi* form originally developed outside of any formal law, although was eventually brought within the colonial legal system. The Commission on Indigenous Legal Persons reported in 1931 that many indigenous businesses and associations were operating without any type of formal Dutch legal personality.²⁷⁷

In 1991, the BPHN conducted a survey of notaries to find out what kinds of notarial deeds that they produced. The notaries said that they had assisted with the establishment of various different business forms including the various partnership forms found in the Commercial Code, different variations on the PT (PT. Familie (Family companies), PMDN (Domestic Investment Companies), PMA (Foreign Investment Companies), PT Persero (State-owned limited liability Companies)), but also some forms without formal legal basis such as *perusahaan dagang* (trading company), *usaha dagang* (trading business), *perusahaan perorangan* (sole proprietorship), and *pemborong bangunan* (building contractor).²⁷⁸ The report concluded that something needed to be done to bring all these different business forms within the formal law system.

Pompe (1991) in a study of small commercial ventures in Surabaya found ‘*toko*’ (shop) and ‘*usaha dagang*’ forms being used extensively. Pompe found evidence that the *usaha dagang* form had most likely originated in the 1960s when anti-Chinese discrimination was strong and Chinese businesses could not get permission to form PTs, while *toko* and *kongsi* forms were avoided as being too obviously Chinese. Notaries developed standard deeds for the establishment of *usaha dagang* and these had to be registered with the Ministry for Trade. As Pompe points out, the Commercial Code did not actually close off the possibility of other business forms being used – it merely set out possible options.²⁷⁹ Manopo (1984) also noted

²⁷⁵ See *supra* note 23.

²⁷⁶ See, e.g., Zeylemaker, *supra* note 24; VAN DER BIJ, *supra* note 66, at ch. II.

²⁷⁷ VERSLAG VAN DE COMMISSIE VOOR INLANDSCHE RECHTSPERSONEN, *supra* note 78, at 27-34.

²⁷⁸ KUSWANTYO TAMI HARYONO, LAPORAN AKHIR PENELITIAN PERKEMBANGAN BENTUK BADAN USAHA DI INDONESIA [FINAL REPORT ON INVESTIGATION INTO THE DEVELOPMENT OF BUSINESS ENTITIES IN INDONESIA] (1991).

²⁷⁹ S. Pompe, *The Usaha Dagang; A Commercial Venture within Indonesian State Law*, 147 BIJDRAGEN TOT DE TAAL-, LAND-, EN VOLKENKUNDE 485 (1991).

that business entities (*'badan usaha'*) often acted as limited liability companies before obtaining permission from the Ministry of Justice.²⁸⁰

Another business form that gained notoriety during the New Order era was the *yayasan* (*stichting* or foundation). Although these were nominally charitable institutions, they were used as a category of state enterprise and were extensively utilised by the Suharto family to siphon off state funds and to buy votes for the ruling party Golkar.²⁸¹ The *yayasan* apparently loosely originated in the Dutch *stichting* practice,²⁸² but developed over time according to unwritten law and custom and some jurisprudence.²⁸³ *Yayasan* were not used for profit seeking before independence, but afterwards they have been used as a business form.²⁸⁴ *Yayasan* were not subject to auditing or taxation and were an ideal way to hide personal wealth. In response to pressure from the IMF to prevent misuses of the *yayasan* form, a law was passed in 2001 to specifically redefine it as a charitable organisation with auditing requirements for larger *yayasan* and for those that receive government assistance.²⁸⁵ Almost 90% of Indonesia's NGOs are now formed as *yayasan*.²⁸⁶

Consideration of informal modes of business regulation in Indonesia demonstrates that the legislature has not held exclusive rights to initiating legal change. The evidence presented above shows private actors finding niches for themselves that are acceptable to the bureaucracy and thereby creating new business forms. These informal modes have more obviously responded to the needs of entrepreneurs and thus probably lessened any desire for formal company law reform.

²⁸⁰ Manopo, *supra* note 108, at 90.

²⁸¹ Alberto D. Hanani, *Indonesian Business Groups: The Crisis in Progress*, in BUSINESS GROUPS IN EAST ASIA: FINANCIAL CRISIS, RESTRUCTURING AND NEW GROWTH 179, 188 (Sea-Jin Chang ed., 2006).

²⁸² The *stichting* was not given legal recognition in the Netherlands until 1954, and in 1956 was included in the Netherlands Civil Code.

²⁸³ HIMAWAN & KUSUMAATMADJA, *supra* note 188, at 77. This statement is also found in the elucidation in the Law no. 16/2001 on *Yayasan*. See also Simorangkir, *supra* note 156, at 5 (noting that the LPHN produced a draft *yayasan* law sometime between 1958 and 1965).

²⁸⁴ Manopo, *supra* note 108, at 88.

²⁸⁵ Law no. 16/2001 on *Yayasan* as amended by Law no. 28/2004. See also: Samiul Hasan & Jenny Onyx, *Governance Approach in Asia's Third Sector: Adapted Western or Modified Asian?* in COMPARATIVE THIRD SECTOR GOVERNANCE IN ASIA: STRUCTURE, PROCESS AND POLITICAL ECONOMY, 193, 197 (Samiul Hasan & Jenny Onyx ed., 2008).

²⁸⁶ Maria R Nindita Radyati, *Third Sector Organisation Governance in Indonesia: Regulations, Initiatives and models*, in COMPARATIVE THIRD SECTOR GOVERNANCE IN ASIA: STRUCTURE, PROCESS AND POLITICAL ECONOMY 253 (Samiul Hasan & Jenny Onyx ed., 2008).

4.4 The Informal Business Sector in Indonesia

It should also be noted that in Indonesia's informal economy legal business forms are largely ignored altogether. The Indonesian Bureau of Statistics makes a clear distinction in its economic data collection between businesses that are 'legal entities' (*berbadan hukum*) and those that are not. Legal entities are defined as SOEs, public and private companies, partnerships, cooperatives, *yayasan* and 'other' which apparently covers the *usaha dagang*. Based on 2006 data, the Bureau estimates that 1.3 million businesses or 10.25% are established as legal entities, while the remainder have no legal standing at all.²⁸⁷ Businesses with legal entity status are predominately (with more than 25%) found in electricity, gas and water, construction, transport, warehouses, communication, health and education services. There are smaller proportions of legal entity businesses in the manufacturing, trade, hotel and restaurant sectors (between 3.44% and 8.04%). It is variously estimated that Indonesia's informal sector contributes between 19-38% of national GDP and that this proportion has changed over time.²⁸⁸ More precise data from 2010 show provincial variation; the informal sector (defined as an absence of legal entity status) represented 37% of GDP in the cultural centre of Yogyakarta but only 27% in the much more industrialised province of Banten.²⁸⁹ Business entities in the informal sector tend to be regulated through a 'moral economy' of kinship obligations and informal cooperation, although may also be characterised by forms of social and sometimes physical domination of some groups and individuals by others.²⁹⁰

The existence of the large informal economy where legal entity status is irrelevant is a further factor in lessening public interest in and demand for formal company law reform. It is clear that formal law is not necessarily a prerequisite for business activity. Further, it appears that

²⁸⁷ BADAN PUSAT STATISTIK, PROFIL PERUSAHAAN BERBADAN HUKUM [PROFILE OF COMPANIES WITH LEGAL ENTITY STATUS] (2006). *See also*, BADAN PUSAT STATISTIK, PROFIL PERUSAHAAN TIDAK BERBADAN HUKUM [PROFILE OF BUSINESSES WITHOUT LEGAL ENTITY STATUS] (1998).

²⁸⁸ *See, e.g.* Friedrich Schneider, Size and Measurement of the Informal Economy in 100 Countries Around the World, paper presented at Workshop of Australian National Tax Centre, Australian National University, Canberra, 17 July 2002 (estimating Indonesia's informal economy as 19.4% of GDP); Sining Cuevas, Christian Mina, Marissa Barcenas and Aleli Rosario, Informal Employment in Indonesia, ADB Economics Working Paper Series no. 156, at 1 (2009) (citing the estimated GDP share of the informal sector in Indonesia at 38%).

²⁸⁹ Asian Development Bank & Badan Pusat Statistik, The Informal Sector and Informal Employment in Indonesia Country Report 2010 (2011).

²⁹⁰ *See, e.g.*, Hans-Dieter Evers & Ozay Mehmet, *The Management of Risk: Informal Trade in Indonesia*, 22 WORLD DEVELOPMENT 1 (1994); PETER VAN DIERMAN, SMALL BUSINESS IN INDONESIA (1997); SARAH TURNER, INDONESIA'S SMALL ENTREPRENEURS: TRADING ON THE MARGINS (2003); Nina Indriati Lestari, Mineral Governance, Conflicts and Rights: Case Studies on the Informal Mining of Gold, Tin and Coal in Indonesia (2011) (unpublished PhD dissertation, Australian National University).

the legal divide between European and native businesses that was created during the colonial era is mirrored in the modern statistics that show around 90% of Indonesian businesses operating without any legal entity status. Colonial heritage, and the long historical effects of the plural legal system where a large proportion the society and economy was outside the state law system, has arguably had deep path dependent effects. Thus, as noted previously, in Indonesia there has been a strong continuing influence of colonial ‘legal history’ in determining the legal development and practical implementation of the company form that is distinct from ‘legal family’ or ‘legal origins’.

5. Conclusion

This paper has charted in detail the processes of legal evolution of the corporate form as it has developed through the periods of Indonesian history. Seeking chiefly to understand the almost 150 year hiatus in reform to Indonesia’s main company law and the pathways that it has since taken, this paper found that Pistor et al.’s broad analytical framework offers very useful insights into how transplant countries may follow different trajectories of development compared with the countries where their legal systems and company laws originated. While Indonesia has retained some Dutch formal company law concepts and style, it has had a significantly different pattern of change to that of the Netherlands. Indonesia’s low rate of formal company law change and its more recent home-grown innovations provide evidence against the ‘legal origins’ theory and its assumptions about essential similarities between jurisdictions belonging to a single legal family.

In considering the case of Indonesia, the study has extended Pistor et al.’s framework in two key ways. Firstly, through use of close historical detail, it has revealed features of company law development that fall outside Pistor et al.’s observations of formal legal change, including the long-term path dependency effects of the colonial plural legal system on the corporate form, competing ideological emphases on cooperatives and SOEs laws, and the non-regulatory or aspirational roles that company law has represented. Secondly, through consideration of informal regulatory mechanisms the analysis was extended to taking account of the relationship between the formal and informal systems and questioned Pistor et al.’s emphasis on formal law innovation as being the critical factor in development of the company form.

These extensions of the analysis indicated that Pistor et al.'s division of 'origin' and 'transplant' countries is perhaps too generalised to take account of the development of the corporate form and company law in Indonesia. Transplant countries which are also post-colonial states with developing economies and weak rule of law may display additional complexities in the pathways that company law development takes through time that are not directly connected to the original legal transplant. Further research into the historical development of company law in developing countries, might also fruitfully take a similar widened approach to Pistor et al.'s framework. The Philippines, for example, experienced little change to its company legislation between 1906 and 1980, while Malaysia was also identified by Pistor et al. as having experienced long periods of stagnation. These two neighbouring countries would make very useful comparisons with Indonesia given their differing legal families and colonial histories. Such detailed comparative research might cast further light on why certain countries might experience long periods of stagnation in company law reform and on the pathways of subsequent developments.