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suit against Samsung[122] suggests that general class action should be introduced in Korea. Moreover, since the introduction of general class action was contemplated in Korea, it is high time it was enacted by the Korean Parliament. Hence, the bill introducing a general class action legal framework in Korea should be passed into law by the country's legislature. This paper argues that the introduction of the general class action legal regimes in Nigeria and Korea encourages access to court, fosters behavioural changes by corporations, facilitates regulatory enforcement, deters future wrongdoings, and culminates in compensation of victims. This can be achieved through, *inter alia*, law reform, the role of judges, flexible rules of court and laws, adequate notice, and engaging in public enlightenment programmes.

122 In view of the settlement reached between Samsung and the Samsung workers that were ill, in which Samsung agreed to compensate these workers till 2028, see Dellinger (n 96).

A POST-COLONIAL COMPARATIVE CRITICAL LEGAL STUDY OF THE OPEN NORM OF REASONABLENESS AND FAIRNESS (OR GOOD FAITH) IN DUTCH AND INDONESIAN CORPORATE LAW

*Bart Jansen, Faizal Kurniawan, Annida Putri & Tineke Lambooy**

1. INTRODUCTION

Both Dutch and Indonesian corporate law contain 'open norms'. This means that there is room for interpretation of the content and purpose of these standards. The best-known Dutch open norm is that of 'reasonableness and fairness' — a standard also known in Indonesia as 'reasonableness and fairness' and as 'good faith'. In this contribution, the common origins of this standard, as well as developments in the interpretation thereof in both jurisdictions, will be examined and analysed.

There are examples of open norms in corporate law which have been adopted in many jurisdictions around the world, *e.g.* the renowned 'comply or explain' open norm which can be found in almost every corporate governance code in the world today.[1] This originally British principle has marched triumphantly through the corporate laws of many countries within a very short timeframe. The Cadbury Committee published the first code on corporate governance in 1993. Companies listed on the United Kingdom's stock exchanges were obliged to disclose their compliance with that code from then on in on a 'comply or explain' basis.[2] The Dutch Corporate Governance Code[3] is also based on this principle. It is a form of regulation imported from British law and has had a legal basis in the Netherlands since 2004.[4] In Indonesia, this principle has also been adopted, *i.e.* by the Indonesian Financial Services Authority *Otoritas Jasa Keuangan, OJK*, and

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1 A.A. Sewbaransingh & H. Koster, 'Corporate governance en het apply and explain principe' ['Corporate Governance and the Apply and Explain Principle'] (2019) 164 16 *Ondernemingsrecht* [*Corporate Law*] 916.

2 A. Kahn & W. Santoso, *Indonesia Corporate Governance Manual* (Jakarta: International Finance Corporation, 2018), p. 32.

3 English version of the Dutch Code: Monitoring Committee of the Dutch Corporate Governance Code, *The Dutch Corporate Governance Code*, 8 December 2016.

4 Art. 2:391(5) of the Dutch Civil Law Code (DCLC).

integrated into the Indonesia Corporate Governance Code.[5] Since 2015, all Indonesian public companies must 'comply or explain' under this Code.[6] The incorporation of a foreign legal figure into a jurisdiction — in this case a British figure into the Dutch and Indonesian jurisdictions — inevitably triggers interpretation dynamics that require mutual adaptation of the legal figure and the internal context of the jurisdictions concerned. The transfer of legal rules from one legal system into another is like a 'legal transplantation' — a metaphor that makes the social context of a legal system inherent to its interpretation.[7]

Legal transplantation also played a role in the development and interpretation of open norms in corporate law in the Netherlands and Indonesia,[8] as Indonesian corporate law is based on the Dutch Civil Law Code and the Dutch Code of Merchant Law respectively: *Burgerlijk Wetboek* and *Wetboek van Koophandel*. These Dutch laws were codified in 1838 (hereafter: 1838 Civil Law Code) and were based on the Napoleonic Code. They were introduced during the French conquest of the Netherlands and are essentially French origin transplants.[9] The 1838 Civil Law Code was subsequently introduced by the Dutch into its former colonies, and large parts thereof remained in effect at and after the Declaration of Independence of Indonesia in 1945.[10]

5 English version of the Indonesian Code: National Committee on Governance, *Indonesia's Code on Good Corporate Governance*, 2006.

6 OJK Regulation № 21/POJK.04/2015 and Circular Letter of OJK № 32/SEOJK.04/2015 on Implementation of Corporate Governance Guidelines for Public Companies ('OJK CG Guidelines') .

7 G. Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergencies' (1998) 61 1 *Modern Law Review* 11-32.

8 See for an analysis that focusses on the development of corporate law in six 'transplant' countries — countries that imported their corporate law from another country or other countries rather than developing it domestically, *in casu* Chile, Colombia, Spain (French law family), Israel, Malaysia (British law family), and Japan (German law in the late nineteenth century and U.S.A.-style corporate law after World War II) — from the date they first imported the law: M.D. West, K. Pistor, Y. Keinan & J. Kleinheisterkamp, 'Evolution of Corporate Law and the Transplant Effect: Lessons from Six Countries' (2003) 18 1 *World Bank Research Observer* 89-112.

9 For instance, the Dutch public limited company was, and still is, called '*naamloze vennootschap*', meaning 'anonymous company', derived from the French '*société anonyme*'. The opening article on this company form read: "The public limited company shall not have a common name, nor shall it carry the name of one or several of its partners but shall only be indicated by the object of its business enterprise". Because of this provision, this article tried to distinguish the public limited company from the commercial company and the limited partnership: the public limited company does not carry a fantasy name or have the names of its partners as part of its name. *Vid.* C. de Groot, 'The Duty of Directors to be Guided by the Best Interests of the Company' in C.G. Breedveld-de Voogd, A.G. Castermans, M.W. Knigge, T. van der Linden & H.A. ten Oever (eds.), *Core Concepts in the Dutch Civil Code. Continuously in Motion* (Deventer: Wolters Kluwer, 2016), p. 192.

10 M. Yahya Harahap, *Hukum Perseroan Terbatas* [*Corporate Law*] (Jakarta: Sinar Grafika, 2009), p. 21.

We will provide a perspective on the cultural legal background which is so important in the process of explaining open norms. This process involves the concretisation of abstract law; also referred to as 'finding law' in the Netherlands and Indonesia (Dutch: '*rechtsvinding*'; Indonesian: '*penemuan hukum*'). There are two ways of approaching this subject. One is to analyse the concretisation of rules; the other is to examine the concretisation of open norms. Several scholars, among which the Dutch scholar Paul Scholten and the American scholar Ronald Dworkin are leading, discussed the difference between the two approaches.[11] The theory of Scholten and Dworkin is that every legal decision which is based solely on the abstract formulation of the law is unquestionably unjust. In their opinion, justice can only be reached if both the demands of general law and the demands of the singular situation are acknowledged and implemented in the concrete situation.[12] The interpretation of open norms requires more interpretative thought on the part of a judge than the interpretation of rules. Consequently, the process of interpreting principles — or 'open' norms and 'vague' standards — points us to the complexity of a society in which abstract general law becomes concrete in a singular situation. Other than society's legal complexity, what can a judge rely on in grounding his decisions; when facing a new concrete and singular situation?[13]

A legal comparison of the Dutch and Indonesian norm of 'reasonableness and fairness' (also known as 'good faith') is interesting because it necessitates clarification of the cultural legal background against which corporate law is interpreted in both countries. That is: in the Netherlands against the background of a legally centralist state and in Indonesia against the background of a legally pluralist state. This will be explained in section 3. In sections 4 and 5 we will elaborate upon the similarities between Dutch and Indonesian jurisprudence concerning the norm of reasonableness and fairness and will consider the legal origins thereof, *i.e.* contractual limitations and the behavioral normative dimension. In section 6 we will discuss prevailing legal theoretical perspectives and their practical elaboration in the Netherlands and Indonesia. We will close with a comparative analysis and a conclusion in section 7. In the following section we will delve deeper into the legal figure of reasonableness and fairness.

11 P. Scholten, *Mr. C. Asser's Handleiding tot de beoefening van het burgerlijk recht. Algemeen deel* [*C. Asser's LL.M. Manual for the Practice of Civil Law. General Part*] (Zwolle: W.E.J. Tjeenk Willink, 1974, orig. 1931), pp. 60-66; R. Dworkin, *Taking Rights Seriously* (Cambridge, Massachusetts: Harvard University Press, 1978), pp. 24-38.

12 P.J. Tillich, *Liebe — Macht — Gerechtigkeit* [*Love — Power — Justice*] (Berlin: Walter de Gruyter, 1952/1991), p. 152.

13 D.R. Hofstadter & E. Sander, *Surfaces and Essences: Analogy as the Fuel and Fire of Thinking* (New York: Basic Books, 2013), p. 23.

2. THE LEGAL ORIGINS OF 'REASONABLENESS AND FAIRNESS'

In Dutch and Indonesian corporate law open norms manifest themselves in various ways. In this contribution, we focus on the interpretation of the open norm articulated in Article 2:8 Dutch Civil Law Code (DCLC; *i.e.* Book 2 of the (new) Dutch Civil Law Code, which contains the Dutch company act and was introduced in 1992).[14] Article 2:8 prescribes to act in accordance with standards of reasonableness and fairness in Dutch corporate law.[15] It resembles Article 4 Law № 40 of 2007 (*i.e.* the Indonesian Company Act 2007, hereafter ICA) concerning the limited liability company. This Article 4 states that company boards are obliged to comply with good faith principles, reasonableness and fairness and good corporate governance in running the affairs of the company. Under Indonesian law, reasonableness and fairness must also be taken into account in the implementation of Corporate Social Responsibility, *i.e.* pursuant to Article 74 ICA.

The open norm of 'reasonableness and fairness' (Dutch text, Book 2 DCLC) or 'good faith' (Indonesian text, ICA), occupies an important place in both Dutch and Indonesian corporate law.[16] In both legal systems this norm derived from the 1838 Civil Law Code, in which it was referred to as 'good faith'. This is why Indonesian law currently still uses the term good faith, whereas in the Netherlands the term was changed to reasonableness and fairness upon introduction of Book 2 DCLC.

A consequence of the 'reasonableness and fairness' norm in Dutch corporate law is, for example, that a shareholder may not let his[17]voting behavior at a shareholders' meeting be guided solely by his own interests, but must also always take the interests of the company and other stakeholders into account.[18] In addition, a clause in a Dutch company's articles of association does not have to be applied if application thereof would be unacceptable under the circumstances of a specific case, taking

14 Art. 2:8 DCLC; Art. 1339 Indonesian Civil Law Code (ICLC). Please note there is no official translation of the *Burgerlijk Wetboek*. The Indonesian term for reasonableness and fairness, '*kepatutan dan keadilan*', when used in this contribution refers to the Dutch '*billijkheid*'.

15 *Cf.* J.M. de Jongh, 'Analoge werking van art. 2:8 BW' ['Analogous Effect of Article 2:8 DCLC'] (2020) 160 17 *Ondernemingsrecht* [*Corporate Law*] 938-940.

16 Under the old Dutch Civil Law Code of 1838, the concept of 'reasonableness and fairness' was also referred to in the Netherlands as 'good faith'.

17 Wherever the masculine 'he', 'him', or 'his' is used in this contribution, one can also read "'she', 'her', or 'her'" in: "'she', 'her', or 'her', or 'they', 'them', or 'theirs'..

18 M.J. Kroeze, L. Timmerman & J.B. Wezeman, *De kern van het ondernemingsrecht* [*The Essence of Corporate Law*] (Deventer: Kluwer, 2013), pp. 115-116.

into account the criteria of 'reasonableness and fairness' (derogating effect). And, under Indonesian corporate law the boards of directors and commissioners of a limited liability company cannot be held liable for a corporate decision adopted in good faith.

The characteristics of reasonableness and fairness can be continuously questioned due to the open and dynamic character of this norm. To assist societal actors and judges herein legislators have provided some instructions. When interpreting this open norm, a judge must take into account: the generally recognised principles of law, the living legal convictions, and the social and personal interests involved in a specific case.[19] However, such instructions are difficult to follow when legal beliefs are not widely shared, principles are not widely recognised, and interests are conflicting, as is the case in Indonesia, which comprises more than 16,000 islands spread out over thousands of kilometers of Indian Ocean. Consequently, principles of law, living legal convictions and social norms vary in different parts of Indonesia.

3. THE HISTORICAL EVOLUTION OF DUTCH AND INDONESIAN LAW

The most impactful export of Dutch civil law in the past two centuries is without doubt the export of the 1838 Civil Law Code to the former Dutch colonies, including the former Dutch East Indies (now: Indonesia).[20] This export entailed the introduction of codifications that closely followed the Dutch legal example. The introduction of Dutch legislation into Indonesia is the result of the so-called 'concordance principle', an instruction standardly issued to the governments which were part of the Kingdom of the Netherlands.[21] This principle entailed that the former colonies should strive to have their provisions of civil and commercial law, civil procedure, criminal law, criminal procedure, but also their provisions regarding weights and measures[22], be as similar as possible to corresponding legislation and provisions in the Netherlands.[23]

19 Art. 3:12 DCLC; Art. 1339 ICLC.

20 The export of the Dutch Civil Law Code was not limited to the former colonies, as Timmermans proves: W.A. Timmermans, 'Nederlandse invloed op het nieuwe Russische BW' ['Dutch Influence on the New Russian Civil Law Code'] (1997) 13 *BW-krant Jaarboek* [*Dutch Civil Law Code Journal Yearbook*], 95-112.

21 Art. 39 of the Charter for the Kingdom of the Netherlands. *Cf.* J.E. Jonkers, *Vrouwe Justitia in de tropen* [*Lady Justice in the Tropics*] (Deventer: Uitgeverij W. van Hoeve, 1942), pp. 7-9.

22 This concordance principle applied to the entire Kingdom of the Netherlands. So also to former colonies such as Suriname and the Netherlands Antilles.

23 H.D. Ploeger, 'Het BW 1938 naar de Oost en de West' ['The Dutch Civil Code to the East

It is generally assumed that Roman-Dutch law[24] was first introduced to the former colonies by means of an instruction letter issued in March of 1621 by the highest executive college of the Dutch East India Company.[25] More than two hundred years later, the codification of the 1838 Civil Law Code took place entirely in accordance with the principle of concordance. The civil law codification was proclaimed in the former Dutch East Indies by Royal Decree of April 30, 1847.[26] While, in 1991, the Netherlands waved its 1838 Civil Law Code goodbye to welcome a new Dutch Civil Law Code on January 1, 1992, Indonesia has, to this day, maintained the 1838 Civil Law Code as the basic framework for its civil law system.[27] Changes to the law have been implemented therein.

In literature on the historical development of corporate law in Indonesia, it is often uncritically argued that this law has remained unchanged for over 150 years since the introduction of the company form by the Dutch Code of Merchant Law in 1848. This is, however, incorrect. Originally there were only twenty-one articles in the transplanted Dutch Code of Merchant Law of 1848. This Code, for instance, introduced the possibility of establishing a public limited company in the Indonesian jurisdiction. The pertinent legal rules survived until 1995, in which year a far more detailed system of corporate law was introduced to Indonesia: Law № 1 of 1995 concerning the Limited Liability Company. Subsequently, in 2007, the new Indonesian Company Act 2007 (ICA) was introduced, which in terms of content and style was, however, still largely based on its predecessors.

As indicated in the Introduction, Indonesia has had a (non-mandatory) Corporate Governance Code since 1999, in addition to its corporate law legislation. Consequently, Indonesian corporate law has undergone

and to the West'] (1997) 13 *BW-krant Jaarboek* [*Dutch Civil Code Journal Yearbook*], 57.

24 *Cf.* J.H.A. Lokin & W.J. Zwalve, *Hoofdstukken uit de Europese codificatiegeschiedenis* [*Chapters from the History of European Codification*], (Den Haag: Boom Juridische uitgevers, 2014), p. 356.

25 Dutch East India Company, in old Dutch: *Vereenigde Oostindische Compagnie* (VOC). Ploeger, 'Het BW 1939', 59; Jb. Zeijlemaker Jnz., 'Het Burgerlijk Wetboek in Nederlands-Indië' ['The Civil Law Code in the Dutch East Indies'], in P. Scholten & E.M. Meijers (eds.), *Gedenkboek Burgerlijk Recht 1838-1938* [*Commemorative Book Civil Law 1838-1938*] (Zwolle: Tjeenk Willink, 1938), p. 717.

26 Ploeger, 'Het BW 1939', 64.

27 B. Jansen, 'Paul Scholten's Dynamic, Open System and Its Recodification: "Law Exists, but It Has to Be Found, the Finding Comprises the New"', in Proceeding Asosiasi Pengajar Hukum Keperdataan IV [Proceeding on the Association of Indonesian Civil Law Scholars IV], *Perumusan Naskah Akademik Ruu Hukum Perikatan* [*Academic Manuscript Formulation of Association Laws*] (Malang, Indonesia: Inteligensia Media, 2019), pp. 4-9.

change from time to time.[28] This means that Dutch and Indonesian corporate law may have deviated over time. Nevertheless, it is interesting to compare the two systems, as they have a lot in common in terms of the grammatical, and thus hermeneutical, aspects of many important subjects. In this contribution, a number of such similarities are put into perspective by highlighting the cultural differences between the Netherlands and Indonesia within which the abstract text of the law is given concrete form.

One of these cultural differences concerns the situation that the Netherlands is considered — by legal anthropologists — a legally centralist state, whereas Indonesia is characterised as a legally pluralist state. Legal centralism builds on the idea that legal codification recognises the original spirit of a common national consciousness. The main function of the legislator is thus to follow the spirit of the nation.[29] Legal pluralism is based on the idea that legal anthropological research into enforceable rules includes both state rules and social norms.[30] Therefore, legal pluralism was in the 1970s and 1980s a critical intellectual movement against centralism. The term 'legal pluralism' first appeared in Franz von Benda-Beckmann's study of legal pluralism in Malawi[31] (1970) in order to anthropologically conceptualise a particular space. Benda-Beckmann used this term to describe the situation resulting from the imposition of British law in colonised areas of Africa, including an overarching centralist legal system aimed at regulating a range of already existing (local) social manners.[32]

Today, the concept of pluralism is increasingly appearing in scholarship concerning corporate law. On the one hand, the concept arises, for example, in the transnational context of corporate law.[33] Pre-existing sociological

28 P. Mahy, 'The Evolution of Company Law in Indonesia: An Exploration of Legal Innovation and Stagnation' (2013) 61 2 *The American Journal of Comparative Law* 378.

29 In German '*Volksbewusstsein*', *cf.* F.C. von Savigny, *Of the vocation of our age for legislation and legal science* (New York: Arno Press, 1814/1975), pp. 27-28.

30 *Cf.* L. Lessig, 'The New Chicago School' (1998) 27 S2 *The Journal of Legal Studies* 661-691.

31 F. von Benda-Beckmann, *Rechtspluralismus in Malawi. Geschichtliche Entwicklung und heutige Problematik* [*Legal Pluralism in Malawi. Historical Development and Contemporary Problems*] (München: Weltforum Verlag, 1970).

32 F. Pirie, *The Anthropology of Law* (Oxford: Oxford University Press, 2013), p. 39.

33 *Cf.* J. Eijsbouts, 'Corporate Responsibility, beyond Voluntarism: Regulatory Options to Reinforce the License to Operate', in S. Renssen, C.A. Schwarz, C.E. van Basten-Boddin, & S.C. de Hoo (eds.), *Towards Sustainability: Major Challenges for Corporate Law, Corporate Governance and Regulation* (The Hague: Eleven International Publishing, 2014), pp. 96-103; P. Zumbansen, ''New Governance' in European Corporate Law Regulation as Transnational Legal Pluralism' (2009) 15 2 *European Law Journal: Review of European Law in Context* 246-276; A.A. Kay, *Intergovernmental institutions, transnational corporations and the modern paradigm: The reflexive possibilities of transnational legal pluralism for sustainable*

insights into pluralistic legal orders and contemporary concerns about the fragmentation of the law outside of the nation state lie at the basis of this context. The employment of the concept of legal pluralism has revealed dilemma's within the nation state regarding the supposed unity of the legal order, legal formalism, and the hierarchy of norms.[34] On the other hand, scholars use legal pluralism within the discourse of Corporate Social Responsibility[35] (CSR) both in favor of and as a critique of CSR.[36] For example, the question is discussed how Indigenous peoples' rights can be incorporated into modern-day water regulations.[37] At the same time, the concept of legal pluralism is used to criticise CSR as a form of neo-colonialism.[38] Within this discourse it is argued that CSR cannot be considered a solution, but rather that it manifests itself as a continuation of a problem, therefore constituting a problem in and of itself.

development (dissertation York University, Canada: ProQuest Dissertations Publishing, 2006).

34 P. Zumbansen, 'Transnational Legal Pluralism' (2010) 1 2 *Transnational Legal Theory* 141-189.

35 T.E. Lambooy, *Corporate Social Responsibility: Legal and Semi-Legal Frameworks Supporting CSR: Developments 2000-2010 and Case Studies* (dissertation Leiden University), pp. 227-276.

36 See for instance the following Indonesian laws: Basic Agrarian Law № 5/1960 (BAL); Basic Forestry Law № 5/1967 (BFL); Mining Law № 11/1967; Basic Forestry Law № 41/1999 (BFL 1999); Decree № IX/MPR-RI/2001 on Agrarian and Natural Resource Management Reform; Law № 7 Year 2004 on Water Resources; Law № 18 Year 2004; Law № 27/2007 on Coastal Areas and Small Islands. Various literature on CSR and legal pluralism, for instance: B. Turner, 'Supply-chain legal pluralism. Normativity as constitutive of chain infrastructure in the Moroccan argan oil supply chain' (2016) 48 3 *The Journal of Legal Pluralism and Unofficial Law* 378-414; F.M. Zerilli, 'The rule of soft law: An introduction', (2010) 56 *Focaal — Journal of Global and Historical Anthropology*, special F.M. Zerilli (ed.), *Non-binding coercions. Ethnographic perspectives on soft law* 3-18; Ph. Burnham, 'Whose Forest? Whose Myth? Conceptualisations of Community Forests in Cameroon' in A. Abramson & D. Theodossopoulos (eds.), *Land, Law and Environment. Mythical Land, Legal Boundaries* (London: Pluto Press, 2000), p. 40-54.

37 E.J. Macpherson, *Indigenous Water Rights in Law and Regulation. Lessons from Comparative Experience* (Cambridge University Press, 2019); B. McIvor & K. Gunn, *Canadian Aboriginal Law in 2018: Essays and Case Summaries* (First Peoples Law Corporation, 2019). M. Willems, T. Lambooy, S. Begum, 'New Governance Ways Aimed at Protecting Nature for Future Generations: The Cases of Bangladesh, India and New Zealand: Granting Legal Personhood to Rivers' (2020) *ISWEE Conference Proceedings*, Paper ID: ISWEE-MS-1247.

38 J. Poesche, 'Coloniality of Corporate Social Responsibility' (2020) 20 2-3 *International Journal of Discrimination and the Law*; Y. Fontoura, A. Barros, & N. Spohr, 'The Role of CSR in (Re)framing New Post-Colonial Relations: A Case from the South' (2017) 17297 *Academy of Management Proceedings*, DOI: 10.5465/AMBPP.2017.17297abstract; C. Rhodes & P. Fleming, 'Forget political corporate social responsibility' (2020) 27 6 *Organization* 943-951.

4. THE MEANING OF REASONABLENESS AND FAIRNESS – THE NETHERLANDS

4.1 The Law: Companies and Contracts

In both the Netherlands and Indonesia, the origins of reasonableness and fairness (and good faith) can be found in jurisprudence on contracts given that a company was once considered a contractual arrangement between several stakeholders.[39] Indeed, a partnership still is a contractual arrangement between the parties thereto, *e.g.* a *maatschap* (professional partnership), a *vennootschap onder firma* (entrepreneurial partnership), and a *commanditaire vennootschap* (partnership with partners with limited liability).[40] These types of enterprises are provided for in the Netherlands in Book 7A DCLC, Bijzondere Overeenkomsten (Special Agreements) and in Indonesia in the ICLC and in the Commercial Code. Consequently, it is necessary to examine the jurisprudence on contracts to understand the origins of the open norm of reasonableness and fairness.

Under Dutch and Indonesian civil law, as in many other jurisdictions, a contract concerns an obligation to perform by one party towards another party. This could be an obligation to do or not do something. The 'receiving' party is entitled to that performance. The contractual agreement is established by an offer and an act of acceptance. Offer and acceptance lead to a concurrence of wills[41], which wills are manifested by a declaration.[42] Problems may arise while concluding an agreement.

39 J.M. de Jongh, *Tussen societas en universitas: De beursvennootschap en haar aandeelhouders in historisch perspectief* [*Between Societas and Universitas: The Stock Exchange Company and Its Shareholders in Historical Perspective*] (dissertation Erasmus University Rotterdam).

40 Mahy, 'Evolution of Company Law', 385*n*: "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."

41 Art. 6:217(1) DCLC; Art. 1233 ICLC.

42 Art. 3:33(1) DCLC. Art. 1320 ICLC only specifies the doctrine of consensus in the ICLC, however, there is no provision that requires the statement of the 'will' as in the DCLC. Instead, four theories are based on this doctrine: (1) the theory of the will (*wilstheorie*), (2) the sending theory (*verzendtheorie*), (3) the hearing theory (*vernemingstheorie*), and (4) the theory of good faith (*vertrouwenstheorie*). However, certain contracts do require mutual consent to be expressed through written form, such as in the form of an

There may be problems with the offer (was it an offer?), the will and the declaration may not coincide (erroneously generated trust), there may be a lack of will (error, deception, threat, or abuse of circumstances), and there may be problems concerning non-compliance with the four corners of the agreement. To determine what those are, we must first ascertain the content of the agreement, because without content there is no need to limit it.[43]

The content of an agreement is, in abstracto, based on the freedom of contract. The principle of contractual freedom means that the parties are free to determine what they want to agree upon (content) and with whom they wish to conclude a contract (the parties), as long as both parties are legally competent and the agreement (in terms of content) is not in conflict with the law or public order. The content of the agreement is specifically determined by the obligations which the parties have together agreed upon, the law, custom, and the requirements of reasonableness and fairness.

4.2 Functions of Reasonableness and Fairness

Under Dutch law, the open norm of reasonableness and fairness can play a role in contract law, and, therefore, also in corporate law, in four ways. Firstly, this norm is considered a standard that can augment what has been agreed upon. An example of this is when a newly purchased car is delivered by the seller to the purchaser; the latter may reasonably expect the seller to have left some gas in the tank.

Secondly, this standard can have a derogating effect. The derogating effect of reasonableness and fairness entails that (certain elements of) agreements agreed upon by the parties can be put aside and excluded. For instance, when a minority shareholder does not wish to participate in the amendment of a shareholders' agreement, with as a result that the company may likely go bankrupt, a court may decide that such shareholder is acting contrary to the principles of reasonableness and fairness which are applicable to those who are affiliated with the company.

Thirdly, it can have an interpretative function. The interpretative

authentic deed (Art. 1692 ICLC), the formation of a limited liability company (Art. 30 Limited Liability Company Law), and a private deed (Art. 1851 ICLC). *Vid.* C.F.G. Sunaryati Haryono, 'The Indonesian Law on Contracts' (2001) 10 *Institute of Developing Economies (IDE), Asian Law Series* 14-16.

43 J.W.P. Verheugt, *Inleiding in het Nederlandse recht* [*Introduction to Dutch Law*] (Amsterdam: De Zuidas, 2018), pp. 279 *et seq.*

function entails that the norm of reasonableness and fairness plays a role in explaining what has been agreed upon. In the Netherlands, the question whether a contract (or contractual provision) should be interpreted primarily linguistically,[44] or whether the intention of the parties is leading was debated for a long time. The landmark *Haviltex* case provided the answer: the interpretation depends on what meaning can be reasonably attributed to the provisions under the given circumstances and what the parties can reasonably expect of each other (the so-called *Haviltex* criterion,[45] which is still applied by the courts).[46] A contractual 'entire agreement clause' does not automatically prevent the intention of commercial contractual statements, or the conduct of the parties prior to the conclusion of the contract, from being relevant for its interpretation.[47]

Although the first three functions continue to play their own role within corporate law, it is primarily the fourth function of the open norm of reasonableness and fairness that has meaningful creative potential in a corporate law context. This fourth function is the norm-setting function, which aims to steer the behaviour of the parties that are stakeholders within a company structure. Behavioural norms are legal norms that command, prohibit or permit behaviour. In this behaviour-norm-setting function, the norm prescribes that the 'person concerned' must act reasonably towards the other parties involved in the transaction or corporate setting. This implies that the person concerned is obliged to prevent his actions from unreasonably harming others involved.[48]

According to Bakker, the words reasonableness and fairness are not a tautology; they do not mean or assume the same thing but form a pair of distinct concepts, each with its own mutually complementary behaviourally normative dimensions.[49] The respective terms are equivalent quantities linked by language: a so-called *hendiadys*.[50] One can see a human connection between them. Reasonableness and fairness can

44 Dutch Supreme Court 17 September 1993, *NJ* 1994, 173; Dutch Supreme Court 24 September 1993, *NJ* 1994, 174.

45 Dutch Supreme Court 13 March 1981, *NJ* 1981, 635 (*Haviltex*); *vid.* Dutch Court of Appeal Arnhem 2 March 2010, *JOR* 2010, 150 (*Delta vs Essent*).

46 B. Kemp, *Aandeelhoudersverantwoordelijkheid* [*Shareholder Responsibility*] (VDHI No 129 2015), r. 6.2.2.2.

47 Dutch Supreme Court 5 April 2013, *LJN* BY8101 (*Lundiform vs Mexx*).

48 Kemp, *Aandeelhoudersverantwoordelijkheid*, r. 6.2.2.2.

49 P.S. Bakker, *Redelijkheid en billijkheid als gedragsnorm* [*Reasonableness and Fairness as a Norm of Conduct*] (dissertation Vrije Universiteit Amsterdam, Amsterdam: Kluwer, 2012), p. 10.

50 From 'one through two', '*ἓν διὰ δυοῖν*'. A *hendiadys* is the substitution of a conjunction for a subordination.

be perceived as personified quantities that, like companions in a good marriage, cannot exist without each other.[51]

This is not to say that reasonableness and fairness never appear separately in Dutch law. Anyone who reads the Dutch Civil Law Code will note that the legislator has no difficulty in using the two terms separately. However, several prominent authors argue that when the legislator talks exclusively about 'reasonableness' or 'fairness', he is in fact still referring to the good marriage of 'reasonableness and fairness'.[52]

4.3 The Reasonableness and Fairness Norm in Contract Law

With the legal obligation to act reasonably, parties to a contract are instructed to exercise fairness if certain contractual provisions do not work as envisioned, or if rigid adherence to the agreement would harm the interests of one of the parties.[53] In that case, it is primarily up to the parties themselves to find a solution based on fairness. If they fail to find a solution, reasonableness and fairness can be used to solve the issue.

It follows from the foregoing that reasonableness and fairness is not only reserved for the judge but can primarily be seen as a behavioural norm for individuals rooted in social life. This view is also based

51 Snijders, 'Redelijkheid en billijkheid', 776. Former Dutch Advocate General to the Dutch Supreme Court (corporate law section), Levinus Timmerman, raised and defended the anecdotal thesis that corporate law has the same ontological *foregrounding* as Richard Wagner's cycle *Der Ring des Nibelungen* (1874), namely 'love' and 'power'. In Wagner's cycle, Alberich's Ring is cursed because, if you possess the Ring, you may have enormous power over people and nature, but at the same time you lose the ability to love people and nature. The structural, *i.e.* legal constructive, part of corporate law would be the side of 'power', the behavioral part, most strikingly the reasonableness and fairness, would be the side of 'love'. The peculiarity of modern corporate law is that it presents itself with the difficult task of uniting both 'love' and 'power': L. Timmerman, 'Der Ring des Nibelungen en het ondernemingsrecht' ['The Ring of the Nibelung and Corporate Law'] (2014) 7037 *Weekblad voor Privaatrecht, Notariaat en Registratie (WPNR)* [*Weekly Magazine for Private Law, Notarial Profession and Registration*] 1026-1027. Theologian Paul Tillich wrote an extensive study on this theme: *Love, Power, and Justice. Ontological Analyses and Ethical Applications* (translated as *Liebe — Macht — Gerechtigkeit*, 1952, pp. 185, 188). 'Law' is the form (1) in which the 'power' of being actualises itself, and (2) in which and through which 'love' does its work. 'Love' reunites and is the final principle of 'law', and so is 'law' the form for that unity. Timmerman's speculation that the unity of reasonableness and fairness within corporate law contains the ontological structure of love within it may be anecdotal but there is something to be said for it.

52 H.J. Snijders, 'Redelijkheid en billijkheid in het vermogensrecht van het Burgerlijk Wetboek voor en na 1992' ['Reasonableness and Fairness in Property Law of the Dutch Civil Code before and after 1992'] (2012) 10 *Ars Aequi* 775.

53 Bakker, 'Redelijkheid en billijkheid', 9.

on the *Baris vs Riezenkamp* ruling,[54] a well-known Dutch Supreme Court decision of 1957, stating that objective good faith is concerned with the question "what, given the nature of the agreement and the circumstances, do reasonableness and fairness dictate to the parties."[55] In the *Baris vs Riezenkamp* decision, the Supreme Court formulated the rule that reasonableness and fairness entail that the parties "must allow their conduct to be partly determined by the legitimate interests of the other party."[56] It is generally assumed that through this kind of open legal norm, ethical norms can become part of the law.

The facts of *Baris vs Riezenkamp* were as follows. Baris sold his factory for manufacturing scooter engines to Riezenkamp for a total amount of 110,000 Dutch guilders (predecessor of the euro). Baris had indicated that the engines could be produced in the factory for 135 Dutch guilders each. However, after the purchase agreement was concluded, Riezenkamp discovered that it would actually cost 230 guilders to produce a single engine, effectively making them too expensive to sell. Baris demanded in court that Riezenkamp pay the total amount of 110,000 Dutch guilders. Riezenkamp refused to pay.

Baris then claimed dissolution of the purchase agreement and demanded financial compensation. Riezenkamp defended himself by invoking error[57] and requested the annulment of the purchase agreement. Baris responded by arguing that the error was to be blamed on Riezenkamp himself, because he had failed to conduct enough research into the cost price of producing an engine.[58]

The legal question posed in this judgment was whether Riezenkamp could successfully invoke error with the remedy to annul, and/or whether Baris could successfully invoke breach of contract, dissolve the contract and claim financial compensation. Annulment makes it so that the contract never existed in the eyes of the law because it was invalid to

54 Dutch Supreme Court 15 November 1957, *NJ* 1958, 67 (*Baris vs Riezenkamp*).

55 Dutch Supreme Court 21 June 1957, *NJ* 1959, 91 (*Thurkow vs Thurkow*). In Dutch: *wat in verband met de aard der overeenkomst en de omstandigheden de redelijkheid en billijkheid aan partijen voorschrijven.*

56 Dutch Supreme Court 15 November 1957, *NJ* 1958, 67 (*Baris vs Riezenkamp*), *n.* 17, in Dutch: *hun gedrag mede moeten laten bepalen door de gerechtvaardigde belangen van de wederpartij. Cf.* Bakker, 'Redelijkheid en billijkheid', 11.

57 'Error', or in Dutch '*dwaling*' is a legal concept with the emphasis on the false precontractual statement of fact made by the other party, or his failure to disclose information, *vid.* M.M. van Rossum, 'The Concept of 'Dwaling' under the New Civil Code Compared to the English Doctrine of Misrepresentation' (1992) 39 3 *Netherlands International Law Review* 303-331.

58 Art. 6:228(2) DCLC; Art. 1321, Art. 1322 ICLC. The English words 'invalid' and 'mistake' refer in the ICLC translation to the Dutch words '*nietig*' and '*dwaling*' respectively.

begin with; dissolution has retroactive effect. In both cases, a legal claim to compensation may arise.

The Supreme Court found that for a successful appeal to error it is not explicitly required by law that the error can be annulled. Reasonableness and fairness means that both parties must take each other's interests into account, which in this case was explained as follows: in principle, Riezenkamp had an obligation to investigate; however, this obligation to investigate was lifted by the statement from Baris, which Riezenkamp should have been able to rely on.

Whether or not the obligation to investigate can be lifted must always be assessed on the basis of the circumstances of each individual case.

According to Nieuwenhuis, the *Baris vs Riezenkamp* judgment constitutes an inconceivable climax of altruistic rhetoric: by entering into negotiations, the parties come together "in a special legal relationship, governed by good faith, which also implies that they must let their behaviour be determined by the legitimate interests of the other party."[59] Is there still room for rhetoric from the other side? In this case, Baris had pointed out "that it was Riezenkamp's business to decide freely whether he wanted to become a purchaser or not".[60] But what then of his own interests? Was self-interest even a factor to be reckoned with? This court decision does not reference it explicitly, or non-explicitly for that matter. According to Nieuwenhuis, this can mean either of two things:

1. either, the primacy of self-interest as a guideline for negotiating parties still forms a natural, and, therefore, unspoken, principle;

2. or, a reference to self-interest would merely mean paying lip service to nineteenth-century liberal individualism (every man for himself).

To illustrate the importance of this rule that parties must let their behaviour be determined by the legitimate interests of the other party, reference can be made to the case law dealing with the pre-contractual phase. The norm of reasonableness and fairness as formulated in *Baris vs Riezenkamp*

[59] Dutch Supreme Court 15 November 1957, *NJ* 1958, 67 (*Baris vs Riezenkamp*), *n.* 17, in Dutch: *in een bijzondere, door de goede trouw beheerste, rechtsverhouding, medebrengende dat zij hun gedrag mede moeten laten bepalen door de gerechtvaardigde belangen van de wederpartij. Cf.* H. Nieuwenhuis, *Waartoe is het recht op aarde?* [*What is Law on Earth for?*] (Den Haag: Boom Juridische Uitgevers, 2006), p. 93.

[60] Dutch Supreme Court 15 November 1957, *NJ* 1958, 67 (*Baris vs Riezenkamp*), *n.* 17, in Dutch: *dat het zaak was van Riezenkamp om in alle vrijheid te beslissen of hij koper wilde worden of niet.*

was also cited by the Supreme Court in its 1982 landmark case, *Plas v Valburg*, concerning the unilateral termination of a negotiation process The Court concluded that – depending on the specific circumstances o the situation and the interests of the other party – a party is not free t abruptly terminate negotiations at any given moment.[61]

In the 1992 DCLC, the courts have gained in importance. According to Hijma and Snijders, the judge has been given more room fo interpretation.[62] The fact of the matter is, that the development of civil law during the twentieth century is mainly characterised by the accentuatior of altruistic themes, enveloped in vague norms of unwritten law.[63] The consistent application of the abovementioned judgement seems to involve a suggestion by the Supreme Court that reasonableness and fairness, at least in contractual relationships, must first and foremost be regarded as a norm of conduct.[64] This is in keeping with Duncan Kennedy's observation concerning the correlation between altruistic rhetoric and 'equitable standards'.[65] We will come back to that later.

4.5 The Reasonableness and Fairness Norm in Corporate Law

According to Van Schilfgaarde, institutional corporate legal reasonableness and fairness,[66] *e.g.* the reasonableness and fairness norm enacted in the corporate law Article 2:8 DCLC, does not differ essentially from reasonableness and fairness under contract law.[67] An important difference can, however, be found in its scope. Contract law is after all about the relationship between 'creditor and debtor'[68] or the relationship between 'parties'.[69] In a typical contractual case, two people are in the contractual relationship. However, the relationships within a company are generally multifold: the number of people can indeed be limited to two, but more often than not there are many people involved.[70]

[61] P. de Graaf, 'Bedrijfsethiek, recht en zelfregulering' ['Business Ethics, Law, and Relf-Regulation'], in B. Hessel & P. de Graaf (eds.), *Over recht en bedrijfsethiek. Pleidooien voor samenwerking* [*About Law and Business Ethics. Pleas for Cooperation*] (Nijmegen: Ars Aequi Libri, 1998), pp. 73-74. The landmark case is: Dutch Supreme Court 18 June 1982, *NJ* 1983, 723.

[62] Jac. Hijma & H. Snijders, *The Netherlands New Civil Code/Kitab Undang-Undang Hukum Perdata Belanda yang Baru* (Jakarta: National Legal Reform Program, 2010), p. 13.

[63] Nieuwenhuis, *Waartoe is het recht*, p. 94.

[64] Bakker, 'Redelijkheid en billijkheid', 11.

[65] Nieuwenhuis, *Waartoe is het recht*, p. 95.

[66] Art. 2:8 DCLC; Art. 1339 ICLC.

[67] Book 6 DCLC (General part of contract law).

[68] Art. 6:2 DCLC; Art. 1235 ICLC.

[69] Art. 6:248 DCLC; Art. 1337 ICLC.

[70] Art. 2:8(1) DCLC.

In his study of reasonableness and fairness in corporate law, Van Schilfgaarde asserts that this large number of people is related to the institutional character of the legal person as an independent sub-legal order. This institutional character also depends on the fact that regulated decision-making processes take place based on a certain division of powers. This division ensures that managing directors and supervisory directors enjoy a certain degree of autonomy within that sub-legal order. Once again there is a difference with contract law relationships on this point.[71]

As stated by Bakker, the open character of the reasonableness and fairness norm leads to the following three observations/conclusions: (1) this standard is to be constantly applied between the parties; (2) this standard affects all aspects of the legal relationship between the parties; and (3) societal perceptions or ideas concerning the type of legal relationship in which the parties are involved, need to be taken into account.[72] The next question that arises concerns the implications of this social ideology. In other words, what does the use of reasonableness and fairness in corporate (and civil law) tell us about social ideas? A critical reading of corporate (and civil law) in the Netherlands and Indonesia offers a comparative answer.

5. THE MEANING OF REASONABLENESS AND FAIRNESS — INDONESIA

5.1 The Law: A Pluralistic Perspective

Indonesia may have adopted its Civil Law Code from the Dutch 1838 Civil Law Code, but cultural differences and contrasting values between the two countries have led to distinct differences in their respective jurisprudence over the past 180 years. The Indonesian recognition of Adat and Islamic law in parallel to its corporate (and civil) law leads to a pluralistic legal system. The vast majority of Western legal theory in the twentieth century focused on the state law of national legal systems and on public international law governing relations between states. The main exception to this approach, was propagated by legal anthropologists who emphasised the importance of a legally pluralistic view of the law, with Cornelis van Vollenhoven (1874-1933) as one of the earliest and most distinguished examples. This Dutch legal scholar and social scientist

71 P. van Schilfgaarde, *De redelijkheid en billijkheid in het ondernemingsrecht* [*Reasonableness and Fairness in Corporate Law*] (Wolters Kluwer, 2016), pp. 115-116. The annex to Art. 4 of Indonesian Corporate Law № 40 of 2007 also stipulates that companies are obliged to comply with reasonableness and fairness in carrying out corporate duties.

72 Bakker, 'Redelijkheid en billijkheid', 10.

opposed the Dutch coloniser's centralising tendencies and its subtle, interpretative transformation of the Adat law existing and employed in the former Dutch East Indies.[73] These anthropologists expressed an interest in the so-called non-state law: Adat law and Islamic law, among others. To gain a holistic view of the Indonesian legal status quo, we need to include this non-state law in the analysis of the Indonesian legal norm of reasonableness and fairness.[74]

The presence of legal pluralism is not uncommon among colonies and former colonies; customary and religious law often have a (limited) function in family and inheritance law. Pluralism is not only a division, but also a diffusion of law. This diffusion of law is a complex, insatiable process where, for example, the diffusion can take place between many types of legal system sat different geographical levels (*e.g.* locations, regions, and islands). The diffusion can be complex and indirect; it can take place through informal interaction without formal adoption or enactment. In addition, legal rules and concepts are not the only or even the most important objects of study, and governments are not the only, or even the main, agents of diffusion of law.[75]

5.2. Historical Perspective: Decolonisation

Indonesia has experienced a fast-growing economy in recent decades and is currently one of the Newly Industrialised Countries (NICs), together with Brazil, China, India, Malaysia, Mexico, the Philippines, South Africa, Thailand, and Turkey.[76] Strangely enough, this only really seems to have impacted public law in Indonesia and had less of an influence on the development and interpretation of corporate law, commercial law and forms of civil law in the broader sense. Characteristic of NICs is that the first phase of economic development consists of a specific type of industrialisation policy. In the period between Indonesia's independence from the Netherlands and 1980, the view that equates economic growth with 'development' — *i.e.* the orthodox development theory — called for import-substituting industrialisation (ISI) with associated infrastructure

73 D. Kennedy, 'Savigny's Family/Patrimony Distinction and its Place in the Global Genealogy of Classical Legal Thought' (2010) 58 4 *American Journal of Comparative Law* 841.

74 W. Twining, 'The significance of non-state law', in W. Twining (ed.), *General Jurisprudence: Understanding Law from a Global Perspective* (Cambridge, UK: Cambridge University Press, 2012), p. 362.

75 W. Twining, 'Diffusion of Law: A Global Perspective' (2004) 36 49 *The Journal of Legal Pluralism and Unofficial Law* 1-2, 34-35.

76 F. Zeren & H.T. Akkuş, 'Oil Prices and Stock Markets: Further Evidence from Newly Industrialized Countries' (2018) 3 1 *Management and Economics Review* 112.

requirements.[77] The Indonesian state had a very active, if not completely dominant, role in implementing this strategy — a typical strategy of rural exploitation, ostensibly because of industrial capital formation in the cities. The ISI strategy thus relied entirely on public law and government intervention and was also strongly supported by various United Nations bodies, including the World Bank.[78]

5.3 Reasonableness and Fairness in the Law

The Indonesian Civil Law Code (ICLC), Adat law and Islamic law each played a significant role in offering alternatives for resolving private law disputes.[79] Reasonableness and fairness is among the main principles of the ICLC.[80] The ICLC prescribes that "an agreement is not only binding for what is explicitly stated, but also for what is, by nature, obliged through reasonableness, custom and the law".[81] Reasonableness is additionally implicated in the validity of a contract, as one of the requirements for concluding a valid agreement is having lawful cause.[82] In this context, lawful means that the agreement shall comply with the laws, the norms, and the general public order.[83] Reasonableness and fairness is thus referred to in the context of general public order.[84]

The Indonesian legal scholar Subekti stressed in his study of Indonesian contract law (1984) that the content of the agreement should contain values of justice, including a 'reasonableness' that is developed in society.[85] The

77 D. Kennedy, 'African Poverty' (2012) 87 1 *Washington Law Review* 207-208.

78 D. Kennedy, 'Three Globalizations of Law and Legal Thought: 1850-2000', in D.M. Trubek & A. Santos (eds.), *The New Law and Economic Development: A Critical Appraisal* (Cambridge, UK: Cambridge University Press, 2006), pp. 58-59.

79 For instance, Indonesia's inheritance law offers a choice between the ICLC, Adat law or Islamic law, depending on the circumstances of the case, in: S. Tamakiran, *Asas-Asas Hukum Waris menurut Tiga Sistem Hukum* [*Principles of Inheritance Law according to Three Legal Systems*] (Bandung: Pionir Jaya, 1992), pp. 8-12.

80 Salim, *Hukum Kontrak: Teori dan Teknik Penyusunan Kontrak* [*Contract Law: Theory and Contract Drafting Techniques*] (Jakarta: Sinar Grafika, 2010), c.13; Y. Sogar Simamora, *Prinsip Hukum Kontrak dalam Pengadaan Barang dan Jasa Oleh Pemerintah* [*Contract Law Principles in State Procurement*] (Surabaya: Pascasarjana Universitas Airlangga, 2005), p. 40.

81 Art. 1339 ICLC.

82 Art. 1320 ICLC.

83 Art. 1337 ICLC.

84 M. Yahya Harahap, *Hukum Acara Perdata* [*Civil Law*] (Jakarta: Sinar Grafika, 2013), p. 56.

85 Subekti, *Hukum Perjanjian* [*Contract Law*] (Jakarta: PT Intermasa, 1984), p. 5; *cf.* Cindawati, 'Prinsip Good Faith (Itikad Baik) Dalam Hukum Kontrak Bisnis Internasional' ['Good Faith Principles (Itikad Baik) in International Business Contract Law'] (2014) 26 2 *Mimbar Hukum* [*Legal Forum*] 181-193.

norm of reasonableness and fairness is also used to determine whether an act must be considered unlawful tort, *onrechtmatige daad*; also part of civil law. According to the legal scholar Satrio, to act unreasonably and unfairly means to ignore and violate the other person's interests. If doing so while pursuing personal interests, such behaviour could constitute an unlawful act.[86]

5.4 Jurisprudence Concerning 'Unlawful Acts'

In Indonesian law, reasonableness and fairness indeed stems from the concept of an unlawful act, thereby following the Dutch Supreme Court ruling of 31 January 1919: *Lindenbaum vs Cohen*.[87] In this case, Cohen incited a servant at the commercial printing house of his competitor, Lindenbaum, with gifts and promises in exchange for information about "everything that was going on at Lindenbaum's office". This was a gross form of unfair competition, which we nowadays call industrial espionage, that at the time was not legally defined as an offence. Lindenbaum, however, alleged that Cohen's actions were unlawful and claimed damages from Cohen. Cohen argued that his actions were not prohibited by civil law. Indeed, the Court of Appeal dismissed Lindenbaum's claim because it was unable to find a legal rule prohibiting Cohen from acting in such a manner. The mere fact that Cohen's actions were careless did not make them unlawful. The Supreme Court ruled, however, that Cohen's actions were unlawful on the grounds that they were contrary to "the due care that should be exercised with regard to another's person or property".[88]

Under Dutch-Indonesian law, this decision is seen as the most important decision ever taken by the Supreme Court.[89] Pursuant to *Lindenbaum vs Cohen*, there are four criteria for finding an act unlawful: violating the legal obligation of a party; violating subjective rights of others; violating certain rules of decency; and violating reasonableness, prudence, and a duty of care in interacting with others, or when dealing with the possessions of other people.[90] Open norms are included in the third and fourth criteria, as they refer to unwritten norms. They provide the

86 J. Satrio, *Hukum Perikatan, Perikatan yang Lahir dari Undang-Undang, Bagian Pertama* [*Law of Obligations, Obligations Formed by the Law, First Chapter*] (Bandung: Citra Aditya Bakti, 2001), p. 177.

87 Dutch Supreme Court 31 January 1919, *NJ* 1919, 161 (*Lindenbaum vs Cohen*).

88 M.E. Franke, 'Lindenbaum/Cohen', in M.E. Franke, Jac. Hijma, J.P. Jordaans, *et al.* (eds.), *Verkort verklaard* [*Briefly Explained*] (Gouda: Quint, 1996), pp. 17-18.

89 Verheugt, *Inleiding Nederlands recht*, p. 330.

90 R. Agustina, *Perbuatan Melawan Hukum* [*Unlawful Act*] (Jakarta: Program Pascasarjana Universitas Indonesia, 2003), p. 50.

Courts with wide discretionary power to invoke new concepts regarding unlawful acts through the 'finding of law'.[91]

5.5 Jurisprudence Concerning Contract Law

A landmark decision was reached by the Indonesian Supreme Court in the case of *Made Oka Masagung vs PT Bank Artha Graha et al* in 2001.[92] The Supreme Court established that reasonableness and fairness play an indisputable role in the conclusion of an agreement. In this case, there was an unlawful signing of an agreement due to 'abuse of circumstances' *misbruik van recht*. The Indonesian legal figure 'abuse of circumstances' is a product of case law. It was developed by means of precedents, as it is not regulated in the ICLC. In the subject case, the Indonesian Supreme Court ruled that the signing of an agreement while in prison constitutes a hindrance of free will. This is due to an abuse of circumstances, given that the plaintiff was in prison when he signed a sales agreement with the respondent. In addition, within the freedom of contract, reasonableness and fairness could be invoked as a reason for amending the agreed terms.

Indonesian contract laws and corporate laws are theoretically distinct from the Adat and Islamic legal systems. It is widely understood that the implementation of Adat and Islamic laws in Indonesia is strictly limited to the law of persons, as in the case of inheritance law.[93] However, the 1978 Supreme Court judgement in the case of *Usup Suwita vs RD Endjam Suprapti*[94], in which such principles were invoked, concerned an unlawful act committed in relation to the termination of a rental agreement. This indicates that the Indonesian pluralistic legal system also influences the application of contract laws. The Supreme Court, in considering whether it was reasonable and fair to terminate the agreement, turned to Adat law principles instead of the ICLC. Adat law notably does not follow the ICLC requirements regarding contracts, rather it follows community customary law. Adat law is characterised as *contant* (cash), *concret* (concrete), and *direct*.[95] '*Contant*' implies that a direct action will immediately complete an obligation of performance, while '*concret*' refers to the presence of visible affirmation of what has been done or will be done in the near future, such as a symbolic act or

91 Agustina, *Perbuatan*, p. 19.

92 Indonesian Supreme Court Decision № 3641 K/PDT/2001.

93 *Cf.* A. Putri & B. Jansen, 'Dynamics of Reasonableness and Fairness in a Pluralistic Legal System: Perspectives from Adat, Islamic and Civil Inheritance Law' (2021) 36 1 *Yuridika* 1-14.

94 Indonesian Supreme Court Decision № 1685 K/SIP/1978.

95 Hilman Hadikusuma, *Pengantar Ilmu Hukum Adat Indonesia [Introduction to Indonesian Adat Law]* (Bandung: Mandar Maju, 1992), p. 10.

statement.[96] According to Adat law, an agreement is already considered valid if it exhibits these three characteristics. Furthermore, Adat law does not differentiate between property rights and individual rights.[97] Based on the above characteristics, the Court in this case drew a distinction between the concept of reasonableness and fairness in Adat law and the ICLC.

Due to the Adat nature of the case – the object of dispute was located within an Adat region and the parties to the contract were members of the Adat community – the Court decided to assess the case under Adat law. The termination of the agreement was considered reasonable and fair under Adat law and thus the Court did not consider it unlawful. Additionally, this decision confirms the open and dynamic nature of reasonableness and fairness to the extent that Adat law, as the 'living law'[98] of Indonesia, can be applied in a civil law case relating to a contract.

5.6 Jurisprudence Concerning Corporate Law

The norms applicable to companies are spread out over Indonesian corporate law. Partnerships are mainly regulated under the Code of Commerce, as the ICLC only oversees the form of sole proprietorship. And Law № 40 of 2007 provides the norms for limited liability companies. As regards open norms, the explanatory notes to Article 4 of this law mention an obligation for companies to abide by principles of reasonableness and fairness, in addition to the law. This affirms that the enactment of the law does not diminish the obligation of companies to comply with the principles of good faith, reasonableness and fairness and good corporate governance in running the company.

An explicit reference to compliance with reasonableness and fairness exists in the obligation for companies to act in accordance with Corporate Social and Environmental Responsibility (*i.e.* CSR).[99] The standard of reasonableness required in this context is elaborated upon in a Government Regulation concerning Social and Environmental Responsibility, which Regulation narrows the scope of reasonableness and fairness in this context down to:

96 S.M. Pide, *Hukum Adat Dahulu, Kini, Dan Akan Datang [Adat Law: Past, Present, and Future]* (Jakarta: Prenada Media Group, 2014), p. 25.

97 Hadikusuma, *Pengantar*, p. 30.

98 Adat law is called 'living law' in Indonesia, because it is the law that derives from customs and practices in Indonesian civil society, whereas the codified civil law is perceived as 'external' transplanted law, with inherently colonial connotations.

99 Art. 74(1) Law № 40 of 2007 on Limited Liability Companies.

> [...] policies of companies adjusted with the financial capability of the company, and potential risks that result in social responsibility and the environment that must be borne by the company in accordance with its business activities that do not reduce the obligations as stipulated in the provisions of the legislation related to the company activities.[100]

Nevertheless, in corporate activities relating to contractual matters and unlawful acts, the ICLC is still the fundamental legal basis for the courts. Consequently, the concept of open norms as explained above remains applicable to all companies.

In summary, the examples of cases in this section on Indonesian law illustrate that, although the presence of reasonableness and fairness in the Indonesian civil and corporate law system may seem limited in theory, the various concepts of open norms within the pluralistic Indonesian legal system leave room for broad application of these standards by the courts. This situation is further encouraged by the fact that the Indonesian legal system does not apply the rule of binding precedent. In Indonesia, precedents are continuously applied and developed by the courts.

5.7. New Legislative Developments

The future of Indonesian civil law lies at the heart of the draft bill for a New Civil Code. There is not yet an official date for conclusion of the draft bill. However, the bill as it currently stands, offers a glimpse into the future development of contract law in Indonesia. According to the Academic Manuscript of the draft bill, reasonableness and fairness as basic principles of contract law, will remain the foundation of contract and corporate law in Indonesia. However, the urgency that is felt to accommodate the needs of contemporary Indonesian society will influence how these principles will be applied. With this objective in mind, the drafting team recognised the need for a dynamic application of the standards of reasonableness and fairness, *i.e.* it will leave ample room for discretion in order to enable the judges to take the relevant context and circumstances of each case into account.

The Draft Bill aspires to apply open norms just as freely as the open norms in the DCLC. However, it also seeks to balance this freedom with principles of Adat law and with the nation's ideology of *Pancasila*. Those norms will limit the judges' discretionary freedom in the interpretation of open norms. *Pancasila* is the ideology of the nation and is incorporated

[100] Annex of Art. 5(1) Government Regulation № 47 of 2012 concerning Social and Environmental Responsibility.

in the Constitution of Indonesia. It is often viewed as stating the moral grounds of Indonesian society.[101] The values of *Pancasila* are very relevant to business activities, as most of them have been accommodated in the laws and regulations governing business activities in Indonesia.[102] *Pancasila* is also an amalgamation of values from all three pluralistic systems; the drafters may have been looking to create common ground.

6. DISCUSSION: A CRITICAL LEGAL STUDY OF OPEN NORMS

In the study 'Form and Substance in Private Law Adjudication'[103] (1976), two rhetorical styles are distinguished in the debate on the settlement of contractual disputes, namely 'individualism' and 'altruism'.[104] Duncan Kennedy, the author of this study, is primarily known as the grand star of the American Critical Legal Studies (CLS) movement. During the 1970s, this movement undermined the central ideas of modern legal thinking by coming up with a critical alternative. In short, modern legal thinking is divided into, on the one hand, the idea that law and morality are not, or not necessarily, related to each other (normative and descriptive legal positivism, respectively[105]) and, on the other hand, the idea that law and morality are inextricably linked (hermeneutical constructivism). According to the latter theory, in reaction to legal positivism, moral principles inevitably play a role in the practice of positive law, especially in the interpretation of legal rules and open norms. However, according to supporters of CLS, these so-called ethical principles mask only partial interests but with different weapons, and thus hermeneutical constructivism is only a continuation of the immorality of legal positivism.[106] Ethics seem to enter the law here and are properly recognised as an inevitable part of hermeneutical constructivism.

[101] N. Jesica, M. Nadia & L. Septiyati, 'The Realization of Social Justice for the Poor Citizens According to Legal Philosophy' (2018) 12 4 *Fiat Justisia* 284-297.

[102] Sulistiowatu, N. Ismail, Paripurna, & Sulastriyono, 'The Values of Pancasila in Business Activities in Indonesia (Case Studies of Limited Liability Company and Cooperation)' (2016) 28 1 *Mimbar Hukum* 107-122.

[103] D. Kennedy, 'Form and Substance in Private Law Adjudication' (1976) 89 *Harvard Law Review*.

[104] Nieuwenhuis, *Waartoe is het recht*, p. 93.

[105] A distinction can be made within legal positivist theory, *cf.* B.P. Casey, *Natural Law and the Challenge of Legal Positivism* (dissertation University of Missouri-Columbia, USA: 2007), p. 34: 'normative legal positivism' means that whichever official is charged with authoritatively determining whether a particular norm is a law of a particular legal system, should do so without making any moral or evaluative judgments; 'descriptive legal positivism' means that law can be characterised based on social facts alone and does not contain any moral or evaluative content *per se*.

[106] C.W. Maris & F.C.L.M. Jacobs (eds.), *Law, Order and Freedom. A Historical Introduction to Legal Philosophy* (Springer, 2011), p. 15.

Penetrating gaps, conflicts, and ambiguities in the elaborate corpus of law often give rise to difficult cases.[124] As far as those cases are concerned, the law leaves the decision-makers a wide margin for maneuver. The law applicable to the difficult cases is limited to conflicting stereotypical policy arguments or the 'rhetorical modes' of individualism and altruism.[125]

The tension between the ideas of individualism and altruism can be represented as a continuum on which rules of contract and corporate law take place in relation to each other. From that point of view, the rule is a sum of different elements, each of which is more focused on individualism than on altruism.[126] Compared to other rules, the rule can be described as relatively more or less based on individualism or altruism. According to Kennedy, the distinction between individualism and altruism corresponds to a preference for, in the first case, closed rules ('rigid rules rigidly applied') and, in the second case, open norms, such as reasonableness and fairness ('equitable standards').[127] Altruism offers other definitions of legal certainty, efficiency and freedom.[128] For example, freedom is a negative freedom for individualists. The preference of individualists for legal certainty (the certainty-by-rules) is that people with a bad will identify the precise limits of tolerance for their badness. This empowers the villain to go as close as possible to the limits of that rule. That is impossible with an open norm; an open norm is simply too vague for that.[129]

124 Bratton, 'Manners', 883.

125 Bratton, 'Manners', 884.

126 C. Mak, 'Grondrechten en Europees contractenrecht. Over de rechtspolitieke achtergrond van contractenrechtelijke uitspraken' ['Fundamental Rights and European Contract Law. about the Legal-Political Background of Contract Law Judgments'], (2008) 33 6 *Nederlands Juristen Comité voor de Mensenrechten-Bulletin* (*NJCM-Bulletin*) [*Bulletin for Dutch Lawyers Committee on Human Rights*] 775.

127 Compare the concepts of 'rules' and 'standards' (or 'principles') with the concepts of the 'republican heteronomy' and 'despotic autonomy' in: G.J. Wiarda, *Drie typen van rechtsvinding* [*Three Types of Finding Law*] (Zwolle: W.E.J. Tjeenk Willink, 1988), pp. 13-15; *cf.* C.E. Smith, *Regels van rechtsvinding* [*Rules of Finding Law*] (Den Haag: Boom, 2007), pp. 21-49.

128 Behold again a glimpse of Timmerman's corporate legal *Ring* cycle anecdote. 'Individualism' is viewed skeptically by critical legal scholars as being a structure of 'power', while 'altruism' is viewed positively by them as being a structure of 'love'. The concept of 'power' in this context can be traced back to its use by philosopher Michel Foucault, *Histoire de la sexualité I: La volonté de savoir* [*The History of Sexuality I: The Will to Knowledge*] (Paris: Éditions Gallimard, 1976), pp. 112-113: "... Finally, because it is a power whose model would be essentially juridical, centered on the sole statement of law and the sole operation of taboos. All modes of domination, submission, and subjugation would ultimately come down to the effect of obedience."

129 Kennedy, 'Form and Substance', 1773.

7. FINAL REMARKS

This contribution provided an insight into the different interpretatio of the open norm 'reasonableness and fairness' in Dutch and Indonesi corporate law. The comparison of this open norm in the corporate ar civil laws of these countries is interesting, because: (1) the countri have a colonial and, therefore, transplant relationship; (2) both countri have major cultural, economic, political, and religious differences th influence the way in which an open norm is interpreted; (3) there a centralistic legal system in the Netherlands and a pluralistic leg system in Indonesia; (4) both Dutch and Indonesian corporate law (a *lex specialis*) have undergone a development that is still partly connecte with Dutch and Indonesian civil law (as *lex generalis*); and (5) th historical development of Dutch and Indonesian corporate law ha followed separate and independent paths.

Dutch and Indonesian laws hold similar standards of reasonableness an fairness; mainly as a norm of conduct that serves the best interests of th parties based on rules of decency (altruistic). This altruistic interpretatio of open norms helps to settle disputes in a legal pluralistic state mor than an individualistic interpretation of open norms would. To protec its cultural and religious diversity, Indonesian law could accommodat this social pluralism with strong internal legal pluralism. By usin open norms in corporate and civil law, judges have the power to colo these open norms with culturally determined values. This means tha corporate and civil law practitioners must remain open to multiformit by allowing cultural backgrounds to play a role in the interpretation o open norms. The lower limit for a cultural interpretation of open norm lies in the tension zone with public order and safety.[130] In this way, th open norms not only provide a more altruistic law, but also offer th necessary legitimacy to the reform of Indonesian civil law.

The main difference between the interpretation of reasonableness and fairness in Dutch and in Indonesian law lies in the application o open norms in a legal centralistic system (Dutch) as opposed to a legal pluralistic system (Indonesian), in which non-state laws extend the judge's interpretation of open norms. This can be done by adopting the rule of binding precedent. On the one hand, Indonesia may learn from the Netherlands in the adoption of open norms amidst its pluralistic system by strengthening the position of court rulings as a source of civil law. On the other hand, the Netherlands may learn from Indonesia in the concretisation of a more pluralist legal system. The Netherlands is

130 F.T. Oldenhuis, J.G. Brouwer, D.N.R. Wegerif & F.E. Keijzer, *Schurende relaties tussen recht en religie* [*Abrasive Relationships between Law and Religion*] (Assen: Van Gorcum, 2007), p. 72.

becoming increasingly multicultural and multi-ethnic, and because of this diversity a divided nation is defending all kinds of interests. For example, ample legal research is being conducted into the different interests flourishing within the boundaries of the Dutch democratic constitutional state.[131] In the field of corporate law, Islamic law is also becoming increasingly interesting for Western countries due to the growing share of Islamic parties in the world market.[132] Islamic financing is a pertinent example.[133] However, the question as to the desirability of more legal pluralism in the Netherlands is also an ongoing debate in which emotions can run high.[134] This is illustrated by the well-known Dutch proverb, which translates literally as: "A farmer doesn't eat what he doesn't know."[135] On this matter, we note that legal anthropology is also divided on the question whether legal pluralism is at all possible, and as a consequence, whether apparent legal pluralism may turn out to be a colonising legal centralism, a transplantation, after all.[136] Should the latter be the case, then this contribution should of course never have been called a post-colonial comparative study to begin with.

131 *Vid.* F. Abdi & W.M. van Rossum, 'Rechtspluralisme onder Marokkanen in Nederland' ['Legal Pluralism among Moroccans in the Netherlands'], (2009) 16 84 *Nederlands Juristenblad* [*Dutch Legal Journal*] 1030-1035: A striking example are Moroccans living in the Netherlands who find themselves in a legal pluralistic situation given that they must deal with Dutch (as citizens), Moroccan (as citizens), and possibly Islamic law (as religious). This raises such questions as: How do they deal with this? — *i.e.* which law do they allow to prevail in which situation?

132 For a comprehensive introductory overview of (1) Islamic corporate law, and (2) Islamic commercial contract law, we recommend the following studies: (1) M.A.R.A. Roshash, *Islamic Company Law: A Comparative Juristic Analysis* (Pharos Media & Publishing, 2005); (2) S. Hussain, *Islamic Commercial Contractual Law Between Muslims and Non-Muslims: A Classical and Contemporary Comparative Analysis* (Lambert Academic Publishing, 2012).

133 M.S. Berger, *Klassieke sharia en vernieuwing* [*Classic Sharia and Innovation*] (Amsterdam: Amsterdam University Press, 2006), pp. 75-77.

134 A major discussion in the last decade about the desirability of legal pluralism in the Netherlands resulted in the dissertation of jurist and political scientist Machteld Zee (Leiden University): *Choosing Sharia? Multiculturalism, Islamic Fundamentalism and Sharia Councils* (Eleven International Publishing, 2016).

135 In Dutch: *Wat de boer niet kent, dat vreet hij niet*

136 Legal anthropologist Agnes Schreiner (University of Amsterdam) disapproves of this semblance of legal pluralism since non-state law is constantly being translated, even by force, into state legal concepts: A.T.M. Schreiner, 'Observing the Differences', in A. Soeteman (ed.), *Pluralism and Law: Global Problems* (Franz Steiner Verlag, 2004), pp. 87-94. *Cf* A.T.M. Schreiner, 'Way of(f) the Law', in *According to Aboriginal Law* (Amsterdam: Duizend & Een, 2019), p. 64: "It seems as if there is acknowledgement for local law at what appears to be the successful legal pluralist moments, but in actual fact each moment is evidence of the creativity and flexibility of the dominant law which forces the local law to transform and which enriches or elevates itself via court decisions and statute law to a new stage in its own development."