Autonomy of law in Indonesia

Bedner, A.W.

ARTICLES

Autonomy of law in Indonesia*

Adriaan Bedner

Introduction

Understanding how law and legal institutions in developing countries function has its particular difficulties. For a legal scholar, the study is complicated by a scarcity of legal sources, debates about hierarchies of laws and regulations, and the absence of good handbooks that introduce him or her to the basics of a particular field of law. Socio-legal scholars will add that the "modern" body of state law that was first introduced under colonial law and then further developed after independence is often at odds with persisting local bodies of customary or religious law. Where in Europe and North America the evolution of law was part of a gradual process of state formation and economic development, the trajectory in the developing world has been uneven and partial. States in the developing world are typically weak,[1] and when they include strong institutions the judiciary is seldom among them. The scholar of law in developing countries should moreover always be aware of the incongruence between the positive law's assumptions about the situation it seeks to regulate and the actual situation itself, of how the legal system looks on paper and how it looks in reality. These issues are familiar to socio-legal scholars studying the Western world, but their scope and depth are of different dimensions.

These features of state law in developing countries are closely related to the notion of autonomy of law. For the purpose of this article, I define such autonomy as the condition in which legal institutions, constituting a legal system, are able perform their tasks – and notably the systematic development of substantive rules and principles of law – in accordance with the procedural rules designed to guide them, without interference from outside actors based on non-legal grounds. The lack of such autonomy is a central problem in most developing countries.

The question this article seeks to answer is how useful the theoretical approaches developed in Europe and the United States are for explaining or understanding the autonomy of law in Indonesia – a nation that is on the verge of becoming a lower-middle-income country and whose legal system presents many of the features found in other developing countries' legal systems. To this end I will first outline three lines of theoretical thought that have dominated the inquiry into

* The author would like to thank Tobias Arnoldussen, Keebet von Benda-Beckmann, Erhard Blankenburg, Danielle Chevalier, Nick Huls, Awaludin Marwan, Robert Knegt, Rob Schwitters and an anonymous reviewer for their helpful comments on earlier versions of this article.

1 The classic text is Migdal 1988.

Recht der Werkelijkheid 2016 (37) 3
doi: 10.5553/RdW/138064242016037003002

autonomy of law in (Western) sociology. I link these to the different points of departure articulated by the classical sociologists Marx, Weber and Durkheim, as developed by various schools of socio-legal thought. I am aware that I could have made other choices and that other orderings would have been possible, but I think that these three help to capture some basic distinctions.
I will then seek to assess to what extent these three theoretical approaches are represented in the socio-legal studies of Indonesian law, to what extent their insights are relevant, and whether we need alternative or supplementary approaches to fully capture the particular features of the autonomy of law in Indonesia. For bringing some order in the vast array of socio-legal work on Indonesia I will first discuss legal anthropological studies, then political science inquiry into legal institutions, and finally law in context. These distinctions are somewhat arbitrary, as many scholars cannot be properly placed within the confinements of one of these categories. Law in context is moreover somewhat of a "left-over" category, which as a result contains a wide variety of perspectives. Still, I think these distinctions are helpful to obtain an ordered overview of how socio-legal scholars on Indonesia have looked at the autonomy of law.

Theories about law's autonomy: three approaches

The social-science theories about law's autonomy developed in the course of the 19th century were preceded by the substitution of natural law for legal positivism as the main paradigm of legal theory. The idea that law was not something innate in God or Nature made way for two alternative visions: law as a body of norms growing out of a particular society,[2] or law as a political tool, to be used at liberty by political power holders without room for autonomous juridical interpretation. In one case, law was conflated with society, in the other with the legislature and the executive. In both conceptions the role of learned jurists was limited.
However, the juridical profession – judges, lawyers, legal scholars and notaries – managed to repel the attack on their monopoly of legal knowledge. In Germany and England appeals for codification were defeated, leaving Roman and Germanic law in place in Germany[3] and the common law in England.[4] These bodies of law were considered to be the fruit of the particular histories of the German and the English peoples respectively. In Germany this reinforced the position of legal scholars, in England the position of the judiciary and the bar.
In France the Napoleonic codes, the *Code Civil* in particular, were drafted by prominent jurists on the basis on the received Roman law and the codified *Coutume de Paris*. The *Code Civil* was accompanied by an explicit statutory prohibition (Art. 1(4)) to further develop it through "deciding cases in a general and regulating manner." However, in practice judges and lawyers soon started interpreting

2 Montesquieu was probably the first to articulate this idea (Falk Moore 2005, p. 12) Other early representatives of this mode of thought were Henry Maine and William Sumner.
3 Eizenhardt 1984, p. 361-374.
4 Wagner 1952-1953, p. 337-340 and 343-345.

the new rules in the light of the underlying Roman law and in the process they gradually developed an impressive body of precedents on a case-by-case basis.[5]
The autonomy of scholarly and judicial lawmaking thus survived the challenges mounted by the decline of the natural law doctrine. Soon, however, two theoretical challenges of a different nature presented themselves. The first is whether the presentation of law as a neutral body of rules produced and administered by an autonomous legal system is no more than a sham, obscuring from view how it promotes the interests of the rich and powerful. The second is whether the operation and reproduction of law are indeed determined by the strict rules the legal institutions develop by themselves. These questions lie at the basis of the three major approaches to the idea of law's autonomy, which I will now outline. The accounts are brief and only intend to capture the core of each approach.

1) The Marxian tradition

Although Marx himself never articulated a separate theory of the autonomy of law, he has frequently addressed the role and position of law in his work and his ideas form the starting point of a major line in sociological thought on the subject. Marx's basic position denied any autonomy for law. Law, according to Marx, is a crucial part of the superstructure that grows out of the property relations underpinning the capitalist system that is built on exchange relations.[6] Law, in this conception, serves as a mask for the interests of the ruling class, lending a neutral appearance to a system that is fundamentally partisan. The issue is not whether individual judges are biased in particular cases; it is the substance and the procedure of the system itself that reproduce inequality. At the core of this process is the legal form that "makes an abstraction of real men."[7] This is well illustrated by the famous phrase of Anatole France's when he speaks of "the majestic equality of the French law, which forbids both rich and poor from sleeping under the bridges of the Seine."[8] Procedurally, the law may be tilted against the lower classes as well, for instance, by valuing written over oral evidence or by the use of formal language that is hardly comprehensible to those without higher education. The perceived neutrality of the law, based on the idea of legal equality, moreover misleads people in noticing the social inequality and class differences that are embedded in the system. This leads to a "depolitisation" of governing, which is increasingly considered as a technocratic activity instead of a power struggle about access to privileges and scarce resources.[9]
At a more abstract level, it is argued that the systemic requirements of capitalism demand that as a system the law "functions and develops according to its own internal dynamics." This implies that it cannot cater to the needs of the powerful at a concrete individual level.[10] The core of the Marxian approach is that, in order to be effective in continuing the subjection of an ever-increasing number of poor

5 Bouckaert 1981.
6 Fuller 1949, p. 1159-1160.
7 Marx, quoted in Lefebvre 1969, p.127.
8 Quoted in Balbus 1977, p. 577.
9 Balbus 1997, p. 577-578.
10 Balbus 1977, p. 572.

Recht der Werkelijkheid 2016 (37) 3
doi: 10.5553/RdW/138064242016037003002

and disadvantaged, the legal system must *appear* autonomous. This requires that the legal system is autonomous in individual decision-making and indeed is willing to sacrifice individual interests of upper-class members to maintain this appearance of neutrality. Only in this manner will it ensure the legitimation of the status quo. In his famous essay on the death penalty in 17th century, England, Douglas Hay gives the example of the rare aristocrat who was hanged for breaking laws that served to repress the lower classes.[11] This legitimation through the appearance of equality before the law serves to prevent "the formation of the class consciousness necessary to the creation of a substantively more equal society."[12]

The "orthodox" Marxist approach which postulates that law is fully determined by capitalist relations – and in that sense has no autonomous existence at all – has little traction anymore.[13] But the idea that law serves as a legitimating mask for class-, gender-, or race-based interests is still influential. A quite diverse array of approaches has been developed on this basis, two of which have been particularly influential. The first was developed by a number of Marxian historians, studying English 18th-century criminal law. They exposed how indeed law serves the interests of the elites, but at the same time offers opportunities for resistance and imposes constraints on the arbitrary exercise of power. In particular, E.P. Thompson's defense of the particular constellation of laws, principles, and practices he refers to as the rule of law has been influential. Thompson's argument is in line with the Marxist views outlined above – law is a tool of oppression for the ruling class. However, according to Thompson the inherent limits to the use of law as a means of enforcing power are of great value and should not be dismissed as a "mask." Autonomous law indeed confers legitimacy upon the existing order, but it does so by binding this existing order to its own rules. In this manner it also offers protection to the poor and disadvantaged.[14]

The other main line of thinking within the Marxian tradition is critical theory. The main objective of critical theory – and Critical Legal Studies (CLS) in particular – is to unmask the neutrality of the law, by revealing how the assumptions underlying particular fields of doctrinal law are fallacious.[15] Lawyers, according to CLS scholars, produce "ideological pictures" of social relations, for example, by defining a concept as "reasonableness" in tort law in line with dominant understandings of male behavior.[16] As a result they promote the reproduction of social patterns of injustice and inequality.[17] CLS scholars assume that by revealing the "truth" about the law they can change people's legal consciousness, and this will cause social transformation.

11 Hay 1975. For a critique of Hay's interpretation see Langbein 1983.
12 Balbus 1977, p. 577.
13 An example is Pashukanis (see Cotterrell 1994, p. 99-100).
14 Thompson 1975, p. 258-269.
15 These ideas build on "the Gramscian notion of 'hegemonic consciousness'" (Trubek 1984, p. 607). For the relation between critical theory as developed in Europe by Horkheimer and others and critical legal studies, see Cotterrell 1994, p. 204-217.
16 Tushnett 1991, p. 1526.
17 Trubek 1984, p. 590.

CLS has been criticized for its lack of clarity concerning the nature of this process of transformation[18] as well as for epistemological weaknesses – including their refusal to separate "ought" from "is."[19] Another point of criticism has been that, just like doctrinal legal scholars, CLS scholars overestimate the influence of law on society even though there is a wealth of socio-legal scholarly work that has shown otherwise.[20] Yet others have problematized the assumption that a society shares a single "legal consciousness"; instead social stratification leads to a situation where different forms of legal consciousness co-exist.[21] One of the most insightful CLS lines of research indeed concerns one such "epistemic community," namely law schools, and demonstrates how legal education produces a type of legal consciousness in its students that promotes substantive inequality.[22] I will get back to this issue below when discussing Bourdieu's approach of the legal field.

2) From Weber's idea of autonomous law to Bourdieu's "champs juridique"

Of the classical sociologists Max Weber was the one most concerned with the idea of law's autonomy. Taking neither a (class) conflict nor a functionalist perspective as his point of departure, Weber argued that the rise of an autonomous legal system is logically connected to the development of a modern, national, capitalist state. Weber's approach is influenced by Marx, for Weber also considered law primarily as a tool for legitimating the state. This linkage is also evident in the theories developed by those who can be considered as primarily influenced by Weber. Weber's main insight is that, as states become increasingly centralized and concerned with nation-building, law becomes synonymous with national state law and acquires a formal-rational character. This implies that the administration of the law must be governed by strict rules and that no interference by the executive or societal groups is allowed. This ideal is captured in the ideology of the rule of law and equivalents as *rechtsstaat* and *état de droit*.

The major features of the "autonomous law" coined by Weber have been well described by Nonet and Selznick. Most importantly, law is separated from politics. This, according to Nonet and Selznick, is "the master strategy of legitimation."[23] It means that political action is subordinated to law, in particular to the constitution, and that many of the state's actions are subject to judicial review. This requires an institutional separation of government functions. The other side of this is that the courts must limit themselves to questions of legality. Judicial lawmaking does not fit into this system, which explains why judges sometimes go

18 Trubek 1984, p. 596-597 and 610-612. Trubek points out that the CLS idea about social transformation builds on Habermas"s idea of "world-maintaining interpretive systems" (599).
19 Trubek 1984, p. 596.
20 Trubek 1984, p. 612.
21 Mann (1970) quoted in Trubek 1984, p. 614.
22 Notably Kennedy (2007/1982). Munger and Seron have argued that the CLS scholars' critique of legal doctrine "has had the effect of reinforcing the centrality of doctrine and the role of the legal professional as uniquely qualified interpreter of law.'" (1984, p. 284) In other words, exactly the opposite of what the CLS scholars try to achieve.
23 Nonet & Selznick 1978, p. 59.

Recht der Werkelijkheid 2016 (37) 3
doi: 10.5553/RdW/138064242016037003002

out of their way to explain that their creating of new rules should not be considered as law*making*.[24]

This is only possible if judges (and other officials) apply rules that have been established by the political power holders, according to formal procedure. Here tensions between formal and substantive rationality become visible. If the court emphasizes substantive outcomes over adherence to formal rules and procedure, he or she endangers the divide between the political and the legal system.[25] On the other hand, if legal formalism leads to outcomes that are widely perceived as unfair, the legitimating force of the system will be undermined.[26] The development of a nuanced body of doctrinal law ("canons of interpretation"), which considers legal rules in the light of underlying principles and concepts, provides a kind of "middle ground" for the judge. The generality of legal rules instead of their specificity facilitates such doctrinal development.[27] In such a body of doctrinal law, there is also a place for the *telos* (purpose) of statutes, but teleological interpretation remains a delicate issue from a legality perspective.

No matter how formally autonomous the law is in the sense described above, if citizens cannot invoke it because of monetary, social or other barriers, this will lead to a gap between entitlements in law and in practice.[28] As a result the courts cannot develop the law to bring it into conformity with societal conditions and the law will no longer provide the legitimation that constitutes the foundation of its own autonomy. Legal autonomy requires a minimum degree of correspondence between law and social reality, and access to a legal system that provides a fair hearing and a just remedy is key to achieve this.[29]

Law thus needs the mediation of doctrine to be able to respond to demands for justice, and the judiciary cannot develop this doctrine on its own. It must be assisted by a well-trained, independent epistemic community of legal professionals. There is a huge literature examining the position, role and functioning of the legal profession and its constituent elements (in particular the judiciary, the bar and law schools) and how they contribute to sustaining the autonomy of the law by developing a consistent legal discourse. One of the most ambitious attempts to offer a theoretical framework for analyzing this process of the production and reproduction of law by the epistemic community of legal professionals, its relative autonomy, and its broader sociological meaning is Pierre Bourdieu's outline of

24 Nonet & Selznick 1978, p. 57-60.

25 In the final section of their book, Nonet and Selznick propose a system that reconciles this tension, in a move towards what they call "responsive law." They are quite explicit that this is only possible if there is already a well-established system of autonomous law, and that there is always a danger of relapsing into "repressive law" (1978, p. 116-117).

26 Nonet & Selznick 1978, p. 67.

27 Lempert 1987, p. 161.

28 Lempert 1987, p. 165-166.

29 Galanter 1974 has demonstrated how skewed the legal arena is in the US. See also Lempert 1987, p. 166-167.

"elements for a sociology of the juridical field" (*champs juridique*), which I will now outline.[30]

According to Bourdieu, law is autonomous to a certain extent because it is produced by a particular field. This field has its own logic, which is determined on the one hand by the power relations that give it a specific structure – for instance those between the bar and the judiciary – and, on the other hand, the juridical doctrine, which limits the number of solutions to resolve conflicts.[31] Key to the power of the field is the social recognition of the monopoly to "speak the law" (*dire le droit*), which is based on the acknowledged technical capacity of jurists and consists of a combination of logics and ethics.

The cohesion of the juridical *habitus*[32] is reinforced by the hierarchical order of the system, which in the end imposes – at least for the time being – a resolution to an interpretational dispute. This can be a ruling by the supreme court, but also the *communis opinio doctorum*. The latter is even stronger, as it is rooted in the social cohesion of the *corps des interprètes*. The production of this "body of rules and procedures of universalist pretension" is the result of a division of labor between "theoreticians" and "practitioners."

Theoreticians are primarily professors of law whose task it is to maintain the integrity of legal doctrine by "elaborating a systematic body of rules, founded on rational principles and meant for universal application."[33] The obligation for judges to follow precedents serves the same purpose of "affirming the autonomy and the specificity of the reasoning and the juridical judgment."[34] According to Bourdieu, the predictability of Weber's rational law resides in "the constancy and the homogeneity of the juridical habitus" rather than in the body of objective law. Similar training and experiences instill jurists with "categories of perception and appreciation that structure the perception and appreciation of ordinary disputes and orient the work bound to transform them into juridical confrontations."[35] An important constituting feature of the juridical field is the combination of common linguistic elements with a special neutralizing and impersonal language (including in grammar).[36] This linguistic and attitudinal neutrality serves to create a "derealization" and distancing of the direct interests from the legal procedure. It is deeply imprinted in the judicial *habitus*. Bourdieu here speaks of "dispo-

30 Bourdieu 1986. Bourdieu places his framework in a Marxian rather than a Weberian tradition, but the question he then seeks to answer is closer to what Weber was concerned about: which historical conditions must be fulfilled for the emergence of an "autonomous social universe" that, through its own specific functioning, can produce and reproduce a juridical body of knowledge (corpus) that is relatively independent of external constraints (1986, p.3)?

31 Bourdieu 1986, p. 3-4.

32 Here Bourdieu refers by *habitus* to what others have called the "internal perspective" of jurists.

33 Bourdieu 1986, p. 7. Bourdieu takes this activity and its effects seriously, while being well aware that the self-image of some (French) legal theoreticians as being purely deductive reasoners is clearly false (1986 p. 6-7).

34 Bourdieu 1986, p. 10.

35 Bourdieu 1986, p. 11.

36 Bourdieu 1986, p. 4-5. Only in times of crisis will jurists look beyond their practices to locate a foundational rule for their science. Bourdieu gives the example of the *Grundnorm* in the "pure law theory" of Hans Kelsen.

Recht der Werkelijkheid 2016 (37) 3
doi: 10.5553/RdW/138064242016037003002

sitions that are at the same time ascetic and aristocratic" and that judges are constantly reminded of by their peers.[37] The entrance into the juridical universe completely redefines the ordinary experience of a dispute and forces those entering to accept the rules of the juridical game.[38]

Practitioners pursue pragmatic ends, such as resolving a dispute. They are primarily case oriented and have to adapt the body of legal rules to the ever-changing reality. Organizational variables confer a degree of arbitrariness on judicial decisions, as do the differences in capacity of the lawyers involved in a case. In the end, the decision is determined by the "ethical dispositions" of the agents involved – within the limitations imposed by the *habitus* –rather than by "the pure norms of the law." It is the rationalization of the decision, accompanied by the solemn rituals of the court, which confer upon it the "symbolic effectiveness" that produces legitimacy.[39] At the same time, these decisions provide theoreticians with the building blocks for creating changes in the body of law.

Bourdieu argues that the form of the *corpus juridique* is closely linked to the relation between the theoreticians and the practitioners, and that together they to a large extent determine different national legal traditions. The relative force of these holders of different forms of juridical capital is also related to the position of the legal field in the general field of power, which differs in countries with a strong rule of law tradition and those where a bureaucratic "reglementation" is central. Nonetheless, in all cases, theoreticians and practitioners may coalesce against the legislator, resisting changes imposed by statutes by means of doctrinal argument.[40]

The constitution of the juridical field would not be possible without the professional monopoly over providing and commercializing legal services. In order to safeguard this monopoly and the profits it guarantees, the members of the legal profession need to be able to control the "production" of jurists. This situation also stimulates a process of juridification of forms of dispute resolution that earlier fell outside the juridical field. The acquisition by laypeople of legal skills concerning particular topics may drive jurists to promote technical complexity of the law concerned in order to push out these competitors and safeguard the monopoly of the legal profession.[41]

According to Bourdieu, law is one of the most effective symbolic forms of power in creating or codifying social structures in accordance with the vision of the state. In order to be effective, the legal categories must correspond with pre-existing forms and categories. If not, the law runs the risk of losing its magical power. Yet, the "consciousness of the social conditions for the effectiveness of juridical

37 Bourdieu 1986, p. 9.

38 Bourdieu 1986, p.10. Martin Shapiro has argued that this is not true for trial judges, who will always be inclined to use mediation and other dispute resolving techniques to sustain their legitimacy in the triad of litigants and dispute resolver (1986, p.8).

39 Bourdieu 1986, p. 8. This account is very much in line with Mitchell Lasser's analysis of judicial decision-making in the French Court of Cassation (Lasser 2004).

40 Bourdieu 1986, p. 6. The opposite may of course also happen: doctrinal developments may lead to changes that the legislator does not wish to realize.

41 Bourdieu 1986, p. 11-12.

acts" must not lead to ignoring how effective a rule can be even if it goes against social norms, in particular if it is accompanied by sanctions.[42] The efforts to systematize and rationalize particular to the juridical field moreover confer a "seal of universality" upon judicial decisions and may normalize what hitherto was considered as deviant social behavior.[43]

The legitimation of law should not be understood primarily in terms of the ideas of "eternal values" enunciated by the legal profession, or, in contrast, by how law is rooted in social customs representing the power relations in society. The key to the legitimation of the practice of legal professionals resides in their relations with the producers of political and economic power. This point is obviously very much in line with the Marxian argument discussed above. Bourdieu adds that the juridical field itself has less autonomy than other fields that contribute to the maintenance of the symbolic order, such as the field of arts or the field of sciences. This affects the divisions and power relations *within* the juridical field, in particular the prominence of sub-disciplines and their representatives. These are closely linked to the positions of particular interest groups in society, such as labor law to workers, or commercial law to traders and entrepreneurs. According to Bourdieu, the power relations in the outside world are replicated within the juridical field. An example is the ascendancy of private law jurists over administrative law specialists, which is a result of the dominant political position capital owners hold since the triumph of neo-liberalism as the dominant political ideology. The ascendancy of a particular professional sub-discipline within the juridical field becomes visible, for instance, in law school curricula, the fees the practitioners within this sub-discipline charge, and the prominent positions they hold in the bar association and other professional bodies.[44]

Bourdieu's theory is both universalist and particularist at the same time. It is obviously constructed based on his analysis of the French juridical field and how it is embedded in a broader field of symbolic power production. By elevating it to a more abstract level, it suggests offering a complete framework for analysis of law and the juridical field in other parts of the world. We will later consider to what extent this suggestion is justified, but first we will look what we can learn about law's autonomy by looking at systems theory.

3) Systems theory: Luhmann's autopoiesis

The systems approach to sociology of law builds on the structural-functionalist tradition of Durkheim and Talcott Parsons. At the core of systems, theory as applied to law is the idea that the legal system, together with the economic, the political and other systems, serves to integrate a society. Within the sociology of law, the most influential but also the most radical version of systems theory is the so-called autopoietic theory of law first developed by Niklas Luhmann, which I will use as the representative in this category.

42 Bourdieu, p. 1986, p. 13-14.

43 Bourdieu 1986, p. 16. The example Bourdieu provides is of family practices that are initially common to "an ethical avant-garde" but gradually spread to other layers of the society.

44 Bourdieu 1986, p. 18.

Recht der Werkelijkheid 2016 (37) 3
doi: 10.5553/RdW/138064242016037003002

Autopoietic theory intends to explain the functioning of legal systems in late modern societies, which are characterized by a high degree of functional differentiation. Law's function is "the exploitation of conflict perspectives for the formation and reproduction of congruently (temporally/objectively/socially) generalized behavioral expectations."[45] Often criticized for its extremely abstract, almost "hermetic" nature,[46] autopoietic theory nonetheless provides an original contribution to socio-legal thinking about the autonomy of law and the legal system. This is not in the least because this theory is so radical in its position:[47] it postulates the autonomy of the legal system, putting communication and self-referentiality at its center.

Autopoietic systems theory conceptualizes law as a system of communications that "reproduces its own elements by the interactions of its elements."[48] It conceives of the legal system as a unity that can appropriate facts from its environment (it is "cognitively open"), which it orders as legal/illegal according to its own internal norms. These norms can only change through operations of the legal system itself, in other words, the system is "normatively closed." This latter aspect determines the legal system's autonomy, setting "effective limits to the political instrumentalization of law."[49] It is important to recognize that the word system here is used in a very different way than in the other lines of theory discussed: the system is not constituted of actors who produce the law, but the system *is* the law. This has not always been properly recognized by the critics of autopoietic theory, which – in combination with the theory's level of abstraction – explains why autopoietic theory has often led to rather confusing debates.[50] Luhmann himself has explained that his idea about the unity of the legal system serves to overcome the situation that "jurists basically content themselves with considerations of consistency," whereas "the sociology of law is interested only in correlations between legal and extra-legal variables and, though it may talk of a legal system, it never clearly perceives the unity of this system."[51] In other words, autopoietic theory claims to be capable of relating the functioning of legal discourse to the institutional structures producing this discourse.

The first key aspect of autopoietic theory to achieve this is the centrality of "communication" to the system. The elements of a legal system are communications that refer to one another. This requires that a legal language act should be "communicated"; in other words, it is directed at a particular audience.

The second central aspect of autopoietic theory is that a legal system is self-referential. A communication always refers to another communication, for instance, a plea in a criminal procedure refers to the law. The law itself refers to other laws, but also to the constitutional rules that have to be followed in order to give the law its validity. However, autopoietic theory argues that the system of self-refer-

45 Luhmann 1988, p. 27.
46 See, for instance, Lempert 1988.
47 Lempert 1988.
48 Teubner 1988, p. 3.
49 Teubner 1988, p. 4.
50 Nelken 1988 provides a good overview.
51 Luhmann 1988, p. 13.

encing is of a circular nature and thus constitutes itself. In the words of Luhmann: "Laws are only regarded as norms because they are intended to be used in decisions, just as these decisions can only function as norms because this is provided for in laws."[52] The possibility of self-referentiality presupposes that communications are not limited to the particular case at hand or to the moment in which they occur, but that they are processed in a form which makes them accessible to others. This, according to Luhmann, is what drives legal development and produces the autonomy of the system.[53] Drivers of legal change can be new legislation, case law, doctrinal writings or other forms of legal communications referring to one another. Such differentiation of sources is required to produce a degree of legal certainty – or "expectations that are actually met," in the words of Luhmann, which is the central objective of the legal system – upon which its legitimacy is founded in large part.

The idea of self-referentiality leads to particular observations about law that may seem self-evident. Thus, Luhmann writes that, "legal forms are valid because they are valid" or "they contain their justification within themselves."[54] But then he makes an important observation about the autonomy of law:

> "Like the metaphor or the joke, the form functions only when it remains unquestioned. The use of form occurs when it is insisted that valid rules should be carried out – because otherwise the legal order itself would be called into question. Forms are carried out in a ritualistic manner. Here references to the world are eliminated and replaced by references to the system itself – a typical characteristic of rituals. Forms are therefore all the more susceptible to every kind of symbolic breakdown – and one form of breakdown is that these forms are no longer believed in."[55]

The third central feature of autopoietic theory is that a system is "cognitively open" but "normatively closed." Legal systems recognize events taking place within other systems, but only in as far as they are relevant from a legal perspective. The legal system is only interested in acts that engender legal consequences. To such acts the system is "cognitively open." Yet the rules and principles that underlie this normative perception of "outside events" can only be changed through legal acts, not directly through events outside the legal system. One example of such a legal act is new legislation; another is the conferring of legal consequences upon outside events recognized as legally relevant, since conferring such consequences may actually change the legal rule itself for future operation. The system remains normatively closed, for it is only through this act of attaching legal meaning to an outside event that it reproduces itself, not through this event by itself.[56] In the words of Luhmann: "[the legal system] consists solely of the the-

52 Luhmann 1988, p. 21.
53 Luhmann 1988, p. 18-19, 21.
54 Luhmann 1988, p. 23.
55 Luhmann 1988, p. 23.
56 Luhmann 1988, p. 17-18, 20.

Recht der Werkelijkheid 2016 (37) 3
doi: 10.5553/RdW/138064242016037003002

matization of [physical events] and other events in a communication which treats them as legally relevant and thereby assigns itself to the legal system."[57]
Autopoietic theory and its ideas about autonomy and self-referentiality seem very far removed from the situation in developing countries where many of the preconditions for meaningful legal communication are absent. Yet precisely by taking this specific perspective of law as a system of communications it may help us to identify and specify the basic conditions for the existence of autonomous law.

An important feature common to all three lines of theory discussed is that the autonomy of law is key to the law's legitimation of the political system, or – in the case of a functionalist perspective – to the stabilization of society. Furthermore, all three pay considerable attention to law and legal process, linking these to institutional and societal conditions. The way I see them, they do not exclude but complement each other, as they differ in their point of departure and the emphasis they put on different dimensions of law's autonomy. In particular autopoietic theory is often considered as a branch of its own, because its conceptualization of the legal system is so different from the other approaches. However, if one "translates" some of its concepts into more common ones, it appears to have several points in common with Bourdieu's discussion of the functioning of the juridical field.
The next part of this article provides an overview of socio-legal studies on Indonesia and how their findings about legal autonomy relate to the theoretical lines discussed above. On this basis I will attempt in the end to assess how relevant the approaches discussed are for countries that cannot be called "late modern."

Law and the legal system's autonomy in Indonesia

The autonomy of law and the legal system is an issue that has concerned many jurists, socio-legal scholars and political scientists working on Indonesia. This includes Indonesian legal scholars and sociologists, most of whom are well aware of the different conditions applying to Indonesia compared with the Western world (including Japan). Prominent Indonesian professor of legal sociology Satjipto Rahardjo, for instance, always spoke of Indonesia's "legal system in the making," by which he implied that this system was still incomplete, incoherent and therefore less resistant to political and social pressure.[58] Another example is the effort by the Indonesian jurisprudential school of "pure law" (*hukum murni*), promoted by professors Philippus Hadjon and Peter Machmud from Surabaya's Airlangga University, to establish (or re-establish) the autonomy of law by formulating an orthodox formalist approach based on the ideas of Hans Kelsen.[59]
Much of the socio-legal work on Indonesian law and the legal system has been conducted by *legal anthropologists*. Their primary interest has never been to

57 Luhmann 1988, p. 19.
58 Personal communication from Jan Michiel Otto and interview with Professor Rahardjo (October 2010).
59 Bedner 2013, p. 264.

improve the legal system nor to engage in legal theory and demonstrate that court practices are not in accordance with what they are supposed to do. Instead, they have concentrated on how different legal/normative systems are operating within the same social space. A particular concern of legal anthropologists has been the problems resulting from the imposition of a state legal system on different legal orders found in society.

The legal anthropological research concerned has demonstrated that, at the local level, the national legal system cannot operate autonomously, but that we find "semi-autonomous social fields."[60] These are impervious to direct influences from the outside, but under their influence generate their own rules. The main point of the legal anthropologists is that law can be used as an analytical category to look for the "legalness" in norms, procedures, principles, rules, and decisions. Yet, the nature of legal thought in these semi-autonomous social fields is different from the primarily formal-rational way of thinking that has been the hallmark of Western law. Legal anthropologists have demonstrated how such local law consists of maxims and principles rather than fixed rules and categories, and how the overall goal of achieving consensus determines legal procedures. The overall picture resonates with studies of custom and customary law in other countries and emphasizes fluidity, flexibility and procedural orientation – within certain boundaries.[61]

Despite its different orientation, the legal anthropology of Indonesia has yielded valuable insights into the autonomy of state law and how judges in particular try to promote such autonomy. Keebet von Benda-Beckmann has demonstrated how much difficulty state courts have in dealing with *adat* law in land cases; precisely because of *adat* law's flexibility and procedural nature, and also because of how difficult it is to gather the legally relevant facts. Her study of land disputes in West Sumatra in the 1970s exposes the tendency of judges to act in a formalist manner and to rigidly apply state law procedures in dealing with the many uncertainties they face.[62]

This reliance on formal rationality and procedure resonates with the views of Weber and Bourdieu about the way in which the juridical field tries to sustain the autonomy of law and its own monopoly on producing law. The foundation for this judicial approach in Indonesia was provided by the formalist, theoretically oriented education that judges received during the 1950s and 1960s.[63] However, this approach did not work here: the huge gap between the formal-rational administration of law and the local views of justice encouraged people to take an instrumental view of courts as institutions that one could manipulate into pro-

60 Falk Moore 1973.
61 See, for instance, F. & K. Von Benda-Beckmann 2011 and 2013; Vel 2008; Slaats & Portier 1981.
62 Von Benda-Beckmann 1984.
63 Massier 2008, p. 201-214.

Recht der Werkelijkheid 2016 (37) 3
doi: 10.5553/RdW/138064242016037003002

ducing desired outcomes. Disputes were seldom brought to a close and would start over again whenever the opportunity arose.[64]

Looking at this situation, there is an obvious explanation for this failure. In independent Indonesia, Bourdieu's "theoreticians" – the Supreme Court judges and the law professors – did not manage to develop a *corpus juridique* that could guide judges in similar cases. This is a precondition for an effective application of a formal-rational approach to promote the autonomy of law, and this precondition was not in place.

These findings about the relation between a formal-rational administration of justice and autonomy of law gain depth when we compare them with the results of legal anthropological studies about the administration of justice by the state Islamic courts (*pengadilan agama*). These courts administer justice in family law matters of Indonesian Muslims, applying a combination of state law and state-sanctioned Islamic law. In the 1980s and 1990s, John Bowen found that judges from these courts were much more effective in bridging the gap between formal-legal reasoning and local conceptions of justice than were their colleagues from the general courts. In cases concerning inheritance in the highlands of Aceh, they even managed to effectively apply legal reasoning to justify or stimulate the alteration of social practices at the village level. Using "new" notions of Sharia, they thus improved the position of women in inheritance cases that were hitherto governed by an *adat* which denied women any part of the inheritance. The judges concerned did not oppose Islamic with *adat* norms, but argued that what the Islamic law ordained had actually been *adat* law all along. Bowen has emphasized that this was not an incidental case, but that it forms part of a broader jurisprudential development in which judges took into account the opinions of Islamic legal scholars on this matter, as well as the views of Supreme Court judges.[65]

Other studies about the administration of justice by the Islamic courts[66] make the same point. They demonstrate how the interaction between practitioners – in this case lower courts – and theorists – scholars of Islamic law and the Supreme Court – are central in producing autonomy of law. This process has been reinforced by the development and adoption in 1994 of the so-called Islamic Law Compilation (*Kompilasi Hukum Islam*), a codification of Indonesian Islamic family law that is generally applied in the Islamic courts.

Indeed, the Islamic juridical subfield in Indonesia by its form and nature is far more autonomous than its "secular" counterpart (which I will discuss below). It has many of the attributes outlined by Bourdieu as necessary for constituting a juridical field with the degree of autonomy that can generate and wield symbolic

64 Von Benda-Beckmann 1984. See also Colombijn 1992. This situation was partly due to the ceasing of publication of legal journals altogether after the invasion of the Japanese in 1942, and was not resumed thereafter. Neither were the efforts at mapping and systematising *adat* by Van Vollenhoven and his pupils. In the 1980s, the Ministry of Justice developed short descriptions of the basic features of *adat* systems, to support judges unfamiliar with local *adats*. This was deemed necessary since judges no longer served more than five years in one court and within one region.

65 Bowen 2003, p. 126-130.

66 Cammack, Donovan & Heaton 2007; Nurlaelawati 2010; Van Huis 2015.

power. Judges from the state Islamic courts receive a legal education that is different from the one offered by "secular" universities. The emphasis is on Islamic legal doctrine, which exposes the students to legal argumentation in the Islamic law tradition, combined with training in the rules and principles laid down in the Indonesian codification of Islamic law. There is a platform for debate in the government-sponsored journal *Mimbar Hukum*, which also provides a medium for communicating important Supreme and Constitutional Court rulings. That so far the Islamic legal subfield primarily deals with family law of Muslims moreover provides relatively clear boundaries.[67]

This does not alter the fact that Islamic law in Indonesia remains an area of contestation and that it is far removed from the self-referential autonomy constructed by the theorists of autopoiesis. The administration of justice by the Islamic courts has remained open to outside interference by Islamic authorities who attack the courts' views with alternative visions that cannot be accommodated in the pattern of legal communication, but that cannot be ignored either. This has had its influence on the form of legal development. Islamic law has been moving towards substantive equality between men and women, while maintaining formal inequality in Islamic legal terms. Conservative Muslims have effectively opposed attempts at creating a special Indonesian "school" (*mazhab*) of Islamic legal thought, which started in the 1950s and was intended to be more openly neutral. The Islamic courts have now for many years been "inching towards equality," but they have framed this process in the familiar Islamic law terms instead of a secular vocabulary.[68] Once again, it shows the relative autonomy of the Islamic courts and sustains the argument of Van Huis that there may not be an Indonesian Islamic *mazhab*, but that there certainly is an Indonesian Islamic legal tradition located in the Islamic state courts.[69]

A second major line of socio-legal research relevant to the autonomy of law in Indonesia has been inspired by political science. Its focus is on legal institutions – courts in particular, but also the public prosecution counsel, the bar and legal aid – and how they are engaged in a struggle for power with one another and with other political actors. I will refer to them as *legal institutional studies*. The research in this field is not much concerned with legal thought and discourse and how it is produced, but instead focuses on the autonomy of the major institutional actors involved.

This approach was pioneered by Dan Lev, who during the 1960s and 1970s was almost the only non-Indonesian scholar to study Indonesia's national legal system. Lev's main concern was to explain how and why the legal institutions sustaining the rule of law, in particular the judiciary and the bar, lost influence and status from the 1950s onwards until the fall of Suharto in 1998. Lev explained this process as a result of the struggle for power between the dominant political currents in Indonesia, and the influence of the military in particular. Just as in

67 This is changing, though, because in 2006 the Islamic courts gained jurisdiction in the fields of Islamic banking and other parts of Islamic commercial law (Act 3/2006 Section 49).

68 Cammack 1999.

69 Van Huis 2015, p. 85. The idea of a legal tradition was developed by Patrick Glenn.

Recht der Werkelijkheid 2016 (37) 3
doi: 10.5553/RdW/138064242016037003002

most developing countries at that time, none of the major political actors supported autonomous legal institutions.[70] Moreover, the complex, legally plural system left behind by the Dutch hindered the legal unification desired by the new national elite.

Lev's work carries the influence of Marx and Weber, both in its consistent attention for the importance of class struggle and in its interest in the link between political and legal development. In the end, his analysis is that an autonomous legal system is primarily in the interest of an independent middle class and that Indonesia hardly had one. Moreover, the tiny middle class consisted mainly of ethnic Chinese, who were not in a position to openly champion their interests.[71] When Suharto started to rebuild the Indonesian economy after his bloody ascent to power in 1965-1966, many Indonesian jurists thought that they could seize the opportunity to rebuild the rule of law. However, it soon became evident that the new regime preferred a rule of law that was merely a façade for a system driven by political interests, patronage and nepotism. In the process, the judiciary became deeply corrupt. Some segments of the independent legal professional class – notably the bar association and legal aid NGOs – continued for the longest time to promote the idea of the rule of law.

It is not easy to link Dan Lev's work and legal-institutional studies more broadly to the three theoretical lines regarding autonomy of law discussed above. Legal institutions constitute the juridical field and Bourdieu's framework therefore seems relevant, but the conditions in Indonesia are fundamentally different from those Bourdieu is concerned with. The subtleties in the collaboration between "practitioners" and "theoreticians" are irrelevant when there are no theoreticians. In Indonesia, law can moreover hardly function as a "mask" for power relations or as a means of wielding symbolic power, because there is such a deep distrust of the legal system. When there are hardly legal communications, to conceive of law in Indonesia as a self-referential system makes no sense at all. Dan Lev and those who have followed in his footsteps look at legal institutions and cannot but conclude that any form of autonomy of law is absent.

Lev's work has been a source of inspiration for many – if not all – socio-legal scholars working on Indonesia and has made them aware of the fact that law is a major site of political conflict. The most prominent study in the Levsian tradition is Sebastiaan Pompe's brilliant analysis of the "institutional collapse" of Indonesia's Supreme Court.[72] Tracing the history of the Supreme Court from colonial times until the early 2000s, Pompe explains in detail what went wrong with this institution as a result of direct political pressure and neglect from the government and the legislature. The study shows how this led to the Court being stripped of its political authority and how the conditions for reproducing consistency in judicial decisions fell apart. Although Pompe discusses a number of cases, the study is not much concerned with legal reasoning as a process. It extends Lev's

70 See, for example, Heady 2001. For an analysis of the different political ideologies in Indonesia, see Bourchier & Hadiz 2003.

71 See in particular Lev 1990.

72 Pompe 2005.

approach towards a Bourdieuan analysis of legal autonomy by paying more attention to the functioning of the juridical field in producing law, but without locating it in a broader sociological context of class struggle or modernization.

Researchers following in Lev's footsteps after the advent of democracy in 1998 have tried to analyze the struggle of legal institutions to regain the position they held at independence, and the limited results of their efforts.[73] Corruption in the judiciary has become an important focus of attention.[74] Legal-institutional studies have demonstrated how judges and other law practitioners are subject to political interference and corruption, how this has undermined the primacy of legal sources in guiding the judge to a decision in the legal process, and how this has contributed to undermining the status of the courts. The perverse effects deriving from assessments of judges' performance based on political subservience and the role of bribes in getting promoted directly influence the outcomes of cases and the corresponding quality of legal reasoning by judges, lawyers and public prosecutors.[75]

Moreover, they demonstrate how the systematic underfunding of legal institutions and the erosion of the quality of first instance courts (later followed by a similar process in the courts of appeal) led to enormous backlogs at the Supreme Court. Unsatisfied with the results at lower levels of the court system, many litigants choose for appeal all the way up to the Supreme Court. This has led to a situation in which Supreme Court justices, with very little staff to support them, hardly have time to consider the merits of a case, but need to process them as rapidly as possible.[76]

Even though they uncover the conditions for the development of legal thinking in this manner, most of the legal–institutional studies pay little attention to legal thinking itself. They commonly assume that the law produced by these institutions is of poor quality, but seldom pay attention to what courts or other actors actually do in terms of producing law – and they certainly do not offer any systematic analysis of this.[77] One may of course argue that there is no need for such analysis given the problems with the legal institutions but, as I will argue below, attention for what jurists actually produce in terms of law leads to deeper insights into its problems.

I will refer to the third socio-legal approach to Indonesia as *"law in context."* It builds on insights from the legal institutional approach, and to a lesser extent on the legal anthropological one. The main difference is that it pays much more

73 A good example is Tahyar 2013.

74 Lindsey & Dick 2002.

75 Pompe 2005, Bedner 2001.

76 Pompe 2005, p. 425 ff. Presently judges have to deal with 8-10 cases a day (personal communication from Supreme Court judge Irfan Fachruddin, September 2016). According to the Supreme Court Report 2015 there are 40 Supreme Court judges who decided 14,452 cases in 2015 (page 16).

77 Western socio-legal scholarship obviously knows example of such studies too, the best known being those concerning the US Supreme Court by the so-called "attitudinalists" (see for an overview Geyh 2011, p. 1-16). Unlike their Indonesian counterparts these studies are mainly concerned with political convictions of judges, rather than with direct economic or political influences.

Recht der Werkelijkheid 2016 (37) 3
doi: 10.5553/RdW/138064242016037003002

attention to state law and to legal analysis.[78] This approach has been mostly applied with regard to particular legal fields, such as land law and Islamic law. Since 1998 it has gained prominence, as more legal materials have become available.

The demarcation between the legal institutional approach and "law in context" is porous. An example is my own study of the Indonesian administrative courts, which combined a legal analysis of court cases with a legal-institutional assessment of the courts' origins, how they developed, the external and internal factors that influenced their performance, and the effects they have had on Indonesian state institutions and politics more broadly.[79] The more law in context studies combine legal-institutional with legal analysis, the more they reveal about the nature of Indonesian legal thinking and the autonomy of Indonesian law.[80] This approach may also reveal important underlying patterns, for instance that, in a system where bribes from litigants play such an important role, there is actually an incentive for judges to keep the law vague, in order to increase the scope for discretion.[81]

Much of the body of "law in context" scholarship is primarily concerned with the analysis of legal texts, including court decisions. It is important to note that in Indonesia itself analysis of court decisions is rare and only recently have scholars and practitioners started to resume this practice. This has partly to do with the lack of availability of the legal materials required and partly with legal scholars being no longer used to conducting such doctrinal studies.[82] Moreover, many Indonesian scholars who have been trained in the United States or Australia mistakenly assume that studying court decisions is not a part of the civil law tradition and that it would be better to get rid of the Dutch legal heritage altogether by introducing a common law system in Indonesia.[83]

An important focus of "law in context" scholarship is the judgments of the Constitutional Court, which was created in 2003 through the constitutional amendments that were adopted after the fall of Suharto.[84] This popularity can be

78 I should add here that some legal-anthropological work looks at state legal procedure in detail as well. The best example is Von Benda-Beckmann 1984, but see also Bakker 2009, Slaats & Portier 1981, and Roth 2003.

79 A more recent example is Stijn van Huis's dissertation on divorce initiated by women, which, in addition to an analysis of legal reasoning in the Islamic courts, looks in detail at the considerations of women themselves on whether or not to use the courts, as well as to the local political constellations in which they function. At the same time, the research contains ethnographies of divorce practices in Cianjur (West Java) and Bulukumba (South Sulawesi), so it is also legal anthropological (Van Huis 2015). Other examples of books within the law and context category are Nicholson 2010, Arnscheidt 2009, Lindsey 2008, Safitri 2010, Simarmata 2012, Crouch 2013, Moeliono 2011, Reerink 2011, Setiawan 2013, Wiratraman 2014, Butt 2015, and Tjandra 2016.

80 By "legal thinking," I am referrng to the "internal attitude" of jurists: how they construct legal categories, what methods of interpretation they use, and how they build up their legal arguments.

81 Bedner 2001.

82 Bedner 2013.

83 They obviously never articulate how that should be done.

84 Examples are Butt, Crouch and Dixon , and Butt and Lindsey 2012.

explained from the political and social importance of the Court's judgments, but there are also more practical reasons. For one thing, the Constitutional Court was the first judicial body in Indonesia in years that actually published its judgments. This means that legal scholars can access them without having to go to a court archive.[85] Another reason is that, unlike the civil and criminal courts, the Constitutional Court provides a relatively elaborate justification for its rulings, which makes it easier for legal scholars to comment on them.[86] The Constitutional Court thus presents at least some of the conditions required for establishing an autonomous legal discourse.

The studies on the Constitutional Court reveal that, from a doctrinal viewpoint, its reasoning is not flawless and at times it transgresses its jurisdiction.[87] A good example is a case where the plaintiff sought a review of Articles 4 and 5 in the 1974 Marriage Act. These impose strict limitations on polygamy, which, according to the plaintiff, would constitute a violation of the freedom of religion. Instead of looking how far the constitutional guarantee of freedom of religion extends and what this meant for the case under review, the Court started to analyze the Islamic rules regarding polygamy – which is outside its mandate (and expertize).[88]

Furthermore, it is not always easy to follow the Court in its selection of legal sources. In one of its first cases, the Court had to consider the lawfulness of the retroactive application of the new Anti-Terrorism Act (15/2003). In its opinion, the majority of the court relied on a scholarly article by Robin Trueworthy, which discusses retroactivity in the specific case of the United States. The judges did not explain why this article would be applicable to Indonesia, nor did they look beyond this specific article to inform themselves about a possible *communis opinio* regarding this matter. They just accepted the author's arguments at face value.[89]

The same case has also been criticized for the Constitutional Court's refusal to accept the consequences of its own judgment. After the Court found that the retroactive application of the Anti-Terrorism Act was unconstitutional, its chairman was quick to explain that the judgment did not apply to any convictions that had already been made on this basis. Such an interpretation was in clear contradiction of the very legal principle underlying the Court's power: i.e. that a review should lead to a reconsideration of all legal measures – including convictions – taken on the basis of the provision declared unconstitutional.[90]

85 See generally Churchill 1992. It is still common that lawyers are asked to pay an unofficial fee (up to several hundreds of euros) to get a copy of the judgment in the case of their client (personal communication of Anton Cahyadi, 15 April 2016). For an account of how difficult it is to actually find judgments that are even often mentioned in public debate, see Wiratraman 2014. For the legal analysis in Bedner 2001 I had to actually go to the first instance courts to get access to judgments, including those of the Supreme Court which were kept in these archives.

86 The other exception if the Islamic courts, as I discussed above.

87 See Butt, Crouch & Dixon 2016.

88 Cammack, Bedner & Van Huis 2015, p. 16-17.

89 Trueworthy 1997. Mark Cammack made this point was made in a lecture at Leiden University, 7 September 2015.

90 Butt & Hansell 2004, p. 104.

Recht der Werkelijkheid 2016 (37) 3
doi: 10.5553/RdW/138064242016037003002

The reason to discuss the example of the Constitutional Court here in some detail is to show how basic understandings about law, legal procedure and legal reasoning cannot be taken for granted even in Indonesia's most prestigious court. In terms of the three approaches to autonomy of law we can draw several conclusions. Law in Indonesia is hardly the result of a formal-rational process of legal reasoning and cannot legitimate itself in this manner. It lacks the protective function enshrined in the rule of law, which requires a basic adherence to neutrality. The juridical field operates in a very different way in Indonesia than in France, which served as the example for Bourdieu's outline. In Indonesia it is patchy, with problematic links between the different actors that constitute it, and hardly any links between theoreticians and practitioners to provide it with stability. Many of the rituals sustaining the field's autonomy have become empty forms, as litigants and the general public alike assume that the law will be twisted.[91] Given the amount of conflict in Indonesian society, the extremely low litigation rates indicate that the courts are not an important avenue for dispute resolution thus reducing law's importance as a symbolic form of power. Finally, in terms of systems theory, law in Indonesia is *not* a self-referential system. It obviously cannot be, because legal communications are so few and so limited: references to legal acts have been reduced to references to statutory law.[92] This is where the three approaches to autonomy of law come together: they all take as their point of departure a functioning system of legal production, with a basic degree of coherence. Without such a system, law cannot be autonomous in any of them.

Within the law in context literature one study sheds more light on the issue of legal communication and its structural underpinnings in Indonesia. The author, Ab Massier, does not take Bourdieu's legal field as his point of departure, but his concerns are similar, and in his analysis of legal communication he explores the preconditions for self-referentiality of the legal system. Massier uses the analytical tool of language theory[93] to analyze the "obsession" of Indonesian jurists with language. Since the 1970s in particular, Indonesian jurists have blamed many of the problems of the functioning of Indonesian law on the inadequacy of the Indonesian language as an "instrument" of the jurist. Issues brought to the fore include problems with grammar, equivocal concepts, and the gap between legal and common language.[94]

Massier argues that this framing of the problems of law is misguided because law and language cannot be separated. Law is a form of language;[95] it makes no sense to conceive of law as a kind of mental image which the jurist subsequently translates into language and "sends" to a receiver. Jurists can communicate with one

91 This explains the obsession of judges with the "contempt of court" procedure in common law systems (Pompe 2005), as well as the remarkable detail with which ritual aspects of court procedure have been prescribed (Bedner 2001).

92 In his PhD-thesis on spatial planning, Tristam Moeliono even demonstrated how the spatial planning rules are eventually determined by the lowest echelon of the administrative apparatus (Moeliono 2013). See also Bedner 2013.

93 Most notably the work of Michael Bakhtin, but also A.L. Becker and James Boyd White.

94 Massier 2008, p. 183.

95 Which is reminiscent of the autopoietic theory taking communications as its point of departure.

another because the "speech acts" (or acts of writing) they perform relate to texts familiar to the legal community. According to Massier, until the 1960s "the leading elite of Indonesian jurists still had access to a common frame of reference of basic juridical language, texts and terminology, which enabled them to remain an 'imagined community'." Due to the processes described in the legal-institutional literature discussed above, this community disappeared during the 1970s and 1980s. In other words, the juridical field unraveled.

One of the specific problems noticed by Massier has been the transition from Dutch to Indonesian as the official legal language. Unlike most former British and French colonies, the new Republic of Indonesia, Indonesian replaced Dutch as the official language of the state, but the shift was incomplete in as far as virtually all major legal codes and laws were left in place and were never officially translated. This colonial body of law could moreover originally be interpreted with the use of contemporary Dutch legal sources because the so-called principle of concordance (*concordantiebeginsel*) demanded that the law in the Netherlands East Indies follow Dutch law. While the first generation of Indonesian jurists after independence still had access to the original sources, the next generation relied on a mishmash of different translations that were not suitable for creating the "linguistic community" required. Furthermore, they did not have access to the published body of Netherlands East Indies precedents nor to the Dutch precedents that at least unofficially continued to be valid sources of law, even after the principle of concordance had been abolished.

As a result, the body of legal sources available to the community of jurists was reduced enormously. The going back and forth between scholars and practitioners in a process of "systematizing-adjudication-systematizing" no longer functioned. It was a gradual process that took many years. Some 20 years ago there were still many jurists from the older generation who could speak and read Dutch and thus continued to speak and think within the framework of the "old" tradition. But they were unable to pass on this tradition to the next generation because the texts and ideas in Dutch were never translated into a new common language.[96] Disputes about "correct" translations and the absence of an extended framework of reference for those who could not speak Dutch gradually undermined the "unity of consciousness" and affected the cohesion of the legal system.[97]

To characterize the situation, Massier introduces the notion of law as a "language game." He uses it to describe the influence of the external factors interfering with the legal system as described in the legal-institutional literature. The rules governing law as a game are strict; if they are broken the game loses its relevance and

96 One can compare this situation to the one in continental Europe after the introduction of the major codifications in the 19th and, in some countries, early 20th centuries. The difference is that throughout this period jurists continued to be able to read the Latin texts that constituted the main source for these codifications and enabled these jurists to interpret the Codes in the light of such texts. It was only after World War II, so in most countries concerned more than a century after the replacement of Latin as the major legal language, that Roman law lost its primacy and that most law students have no access any more to its texts. In Indonesia, this process unfolded in a decade.

97 Massier 2008, p. 236.

Recht der Werkelijkheid 2016 (37) 3
doi: 10.5553/RdW/138064242016037003002

cannot be played anymore.[98] Law is reduced to an empty form. Now that "cheating" has become the rule rather than the exception in Indonesian legal procedures, the law loses its position as a "ritual" of justice. This loss of legitimacy directly affects the autonomy of law.

Through this language theory lens, Massier adds significant insights to legal anthropological, legal-institutional and other law-in-context approaches. Although he does not refer to it, his work is reminiscent of Bourdieu's observations on the juridical field. The study also relates to the ideas about self-referentiality of autopoietic systems theory. Its findings are clear: law in Indonesia lacks the autonomy to perform the legitimating and stabilizing functions ascribed to it in the Western lines of theory discussed.

Conclusion

Sociologists and socio-legal scholars have developed different lines of theory to understand autonomy of law and its function in the Western world. These lines of theory have been juxtaposed and contested, but all of them have contributed in their own way to a broader understanding of the autonomy of law. I view them as complementary rather than as exclusionary: they focus on different aspects of the same concept. When combined, their deployment leads to broader insight: they alert the researcher to many aspects connected to the autonomy of law that he or she might otherwise overlook. I should acknowledge that Bourdieu's theory of the juridical field, which I have placed in the Weberian tradition as it is particularly concerned with professionalizing and rationalizing, goes a considerable way towards integrating this line of thought with the Marxian tradition of viewing law as a means of legitimation and of exercising symbolic power, as well as with autopoietic theory's approach of considering law as a system of communications.

Are these approaches useful for studying the autonomy of law in a developing country such as Indonesia? The socio-legal literature on Indonesian law, which I discussed in the second part of this article, indicates that generally the answer is yes. The scholarship in Western countries has directly and indirectly influenced the studies of these scholars. Conversely, I would argue, their findings are relevant for Western scholars as well.

Having said this, I must add a few points. The first is that there are differences in this relevance from one field of socio-legal scholarship on Indonesia to the other. Legal anthropologists have been far less concerned with the question of autonomy of the law and thus to them theories concerning this autonomy have not been that important – at least where it concerns *national* law. They rather see that national law is *not* autonomous – and certainly that it does not operate autonomously – and from that point they start their inquiries into how different forms of law or norm systems interact at the local level. Similarly, many more juridically oriented law-in-context scholars are concerned primarily with legal consistency, but limit themselves to describing the *in*consistencies they find,

98 See also Huizinga 1950, p. 38.

without probing for the deeper explanations. Those focusing on legal institutions have generally paid less attention to how law is being produced, the role of communication within the legal discipline, and so forth.

The second point is that the theories developed in a Western context are not all equally relevant. The Marxian insight that law serves the interests of the elite is sound enough, but the mechanism of law as an instrument of legitimation is not so helpful if the law is perceived as skewed and legal institutions as corrupt. As Bourdieu noted, legitimation through autonomous law presupposes a degree of correspondence between the law and reality. How law students are indoctrinated, a favorite topic of critical legal studies scholars, is not so relevant if the categories in the law are incoherent and on the face of it lack neutrality. This applies even more to describing law and the legal system in terms of autopoietic systems theory. If hardly any of the conditions for legal communication are in place, what is the relevance of trying to capture a legal system in such terms?

The third point is that there are differences between legal sub-disciplines in the degree of relevance of theories about autonomy of law. The development of Islamic law and how the state Islamic courts apply it are a good example of such a sub-discipline, where the different requirements for autonomy of law are better guaranteed than in others. Such differences enable "internal comparison" between sub-disciplines and help to develop an idea of the complexity and the coherence of the juridical field and how it is constituted.

Finally, I would like to make the point that, even if not directly applicable, all of the theories discussed have their use in "sensitizing" the socio-legal scholar to aspects of law and the legal system that are not perceived as problematic. In other words, they can be used effectively in a "negative" way to better understand why law and the legal system cannot live up to their inherent ideals – ideals that, despite all of the problems, all of the actors in the legal field at least pay lip service to. The reason is that law, as an attribute of the national state with a particular claim to providing justice, is not something of the Western world, but is found across the globe. The evolution of Western law has been quite specific, and the reception or imposition of Western laws and ideas in the colonial and post-colonial world may have been partial and contentious, with the result that is that the juridical field, the different groups it consists of and its role in maintaining the autonomy of law differs considerably from one country to the other. Nonetheless, the ideal of the autonomy of law – an important dimension of the rule of law – has been imported together with the forms and structure of modern law itself. Indonesian jurists cherish the ideal of the autonomy of law as much as their western counterparts, even if many of them do not live up to the limitations this imposes on their behavior. This, I would argue, applies to almost all of the developing world.

It is the reason that, although socio-legal scholars studying developing countries need supplementary concepts and theories, they can use the Western ones as their point of departure in understanding the functioning of law in a setting that is so different from the one in which these theories were developed. Nonet and Selznick's recognition of the difficulty of using teleological interpretation in a system of autonomous law helps us to better understand why some Indonesian legal

Recht der Werkelijkheid 2016 (37) 3
doi: 10.5553/RdW/138064242016037003002

scholars have advocated so fiercely for a formal-rational ideal of Kelsenian "pure law." Bourdieu's ideas about the "juridical field" indicate to us that the effects of endless litigation not only affect the parties and legal certainty in a direct manner, but that, according to this, they also undermine the cohesion of the "juridical *habitus"* and therefore ultimately the autonomy of law and so forth.

Finally, using these theories in the context of developing countries also leads to new research puzzles. How has it been possible, for instance, that a juridical field like we find in Indonesia, with such limited cohesion and professional capacity, has managed to retain a monopoly on entrance into the legal professions? And is social change through law possible if the distance between law and social structures is so vast?

Many more such questions can be added and contribute to a research agenda for legal systems in developing countries. The answers to these questions will not only be relevant for the developing world but also for sharpening the existing theories about how legal systems function everywhere.

References

Arnscheidt, J., *Debating nature conservation: policy, law and practice in Indonesia: A discourse analysis of history and present*, Leiden: Leiden University Press 2009.

Balbus, I., 'Commodity form and legal form: An essay on the "relative autonomy" of the law', *Law and Society Review*, 1977, p. 571-588.

Bedner, A., *Administrative courts in Indonesia: A socio-legal study*,*The Hague:* Kluwer Law International, 2001.

Bedner, A., 'Indonesian legal scholarship and jurisprudence as an obstacle for transplanting legal institutions', *Hague Journal on the Rule of Law*, 2013-5(2), p. 253-273.

Bedner, A., & S. Van Huis, 'The return of the native in Indonesian law: Indigenous communities in Indonesian legislation.' *Bijdragen tot de taal-, land-en volkenkunde/Journal of the Humanities and Social Sciences of Southeast Asia*, 2008- 164(2-3), p. 165-193.

Benda-Beckmann, K. Von, *The broken stairways to consensus: Village justice and state courts in Minangkabau*, Foris Publications 1984.

Benda-Beckmann, F. Von, & Benda-Beckmann, K. Von, 'Myths and stereotypes about *adat* law: A reassessment of Van Vollenhoven in the light of current struggles over *adat* law in Indonesia', *Bijdragen tot de taal-, land-en volkenkunde/Journal of the Humanities and Social Sciences of Southeast Asia*, 2011-167(2), p. 167-195.

Benda-Beckmann, F. Von, & Benda-Beckmann, K. Von, *Political and legal transformations of an Indonesian polity: The Nagari from colonisation to decentralization*, Cambridge: Cambridge University Press 2013.

Bouckaert, B., *De exegetische school: een kritische studie van de rechtsbronnen-en interpretatieleer bij de 19de eeuwse commentatoren van de Code Civil*, Mechelen: Kluwer 1981.

Bourdieu, P., 'La force du droit [Eléments pour une sociologie du champ juridique]', *Actes de la recherche en sciences sociales*, 1986-64(1), p. 3-19.

Bowen, J., *Islam, law, and equality in Indonesia: An anthropology of public reasoning*. Cambridge: Cambridge University Press, 2003.

Bourchier, D., & V. Hadiz (eds), *Indonesian politics and society: A reader*, London and New York: Routledge 2003, p. 1-23.

Butt, S., *The Constitutional Court and Democracy in Indonesia*, Leiden: Brill, 2015.

Butt, S., Crouch, M., & R. Dixon, 'Special Issue: The first decade of Indonesia's Constitutional Court', *Australian Journal of Asian Law*, 2016-16(2).
Butt, S., & D. Hansell, 'The Masykur Abdul Kadir Case: Indonesian Constitutional Court Decision No 013/PUU-I/2003', *Australian Journal of Asian Law*, 2004-6(2).
Butt, S., & T. Lindsey, 'Economic reform when the constitution matters: Indonesia's Constitutional Court and Article 33', *Bulletin of Indonesian Economic Studies*, 2008-44(2), p. 239-261.
Cammack, M., 'Inching toward equality: Recent developments in Indonesian inheritance law', *Indonesian Law and Administration Review*, 1999-5(1), p. 19-50.
Cammack, M., Donovan H., & T. Heaton, 'Islamic divorce law and practice in Indonesia', in: R. Feener & M. Cammack (eds*), Islamic law in contemporary Indonesia: Ideas and institutions*. Cambridge Massachussetts: Harvard Law School, 2007.
Cammack, M., Bedner, A., & S. Van Huis, 'Democracy, human rights, and Islamic family law in post-Soeharto Indonesia', *New Middle Eastern Studies*, 2007-5, <brismes.ac.uk/nmes/archives/1413>
Churchill, G., 'The development of legal information systems in Indonesia', Leiden: Van-Vollenhoven Institute Working Paper 1992.
Colombijn, F., 'Dynamics and dynamite: Minangkabau urban landownership in the 1990s', *Bijdragen tot de taal-, land-en*http://www.volkenkunde, 1992-3(4), p. 428-464.
Cotterrell, R., *Law's community: legal theory in sociological perspective*, Oxford: Oxford University Press 1994.
Crouch, M., *Law and religion in Indonesia: Conflict and the courts in West Java*, London: Routledge 2013.
Eisenhardt, U, *Deutsche Rechtsgeschichte*. CH Beck, 1984.
Hay, D., 'Property, authority and the criminal law', in: G. Ray, D. Hay, P. Linebaugh, J. Rule, C. Winslow & E. Thompson, *Albion's fatal tree: crime and society in eighteenth century England*, New York: Pantheon 1975.
Moore, S., 'Law and social change: the semi-autonomous social field as an appropriate subject of study', *Law & Society Review*, 1973-7(4), p. 719-746.
Moore, S., (ed.), *Law and anthropology: a reader*, Malden: Blackwell Publishing 2004.
Feener, M., *Muslim legal thought in modern Indonesia*. Cambridge: Cambridge University Press 2007.
Fuller, L., 'Pashukanis and Vyshinsky: A study in the development of Marxian legal theory', *Michigan law review*, 1949-47(8), p. 1157-1166.
Galanter, M., 'Why the "haves" come out ahead: Speculations on the limits of legal change, *Law & society review*, 1974-9(1), p. 95-160.
Geyh, C., *What's law got to do with it?: What judges do, why they do it, and what's at stake*, Palo Alto: Stanford University Press 2011.
Heady, F., *Public administration: A comp arative perspective*, New York: CRC Press 2001.
Huis, S. van, *Islamic courts and women's divorce rights in Indonesia: The cases of Cianjur and Bulukumba*, Leiden: Leiden University Press 2015.
Kennedy, D., *Legal education and the reproduction of hierarchy: A polemic against the system*, New York: NYU Press 2007/1982.
Langbein, J., 'Albion's fatal flaws', *Past & Present*, 1983-98(1), p. 96-120.
Lasser, M. *Judicial deliberations: A comparative analysis of transparency and legitimacy*, Oxford: Oxford University Press 2004.
Lefebvre, H., *Le langage et la société*, Paris: Gallimard 1967.
Lempert, R., 'The autonomy of law: Two visions compared', in: Teubner, G., (ed.), *Autopoietic law - A new approach to law and society*, Berlin: Walter de Gruyter 1987, p. 152-190.

Lev, D., 'Intermediate classes and change in Indonesia: Some initial reflections', in: R. Tanter & K. Young (eds), *The Politics of Middle Class Indonesia*, Clayton: Monash 1990, p. 25-43.
Lindsey, T., & H. Dick, (eds) *Corruption in Asia: Rethinking the governance paradigm*. Leichhardt: Federation Press, 2002.
Lindsey, T., (ed.) *Indonesia, law and society*, Leichhardt: Federation Press 2008.
Luhmann, N., 'The unity of the legal system', in: Teubner, G., (ed.) *Autopoietic law: A new approach to law and society*. Berlin: Walter de Gruyter 1987, p. 12-35.
Massier, A., *The voice of the law in transition: Indonesian jurists and their languages, 1915-2000*. Leiden: KITLV Press 2008.
Migdal, J., *Strong societies and weak states: State-society relations and state capabilities in the Third World*, Princeton: Princeton University Press 1988.
Moeliono, T., *Spatial management in Indonesia from planning to implementation. Cases from West Java and Bandung: a socio-legal study*. Doctoral dissertation, Leiden University 2011.
Munger, F., & C. Seron, Critical legal studies versus critical legal theory: A comment on method. *Law & Policy*, 1984-6(3), p. 257-297.
Nelken, D., 'Changing paradigms in the sociology of law, in: Teubner, G., (ed.) *Autopoietic law: A new approach to law and society*, Berlin: Walter de Gruyter 1987, p. 191-216.
Nicholson, D., *Environmental dispute resolution in Indonesia*, Leiden: Brill 2010.
Nonet, P., & P. Selznick, *Law and society in transition: Toward responsive law*, New Brunswick: Transaction Publishers 1978.
Nurlaelawati, E., *Modernization, tradition and identity: The Kompilasi Hukum Islam and legal practice in the Indonesian religious courts*, Amsterdam: Amsterdam University Press 2010.
Pompe, S., *The Indonesian Supreme Court: A study of institutional collapse*, Ithaca: Cornell University Press 2005.
Reerink, G., *Tenure security for Indonesia's urban poor: A socio-legal study on land, decentralisation, and the rule of law in Bandung*, Leiden: Leiden University Press 2011.
Roth, D., *Ambition, regulation, and reality: Complex use of land and water resources in Luwu, South Sulawesi, Indonesi*, Dissertation, Wageningen University 2003.
Safitri, M., *Forest tenure in Indonesia: The socio-legal challenges of securing communities' rights*, Doctoral dissertation, Leiden University 2010.
Setiawan, K., *Promoting human rights: National Human Rights Commissions in Indonesia and Malaysia*, Leiden: Leiden University Press 2013.
Simarmata, R., *Indonesian law and reality in the Delta: A socio-legal inquiry into laws, local bureaucrats and natural resources management in the Mahakam Delta, East Kalimantan*, Leiden: Leiden University Press 2012.
Slaats, H, & K. Portier, *Grondenrecht en zijn verwerkelijking in de Karo Batakse dorpssamenleving*, Nijmegen: Katholieke Universiteit 1981.
Supreme Court of Indonesia, Report 2015, Jakarta: Supreme Court 2016.
Tahyar, B., *Patrimonialism, power and the politics of judicial reform in post-Soeharto Indonesia: An institutional analysis*, Doctoral dissertation, University of London 2012.
Teubner, G., 'Introduction to autopoietic law', in: Teubner, G., (ed.) *Autopoietic law: A new approach to law and society*, Berlin: Walter de Gruyter 1987, p. 1-11.
Thompson, E., *Whigs and hunters: The origins of the Black Act*, New York: Pantheon 1975.
Tjandra, S., *Labour law and development in Indonesia*, Leiden: Leiden University Press 2016.
Tushnet, M., 'Critical legal studies: A political history', *Yale Law Journal*, 1991, 100, p. 1515-1544.

Vel, J., *Uma politics; An ethnography of democratization in West Sumba, Indonesia, 1986-2006*, Leiden: KITLV Press 2008.

Wagner, W., 'Codification of law in Europe and the codification movement in the middle of the nineteenth century in the United States', *St. Louis University Law Journal*, 2, 1952, p. 335-359.

Wiratraman, H., *Press freedom, law and politics in Indonesia: a socio-legal study*, Leiden: Leiden University Press 2014.

Recht der Werkelijkheid 2016 (37) 3
doi: 10.5553/RdW/138064242016037003002