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

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Introduction

Commercial lawyers

The past 30 years have seen a steady increase in publications about lawyers and the role they play in legal systems. Where the traditional jurisprudential view has considered them mainly as facilitators of court procedures, the more recent socio-legal literature has shown how lawyers are involved in a variety of ways in shaping the legal system and how they exercise considerable influence on legal process in- and outside of courts. Not only are they gatekeepers – controlling access to courts and other legal institutions – but as an organised profession with a considerable degree of autonomy they also are political actors.

Sociological interest in what is often called 'the legal profession' goes back quite a long time, to the early days of legal sociology when the first 'socio-legal' publication about lawyers in the US appeared (Cohen 1916). This study addressed the question whether legal practice is a profession or a business and it already acknowledged the political significance of lawyers. Over the years researchers have added many other perspectives on lawyers and their practices, addressing the role lawyers play in reproducing inequalities between parties to a dispute (Galanter 1974, 2006), changes to their professional ideals (e.g. Kronman 1993; Nelson and Trubek 1992), and the prestige they gain by representing powerful organisations (Heinz, Nelson, Sandefur & Laumann 2005).

For many years studies about lawyers mainly focused on the US and most of the seminal articles in the field are from well-known American law and society scholars. By contrast, the more recent literature has expanded its geographical scope to include lawyers from all regions across the globe and also pays attention to those working transnationally. This is reflected in two key publications on the legal profession, which appeared in 1988 and in 2020 (forthcoming) and endeavour to provide a comprehensive overview of private lawyering around the world. While the volumes published in 1988 included 22 jurisdictions, those that will appear in 2020 have expanded to include 46 ones.

The present surge in literature about lawyers in many different jurisdictions indicates that they are important actors across the civil and common law divide. While their role in common law jurisdictions traditionally has been more pronounced, scholars have now recognised their significance in civil law jurisdictions (cf. Abel 1988:40-42). Lawyers play an important role in transforming disputes in any type of jurisdiction. They control whether

problems will be converted into social, legal, or political disputes, which makes them critical actors as transformation agents (Menkel-Meadow 1985; Felstiner, Abel & Sarat 1980). They translate the language of law to help their clients understand the rules and they transform the objectives of their clients into legal actions; they predict the outcome of cases and thus shape the probability that a client will start legal proceedings; they resolve disputes through negotiation without accessing the courts; and they educate their clients on the legal system more generally (Barclay 2004:10; Mnookin and Kornhauser 1979). As repeat-players who have intimate knowledge of a particular legal field and its interpretations, some lawyers litigate not only for a specific case or client, but also for changing the rules to influence outcomes of future cases. This means that they also represent an independent force within litigation (Galanter 1974). In these ways lawyers to a large extent determine how the legal system works.

An important characteristic of lawyers is that they can test the limits of the legal system. They are in a position to gauge how far they can go in using the law for their purposes without breaking the rules or ethical codes. This is an important professional task they perform, which contributes to promoting the integrity of the legal system: by indicating the system's loopholes and weaknesses lawyers' practices point the way to reparation and improvement (LoPucki & Weyrauch 2010:84-6).

However lawyering is not only a professional activity geared towards making the legal system work, but also a 'business of managing uncertainties' for clients (Flood 1991). It is important to recognise the tension between these two objectives. In order to 'produce' the certainties their clients desire lawyers may be tempted to cross ethical boundaries or even transgress legal rules.[1] It can even make them engage in corruption, for instance by bribing judges to control the outcome of cases (Tamarkin 1984; Hualing 2007). Lawyers are professionally in an optimal position to act as brokers, which may also include brokering in judicial corruption. Because they can efficiently cultivate and maintain connections with judges from their repeated encounters with them, lawyers can reduce the transaction costs connected with bribery (Li 2017). Moreover, as middlemen between judges and litigants, they can offer their services of legal representation and corruption brokerage in a single package.

No studies that I know of have looked at this tension between the lawyers' professional role and 'law as a business' in a legal system where legal uncertainty and corruption are deeply engrained and what this means for the role lawyers' play as 'brokers'. The present study is a contribution to fill this gap. It looks at lawyers in Indonesia, a country where the legal system indeed offers few certainties and which is known for its corruption (Baker 2013; Butt 2008; Lindsey 2006; Pompe 2005; Bedner 2001). In

1 A good example is the Enron scandal, where lawyers were key players in concealing the corporation's losses and debts by structuring transactions and creating financial contracts (Rhode and Paton 2002).

exploring this tension I will consider how commercial lawyers test legal rules under conditions of legal uncertainty and corruption, what strategies they use in doing this, and how does this impacts on the legal system?

It is the particular context of uncertainty and corruption which sets my study apart from those that have addressed similar questions.[2] Obviously, the legal system in which lawyers operate is of major influence on their practice. As already mentioned, lawyers try to provide as much certainty as they can and apply various strategies to this end (Francis 2004). However in a country like Indonesia they are constrained by a legal system that is inefficient, uncertain and rife with corruption.[3] These conditions make it difficult for lawyers to provide certainty for their clients.[4] They are dependent on judges whose decisions are hard to predict and they are under pressure from clients to dodge their professional responsibilities.[5] Once lawyers have yielded to engage in corruption to influence legal procedure it is in their interest to keep the substantive legal rules vague. In this way they are in a position to provide certainty on other than legal grounds to a party seeking their services. These dynamics foster a self-perpetuating system of legal uncertainty (cf. Bedner 2016). A major objective of this study is to test what this situation means for the practice of lawyers in Indonesia and the other way round.

There are only few studies about commercial lawyering in Indonesia and none of them have looked specifically at lawyers as brokers within the legal system. Dan Lev (1976; 1972) was the first to write about the subject, exploring the colonial origins of the legal profession and how these affected post-colonial practice, while Dezalay and Garth (2010) have examined how lawyers in Asia served colonial states and at the same time facilitated resistance against them. Their case study on Indonesia discusses the rise of "elite lawyers" who benefited from Soeharto's crony capitalism, but does not address the actual practices on the ground nor their effects on the legal system.

These practices and their effects are central to this study. In examining Indonesian lawyers, their strategies, and how they test – and transgress –

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2 While there are many studies about lawyers, only few scholars have addressed the issue of how and under what conditions do lawyers not only test but also transgress legal rules, what strategies they use in doing this and how does this impact on the legal system. Some examples are: a study by Macaulay (1966) about automobile manufacturers and their dealers, by Rubin and Bailey (1994) about how product liability disputes benefit tort lawyers, and by Galanter (2006) about how artificial persons or organizations get their ways by using law and courts.

3 Although the World Justice Project reported improvements in 2014 in their Rule of Law Index Report, the Report also ranked Indonesia amongst countries with the most serious law enforcement and judicial corruption problems.

4 In some respect it resembles the conditions lawyers in China have to face (e.g., McMorrow 2010), or even lawyers in Nazi Germany (e.g., Jarausch 1990), or lawyers operating in the setting of organized crime in Naples' suburbia (Holden & Tortora 2007).

5 Article 4(c) Indonesian Lawyers' Code of Ethics prohibits lawyers to guarantee outcome of cases to their clients.

ethical boundaries and the rules of the legal system, I focus on commercial lawyers involved in cases concerning land development and property business. I use 'lawyers' as a generalized term for the various informal and professional titles in Indonesia indicating private practitioners.[6] The lawyers in this study represent corporations that operate in the world of trade and business. Their principal objective is to make money. They are the group of legal practitioners in Indonesia that have been least studied.[7]

Land development and property business

I have chosen land development and property business as the specific field of law to examine commercial lawyers' practice, because Indonesian land law is particularly known for problems with legal certainty (e.g. Bedner 2016; Fitzpatrick 1997). The point of departure for land tenure in Indonesia is that the state is sovereign over all land within its territory (Bedner 2001:184). People can obtain different formal land rights from the state, for different purposes; upon registration they receive a land certificate that means formal recognition of their right. However, until the present much land has remained unregistered and the process of registration has led to innumerable disputes.[8]

An extensive number of studies have dealt with these problems of registering land and the original issuance of title[9], but few have paid to what happens after the land has been registered. Perhaps surprisingly, private

6 The common term for lawyers in Indonesian is *pengacara*, which is derived from *acara*. *Acara* means program, event, agenda, and procedure. The prefix *peng-* is added to describe the actor of the verb. Therefore, in Indonesian, a lawyer is someone who performs a procedure. Other words used for lawyers in Indonesia are *advokat* and *penasehat hukum*. *Advokat* is from the Dutch word *advocaat*, and *penasehat hukum* means legal consultant. In the early period of the New Order (between the 1960s and 1980s), lawyers registered with the Ministry of Justice could call themselves *advokat*, and those who did not could only call themselves *pengacara*. However, the term mattered mostly for prestige, since lawyers were allowed to practice regardless of registration (Lev 1992: 27).

7 In contrast to public interest lawyers (e.g. Lindsey & Crouch 2013; Crouch 2011; Lev 2011).

8 See for instance https://www.thejakartapost.com/news/2019/02/14/agrarian-ministry-hikes-land-registration-target.html. Last accessed, 4 December 2019.

9 For instance, see Parlindungan, AP. (1990), *Pendaftaran Tanah di Indonesia*, 2nd ed. Bandung: Mandar Maju., Hardjono, A social assessment of the Land Certification program, Indonesian Land Administration Project, World Bank Jakarta 1999; Hermit, 2004, *Cara memperoleh sertifikat tanah hak milik, tanah negara dan tanah pemda* (Bandung: Mandar maju); Larson, Land Registration & Cadastral systems tools for Land information and management (New York: Longman Scientific & Technical, 1995), Effendie, *Pendaftaran Tanah di Indonesia dan Peraturan Pelaksanaannya*, Second edition (Bandung: Alumni, 1993); Smeru (2002), An Impact evaluation of systemic land titling under the land administration project (LAP), Jakarta, Smeru Research Institute; Soerodjo, I. (2003) *Kepastian Hukum Pendaftaran Hak atas tanah di Indonesia,* Arkola, Surabaya. For an overview of the incompatibilities of 'modern' Basic Agrarian Law with adequate land certification, see Fitzpatrick (1997).

disputes about registered land are as abundant as those about unregistered land. These disputes about registered land mainly concern land transfer and the registration of encumbrances. In the transactions concerned land titles are objects of a private business deal, but at the same time they are subject to public regulations regarding the limits and uses of titles. [10] In practice this means continued involvement of state agencies in disputes concerning land transactions, in particular of the National Land Agency (*Badan Pertanahan Nasional*)[11]. As a result land-related disputes are prominent not only in the dockets of Indonesian courts, but also in those of guardian institutions such as the Ombudsman[12] and the National Human Rights Commission (*Komnas HAM*)[13].

These disputes occur in a situation of booming real-estate business. In major cities, developers keep building higher towers and more residences, and urbanization is rapidly spreading. Many apply for mortgages from banks to buy housing units[14], and those with extra income are investing in land and buildings, collecting rent – envisioning great financial returns in the future. This puts a lot of pressure on the market and increases the stakes of those who get embroiled in land disputes. This combination of market pressure with legal loopholes and uncertainties provides fertile ground for lawyers to develop strategies in the twilight zone between legality and illegality.

One of the main characteristics of property business is the need to use the legal system as a way of securing investments. It means that this business requires formal procedures, specifically in situations involving releasing rights or fulfilling obligations: in sales, purchases, rents, and uses of the property. For actors such as developers and prospective buyers, legal certainty about land or buildings is a prime element to pay attention to before they make an investment. Moreover, besides the gains that property

10 Government Regulation No. 24/1997 defines objects of land registration as: *Hak Milik* (ownership), *Hak Guna Usaha* (HGU or title to cultivate state land), *Hak Guna Bangunan* (HGB or title to building), *Hak Pakai* (title to use), *Hak Pengelolaan* (right to manage), *tanah wakaf* (land that has been given for religious purposes), *Hak milik atas Satuan Rumah Susun* (Condominium/apartment ownership), and *Hak Tanggungan dan tanah negara* (state land).

11 National Land Agency (Badan Pertanahan Nasional or NLA) is a government body that has the authority to manage and govern land in Indonesia. With Presidential Decree No. 17/2015, they are referred to as the Ministry of Agraria and Spatial Planning/National Land Agency. Before this, they were not a ministerial body and answered directly to the President.

12 Land is the subject of the most reported problems to Ombudsman (Ombudsman Annual Report 2018, p. 14).

13 The majority of cases at Komnas HAM are complaints toward corporations that hold rights over wide areas of land. See https://www.komnasham.go.id/files/20181126-kertas-posisi-penyelesaian-konflik-$AINDB.pdf. Last accessed, 2 December 2019.

14 KPR Kredit Pemilikan Rumah is similar to mortgages in the United States.

development can bring, the property business is also attractive for speculative trading.[15] Speculative traders treat investments like a game, and they are willing to take risks, especially when the gains promised by developers are high. In summary, land disputes in Indonesia occur in a highly volatile socio-economic field.

Land Litigation

Land litigation in Indonesia concerns disputes where the ultimate object is a formal right over a parcel of land. Parties usually bring cases to the court to determine the status of the land concerned (i.e., who is the legitimate holder of title) or about the basis of the title. The purpose of the claimant is to gain formal recognition by the state and documentation supporting it.

In Indonesia, the system of land registration does not offer full protection to the person who registered a plot. Anyone who thinks that he or she has a stronger claim may start court proceedings, and if the court upholds the claim, the ownership is registered according to the court decision (Parlindungan 1991:34). To avoid disputes, Government Regulation No. 24/1997 requires parties who have not registered a land transfer to file their claims within five years after the original certificate that serves as evidence of the registration was issued.[16] However, this limitation does not have the intended effect, because courts still accept claims concerning accuracy of the information stated in the certificate or the process of its issuance (Sutedi 2011:196). This means that the holder may be sued at any time, which seriously undermines legal certainty for the landholder.

While those involved in land disputes are usually looking for quick solutions, land litigation is often lengthy and exhausting. In big land cases, corporations that want to avoid the perils of lengthy court cases recur to the services of lawyers with a reputation of not only knowing the law and legal procedure, but also of having good connections and of mastering the practical strategies required to win this type of cases. Many corporations holding a stake in such litigation are prepared to use any method to win them. One particular feature of the Indonesian legal system is that in practice it allows lawyers to bring claims concerning one single case before multiple bodies. These range from general courts (*Peradilan Umum*) and administrative courts (*Pengadilan Tata Usaha Negara*, henceforth PTUN) to state auction offices (henceforth *Kantor Lelang*), auction houses (henceforth

15 Speculative trading is commonly done in corporate land deals, usually on a large-scale known as 'land grabbing'. These deals bet on rising global land values: 'investors put their money in land, as they might put it in gold, works of art, British Petroleum shares or pork-belly futures.' See especially White, B., et al. (2012): The new enclosures: critical perspectives on corporate land deals, The Journal of Peasant Studies, 39:3–4, 619–647.

16 Article 32(2).

Balai Lelang)[17], notaries, PPAT[18], NLA, and police.[19] This plurality of fora makes litigation of land-related issues a lengthy and expensive process.

The Field of Property Development: Gift-giving, Rent-seeking and Corporate Structures

Many actors involved in property development and land transactions are not hesitant to bend or violate the law when this will help them in their ventures. Businesses give financial support to politicians in order for them to obtain office, expecting that they will give their signatures in licenses and permits for the businesses later on. In this way, political positions are used as kind of commodity by the officials (Sanusi 2009). During Soeharto's New Order, it was widely believed that in order to obtain official signatures in commercial contracts, one had to pay 'upeti' (a 'tribute') of 10% from the contract price (McLeod 2000).[20] While currently the informal rules have become less straightforward, such illegal practices are still widespread and often involve commercial lawyers.

Gift-giving practices are typical for Indonesian social and political life, which has often been analyzed in terms of patronage and clientelism (e.g. van Klinken 2009, Simandjuntak 2012, van Klinken & Berenschot 2018). There are many terms in use for gift-giving as a socio-economic transaction. *Upeti*, as I mentioned above means a tribute, originally given to gods and kings (Suhardiman & Mollinga 2017). Another term, often used by judges, is *rezeki* (Bedner 2001:228), which means a blessing from a superior. Perhaps most common is the term *pungli*, which refers to arbitrary levies imposed by those holding power on those who depend on them. Such power holders can be district heads who only issue permits in exchange for a 'gift' or judges who only type up their judgments after having received 'compensation'.

In the more developed part of business ethnic Chinese are particularly prone to be the victim of these rent-seeking practices. They are economically powerful, but politically they are a vulnerable minority (Chong 2015, Koning 2007, Mackie 1991). For protection from extortion, they often join forces with Indonesian officials. Over time, this 'collaboration' may develop

17 Both *Kantor Lelang* and *Balai Lelang* can issue minutes of auction that will be used to register the Deed of land transfer and can auction off the Mortgage Deed (henceforth *Hak Tanggungan*). *Balai Lelang* are privately-run, with officers qualified in its area to commence an auction.

18 PPAT are similar to notaries in that they also make authentic deeds. PPAT are specialized in making deeds in connection with the status of rights to land. They provide evidence of legal action concerning certain pieces of land that will then be the basis for registering the change to the juridical data caused by the legal action. This is regulated by Government Regulation No. 37/1998.

19 For instance, through allegations of fraud and embezzlement regarding investments in land development.

20 This belief is reflected into the nickname 'Madame 10%' given to the wife of President Soeharto, Tien Soeharto.

into a form of business organization, often referred to as 'Ali-Baba'.[21] Ali refers to the mostly Muslim officials, and Baba to Chinese businessmen. With the combined advantage of political and trading networks, some Ali-Baba corporations have grown to become the largest businesses in Indonesia. Although in principle they are based on informal ties, commercial lawyers play a central role in these partnerships as 'experts' as they provide the legal framework in which these ties are embedded. In some cases commercial lawyers also play a more active role in the transactions between the Ali-Baba partners.

Several studies about Indonesian corporations have highlighted how they protect and develop themselves, paying particular attention to the Ali-Baba form I mentioned above. In their study on Salim Group, one of the largest corporate group in Indonesia and an ethnic Chinese family business, Dieleman and Boddewyn (2012) found how corporate organizational structures are used to avoid tax, hide ownership, and manage Salim Group's connections to different 'Alis'. Salim Group structures its companies in such a way that they are protected from adverse effects of their ties with officials. They group different companies to different officials, so one official is not tied to another. In this manner the official cannot become a liability, misappropriate resources and spread damage to the entire organization.

Corporations, Corporate Structure and Title to Land

This research uses the term corporations to refer to a company or a set of companies in a group structure. There are different types of company ('PT'[22]), classified by the source and owner of capital and shares[23], and by whether it is private or public.[24]

According to Indonesian law, a company ('PT') cannot hold ownership (*Hak Milik*). They can only hold title to cultivate land (HGU), title to a building (HGB), or title to use land (*Hak Pakai*). The limitation that companies cannot obtain land as full property (*Hak Milik*) looks appropriate for

21 This was originally a policy implemented under the cabinet of Ali Sastroamidjojo in the 1950s to 'Indonesianize' the economy, encouraging more indigenous Indonesians (*orang Indonesia asli*) and remove foreign (Dutch) influence in businesses, particularly for import licenses (Lindblad 2002).

22 *Perseroan Terbatas*, a business organization similar to Limited Liability Company. In Indonesia, such an organization is regulated by Indonesian Company Law (Law No. 40/2007, commonly known as 'UUPT').

23 The PT could be local, joint venture, or foreign direct investment ('PT. PMA'). PT. PMA requires more capital compared to local and joint venture companies, subject to areas of business that are allowed in government's investment list, most recently regulated in Presidential Regulation No. 44/2016. In addition to UUPT and other various regulations, PT PMA is regulated in Law No. 25/2007 about Investments.

24 Public PT (PT. Tbk) means that the company is listed on the stock exchange. There are lots of regulations involved in establishing and maintaining a PT. Tbk., e.g., regulations by Bursa Efek Indonesia (Indonesian Stock Exchange—IDX), auditors, and BAPEPAM-LK (Indonesian Capital Market Supervisory Agency).

avoiding land-grabbing and limiting expropriation. However, these titles are granted for long periods of time, from 30 to 95 years, with an option for extension. Any PT can also hold *Hak Tanggungan* (a deed to guarantee a loan by mortgaging the title to land),[25] and investors can buy shares of the PT whose name is listed in the *Hak Tanggungan* deed. In this way, the investor gets the benefit of holding economic interest over land through first lien.

Aside from this limited right to hold land, corporations generally enjoy more advantages and less liability compared to natural persons. As artificial persons, they have a specific legal form and enjoy a certain degree of immunity, e.g. immunity from criminal punishment. Furthermore, their form also grants them privileges that make them more powerful than wealthy natural persons. These advantages and liability structures mean that research about corporations will involve layered and structured obligations and relationships (Galanter 2005, 1974; Yngvesson 1985).

The Legal Framework in Corporate Litigation

In order to understand land litigation and the role of commercial lawyers in such litigation one needs to be aware of the complexity of Indonesian land law. A wide variety of legal fields inform the practice of corporate litigation involving land. Lawyers often invoke not just land law and commercial law provisions, but also those from other areas of law such as criminal and tort law.

Given this complexity it is difficult to provide a clear overview of the relevant legal framework. The 'ego-sectoral-ist' (Arnscheidt 2003:54) nature of institutions that deal with land title and disputes does little to ameliorate the unpredictable character of practice. There is a tendency for each government department to have its own laws and regulatory framework for internal and external management. This specialization is not coupled with effective communication—not even in cases where several departments are working on the same subject area, for instance between the NLA and Ministry of Forestry. This fragmentation of bodies of law seriously undermines the legal certainty for those involved in legal disputes over land.

Corporate litigation regarding land involves many actors, including judges, plaintiff(s), defendant(s), lawyer(s), notary(/ies), and land administration official(s), who also make their own internal decisions, with each being supervised by different institutions. This network of actors with different relations suggests a more complex social logic in dispute resolution than the archetypical triad from Shapiro (1986), which consists of two

25 *Hak Tanggungan* as a land title differs from other titles in that it can be used to obtain loans or credit. *Hak Tanggungan* can be used as collateral or credit guarantee for ownership (*Hak Milik*), title to cultivate state land (HGU) and title to a building (HGB). *Hak Tanggungan* has to be registered in the National Land Agency (Badan Pertanahan Nasional) by a Notary specifically authorized to document and record legal actions regarding a certain parcel of land. They are called Land Deed Officers (Pejabat Pembuat Akta Tanah, henceforth PPAT).

disputing actors and a decision-maker/judge. The practice of lawyers and law firms is linked to all of these actors and reflects this complexity of the legal-administrative framework applicable to litigation about land.

I Conceptual and theoretical framework

Legal Strategy

An important concept in this book to discuss the practices of corporate lawyers is strategy. Strategies are actions, tactics, maneuvers, plans, and methods for achieving one or more desirable goals. They require performing actions different from the possible activities of rivals or performing similar activities in different ways (Porter 1996:61). Strategies are about shaping the future (McKeown 2012). Strategies are not always well-considered and explicit, but may also be tacit and pre-reflective (Swartz 1997:70).

Legal strategy refers to the decisions actors take on how to deal with the legal system's constraints and opportunities to further their commercial objectives. Some legal strategists seek to break the law in a manner that avoids the associated penalties (LoPucki & Weyrauch 2010:45). Litigation opens a wide window of opportunities to manipulate the legal system. Moreover, when the process of challenging the legal system's opportunities and constraints occurs through a judicial forum and relies on experienced actors who are usually concerned with the rules that will govern similar future cases, it is expected that there will be heavy expenditure towards rule-development (Galanter 1974). The process is expected to change the rules of legal procedure, as articulated by practice.

Legal Strategy and Litigation Behavior

Since around the 1960s, scholars have been attempting to explain litigation behavior. Miller and Sarat (1980), Felstiner, Abel, and Sarat (1980), Merry and Silbey (1984), and other socio-legal scholars have articulated how and why disputes come about, what happens in disputes and litigation, and how this can be explained. Gilson and Mnookin (1994) have analyzed disputing through agents and relationships between opposing lawyers, as well as reasons and strategies for lawyers to settle or exacerbate conflicts. Kritzer (2001) has studied litigation behavior in relation to lawyer's fees, and Johnson (1980) has analyzed how lawyers decide how much time to devote to which clients and which cases.

There is a vast literature about dispute processing and legal profession besides the aforementioned works by socio-legal scholars. However, as pointed out by Wilkins (in Sarat et al. 1998:68), most of the research shares a presumption that the typical lawyer-client interaction is between a dedicated and skilled solo practitioner and an unsophisticated individual client. Moreover, by far most studies discuss litigation behavior in the US context.

Only a handful of scholars have also looked at litigation involving more sophisticated clients. Macaulay (1985) has studied business and contracts, how and why contracts are used (or not used) and how this connects to the management of exchange relationships. Galanter (1974) has taken a closer look into what happens in litigation and provided a typology of parties, legal services, institutional facilities, and rules. In addition he has explained legal strategy implicitly through strategies for reform and reform's implication for the role of lawyers. Macaulay and Galanter provide important insights on the role of continuing relationships in business (contracts) and law and how this influences the choice for particular strategies, which are relevant for this research in the context of Indonesia.

In 1980, the Law and Society Review published a special issue on dispute processing and civil litigation (Vol. 15:3-4), which serves as a milestone on ways to think about disputes and methods to study them. More recently in 2010, the American Business Law Journal issued an issue with a similar focus,[26] although it took a more economical or strategy-oriented approach compared to the Law and Society Review's socio-legal perspective. Nevertheless, the topics are more or less the same: decision-making processes in law and how they affect outcomes.

These ideas by Law and Society scholars have been adopted in legal strategy theory, but the latter has another focus than the dispute processing literature. The older socio-legal scholarship, some are mentioned above, tend to focus on the 'not-haves' or the OS (one-shotters), while legal strategy theory focuses on the 'haves' and the RPs (repeat-players); usually those with capital, i.e., businessmen, CEOs, lawyers, and corporations.

Drawn from a business perspective about legal astuteness as a competitive advantage, the study of legal strategy is an emerging discipline (Bagley 2010; Siedel 2000). It promotes awareness and understanding of law as a part of business strategy, making a compelling argument that law is more than a force that constrains managers and their firms, but can be turned into a tool to their advantage (Bagley 2010). This insight is key to the theoretical framework in this research. While developed in the context of the Unites States, I argue that it is equally relevant in Indonesia. Within legal strategy studies, different scholars have taken three different approaches to the subject:

1) Managerial Approach: The managerial approach views legal strategy as a legal policy in a corporate setting. It suggests that business people need to make themselves familiar with the law in order to be able to use it as a resource to implement an advance strategy to manage or avoid risk. Driven by the broad concept of resources, the managerial approach sees the use of the law as potentially creating a competitive advantage with as the ultimate goal to outperform rival companies through legal astuteness (Bird 2010).

26 American Business Law Journal, Volume 47, Issue 4, 2010.

2) Judicial Approach: Focusing on litigation and the relationship between the law, judges, and legal strategy, LoPucki and Weyrauch (2000), authors of *A Theory of Legal Strategy*, seek to explain what lawyers do when they strategize. They start by explaining two views of the law, conventional and strategic, arguing that the strategic view captures the reality of the legal process while a conventional view misses it. In the conventional view, actors either follow the law and seek maximum advantage under it or they violate the rule and accept the consequences (Williams 1998). However, LoPucki and Weyrauch's legal strategists seek to avoid, manipulate or violate the law in a manner that avoids the penalty as well. They provide a typology of activities that they refer to as 'legal strategy', and ultimately argue that the law is always malleable. Nonetheless they add a normative twist by arguing explicitly that legal systems should be redesigned consciously to minimize strategic opportunities. They emphasize that legal outcomes are the products of complex human interactions that cannot be drawn only by 'written law', just as one cannot predict the outcome of a game of chess by knowing the rules of the game and the position of the pieces, but without knowing who is playing. Finally, they analyze how the outcomes of legal strategy trigger responses from judges and/or lawmakers that lead to legal change.

3) Normative Approach: The normative approach to legal strategy focuses on the misuse of norms and explores the conditions or circumstances that create the opportunity for legal strategy development. These opportunities are *hazy law* (i.e., undetermined law because of its imprecision), *crazy law* (i.e., legal incoherence, contradictory, or conflicting law), *accidental law* (i.e., law that produces an unwanted effect), and *malleable law* (i.e., law whose substance can be easily altered).

Rather than conflicting, these three approaches are analytically complimentary (Masson & Shariff 2011). They underlie the existence of various strategies based on normal uses and misuses of the law, they aid us in noticing these strategies, and they help lawmakers redesign the law in such a way that they minimize opportunities for its manipulation. Moreover, they allow us to to keep the lawyers as the central actor, but by offering tools for considering their relations to managers (business actors), courts and judges, and for analyzing how lawyers use or do not use the rules, this approach promotes a more comprehensive analysis.

Legal strategy in Indonesia

As already mentioned, all of these approaches derive from an American perspective on business and despite similarities, there are also major differences with Indonesia. An important one is that settlement strategies are very different in the United States compared to most other legal systems

because of the procedure of *discovery* (determining evidence in litigation). In the American legal system, there is compulsory discovery, which compels disclosure of all facts, even disadvantageous ones (e.g., Cooter & Rubinfeld 1994).[27] Because of its important role in steering the litigation, this obligation to reveal facts in discovery becomes a strong motivation for settlement, especially for litigants that want to avoid disclosure of certain business strategies or vulnerabilities (LoPucki and Weyrauch 2000).

In Indonesia, the process is quite different. Discovery is performed when a plaintiff has brought his/her case to a court, and to a large extent it is the judge who performs the discovery during trials. At this stage, a settlement between the parties is no longer possible, unless the judge approves it by issuing a separate decision.

To discuss legal strategy in Indonesia and its peculiarities, we have to focus on the actors involved in the strategy and what motivates them to perform certain legal actions. There are two major actors in these processes: company executives acting for 'artificial persons' (corporations, associations, and governments) and lawyers. None of them are personally liable for the outcome of disputes: a corporation's representation (e.g., legal counsel, CEOs, and managers) and lawyers are agents for their employer's (i.e., a company's) interests. The relation between these actors is often complex. Personal and employer interests might overlap or contradict, which is determined by social and legal settings within the corporations (employer-employee relationships), in lawyer-client relationships, and to some degree, in lawyer-lawyer relationships. As we will see later in this study, it is important to look into both social and legal settings of corporations and lawyers when trying to understand how legal strategies work.

Research on the Indonesian Supreme Court *(Mahkamah Agung)* by Pompe (2005), the Indonesian Administrative Court *(Pengadilan Tata Usaha Negara)* by Bedner (2001), and Wilson's theory of how government agencies operate (1989) serve as points of departure in understanding how factors, such as management and training, shape the functioning of institutions, such as courts and the National Land Agency, that more indirectly influence legal strategy and that are particular to the Indonesian context.

An important general difference between the Indonesian and the US context concerns social relations. In Indonesian society, family, community and bureaucracy are intertwined (cf. Riggs 1964), and I already discussed the prevalent practice of gift-giving earlier in this chapter. Related problems are lack of regulatory effectiveness, excessive bureaucracy, delays, corruption, and inconsistent application of the law (Mowbray 2004:244). These socio-legal aspects are of major importance in understanding legal strategy by lawyers in Indonesia.

27 United States Federal Rules of Civil Procedure 26(b)(1).

Rule of Law, Legal certainty and Lawyers' Ethics

An important overarching concept in this study is Rule of Law. Ideas about Rule of Law constitute the core of the ideological context in which commercial lawyers operate, while at the same time its meaning is shaped by the same lawyers and other actors in the legal system. Rule of Law is a legal and political concept to which there is no single definition, but arguably it consists of different elements which can be grouped into three categories: procedural, substantive, and controlling mechanisms (Bedner 2010).

This research is mainly about procedural elements of Rule of Law, in particular about formal legality. Formal legality is not just concerned with the use of rules as an instrument of state action but with the quality of these rules – whether they are clear, certain and applied equally (Tamanaha 2004:99; Bedner 2010:56). Formal legality can to a large degree be equated to legal certainty. Legal certainty is about predictability; having legal certainty means a situation where those with proper knowledge of the law have the ability to gauge what a judge will decide in a particular case.

In their practice, lawyers should be guided and constrained by Rule of Law. The International Bar Association has enacted International Principles on Conduct for the Legal Profession, defining lawyers around the world as 'professionals who place the interests of their clients above their own, and strive to obtain respect for the Rule of Law'.[28] Lawyers are special agents, having not only duties as representatives of their clients, but also as representatives of Rule of Law. In this capacity they are rewarded with protection and independence, such as from governments and from their clients (as stated in the Basic Principles of the Role of Lawyers enacted by the United Nations in 1990); and the profession is regarded as a 'noble' profession.[29]

Nevertheless, in many places the practice of law has become an unscrupulous business and lawyers in the US increasingly view law in an instrumental fashion, as no more than a means to an end (Tamanaha 2006:55). Much literature on the legal profession is skeptical about the ethical scruples of lawyers in the world of business and markets. Levin & Mather (2012) observe that even good US lawyers apply ethics narrowly, only to the very minimum of what the rules state. Suchman (1999) found that ethics are relevant even in the US elite litigators' world, but only narrowly, as professional rules that are not in good condition.

The instrumental view of law as no more than a tool to achieve certain practical ends seriously threatens Rule of Law as an ideal (Tamanaha 2006). It creates the danger of the system degrading into rule *by* law while using the rhetoric about Rule of Law as an ideological smokescreen.

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28 For elaboration on these principles, see Chapter 2.

29 Indonesian Ethics Code for Advocates emphasizes this as "officium nobile" and puts lawyers in the same position as other 'law enforcers' such as judges and prosecutors.

This research focuses on lawyers in Indonesia as a group of individuals who know how to provide a degree of certainty to their clients in the absence of clear predictable rules, and who know how to conduct commercial transactions in the midst of sporadic application of rules. This research does not contest that there is a danger in the instrumental view of law as argued by Tamanaha, but it recognizes that empirically for most lawyers in Indonesia legal knowledge is a technical instrument. At the end of this book, after having presented lawyers' practices and after having analyzed what their consequences 'on the ground' are, I will consider what this means for the condition of Rule of Law in Indonesia.

II Research questions

This study will be guided by the following research questions:

1) What strategies do lawyers develop and follow in corporate litigation about land, and what factors shape their choices?

2) Why do parties – informed by their lawyers – choose litigation in conflicts about land, and what are the types of disputes commonly encountered in corporate litigation?

3) What is the relationship between corporate litigation practices and: a) the professional attitudes of lawyers and b) legal development in Indonesia?

4) How does the practice of corporate litigation relate to the condition of the Indonesian legal system generally, in particular in terms of formal legality, and more broadly to Rule of Law?

III Methodology and research notes

This research started developing in 2011 when I decided to move away from lawyering practice. I had been an associate and personal assistant to a 'family' lawyer[30] in Jakarta since 2009. The most important reason for the move was that I felt that after two years of legal practice, I was not gaining any new knowledge about Indonesian law or making a useful contribution to the development of the rule of law. Obviously, such a contribution is not the main task of lawyers. However, I expected that there would be certain ideals that I could promote, which turned out not to be the case.

30 Lawyers who operate as fixers but with more powerful and complex means. See Chapter 2.

I started to examine certain deficiencies of Indonesian law. I noted down my observations and as a lawyer and assistant, I attended as many meetings with clients and counterparties as I could. At that moment, I did not have any concrete research topic. I only knew that for the sake of knowledge, the practice of law by the 'haves' (Galanter 1974) in Indonesia needed to be understood.

Thus, I unintentionally performed a kind of participant observation throughout my lawyering career. I was observing legal practice as an actor, not spectator. I follow Bourdieu's view on defining practice (1990; 2001; 2003). According to him, practice is an embodied logic put into actions by actors as 'strategic improvisers who respond dispositionally to the opportunities and constraints offered by various situations' (Swartz 1997:100), meaning that actors are conditioned physically, normatively, and cognitively in their scope of actions and margins of maneuver. Practitioners are not often aware of why they do certain things, especially when they look back and try to describe or explain what they did to an outsider. Therefore, being a detached observer is insufficient for understanding the urgency of actors' decision-making. This is why I needed to be reflexive and to try to be objective in addition to participant observation.[31]

To turn the participant observation into genuine research, I moved to Leiden in early 2013 to become a PhD researcher at the Van Vollenhoven Institute (VVI). At VVI, I was encouraged to look into land, which is one of the institute's foci of study. Combining these interests, I chose to focus on legal practices regarding the buying and selling of the rights to own or develop land, which requires licenses or approval from the state. This focus offered me an excellent opportunity to contribute to one of the main themes of VVI and pursue my interest in corporate lawyering.

My previous participant observation provided me with foreknowledge about a particular type of lawyer and law firm's practice. It involved meetings between lawyers, clients, and their counterparties and opposing counsels. I dealt with notaries, business acquaintances and political, administrative, and judicial connections. I drafted contracts and explained the meanings of statutes, litigation procedures, and outcome chances to clients, as well as—the most difficult part—why they lost in court. I managed lawyers' fee invoices alongside abrupt business trips to Singapore and Hong Kong for note-taking and general assistance. Such observations were not enough since there was a danger of creating a black swan theory: the possibility that my findings were only found in one particular firm.

To avoid this, when I started my research, I first looked into information that would be available to anyone. I looked into the published decisions of the Indonesian Supreme Court. Selecting cases required creativity, as their database was rather disorderly. At the start, I was confronted with massive numbers of cases, although I found I could narrow my search by going

31 Bourdieu refers to this methodology as *participant objectivation* (2001).

directly to the registrar's page of the court's website (https://kepaniteraan.mahkamahagung.go.id/perkara/) and filter cases by inserting *PT*[32] at the 'Parties' name' column. Chapter 1 explains further selection methods, as well as an overview of corporate litigation. I also used media reports, financial and annual institutional reports (issued by, e.g., banks, companies, the Supreme Court, Ombudsman, *Komnas HAM*, *LBH*), and attended professional seminars.

To complete and crosscheck the findings and assumptions from participant observation, I went back to Jakarta in early 2014 to conduct interviews with lawyers. I could interview 48 lawyers, whom I selected by distinguishing between two distinct practices. First, those who have positive views about 'family' lawyers, either because they work as such or they admire them, and secondly, those who have negative views and consider that kind of practice to be 'dirty'. I selected interviewees from these two sides. I complemented these by interviewing clients of these lawyers whom I could access: bankers, company representatives, and businessmen in private equity, or 'investors' as I will refer to them in this book.

I also interviewed three Supreme Court judges, two District Court judges, a court registrar, a KPK investigator, three NLA officials, an administrator, and the head of an Indonesian bar association whom I selected based mainly on whom I had access to.[33] These were relatively formal, intensive interviews that were semi-structured and lasted between one and four hours. There were also shorter interviews that occurred with limited privacy in-between seminars and conferences, in the courthouses' hallways, restaurants, and hotel bars.

Before conducting any interview, I created an interview guide that included a proto-case with assumptions of expected answers and follow-up questions (Annex 1). A few of the more general questions I asked during interviews were about the interviewees' opinions about the development of Indonesian law, their personal reasons or motivations for becoming a lawyer, and what a good lawyer was to them. I asked about their career development, why they changed firms, the most difficult case they had handled, what the most difficult time in their career was, and, to get an idea of their personal background and attitudes, about their hobbies, their families, and their religion.

I decided to take notes instead of recording the interviews because I wanted interviewees to be as open as possible. To create an atmosphere of mutual trust, I always told the interviewees (or agreed) at the start of the interviews, to give them an overview of my findings after the interview to

32 PT is short for *Perseroan Terbatas*, which means the result would only focus on cases that have at least one company involved.

33 The district court judges, registrar, and KPK investigator were handling a corruption case of a lawyer, and the NLA officials are in charge of handling land disputes at the main office of the Ministry of Agraria and Spatial Planning/National Land Agency in Jakarta.

which they could add suggestions and clarifications. Note-taking proved to be strategic.[34] I noticed that the interviewees usually got encouraged to elaborate on a specific topic when I was writing something in my notebook. I also used note-taking as a moment to pause and allow the interviewee time to say more or clarify their statements.

At the beginning of the interviews, I introduced myself as a PhD researcher from Leiden University and maintained this position throughout the interview. One of the most remarkable observations during the interviews was the following: Usually, interviewees would speak in exalted terms about the law and assert that they were idealists. Towards the end of the interview, however, when they learned (by asking me questions) that I worked for the 'family' lawyer, they quickly changed their tone, assuming that I understood their kind of practice. They would then disclose more details of what they actually *did* in practice. In doing so, they showed that they realized that certain practices (which they initially concealed) were illegal or wrong, or at least perceived as wrong by the general public and society.

The next thing I tried to find out was the kinds of social capital lawyers have at their disposal, which plays a more important role than legal skill and often clashes with or violates professional norms. For this, I needed to know my interviewees' network, so I asked them about their peers' work, their opponents in lawsuits, and their co-plaintiffs or co-defendants, as well as their opinions concerning the widely-alleged existence of a judicial mafia.

Reflexivity and ethical concerns

Writing down my findings proved to be ethically difficult. Positioning myself as an insider in Indonesian lawyering and as an outsider in international academia, or vice-versa, has remained a disorienting position. Reflecting on my experiences and findings came with a 'transgression that takes on the air of treason' (Bourdieu 2003:283), which means that while writing, I had a feeling of disloyalty to my colleagues in Jakarta.

As a lawyer, I had to distinguish the legal from the illegal, looking primarily and subjectively from the perspective of my clients or employer. By contrast, my obligation as a researcher and author is to find and present genuine scientific objectivity. I had to distance myself from my subject, yet I also had to realize how my role affected my subject, as well as viewing myself as a subject in my research. Therefore, the methodology I used for this thesis needed to be reflexive, i.e., a method that removed my 'lawyerly bias'. I had to realize the effects and limits of my experience in my professional universe(s). During the research, I had to shift frequently from being

34 I was only asked once why I did not have a recording device ready. The interviewee even took the lack of any visible recording technology (such as a tape recorder or a camera) as an offense and claimed that I was not a real researcher unless I 'recorded' him.

a researcher at the Van Vollenhoven Institute; an institute mostly dealing with the poor, the marginalized, and victims, to being a lawyer in Jakarta researching the elite or the perpetrators.

Removing judgment was not easy for a lawyer who was trained to use normative labels such as 'corruption' or 'justice'.[35] The objective of this study was to understand processes and attitudes. To do this properly, I needed to take a sufficiently detached standpoint. Extended time in Leiden was crucial for this, as it aided me in relinquishing my role as an actor and switching from the perspective of a participant (lawyer) to an observer (socio-legal scholar).

In the end, this methodology allowed for me to show how deals are made and negotiated, how favors are won and useful 'friends' are made, and what steps are taken when problems emerge by the objects of this research: elites who are unapologetic in the name of progress, development, and the accumulation of wealth.[36]

IV Structure of the book

This book is structured according to the litigation process. The first chapter is an overview of the issue and shows the types of cases and parties involved, what legal arguments they bring to courts, and the legal reasoning and decisions the courts provide. Chapter 2 paints a detailed picture of lawyers as the most important actors in using and developing the legal procedures explained in Chapter 1. Chapter 2 analyses lawyers' habitus, their field, and their professional relationships. Chapter 3 illustrates the types of cases explained in Chapter 1. To understand why cases come about, one has to understand the business practices of developing land in Indonesia, how businesses are organized, how contract relationships are formed and carried out, and what rules are applied when these relationships were in distress. Chapter 4 shows the strategies lawyers use before, during, and after litigation, what follows litigation, and how enforcement is performed. The book concludes with an analysis of the Rule of Law condition in Indonesia and offers suggestions to form policies and give recommendations for legal reform

35 In fact, two dichotomies are being conflated here: actor versus scholar and normative versus empirical research.

36 Mistakenly perceived as *kesejahteraan* or *kemakmuran* (prosperity). In this, they meant the prosperity of their group, not the noble notion of *kesejahteraan masyarakat* (prosperity of the people) or *kemakmuran bagi seluruh rakyat Indonesia* (prosperity for all Indonesian citizens).