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

Kouwagam, S.U.

Summary

Indonesia enacted the Law on Lawyers including its Code of Ethics only 58 years after its proclamation of independence, and only as a larger part of reform of commercial laws. The Law was a requirement agreed between the Indonesian government and the IMF in order for Indonesia to receive a "reform package" from the IMF after the 1997 Asian financial crisis. This financial crisis resulted in President Soeharto's resignation and the so-called period of Reformasi: a movement to eradicate corruption, collusion and nepotism, rampant in Soeharto's New Order, including inside the Indonesian legal system.

Despite the Reformasi, researchers have found that little has changed in the corrupt practices in the legal system, particularly in the judiciary. The anti-corruption movement continues to be the center of attention, and a Corruption Eradication Commission (KPK) has become one of the most prominent institutions in Indonesia. However, there is not much scholarly research on other actors in the legal system than the judiciary and on the role they play in the legal system, including its corrupt practices. This thesis takes on this challenge and looks into the world of Indonesian elite lawyers, how they operate, and what their influence is on the legal system.

In Indonesia the term "elite lawyers" not only refers to lawyers engaged in international, high-income corporate practice, but also to those lawyers who manage to influence the legal, economic and to some extent the political system through their use and manipulation of law. This very important group has been missing in research about the role of law in economic development and globalization in Indonesia.

Lawyers in Indonesia can be divided into different groups, serving different clienteles, doing different work and pursuing different kinds of ideals . What unites them is that they all have to deal with dilemmas resulting from a disparity between two worlds, one globalized, 'modern' law and legal practice with its rational impersonal approach and ideals, the other the local, traditional world of relationality. This thesis analyzes the actions they perform in order to win land rights for corporations and how they use the legal system for this purpose. It shows how certain groups of lawyers not only deploy the weaknesses in the law, but supplement their strategies with the social capital they have obtained in the form of relations of loyalty with judges, court registrars, policemen and prosecutors. The thesis examines how such practices influence the condition of the Rule of Law in Indonesia.

Chapter 1 gives an overview of corporate litigation and how courts accommodate lawyers' strategies by compromising quality in order to meet public demands for efficiency. It locates problems in procedural law, particularly civil procedure. Chapter 2 provides an in-depth analysis of lawyers in Indonesia, how the profession has developed, the training and certification of lawyers, their failure to organize and self-regulate, as well as the compartmentalization in extremely diverging practices, some oriented towards playing along the official rules and ideals of the legal system but evading Indonesian courts, and others oriented towards manipulating the rules. These practices have stunted lawyers' contribution to legal development.

Chapter 3 discusses the typical model of land acquisition by corporations, how land developers are organized, and in what regulatory environment they operate. It then explains the causes of disputes in business relations, notably the confusion concerning the relation between contract law and tort law due to misinterpretations and diverse opinions of jurists. This has resulted in serious problems with the enforcement of agreements. Chapter 4 analyzes the strategies lawyers use before and during litigation, and the strategies related to enforcement.

The findings highlight three main aspects of the condition of the Rule of Law in Indonesia which need special attention for legal reform. First, parties to disputes are not equal before the law and bringing contract or tort claims to the courts does not level the playing field. Second, the issue of corruption indicates the incompatibility of current social norms in business and bureaucratic decision-making on the one hand and law, which is supposed to be rational and impersonal on the other. The lack of clarity of the rules of legal procedure (particularly civil procedure) reinforces this problem. Third, the endeavor to 'free' laws from colonial sources has resulted in an ambiguous status of the general rules on contracts and torts found in the Civil Code. The result is a commercial litigation practice that has many features of a ritual and that is only understandable to lawyers and repeat-litigants, who therefore hold an interest in maintaining the status quo.

As a result of this condition, there is a wide grey area of practices that may be considered unethical but that are not illegal. The thesis argues that we need a rethinking of the kinds of behavior that are considered professionally unethical for lawyers. This thesis posits that when the degree of legal uncertainty in a particular country is high, lawyers (including corporate transactional lawyers) must adhere to stricter ethical standards to promote the rule of law.

To improve legal certainty, reform need not only come from lawyers, but also from judges. Judges need to provide sufficient legal reasoning in their judgments, specifically by explaining their understanding of the facts and why they came into such decisions. This should be accompanied by a codification of civil procedure. For this codification, further research into the existing rules of conduct is still needed.