

The Indonesian Court for Corruption Crimes: Circumventing judicial impropriety?



A trial in the Jakarta Anti-Corruption Court, Sept 2013.
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The anti-corruption world has witnessed increasing institutional specialisation, including the emergence of anti-corruption courts. Indonesia's Special Court for Corruption Crimes in Jakarta gained prominence for a nearly 100 per cent conviction rate from 2004 to 2011. However, after corruption courts were established in all provincial capitals in 2011, scandals and acquittals have raised questions and criticism about the courts' integrity. While conviction and acquittal rates are popular proxies for court performance in Indonesia, they should not be used as stand-alone indicators. This case illustrates that institutional specialisation when rolled out to a larger scale must go in hand with broader judicial reform.



New, specialised courts have been established in many developing countries. Their emergence is often explained by reference to international pressure for the rule of law and legal certainty, as well as by states' "own volition" (Harding and Nicholson 2010, 3). As Horowitz (2013, 240) has observed, "If existing courts are unsatisfactory, one route to quick reform is to circumvent them."

Among these new courts are specialised anti-corruption courts. These follow various models: they may have exclusive jurisdiction to adjudicate corruption cases, share jurisdiction with the general courts, or occupy a special chamber within the general court system. Examples include the Sandiganbayan in the Philippines (since 1984); the accountability courts in

Pakistan (since 1999); the Special Court for Corruption Crimes (Pengadilan Tindak Pidana Korupsi, or Tipikor) in Indonesia; and, more recently, courts in Uganda, India, and Malaysia (Hakobyan 2003; Pangalangan 2010; Tahyar 2010).

These new courts have generally been established for the same reasons as specialised anti-corruption agencies: to insulate corruption cases from existing corrupt systems and to build special expertise in the handling of complex cases. However, unlike anti-corruption agencies, these special courts have received little scholarly attention. While corruption cases regularly make it into the local, national, and sometimes international media, there has been little analysis of the rationales for the anti-corruption courts' establishment and of their performance in comparison to regular courts.

This Brief is a first step towards filling this gap, using a case study of Indonesia's Special Court for Corruption Crimes. This court provides a particularly rich example, as recent changes to its institutional design highlight the challenges of specialisation. The case study also demonstrates that, although the anti-corruption courts are designed to circumvent the general courts, specialisation may not obviate the continuing need for broader judicial reform.

Establishment of Indonesia's Anti-Corruption Court: Innovations and early support

Judicial power in the Indonesian court system is divided between the Constitutional Court, the Supreme Court, and four lower legal branches: the general courts, the administrative courts, the religious courts, and the military courts. The Special Court for Corruption Crimes (hereafter, the Anti-Corruption Court) was established by a statute enacted in 2002 as a chamber of the Central Jakarta District Court, a general court. It was given exclusive jurisdiction to hear the cases investigated and prosecuted by the Indonesian Corruption Eradication Commission (Komisi Pemberantasan Korupsi, KPK). The Anti-Corruption Court and the KPK were established simultaneously because reformers feared that KPK investigations and prosecutions might not result in convictions if presented before corrupt judges in the general courts (Bolongaita 2010). As Fenwick (2008, 413) observes, "The only objective of such a specific set of provisions is to attempt to circumvent entirely a judicial system known to be complicit in protecting corruptors, and – at the very least – capable of being unresponsive or incompetent in the administration of justice."

The Anti-Corruption Court was the first specialist chamber at the general court with a majority of ad hoc, or non-career, judges. There is a set ratio of three ad hoc judges to two career judges at the first instance Anti-Corruption Court and on both subsequent levels of appeal. These ad hoc judges, who are recruited from outside the existing judiciary, are typically legal experts or retired judges. In Indonesia they are "considered less likely than career judges to be entwined in institutionalized corruption or to have divided loyalties" (Butt and Lindsey 2011, 208).

Strict timelines were established within which the Anti-Corruption Court was required to decide cases. The maximum time between case commencement and decision was 90 days for first instance courts, 60 days for high courts, and 90 days for the Supreme Court. These time limits were intended to prevent the accumulation of a backlog of undecided cases, similar to that faced by the Supreme Court (Fenwick 2008). To our knowledge, these time restrictions have not yet been breached. Indeed, some corruption panels have reportedly heard cases well into the night to avoid infringing these limits.

The Jakarta Anti-Corruption Court itself pioneered another reform by introducing audiovisual recordings of all its proceedings to increase the transparency and reliability of court records. Its judges were said to distrust the capacity of the single stenographer assigned to the court (Tahyar 2010). The Supreme Court followed suit in 2012, ordering that all corruption and other important trials be recorded and that the recording be included in the case file in the event of an appeal. As this reform is relatively new, the accessibility and maintenance of the recordings has not yet been evaluated systematically. In principle, however, keeping accurate records of court proceedings should allow for easier assessment of judges' reasoning and conduct on the bench.

Together, the KPK and the Anti-Corruption Court gained prominence and built public support by achieving a nearly 100 per cent conviction rate in over 250 cases. In other words, every time the KPK prosecuted a case in the Anti-Corruption Court, the court found the defendants guilty and sentenced them to a term of imprisonment. This "success" was primarily attributed to two factors. First, the KPK invested heavily in the training of its investigators and prosecutors and encouraged cooperation between investigators and prosecutors of different professional backgrounds. It also had more resources to spend on case management than the Attorney General's Office, which prosecuted cases heard in the general courts (Schütte 2012). Second, a fixed majority of ad hoc judges sat on all Anti-Corruption Court panels. This meant that the career judges on the panel – whose integrity might be questionable – would be overruled in a split decision.

Decentralisation and new challenges

However, the vast majority of corruption cases were still being prosecuted by the Attorney General's Office and heard by the ordinary general courts – with much lower conviction rates. Indonesia Corruption Watch, a leading nongovernmental watchdog organisation, reported that from 2005 to mid-2009, only 51 per cent of the corruption cases prosecuted by the Attorney General's Office resulted in a conviction. And when general courts did convict, sentences were typically much lower than those handed down by the Anti-Corruption Court (ICW 2009).

Subsequently, several of those indicted by the KPK and convicted in the Anti-Corruption Court challenged the constitutionality of this two-track system. They pointed out that two defendants charged with the same crime could be investigated and tried under different procedures, depending on whether the KPK or the public

prosecutors took the case. In late 2006, the Constitutional Court ordered the issuing of new legislation to remove this dualism.

In 2009 the Indonesian national legislature enacted a new statute on the Special Court for Corruption Crimes in response to the Constitutional Court's decision. This law dramatically changed Indonesia's anti-corruption landscape. It stipulated that the Anti-Corruption Court was to hear all corruption cases, including those brought by public prosecutors. It also ordered the Supreme Court to establish regional anti-corruption courts in all provincial capitals within two years. This has been a massive logistical challenge. With support from the United Nations Office on Drugs and Crime, 120 judges underwent special awareness training and certification for corruption cases. This is one of the very few instances in which targeted donor support has been provided to the Anti-Corruption Court, although the judges have also benefited from more general training supported by donors to the Supreme Court.

During parliamentary deliberations on the new law, one topic of heated debate was whether the ratio of ad hoc to career judges should be reversed or otherwise altered. Lawmakers decided to leave the composition of the judges' panel to the head of each general court – a career judge – where the anti-corruption chamber is located. Anti-corruption activists, however, expressed fears that if non-career judges no longer form a majority on panels, the result will be low conviction rates and sentences comparable to those issued by the general courts.

These fears were apparently borne out when the first acquittals occurred soon thereafter (Butt 2012). Worse, in mid-2012 three ad hoc judges of the Semarang Anti-Corruption Court in Central Java were caught soliciting bribes, followed by similar charges against another ad hoc judge in Pontianak (West Kalimantan) and a career judge in Bandung (West Java). This led to calls, including from the Constitutional Court chief justice and from the justice and human rights minister, for the regional anti-corruption courts to be shut down (Tempo 2012; Aritonang 2012).

What do conviction rates tell us?

In a country where white-collar crime has gone mostly unpunished in the past, a preoccupation with conviction rates is understandable. Nevertheless, conviction rates are a poor measure by which to judge the success of any court, at least without accompanying detailed analysis of the court's decisions. There are many reasons why courts do, should, and indeed must acquit in specific cases. Without a thorough analysis, acquittals are not a good indicator of performance. For example, in countries where court proceedings are misused to target political opponents, a high conviction rate would in fact be a bad measure of court performance.

The presumption of innocence is applicable in Indonesian

courts. If the prosecution cannot convince the presiding judges of the defendant's guilt, then the judges must acquit the defendant (Butt 2012). Hence, to draw any implications from an acquittal, one must look at the individual case to assess whether the performance, capacity, or propriety of the judges or prosecutors was questionable. Evaluating the performance of any institution comes with special attribution challenges (Johnsøn et al. 2011). In Indonesia, the functions of the prosecutors – both public and KPK – and the courts are closely interlinked, and a fair evaluation of the role of either requires analysis of individual cases. In short, effectively assessing performance is far more nuanced and complex than simply gathering statistics.

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Conviction rates are only one output indicator and should be part of a more comprehensive assessment, such as the one developed by the United States' National Center for State Courts (2013). This takes into account various factors including access, fairness, clearance rates, time to disposition, age of active pending caseload, trial date certainty, reliability and integrity of case files, collection of monetary penalties, costs per case, and court employee satisfaction. In the Indonesian context,

where statistical data on these factors are difficult to obtain, if they are available at all, assessments should ideally be complemented by firsthand observations of the proceedings or analysis of the audiovisual recordings, along with analysis of the court's final judgements.

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Nevertheless, for the Indonesian public, conviction rates are likely to remain an important and simple proxy for the rule of law and judicial integrity for the time being. The impunity of the past was possible in large measure because the judiciary lacked integrity and independence. At their core, concerns about acquittals in Indonesia are really concerns about judicial impropriety and that these acquittals have been bought.

Integrity matters

Judicial integrity is a necessary condition for fair trials. The Jakarta Anti-Corruption Court, with its fixed majority of ad hoc judges, was established primarily to circumvent the existing courts. Its story demonstrates that extreme specialisation – that is, insulating the Anti-Corruption Court from the existing system by limiting its jurisdiction and introducing special legal procedures – can lead to concerns about equality and fairness, at least if other corruption cases continue to be heard by nonspecialised courts. Attempts to mitigate these concerns by extending



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the Anti-Corruption Court's jurisdiction to all corruption cases and delegating its functions to provincial courts appear to lead us back to the resource availability, capacity, and integrity challenges of ordinary law enforcement institutions.

As of this writing, of the 150 or so anti-corruption court judges in Indonesia, five have been indicted for corruption, four of whom are ad hoc judges. Seven other ad hoc judges are under review by the Judicial Commission for moonlighting as lawyers (ICW 2013). The downside of the relative independence from the influence of the Supreme Court is that it becomes difficult to discipline ad hoc judges. They cannot be suspended; their salaries cannot be cut for impropriety; and as they cannot be promoted, they can be neither punished with career regression nor rewarded with career advancement. The only disciplinary instruments available are dismissal or rotation (Kompas 2013). If the integrity and professionalism of the ad hoc judges is doubtful, then having a fixed majority of them on the panels will not bring improvement.

This dilemma is closely related to the number of ad hoc judges needed and the process of their recruitment. The more anti-corruption courts are established, the more ad hoc judges are needed. The pool of qualified applicants is small, especially in Indonesia's outer provinces, making it difficult to apply the stringent selection criteria for appointment suggested by nongovernmental anti-corruption organisations. Moreover, the proximity to locally powerful groups puts ad hoc judges at risk of coming under local influence that could improperly affect their decisions.

Lessons from the Indonesian anti-corruption courts

The anti-corruption courts are at the frontline of Indonesia's anti-corruption reforms. Certain innovations – notably time limits for court rulings and the audiovisual recording of court proceedings – have set good precedents for practices in courts all over Indonesia and for specialised courts elsewhere. However, contradictions with the general court system, acquittals rates and lapses in the integrity of ad hoc judges have raised concerns. Popular attention tends to focus on the courts' conviction rates. A comprehensive assessment of the performance and overall impact of the anti-corruption courts, however, must go beyond conviction and acquittal rates to encompass a broad set of indicators, along with analysis of specific court decisions.

The assignment of ad hoc judges to corruption trials became problematic once the Anti-Corruption Court was expanded to Indonesia's regions and a large number of ad hoc judges

needed to be recruited and managed. It is much harder to oversee the integrity of court processes in 34 dispersed regional courts than in just one court in Jakarta.

The Indonesian case shows that using specialised courts to circumvent bad judicial practice may be effective on a small scale, but the risk of creating inconsistencies with the overall judicial system looms large. When rolled out on a larger scale, specialised courts are likely to face the same challenges of integrity and professionalism as general courts. Anti-corruption courts are no short-cut or "route to quick reform" (Horowitz 2013). They may help jump-start a reform process but they cannot replace that reform process in itself. The challenges faced by the Indonesian anti-corruption courts and their frictions with the general court system emphasise that efforts to improve the handling of corruption cases must be part of broad, long-term judicial reform.

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