
Indonesia's Anti-corruption Courts and the Persistence of Judicial Culture

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Indonesia has long been notorious for having very high levels of public sector corruption, which became particularly prevalent during Soeharto's time in power (1966–98). Transparency International's Corruption Perceptions Index (CPI), perhaps the most commonly cited corruption-related survey, has consistently rated Indonesia among the world's most corrupt countries.¹ However, in more recent years, the CPI has appeared to signal an improvement in Indonesia's corruption levels. For example, in 2007, Indonesia was the 143th most corrupt country of 180 countries reviewed by Transparency International, but by 2015 had improved to 88th of 168, and in 2017 had slipped slightly to 96th of 180. Whether these improvements in perception actually reflect corruption reduction is a matter of some debate.² But any perceived or actual improvements are likely due in large measure to the successes of two institutions established after Soeharto: the Anti-corruption Courts (ACCs) and the Anti-corruption Commission (*Komisi Pemberantasan Korupsi* or KPK).

The KPK was established in 2003 as an independent body with power to, *inter alia*, investigate and prosecute high-level corruption cases. In 2004, an ACC was established in Jakarta as the sole feeder court for all KPK investigations and prosecutions. I argue that the ACCs represent somewhat of a paradox in terms of Indonesian judicial culture. On the one hand, the 2004 ACC was established to circumvent what has arguably become the most prominent aspect of judicial culture in most other

¹ Transparency International, www.transparency.org/.

² There is some debate about whether corruption levels have dropped in Indonesia. Some argue that perceptions might have improved simply because more investigations and prosecutions are occurring, but that corruption levels remain very high, particularly in Indonesia's regions. The Index is based on the views of analysts, business persons and experts about the extent of public sector corruption. See www.transparency.org/research/cpi/overview.

Indonesian courts: having corruption levels so high that they affect or even determine judicial processes and outcomes.³ The main design feature intended to reduce or avoid corruption in the ACC was the use of non-career judges (commonly called 'ad hoc' judges in Indonesia) to work alongside career judges in ACC cases. The main presumption here was that career judges are likely to be part of well-established corrupt networks through which bribes are extorted from defendants to ensure a light sentence or an acquittal (Satuan Tugas Pemberantasan Mafia Hukum 2010; ICW 2001; Fenwick 2008). Importantly, as initially conceived, there were to be three non-career judges and two career judges on each five-judge panel, so that non-career judges would outnumber career judges in all ACC cases. If a decision in a case was split along non-career and career judge lines, then the career judges would hold sway. Of course, having 'clean' ACCs is particularly important in the broader so-called 'fight' against corruption that has continued since Soeharto's fall. If corruption trials are themselves marred by corruption, successful prosecutions for corruption will be unlikely, providing near immunity for 'corruptors' and the judges who protect them.

Though various challenges to the initial institutional design of the ACCs have threatened their ability to resist this culture of corruption, the ACCs have retained these design aspects, at least in most cases. And, while some ACC judges, including some of its non-career judges, have been caught red-handed taking bribes themselves, the ACCs arguably have a reputation for integrity that is no worse than most other judges working in Indonesia's courts.

On the other hand, the ACCs frequently convict defendants – particularly in KPK-prosecuted cases, where the ACCs have issued guilty verdicts in 100% of cases.⁴ This is widely regarded in Indonesia as a 'success', attributable to the ACCs having a majority of non-career judges on each panel. However, this conviction rate has led some commentators, both foreign and Indonesian, to question the objectivity and

³ While corruption is said to be rampant in most Indonesian courts, it bears noting that complaints about corruption are rarely heard in relation to Indonesia's religious courts, discussed in Huis, this volume.

⁴ Other civil law countries have similarly high conviction rates, with the conventional explanation for this being that various safeguards exist to prevent cases reaching trial in the absence of very strong evidence, including that prosecutors should themselves also consider and present evidence that supports the defendant's innocence. However, this rarely happens in Indonesia and, indeed, as mentioned below, once a suspected perpetrator is formally named a 'suspect', the KPK cannot drop the case, even if they discover exculpatory evidence.

impartiality of the ACCs, and even to ask whether the ACCs are even performing a 'judicial' function – that is, to rigorously examine the evidence put before them to determine whether it supports a finding of guilt. It is possible to speculate that these judges are in fact responding to public opinion, which, for reasons considered below, holds that a defendant brought before the courts is surely guilty. If the defendant is acquitted, then the general public are thought to presume that something improper must have occurred, such as the payment of a bribe to secure that acquittal. It is arguable that this apparent sensitivity to public opinion is also becoming increasingly part of Indonesia's judicial culture more broadly, which hardly bodes well for the rights of defendants and the rule of law. Nevertheless, in some cases it appears to have a mitigating effect on the judicial culture of corruption.

This chapter discusses the background to the establishment of the ACCs, the statutory powers they have been granted, their functions and workings, and their place within the broader judicial system. As this chapter demonstrates, the legal and institutional frameworks within which the ACC initially operated in 2003 have since undergone significant change – most notably, with the establishment of thirty-three new ACCs, so that all Indonesian provincial capitals now have one. This has brought real challenges to the way that the ACCs function that have significant potential to undermine their future efficacy. I conclude by discussing how these courts have been shaped by, and themselves shape, judicial culture in Indonesia.

It is impossible to discuss the ACC without also considering the role and performance of the KPK, which investigates and prosecutes many of the cases the ACCs decide. For this reason, I begin with a brief description of the background to the establishment of the KPK.

The Establishment of the KPK and the ACC

During Soeharto's authoritarian rule, corruption was very prevalent in government, and a significant portion of illicit funds made their way to Soeharto himself, his family and the members of his inner circle. Soeharto alone is estimated to have creamed somewhere between \$USD 15–35 billion during his rule (Colmey and Liebhold 1999). Corruption was rampant in underfunded government institutions, including the courts (Butt and Lindsey 2011), which needed to seek external revenue streams in order to function. Corruption was also prevalent among underpaid

government officials, many of whom participated in what has perhaps best been described as the 'Soeharto franchise' (McLeod 2000). Unofficial payments and kickbacks could be received with impunity, provided that a proportion was passed up through one's superiors (Goodpaster 2002). The courts were particularly bad, with prominent lawyers likening them to auction houses, where law and legal argument mattered little, if at all (Goodpaster 2002). Dan Lev was an important scholar who identified the dramatic increase in judicial corruption under Soeharto, and its various egregious consequences.

With Soeharto's fall came the dismantling of the pillars of his authoritarian system. Many commentators and politicians genuinely thought that Indonesia would disintegrate or Balkanise unless a meaningful and genuine programme of broader governance reform was achieved (Crouch 2010; Horowitz 2013). It was in this political context that important changes were made to Indonesia's anti-corruption legal and institutional framework; the idea for an independent anti-corruption commission with real power crystallised; and preparations for its establishment commenced.

It bears noting that Indonesia had certainly experienced no shortage of anti-corruption commissions and agencies – even during the Soeharto period (Assegaf 2002). But most were just public relations exercises to quell public anger after media reports of government corruption (Hamzah 1984), comprising task forces of existing police and prosecutors. The genuineness of the concern of many of these task forces to pursue corruption case was, quite rightly, called into question. Police and prosecutors had long been notorious for accepting bribes to drop cases, including corruption cases, and it became widely believed that many judges would issue a light sentence, or even acquit, in return for a bribe. Collectively, along with many lawyers, these officials form part of what Indonesians call the 'court mafia' (mafia peradilan).

Even when these task forces did seek to pursue allegations of corruption, including within Indonesia's courts, law enforcement institutions tended to close ranks around their embattled employees. This was widely seen by many as an attempt by senior law enforcers to protect the patronage networks of which they were part and from which they personally benefitted. A stark example was the pushback against the Joint Investigating Team for the Eradication of Corruption (*Tim Gabungan Pemberantasan Tindakan Korupsi*, or TGPTK), which was established in 2000 as a 'stop-gap' measure until the KPK could be

formed. Its purpose was to help with difficult-to-prove corruption cases, but only by coordinating investigations and prosecutions that ordinary police and prosecutors conducted. It could not investigate or prosecute on its own initiative (Assegaf 2002).⁵ When the Team began investigating allegations that Supreme Court judges had received bribes in return for favourable decisions, the judges responded by challenging, in the Central Jakarta District Court, the jurisdiction of the Team to investigate them. They were successful, albeit on highly dubious legal grounds, and the investigation into them was declared invalid. The judges also sought, before their brethren on the Supreme Court, a judicial review of the government regulation which established the Team. Again, they were successful despite questionable legal arguments. The Supreme Court invalidated the regulation, thereby disbanding the Team.⁶

And so, with what appeared to be the first genuine intentions to combat corruption for many decades, if not in Indonesian history, the KPK and the Jakarta ACC were born through passage of Law 30 of 2002 on the KPK. Both institutions were strong and independent in design. However, the Law did not require the KPK to handle *all* corruption cases; ordinary police and prosecutors continued handling them too. This was arguably a necessity; as a new institution, with limited resources, both human and budgetary, the KPK would likely have been overwhelmed if given responsibility for pursuing all corruption cases. It has handled, and continues to handle, a relatively small proportion of all corruption cases. In the period 2004 to 2011, for example, Indonesia's ordinary public prosecutors prosecuted almost 8,000 cases, while the KPK prosecuted around 230 (Butt 2012).

Perhaps the most significant feature of the KPK's introduction was the exclusion of ordinary police and prosecutors from handling serious corruption cases. As mentioned, their involvement had made effective pursuit of corruption cases difficult for many decades. The KPK Law itself explicitly recognises that the previous involvement of ordinary police, prosecutors and judges in handling corruption cases had contributed to the failure of previous anti-corruption efforts. The KPK has its own investigators and prosecutors and its primary task, at least concerning 'law enforcement', is

⁵ Ultimately, however, the Joint Team was able to complete investigations leading to prosecutions in only around ten percent of the cases submitted to it: Assegaf, 2002, 135, leading the Head of the Team, former Supreme Court judge and respected reformist Adi Andojo Soetjipto to eventually resign in frustration: *The Jakarta Post* 2001.

⁶ For a full discussion of this case, see Butt and Lindsey 2010.

investigating and prosecuting serious corruption cases, leaving run-of-the-mill cases to general police and prosecutors. More specifically, the KPK can initiate its own corruption investigations and prosecutions in cases that

1. allegedly involve law enforcers (that is, police, prosecutors or judges) and state officials, or people who have conspired or collaborated with law enforcers or state officials to engage in corruption;
2. draw the attention of, and disturb, the community; or
3. involve a loss to the state of at least Rp. 1 billion.⁷

More controversial has been the power of the KPK to take over existing corruption investigations and prosecutions if

- the KPK receives a report or complaint about police or prosecutors failing to pursue a case or protecting the real perpetrator;
- a corruption investigation or prosecution stalls for no good reason, is marred by corruption itself, or is interfered with by the executive, legislature or judiciary; or
- any circumstance arises that, according to police or prosecutors, makes a particular corruption case difficult to handle.⁸

These features of institutional design appear to have been effective, at least if successful prosecutions are used as a measure of success. Against the expectations of most, in the fifteen years since its establishment, the KPK has fearlessly and successfully prosecuted very high-profile figures. These include a relative⁹ of former president Susilo Bambang Yudhoyono (SBY) and senior officials from SBY's political party, the Democrat Party, including its former treasurer Muhammad Nazaruddin (who received a four-year and ten-month sentence in 2012, extended to seven years by the Supreme Court in 2013); former party Deputy Secretary General Angelina Sondakh (sentenced to four and a half years in 2013, increased to twelve years by the Supreme Court later that year, then reduced to ten years on reconsideration (PK) appeal in 2015); former Sports Minister Andi Mallarangeng (who received a four-year jail sentence in 2014); and former party Chairperson Anas Urbaningrum (sentenced to eight years in 2014, and increased to fourteen years by the Supreme Court in 2015)

⁷ Art. 11 of the KPK Law.

⁸ Arts. 8–9 of the KPK Law.

⁹ In 2009, Aulia Pohan, a former Bank Indonesia deputy governor, was convicted for his role in disbursing around \$10 million from the Indonesian Banking Development Foundation for improper purposes: Crouch 2010: 72–3.

(Movanita 2015; Gabrillin 2016; *Hukumonline* 2013b). In 2013, serving Chairperson of the Constitutional Court, Akil Mochtar, was convicted and sentenced to life imprisonment for taking bribes to fix the outcome of cases (Rahmi 2014). Another Constitutional Court judge, Patrialis Akbar, was also successfully prosecuted and sentenced to eight years' imprisonment. Setyo Novanto, speaker of the national parliament, was convicted in 2018 for receiving money earmarked for an electronic identity card system (Cochrane 2018). Many other ministers and former ministers, other senior national party officials, legislators, governors, mayors and regents have also been tried and convicted (Rastika 2013; Kompas 2014).

The KPK has achieved these prosecutions despite very strong push-back from most of those it has pursued, or their associates. In both 2009 and 2014, for example, police arrested three of the KPK's five commissioners, effectively hobbling the KPK for several months and forcing it to drop some investigations (Butt 2012, 2015). These arrests were made based on obviously manipulated evidence or trumped-up charges, apparently at the behest of senior law enforcers who themselves were under investigation.

For example, in 2014, after newly elected President Joko Widodo announced his intention to appoint Commander General Budi Gunawan as police chief, the KPK revealed that it was investigating Gunawan for corruption and urged Widodo not to appoint him. The police retaliated by charging all KPK Commissioners with various offences. These charges were not supported by convincing evidence, raising speculation that police had fabricated them, as they had in 2009 (Butt 2012). KPK Chairman Abraham Samad and well-respected human rights lawyer and anti-corruption activist, Bambang Widjojanto, were forced to resign. This is because Article 32(2) of the KPK Law allows KPK commissioners to be suspended if they are 'named as a suspect' in a criminal case. While this provision was apparently included in the KPK Law to protect the KPK's reputation if one of its commissioners was suspected of wrongdoing, it hands enormous power to police. Faced with a KPK investigation into one of their own, the police can and have simply charged a KPK commissioner with an offence. This will, at worst, stall the investigation and, at best, result in it being dropped altogether.

National parliamentarians, dozens of whom the KPK has also pursued, continually threaten to take away the KPK's powers, reduce its budget and even disband it. Most notable has been the threat to remove the

KPK's power to wiretap without a warrant from a judge (*Hukumonline* 2013i). The KPK commonly reports that wiretaps are crucial to the success of KPK investigations and that it routinely relies upon them for successful prosecutions. One fear is that if the KPK is forced to seek judicial pre-approval to wiretap, then corrupt judges might 'tip off' those under investigation about the wiretap in return for a bribe. If the suspect is forewarned, then the KPK is unlikely to obtain any admission or useful evidence from any ensuing recorded conversation.

Key figures in the national legislature have also attempted to discredit the KPK. A recent example of this is the response of the national parliament (DPR) to the KPK's investigation of the so-called 'e-KTP scandal'. According to the KPK, the case resulted in state losses of Rp. 2.3 trillion, making it the largest corruption scandal ever investigated by the institution (Firmanto 2017). The KPK alleges that all fifty-one legislators in DPR Commission II accepted kickbacks from project managers in 2010–12 in relation to the scheme, and, at time of writing, had indicted fourteen of them (Kompas 2017). The first person convicted was DPR speaker, Setya Novanto, who, as mentioned, was imprisoned for fifteen years for his involvement in the scandal.

In response, members of the national legislature sought to 'dig up dirt' on the KPK. In particular, they alleged that the KPK had misused its powers, manufactured key evidence and even mistreated witnesses and suspects. As part of this attempted smear campaign, key politicians launched a special inquiry into the KPK in April 2017, using its 'angket' power. The DPR has had this power for decades, which is defined, in Article 79(3) of Law 17 of 2014 on the MPR, DPR, DPD and DPRD (often called the MD3 Law), as the power to investigate

the implementation of a statute and/or government policy, related to an issue that is important, strategic and has a wide impact on the life of the people and the nation, which is suspected to violate the law.

In the context of DPR–KPK relations, it seems clear that the DPR wished to compel the KPK to attend investigations to give the impression that it was stronger than and superior to the KPK and, ultimately, to find a justification to disband it. Realising this, the KPK initially refused to meet with any members of the special committee. It did so for various reasons. Legally, the KPK argued that the DPR had no power to compel it

to attend. Politically, the KPK would undoubtedly have been reluctant to appear subservient to the DPR, whose members the KPK was investigating, and whose moral legitimacy was questionable, given that it is often rated as one of Indonesia's most corrupt institutions, if not the most corrupt, including by Transparency International (Indonesia Investments 2018).

Responding to the launch of the inquiry, in July 2017, the Forum for the Study of Law and the Constitution, along with a student and an academic, sought review of Article 79(3) before the Constitutional Court. These applicants asked for an order from the Court that Article 79(3) was unconstitutional unless interpreted to restrict the DPR to calling institutions that were part of the executive. They argued that the KPK, which by law is independent and free from government interference, was not subject to the DPR's *hak angket* power. However, the applicants were unsuccessful. The majority accepted that the KPK was part of the executive and that the KPK Law required that the KPK be independent in performing its functions. However, this did not mean that the KPK was immune from the *hak angket* process.

Three judges – I Dewa Gede Palguna, Suhartoyo and Saldi Isra – issued a joint dissent, and Maria Farida Indrati wrote her own dissent. The three-judge minority decided that KPK was not part of the executive. It could not, therefore, be compelled to attend investigation by the legislature. Indrati decided that the KPK was part of the executive but found that it was not subject to the *angket* process. For her, the KPK was not accountable to the head of the executive – the president – but rather only to the public, so it could not be called to account by the national legislature.

Even though the majority's views did not favour the KPK, it appeared to escape the controversy relatively unscathed. The special committee issued preliminary findings in September 2017, recommending that the KPK's operations be suspended. However, the committee eventually delivered a greatly watered-down list of recommendations on 14 February 2018. Ironically, one of the committee's findings was that the KPK had not done enough to improve Indonesia's corruption perception rating (KBR 2018).

The KPK's track record of successful prosecutions has traditionally been attributed to two main things. One is its high investigative and prosecutorial standards – at least relative to ordinary police and prosecutors. This, the KPK claims, is borne out of comprehensive training, stringent evidence handling and meticulous preparation, making conviction more likely. These high standards are necessary because the KPK

Law requires that the KPK must proceed to trial once it formally names an alleged perpetrator as a suspect. The second is that it has prosecuted all of its cases before specialised ACCs. It is to the establishment of these courts to which I now turn.

From Sole Jakarta ACC to Provincial ACCs

The 2002 KPK Law required the establishment of an anti-corruption (*Tindakan Pidana Korupsi* or Tipikor) court (ACC) to perform one function: hear corruption cases that the KPK prosecutes.¹⁰ While formally independent, structurally the ACC was a chamber of the Central Jakarta District Court, although it was not housed in the Central Jakarta Court complex, but rather was located in separate premises. As mentioned, a panel of five judges presided over each case, with a majority of them being non-career judges.¹¹ They are legal experts, such as lawyers who are hired as corruption court judges for a limited period. The non-career judges were joined on each panel by two career judges – that is, judges who had worked in at least one of Indonesia's general courts and had been certified by the Supreme Court for work on the ACC.

The rationale for having this ratio appears to have been at least twofold. On the one hand, the career judiciary was, on the whole, considered largely corrupt. Indeed, Fenwick describes the establishment of the ACC as an

[a]ttempt 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. (Fenwick 2008: 413)

It was presumed that having a majority of non-career judges, who were not part of the judicial corps, would improve the likelihood of corruption cases being decided on their merits, rather than being dictated by bribes, because they were 'less likely than career judges to be entwined in institutionalised corruption or to have divided loyalties' (Butt and Lindsey 2011: 208). Because career judges did not constitute a majority, the non-career judges would win the day if disagreement occurs along career and non-career lines. On the other hand, many non-career judges lacked the judicial experience to run trials and to write judgements. It

¹⁰ Article 53 of the KPK Law. The ACC was initially regulated in Articles 53–62 of the KPK Law.

¹¹ Article 58(2) of the KPK Law.

was, therefore, felt necessary to have career judges on these panels, too. However, having them as a minority appeared to implicitly recognise that reformers considered integrity more important than judicial experience.

Rights of appeals lay to a high anti-corruption court and from there to the Supreme Court, which both maintained this ratio of non-career to career judges. Strict deadlines for case handling were imposed. First-instance courts were required to deliver their verdicts within ninety days of the trial commencing. Appeal courts had sixty days and the Supreme Court ninety days.¹² These timelines were intended to reduce the possibility of backlogs of undecided cases accumulating, for which the Supreme Court was notorious. This backlog problem was thought to be particularly acute in high-profile corruption cases, which often languished, often to the advantage of defendants who remained free pending appeal.

As mentioned, between 2004 and 2010, the Jakarta Court maintained a 100 per cent conviction rate in around 200 cases. Even so, some anti-corruption activists complained that the ACC did not impose sufficient penalties upon those it convicted, some of whom it found guilty of causing very large losses to the state. For example, the Court has imposed life imprisonment only once, and has never imposed the death penalty for corruption, despite its availability. There is merit in this criticism about leniency, particularly in light of the strong political and legal rhetoric – including in the KPK Law itself – emphasising corruption as an ‘extraordinary crime’ (*kejahatan luar biasa*) and the importance of taking strong action against it. The ACC’s sentences are, however, conspicuously tougher than those traditionally issued for corruption by the general courts. For example, Indonesia Corruption Watch (ICW) estimated that the general court average sentence in corruption cases was just six months in the 2000s. But for the ACC, in 2008, the average was just over four years’ imprisonment (ICW 2009b). This had dropped to just over two years’ in 2016 and 2017 (ICW 2018).

Of course, not everyone sees this conviction rate, and the relatively higher sentences, as ‘successes’. Defence lawyers and their clients commonly complain that the KPK simply cannot have got it right in all these cases and that the presumption of innocence is being compromised somewhere along the way. According to them, it is simply inconceivable that the KPK could ‘get it right’ in every single case. Surely at least

¹² Articles 58(1), 59(1) and 60(1) of the KPK Law.

sometimes has made mistakes or the defendant has adduced counter-evidence that led the judges to doubt whether the KPK had proven the defendant was guilty to the Indonesian standard: ‘convincingly and legally’.¹³ After all, many of the lawyers hired by defendants to represent them are among Indonesia’s most highly regarded and successful. But this line has not got much traction yet in Indonesia, with many saying that corruption is such a big problem that some collateral damage can be justified.

One Indonesian legal expert, Professor Indriyanto of the University of Indonesia (who was a legal advisor for Abdullah Puteh, former Aceh governor, when he was tried before the ACC in the first case prosecuted by the KPK), has claimed that ACC judges are swayed by public pressure and the press to convict defendants, even in the face of unconvincing evidence of guilt (see Tapsell, this volume). In a similar vein, one lawyer who has appeared in several ACC trials claimed that, from his experience, the ACC was unfair and biased.¹⁴ He stated that ACC court judges did not look for the ‘truth’, as required by Indonesian law, but rather were more interested in establishing ‘guilt’. He claimed also that some of his clients had asked him to temper the vigour with which he represented them, fearing that putting up too much of a fight would cause them additional ‘problems’ during investigations and trials, and might result in an increased sentence.

As mentioned, this conviction rate is commonly explained as being a product of the KPK’s professionalism.

One ad hoc judge [indicated] that even though ad hoc judges and high public expectations to convict were important factors, the conviction rate was primarily due to the strong evidence presented by KPK prosecutors. As former Junior Attorney General for Special Crimes and KPK Commissioner for Enforcement (2003–7) Tumpak H. Panggabean put it, convictions were obtained because of “correct investigations, perfect cases files and sufficient evidence”. Former KPK chairman Taufiqurrahman Ruki (2003–7) explained that the KPK was wary that losing a case would undermine public confidence in the KPK and thus put extra effort into collecting three to five pieces of evidence to present before the Court, instead of the legally required two, to ensure conviction. To these ends, the KPK invested heavily in training its investigators and prosecutors, encouraged cooperation between investigators and prosecutors of different professional backgrounds and allocated more resources to case-management than the Attorney General’s Office (Butt and Schutte 2014: 607–8).

¹³ Article 191 of the KUHAP.

¹⁴ Interview with advocate, Jakarta, 15 July 2007.

Nevertheless, the newly appointed ACC non-career judges complained about receiving insufficient institutional and budgetary support, particularly in its early years.

Tipikor Court judges had no access to secretarial and only minimal janitorial support and were initially required to pay for stationary from their own pockets. Worse, ad hoc judges were not paid for one year after their appointments. Tahyar describes how the presidential decree allocating ad hoc judges a monthly salary of Rp. 10 million (about US\$ 1000) took one month to travel from the State Secretariat to the Supreme Court – a distance of around one kilometre (Butt and Schutte 2014: 607, citing Tahyar 2010).

In 2009, the national parliament issued Law 46 on the ACC, which required the Supreme Court to establish ACCs in the general courts located in each of Indonesia's thirty-four provincial capital cities.¹⁵ The only exception is Jakarta, which has ACCs in each of its municipalities, again with jurisdiction over the same area as their corresponding district courts (Article 4). These new ACCs have now been established and have exclusive jurisdiction over corruption and money laundering cases that occur within the physical jurisdiction of their district court (Articles 3, 35). Like the Jakarta ACC, they were designed to have a majority of non-career judges serving on each panel.¹⁶ However, ACC panels can now be either three- or five-judge. Critically, ordinary prosecutors must now use these courts, rather than the ordinary general courts, to prosecute in corruption cases. Both the KPK and ordinary prosecutors therefore appear there, though they continue to pursue their own cases, largely independent of each other.

The national parliament was moved to issue this statute by a decision of Indonesia's Constitutional Court, in which the 'two-track' system for resolving corruption cases was declared to violate the constitutional principle of legal equality (Article 28D(1) of the Constitution).¹⁷ As mentioned, the KPK handled only the corruption cases it initiated or took over from the police or prosecutors, and its cases were decided by the ACC, which, as discussed below, could be expected to reliably convict. Cases handled by the general courts (which were brought by ordinary prosecutors, usually after police

¹⁵ Article 3 of 2009 ACC Law.

¹⁶ Article 4 of 2009 ACC Law.

¹⁷ Constitutional Court Decision 012-016-019/PUU-IV/2006. The Constitutional Court is discussed generally in Roux, this volume; see also Butt, Crouch and Dixon 2016.

investigations) would result in conviction in only 50 per cent or so of cases. While the Constitutional Court did not mention these differing conviction rates in its decision, it did point to several differences in the KPK Law that made it easier for the KPK to investigate and prosecute corruption cases, compared with ordinary law enforcement institutions, such as to wiretap and record conversations, issue travel bans, block accounts, suspend transactions and seize evidence without prior judicial approval.¹⁸

Also not mentioned in the Court's decision, but perhaps implicit in its thinking, was that every person named as a suspect by the KPK had ultimately been convicted at trial. Relevant here is that the KPK lacks one power that ordinary police and prosecutors have – to issue Cessation of Investigation Orders (*Surat Keputusan Penghentian Penyidikan*, or SKPP). Article 40 of the KPK Law provides that once the KPK formally names a person as a suspect (*tersangka*), it cannot drop the case. This restriction was intended to prevent the KPK from ceasing investigations in questionable circumstances, as had police and prosecutors in many previous cases. They did so most notoriously in the case against Soeharto for corruption, when they used claims that the former president's health was failing, to justify dropping all charges against him. However, being named as a suspect became synonymous with guilt, because every person named as a suspect was ultimately convicted.

An optimist might applaud the expansion of the ACC network, particularly if the 'success' of the Jakarta ACC could be replicated across Indonesia. Indeed, NGOs had initially pushed for ACCs to be established in all provinces, though importantly, they also wanted them kept separate from the existing judiciary, attributing the failure of Indonesia's commercial courts to it forming part of the corrosive general courts (LeIP et al. 2002). Regional ACCs might result in convictions of subnational officials that might not have been possible in the general courts in those regions, or in the Jakarta ACC. This is because, as mentioned, non-career judges still formally 'prevail' in regional ACCs, just as they do in the Jakarta ACC. Even cases brought by ordinary prosecutors, then, are decided by non-career majority panels, reducing the potential for 'justice mafia' collaboration.

Some commentators have put forward more sinister explanations for the regional ACC model established in 2009. They have suspected that

¹⁸ Articles 12 and 47 of the KPK Law.

parliamentarians established these new courts as part of a deliberate strategy to weaken Indonesia's anti-corruption framework, because they feared that the KPK and ACC were becoming too powerful. After all, many parliamentarians were either under KPK investigation themselves or be a political party whose members were under investigation. Having corruption trials in regional areas makes them more difficult to monitor, particularly by national-level NGOs and the KPK. Improper interference in proceedings thereby becomes more feasible. And allowing general prosecutors to prosecute in the ACCs, even the Jakarta ACC, might allow defendants to buy their way out of trouble – at least in cases the KPK does not pursue. Potentially, then, the work of the KPK could be undermined despite its popularity, without directly attacking it.

There are various weaknesses in this explanation. One is that if the national parliament had wanted to hobble the KPK's efforts indirectly by targeting the ACC, it could have done so much more effectively by choosing a different strategy. The Constitutional Court decision that prompted the 2009 ACC Law gave the national legislature a three-year deadline to enact a new statute on the ACC that did not establish a two-track system. If that deadline was not reached, then the statutory basis for the ACCs that existed at that time would automatically have become invalid, meaning that the ACC would no longer have a legal basis under which it could perform its functions. If this deadline had been missed, then the Jakarta ACC would probably have needed to close down, leaving the ordinary courts to regain exclusive jurisdiction over all corruption and money laundering cases. In this context, it would have been much easier for the national parliament to have simply done nothing, and then to have blamed the Constitutional Court for the ACC's demise. It is unclear precisely why the national parliament did not take this course, but one can surmise that it would have drawn significant public and press criticism, given that, at that time, the KPK and ACC were among the most publicly popular institutions in Indonesia, and the government appears to have become accustomed to complying with decisions of the Constitutional Court as a matter of course (Butt 2015).

Assessing the Regional ACCs

Regardless of the true motivations for regionalisation, in 2011, in one of the first cases brought by an ordinary prosecutor before the Jakarta ACC, the court issued its first acquittal, apparently due to errors that prosecutors made in presenting their case (Butt 2011a). Several further acquittals followed soon thereafter. Although ACC case disposition statistics are

difficult to obtain, in the first year these regional ACCs heard 466 cases and acquitted in 71 of them. Although acquittals do not necessarily reflect judicial decrepitude, in Indonesia this news made headlines and was perceived as an indication of impropriety, as discussed in more detail below.

Since regionalisation, the ACCs have been under almost continuous threat of reduced efficacy for reasons both external and internal to them. Internally, ACC judges have become embroiled in corruption scandals themselves, with several of them caught red-handed by the KPK when receiving bribes, and others being criticised for acquitting defendants. The Surabaya ACC, for example, has made headlines for acquitting more defendants than any other. Nineteen of these acquittals were issued in the first four months of the court's existence.¹⁹ The Samarinda ACC also received criticism for acquitting fourteen regional parliamentarians from the Kutai Kartanegara DPRD in four days. The Semarang ACC, too, has been targeted for acquitting, with one of its judges, Lilik Nuraini, even being punished by being transferred to another court on the recommendation of the Judicial Commission. Nuraini had chaired panels that had acquitted in at least six cases (Kompas 2012b; Parwito 2012). (As argued below, however, acquittals alone are a poor indication of judicial performance and less emphasis should be placed on them.)

Worse, in August 2012, the KPK arrested Semarang ACC non-career judge Kartini Juliana Magdalena Marpaung for allegedly receiving a bribe. According to media reports, she was caught red-handed receiving around Rp. 150 million (US\$15,806) from Heru Kusbandono, a ACC judge from Pontianak, West Kalimantan, who was acting as a 'case broker' for a matter the Semarang ACC was deciding and delivered the money to Kartini. The media named Sri Dartuti as the person who gave Heru the bribe to pay to Kartini. Sri Dartuti is the younger sister of the former speaker of the Grobogan Regional House of Representatives, Muhammad Yaeni. The KPK revealed to the press that it suspected that the payoff was intended to ensure the acquittal of Yaeni in a corruption case concerning the misuse of funds for maintenance of the Grobogan parliament's official cars in 2006–8, a case involving around Rp. 1.9 billion (Tempo 2012). Other judges on the panel hearing the case

¹⁹ According to some media reports, the Surabaya court has only twice handed down prison sentences exceeding five years (Surya Online 2012). Most sentences have been only one or two years (Ambarita 2012).

were also reported to have received bribes. In fact, *Tempo magazine* reported that one judge, Pragsono, in a meeting with the Supreme Court Chief Justice about the case, acknowledged being the first judge to meet with Heru in an effort to 'fix' the Yaeni case. Pragsono even admitted to protesting that the bribe was only Rp. 100 million and pushing Heru to increase it to 150 million (Tempo 2012). According to *The Jakarta Post*, Kartini had also acquitted four corruption defendants in other cases (*The Jakarta Post* 2012). As a result of these allegations of judicial impropriety, the KPK itself has asked the Semarang ACC to hand over particular cases to the Jakarta ACC for trial.

Critics of the regional ACCs appear to presume that these acquittals are, at least for the most part, indications of judicial impropriety and, to add weight to this claim, they point to the Semarang ACC judge bribery investigation. They also refer to research conducted by ICW which found that eighty-four career judges in fourteen ACCs had 'problematic' integrity, quality and administrative skills (*Hukumonline* 2012d). This assessment was based on the failure of most of these judges to comply with mandatory asset reporting requirements and on some of them having been reported to the Judicial Commission and Supreme Court for breach of the Judicial Ethics Code, including by continuing to work as lawyers and meeting with lawyers outside of court. In short, critics appear to assume that the acquittals in corruption cases are inevitably the result of a bribe paid by the defendant to one or more judges presiding over his or her case.

Some legal commentators, including former Constitutional Court Chief Justice Mahfud, criticised the ACCs, implying that they were making the problem worse, and called for them to be disbanded. And the then KPK Chairperson Abraham Samad said, 'I appreciate our many [anti-corruption court] judges who are good, but I cannot close my eyes to the many of our career judges who are bad' (Antara 2012). Another fear initially raised was that there was a shortage of non-career judges and that this would mean that ad hoc judges might no longer make up a majority on ACC panels. Of course, this would be a major backward step given that excluding career judges from important corruption cases was the main rationale for establishing the ACC in the first place.

While the corruption scandals involving ACC judges have significantly undermined the credibility of the ACCs and many of the decisions they issue, the precise extent of corruption within the ACCs is unclear, as it is for other Indonesian courts. It is quite possible that there has been some over-hysteria about this; it is by no means clear that the integrity of ACCs is any worse than other Indonesian courts. The KPK has ensnared judges

working in other courts, too. And most of these non-career judges were caught within a couple of years of the regional ACCs being established. Generally speaking, fewer corruption court judges have been arrested in more recent years.

Externally, the ACCs have been affected by recruitment problems, which have resulted in a shortage of non-career judges to serve on ACCs, leading some commentators to express fears that career judges might be forced to constitute the majority on ACC panels. Indeed, the ACC Law seems to permit a majority of career judges to sit on ACC trials. The chairperson of the district court housing the ACC is also the chairperson of that ACC (Article 9(2)). For each case, he or she determines whether the ACC panel will have three or five judges and the ratio of non-career to career judges on that panel. There must be either one or two non-career judges on three-judge panels and two or three on five-judge panels.

Some commentators have also expressed concerns about a lack of good-quality non-career judges. Of course, the ACCs can do little about this, given that non-career judge recruitment is primarily the responsibility of the Supreme Court. The Supreme Court has encountered significant difficulties in recruiting sufficiently qualified non-career judges to sit on regional ACCs ever since regionalisation (*Hukumonline* 2016a). There are several apparent reasons for this, including that the pool of qualified applicants appears to be small, especially in Indonesia's outer provinces, and that the budget allocation for recruitment has been too low (*Detik News* 2011b). NGOs such as ICW have argued that many of those recruited have highly dubious backgrounds, including because of their party affiliations, insufficient legal experience and questionable legal qualifications, and in some years have even complained that no credible candidates have been appointed (*ICW* 2015).

As for panel representation, the fears about non-career judges being outnumbered by career judges on most corruption court panels do not appear to have transpired. As part of my recent research, 1,050 corruption cases hosted on the Supreme Court's website were examined. Only around 5 per cent did not have non-career judges as a majority. A handful of cases had panels comprising only non-career judges. The acquittal rate of the ACCs has been about 10 per cent. As for concerns about the quality of decision-making, it is very difficult to determine whether ACC decisions are any better or worse than those produced by general courts – no comparative analyses have been produced.

There is almost no data upon which to assess the performance of these new ACC courts, much less any established measures to assess that performance in the Indonesian context. However, there are clearly much better indicators of judicial performance than conviction rates and sentences. Relying on conviction rates presumes that defendants are guilty if brought to trial, and that if they are acquitted then judicial impropriety was the cause. This presumption is, however, deeply flawed, for two main reasons. First, prosecutors may have put forward a weak case. Under Indonesian law, as elsewhere, defendants are presumed innocent until proven guilty. Though judges have scope to independently call witnesses, the prosecution is primarily responsible for proving the defendant's guilt 'convincingly and legally' (*secara sah dan meyakinkan*) – Indonesia's equivalent to 'beyond reasonable doubt'. If the prosecution fails to do so, then the defendant must be acquitted. The Supreme Court has made comments to a similar effect in defence of its acquittals in corruption cases:

It needs to be understood that not all cases brought before the Courts have enough evidence. In these cases, no one can force a judge to convict the defendant for any reason.²⁰

Second, evidence of guilt adduced at trial might not withstand in-court examination. A primary objective of trials in Indonesia, as elsewhere, is to scrutinise relevant physical evidence and witness testimony pointing towards guilt or innocence. At trial, the defence might successfully challenge the evidence upon which the prosecution's case is based. For example, the credibility of a key prosecution witness might deteriorate under cross-examination.

Furthermore, corruption is, generally speaking, more difficult to pursue than many other types of crimes – it is a 'secret crime, [usually] carried out by powerful and often sophisticated perpetrators intent on silencing potential witnesses ...' (Wagner and Jacobs 2008: 183, 18; Pearson 2001: 39). Evidence is, therefore, often difficult to obtain. Low conviction rates in corruption cases are commonplace in most countries – even developed states (ADB 2006). It may be, then, that a 10 per cent acquittal rate is low, especially given that general prosecutors now bring the vast majority of cases before these courts. Much research remains to be done, but all in all, the performance of the ACCs might not be as bad as initially expected.

²⁰ Hukumonline, 'MA Tantang ICW Uji Data Vonis Kasus Korupsi'.

Conclusion: The ACCs and the Pervasiveness of Judicial Culture

Indonesia's ACCs find themselves in a difficult position, almost a decade after their expansion. On the one hand, it seems clear that the public expects them to continue convicting, as does the KPK, which is perhaps the most publicly popular government institution in Indonesia today, given the progress it is making, at least in high-profile cases. However, this public pressure appears to significantly influence the ACCs' decision-making – that is, to push them to convict. This pressure is reinforced by the media criticism the ACCs face when they acquit defendants in corruption cases. However, to the extent that the ACCs succumb to pressure to convict as a matter of course, even when the circumstances of the case (such as weak evidence or a flawed indictment) point towards an acquittal, they cannot be said to be performing a 'judicial' function. That is, they are not objectively applying the law to the facts presented before them. Yet, without public support, the very existence of the ACCs is by no means certain: politicians would likely seek to abolish them or discredit them, because many politicians quite rightly anticipate that they might appear as defendants in them. The same thing that allows them to continue in existence also raises questions about their contribution to the rule of law.

Comparisons between the performance of ordinary law enforcers (that is, police and prosecutors) and the KPK on the one hand, and the general courts and the ACCs on the other, raise an important question: is it possible to insulate a single judicial institution from negative aspects of judicial culture prevalent in other courts? More specifically, has the ACC experiment – to keep important corruption cases from the general courts – worked? Unfortunately, there is presently insufficient data to definitively answer this question, much less any agreed-upon criteria upon which to judge success. If the higher conviction rate, and generally higher sentences (at least compared with the general courts), indicate a higher level of professionalism, then this might indicate that the experiment has been successful. But the continuing potential for career judge majorities on ACC panels and corruption scandals involving ACC judges themselves has led some commentators to speculate that the corrupt practices of career judges have in fact already infected some ACC non-career judges, taking Indonesia's anti-corruption drive 'back to square one', where corruption cases are, in essence, decided by judges willing to acquit for a bribe.

While it appears that the vast majority of trials take place with a majority of non-career judges on the panels, there is, of course, no guarantee that these judges are immune from the general judicial culture of corruption, thought to be prevalent among their career brethren. That several non-career judges have been convicted of accepting bribes confirms this, though it is important to note that this is not exceptional within Indonesia's judiciary.

It also bears noting that, from an institutional perspective, the establishment of the KPK and ACCs has never taken *all* aspects of corruption cases to the courts, even in cases the KPK initiated or took over from ordinary police. The initially intended insulation has not, therefore, been complete. This is because suspects have always been able to challenge the validity of their arrest or detention using the so-called pretrial hearing (*praperadilan*) process outlined in Articles 77–83 of the Code of Criminal Procedure. This has been loosely compared to the principle of *habeas corpus* in common law countries but is much narrower and more restricted. Importantly, a single judge hears the challenge in the general courts.²¹ Because pretrial hearings are decided by a single judge and determinations cannot be appealed, standards of decision-making are generally low, with outcomes notorious for lack of uniformity and predictability (Fitzpatrick 2008: 506). However, there is no right of appeal from a pretrial determination to a high court or the Supreme Court. If the *praperadilan* judge finds the arrest or detention to be unlawful, then the accused is released (Article 82(3)(a)).²²

Before 2015, the *praperadilan* process was not particularly contentious. If a defendant won at the pretrial stage, police or prosecutors could continue to pursue that suspect by recommencing their investigations or prosecutions. If, for example, a suspect was released after being illegally arrested without a warrant, police could simply obtain a warrant and re-arrest that suspect. However, this changed in early 2015 when police chief candidate Budi Gunawan, who faced KPK prosecution for corruption, challenged the legality of his being named a suspect by the KPK in *praperadilan* proceedings. This was controversial, because 'being named a suspect' is not a ground upon which *praperadilan* proceedings can be brought under the Code of

²¹ A decision must be reached within ten days of the application being made (Articles 78 and 82(1)).

²² A suspect or accused person can receive compensation for unlawful detention (Article 95). See also Articles 77(b) and 81. If an issue relating to arrest or detention is not raised in a pretrial hearing, courts usually refuse to allow it to be raised at trial.

Criminal Procedure. This decision was widely condemned as an illegitimate expansion of judicial power and as indicating judicial impropriety, though this was never proved. A few months later, the Constitutional Court expanded the matters that can be challenged in pretrial motions, to allow applicants to challenge the legality of being formally named a suspect by law enforcement officials.²³ While instinctively this appears to be a sound decision, it has been subsequently used by alleged corruptors to challenge their being named a suspect, successfully in some cases (*The Jakarta Post*, 12 May 2015).

This has had critical implications for the handling of corruption cases in Indonesia. In particular, it allows suspects to defend themselves before the general courts in the face of KPK investigation. Issues that may have been considered at trial by an ACC can now be judged by a single career judge. These include whether there was sufficient evidence upon which to proceed against the subject. Under Indonesian criminal law, a suspect cannot be arrested, or a defendant convicted, unless two pieces of legal evidence are produced (Butt 2008). Though the precise processes are yet to be confirmed, it appears that a general criminal court can now assess the strength of the evidence police claim to have against criminal suspects – including KPK commissioners – as a basis for charging them. Presumably, the court can order that charges be dropped if based on insufficient evidence.

Another issue that has been considered in *praperadilan* hearings is whether the KPK had jurisdiction to pursue the particular case. So, for example, in one *praperadilan* case, a judge decided that the KPK's investigations into the suspect were invalid because they were not conducted by seconded police but rather the KPK's internal staff (Assegaf 2015). Similar jurisdictional issues were successfully raised in the Budi Gunawan case itself. As Assegaf explains:

the court invalidated the KPK investigation on the grounds that Budi's alleged offence was not within the jurisdiction of the KPK. The KPK had accused Budi of accepting bribes paid by other police officers to secure higher and more prestigious postings. The court ruled that this type of corruption allegation could only be investigated by police or prosecutors. The KPK was then forced to hand the investigation over to the Attorney General's Office, which, in turn, handed it over to the police. They, unsurprisingly, dropped the case against one of their most senior and powerful officers. (Assegaf 2015)

²³ Constitutional Court Decision No. 21/PUU-XII/2014.

Assegaf argues:

The legal questions raised in this case are serious, and go to the core of the KPK's operations. Such questions require extensive discussion, with an opportunity for review by a higher court through an appeals process. A single court session that cannot be appealed is not enough. (Assegaf 2015)

In other words, very important matters of jurisdiction and evidence are now able to be decided by a single general court judge, who, apart from being a career judge and hence perceived to be more susceptible to bribery, is arguably easier to bribe than a panel of three judges. Despite the best efforts of reformers in the immediate post-Soeharto period, corruption – perhaps the centrepiece of judicial culture in Indonesia – remains a significant threat to judicial impartiality, the anti-corruption movement and, ultimately, the rule of law in Indonesia. In this regard, Dan S. Lev's scepticism of quick-fix reforms of the judiciary remains relevant today.