The rule of law and anti-corruption reforms under Yudhoyono: the rise of the KPK and the Constitutional Court

Simon Butt[1]

President Susilo Bambang Yudhoyono came to office at a pivotal time for rule-of-law and anti-corruption reforms in Indonesia. The two institutions at the forefront of these reforms were already established by the time he was inaugurated on 20 October 2004, but they had not been operating long and were still finding their feet. The first, the Constitutional Court, was established just one year earlier, on 15 October 2003. The second, the Corruption Eradication Commission (Komisi Pemberantasan Korupsi, KPK), had been working since mid-December 2003. The Jakarta Anti-Corruption Court (Pengadilan Tindak Pidana Korupsi, or Tipikor Court), which tried all of the KPK's defendants, handed down its first decision in March 2005, well after Yudhoyono took office.

During Yudhoyono's presidency, the Constitutional Court and the KPK firmly established themselves within a largely unaccommodating political environment, and then actively and professionally performed their functions, which have been critically important to overall post-Suharto reform. As we shall see, both institutions had a relatively slow start during Yudhoyono's first term, with the KPK choosing to target small fry and the Constitutional Court invalidating unconstitutional legislation. However, as Yudhoyono's second term commenced, both institutions became perceptibly emboldened. The KPK began to target powerful politicians, while the Constitutional Court adopted more aggressive decision-making practices, such as amending constitutionally questionable legislation rather than simply invalidating it.

Although the KPK and the Constitutional Court became very popular with the public, they also faced significant obstacles, put in their path mainly by those whose interests were adversely affected by their work. For example, several KPK commissioners were arrested by police or prosecutors who either were themselves under KPK investigation or appeared to act at the behest of others being investigated. The paucity of evidence to support these arrests led to speculation that the commissioners had been framed. Sections of the national parliament—many members of which had been investigated or prosecuted by the KPK—threatened to cut

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the KPK's budget and powers, and to reduce the potency of the anti-corruption courts. The Constitutional Court faced two efforts—one through a statute passed in 2011 and the other through a government regulation in lieu of law (Peraturan Pemerintah Pengganti Undang-undang, Perppu) issued by the president himself in late 2013—to rein it in and to ensure that allegations of judicial misconduct could not be handled internally. The court defended itself from both interventions by invalidating Yudhoyono's regulation and most of the statute.

Even though Yudhoyono came to office and was re-elected on a reformist platform, there is little evidence that he contributed much to the success of either the Constitutional Court or the KPK. He rarely stepped in to defend them when they came into conflict with powerful and resentful political players. When he did act, he usually did so late and under significant public pressure, perhaps when these institutions had already averted the real dangers they faced. Yet, there is also little evidence to suggest that Yudhoyono sought actively to undermine or weaken them, even when the KPK successfully prosecuted senior members of his own Democrat Party (Partai Demokrat, PD) and a member of his extended family for corruption. Neither did Yudhoyono retaliate, at least publicly, when the Constitutional Court invalidated the Perppu he issued in late 2013. There is also very little to suggest that Yudhoyono interfered in any Constitutional Court decision.

As with many other challenges facing his administration, particularly in its second term, Yudhoyono appeared to adopt a hands-off approach, allowing legal and anti-corruption reforms and controversies to be handled by others. While he faced significant criticism for doing so, as president, it was in fact his constitutional and statutory duty to refrain from interference, either to help or to hinder these institutions. Overall, his reticence created an environment in which both institutions could thrive, significantly enhancing rule-of-law and anti-corruption efforts in the country.

This chapter has six sections. I begin by describing the rise of the KPK as a major force in tackling corruption, and then the various setbacks it experienced as members of the political elite retaliated against its commissioners and tried to circumscribe its powers. The third section analyses Yudhoyono's relations with the commission. The fourth section describes the rise of the Constitutional Court as Indonesia's apex court for constitutional matters and, in particular, its posture of judicial activism. The fifth section summarises President Yudhoyono's attitude towards the Constitutional Court, noting his general readiness to accept court decisions and his reluctance to intervene in its affairs. In the concluding section, I return

to the question of Yudhoyono's role. I argue that while we cannot point to much evidence of active or positive support for these two institutions by Yudhoyono, his reluctance to intervene against them at least gave them the space to develop independent authority and public support. Whether the president's reluctance to intervene was driven by a sense of constitutional propriety or by his well-known sensitivity to public opinion, however, remains an open question.

THE KPK AND ANTI-CORRUPTION REFORM

Indonesia is notorious for having high levels of corruption. Figure 10.1 illustrates Indonesia's progress over the course of Yudhoyono's presidency, at least from the perspective of Transparency International's ranking of countries according to their levels of corruption. It is commonly said that Yudhoyono was re-elected on an anti-corruption platform in 2009, but that his second term was fairly disappointing from an anti-corruption perspective. The Transparency International figures do not support this view. During Yudhoyono's first term, Indonesia's ranking on the Corruption Perceptions Index rose from 133 to 111 among the 150 or so countries surveyed. During his second term, the country's ranking went slightly backwards to 118 in 2012 and 114 in 2013, but then rose to 107 in 2014, among roughly 180 countries surveyed. Despite the backsliding in 2012 and 2013, Indonesia's average ranking was 110 during the president's second term (2009–14), compared with 130 during his first term (2004–09).

As we shall see, Yudhoyono's second term witnessed the 'rise' of the KPK, as it began to target relatively senior and politically well-connected people suspected of corruption, and as the attempts of some of those suspects to retaliate against the commission were publicly exposed. During this period, Yudhoyono was inconsistent in his stance towards the KPK, on some occasions publicly chiding it but on others lending it his support.

The KPK was established with the jurisdiction to investigate and prosecute serious corruption cases and to take over corruption cases from police and prosecutors in some circumstances. It was also given special powers to wiretap, block accounts, impose travel bans and the like, usually without judicial approval. Importantly, the KPK could not drop a case once it had formally named someone as a suspect. This was to prevent it from dropping cases in suspicious circumstances (Fenwick 2008). The KPK itself prosecuted all of its own cases before the sole Tipikor Court in Jakarta, established as a chamber of the Central Jakarta District Court in 2004.

The establishment of the KPK and the Tipikor Court outside the ordinary law enforcement apparatus reflected the fact that the ordinary police, prosecutors and courts 'had not been effective or efficient in eradicating corruption'.[2] It was presumed that this was because those law enforcers were themselves corrupt (ICW 2001; World Bank 2003) or lacked the forensic skills to investigate complex financial crimes. Although the KPK and the Tipikor Court were formally independent of these law agencies, however, some KPK investigators and prosecutors were on secondment from them.

During its first few years the KPK chose easily winnable cases, targeting cases supported by clear evidence and focusing on relatively insignificant perpetrators, such as regional officials and civil servants. To the frustration of anti-corruption reformers, it avoided pursuing some of Indonesia's more notorious corruption cases, including those arising out of bank bailouts after the Asian economic crisis of 1997–98 and those involving Suharto and his inner circle. Nevertheless, this strategy allowed the KPK to establish and maintain a 100 per cent conviction rate in the cases it did prosecute.

Two factors are commonly cited to explain the KPK's high conviction rate. The first is that, unlike most Indonesian courts, the Tipikor Court had five rather than three judges presiding over each case, a majority of them ad hoc judges, mostly lawyers. The rationale for recruiting judges from outside the career judiciary was, as mentioned, that many career judges were considered corrupt. The second conventional explanation for the KPK's success was that it was better resourced, and its investigators better trained, than the ordinary police.

From 2009 the KPK began to pursue more powerful political figures, soon after Antasari Azhar became chairperson in December 2007. The KPK's more noteworthy scalps during this second period included a deputy governor of the central bank, several parliamentarians and businesspeople, and even a Constitutional Court chief justice.

- Miranda Gultom was sentenced to three years' imprisonment for bribing members of parliament's Finance Committee to support her candidacy for the position of deputy governor of Bank Indonesia. Nunun Nurbaeti, the businesswoman who distributed the bribes (in the form of traveller's cheques), also served time in jail, as did the 26 parliamentarians involved.

[2] Law 30/2002 on the Corruption Eradication Commission, Preamble, part (b).

- The chair of the Prosperous Justice Party (Partai Keadilan Sejahtera, PKS), Luthfi Hasan Ishaaq, was given a 16-year sentence for attempting to manipulate Indonesia's beef import quota.

- The head of the energy regulator (SKK Migas), Rudi Rubiandini, was sentenced to seven years in jail for fixing tenders and manipulating the formula for determining the price of gas.

- Golkar parliamentarian Zulkarnaen Djabar was sentenced to 15 years' imprisonment for rigging two Ministry of Religion tenders for the procurement of Korans, on which he received kickbacks.

- Constitutional Court Chief Justice Akil Mochtar was given a sentence of life imprisonment for taking bribes to fix local election cases.

Famously, some of the KPK's targets were close to Yudhoyono himself, including several members of his own party and a relative by marriage.

- Senior members of Yudhoyono's party, PD, were found guilty of corruption in connection with the construction of a sports complex at Hambalang, West Java. Sports Minister Andi Mallarangeng was given a four-year sentence (appeal pending), party treasurer Muhammad Nazaruddin was given a jail term of almost five years (increased to seven years by the Supreme Court on appeal) and party chair Anas Urbaningrum was sentenced to eight years (appeal pending).

- Aulia Pohan, whose daughter is married to Yudhoyono's oldest son, was convicted for his role in disbursing around $10 million from the Indonesian Banking Development Foundation for improper purposes (Crouch 2010: 72–3). The former Bank Indonesia deputy governor was sentenced to four years and six months in jail for corruption, reduced on appeal to four years, then by the Supreme Court to three years; he was released on parole in 2010 after serving two years of his sentence (Sofyan 2010).

SETBACKS FOR THE KPK

The KPK's change in strategy in 2009 to target more prominent Indonesians with strong political connections invited stronger pushback. In particular, its decision to exercise its mandate to pursue law enforcement officials made it vulnerable to retaliation from police and prosecutors. Under article 2 of Law 30/2002 on the Corruption Eradication Commission (the

KPK Law), apparently designed to protect the KPK's reputation, a KPK commissioner who is formally charged with a crime can be suspended immediately by the president, and can be dismissed once the case goes to trial—even without being found guilty of any crime. This gives police and prosecutors enormous power to affect the composition of the KPK, because they can charge and prosecute commissioners unilaterally.

In early March 2009, police and prosecutors used these powers to suspend KPK chairperson Antasari Azhar, who was suspected of ordering a murder, and then to remove him when the case went to trial. Later that year, two other KPK commissioners—Chandra Muhammad Hamzah and Bibit Samad Rianto—were arrested and charged on vague 'abuse of power' grounds. As it emerged that the police could not provide solid evidence of any wrongdoing by Bibit and Chandra, raising suspicions they had been framed, public support for the KPK—and public disdain for those who were trying to discredit it—grew. These suspicions were confirmed by wiretapped conversations between senior law enforcement officials and suspects the KPK was investigating at the time. The conversations were aired during Constitutional Court proceedings, broadcast live on television, to decide whether removing the commissioners from office before they had been convicted of a crime breached the presumption of innocence. The court found that Bibit and Chandra had been framed and ordered their release; it also found that their right to the presumption of innocence had been breached.

Antasari was not so fortunate, however. After a highly irregular trial at which prosecutors could provide no credible evidence of his guilt, he was convicted of ordering the murder of Nasruddin Zulkarnaen, a businessman. According to prosecutors, the victim had blackmailed Antasari after discovering that the commissioner and Nasruddin's wife had had a brief sexual encounter. Though the trial smacked of a set-up to remove Antasari, under whom the KPK was targeting bigger fish, his conviction was subsequently upheld. Unlike Bibit and Chandra, who enjoyed significant public support, Antasari had never been popular with reformists, because of the allegations of corruption surrounding both his appointment as KPK chair and some of the cases he had handled in previous prosecutorial posts (Handayani, Kustiani and Nilawaty 2009).

Around the same time, the KPK had begun to investigate another category of big fish: national parliamentarians. They had even more power to retaliate than the law-enforcers. Because the KPK and the Tipikor Court are creatures of statute, parliament can amend or

revoke the statutory bases upon which both institutions exercise their powers. The main avenue of legislative push-back chosen by the parliamentarians was Law 46/2009 on the Anti-Corruption Court, which was being deliberated as the scandals surrounding the KPK commissioners were unfolding and as the KPK was investigating several serving and former parliamentarians. Law 46/2009 was drafted in response to a 2006 decision in which the Constitutional Court had held that having a dual-track system for handling corruption cases violated citizens' constitutional right to equal treatment before the law. At the time, the KPK pursued some corruption cases through the Tipikor Court, while the bulk of cases were pursued by 'ordinary' (non-KPK) police, prosecutors and judges through the general courts, under different procedures. This dual-track system resulted in very different conviction rates: 100 per cent in the case of the KPK and Tipikor Court but just 50 per cent in the case of the general courts (Diansyah 2009).

The new law required the Supreme Court to establish regional corruption courts—one in the district court of each provincial capital—by October 2011. Together with the original Tipikor Court in Jakarta, these courts now hear all corruption and money-laundering cases, thereby removing the dual-track system that had concerned the Constitutional Court. The new courts have been strongly criticised, however, for their high acquittal rates. Indonesia Corruption Watch claims, for example, that the regional Tipikor courts acquitted as many as 71 defendants between December 2010 and August 2012.[3] A handful of Tipikor court judges have themselves been convicted of taking bribes to fix bribery cases, and several more were being investigated at the time of writing.[4]

The perceived poor performance of the regional corruption courts has led to calls by some prominent figures for their disbandment.[5] In my view, however, such calls are misguided. Acquittal and conviction rates are, in themselves, poor measures of judicial performance and presume that anyone who is tried must be guilty. Also, although it would be highly desirable to have more professional and less corruption-prone Tipikor court judges, judicial integrity

[3] 'Vonis bebas pengadilan Tipikor' [Corruption court acquittals], *Kompas*, 2 August 2012.
[4] 'KPK tahan eks Hakim Pengadilan tinggi Jawa Barat' [KPK detains former West Java High Court judge], *hukumonline.com*, 8 August 2014; 'KPK tahan eks Hakim Tipikor Bandung', [KPK detains former Bandung Corruption Court judge], *hukumonline.com*, 14 August 2014.
[5] 'Pengadilan Tipikor daerah diusulkan dibubarkan' [Regional corruption courts proposed to be disbanded], *Tempo*, 5 November 2012; Aritonang (2012).

has long been a problem across the entire judiciary (Pompe 2005; Butt and Lindsey 2010), not just the Tipikor courts.

Law 46/2009 makes two critical changes to Indonesia's legal framework for handling corruption cases. First, it gives district court chairpersons the power to appoint a majority of career judges to each five-judge panel if the court lacks sufficient ad hoc judges. Given that the Supreme Court is having trouble finding qualified candidates to fill ad hoc judicial positions, career judges are now likely to constitute a majority on most panels. This change to the law has implications for conviction rates, because the ad hoc judges are generally considered more professional and less corruption-prone than the career judges. Recognising the scarcity of ad hoc judges, the new law also gives district court chairs the discretion to allocate three rather than five judges to cases in some circumstances. Despite this, many Tipikor courts still do not have enough ad hoc judges to handle cases. The Supreme Court estimates that it needs around 60 judges to fill all vacancies across Indonesia, but in 2013 it could find only one qualified candidate among the 289 candidates who had registered interest in becoming an ad hoc judge.[6]

The second change is that Law 46/2009 allows general public prosecutors to bring cases before the Tipikor courts. As Figure 10.2 shows, general prosecutors have always handled the vast majority of corruption prosecutions. This is because the KPK lacks both the jurisdiction and the resources to handle all corruption cases. Although it had around 200 investigators in 2013, it had fewer than 50 prosecutors (KPK 2013: 46). In fact, the KPK does not even have regional offices, meaning that it largely restricts itself to Jakarta-based prosecutions.

Unless the KPK is radically expanded, there seems little alternative to allowing general prosecutors to appear in the Tipikor courts, even though the professionalism of KPK prosecutors is widely considered a key factor in the Jakarta Tipikor Court's high conviction rate. Unfortunately, when Yudhoyono's term in office ended in 2014, most corruption cases were still being handled in much the same way as they had been before he was elected in 2004. Though the KPK has been both bold and strong in pursuing corruption among the higher echelons, most cases continue to be pursued by ordinary police, prosecutors and judges—the very people whose influence the KPK and the Tipikor Court were established to

[6] 'MA krisis hakim ad hoc Tipikor' [Supreme Court crisis of ad hoc corruption court judges], *hukumonline.com*, 30 August 2013.

circumvent. The KPK prosecutes only a small proportion of cases, and ad hoc judges constitute a majority on some, but probably not most, Tipikor court panels.

Perhaps fearing or under KPK investigation, some legislators and government officials have continued to try to curb what they call the 'excessive' powers of the KPK. For example, proposals have long circulated to remove the KPK's powers to investigate and prosecute, and to require it to obtain judicial permission to wiretap. Indeed, Law 46/2009 itself appears to anticipate this 'reform'; it does not mention the KPK at all, referring only to the powers of 'general' public prosecutors to prosecute before the Tipikor courts. This omission was not a drafting oversight (Dhyatmika et al. 2009; Wright 2009). These and other proposals to weaken the KPK's powers and lessen its impact continue to loom large.

YUDHOYONO AND THE KPK

Yudhoyono's popularity during his first term was partly due to his support for strong action against corruption, and partly a product of the spectacular prosecutions brought by the KPK. It is widely presumed that his resolve weakened during his second term, particularly after the KPK prosecuted, and the Tipikor Court convicted, his relative by marriage Aulia Pohan and members of PD. These scandals led to Yudhoyono's party being decimated as a political force at the 2014 legislative elections.

While this assessment is generally accurate, in fact Yudhoyono's support for the KPK during his first term was always qualified. For example, he publicly warned that the anti-corruption drive should 'respect the presumption of innocence' (Hotland and Taufiqurrahman 2006) and complained of the KPK's 'hyperactivity' in its investigations and prosecutions after it raided parliamentarians' offices.[7] In April 2008, in a speech to the National Law Convention, he said that the KPK should focus on preventing corruption rather than 'entrapping' citizens by 'taking advantage of their ignorance of laws and regulations on corruption' (van Klinken 2009). In early July 2009, as the Antasari, Bibit and Chandra sagas were unfolding, Yudhoyono said:

> Regarding the KPK, I must caution it. Power must not go unchecked. This KPK has become incredibly powerful. It seems to be accountable only to God. Be careful (Dhyatmika et al. 2009).

[7] 'Akhirnya, DPR persilahkan KPK menggeledah' [Finally, the DPR invites the KPK to conduct a search], *hukumonline.com*, 26 April 2008.

Yudhoyono did lend some support to the KPK, however, especially when the attacks on the commission rallied enormous public support behind it and made it the *cause célèbre* of 2009. By September 2009, with its chairperson removed and two commissioners suspended, the KPK's ongoing investigations and prosecutions had ground to a halt. Without Bibit and Chandra, its two chief investigators, the institution was struggling; the remaining two commissioners, Mochammad Jasin and Haryono Umar, were primarily responsible for corruption prevention and monitoring, and for information collection and distribution. On 21 September 2009, Yudhoyono issued a government regulation in lieu of law (Perppu) giving him the power to appoint KPK commissioners if three or more positions had become vacant.[8] A Perppu is a regulation that can be enacted in times of emergency to serve as a statute until it has been confirmed or rejected by the DPR. On 6 October 2009, under his emergency regulation, Yudhoyono swore in three temporary KPK commissioners: Mas Achmad Santoso, Waluyo and Tumpak Hatorangan Panggabean.

Most media and legal commentators strongly criticised Yudhoyono for issuing the regulation,[9] accusing him of implicitly sanctioning the attacks on the KPK by filling Bibit and Chandra's positions, albeit temporarily (Azly 2009). Others pointed out that the KPK Law already provided a process for appointing KPK commissioners that helped avoid undue influence or interference. By contrast, under the new regulation, the president could unilaterally appoint commissioners who were loyal to him rather than dedicated to the eradication of corruption.[10]

While there was some truth to these criticisms, Yudhoyono ultimately chose well-regarded temporary commissioners, and the alternative would undoubtedly have been worse. Installing replacement commissioners using the procedures outlined in the KPK Law would have been a time-consuming process, requiring a selection committee to test and vet applicants and parliament to subject them to a fit-and-proper test. This would have stalled KPK's work for many months, during which time further attacks on the institution could have been made. Also, given that some national parliamentarians were themselves under KPK investigation,

[8] Government Regulation in Lieu of Law 4/2009 Amending Law 30/2002 on the Corruption Eradication Commission.

[9] 'LSM dan sejumlah tokoh tolak perpu plt pimpinan KPK' [NGOs and several figures reject the regulation on the KPK leadership], *hukumonline.com*, 28 September 2009.

[10] 'KPK under siege', *hukumonline.com*, 4 October 2010.

the appointment process would probably have been highly fraught and susceptible to manipulation and rent-seeking.

Soon after issuing his emergency regulation, and with public and media condemnation of the handling of the Bibit and Chandra case reaching fever pitch, Yudhoyono established a 'Team of Eight' to investigate the case. It comprised eight highly esteemed lawyers and public figures, including noted lawyers Adnan Buyung Nasution and Todung Mulya Lubis. The team concluded that, although police and prosecutors had acted correctly in agreeing to investigate Bibit and Chandra, they should have dropped the case shortly afterwards when the lack of evidence against them became clear. That the case proceeded led to 'the impression that there had been engineering'. The team recommended that the cases against Bibit and Chandra be dropped, and that the police investigator and deputy attorney general responsible for pursuing the charges resign.[11] Both recommendations were followed, though not at the request of the president (Haryadi 2009; KPK 2009).

In 2012, Yudhoyono sought to intervene in favour of the commission when the KPK and police clashed over the KPK's decision to pursue allegations of high-level corruption within the police force. Both the KPK and the national police force claimed the authority to investigate Djoko Susilo, the chief of the traffic police, in connection with the awarding of contracts to procure driving simulators for the traffic police. When KPK investigators raided the headquarters of the National Police Traffic Corps in South Jakarta to obtain evidence for their investigations, police detained them and refused to release them until the following morning. After a stalemate lasting several months, Yudhoyono finally recommended that the police leave the case to the KPK and cooperate fully with the investigation (Pramudatama and Aritonang 2012). In September 2013, Djoko Susilo was found guilty in the Jakarta Tripikor Court and sentenced to ten years' imprisonment. His sentence was increased to 18 years on appeal (Rastika 2014).

Overall, we are left with a clear conclusion: while Yudhoyono never took the initiative in defending the KPK, his well-known sensitivity to public opinion (detailed by Greg Fealy in this volume) did seem to have an effect. When public concern about undermining of the KPK reached high levels, he tended to respond by acting in the commission's favour, even if he sometimes did so rather reluctantly.

[11] 'Inilah dokumen lengkap rekomendasi Tim Delapan' [This is the complete recommendation of the Team of Eight], *Kompas*, 17 November 2009.

THE CONSTITUTIONAL COURT

During its first decade (2004–14), particularly under the stewardships of founding Chief Justice Professor Jimly Asshiddiqie (2003–08) and his successor, Mahfud MD (2008–13), the Constitutional Court established itself as one of Indonesia's most successful post-Suharto institutions, widely respected by citizens, civil society and even government. Beyond the expectations of most, and with a few important exceptions, the Constitutional Court exercised its powers professionally—that is, impartially and with concern to justify its decisions by reference to the law.

The Constitution gives the Constitutional Court several functions, but two have taken up most of its time. The first is constitutional review, under which citizens and various legal entities can challenge the constitutionality of national legislation. If the court decides that a statute violates the Constitution, the court can invalidate it and declare it no longer binding. The court has exercised this power regularly to strike down legislation. The court's second main function is to resolve electoral disputes, a task it has carried out largely to the satisfaction of contesting parties. The court has handled thousands of disputes arising from polls for the presidency, for national, provincial, city and county legislatures, and for the Regional Representative Council (Dewan Perwakilan Daerah, DPD). In 2008 its jurisdiction was extended to disputes arising from elections for regional heads, although in May 2014, in a rather bizarre decision, the court decided that it no longer had jurisdiction to consider such cases.

Indonesia's Constitutional Court can be categorised as an 'activist' court by world standards (Dressel 2012). In Asia, the only other constitutional court that rivals it in terms of activism is the South Korean Constitutional Court (Ginsburg 2002, 2003)—the court the architects of Indonesia's Constitutional Court looked to for inspiration. At least three features of the court's decision-making processes justify its description as 'activist'.

First, the Constitutional Court is active in the sense that it actually performs its function and invalidates statutory provisions—or even entire statutes—deemed to be unconstitutional. It does not shy away from cases that are highly political or otherwise difficult, such as those involving significant vested interests. In contrast, many other Indonesian courts have traditionally avoided invalidating statutes. The Supreme Court, for example, was generally reluctant to exercise its powers of judicial review during the Suharto years (Pompe 2005; Huda 2010) and has begun to hear such cases only recently (Butt and Parsons 2014).

The Constitutional Court issued many landmark decisions during its first decade, some of which have been crucial for Indonesia's democratic development. For reasons of space, I mention only a few here. In one category of cases, the court was asked to uphold the right to freedom of speech. President Yudhoyono was well known for being willing to take legal action against journalists and others he perceived to be unduly critical of him. In one early case, the court invalidated Criminal Code provisions that prohibited citizens from insulting the president and government officials (the so-called *lèse-majesté* articles) and from 'sowing hate' (the so-called *hatzai artikelen*) (Royan 2008). In 2007, the court found that these provisions violated citizens' rights to freedom of expression (article 28E(2) of the Constitution), freedom to express an opinion (article 28D(3)) and freedom to communicate (article 28F).[12] However, in cases decided in 2008 and 2009, the court held that these 'free speech' rights were overridden by article 28G of the Constitution, which gives citizens (including public figures) rights to protection of honour and reputation. In other words, the court decided that the reputational rights of government officials prevailed over the free speech rights of citizens.[13] As a result, most 'crimes' that prohibit citizens from insulting public officials, such as defamation, remain constitutional. Criticism of the government may therefore be a crime, even if it is based on established fact.

The court has also helped shape Indonesia's electoral system (Dressel and Mietzner 2012). In one of its earliest cases, in 2003, it removed restrictions preventing former members of the Indonesian Communist Party and their families from standing for election, holding that those restrictions were discriminatory.[14] In 2009, the court held that citizens could vote even if they were not registered to do so, provided they presented a valid form of identification, such as an identity card or passport, to polling officials on election day.[15] In another case decided before the 2009 election, the court held that Indonesia's semi-open party-list system for electing

[12] Constitutional Court Decision 013-022/PUU-IV/2006; Constitutional Court Decision 6/PUU-V/2007.

[13] Constitutional Court Decision 14/PUU-VI/2008; Constitutional Court Decision 50/PUU-VI/2008; Constitutional Court Decision 2/PUU-VII/2009.

[14]Constitutional Court Decision 011-017/PUU-I/2003. In the majority: Asshiddiqie, Marzuki, Natabaya, Harjono, Palguna, Fajar, Siahaan and Soedarso. In the minority: Roestandi. The provision in question was article 60(g) of Law 12/2003 on General Elections.

[15] Constitutional Court Decision 102/PUU-VII/2009.

legislative candidates was unconstitutional. Under this system, voters could choose an individual candidate, a party, or both in their electoral district. Individual candidates needed to obtain 30% of the number of votes required for a seat to be elected. In practice, this meant that candidates who received fewer votes, but occupied higher positions on party lists, would be elected before candidates who received more votes. The Constitutional Court's decision dramatically altered this system, requiring parties to allocate seats to candidates who had received the most personal votes, regardless of whether or not they had met the quota.[16]

The court has also issued momentous decisions upholding economic and socio-cultural rights. In 2012, for example, it decided that a child born out of wedlock had a civil legal relationship not only with its mother, as had previously been the case under Indonesia's Marriage Law, but also with its biological father. This *Wedlock* decision removed some legal roadblocks for such children to claim maintenance and receive inheritances from their fathers. In 2013, in another landmark decision, the court upheld the traditional land rights of indigenous (*adat*) communities over coastal resources and forests, thus preventing the state from awarding concessions or rights over natural resources while ignoring the rights of recognised *adat* communities.[17]

The second reason for calling Indonesia's Constitutional Court 'activist' is that it has tested the boundaries of its jurisdiction. Many courts around the world do this, but usually more gradually and incrementally than Indonesia's Constitutional Court, which has exceeded its jurisdiction in many cases. For example, the statutes granting the court power to resolve electoral disputes authorise it only to decide disputes about vote-counting and, if errors are identified, to stipulate the correct count. The court has gone well beyond this, ordering recounts and even reruns of elections, and also adjudicating on some types of breaches of the electoral laws that occur before counting even takes place (Butt 2013).

Perhaps the best examples of the court's expansion of its jurisdiction in constitutional review cases are those in which it decides that the statute being challenged is 'conditionally

[16] Constitutional Court Decision 22-24/PUU-VI/2008.

[17] Constitutional Court Decision 35/PUU-X/2012, reviewing Law 41/1999 on Forestry; Constitutional Court Decision 3/PUU-VII/2010, reviewing Law 27/2007 on the Management of Coastal Areas and Small Islands. See also Constitutional Court Decision 55/PUU-VIII/2010, reviewing Law 18/2004 on Plantations.

constitutional'. In such cases, the court declares that the statute it has reviewed appears to be constitutionally defective. However, rather than invalidating the statute as the court's governing law appears to require,[18] it decides that the statute under review can remain constitutional provided it is interpreted in such a way that its effect is not unconstitutional. The court issued several declarations of conditional constitutionality in its early decisions, and many more in its later decisions, particularly under Chief Justice Mahfud. Under the first chief justice, Jimly Asshiddiqie, around 35 per cent of successful challenges involved declarations of conditional constitutionality, but this increased to around 60 per cent under Mahfud. The court also consciously shifted towards declaring statutes 'conditionally unconstitutional'—that is, unconstitutional unless interpreted in a particular way or given a particular meaning. The court did this in response to perceptions that the government was not heeding its 'conditionally constitutional' decisions.[19] Perhaps most importantly, the court's decisions became more prescriptive and specific. If the conditions the court imposed early on were vague and aspirational, they later resembled legislative amendments. A clear example is provided by the *Wedlock* case mentioned above. There, the court reviewed article 43(1) of the 1974 Marriage Law, which states that:

> A child born out of marriage has a civil legal relationship with its mother and her family.

The court's decision was to declare article 43(1) conditionally unconstitutional—that is, unconstitutional unless interpreted to read:

> A child born out of marriage has a civil legal relationship with its mother and her family, and its father and his family [provided that paternity] can be proven by science and technology and/or another form of legally recognised evidence that the father has a blood relationship with the child.[20]

Putting the obvious desirability of the decision to one side, the court, in essence, changed the wording of article 43(1) of the Marriage Law to grant additional rights to children, create obligations for biological fathers and establish how those rights and obligations arise.

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[18] See article 57 of Law 24/2003 on the Constitutional Court.

[19] See, in particular, Constitutional Court Decision 54/PUU-VI/2008, para 3.22.

[20] Constitutional Court Decision 46/PUU-VIII/2010, para 3.13.

The court's decisions in this and similar cases have the same effect as amending the legislation itself, and are arguably decisions better left to the legislature. On the other hand, declarations of conditional constitutionality are a pragmatic response to the highly realistic expectation that the legislature will respond to the court's decisions slowly, if at all. In this context, striking legislation down would probably result in a prolonged legal vacuum during which the invalidation might put the applicant in a worse position. Applied to the *Wedlock* case, for example, if the court had simply struck down article 43(1) of the Marriage Law, then children might have had no legal basis to claim from anyone, *including* their mothers.

The third way in which Indonesia's Constitutional Court can be called 'activist' is in rejecting interference from the legislature. Most dramatically, the court rejected attempts by the legislature to restrict the exercise of what it believed was its constitutionally mandated jurisdiction. Law 24/2003 on the Constitutional Court (the Constitutional Court Law), for example, sought to restrict the court to reviewing statutes enacted after the first amendments to the 1945 Constitution in 1999, thereby preventing the court from reviewing Suharto-era legislation. The court invalidated this provision within its first year of operation. The amended Constitutional Court Law passed in 2011 (Law 8/2011) sought to limit the types of decisions the court could issue, including prohibiting it from issuing declarations of conditional constitutionality. The court did not allow these amendments to hinder its decision-making practices, invalidating almost all of them within a few months of their enactment. The court has similarly rejected attempts by the legislature to empower the Judicial Commission (Komisi Yudisial) to monitor and supervise the court.

Nevertheless, the court has chosen to confine its own activism by giving its decisions limited effect. The court's decisions generally apply only prospectively; a statute is unconstitutional and no longer binding only once the court declares it to be. Any government action taken under a law before it is declared unconstitutional therefore remains valid. Unlike the decisions of other courts—the courts that resolve disputes between parties or determine whether a citizen has committed a crime—the decisions of the Constitutional Court are binding for *all* citizens. But the prospective nature of those decisions means that applicants who have suffered damage to their constitutional rights and had their cases upheld by the Constitutional Court are not entitled to redress. At best, they can claim only a 'moral victory', helping to prevent the constitutional rights of others who might have been affected by the statute from being diminished in the future. This limitation, it should be stressed, is self-

imposed: the court itself has come up with this interpretation of its powers. It has not been a limitation imposed on it by the government or any other external body.

YUDHOYONO AND THE CONSTITUTIONAL COURT

Although the press occasionally reported that Yudhoyono had contacted members of the Constitutional Court to ask for advice, there is little evidence to suggest that he ever actively sought to influence a decision or that he refused to comply with one. Chief Justice Mahfud admitted that he knew Yudhoyono well, but said that the president never asked him about cases the Constitutional Court was hearing, let alone sought to interfere in them (Budiarti 2012: 171–5).

Only once did Yudhoyono actively seek to intervene in the processes of the court, through a Perppu issued in late 2013.[21] The regulation was directed at remedying perceived defects in Law 24/2003 on the Constitutional Court brought to light by the arrest of Chief Justice Akil Mochtar on charges of corruption (discussed below). It sought to change the appointment process for Constitutional Court judges, presumably to prevent a repeat of this saga. The regulation required candidates to undergo a fit-and-proper test that would be administered by a Panel of Experts, to be appointed by the Judicial Commission. It also prohibited aspiring Constitutional Court judges from appointment if they had been a member of a political party in the past seven years, and sought to establish a permanent Constitutional Court Judge Honour Council (Majelis Kehormatan Hakim Konstitusi) to investigate allegations of misconduct.

Within only a few months, however, the Constitutional Court had invalidated these amendments.[22] One of the reasons the court gave for its decision was that the participation of the Judicial Commission in both the appointment and dismissal of judges had the potential to affect the court's independence. The court also found that the requirement for a judicial candidate not to have been a member of a political party was discriminatory, following the

[21] Government Regulation in Lieu of Law 1/2013 on the Constitutional Court.

[22] Judicial Commissioner Imam Anshori Saleh described the court's decision as a 'tragedy for law enforcement', saying that 'a new Akil Mochtar' might emerge and little could now be done to prevent this. See 'Batalkan eks perppu, MK tetap tak mau diawasi' [Invalidating government regulation in lieu of law, the Supreme Court still does not want to be supervised], *hukumonline.com*, 13 February 2014.

PKI case (2003), while noting that, in any event, membership of a political party was not the sole indicator of political bias. In other words, Yudhoyono's one attempt to shape the Constitutional Court was a complete failure.

Overall, the Constitutional Court faced few conspicuous failures or setbacks during the Yudhoyono years. Allegations of impropriety by judges or court staff were minimal, with one exception: the arrest and conviction, in 2014, of Chief Justice Akil Mochtar, who had served on the court since 2008. The court's reputation nosedived when Mochtar was arrested by the KPK for receiving bribes to fix electoral disputes. Mochtar was also investigated by police for narcotics offenses, after illicit substances were found in his chambers. He was convicted of money-laundering and sentenced to life imprisonment. The court suffered significant reputational damage because of the scandal, with commentators concerned that it might not recover given that much of its public and political support was based on its perceived integrity and impartiality. In fact, however, the court regained much of the respect it had lost during this episode through its professional handling of the challenge lodged by losing candidate Prabowo Subianto to the 2014 presidential election result.

Despite this setback, the Constitutional Court has become an important institution in Indonesian democracy. From humble beginnings—initially it was run out of hotels and government offices—it is now housed in a grand court complex and is relatively well resourced. At first, it appeared that the court might have trouble convincing the government to comply with its decisions (Butt and Lindsey 2008), but this fear has largely dissipated, with compliance becoming the norm rather than the exception. While some of the legislative attacks on the court's decision-making mentioned above might be categorised as setbacks, I would categorise them as achievements. The court has had sufficient institutional legitimacy, buttressed by strong levels of public support, to defend itself from these attacks, so that the amendments to the Constitutional Court Law passed in 2011 hardly affected it. At the same time, the court experienced little attempted interference from the president.

CONCLUSION

During Yudhoyono's tenure, the KPK and the Constitutional Court developed into confident institutions willing to perform their functions in ways that disrupted high-level political interests. They managed to do this through careful strategy and prudent leadership. Critically, they built high levels of public support, born from their various and increasing successes. While Yudhoyono did not actively help them much, neither did he actively hinder them.

There are at least two plausible explanations for Yudhoyono's apparent reluctance to interfere with, or retaliate against, the KPK and the Constitutional Court. One is that he chose not to, deciding that it would be illegal or improper to intervene because both institutions are formally independent of the government. As mentioned at the outset of this chapter, the Constitution states that the Constitutional Court is to be independent of government. This independence is, of course, critical to the court performing its mandated role—of acting as a check on the exercise of government power. The independence of the KPK is also guaranteed by law. In short, it is possible that Yudhoyono was cognisant of the legal constraints within which he operated and was motivated above all by a sense of constitutional propriety.

An alternative explanation is that the KPK and the Constitutional Court (at least until the Mochtar scandal) had both become so popular with the public that any attempt to rein them in would have invited significant criticism and tarnished Yudhoyono's reformist credentials. Had he sought to resist or interfere—in response to the KPK's investigation into misconduct by members of his party, or in response to the Constitutional Court's decision to invalidate his government regulation in lieu of law—he may well have been unsuccessful, partly because the popularity of these institutions appeared to surpass his own, at least by the second half of his second term. Renowned for his sensitivity to public criticism, Yudhoyono presumably chose not to expose himself to public defeat and humiliation.

Despite the controversy that has occasionally surrounded them, both the Constitutional Court and the KPK are in better shape now than they were at the beginning of the Yudhoyono period. The Constitutional Court is generally regarded as a good place for Indonesians to air their public law grievances. The court usually gives applicants a fair hearing, regardless of the strength of their claims, and its proceedings are documented and often attract significant media coverage. In short, the court is a useful forum in which to push one's cause (Butt 2012a). The KPK, too, remains very popular with the public and still achieves convictions in all cases it prosecutes itself, despite its decision to target more powerful political players. Under a different president, both institutions might have notched up similar achievements, but under an obstructionist one, they could have fared much worse.

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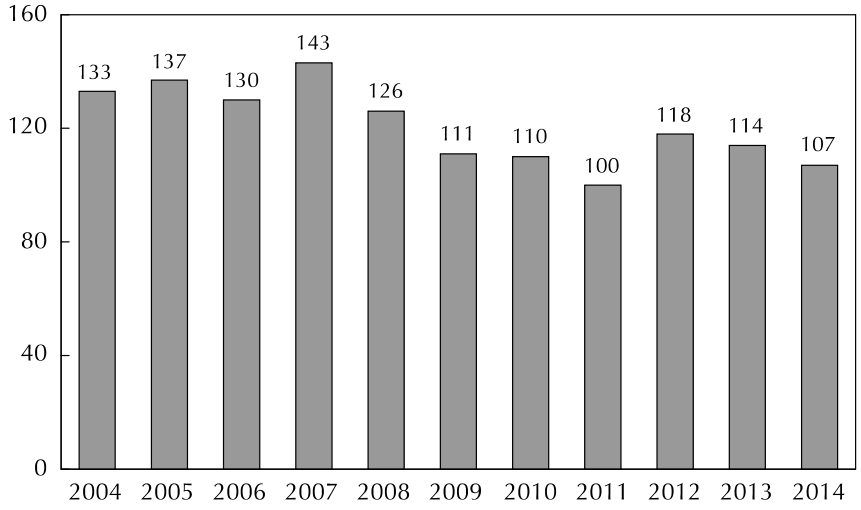
GLOSSARY

adat	custom or tradition; customary or traditional law
DPD	Dewan Perwakilan Daerah (Regional Representative Council)
KPK	Komisi Pemberantasan Korupsi (Corruption Eradication Commission)
Perppu	Peraturan Pemerintah Pengganti Undang-undang (Government Regulation in Lieu of Law)
PKS	Partai Keadilan Sejahtera (Prosperous Justice Party)
PKS	Partai Keadilan Sejahtera (PKS) in 2003
Tipikor Court	Pengadilan Tindak Pidana Korupsi (Anti-Corruption Court)

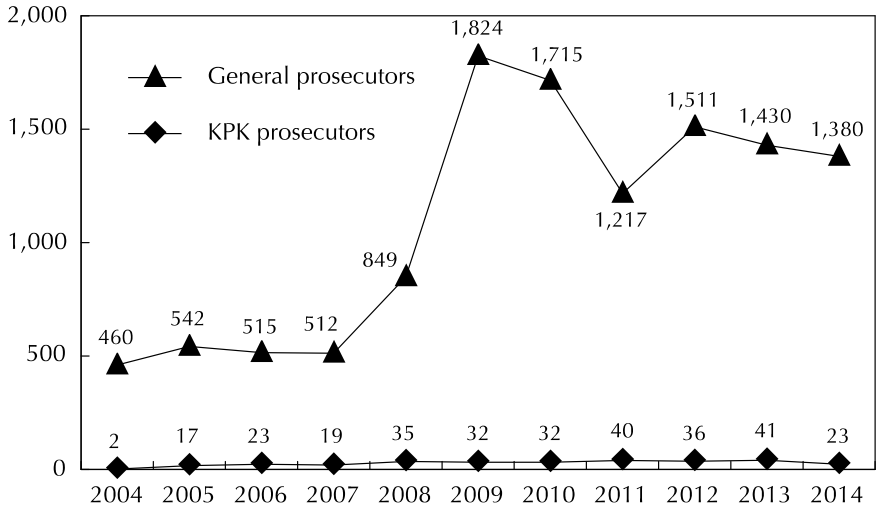
Figure 10.1 Indonesia's ranking on the Corruption Perceptions Index, 2004–14



a The lowest number of countries and territories surveyed during the period is 146 (in 2004); the highest is 183 (in 2011).

Source: Transparency International.

Figure 10.2 Corruption cases handled by general prosecutors and the KPK, 2004–14 (no.)



Source: Butt (2012b).