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Is Indonesia as Corrupt as Most People Believe and Is It Getting Worse?

Professor Howard Dick and Associate Professor Simon Butt

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PROFESSOR HOWARD DICK

Professor Howard Dick is an Asia specialist working primarily on Indonesia and Southeast Asia. His interests include applied economics, Asian laws, Asian business and the Asian business environment. He has written extensively on Indonesia and Southeast Asia, including in *Corruption in Asia: Rethinking the Governance Paradigm* (with Tim Lindsey, Federation Press, Sydney, 2002). His current research focuses on issues of corruption and governance and the difficulties of driving institutional change by formal legal reform. He is a regular media commentator on Australia-Asia relations.

ASSOCIATE PROFESSOR SIMON BUTT

Associate Professor Simon Butt is an ARC Australian Postdoctoral Research Fellow and Associate Director (Indonesia) for the Centre for Asian and Pacific Law at the University of Sydney, where he teaches Indonesian law. He has written widely on aspects of Indonesian law, including in two recent books: *Corruption and Law in Indonesia* (Routledge, London, 2012) and *The Constitution of Indonesia: A Contextual Analysis* (with Tim Lindsey, Hart, London, 2012).

IS INDONESIA AS CORRUPT AS MOST PEOPLE BELIEVE AND IS IT GETTING WORSE?¹

ABSTRACT

Many Indonesians consider their country one of the most corrupt in the world, and think it is getting worse. But is it really that bad? It could be argued that the publicity resulting from the efforts to curb corruption in Reformasi Indonesia – where the press is now free – has created the impression that corruption is getting worse, when the situation may, in fact, be improving. Who is right? And what are the prospects for reducing corruption once Yudhoyono steps down in 2014?

Professor Howard Dick and Associate Professor Simon Butt consider these questions and examine the problems of measuring corruption, including a range of indexes. They discuss post-Soeharto anti-corruption reforms, the role of Indonesia's Anti-Corruption Commission (KPK), the high level of publicity surrounding corruption cases, and how the KPK has become the target of continuing political attack.

¹ Edited version of papers by Professor Howard Dick and Associate Professor Simon Butt, originally presented as a CILIS Seminar at the Melbourne Law School, the University of Melbourne, 17 July 2013.

STATISTICS, HALF-TRUTHS AND ANTI-CORRUPTION STRATEGIES

PROFESSOR HOWARD DICK

Is Indonesia as corrupt as most people believe and is it getting worse? My answer to both questions is 'yes', but also 'no'. But what do we know and how do we know what we believe we know? By its very nature, corruption is clandestine behaviour and therefore impossible to measure in any direct way. Nevertheless, there are some indirect, partial indicators that tell us something about impact and trends and are, to an extent, internationally comparable. We need to understand both the merits and the limitations of these statistics because, even as a set of half-truths, they may be a better guide to policy than a mess of anecdotes and scandals.

I will begin with a brief review of some of the main indicators and then address the strategy of the main anti-corruption agency, the Corruption Eradication Commission (Komisi Pemberantasan Korupsi, KPK), established in 2004. Specifically I will ask four questions:

- Can we measure the incidence of corruption?
- What do the figures (not) tell us?
- Is the KPK strategy working?
- Is there a better strategy?

STATISTICS

The most widely cited international series on the incidence of corruption by country is the *Corruption Perceptions Index* (CPI) of the leading anti-corruption NGO Transparency International. It has been compiled annually since 1995. Three features of the index should be noted at the outset. First, the CPI is a composite of 13 indexes, all but two compiled by other agencies. Second, these indexes are averaged. Third, as the name implies, what is measured is perceptions of corruption, not corruption itself. Together these three features mean that statistically the CPI is a something of a house of cards, although it has become more robust since being substantially revised in 2012. Each country index is now calculated independently and will no longer vary according to changes in the indexes of other countries.

Table 1: Corruption Perceptions Index, 2012

Rank/185	Country	CPI/100
5	<i>Singapore</i>	87
7	Australia	85
17	Japan	74
19	USA	73
54	<i>Malaysia</i>	49
80	China	39
88	<i>Thailand</i>	37
94	India	36
105	<i>Philippines</i>	34
118	INDONESIA	32
123	<i>Vietnam</i>	31
133	Russia	28
157	<i>Cambodia</i>	22
172	<i>Myanmar</i>	15

Source: Transparency International <www.transparency.org/cpi2012/results>

Bearing in mind these limitations, what does the 2012 CPI tell us about Indonesia (Table 1)? Countries are scored over a range of 0 (worst possible) to 100 (no corruption): Singapore scores highly at 87 per cent but Indonesia just 32 per cent, which is very definitely a 'fail' grade, and nothing to be proud of. However, Myanmar scores only 15 per cent, so Indonesia is by no means the most corrupt country in its own region. In fact, on a world scale, Indonesia ranks 118th out of 185 countries, placing it at about the top of the bottom third and with a score that, significantly, approximates the global median.

Within Asia, the CPI ranking suggests that Indonesia (118) is considerably more corrupt than China (80), also Thailand (88), India (94) and even the Philippines (105). Nevertheless, the absolute scores show that all these countries cluster in the range of 31-39 per cent. It is therefore valid to ask how robust are these figures and what may influence the *perceptions* on which they are based. Is it actually proven that Indonesia is significantly more corrupt than China, India or the Philippines?

Two factors in particular may distort country perceptions. First, media exposure of corruption scandals increases the transparency of what is usually hidden and is very likely to lead people to believe that corruption is rampant and getting worse. Second, the investigation and prosecution of cases by anti-corruption agencies and the courts in turn feeds media reporting and public awareness of corruption. Hence progress in the campaign against anti-corruption may make corruption seem to be worse because more of the 'iceberg' is now visible to the public eye.

The best way to get a perspective on the reliability of the CPI is to look at some other indexes. Especially useful is the World Bank's *Doing Business Index* (DBI), which is, in fact, one of the 13 constituent indexes of the CPI. While the DBI has a narrower focus, that is relations between business and government, its virtue is that many of its component indicators are quantifiable and verifiable. For example, these indicators include how many days it takes to start a business, to obtain a construction permit, to get electricity, to register a property, and to get credit.

The Doing Business Index does show up interesting differences from the CPI (Table 2). It is still the case that Indonesia lags well behind Malaysia, Thailand and China, which approximates the regional average for East Asia and the Pacific, but it now ranks just ahead of India, Cambodia and the Philippines, even though the last four still cluster in the range of 128-138 per cent.

Table 2: Doing Business Index ranked by country, 2012

Country	Rank
Malaysia	12
Thailand	18
East Asia & Pacific (average)	86
China	91
INDONESIA	128
India	132
Cambodia	133
Philippines	138

Source: World Bank, *Doing Business Database 2013: Indonesia*

The Doing Business Index also gives some insight into the question of whether Indonesia's corruption is getting worse. Figure 1 (below) shows that between 2005 and 2012 there has, in fact, been a small overall improvement in the index, as measured by the upward movement along the vertical axis of 'distance to the frontier [of best practice]'. This reflects considerable improvement in some components of the index, notably the time taken to start up a business and get credit, and ease of paying taxes. Under the two Yudhoyono governments, the ministers in charge of finance, trade and investment have put a lot of effort into streamlining administration and simplifying procedures, so this finding is reassuring. There has been progress.

Figure 1: Improvement in doing business index by component, 2012

Source: World Bank, *Doing Business 2013 - Indonesia*

The bad news, however, is that there has been no improvement in ‘enforcing contracts’ and minimal progress in ‘registering property’, ‘protecting investors’ and ‘resolving bankruptcy’. These four indicators, all relating to grave weaknesses in commercial law, together show that private businesses remain acutely vulnerable to random shocks and have very little redress in the event that things go badly wrong.

The high level of *uncertainty of outcome* in Indonesia, particularly acute for foreign investors, may help to explain why China appears a much better business environment and also much less corrupt in terms of the CPI. Although the one-party state in China is notoriously corrupt from top to bottom (McGregor, 2010), the formal and informal rules are clearer and there is a perception of greater certainty of outcome. Foreign investors can learn the ways of doing business in China and are less susceptible to random shocks and unpredictabilities as long as they follow the rules.

The pattern of corruption in Indonesia is shown by another aspect of Transparency International’s Corruption Barometer: the public perception of corruption of *key institutions* scored out of 100 (Table 3). Perhaps unsurprisingly, the police (91 per cent) show up as the most corrupt institution, probably reflecting the frequency of public dealings with the public, compared with the military (only 41 per cent).

Table 3. Institutions ranked by perceived degree of corruption, 2013

Institution	%
Police	91
PARLIAMENT	89
Political parties	86
Judiciary	86
Civil Service	79
Business (private)	54
Education	49
Health	47
Military	41
Media	19

Source: Transparency International, Global Corruption Barometer, Indonesia, 2013b <www.transparency.org/Indonesia>

Nevertheless, the taproot of corruption in Indonesia would seem to be Dewan Perwakilan Rakyat (the parliament, DPR) (89 per cent) and its closely associated political parties (86 per cent), as well as the judiciary (86 per cent) and the civil service (79 per cent). Here is a stark picture of a state that is rotten from the top down. Moreover, the independent judiciary, being almost as corrupt as the DPR and more corrupt than the civil service, offers no means to redress the situation.

In Dick and Mulholland (2011), I have written of ‘the state as a market’. By this I mean that the Indonesian state has monetised many of its most important internal transactions. Even in the DPR itself, ministers and public servants must bargain with and pay the chairs of committees (*komisi*) to bring forward and pass legislation, to ask (or not ask) questions, and so on. These funds are distributed by the chairs among the members of their committee for the benefit of their respective parties and their own personal needs. Likewise, court judgments are often subject to ‘commercial’ negotiation instead of being

decided on their merits. The same applies to whether matters are investigated and how they are prosecuted, which helps to explain why it is not infrequently the ‘whistleblower’ who is prosecuted. The system works, after a fashion, but very much to the benefit of insiders with power and money. It is not ‘rule of law’ as usually understood; ‘rule of money’ might be a more appropriate term.

Overall the various indicators confirm what is common knowledge — that Indonesia is plagued by a high level of endemic corruption. They are, however, not able as yet to identify any clear trend. They do not show that corruption is getting worse, but neither is there clear evidence of improvement, except as regards some specific administrative reforms. Part of the difficulty of interpretation is the distinction between the absolute level and the relative rate or incidence of corruption. With the Indonesian economy growing at a rate of around 6 per cent per annum, a given average rate of corruption, say 10 per cent, would translate into an increasing *quantum* of corrupt transactions and therefore more cases and more evidence of corruption. Thus corruption might well be getting worse in terms of the number of corrupt transactions and the total amount of the illegal corruption ‘tax’ on society that they represent. It does not logically follow, however, that the *rate* of that corruption tax is necessarily increasing. Certainly the aim of policy should be to reduce the rate of corruption but the statistical finding is an open one.

STRATEGY

Discussion of what to do about Indonesia’s high level of corruption must begin by recognising that Indonesia has been a democracy since 1998. It therefore cannot provide the predictability of outcomes that were positive features of Suharto’s authoritarian New Order regime and are still provided by China’s one-party state. Democracy has its advantages but, like any political system, it needs to be funded. Under the New Order, Suharto collected economic rents through various ‘franchises’ and disbursed them to reward his supporters, not least in the military, and to buy off potential opposition, also including elements in the military (McLeod, 2000). Under democracy the flow of funds is diffused through political parties and is very much more complex.

It has been said that ‘money is the mother’s milk of politics’. This aphorism traces back to Californian politician Jesse Unruh in 1966. It was subsequently applied by political scientist Chalmers Johnson (1986) to the era of former Japanese prime minister Kakuei Tanaka. It is just as apt for contemporary Indonesia. In the absence of regularised party funding, party bosses and treasurers invent their own rules, which have now become institutionalised through the DPR and its committee system.

It may also be observed that good government involves the payment of taxes to fund the state and the various services that are expected of it. Failure to consolidate an adequate tax base leads governments into all kinds of risky behaviours. Over-borrowing is one risk, as exposed in Europe since the global financial crisis; predatory and corrupt behaviour by state officials is another. World Bank data on the ratio of taxes to GDP

are plagued by inter-country inconsistencies but at face value they show that in 2011 Indonesia (and the Philippines) had a tax ratio of 12 per cent, compared with China 11 per cent, Malaysia 15 per cent and Thailand 18 per cent (World Bank, 2013b). In the case of Greece, the basket case of Europe, and Australia the figure was 21 per cent. With such a very low tax ratio, it is hardly surprising that Indonesia suffers both poor public services and a highly corrupt state apparatus. Tackling corruption, as the Indonesian public expects, will also require more honesty in the payment of taxes. One vice feeds off, and justifies, the other.

Since 2004, the brightest star in Indonesia's anti-corruption firmament has been the Corruption Eradication Commission (Komisi Pemberantasan Korupsi, KPK) (Schuette, 2012). To make an immediate and serious impact, the KPK has seen its mandate as one of catching big fish (*kakap besar*). In this it has been remarkably successful, investigating, arresting and prosecuting ministers, parliamentarians, senior public servants, provincial chiefs, district heads and mayors across the country.

Yet nine years on, it may be asked whether this huge effort has indeed reduced the overall level of corruption. As we have seen, the level of corruption is not readily measurable, let alone the trend over time. The indicators are inconclusive, with small changes within the margin of error. And even if these things could be measured, it would still be hard to determine, counter-factually, how different the situation would have been in the absence of the KPK. The superficial impression (and it is not much more) is that the KPK's activities have been in the nature of 'sustainable harvesting'. In other words, as one 'big fish' is reeled in, another takes its place. Sustainable harvesting is a good thing environmentally but not as a corruption eradication strategy. It does not reduce the rate of corruption.

In this light, should the KPK's strategy be reconsidered? With its limited resources for investigation and prosecution, is it indeed feasible and effective for the KPK to attack corruption at all levels, right down to the district (*kabupaten/kodya*) level all over Indonesia? Simon Butt (2011) is one observer who worries that the regional Anti-Corruption courts are stretching anti-corruption resources too far, leading to failures of investigation and prosecution and perhaps compromising the integrity of the courts themselves.

An alternative strategy, as previously followed by Singapore and Hong Kong, would be to consolidate *islands of integrity*. This would require the KPK to target key state institutions and concentrate resources on cleaning them up, from top to bottom. Corrupt senior officials would be purged, middle and junior staff retrained. Everyone would be both better paid and better monitored, and subject to harsh sanctions should corrupt behaviour reoccur. In the case of Singapore and Hong Kong, a prime target was the notoriously corrupt police force.

In Indonesia it would be logical to begin by cleaning up the Augean stables of the DPR, the source of legislation, but would this be politically sustainable? The KPK has indeed

been fearless in exposing and arresting members of the DPR, including in July 2013 the Chair of the powerful Finance Committee (Komisi XI), Emir Moeis (PDI-P) (Jong, 2013). Yet past arrests of parliamentarians led to a strong backlash against the KPK and were probably connected with the subsequent arrest and imprisonment of KPK Chair Antasari Azhar on charges of murder, and also the pursuit of corruption allegations against two other commissioners. Given that arrests have so far not obviously deterred corrupt behaviour within the DPR, and also that the DPR controls the KPK's legislative authorities, funding and the appointment of commissioners, a head-on confrontation between the DPR and the KPK is unlikely to result in a clear-cut victory for the KPK, even with presidential support (which cannot be assumed beyond 2014).

A better approach might be to first target the legal system and the Department of Finance. The legal system is an obvious priority because it is potentially the check upon abuse of power by the DPR, the executive or the civil service, as well as the foundation for rule of law within the rest of society. There has been some progress with reform of the Supreme Court and the Attorney-General's Office (AGO, *Kejaksaan Agung*) but it has been hampered by reluctance to dismiss judges and prosecutors who are found to have engaged in blatantly corrupt behaviour. The lesson of Hong Kong and Singapore is that exemplary punishment and disgrace can be very effective in consolidating a beachhead. As long as a permissive culture is tolerated, corrupt officials will continue to hold sway and honest officials will be victimised.

A further consideration is that the legal system cannot be cleaned up until corrupt lawyers and advocates are disbarred from practising. It is not enough to discipline judges who accept bribes; it is also essential to disbar lawyers who offer bribes and either suggest or accept their client's instructions to do so. Indonesia is not short of lawyers; it is short of capable and honest lawyers. The same calculus applies to reforming the police. Those who offer bribes to police officers must be disciplined, as well as police officers who accept bribes. Again, this is the lesson of Singapore: bribe givers were warned that a repeat offence would result in imprisonment.

The Department of Finance needs ongoing reform, especially the Directorate General of Taxation, because it is the source of the revenue needed to improve the salaries of public servants, including the Judiciary and Police. The notorious Gayus Tambunan case² in 2010 showed how much corrupt discretion could be exercised by a fairly junior tax official. Fortunately reform is well under way. For some years Department of Finance officials have been better remunerated than their counterparts elsewhere in the Civil Service but this alone does not prevent corrupt behaviour, as the Gayus Tambunan case revealed. Here the KPK's monitoring resources might best be targeted

2 Gayus Tambunan, a former tax official, was imprisoned for seven years for causing a loss of millions of dollars of state revenue. He also bribed his way out of prison for short trips to Singapore, Kuala Lumpur, Macau and, famously, to watch the tennis in Bali (Budisatrijo, 2011).

at both tax officials and their clients.

The other priority should be a political funding law. The aim should be not to forbid donations to political parties but, in the first instance, to ensure that donations are reported as a matter of public record. Only unreported or understated donations would be liable to sanction, breaches being verifiable by public audit. Strict limits on political advertising on television would assist by relieving the pressure for expensive electoral campaigns. Vote-buying is much harder to monitor across such a vast country but there is less need for concern. It does not greatly matter if parties make small gifts to voters as long as the secrecy of the vote is maintained. 'Take the money and vote as you choose' is both good advice and a self-regulating check on vote buying.

A final consideration is 'where?' From Aceh to Merauke is a very long way and it is simply not possible to begin with islands of integrity everywhere. Logically, the KPK would target its endeavours in the capital, Jakarta, the great crossroads of Indonesian democracy, and let the ripples work outwards. Were this approach taken, the anti-corruption successes of Hong Kong and Singapore might, with sufficient effort, be copied. Jakarta is the theatre stage of Indonesian democracy. What happens in one province is seldom noticed around the rest of the country but what happens in Jakarta does catch national attention. A vigorous anti-corruption drive against the Supreme Court and the Department of Finance in Jakarta would achieve maximum impact.

CONCLUSION

Corruption in Indonesia is no small problem. Among the G20 nations, Indonesia's perceived level of corruption is the worst, except for Russia. The distortions, inequities and unpredictabilities to which it gives rise will hold back Indonesia's development and very likely also undermine faith in the country's new democracy. Nevertheless, the challenge is not to moan about it but to find a sensible way of moderating its deleterious effects. The KPK has shown that even very high-level corruption can be prosecuted, something very rarely seen in the nation's almost 70-year history. That is a breakthrough, but not enough. The KPK's arrests and prosecutions, diffused as they are across institutions and across the country, have not been enough to change the underlying norms of behaviour among powerholders. This in turn has sapped public confidence that there is any prospect, even in the long term, of reining in corruption.

It may therefore be timely for KPK and its sister agencies to target its resources and efforts more strategically on the goal of consolidating islands of integrity within the state apparatus. Obvious targets would be the legal system, beginning with the Supreme Court and Attorney General's Office, and also the Taxation Office. More tax, better pay and tougher sanctions, including dismissal, for corrupt behaviour by prosecutors, judges and lawyers, would create a virtuous circle and lay a basis for rule of law and holding other agencies to account. Meanwhile, public pressure for a political funding law would lay the groundwork for reform of the DPR from within, which is, ultimately, the only way that it will be reformed.

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INDONESIA'S ANTI-CORRUPTION COURTS: ARE THEY AS BAD AS MOST PEOPLE SAY AND ARE THEY GETTING BETTER?

ASSOCIATE PROFESSOR SIMON BUTT

Indonesia's KPK (Komisi Pemberantasan Korupsi, or Anti-Corruption Commission) was established in 2003. Its main functions are to investigate alleged corruption and, if sufficient evidence exists, to prosecute those suspected of engaging in it. The Law under which the KPK was established (Law No 30 of 2002) allows the Commission to handle only particular types of cases – those that involve law enforcement or government officials, attract significant public concern, or are thought to have resulted in at least Rp 1 billion in losses to the state. The Commission can also take over corruption investigations and prosecutions from ordinary police and prosecutors if police or prosecutors fail to respond to a corruption allegation reported by the community, or take too long to begin investigating the allegation; if the legislature, executive or judiciary interferes in the handling of a corruption case; if the handling of a corruption case is itself marred by corruption; or if the case is particularly difficult or complex. The KPK is not permitted to drop an investigation once it formally names a person as a suspect.

The Commission, conceived during the post-Soeharto *Reformasi* period, had been eagerly anticipated by citizens and reformists alike, most of whom were frustrated with the rampant corruption amongst Indonesia's ruling elite. The powers and functions granted to the KPK highlight problems that reformists had for many years identified as impediments to the effective handling of corruption cases in Indonesia. One such problem was that ordinary police and prosecutors could not be trusted to handle corruption cases for at least two reasons. First, many of them were thought to be corrupt themselves (ICW, 2001). Enlisting them to help tackle corruption would be like 'sweeping the floor with a dirty broom', according to a common Indonesian saying.

Second, some police were also thought to lack the technical skills to effectively investigate and prosecute corruption, which often requires familiarity with complex financial transaction and techniques. Knowledge of accounting and banking systems are key prerequisites, as are the *modus operandi* used to conceal transactions. After all, corruption is a crime usually carried out in secret, with perpetrators often going to extreme lengths to 'cover their tracks'. By creating a new institution, smaller than, and separate from, the large police force and public prosecution service, KPK investigators

could be trained in the specialised investigative and forensic skills they would need to deal with complex corruption cases, including evidence handling. Specialist KPK prosecutors could be provided with the advocacy skills they would need to draft more convincing indictments and present complex cases more persuasively.

However, many reform activists doubted the KPK's capacity to seriously tackle corruption – one of Indonesia's most serious governance problems (as Dick shows in his accompanying paper). In particular, the KPK was to be staffed by seconded police and prosecutors drawn from the ordinary police and public prosecution services. It was feared that corrupt practices would thereby infect the KPK and that KPK investigators and prosecutors might be reluctant to investigate and prosecute their former colleagues, who they might rejoin upon completing their secondments. Also, the KPK employed only a few hundred personnel, which, according to critics, was insufficient to handle all, or even a significant proportion, of the corruption cases over which it held jurisdiction. Even if the KPK was able to investigate and prosecute corruption cases effectively, its real impact would therefore be limited.

The designers of Indonesia's anti-corruption infrastructure also realised that circumventing only the ordinary police and prosecutors was not enough. The general courts (*pengadilan umum*) had previously enjoyed exclusive jurisdiction over corruption cases and most other criminal matters. However, their judges were also widely considered to be largely corrupt and were accused, particularly by NGOs such as Indonesia Corruption Watch (ICW), of acquitting in around 50 per cent of cases and issuing light sentences. To avoid having cases professionally investigated and prosecuted by the KPK only to be thwarted by the courts, the 2002 KPK Law also established a specialised anti-corruption court (*pengadilan tipikor*) in Jakarta as a chamber of the Central Jakarta General Court. Presiding over this Court was a panel of five judges,¹ three of whom were 'ad hoc judges' — people with legal experience who were not serving career judges, such as lawyers. The rationale for employing ad hoc judges was to keep career judges with questionable integrity from holding sway in split decisions.

For almost seven years, the Jakarta Anti-Corruption Court maintained a conviction rate of 100 per cent. In other words, the Court found defendants guilty in *all* cases the KPK prosecuted before it. Some of these decisions were, in fact, split, with the ad hoc judges, who formed the majority on the bench, all voting to convict (Fenwick, 2008). All these convictions were upheld on appeal to similarly constituted panels on the Jakarta High Court and the Indonesian Supreme Court. And, although the KPK began with relatively 'small fry' targets to build up a track record of convictions, by 2009 (under the Chairmanship of Antasari Azhar) the Court had convicted prominent serving and retired politicians, including around 20 parliamentarians who accepted bribes to elect Miranda

¹ By contrast, most cases in Indonesia are heard by panels of only three judges – or one judge if others are not available.

Gultom as a Deputy Bank Indonesia Governor. The KPK had also begun investigating corruption allegations leveled at senior police – the very people from whom the KPK could take over corruption investigations.

FROM INEQUALITY TO REGIONALISATION

The KPK/Jakarta Anti-Corruption Court design was, however, flawed from the very beginning, at least in the eyes of the Constitutional Court. In a 2006 decision, this Court held the Anti-Corruption Court to be unconstitutional, giving parliament a three year deadline to enact new legislation to ‘re-establish’ the court constitutionally (Butt, 2009b). The constitutional problem was one of equality: the Anti-Corruption Court was hearing only around five percent of corruption cases, whereas the ordinary courts – whose conviction rate was lower than the Anti-Corruption Court’s – were hearing the remainder. The result, according to the Constitutional Court, was a lack of ‘equality before the law’, because suspects the KPK chose to investigate and prosecute would be processed under different laws to those whose cases were handled by ordinary police and prosecutors. One of the purposes of the 2002 KPK Law had, in fact, been to establish procedures for corruption cases to be investigated, prosecuted and adjudicated that would make convictions more likely.

In response to the Constitutional Court’s decision, the national parliament issued a new Anti-Corruption Court Law in 2009. Most significantly, this Law instructed the Supreme Court to establish new anti-corruption courts as chambers of district courts in all Indonesia’s provincial capital cities by the end of 2011 – a task the Supreme Court successfully completed. These new Anti-Corruption Courts were granted exclusive jurisdiction to handle *all* corruption cases that arose in their territorial jurisdictions. The general courts’ jurisdiction to adjudicate corruption cases was removed. Importantly, ad hoc judges now need not constitute a majority on each Anti-Corruption Court panel. Under the 2009 Law, the chairperson of the district court in which the regional Anti-Corruption Court is housed (a career judge), determines whether ad hoc judges will make up the majority of each ACC panel. Problematically, the Supreme Court has so far found it difficult to recruit sufficient high-quality ad hoc judicial candidates and ICW has consistently criticised its appointees for their lack of integrity and experience (Hukumonline, 2013). It is likely that the shortage of ad hoc judges will, in many cases, translate into majority career judge panels. The 2009 Law also allowed both ordinary prosecutors and the KPK to bring cases before these new courts, meaning that Anti-Corruption Courts are no longer a forum for the exclusive hearing of KPK prosecutions.

ACQUITTALS AND BRIBERY

Within only a few months of the Law’s enactment, the Jakarta Anti-Corruption Court issued its first acquittal – in a case brought by a public prosecutor (Butt, 2011). This acquittal, along with a perceived avalanche of further acquittals in subsequent cases, combined with several instances in which Anti-Corruption Court judges have been caught red handed taking bribes, resulted in significant criticism of the new courts. The

Indonesian media widely reported that in 2011, for instance, regional anti-corruption courts acquitted in 15 per cent of cases - that is, in 71 out of 395 cases (Kompas, 2012).² NGOs have strongly condemned these acquittals, fueling public disappointment in the performance of the new courts. Even senior Indonesian legal and political figures have criticised the performance of the regional Anti-Corruption Courts. For example, the then-Constitutional Court Chief Justice, Mahfud M.D., suggested that all regional Anti-Corruption Courts be disbanded because they were 'creating legal chaos' and performing worse than the general courts (Tempo, 2012b). Then-Law and Human Rights Minister Amir Syamsuddin proposed that the regional Anti-Corruption Courts be abolished and that all corruption cases be heard in Jakarta. Syamsuddin explained that this would make monitoring Anti-Corruption Court judges easier and would help to ensure objectivity (Aritonang, 2012). For perceived 'excessive-acquitting' one Anti-Corruption Court judge in Semarang was even transferred to another court on the recommendation of the Judicial Commission, the national judicial 'watchdog' agency.

In my view, these criticisms, based entirely on the Anti-Corruption Court acquittals and a few cases of bribery, are unfair, for two reasons. First, they fail to assess the performance of these regional courts in context. Of course, it would be best if no Anti-Corruption Court judges had allegations of impropriety leveled against them, but regional Anti-Corruption Courts are certainly not the only Indonesian courts whose integrity has been brought into question. With the exception of the religious courts (Sumner and Lindsey, 2010) and the Constitutional Court (Butt and Lindsey, 2012), Indonesia's judiciary is widely seen as notorious for high levels of corruption (ICW, 2001; Butt and Lindsey, 2010; Satgas Pemberantasan Mafia Hukum, 2010). The problem has been admitted by senior judges, as reported in the Indonesian media. For example, former Chief Justice of the Constitutional Court Professor Jimly Asshiddiqie has described judicial corruption as a 'big problem' (Reuters, 2008). Former New Order-era Supreme Court Chief Justice Soerjono estimated that 50 percent of Indonesia's judges were corrupt (Pompe, 2005: 414), as did another New Order-era former Supreme Court Chief Justice, Asikin Kusumaatmadja (Inside Indonesia, 1997). In the mid-1990s, Adi Andoyo, also a former Supreme Court Justice, publicly accused Supreme Court judges of receiving bribes from litigants (Tempo, 1997). It seems reasonable to speculate that the integrity of Anti-Corruption Court judges is certainly no worse than other judges in Indonesia's court system, including those who sit in the general courts from which the Anti-Corruption Court took jurisdiction over corruption cases. Their integrity may, in fact, be better, given the intense media scrutiny many Anti-Corruption Court cases attract, pressuring the judges of this court to resolve cases professionally.

Second, criticisms based on acquittals completely disregard the main purpose of

2 Data indicating conviction rates in 2012 and 2013 was unavailable at time of writing. Most of these acquittals were appealed and some were overturned by the Supreme Court. For example, the Supreme Court overturned the Anti-Corruption Court conviction of Bekasi mayor Mochtar Muhammad.

criminal trials: to interrogate the available evidence to determine whether the accused is guilty or innocent. In this context, there are situations in which judges *must* acquit the defendants prosecuted before them. These include if the prosecution is unable to put forward sufficient persuasive evidence to convince the panel of judges of the defendant's guilt. According to art 183 of the Code of Criminal Procedure (*Kitab Undang-undang Hukum Acara Pidana*, or KUHAP), judges cannot convict a defendant unless they have the strong belief (*keyakinan*) that a crime has taken place and that the accused committed it. This belief must be supported by at least two pieces of 'valid evidence' (*alat bukti*) recognised under Indonesian law.³ If the prosecution's case is not supported by this evidence, then the presiding judges have no choice but to acquit. If they are not convinced that a crime has taken place, or they think that the accused is innocent, again, they must acquit. To this end, the defendant's lawyers can put forward their own evidence to weaken the prosecution case. Judges should also throw out the case after the prosecution has read its indictment — one of the earliest stages of criminal trials in Indonesia — if that indictment is flawed. The KUHAP provides several grounds upon which courts can reject indictments, including that they are not accurate, clear or comprehensive (art 142(3)). Indictments must, therefore, clearly outline the crime that the prosecution seeks to prove and show that the defendant's acts or omissions meet each element of the crime. Of course, the law that the prosecution alleges was breached by the defendant must itself be valid and applicable to the case at hand.

There is some evidence to suggest that the regional Anti-Corruption Courts have acquitted defendants in these very circumstances. According to media reports, the Surabaya Anti-Corruption Court has acquitted defendants in cases in which prosecutors made a fundamental mistake as to the gender of the defendant in their indictment; were unable to locate the defendant and bring him or her to trial but did not specifically ask the court to hear the case in absentia; and claimed in the indictment, that the defendant had breached provisions of the 1999 Anti-Corruption Law that did not, in fact, exist (Musahadah, 2012). In other cases, prosecutors apparently attempted to indict defendants based on statutory provisions to which limitation periods applied. Article 78 of the Indonesian Criminal Code (KUHP or *Kitab Undang-undang Hukum Pidana*) establishes a limitation period of six years for crimes for which the maximum penalty is three years; 12 years for crimes for which the maximum penalty exceeds three years; and 18 years for crimes attracting the death penalty or life imprisonment.

UNDUE PRESSURE TO CONVICT?

Worse, some commentators have speculated that the Anti-Corruption Courts — particularly (but not exclusively) the Jakarta Anti-Corruption Court — have been willing to ignore procedural defects such as these, along with poorly presented prosecutions and strong defence arguments, in order to maintain high conviction rates. This, they argue,

3 Critically, not all types of evidence are categorised as *alat bukti*. They cannot be used to prove guilt. See Butt, 2008 and 2012.

is highly problematic, particularly from a rule of law perspective. The concern – which is primarily leveled by defence lawyers rather than legal reformists and human rights activist – is that the Anti-Corruption Court must have been forgoing the presumption of innocence to secure convictions (Butt, 2009a). After all, they argue, the KPK, although renowned for better investigative and prosecutorial standards than ordinary police and prosecutors, could not have ‘got it right’ in every single one of the 250 or so cases heard by the Jakarta Court before the Anti-Corruption Courts were decentralised.

Despite the increased number of acquittals since 2011, some Anti-Corruption Courts might still be willing to convict in questionable circumstances. For example, Miranda Gultom was successfully prosecuted in 2012-13 for her involvement in bribing members of parliament to appoint her as Bank Indonesia Deputy Governor. She was indicted under provisions to which the limitation periods of art 78 of the KUHP appeared to apply. The judges dismissed her lawyers’ objections, however, and allowed the case to proceed (Pratama, 2012).

In my view, it is possible that Anti-Corruption Court judges find themselves under significant pressure to convict in corruption cases. Once a person of interest is formally named as a suspect and is indicted, many media and anticorruption ‘reformists’ appear to presume that the suspect or defendant is, in fact, guilty. This expectation of guilt is likely fuelled by the Jakarta Anti-Corruption Court’s previous 100 per cent conviction rate. As mentioned, the KPK must proceed to trial once it formally names a person as a suspect. Thus every person the KPK named as a suspect was ultimately found guilty of corruption until the Anti-Corruption Courts were decentralised.

Given the deep abhorrence that most Indonesian citizens feel towards corruption within their institutions of government, it might also be argued that Anti-Corruption Court judges – particularly the ad hoc judges who have been employed as part of efforts to maintain the integrity of the Anti-Corruption Courts – feel under undue pressure to convict in corruption cases lest they be labeled anti-reformist. This appears to be reflected in a statement of Supreme Court Deputy Chief Justice Artidjo Alkostar, widely regarded as ‘reformist’. In an interview published in Tempo magazine in August 2012, he stated that ‘If a corruptor’s file ends up on my desk he won’t get away’ (Tempo, 2012a). It is difficult to see how a corruption case could be heard on its merits in these circumstances.

CONCLUSION

Albeit highly problematic, judging ‘success’ by using acquittal rates is understandable. As mentioned, Indonesia is renowned for having high levels of corruption in its institutions and many of its public officials suspected of corruption have been ‘untouchable’ in the past. Prime examples are, of course, former President Soeharto, his family and his inner circle. During his 32-year rule, he and his children were said to have amassed somewhere between \$US 15-35 billion, despite his presidential salary being only \$US 1,764 per month (Colmei and Liebhold, 1999).

Of course those who engage in corruption need to be pursued and ultimately convicted and punished for their crimes so that others will, hopefully, be deterred from engaging in similar practices. While for some anti-corruption reformists, convictions might constitute success, questionable convictions hardly bode well for the rule of law in Indonesia in the long term. Unless the Indonesian courts begin enforcing legal safeguards and ensuring that all Indonesians receive 'due process', trials will continue to be susceptible to prevailing political winds and public perceptions, however ill-informed.

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Melbourne Law School
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Author/s:

Dick, H;BUTT, S

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