SIMON BUTT AND TIM LINDSEY

Judicial mafia

The courts and state illegality in Indonesia

For decades, Indonesians have regarded the Indonesian judiciary as one of their nation's most corrupt institutions.¹ Surveys indicate that its reputation, ironically, has been for its propensity to act illegally, rather than its capacity to enforce the law, let alone deliver 'justice' (Asia Foundation and ACNielsen Indonesia 2001). Popular belief has it that most of Indonesia's judges and court officials are willing to accept, or even to extort, bribes from litigants to secure victory in their cases, with the Supreme Court seen as one of the most corrupt courts in the country. The Indonesian joke – which even judges tell – has the word *hakim* (judge) as short for *hubungi aku kalau ingin menang* (contact me if you want to win).²

It is also often said in Indonesia that corruption within the judiciary is systematic and institutionalized: illicit payments are filtered into patronage networks within which the recipient's superiors take percentages. For these reasons, the Indonesian justice system is often described as a 'mafia' (*mafia peradilan*) because most bribes are paid as part of a complex web of well-organized 'arrangements' involving a number of corrupt players, rather than just a few rogue individuals (Assegaf 2002:130). Even Supreme Court parking attendants are said to be involved.³

Senior Indonesian judges, including retired Supreme Court Chief Justices, have admitted that there is much in these popular perceptions that is accurate. Former Chief Justice Soerjono, for example, estimated that 50% of Indonesia's judges were corrupt (Pompe 2005:414), as did former Chief Justice Asikin Kusumaatmadja,⁴ although well-regarded lawyers have claimed that the pro-

¹ Research for this article was in part funded by AusAID through the Australia-Indonesia Governance Research Partnership (AIGRP), administered by the Crawford School at the Australian National University. We also thank Firmansyah Arifin of the National Law Reform Consortium (Konsorsium Reformasi Hukum Nasional).

² See 'Mafia atau Mahkamah Agung?' *Tempo* 2 April 2000.

³ See 'Mafia atau Mahkamah Agung?' *Tempo* 2 April 2000.; ICW 2001:1.

⁴ See 'Courting corruption' *Inside Indonesia* 49 (January-March 1997), <http://insideindonesia.org/content/view/892/29/> (accessed 12-11-2009).

portion of corrupt judges is closer to 90%.⁵ Another former Supreme Court Justice – Adi Andojo – went even further in the mid-1990s, publicly naming other Supreme Court judges whom he accused of receiving massive bribes from litigants.⁶ The situation, according to one lawyer, was so dire that an Indonesian court

[...] shouldn't be called a house of justice [*kantor pengadilan*] but instead an auction house [*kantor lelang*]. An auction house for cases. [...] [T]he judge himself calls me or the prosecution calls me or a policeman calls me – they're the ones who ask me, 'Do you want your client to be helped or not? Does your client have enough for a donation or not?' So they're actively pursuing this. They're the producers and they're offering their wares [...] 'Do you have money or not? If you don't, I'll make an offer to your adversary.' Now when I get a telephone call like this, I'm no longer surprised [...] Now I feel that it is natural (Pember-ton 1999:200).

In 2001, respected NGO Indonesia Corruption Watch (ICW) conducted dozens of interviews with judges, lawyers, court employees, prosecutors, litigants and police.⁷ Many interviewees testified that bribery was very widespread and that they had either witnessed it or had participated in it. One interviewee even claimed '[...] while I have been an employee of the court there have been no cases which did not involve the payment of money'.⁸ He concluded that 'if most people who take bribes go to hell, I think that no judges will be let in heaven'.

If even some of these perceptions are accurate (and determining this is a complex issue, which we discuss below), then the implications go much further, of course, than mere corruption within the judiciary. This is because the courts in post-Suharto democratic Indonesia are, in principle, the forum where intractable disputes between citizens and between citizens and the state should ultimately be resolved. They are also where the meaning of laws, the powers and functions of private and public institutions, and the nature and extent of rights should be determined. In other words, much of the power to define and shape the relationship between state and citizens is formally in the hands of the courts. In theory, the judiciary in Indonesia is thus necessarily a key arbiter of the post-Suharto *reformasi* process that has sought to roll

⁵ See 'Wawancara Trimoelja; Mahkamah Agung memang sudah bobrok', *Republika* 21-4-1996, www.republika.com (accessed 12-11-2009).

⁶ As discussed below in detail, these judges were, however, never convicted in relation to these allegations. See also 'Wawancara Adi Andojo; Akhirnya karir saya dan juga Mahkamah Agung tidak ternoda' *Tempo* 3 March 1997, www.tempointeraktif.com/ang/min/02/09/nas1.htm (accessed 12-11-2009).

⁷ On file with authors – we thank ICW for providing this material to us. Some of the interviews were later published in an ICW report entitled 'Opening the curtains on judicial corruption' (ICW 2001).

⁸ Interview with a judge conducted by Narullah from ICW on 26-7-2001 (in the possession of the authors).

back the overwhelming power of the authoritarian state built under Suharto's New Order and replace it with a more open, transparent system of governance in which individual rights have greater currency and the powers of the executive and the legislature are hemmed in by institutionalized democratic checks and balances (Lindsey 2002, 2004).

If, however, the courts are dysfunctional or lawless in themselves, then none of this can happen, or at least it cannot happen in a predictable, rational and fair fashion: a properly functioning judiciary is crucial to the maintenance of state legality. Governments everywhere push the boundaries of legality and it is often left to the judiciary to formally determine whether an act is illegal and, if so, to punish it. In some circumstances, governments may breach the law blatantly, deliberately and with some form of ulterior intent, such as to remove political rivals or dissidents, to secure personal benefits from public resources, or to cover up military human rights abuses. In other circumstances, however, the legality or otherwise of state action is far less clear-cut. Well-intentioned governments might test existing rules in an attempt to provide welfare benefits to citizens or improvements to governance systems by, for example, establishing a judicial watchdog or anti-corruption court to handle corruption cases more effectively (Fenwick 2008; Lindsey 2008); or upholding important socioeconomic human rights of the majority in the face of the competing human rights of a minority (Butt 2007b).

Regardless of the rationale for the government's illegality, if the judiciary fails to enforce the law against state officials, then there is little else to prevent the state acting illegally, save for 'shaming' through the media or academic critique. Such strategies can be risky if the state actor can wield political or physical power or threats. During the New Order period, for example, journalists were routinely threatened and publications shut down for criticizing the government. Even after the fall of Suharto, and with the general opening-up of the media and more permissive stance towards criticism of the state that followed, some critics have been met with threats of defamation litigation. Without an effective judiciary, the state can proceed largely unrestrained by law.

The dangers of judicial dysfunction for the weaker party in the state-citizen relationship are thus obvious. In this sense, illegality within the judiciary contributes to state illegality more generally. Real reform of the kind that might eventually rein in the broader patterns of Indonesian state illegality that persist from the New Order and earlier must therefore itself depend on a transformation of the judiciary that ends illegal practices and delivers a competent, transparent and predictable judicial system (Butt 2008; Goodpaster 2002; Lev 1978).

Accordingly, in this chapter we discuss a number of different types of judicial illegality and their prevalence, as well as their effect on different forms of broader 'state' illegality. Attention is also paid to various attempts at detecting and pursuing judicial illegality and how some members of the

Indonesian judiciary have persistently, strenuously and effectively resisted efforts to hold them accountable for this illegality.

Internal and external illegality

In analyzing the conduct of Indonesia's courts, we distinguish between two types of illegality. The first we call 'internal illegality', by which we mean illegal actions performed by judges when exercising their judicial functions. Judicial corruption and lack of judicial independence in decision making are prime examples of this type of illegality.

The second type we call 'external illegality' or 'authorizing or validating illegality'. This occurs when judges perpetuate or legitimize the illegality of the actions of parties to litigation by not enforcing or upholding the law. When these parties are governments or state officials, the judiciary contributes to 'state illegality' by, in effect, providing them with legal immunity for their illegal acts.

Of course, these two types of illegality are usually linked, because external illegality is typically preceded by internal illegality, such as when judges are bribed or succumb to government pressure, leading to a prearranged outcome in cases involving state officials. We distinguish between them, nonetheless, because we argue that while internal illegality has not significantly decreased overall, it is arguable that external illegality has declined since Suharto fell in 1998.

Defining illegality

We define 'illegal' for the purposes of this chapter to mean 'contrary to law'⁹ and it is clear that when judges act corruptly – that is, when they decide a case in favour of one party in return for some form of personal or professional benefit to which they would otherwise not be entitled – they violate Indonesian law. Indonesia's 1999 Anti-corruption Law, amended in 2001, provides in Article 2(1) a very broad definition of what constitutes corruption, which includes

⁹ 'Law' here means any type of written law, whether contained in the 1945 Constitution, statutes (*undang-undang*), government regulations (*peraturan pemerintah*), presidential regulations (*peraturan presiden*), regional regulations (*peraturan daerah*), or any other of the myriad types of executive-level regulations (*peraturan*) or decisions (*putusan*) (see Article 7(1) of Law no. 20/2004 on Making Laws for Indonesia's so-called 'hierarchy of laws'). 'Law' also includes Islamic law, to the extent that it has been incorporated into state-made law, through the 1991 *Kompilasi* of Islamic Law (issued by Presidential Decree in 1991), for example; and to the extent that it is applied in Indonesia's religious courts (Feener 2007; Hooker 2003, 2004, 2008; Lev 1973; Lindsey 2008; Lindsey and Hooker 2007). It also includes customary law (*adat*), where applicable (Davidson and Henley 2007; Hooker 1978). *Adat* may, in turn, also include elements derived from Islamic legal traditions.

any 'illegal' act that enriches the perpetrator or another, and which damages the finances of the state. Article 3 prohibits any person from, with the aim of enriching him or herself, another or a corporation, misusing their authority, opportunities, or means at their disposal because of the office they hold, in a way which could damage the state's finances or the economy. It is clear, too, that judges act illegally when they act with bias – that is, when they are influenced (whether by inducement or threat) – or choose by reason of personal prejudice, not to decide a case independently on its merits. Bribery and corruption would constitute such interference, as would government pressure. A raft of Indonesian laws make the requirement of independence unequivocally clear.¹⁰

Detecting judicial illegality: methodological challenges

As our definition of 'illegality' suggests, behaviour that is merely inappropriate or immoral is not 'illegal' unless that behaviour is also contrary to law. This has the important implication that judicial actions or decisions that are merely unpopular are not necessarily 'illegal', but this distinction is not often drawn in Indonesia, or at least is not often clearly drawn. In the media, and among lawyers and civil society observers, unpopular judicial decisions are commonly criticized, regardless of their legal merits, for not 'meeting the community's conception of justice' (*memenuhi rasa keadilan masyarakat*), a phrase borrowed from the Elucidation to Article 1(1) of the Judiciary Law. Such claims are often made without a considered analysis of the factors that the judges took into account in coming to their decision or of the legal reasoning they adopted. This is unsurprising, however, given that, as discussed below, most Indonesian courts do not provide easy access to their decisions.

It should be self-evident that whether 'illegality' has played a part in a judicial decision cannot be determined conclusively purely on the basis of the verdict or sentence in a case. Likewise, court staff (including judges) who may have acted illegally in the chain of events that led to the production of a decision are, of course, hardly likely to admit that. There also may well be reasonable legal explanations for decisions that appear to be undesirable by reference to the vague criterion of 'community standards'. These may not always be obvious, and judges may not necessarily disclose these explanations in their decisions. In respect of criminal cases, for example, prosecutorial standards in Indonesia are, in general, low, and prosecutors may simply fail to convincingly prove the allegations made in their indictments. Crucial witnesses or documents may be unavailable. Evidence that might be portrayed in

¹⁰ Article 24(1) of the Indonesian Constitution, for example, states that 'Judicial power is an independent power to maintain a system of courts with the objective of upholding law and justice.' The 2004 Judiciary Law (Law no. 4/2004) also requires judicial independence in a number of its provisions.

the media or elsewhere as indisputable may be brought into question at trial by judges and defence lawyers and, after examination pursuant to evidentiary rules, may be found to be of little or no weight or benefit in a formal sense. As in most jurisdictions, the testing of evidence is one of the main purposes of trial in Indonesia and that process can often lead to a conclusion that evidence is insufficient in a technical sense to ground a guilty verdict (in a criminal case) or a finding of liability (in a non-criminal case). As in many other countries, the subtleties of this process rarely survive media reports.

The laws that judges must apply might also be weak. Classic examples in the Indonesian context are Criminal Code (Kitab Undang-undang Hukum Pidana, KUHP) and Code of Criminal Procedure (Kitab Undang-undang Hukum Acara Pidana), both of which are criticized by Indonesian lawyers for being light on detail and desperately out-of-date, particularly in matters of evidence law (Butt 2008; Fitzpatrick 2008). A judge might, therefore, be acting entirely 'legally' to release an unpopular suspect given the weakness of these two statutes – indeed, a proper application of the law might require the judge to do so – but still find him or herself accused of 'illegality'. In the media, and in public perception, this sort of decision is likely to be portrayed as simple wrongdoing on the part of the judiciary.

Finally, a judicial decision might also employ weak legal arguments, as is, in fact, often the case in Indonesia, but this could be a result of judicial incompetence, rather than corruption. The two are not the same thing, even if they are often found together.

If detection of illegality by reference to case outcomes alone is unreliable, then by what means can illegality be detected? Unfortunately, particular aspects of 'judging' make both internal and external illegality very difficult to detect and prove. This is so in the legal systems of many countries, but the problem is particularly severe in the Indonesian context.

One potential source for detection is the judicial decision itself. It is often presumed that close scrutiny of judicial reasoning will reveal impropriety, if any occurred in the case. A key preliminary issue to be addressed in this regard is access to judicial decisions in Indonesia. It is, of course, impossible to analyse a decision without access to it. Although it would seem basic to any court's credibility that its judgments be freely available, this does not occur in contemporary Indonesia, feeding damaging speculation on the reasons for unpopular decisions.

So, for example, although several thousand decisions of Indonesia's Supreme Court, the Religious Courts (Pengadilan Agama) and the Constitutional Court (Mahkamah Konstitusi) are, at time of writing, available on their websites,¹¹

¹¹ For Supreme Court decisions, see <http://putusan.mahkamahagung.go.id/> (accessed 13-10-2010); for Constitutional Court decisions, see www.mahkamahkonstitusi.go.id (accessed 8-9-2010).

and are available through the AsianLII database,¹² this constitutes only a miniscule proportion of the total number of decisions handed down by Indonesian courts each year, around 3.5 million (Mahkamah Agung 2008). The vast majority of the Supreme Court's decisions are not published on these websites or elsewhere, and most of the millions of decisions of Indonesia's lower courts remain accessible only with great persistence, often involving a personal visit to the court in which the decision was handed down. The most obvious reasons for the lack of publication in Indonesia are budgetary and, as discussed below, unwillingness by judges to subject their decisions to scrutiny, particularly in controversial cases. Another reason is that these judgments have for decades been seen as valuable commodities by court staff, who can extract significant payments for their provision to desperate lawyers, litigants, researchers or journalists, and who thus have a vested interest in making decisions unavailable. It is therefore not unusual for parties who have a judgment entered against them to only discover this fact from the media. Some may, in fact, never receive a copy of the judgment (Butt 2008).

Another impediment to detecting judicial illegality is judicial discretion. Judicial discretion is a fundamental and unavoidable part of adjudication. It is exercised, most obviously, when judges decide whether the evidence presented is sufficient to indicate liability or guilt, but it comes into play in many other contexts in Indonesia, for example, when judges must choose between two or more laws that could be applied in a particular case, but which might lead to different outcomes.

The level of discretion judges exercise differs from place to place and from time to time. Logically, the more scope for judicial discretion, the more difficult illegality will be to detect. The more free judges are in their choice of law to apply, the evidence they will allow, their analysis, and, ultimately, their decision making, the easier it becomes to justify any decision they are inclined to make.

Indonesia's legal system provides judges with what is, by international standards, a relatively high degree of discretion and many opportunities to exercise it. This is partly because Indonesia's laws are, typically, generally worded and thus allow much judicial flexibility when applied to the facts of a given case. Broadly cast laws are a feature of many, if not most, countries in the world, although it is sometimes said that it is particularly prevalent in the European-derived 'Continental' civil law tradition,¹³ which Indonesia follows. However, such laws can often make detecting illegality extremely difficult. Judges can simply declare that the facts that come before them do or do not fall within the scope of a particular provision without being forced to justify this conclusion in detail.

¹² See www.asianlii.org (accessed 8-9-2010).

¹³ Dawson 1994; Glendon, Gordon and Osakwe 1985; Lasser 2004; Merryman 1984.

Detection difficulties are arguably aggravated in countries that do not require judges to provide decisions that contain a detailed and reasoned account of the evidence put forward in the case, the legal arguments made by all parties, the legal difficulties the case raised, and an analysis of the law applicable to the case (Lasser 2003, 2004). Because there are usually at least two sides to any legal dispute, each party often has a reasonable legal argument, particularly in cases that reach the appeal level in the higher courts. In many such cases, it can be easy for judges simply to choose the argument of the party he or she favours. This might require judges to do little more than regurgitate in the judgment the arguments of that party, perhaps simply claiming that the choice was a legitimate exercise of judicial discretion.

Finally, as in many other civil law countries, Indonesia has relatively few rules of evidence, and the admissibility of evidence is therefore largely a matter of judicial discretion. Although hearsay and opinion evidence are not formally admissible, Indonesian judges have otherwise very broad powers to admit or reject evidence. They can, for example, allow highly prejudicial evidence, even if it lacks significant probative value; and they can reject the most convincing evidence in general criminal cases merely on the basis that it is not a formal 'document' or 'testimony'.¹⁴ Likewise, decisions as to the weight to be given to evidence are often reserved until judgment, allowing potentially inappropriate material full play during the hearing, such that findings about its worth in the judgment may come too late to remedy any prejudice already caused. Clearly, then, Indonesian judges have great discretion to accept or reject evidence that might determine innocence, guilt or liability.

Doctrinal issues raised by the guarantees of judicial independence can also compound difficulties in detecting judicial illegality. Judicial independence might appear to be a straightforward proposition: judges must be free to decide cases in accordance with their view of the law and the facts of the case before them; and they should not be pressured into making a decision in favour of one of the parties. If judges were not independent, litigants would have little faith in courts to resolve their disputes (Shapiro 1981:1, 7). Issues arise, however, in determining precisely how judicial independence should be achieved and how much independence judges require to adequately perform their adjudicative functions. One issue is whether judges should be immune from accountability measures such as performance and competence reviews because of fears that these measures might affect the way judges decide cases, thus opening the door to improper influence. Some judges claim that if they are subject to review by a non-judicial body, such as parliament

¹⁴ Butt 2008. This wide discretion exists largely because civil law tradition countries, such as Indonesia, have traditionally not employed juries (Merryman 1984). There is, therefore, no need to protect juries from prejudicial or defective evidence – a concern underlying much of the detailed evidence law often found in common law tradition countries.

or a judicial commission, they might be more likely to issue decisions of the kind that would be favoured by their reviewers. This is an argument that has long had much support among judges in developed democracies, and should be taken seriously. It is, however, open to exploitation by the unscrupulous. The Indonesian cases of Endin and the 'three judges', both discussed below, show that Indonesian judges have gone to extraordinary lengths to avoid scrutiny and that, typically, they have pointed to the doctrine of judicial independence when doing so (Aspandi 2002:101). By resorting to pleas of 'judicial independence', Indonesian judges have, for example, resisted a return to the early New Order practice of *eksaminasi* under which the superior of each judge periodically examined three criminal and three civil decisions handed down by that judge.¹⁵

For example, the Constitutional Court, in a case discussed below, used the principle of judicial independence to justify a decision disallowing scrutiny of judicial decisions by the Judicial Commission in an attempt to detect irregularities. It declared unconstitutional parts of the Judicial Commission Law that purported to allow the Commission to supervise performance of Indonesia's judges – including Constitutional Court judges – by analysing their decisions. This activity, the Court held, was best left to the formal appeals process, under which senior judges assessed the previous decisions of lower-court judges. According to the Court, having non-judicial officers performing this assessment compromised the constitutional requirement of judicial independence.

If Indonesian judicial decisions are difficult or sometimes even impossible to access and, even if one were to obtain them, unlikely to clearly reveal internal or external judicial legality, how then can judicial illegality be identified? The answer, we argue, is, somewhat unreliably, through admissions, anecdotes, estimations, perceptions and presumptions. These measures might provide an overall impression of the extent to which internal and external illegality occurs within the judiciary, but they are far from scientifically rigorous and are susceptible to being based largely simply on the outcome of cases – a danger we identified above. There are, however, usually no alternative methods by which judicial illegality can reliably be measured in contemporary Indonesia.

For these reasons, in asserting corruption and lack of judicial independence in this chapter, it is generally impossible to offer unequivocal data. Instead, we are forced to refer to statements made by senior judges, lawyers and others about the prevalence of corruption, and to public perceptions, often informed by experience, about illegality within the judiciary. Likewise, in discussing the courts' authorizing or legitimizing illegality, we have to focus on the impropriety of meetings between judges and government officials; and the former

¹⁵ Supreme Court Memo (*Surat Edaran*) no. 1/1967 on Examinations, Monthly Reports and Appeals Lists. See Aspandi (2002:80, 127) and Butt (2007a).

structural relationship between the Department of Justice and the Supreme Court that gave the Department a degree of authority over judges and, by all accounts, allowed the Department to interfere in cases. We do so, however, without resiling from our own critique of the limitations of this approach.

Internal illegality and corruption

At the start of this chapter we described the parlous reputation for pervasive corruption of the Indonesian judiciary, and, in particular, the general courts, led by the Supreme Court. The perception that the general courts are utterly rotten is only rarely displaced by shining examples of judicial integrity or excellence. It is usually accepted that the Religious Courts and the new Constitutional Court are relatively clean. Overall, however, there are now signs that internal illegality within the judiciary probably has not decreased and might even be on the rise. Complaints of corruption – particularly within the general courts and within the Supreme Court – are still very common. The majority of complaints lodged with Indonesia's National Ombudsman Commission, for example, relate solely to this issue (M. Crouch 2008:386).

Why these high corruption levels? In Indonesia, a combination of factors is at play. Low operational budgets and low judicial salaries have often been cited as factors forcing judges to seek additional sources of finance and income.¹⁶ On the (highly questionable) presumption that increasing salaries will somehow reduce corruption, judicial salaries have been substantially increased in recent years.¹⁷ The Supreme Court's budget has also recently been greatly expanded, although, so have its administrative responsibilities. Its budget increased drastically from Rp 79.5 billion in 2002, to Rp 153 billion in 2004,¹⁸ and after the *satu atap* (one roof) reforms, discussed below, to Rp 1.2 trillion in 2005, Rp 2.2 trillion in 2006, and Rp 3 trillion in 2007.¹⁹ This appears to be a significant increase, but in real terms it is arguably a reduction, given the vast expansion of the court's responsibilities and administrative burdens. With this budget, the Supreme Court must, for example, administer 67 appeal courts and 706 first instance courts, including paying for building infrastructure and the salaries of over 7,000 personnel (Mahkamah Agung 2008:i).

In any case, increased salaries, even combined with strong new corruption

¹⁶ World Bank 2004:83-5; *Menuju independensi* 1999:62; Dakolias and Thachuk 2000:398.

¹⁷ See 'ICW; Makin besar gaji hakim "gila-gilaan"', 23-7-2002, <http://www.hukumonline.com/warta/2002/7/23> (accessed 8-9-2010).

¹⁸ See 'Kekuasaan kehakiman satu atap, anggaran MA membengkak', 4-9-2004, <http://www.hukumonline.com/warta/2004/9/4> (accessed 8-9-2010).

¹⁹ See 'Permasalahan menahun, anggaran tak cukup', 27-4-2007, <http://www.hukumonline.com/warta/2004/9/4> (accessed 8-9-2010).

laws, have apparently failed to reduce corruption. Judges are, of course, rational persons: corrupt ones are unlikely to change their behaviour unless it is in their best interests to be honest (Dakolias and Thachuk 2000:365, 398; World Bank 2004:vii). This might occur if detection is probable and sufficiently punitive sanctions are likely to be imposed for contravention of those laws. The Indonesian judiciary has, however, resisted the imposition of mechanisms designed to do just that, so it remains unlikely that an errant judge will be punished. This is an issue to which we return below, when we discuss the ill-fated Judicial Commission.

Perhaps the most prominent example of the contempt with which some Indonesian judges view efforts to bring them to account for their alleged illegalities is the Endin case, which occurred after the fall of Suharto in 1998 but before the *satu atap* reforms. We focus on this case because it is one of the few in which the decision is available to us and because it does, on its face and when read in the context of the circumstances surrounding the case, appear to demonstrate clearly both impropriety and the courts' determination to avoid outside scrutiny and detection of internal illegality.

Case study; The Endin and three judges cases

Endin admitted to bribing three Supreme Court judges on behalf of the plaintiff in an inheritance case, for whom he worked as a *calo*, or go-between.²⁰ He claimed to have paid Supreme Court judges Yahya Harahap Rp 96 million, and Marnis Kahar and Supraptini Sutarto Rp 50 million each. Subsequently, Endin's client won the case, but the defendant refused to comply with the decision and the district court failed to enforce the Supreme Court's decision. Such enforcement failures are common in Indonesia because of serious flaws in its regime for enforcement of judgments that expose that process to opportunities for corruption and political interference.²¹

Endin's client was, unsurprisingly, perplexed by her unenforceable victory. Frustrated, Endin claimed that he delivered a letter to the judges at their Supreme Court offices, in which he reminded the judges of the payment, and sought their assistance with the enforcement of their decision.

In September and October, I, along with my friend, gave an amount of operational money to win case no. 560.K/Pdt/1997 to Mr Yahya Harahap, Ms Marnis Kahar and Ms Supraptini Sutarto [...] I requested that [the three judges] contact me to find a solution that is best for everyone.²²

²⁰ Case no 560.K/Pdt/1997.

²¹ For a detailed account of Indonesia's troubled record on enforcement of judicial decisions, see Butt 2008.

²² Endin defamation case (Central Jakarta District Court Decision no. 427/PID.B/2001/PN.JKT.PST), p. 18, copy on file with authors.

Obtaining no response, an apparently infuriated Endin reported the judges to the police, accusing them of accepting his bribes. In a deal struck with then Attorney General Marzuki Darusman and Adi Andoyo Soetjipto, Head of the Joint Corruption Eradication Team (Tim Gabungan Pemberantasan Tindak Pidana Korupsi, TGPTPK) and a former well-respected Supreme Court Judge, Endin was assured that he would not be prosecuted for making the report.²³

The Joint Team duly began preparing their cases against the judges. However, before the criminal case involving the judges as defendants could be heard, the judges reported Endin to the police, alleging that he had defamed them. Defamation proceedings began in the Central Jakarta District Court before the three judges were tried for bribery. In Indonesia, defamation is often dealt with by means of criminal law, and Endin was charged under several articles of the Criminal Code including Article 310(1). This Article provides that anyone who attacks the honour or good name of a person by accusing them of something, with the intent that it is to become publicly known, faces a maximum of nine months in prison for defamation. The Criminal Code does not make 'truth' a defence to defamation in all circumstances but, under Article 312, a court can permit the defendant to avoid punishment by proving the truth of the allegedly defamatory allegation if it is made against an official performing his or her official duties (Article 314(1)). If the defendant fails to prove the truth of the allegation, however, the maximum penalty increases from nine months to four years under Article 311.

Endin was convicted under both Article 310(1) and 311. As for the Article 310(1) charge, the Court considered Endin's letter and concluded that it accused the judges of accepting a bribe to 'fix' a case.²⁴ The Court found this allegation to be insulting and, therefore, defamatory.²⁵ The Court gave Endin the opportunity to attempt to prove the truth of his allegation under Article 311, but held that he failed to do so. The judges maintained throughout the trial that they had never met Endin and that they did not accept the bribes as alleged. The panel emphasized inconsistencies in Endin's version of events that cast doubt on his story.²⁶ In the end, Endin was convicted and sentenced to three months in jail, suspended for six months.

The Court's reasoning in its decision in this case was highly questionable, for two main reasons. First, the Court failed to consider Article 310(3) of the Criminal Code, which provides that no defamation occurs if the allegation is

²³ Lubis 2001. Declaration of Head of Tim Gabungan Pemberantasan Tindak Pidana Korupsi, 22-6-2000 (on file with authors).

²⁴ Endin defamation case, p. 19.

²⁵ Endin defamation case, p. 19.

²⁶ For example, Endin had claimed that he had given the judges Rp 50,000 notes, upon which was a picture of WR Supratman – the composer of the Indonesian national anthem. However, testimony from an expert from Bank Indonesia revealed that these notes circulated from 1-6-1999, which was, according to the evidence adduced at trial, well after Endin claimed to have bribed the judges in late 1998. Endin defamation case, pp. 20-1.

made in the public interest. Surely allegations of corruption within the highest level of the Indonesian judiciary are a matter of public interest? Second, Article 314(3) of the Criminal Code states that if criminal prosecution has begun of a person allegedly defamed, and the prosecution relates to the same matter that the person claims to be defamatory, then defamation proceedings should be stayed until a final decision has been issued in the criminal case relating to the matter alleged. In this case, this would mean that as the judges faced prosecution for corruption based on Endin's allegations, their defamation claims should be delayed until their own prosecution was complete, to ensure consistency in decisions. The Court, however, did not even consider this provision.

In the meantime, prosecution cases against the three judges were thrown out of court in pre-trial (*pra-peradilan*) proceedings.²⁷ The arguments presented by counsel for dismissing these cases, and which were accepted by the Court, were feeble in the extreme. They included that the Joint Team lacked jurisdiction to investigate the three judges because the Joint Team had not been formed at the time the alleged crime took place. As Assegaf (2002:138) points out, this was irrelevant, because the Joint Team was a taskforce within the Attorney General's Office made up largely of pre-existing prosecutors and police who coordinated the handling of particular corruption cases. It was thus not a new body with new powers exceeding those normally exercised by police and prosecutors.

Lawyers appearing for the judges also argued that the 1971 Corruption Law, under which they had been charged, could not be applied in this case.²⁸ They pointed to Article 44 of the 1999 Anti-Corruption Law which states that the 1971 Anti-Corruption Law 'is declared to be not in force (*dinyatakan tidak berlaku*)' with the coming-into-effect of the 1999 Law (which occurred on 16 August 1999). In this interpretation, Article 44 deemed the 1971 Anti-Corruption Law never to have existed. Some kind of specific 'transitional provision' is, they argued, customary when laws (particularly criminal laws) are changed in Indonesia and the 1971 Corruption Law contains one of these customary provisions.²⁹

The act of bribery was alleged to have taken place in 1997, that is, before the 1999 Law came into effect. The judges, their lawyers argued, could therefore not be charged under the 1971 Law, given that the national legislature had revoked it by enacting the 1999 Law. They could not be charged under

²⁷ Marnis Kahar and Supraptini Sutarto appeared together and Harahap separately.

²⁸ See 'Kasus korupsi hakim agung; Terdakwa bisa dikenai UU No 3/1971 dan UU No 31/1999', *Kompas* 3-8-2001.

²⁹ It states in Article 36 that it replaces Law no. 24/1960 for crimes committed after the 1971 Law came into force, but that alleged acts of corruption committed before 29-3-1971 (the date the 1971 Law came into force) would be prosecuted under the 1960 Law. The conspicuous absence of such a provision in Law no. 31/1999 – it simply declares Law no. 3/1971 invalid – appears to lend support to this argument.

the 1999 Law either, because to apply this to an act taking place before the Law's enactment would breach the Indonesian legal prohibition on retrospectivity.³⁰ This interpretation of Article 44 would give any person who had committed a corruption crime before 16 August 1999 de facto immunity from prosecution. The argument is unconvincing. Clearly, the legislature intended that the 1999 Law replace the 1971 Law, not to deem it never to have existed.

In any event, whether or not their claim had merit, it is strongly arguable that the Court lacked jurisdiction to hear the application made by the judges' lawyers at all. Article 77 of the Code of Criminal Procedure limits *pra-peradilan* proceedings narrowly to determining the legality of arrests, detentions or seizures (Fitzpatrick 2008:505-6). The focus of the judges' claim at this hearing was the jurisdiction of the Joint Team itself, an issue that would seem to fall well outside the ambit of Article 77. Despite this, the Court accepted the arguments of the judges' lawyers and dismissed the charges against their clients.

There was, of course, no legal reason to prevent prosecutors from revising and resubmitting their indictments; however, they did not (Assegaf 2002:138). Discussions with Andojo himself suggest that the Joint Team simply recognized that it could no longer prevail against what appeared to him to be an insuperable judicial – and, he claimed, political – conspiracy against it.

It seems he may have been right. Not content with having the case thrown out, the judges' legal representatives then filed a request with the Supreme Court to review the Government Regulation by which the Joint Team was established against the statute under which the Regulation was issued. In their application, they argued that Law no. 31/1999 (which declared that the Joint Team could be established to hear particular corruption cases) and Government Regulation no. 19/2000 on the Joint Team (which contains details about the Team's composition and functions) contradicted each other.

Several provisions of the Regulation, particularly Articles 6(2) and 18, seemed to indicate that the Team was permanent (*bersifat tetap*); yet Article 27 of the Law only stated that the Team 'could be established' (*dapat dibentuk*) 'in the event that corruption is discovered that is difficult to prove' pending creation of a later Corruption Eradication Commission (Komisi Pemberantasan Korupsi, KPK). This, they argued, indicated the Team was, in the words of the Court, 'impermanent, temporary, or incidental and facultative and causative'.

[...] Article 18 of the [Regulation...] has eliminated and placed Article 43 [of the Law...] in a position as a 'etre en soi' (bein in its self), that is the Anti-Corruption Commission has become an 'item' which has been alienated so that

³⁰ Aspandi 2002:34-5. This principle is contained in the first provision (Article 1(1)) of Indonesia's Code of Criminal Procedure (Kitab Undang-Undang Hukum Acara Pidana, KUHAP). A prohibition on prosecution for an act occurring before a law was passed has also been introduced in Article 28I(1) of the 1945 Constitution.

it has no power and even doesn't exist because the Commission is substituted to become the Joint Team.³¹

The Court's reasoning is nonsensical. Rather than just affirming that the Joint Team was indeed only a temporary stopgap measure until the Anti-Corruption Commission was established, the Court decided that it was necessary to invalidate the entire regulation. Lacking a legal basis, the Joint Team was forced to cease operating altogether and so the prospects of prosecuting the three judges ceased with it.

Perhaps most disturbing of all, the judge who chaired the Supreme Court panel appeared to have a serious conflict of interest. Justice Paulus E. Lotolong had previously been assigned by the Association of Indonesian Judges (Ikatan Hakim Indonesia, Ikahi) to 'accompany' the judges being investigated and, if necessary, to take any action as their legal advisor (Assegaf 2002:139). Surely his participation on the panel should have invalidated the Court's decision?³²

We described earlier the very significant difficulties of detecting illegality in Indonesian court decisions, and those caveats remain valid. The Endin and three judges cases, however, are remarkable for an absence across them of clear and compelling reasons for the decisions reached, and for the strong suggestion of ulterior motives for those decisions arising from circumstances in which they were made. Read together, it is hard to resist the conclusion that these cases demonstrate the willingness of the Indonesian judiciary to conduct the most ruthless and aggressive institutional resistance to attempts to detect corruption in its ranks and hold its officers to account, regardless of the merits of accusations against individual judges, and despite what the law intends in such cases. This, in turn, suggests that the reason for the judiciary's fiercely revanchist response in these cases is most likely a wish to protect an institutionalized model of corruption that implicates most of its members.

On this view, the problem of internal illegality in Indonesia's judicial institutions in the form of corruption and resistance to efforts to detect and punish corruption is now primarily about advancing and defending the interests of the members of that institution, rather than being driven by any attachment, ideological or political, to any particular institution outside the judiciary – for example, the New Order, the state, the government, Pancasila or Reformasi.

This can be seen, we would argue, from the fact that at the same time that the judiciary has continued determinedly defending its own members from

³¹ MA Decision no. 03 P/HUM/2000, which can be found on <http://www.hukumonline.com> (accessed 8-9-2010); mis-spelling in original.

³² Article 220 of Indonesia's Criminal Code states that if a judge has a conflict of interest in a case, he should step down from the case. It does not, however, go so far as to state that the judges' continued involvement in hearing the case will invalidate any decision made in that case.

scrutiny, offering them de facto impunity, it has been prepared to withdraw that impunity from other state actors. In other words, while the role of the general courts in authorizing external illegality has declined (although it has not entirely disappeared), and although its independence from the government has been largely won, internal illegality in the sense of corruption has been largely undiminished, despite the immense pressure that has been brought to bear for judicial reform. To demonstrate this, we begin by describing briefly the practice of external illegality prior to Suharto's fall.

External illegality and government interference

The weakening of judicial institutions under Indonesia's first president, Sukarno, and their systematic degradation during Suharto's 32 years in power, has been well-documented.³³ The downfall of what had been a reasonably professional and independent judiciary in the 1950s, began with Sukarno's introduction of 'revolutionary law' (*hukum revolusi*). Under this approach, courts and judges were targeted for obstructing presidential and executive prerogative which, Sukarno claimed, needed to be strong and largely unconstrained so that the new state could realize the goals of the revolution. Sukarno's campaign against the legal system culminated in Law no. 19/1964 on Judicial Power. This statute explicitly rejected the *trias politica* (separation of powers), including the principle of judicial independence; stated that the courts were an instrument of the national revolution; and enabled the president to interfere in, and retrospectively alter, any decision of any Indonesian court for the sake of the 'ongoing revolution or national interests'.

Sukarno's policy was catastrophic for judicial independence and integrity, but the courts fared even worse under Suharto's New Order. Although the overt legal power of intervention under the rubric of revolutionary law was abandoned by Suharto, by the mid-1970s, the regime was, in any case, able to influence – even dictate – virtually any decision, and it consistently did so in cases in which it had any interest at all, even 'petty cases, in which [...] important Justice Department officials or the Supreme Court leadership defined an interest' (Pompe 2005:140).

The government achieved this influence by exercising bureaucratic control over individual judges and administrative control over the judiciary. Most of Indonesia's judges (like judges in many civil law countries), became civil servants and as such were formally required to support government policy. They could, in fact, even be disciplined for breaching civil service

³³ See Butt 2008; Lev 1972, 1978; Lindsey 2000, 2001, 2002, 2004, 2007, 2008; Pompe 2005. The beginning of Suharto's rule is often traced to his actions on 1 October 1965.

regulations, which required adherence to the state ideology (Pancasila), the state and the government, and the prioritizing of the interests of the state over those of groups or individuals.³⁴

As for administrative control, despite strenuous objections from many Indonesian lawyers and judges (Lev 1978), the Ministry of Justice wielded organizational, administrative and financial control over the lower general and administrative courts, under the so-called 'two roof' (*dua atap*) system.³⁵ This gave the Ministry ultimate control over matters critical to the functioning of the courts and to the personal well-being of judges, such as the allocation of budgets, promotions, transfers, and dismissal, although responsibility for the legal competence of judges was nominally retained by the Supreme Court.

In many other civil law countries, the government controls these administrative and organizational matters, with little apparent adverse effect on judicial independence (Wells 1994), at least where there are guidelines and protocols preventing government intrusion. However, government control has had a deleterious effect on judicial independence in some civil law countries, particularly countries still developing cultures of legal and judicial professionalism (see Hammergren 2001; Mattei 1997). In Indonesia it was regularly blamed for very low levels of judicial independence. Specifically, the government was said to commonly exploit judges' reliance upon it for continued employment, pay, promotion and transfer to ensure loyalty, particularly from the early to mid-1970s (Pompe 2005:125-9).

A system thus developed by which judicial promotions were very rarely based on merit; rather, they mostly were based on seniority, 'dedication to service', and 'demonstrated loyalty' (Supreme Court of Indonesia 2003:132). The Department's power to transfer was also a powerful weapon (*Menuju independensi* 1999:50). Indonesia has a broad range of living conditions – from major centres with world-class facilities and luxuries, particularly in Java, to more remote, underdeveloped – and, at times, even dangerous – locations. The prospect of five years in a major centre for 'toeing the line', instead of in a backwater as punishment for recalcitrance, was a strong incentive indeed.³⁶

This non-merit promotion and transfer system that encouraged judicial acceptance of government interference is also responsible for other scourges that, at the time of writing, remain firmly part of the Indonesian judiciary. Continuing judicial education and the *eksaminasi* system, mentioned above,

³⁴ See Government Regulation no. 30/1980 on Disciplining Civil Servants, Articles 2(a) and 2(b).

³⁵ Law no. 14/1970 on the Judiciary, Article 11(1). The Defence and Security Ministry and the Religious Affairs Ministry had similar levels of control over, respectively, the military courts and religious courts.

³⁶ Lembaga Kajian dan Advokasi untuk Independensi Peradilan (LeIP) points to one judge who served in Aceh for 11 years and to some judges who served for similar times in other 'hardship' provinces, and notes that other judges have been promoted and transferred to more comfortable locations (including the capital, Jakarta) far earlier than they would normally be (Supreme Court of Indonesia 2003:131).

were virtually abandoned during the 'two roof' period. After all, there was no need to maintain or improve judicial standards if the primary loyalty of judges was to the government rather than the law. In fact, forensic skill could be a positive disadvantage for a judge, as it might lead him or her to make politically unacceptable decisions. The accountability mechanism of *eksaminasi* was also not required, indeed, it became an embarrassment: the smaller the chances of detection of interference in judicial decision making (even accepting that detection would be difficult in any event), the better for the judiciary and government alike.

It must be acknowledged, however, that some judges (albeit clearly a minority) refused to succumb to these pressures, and continued to decide cases as they saw fit, and there were high-profile cases where the government was defeated in decisions at one level of appeal at least. One well-known example was the celebrated *Tempo* magazine case, where the government lost at first instance and at the first level of appeal, but ultimately succeeded in the Supreme Court (Millie 1999). This seems to indicate that the Department's control over judges, at least with respect to particular cases and particular times, was sufficient to generally ensure that it ultimately secured the outcomes it desired, but was not as absolute as is often presumed.

Unwinding external illegality

Within this 'two roofs' system, the New Order courts did not, for the most part, 'punish' illegal acts by state actors, including judges themselves, unless the executive directed them to do so. Rather, they generally operated to authorize or validate illegal acts of the state, with the politically influential enjoying virtual immunity from conviction. Much has been written about this process and for reasons of space the detail will not be rehearsed here.³⁷

After the fall of Suharto, significant reforms were made to Indonesia's judicial system. One of the most important of these was, as mentioned, the transfer of the organizational, administrative and financial affairs of the lower courts to the Supreme Court – the so called 'one roof' (*satu atap*) reforms. These reforms take ultimate responsibility for the appointment, education, transfer, promotion and dismissal of judges away from the government. By forcing the government out of judicial career paths and the detail of court budgeting, these reforms constituted a radical reinvention of judicial administration in Indonesia.

Although to the knowledge of the authors no comprehensive or rigorous study has yet been able to measure how these reforms have, in fact, improved

³⁷ See, for example, Aspandi 2002; Butt 2008; Goodpaster 2002; Lev 1972, 1978; Lindsey 2000, 2008; Pompe 2005.

judicial independence, it is generally assumed in Indonesia that they have. Certainly it is now much rarer to hear allegations in the media and within Indonesian legal circles of government interference in cases in which it has an interest. And indeed, significant cases have emerged in which the government or state actors have been defeated. There is even evidence suggesting that private parties in disputes against the state might now be on such a level playing field that they are able to defeat the state by offering illicit payments to the judges hearing those cases (Butt 2008). If this is the case, then we speculate that illegality in the form of internal corruption might be filling some of the vacuum left by a decline of state-authorized illegality.

The apparently reduced levels of judicial authorization of external illegality cannot be attributed to *satu atap* reforms alone. The establishment of the Anti-Corruption Court (Pengadilan Tindak Pidana Korupsi, Tipikor) appears also to have made a significant contribution. This it has done by diverting some types of corruption cases involving state officials away from the general courts which would, in the past, have been the forum before which such matters would have been determined. The Anti-Corruption Court has, precisely as it intended, removed some potentially lucrative opportunities for corruption from corrupt judges. In doing so, and by increasing the possibility that general court judges themselves may one day appear before it as defendants, it also constitutes an implicit threat to the impunity of state actors and, in particular, of other judges.

The Anti-Corruption Court was established in 2003 to hear cases investigated and prosecuted by the Corruption Eradication Commission (Komisi Pemberantasan Korupsi, KPK). The KPK, made up of carefully selected seconded police and prosecutors, has been institutionally independent of Indonesia's ordinary law enforcement apparatus. It has the authority to investigate and prosecute cases of corruption that implicate law enforcement officers or government officials, involve a significant amount of the state's finances, or attract significant public concern (Articles 6(c) and 11 of the KPK Law). It can also take over corruption investigations from ordinary police and prosecutors if it determines that the case is not being handled expeditiously, if there are indications of corruption in the investigation or prosecution, or if the case is particularly complex or otherwise difficult (Article 9 of the KPK Law). Initially the KPK was criticized for choosing easy cases it could win, and for avoiding the 'big fish' corruption cases (Fenwick 2008), but in 2008 it began to dispel such criticisms, investigating corruption allegations against members of the national legislature (Dewan Perwakilan Rakyat, DPR), senior state officials involved in significant bank scandals, and even the father-in-law of President Susilo Bambang Yudhoyono's son.³⁸

³⁸ Purba 2008; Kong and Ramayandi 2008. See 'Vonis Hamka dan Antony tidak seragam; Aliran dana BI', 7-1-2009, <http://www.hukumonline.com/warta/2009/1/7> (accessed 8-9-2010), and 'Hamka divonis 3 tahun, Antony 4.5', *Kompas* 8-1-2009.

The Anti-Corruption Court had, at the time of writing, heard and decided around 100 cases that the KPK brought before it and had convicted the defendant in every case.³⁹ Although there are several differences between the Anti-Corruption Court and the general courts (Fenwick 2008), this 100% conviction rate is often credited to one in particular: the Anti-Corruption Court's use of non-career judges. Anti-Corruption Court hearings employ five-judge panels. Two judges are career judges, but three are non-career judges, giving the non-career (ad hoc) judges a majority if the court is split on whether to convict. These non-career judges are legal experts, such as academics, practitioners and retired judges and are considered less likely than career judges to be entwined in institutionalized corruption or to have divided loyalties. This appears to have been borne out in practice: several Anti-Corruption Court decisions have been split along ad hoc vs career lines (Fenwick 2008:414), with the majority ad hoc judges convicting the defendant and the minority career judges declaring that they would have acquitted or imposed a lower sentence.⁴⁰

The contribution of the Anti-Corruption Court should not be overstated: at the time of writing it was still hearing far fewer corruption cases than the general courts (ICW 2008). However, presuming that it remains effective in the future – a matter to which we return below – and assuming also that it continues to have high-profile cases presented to it by the KPK, it seems reasonable to expect that the Court could continue to have a significant effect on the reduction of judicial validation of state illegality in the future, and may even come eventually to address internal illegality within the courts.

Obstacles on the road to reform; Internal illegality and resistance to scrutiny

As mentioned above, Indonesia's courts – particularly the Supreme Court – have strongly resisted attempts to hold them to account for misconduct, whether this be in the form of scrutiny of their decisions in particular cases (such as in the Endin case) or a more systematic mechanism to review their performance (such as a reintroduction of the *eksaminasi* system). The success of this resistance, it seems, allowed internal and external judicial illegality to continue virtually unchecked, at least until the *satu atap* reforms and the Anti-Corruption Court were introduced.

Now it seems Indonesia's new Constitutional Court, itself enjoying a reputation for internal integrity, strong commitment to the new democratic arrangements and apparent freedom from corruption, has supported the wider cause of judicial resistance to external scrutiny. This court, established

³⁹ See 'Pengadilan umum; 'Kuburan' pemberantasan korupsi', Indonesia Corruption Watch, <http://antikorupsi.org/docs/lathukum2008.pdf> (accessed 12-11-2009).

⁴⁰ Appeals from the Anti-Corruption Court are lodged with a High Court, and then with the Supreme Court, again with three ad hoc and two career judges on the panel (see Articles 59(2) and 60(2) of the KPK Law).

in 2003, is the first Indonesian court to have been formally granted powers of constitutional review. This enables it to review national statutes against the Constitution. This function is particularly important now that Indonesia's Constitution has been expanded to include an international-standard Bill of Rights in Chapter XA that closely tracks the Universal Declaration of Human Rights (UDHR). It is the Court's job to ensure that the legislature does not illegally intrude upon these rights when making law.

From its earliest days, the Court made it clear that it was independent and professional, that it intended to establish itself as a model judicial forum immune to bribery, and that it genuinely intended to uphold the Constitution (Butt 2007a, 2007b; Butt and Lindsey 2008). In recent years, however, the Court has handed down some problematic decisions grounded in weak legal argument that have undermined the efforts of the national legislature to increase judicial accountability and tackle corruption. To that extent they have, intentionally or not, contributed to obstructing efforts to reform the general courts. Two of these decisions – concerning, respectively, the Judicial Commission and the Anti-Corruption Court – deserve discussion, albeit briefly for reasons of space.

In the first decision,⁴¹ Constitutional Court judges used the doctrine of judicial independence to make decisions that had the effect of protecting themselves and other judges from external scrutiny by the Judicial Commission.⁴² The case was the final stage in a very public war between the Supreme Court and the Judicial Commission. The controversy began when Professor Bagir Manan, then Supreme Court Chief Justice, rejected a Judicial Commission request to investigate several Supreme Court judges (including himself) for alleged corruption in cases they had handled. In response, members of the Judicial Commission visited the President to demand a reselection or rigorous performance assessment of all 49 Supreme Court justices as the first stage of a comprehensive overhaul of the entire judiciary. This demand was leaked to the media, as was a list of allegedly 'problematic' or corrupt judges. In response, several Supreme Court judges reported then Judicial Commission Chairperson, Busyro Muqoddas, to the police for defamation. They also lodged an application with the Constitutional Court, arguing that the Judicial Commission's power to monitor the judiciary contradicted the doctrine of judicial independence mandated by the Constitution.

On their petition, the Constitutional Court reviewed Law no. 22/2004, the statute which established the Commission. This Law gave the Commission two primary functions: to propose judicial appointments to the Supreme Court and to supervise the performance and behaviour of Indonesia's judges.⁴³

⁴¹ This section draws on Butt (2007a), in which this dispute is discussed in detail.

⁴² The creation of an Indonesian Judicial Commission was mandated by the third amendment to Indonesia's 1945 Constitution (see Article 24B of the Constitution).

⁴³ Law no. 22/2004, Article 13.

However, the supervisory powers of the Commission were limited, presumably in the interests of judicial independence. If the Commission suspected a judge of acting improperly, it could propose that the judge be punished by written reprimand, suspension or dismissal. However, the Commission could take no further direct action – it could only send the proposed sanction and reasons for suggesting it to the Supreme or Constitutional Court leadership. The statute allowed the Commission to review the performance of judges, but the final decision on whether action would be taken lay with other judges.

The Court began its decision by excluding itself from Judicial Commission supervision, pointing to the principle of judicial independence contained in the Constitution, an issue neither party had asked it to rule on. The Court next found that judicial independence also prevented the Commission from supervising the Supreme Court's exercise of judicial powers. The nub of the Court's decision was as follows:

[...] even though assessing the technical-judicial skills of judges by reading judicial decisions might assist the Judicial Commission to identify a breach of a code of conduct or ethics, reviewing judicial decisions might place unjustifiable pressure on the judges, thereby breaching judicial independence. Only the courts could review judicial decisions, and then only through the appeals process – not by evaluating and directly interfering with decisions or by influencing judges (Butt 2007a:192).

In December 2008, the DPR amended the Supreme Court Law (Law no. 3/2009), presumably in response to this decision. Article 11A of the Law gives power to the Supreme Court alone to recommend the removal of a judge to the president if that judge has been found guilty of a crime, neglects judicial duties for three months, has breached the judicial oath, or takes on additional unauthorized work. The Judicial Commission can propose removal for inappropriate behaviour (*perbuatan tercela*) or for a breach of the judicial code of ethics.⁴⁴ Judges, however, have a 'right to defend themselves' before a Judges' Honour Council (*Majelis Kehormatan Hakim*), comprising four Judicial Commission members and three Supreme Court judges. If the Council rejects the judge's defence, then it is to convey its recommendations to the Supreme Court and the Judicial Commission and, within 14 days the Supreme Court Chief Justice is to convey the recommendation to the President.

In the opinion of the authors, it is possible that these new provisions are vulnerable to constitutional challenge on grounds similar to those accepted by the Constitutional Court in the Judicial Commission case. The Judicial Commission members are in the majority on the Honour Council and, presuming that the Council votes by majority, the Judicial Commission appears

⁴⁴ At time of writing, a code of ethics had not been established.

to have the potential to hold sway over the Council. If such a constitutional challenge against the review process was brought, the Constitutional Court might view the Judge's Honour Council's inclusion of Judicial Commission members as a threat to judicial independence.

In the second case in which the Constitutional Court appears to have made decisions that have weakened efforts to reduce internal judicial illegality,⁴⁵ a number of people convicted by the Anti-Corruption Court petitioned the Constitutional Court to review several provisions of the statute by which the Anti-Corruption Court was established – the same statute that created the KPK.⁴⁶

The Court accepted their arguments, holding on two grounds that the Anti-Corruption Court had been established unconstitutionally. The first constitutional fault arose from the fact that both the general courts and the Anti-Corruption Court have jurisdiction over corruption cases. Whether the Anti-Corruption Court heard and decided particular cases was entirely dependent on whether the KPK had chosen to investigate and prosecute those cases. If the KPK decided not to pursue a particular case, it would be handled in the ordinary way, that is, through the normal police, prosecutors and courts. This caused what the Constitutional Court referred to as 'dualism', which it saw as contradicting the constitutional principle of equality before the law. An underlying presumption in the Court's decision appeared, however, to be that defendants were far more likely to be convicted and sentenced if their case was heard in the Anti-Corruption Court rather than the general courts and that this was unfair. As for the second ground, the Court read into the Constitution a requirement that new judicial bodies be established by their own separate statute. The mere fact that the Anti-Corruption Court was established in the Anti-Corruption Commission (KPK) Law was, it held, enough to fall foul of this requirement.

Despite holding that the Anti-Corruption Court had been established unconstitutionally, the Court recognized the seriousness of Indonesia's corruption problem and decided not to disband the Anti-Corruption Court with immediate effect. Rather, it gave the DPR three years to enact a new specific-purpose Law to re-establish the Anti-Corruption Court. The DPR met this deadline in late 2009, at a time when the KPK was cutting a swathe through legislators, with DPR members facing serious corruption charges. It is therefore perhaps unsurprising that the statute the DPR enacted (Law no. 46/2009) may, in any case, render the KPK and the Anti-Corruption Court largely impotent. This is because the new Law appears to bring the ordinary general courts and prosecutors (and thus the problems described above that are so

⁴⁵ Constitutional Court Decision no. 012-016-019/PUU-IV/2006.

⁴⁶ Law no. 30/2002 on the Corruption Eradication Commission.

closely associated with them) back to the fore in corruption cases. It does this in two ways. First, the Law removes the requirement that ad hoc judges constitute a majority on judicial panels in the Anti-Corruption Court. This means that future decisions over which career and ad hoc judges split could now result in acquittals rather than convictions, given that historically career judges have been more favourable to the accused in corruption cases than have ad hoc judges. Second, the statute does not mention the KPK at all, referring instead only to general prosecutors. This has raised concerns that the statute may, in fact, have implicitly removed the KPK's prosecution function entirely.

Conclusion: A persistent mafia

Despite the existence of some special-purpose courts that enjoy relatively good reputations for integrity, judicial corruption (internal illegality) in Indonesia probably remains as strong as ever in the general courts, where it may even have increased. Certainly, the judiciary as an institution has so far been effective in resisting almost every effort to impose tighter scrutiny on it, and has been able to obstruct enhanced detection of illegality within the courts. Against this, however, although it continues to be extraordinarily difficult to convict senior members of the security forces, the judiciary's role under the New Order as source of validation for state (external) illegality at the behest of the elite has diminished significantly since the end of the New Order. This has occurred largely as a result of the reduction of direct government interference in the administration of the courts through the introduction of the 'one roof' system and the removal of some of the Court's control over corruption cases.

We would also argue, however, that pressure for change in the courts has been brought to bear by the freeing up of the media in the post-Suharto era and the parallel growth of assertive and capable civil society organizations, both of which continue to see monitoring of state institutions and public 'shaming' as legitimate levers for reform and have deliberately targeted the courts to this end.

In any case, despite some signs of shift away from the high-water mark of judicial illegality that marked the 1990s, the magnitude of the challenge facing proponents of judicial reform in Indonesia remains almost overwhelming. The reformers must somehow force the institutional development of a hitherto neglected and aggressively resistant institution, the Supreme Court and the general courts below it, at the same time as driving a massive cross-sectoral law reform agenda, most of which will ultimately end up before one or another of those same courts. To make matters worse, the advocates of reform must continue doing all this at a time of sweeping political transition,

in the context of a developing and shaky economy facing a global economic crisis, with all the long-standing geographic, political and demographic complexities that have challenged every Indonesian government since independence in 1945.

It is therefore little wonder that the perceptions of Indonesia's judiciary as little more than a 'mafia' with which this chapter began are still widespread. It will likely be some time before they will change substantially.