

# ANTI-CORRUPTION COURTS IN INDONESIA AFTER 2009



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# ANTI-CORRUPTION COURTS IN INDONESIA AFTER 2009: BETWEEN EXPECTATION & REALITY

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## Foreword

### *Indonesian Institute for Independent Judiciary (LeIP)*

Research on the evaluation of Anti-Corruption Courts performance in Indonesia stems from a monitoring that was carried out by Indonesian Institute for Independent Judiciary (LeIP) on Anti-Corruption Courts that were established in every district court of provincial capitals throughout Indonesia after the enactment of Law No. 46 of 2009 on the Anti-Corruption Courts. The establishment of Anti-Corruption Courts in each provincial capital provides room for handling various corruption cases within the regions. Abundant expectations were arisen toward the new corruption courts, given the success of the Anti-Corruption Court at the Central Jakarta District Court as the first Anti-Corruption Court established in Indonesia.

Corruption cases are known to have high complexity considering its evidence hearing, case settlements that need longer duration, and tendency to attract public attention. The increasing number of corruption cases combined with its great and broad impacts have made the decisions of Anti-Corruption Court as a matter of interest to the public. It is undeniable that when the Anti-Corruption Court decided a defendant was guilty and gave a heavy sentence, the public took this as a remedy for the ache caused by corruptions in Indonesia. In general, the public considers that the higher the conviction rate in the corruption case is, the better the performance of the Anti-Corruption Court and the better the public perception towards Anti-Corruption Court. In this research, this perspective will be discussed as problematic.

The establishment of the Anti-Corruption Court clearly has an impact on the increasing need for the number of *ad hoc* judges in the district courts, high courts, and the Supreme Court. There is a

concern that the high demand for *ad hoc* corruption judges will lower the qualification standards for the candidates of *ad hoc* corruption judges in the selection process merely to meet the number of *ad hoc* corruption judges needed. Of course, if the qualification standard were to be lowered, it will have an impact on the quality of the Anti-Corruption Court's decisions. On the other hand, the poor qualification standards for *ad hoc* judges contributed to the fact that some *ad hoc* judges were caught red-handed in corruption cases. It is an irony when *ad hoc* judges who are supposed to handle corruption cases are instead involved in corruption cases.

The challenge in handling corruption cases is not only faced by *ad hoc* judges but also career judges. Career judges who handle corruption cases meet their own challenges, one of which is high workload. Corruption trap does not relinquish the career judges who handle corruption cases. This happened not only to *ad hoc* judges.

The examples of the challenges faced by the Anti-Corruption Court above indicate that there are problems in the performance of the Anti-Corruption Court. The indications of these problems were also captured by LeIP based on the monitoring program of the Anti-Corruption Courts in 5 (five) areas, namely: Jakarta, Makassar, Semarang, Medan, and Surabaya which was carried out by LeIP in 2014-2016. The data and information from the monitoring of the Anti-Corruption Court is the starting point of this research. Furthermore, these data and information are complemented by various literature studies, interviews, and analysis of 941 of corruption decisions at various levels of the court, to obtain indications of problems in the legal framework and practice.

This research aims to evaluate the performance of the Anti-Corruption Court in Indonesia and encourage the strengthening of the function and performance of the Anti-Corruption Court. The evaluation is carried out by looking in depth whether the performance of the Anti-Corruption Court has been in accordance with its establishment objectives based on an institutional perspective. So far, there have been many studies discussing the Anti-Corruption Court in Indonesia. However, there has not been a comprehensive study of the Anti-Corruption Court from an institutional perspective that also

highlights the issues of human resources, budgeting, infrastructure, in addition to highlighting the issues of legal framework and decisions of the Anti-Corruption Court.

The problems as described in this study are followed up with recommendations for policy makers, especially the Supreme Court. The Research Team, for example, recommended the Supreme Court to strengthening the certification training system for corruption judges as a solution to maintain the quality of knowledge and expertise of judges who handle corruption cases. Furthermore, it is also recommended to create a specialized and structured training for *ad hoc* judges.

This research complements various previous studies discussing the Anti-Corruption Court. With a distinctive approach, the research, as a result from the collaboration between LeIP and the Center for Cultural and Technical Interchange Between East and West (East West Center), aims to provide new color in encouraging the strengthening of Anti-Corruption Courts performance in Indonesia.

LeIP would like to thank the parties who have supported the preparation of this study titled “Anti-Corruption Courts in Indonesia After 2009: Between Expectation and Reality”, namely Siemens Integrity Initiatives, the Supreme Court of the Republic of Indonesia, the Public Prosecution Office of the Republic of Indonesia, and the parties involved in the establishment and observation of the Anti-Corruption Courts. Finally, LeIP hopes that this study will open the door to advocating the improvement of Anti-Corruption Court performance and will become the basis of Anti-Corruption Court’s policies reform, to support the eradication of corruption in Indonesia.

**Liza Farihah**

*Executive Director*

## Preface

The KPK and the Jakarta Anti-Corruption Court constituted the main pillars of anti-corruption efforts for many years, earning the broad respect of the Indonesian public. As a product of the reform era, the Jakarta Anti-Corruption Court, attached to the Central Jakarta District Court, set a standard that most other Indonesian courts could only aspire to. Its decisions were well respected. Its success rate, as measured by convictions, was admirable, and it operated with greater transparency than was the norm at that time. Perhaps reflecting its key role in Reformasi, it also enjoyed greater resources than other courts, also contributing to its widely applauded performance. Another distinguishing factor was the requirement that the Court's judges were drawn from both career jurists as well as civil society appointees, typically professors of law at leading universities appointed as *ad hoc* judges. Needless to say the selection process for both career and *ad hoc* judges was critical to the Court's success. Successful anti-corruption adjudication requires judges of both great personal integrity as well as sufficient expertise in the economic and financial complexities that often inform corruption cases. The perceived high quality of the judges who served on the Court in its early years doubtless contributed to its legitimacy in the eyes of civil society and observers.

In 2006, however, these considerable achievements were placed in jeopardy by a decision of the Constitutional Court. This report discusses in detail the nature and consequences of this decision but suffice it to say that the revision of the Anti-Corruption Law mandated by the Constitutional Court's decision required, and resulted in, a radical reshaping and reconstitution of anti-corruption institutions. The end effect under the revised anti-corruption law adopted by the Parliament in 2009 was the establishment of an anti-corruption

court in all of Indonesia's 34 provincial capitals. Apart from the obvious increased demands for infrastructure and other resources, the appointment of qualified judges posed a considerable challenge for the Supreme Court. In a relatively short period of time the Supreme Court was required to recruit, appoint, and train enough career and *ad hoc* judges to meet this massive expansion of the anti-corruption court system. What was at stake was not only the high respect that the Jakarta Court had earned but also the fate of the anti-corruption efforts critical to Indonesia's governmental reforms and expanding economy. LeIP's Report provides what is now the most comprehensive account and incisive analysis of the consequences of the expansion of the anti-corruption courts.

One of the important features that sets LeIP's Report apart from many other critical assessments of the anti-corruption courts is its systematic nature. The Report is not driven by focusing on particular cases or scandals, but rather on the operation of the system which largely determines the overall quality and performance of the courts. The Report sets out clear objectives, research questions and design, methodology, conceptual frameworks, and metrics. In other words, like LeIP's work in general it aspires to match the best academic standards of research, and in this regard it admirably succeeds. It is to the Report's credit that early on it devotes considerable space to a discussion of the quantitative and qualitative dimensions of assessing a court's performance. This is a complex and contested subject, and it is important that the Report addresses this issue head on, setting out the various approaches and indicators, and establishing the framework that the Report will adopt.

In a logical sequence the Report examines in detail all of the core components of the anti-corruption court system. Employing both quantitative and qualitative methods, the analysis of each of the components is based upon in-depth research and methodological best practices. The report takes up the differences in roles of both *ad hoc* and career judges, illuminating the tensions and challenges that face each of them in the performance of their duties and the measures that have been, or need to be, taken to meet these challenges. The broad comparative basis of the report reveals the striking discrepancies in



workload and resources between different provincial courts, as well as the differing difficulties that judges face in these different settings. Important issues such as management, training, selection, certification, competence, infrastructure, budget, and more, are all dealt with in considerable detail.

The result of this comprehensive analysis is a Report that does much to explain the public perception that the provincial courts are not living up to the standard previously set by the sole Jakarta Anti-Corruption Court before the expansion of the system. It demonstrates why the perceived failings of the system are not simply due to individuals but rather to the strains placed upon the institution as a whole after the requirement of a too-rapid expansion. Based upon the exposure of these systemic features, the Report is able to arrive at sound recommendations for reform and change that should guide the Supreme Court and policy makers in addressing the current shortcomings of anti-corruption adjudication in Indonesia. As such, this Report should be required reading for parliamentarians, judicial actors at all levels, civil society observers, and policymakers in all relevant branches of government.

**David Cohen**

*Director, Center for Human Rights  
and International Justice Stanford University*

*Senior Fellow in International Law, East-West Center*

## List of Acronyms and Abbreviations

Balitbangdiklat Kumdil	:	<i>Badan Penelitian dan Pengembangan &amp; Pendidikan dan Pelatihan Hukum dan Peradilan</i> (Research and Judicial Training Agency of the Supreme Court)
Pusdiklat Teknis Peradilan MA	:	<i>Pusat Pendidikan dan Pelatihan Teknis Peradilan Mahkamah Agung Republik Indonesia</i> (Judicial Training of the Supreme Court)
Bappenas	:	<i>Badan Perencanaan Pembangunan Nasional</i> (National Development Planning Agency)
BPKP	:	<i>Badan Pengawas Keuangan dan Pembangunan</i> (Financial and Development Supervisory Agency)
Ditjen Badilum Mahkamah Agung	:	<i>Direktorat Jenderal Badan Peradilan Umum Mahkamah Agung Republik Indonesia</i> (Directorate General of the General Courts of the Supreme Court of the Republic of Indonesia)
DPR RI	:	<i>Dewan Perwakilan Rakyat Republik Indonesia</i> (The House of Representative of the Republic of Indonesia)
ICW	:	Indonesia Corruption Watch
Keppres	:	<i>Keputusan Presiden</i> (Presidential Decree)
KPK	:	<i>Komisi Pemberantasan Korupsi</i> (Corruption Eradication Commission)
KY	:	<i>Komisi Yudisial</i> (Judicial Commission)
LeIP	:	<i>Lembaga Kajian dan Advokasi Independensi Peradilan</i> (Indonesian Institute for Independent Judiciary)
LHKPN	:	<i>Laporan Harta Kekayaan Penyelenggara Negara</i> (State Official's Wealth Report)
LKPP	:	<i>Lembaga Kebijakan Pengadaan Barang dan Jasa</i> (National Public Procurement Agency)
LPSK	:	<i>Lembaga Perlindungan Saksi dan Korban</i> (Witness and Victim Protection Agency)
MA	:	<i>Mahkamah Agung Republik Indonesia</i> (The Supreme Court of the Republic of Indonesia)
MaPPI	:	<i>Masyarakat Pemantau Peradilan Indonesia</i> (Indonesian Judicial Monitoring Society)
MK	:	<i>Mahkamah Konstitusi Republik Indonesia</i> (Constitutional Court)
MTI	:	<i>Masyarakat Transparansi Indonesia</i> (Transparency Society of Indonesia)

MvT	:	<i>Memorie van Toelichting</i>
NA	:	<i>Naskah Akademis</i> (Academic paper)
Pansel	:	<i>Panitia Seleksi Hakim Ad Hoc Pengadilan Tindak Pidana Korupsi</i> (Selection Committee of Ad hoc Judges for Anti-Corruption Court)
Pengadilan PHI	:	<i>Pengadilan Penyelesaian Hubungan Industrial</i> (Industrial Relations Court)
Pengadilan Tipikor	:	<i>Pengadilan Tindak Pidana Korupsi</i> (Anti-Corruption Court)
Perma	:	<i>Peraturan Mahkamah Agung</i> (Supreme Court Regulation)
Perpres	:	<i>Peraturan Presiden</i> (Presidential Regulation)
Perpu	:	<i>Peraturan Pemerintah Pengganti Undang-Undang</i> (Government Regulation in Lieu of Law)
PK	:	<i>Peninjauan Kembali</i> (Case Revision)
PN	:	<i>Pengadilan Negeri</i> (District Court)
PP	:	<i>Peraturan Pemerintah</i> (Government Regulation)
PPATK	:	<i>Pusat Pelaporan dan Analisis Transaksi Keuangan</i> (Center for Financial Transactions Report and Analysis)
PTUN	:	<i>Pengadilan Tata Usaha Negara</i> (State Administrative Court)
SEMA	:	<i>Surat Edaran Mahkamah Agung</i> (Circular of the Chief Justice of the Supreme Court)
SIKEP	:	<i>Sistem Informasi Kepegawaian Mahkamah Agung</i> (Personnel Information System)
SK KMA	:	<i>Surat Keputusan Ketua Mahkamah Agung</i> (Chief Justice's Decree)
TGPTK	:	<i>Tim Gabungan Pemberantasan Tindak Pidana Korupsi</i> (Joint Team for the Eradication of Corruption)
Tipikor	:	<i>Tindak pidana korupsi</i> (corruption crimes)
UU Drt	:	<i>Undang-Undang Darurat</i> (Emergency Law)
UU KPK	:	<i>Undang-Undang tentang Komisi Pemberantasan Korupsi</i> (Law concerning Corruption Eradication Commission)

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CHAPTER I

# Introduction and Methods



## 1.1 Background

The Anti-Corruption Court is a specialized court established during the post-reform era that was expected to become a model of an independent, high-quality, fair and modern judiciary. The court initially operated under the provisions of Law No. 30 of 2002 on the Corruption Eradication Commission (KPK), conferred with the authority to try corruption offenses with prosecution driven by the KPK.

During the early period of its establishments, namely around 2004,<sup>1</sup> the Anti-Corruption Court was only available in Jakarta. Specifically attached to the Central Jakarta District Court, it was deemed by many as having met with considerable success.<sup>2</sup> Among the indicators used to measure success is the fact that no indictment has ever met with a not-guilty verdict of the court. The quality of court decisions rendered are also considered as superior and progressive in comparison with other Indonesian courts. Further, copies of the decisions of the Anti-Corruption Court are issued more speedily compared to conventional judicial bodies, which also creates a greater sense of transparency and efficiency. The favorable assessment of the anti-corruption court is also partly due to the high confidence placed by the public in the KPK as well as the quality of the indictments formulated by the anti-corruption body. These factors in turn positively affect the performance of the Anti-Corruption Courts in presiding over such cases.

The successful performance of the Anti-Corruption Courts is also viewed to have been brought about by adequate supporting facilities and infrastructure<sup>3</sup>, from a larger parking area and separate

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1 In a formal sense the Anti-Corruption Court was established upon the promulgation of Law No. 30 of 2002. However, it was deemed to be established de facto upon the appointments of the career and *ad hoc* judges in 2004.

2 President of the Republic of Indonesia, *Keputusan Presiden Republik Indonesia tentang Pembentukan Pengadilan Tindak Pidana Korupsi*, Presidential Decree No. 59 of 2004, Art. 4.

3 Abba Gabrillin, "Sejak 2012, Ada 20 Hakim Tersangkut Kasus Korupsi," <https://nasional.kompas.com/read/2019/05/07/10483411/sejak-2012-ada-20-hakim-tersangkut-kasus-korupsi?page=all> accessed on 7 January 2021 accessed on 7 January 2021.

court rooms equipped with adequate facilities, to a more robust security system. These upgraded facilities and infrastructure were able to be introduced, among others reasons, due to the physical location of the Anti-Corruption Court, separated from the Central Jakarta District Court at the Jalan Gajahmada road that was clearly no longer adequate to accommodate court proceedings at that time.

However, in 2006, a mere two years after the court was established, the legislation that provided the foundation for its jurisdiction was found to be in conflict with the constitution by the Indonesian Constitutional Court (Mahkamah Konstitusi) pursuant to its ruling No. 012-016-019/PUU-IV/2006. The considerations of the Constitutional Court in its ruling essentially opined that since the authority of the Anti-Corruption Court is limited to the adjudication of corruption related cases prosecuted by the KPK, the situation creates a dualism in the handling of corruption cases. The Constitutional Court further found that the arrangement causes unequal treatments between corruption defendants tried at the Anti-Corruption Court and those undergoing proceedings at a district court. The Constitutional Court subsequently ruled that the Parliament had three years to amend the underlying legislation of the Anti-Corruption Court. In response to the ruling, the government and the House of Representatives (DPR) subsequently drafted an anti-corruption law that would eventually be passed as Law No. 46 of 2009 on the Anti-Corruption Court.

A number of features set the Anti-Corruption Court apart from other judicial institutions in general. One primary difference involves the composition and requirements of the judges serving in this specialized court. Unlike courts in general, the Anti-Corruption Court consists of only two types of judges, namely career and *ad hoc*. The appointment of *ad hoc* judges is deemed necessary to add to the skills of their career counterparts in adjudicating corruption cases. Secondly, given the low level of confidence placed by the public on judges during the period, the *ad hoc* judges that were recruited from candidates with non-judicative backgrounds were expected to restore the public's trust in the judiciary, in particular in their handling of corruption cases.

However, the challenges encountered in finding *ad hoc* judges who meet expectations became increasingly difficult following the enactment of Law No. 46 of 2009. With the passage of the law the Anti-Corruption Courts and Anti-Corruption High Courts are no longer only located in Jakarta, but in each provincial capital. The change caused the need for *ad hoc* judges to rise drastically. Some elements, especially civil society members, voiced concerns that the expanding number of *ad hoc* judges needed would compromise the standards of qualification applied during the selection process just to meet the quota of *ad hoc* judges who will serve at the Anti-Corruption Court of each provincial capital. The lowering of screening qualification for *ad hoc* judges was feared to bring about a detrimental effect on the quality of court decisions of the Anti-Corruption Courts.

Concern over the possible decline of the quality of the Anti-Corruption Court was amplified when a number of *ad hoc* judges from different Anti-Corruption Courts were arrested for bribery during a KPK sting operation.<sup>4</sup> Although there were a number of Anti-Corruption Court career judges who were also found to be involved in corrupt practices, the arrest of the *ad hoc* judges received more attention as the incident appeared to nullify the public's expectation that judges who did not pursue a judicial career would exhibit more exemplary integrity. The fact that both career and *ad hoc* judges were exposed as having engaged in corrupt practices raised the question of whether the rapid expansion had inevitably degraded the integrity of the overall institution. The quality of court decisions produced by the Anti-Corruption Court judges were also deemed to have degraded by the public due to the number of defendants who were acquitted by the court. The public's disappointment with the rulings of Anti-Corruption Courts located in the regions even gave rise to calls for

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4 Kompas, "Hakim Kembali Ditangkap, Kepercayaan Masyarakat terhadap Pengadilan Terus Menurun," 24 May 2016, <https://nasional.kompas.com/read/2016/05/24/17003711/hakim.kembali.ditangkap.kepercayaan.masyarakat.terhadap.pengadilan.terus.menurun?page=all> accessed on 7 December 2020.

the suspension and dissolution of the regional/local Anti-Corruption Courts in 2011, only two years after their establishment.<sup>5</sup>

During various discussions pursuant to this research on the Anti-Corruption Court, one issue that was repeatedly raised pointed to the court's decisions being seen to have failed in meeting the public's expectations regarding the courts' performance. Such views were arrived upon using, for example, the severity of sentence or conviction rates as indicators. The first Anti-Corruption Court in Jakarta was seen as being successful due to its 100% conviction rate, while its regional counterparts as currently existing in 34 provinces are deemed to have failed since the sentences imposed by these courts, on average, have been perceived as low, or "have set free corruption offenders."

Such conclusions raise important questions as to how to assess the performance of the anti-corruption courts. Are these indicators appropriate to judge the performance of the Anti-Corruption Courts? Would such views still be justified if there was no sufficient evidence for the court to pass a guilty verdict? On the other hand, there are many other aspects, internal as well as external, that could affect the quality of a court decision. Among the internal factors are organizational characteristics, professionalism, competence, and resources. External factors may include quality of indictments, public pressure, and other elements. The present research aims to study factors that may influence the quality of Anti-Corruption Courts' performance. The research does not review the issues only from the severity of punishment rendered, but also tries to uncover institutional problems that inform the performance of the Anti-

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5 The discourse to freeze the Corruption Court was put forward by Suparman Marzuki, the chairman of the Judicial Commission at that time, and Machfud MD, who was then used as Chairman of the Constitutional Court. See: Kompas, "KY: MA Harus Bekukan Pengadilan Tipikor Daerah", 8 November 2011, <https://edukasi.kompas.com/read/2011/11/08/1729008/ky.ma.harus.bekukan.pengadilan.tipikor.daerah> accessed on 11 December 2020; Sindonews, "Mahfud MD: Pertegas Ide Pembubaran Pengadilan Tipikor di Daerah," <https://nasional.sindonews.com/berita/526758/13/mahfud-md-pertegas-ide-pembubaran-pengadilan-tipikor-di-daerah>, accessed on 11 December 2020

Corruption Courts. Proceeding in this manner will lead to a more nuanced analysis and thus to the formulation of solutions grounded on evidence based findings at the practical level.

Aside from issues relating the quality of the judges, there are other potential problems that surfaced following the establishment of Anti-Corruption Courts at each provincial capital. It was anticipated that there would be complexities in the administration and management of trials as well as with access for public prosecutors to the Anti-Corruption Courts. The centralization of corruption cases to district courts located in the provincial capitals would make the caseload of the Anti-Corruption Courts to be quite overwhelming. The need for the proper facilities and infrastructure necessary for effective adjudication also expands proportionally to centralization, and, if not met, would likely influence the judicial process and quality of the courts' rulings.

### 1.1.1 Objectives

Given the background set forth above, the objectives of this research are as follows:

- 1) Conduct an evaluation on the performance of Anti-Corruption Courts established under Law No. 46 of 2009.
- 2) Identify existing challenges that impede the exercise of judicial authority and performance of Anti-Corruption Courts.
- 3) Formulate recommendation options that may be adopted by policymakers with a view to enhance the effectiveness of the functions and performance of the Anti-Corruption Court.

### 1.1.2 Research Questions

The research questions to be addressed are as follows:

- 1) How has the implementation of the Anti-Corruption Courts following the enactment of Law No. 46 of 2009? Have the courts achieved their objectives?

- 2) How was the performance of the Anti-Corruption Courts? What factors have affected the performance of the Anti-Corruption Courts?
- 3) What aspects need improvement to enhance the effectiveness and performance of the Anti-Corruption Courts?

## 1.2 Conceptual Framework: Specialized Courts and Measuring Court Performance

The formulated research questions seek to gauge the court's performance. Performance can be attributed according to various definitions. Discussions on court performance often bring to mind performance with respect to court decisions as a court's primary product. In some countries such as the Netherlands, indicators to measure court performance are its productivity level and the period required for the institution to adjudicate a case. However, measuring the performance of a court from the qualitative aspect of its court decisions is still the topic of ongoing debate. This is especially the case for determining the mechanism by which such measurement is undertaken and for how to ensure that evaluation on the quality of rulings does not jeopardize the independence of the judiciary.

In general terms, performance is defined as the gap existing between the set objectives or standards and the real outcome achieved by an individual (in the context of the courts, individual refers to the judges and court staff) or the court itself.<sup>6</sup> Measuring performance, therefore, can be done by stacking up the subject against the objectives, standards, or expectations defined upon its establishment by the competent policymakers.<sup>7</sup> In measuring the performance of the specialized Anti-Corruption Court, it is important to understand the objectives and expectations based on which the institution was established, which can further be used to evaluate the success of such courts.

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6 Francesco Contini dan Davide Carnevali. *The Quality of Justice in Europe: Conflicts, Dialogue and Politics*. N.p.: Research Institute on Judicial Systems, Italian National Research Council, Draft, June 2010, 2–3.

7 Contini and Carnevali, 2010.



The specialized nature attributed to a court entails that a case brought for adjudication by such court would be examined by judges that possess specialized knowledge and expertise on a particular area of law. This also entails that a specific type of cases would be handled differently or separately from other cases. Although the specialization of courts is often seen as an emerging trend in developments of the law, the approach is not a new phenomenon and there have been many examples of special courts being established in many countries with different legal systems. As for any court, there is of course the general expectation of independence, impartiality, and competence.

The setting up of a specialized court is believed to bring such benefits as increased expertise, improved efficiency and stronger trust in the judiciary. The specialized court approach has also been used as a reform tool and an instrument to address issues that are present in the justice system of many countries.<sup>8</sup> Specialization of the courts may manifest itself in many forms, from the simplest model to the most complex. Examples include the appointment of a sole judge to examine certain types of cases, the formation of court chambers, adoption of a system to manage special cases, establishment of a unit or organization within the judiciary, or even the introduction of specialized courts to try cases under specific categories.<sup>9</sup>

According to Hol and Loth, the specialized character of a court can be viewed from three aspects: knowledge, environment, and organization.<sup>10</sup> From the knowledge aspect, specialization is assessed from the knowledge judicial actors possess.<sup>11</sup> Pro-specialization arguments asserts that a specialized court can positively impact court decision outcomes and encourage better development of the law. From the broader contextual aspect, specialized courts are deemed

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8 Dory Reiling, “Court Specialization or Special Courts? A Toolkit for Development,” Justice Reform Practice Group (LEJR), paper for the World Bank, 2005 <https://home.hccnet.nl/a.d.reiling/html/court%20specialization.htm> accessed on 29 December 2020.

9 Reiling, 2005.

10 Anthoni Hol and Marc Loth, *Reshaping Justice, Judicial Reform and Adjudication in the Netherlands*, Shaker Publishing BV, Maastricht, 2004, 25-29.

11 Hol and Loth, 2004, 35

to be able to strengthen the legitimacy of the judiciary.<sup>12</sup> In terms of organization, specialization of courts is also considered able to improve efficiency and work satisfaction.<sup>13</sup> Nevertheless, Hol and Loth also point out a number of potential detriments that may arise from the specificity of specialized courts, such as inflexibility of the organization and the high cost associated with education programs.<sup>14</sup> Reiling noted other risks that may emerge from the establishment of specialized courts, among others potential inequality due to the different systems and mechanisms applied, inefficiency brought about by the need for separate allocation of budgets, and the potential creation of special interests that may affect the independence and impartiality of the courts.<sup>15</sup> Reiling is also of the view that the more complex the selected form of specialized court, the higher the probability that risks may emerge.<sup>16</sup>

Turning to the Indonesian context, Adriaan Bedner<sup>17</sup> argues that the strategy used to develop specialized courts in Indonesia to improve the performance of the court system in general has not been met with complete success. Bedner uses a number of cases studies involving specialized courts, including the human rights court, state administrative court, commercial court and tax court. One factor highlighted by Bedner is the fragmented yet intertwined nature of the various court jurisdictions with the result that it is difficult to harmonize these jurisdictions.<sup>18</sup> Bedner further recalls the fact that the issue of jurisdiction is not merely a legal matter but also creates a set of issues at the practical level as the parties and justice seekers must bring their dispute before different jurisdictions.<sup>19</sup> In practice the problem can lead to issues of injustice, problems with access to justice, and potential inconsistency of court decisions.

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12 Hol and Loth, 2004, 35

13 Hol and Loth, 2004, 37

14 Hol and Loth, 2004, 38

15 Reiling, 2005

16 Reiling, 2005

17 Adriaan Bedner, "Rebuilding the Judiciary in Indonesia: the Special Courts Strategy, *Yuridika*, Vol. 3 2008, 230-254.

18 Bedner, 2008, 250.

19 Bedner, 2008, 250.

Papers and studies on specialized courts in general, or on the Anti-Corruption Court in particular, have been the focus of the work of academicians and researchers in Indonesia. Among these papers are “Pengadilan Khusus” (Specialized Courts) (Jimly Asshiddiqie, 2013), “Urgensi Pembentukan Pengadilan Tindak Pidana Korupsi dalam Mewujudkan Good Governance (Urgency of Anti-Corruption Court Reform in Creating Good Governance) (Santoso, 2011)”, “Evaluasi Efektivitas Pengadilan Negeri Tindak Pidana Korupsi (Evaluation of the Effectiveness of Anti-Corruption Courts)” (Herlambang dkk, 2013), “Evaluasi pengadilan Tindak Pidana Korupsi di Indonesia (Evaluation of Anti-Corruption Courts in Indonesia)” (Hertanto, 2014). A number of reports on the Anti-Corruption Courts generally start off from the thesis of dissatisfaction with the rulings of Anti-Corruption Courts that are deemed unable to satisfy the public’s sense of justice, or focusing on issues that are present in the legal framework as provided in Law No. 46 of 2009. However, there have been few discussions that offer an in-depth elaboration from an institutional perspective that underlie problems found with the operations of the Anti-Corruption Courts. There has also been insufficient attention to what criteria should be used to assess the performance of the courts and, more specifically, what role public dissatisfaction or perceptions should play in such assessments.

From the various explanations regarding the potential and risks associated with the approach of specializing the courts and reflections on the establishment of specialized courts in Indonesia, some lessons thus far acquired need to be underlined. Among these is the importance to define the problem that is intended to be resolved by the creation of the specialized courts. Further, what has been or what needs to be done to overcome these problems? Is there congruency between the issues sought to be resolved and the solutions presented? Specialized courts need to have their performance measured against the purpose of their creation. To that end, one would have to look at how the policy of specializing the courts has been put into effect by considering a number of elements that make up and determine the success of these courts. It is within this context that an evaluation of the enforcement of Law No. 46 of 2009 on the operation of the Anti-Corruption Court becomes important.

### 1.3. Research Method

#### 1.3.1. Scope of Research

In general, the present research serves two purposes, firstly to evaluate the performance of the Anti-Corruption Courts and, secondly, to provide recommendations designed to strengthen the function and performance of these courts nationally. This research is built upon data and information acquired from the monitoring of courts within the period from 2014 through 2016 in five areas, namely Jakarta, Makassar, Semarang, Medan, and Surabaya as conducted by LeIP and its partners during earlier research activities. This data and information have subsequently been supplemented and updated through quantitative data collection and interviews. In the research conducted in 2020 the information and data collected and analyzed were those relating to Anti-Corruption Courts located throughout Indonesia. Such information includes number of cases, number of career and *ad hoc* judges, selection methods and process, as well as policies that govern the assignment of judges at the various Anti-Corruption Courts.

The research also examines the operations of the Anti-Corruption Courts at the various levels: first instance, appellate and cassation. Research at the Supreme Court level was also conducted with a view to look into Supreme Court policies concerning the technical aspects of trials, administration of judges, personnel, budget, facilities and infrastructure. On this basis the research will be able to demonstrate the main challenges associated with the performance of Anti-Corruption Courts throughout the country.

#### 1.3.2 Research Design

In the research outlined above the method necessary to be applied is the evaluative research method. In conducting the study, the research will examine the Anti-Corruption Court as envisioned by the lawmakers, and subsequently assess how far such concepts have been realized in practice. The research will then look into what factors have influenced the performance of the Anti-Corruption Courts, both during instances where they perform according to

the ideal standards and during times where they have failed to do so. A review of these aspects will then consider how far they have contributed towards the achievement of the objectives set for the Anti-Corruption Courts.

Some of the aspects that will be measured to determine the effectiveness of the Anti-Corruption Courts are in general: 1) legal and policy framework; 2) judges; 3) institution; 4) court decisions; 5) context. These aspects are detailed below. In general, the evaluation framework can be illustrated by the following diagram:

**Diagram 1: Evaluation Framework**



The following elaborates each of these aspects that will be evaluated and studied in this research:

**a. Legal and Policy Framework**

Research into the legal and policy framework aims to identify the desired objectives of establishing the Anti-Corruption Courts as well as the legal basis for their establishment and operations. To that end, the object of the research will not only be limited to Law No. 46 of 2009 but will also include the legislation that

precedes it, namely Law No. 30 of 2002 on the Corruption Eradication Commission. Formulation of the stated objectives of the establishment of the Anti-Corruption Court also take into account the context in which such establishment took place, public expectations and interpretation of the legal framework and the available academic papers.

Another aspect that is reviewed involves the various changes undergone by the Anti-Corruption Court through Law No. 30 of 2002 and Law No. 46 of 2009, and the rationale for such changes. To gain a better understanding of the construction of the clauses contained in the two legal instruments, the academic papers and debates surrounding the drafting of the laws are also reviewed. Additionally, a review is also conducted on the policies that serve as the foundation for the preparations that went into the establishment of the Anti-Corruption Courts at each province capital, such as action plan documents, budget preparation policies, resources preparation policies, and so forth.

## **b. Judges**

Judges constitute the primary element of a judicial process. According to the law there are two categories of judges that adjudicate corruption cases: career and *ad hoc* judges. The presence of career and *ad hoc* judges is one of the distinguishing features of an Anti-Corruption Court. As such it is important to examine the intention behind the introduction of *ad hoc* judges to the Anti-Corruption Courts, how this decision has been implemented, whether it has achieved its objectives, and what challenges were encountered on the ground. The different manner in which *ad hoc* judges are regulated under Law No. 46 of 2009 also requires attention.

In addition to the *ad hoc* judges, the role and function of career judges are also critical elements to be analyzed. Therefore, the research also examines the role and competency of career judges, the nature of the relationship between career judges and their

*ad hoc* counterparts in adjudicating cases and what institutional support career judges receive in undertaking their functions. Lastly, issues concerning institutional support towards enhancing the quality and effectiveness of judges' performance in the Anti-Corruption Courts are also important to be evaluated, such as the adequacy of quantity, distribution, and quality of the judges.

### **c. Institution**

The functions of judges and the judicial process would not be able to be carried out without institutional support. This aspect is examined to identify the enabling factors and impediments in the achievement of the objectives of the Anti-Corruption Courts. Institutional support includes: 1) human resources; 2) budget; 3) facilities and infrastructure. Human resources comprise the organization and management of personnel that support the work of the judges, specifically registrars, acting registrars, and court staff, primarily with respect to the conduct of court proceedings, management of corruption related cases, assignments, quantity and quality. From the aspects of facilities and infrastructure, factors include the sufficiency and adequacy of the available facilities and infrastructure by taking into account the need for such items for the conduct of court proceedings in accordance with procedural regulations and the principle of a fair trial, as well as the existing workload. One objective of studying institutional support, is to analyze the relationship between an Anti-Corruption Court and the court to which it is attached. This issue applies to Anti-Corruption Courts at the various court levels: district court, appellate court, or Supreme Court. Adequacy of budget allocation is also examined, particularly in terms of comparability between the value of the dispute and the real costs associated with the adjudication of the case.

#### **d. Court decisions**

If a court is analogous to a factory, then the output of a court would be court decisions. Assessment of the quality of such court decisions is crucial in determining the performance of an Anti-Corruption Court. Nevertheless, to properly evaluate the performance of court on the basis of the quality of its individual rulings is not an easy task. Some of the aspects of a court's decisions that need to be reviewed for this purpose are the quality of the legal arguments and consistency of rulings. In this study, 944 court decisions were collected to be quantitatively examined. A quantitative review of court decisions is done through an indexing process and categorization of information contained therein to identify issues at the practical level, trends in case adjudication, trends in prosecution, as well as the formats of and relationship between the elements that may emerge.

#### **e. Court Proceedings**

Comprehensive evaluation of the Anti-Corruption Courts requires an in-depth understanding of the aspects that make Anti-Corruption Courts distinct. To measure their success, there needs to be an elaboration on how court proceedings are conducted at Anti-Corruption Courts and the existing impediments. As regards court proceedings, consideration must also be given to an external party's perspective, which in this case includes the public prosecutors as the prosecuting officers. As such, the relationship between the Anti-Corruption Courts, the public prosecutors, and the KPK during a court proceeding is an important aspect that needs to be reviewed. Adequacy of available budget at the Public Prosecution Office and KPK to prosecute corruption offenses is also important to be examined in relation the effort to enhance the quality of the judicial process.



### 1.3.3 Data Collection Method

As part of the exercise to acquire evaluation results and measure components that determine an Anti-Corruption Court's performance, the following are the activities have been undertaken as well as sources information used in the research.

#### **a. Literature Research**

Data collected from library research include: 1) relevant legislation and policies; 2) academic papers and minutes of legislative drafting (Memorie van Toelichting or MvT); 3) statistical data on the performance and annual reports of judicial bodies; 4) books, articles and reports on specialized courts, the Anti-Corruption Courts, or other relevant issues; 5) court decisions of the Anti-Corruption Courts. The library data contains information concerning legal framework, organizational regulations, and the operations or practices of the Anti-Corruption Courts.

#### **b. Observation and Court Monitoring**

During a study conducted by LeIP in the period of 2014-2016 a series of processes was initiated to observe court proceedings and to gain insight of the real conditions on the ground at five Anti-Corruption Courts in Jakarta, Bandung, Medan, Surabaya and Makassar. Information obtained from the observation pertains to the judicial proceedings held at the Anti-Corruption Courts, challenges faced on day-to-day basis, availability of facilities and infrastructure, the public's attitude towards the proceedings, and behavior of the parties during court sessions. Data from the observation were supplemented and updated using data from interviews, as well as from the various court performance reports produced throughout 2020.

#### **c. Interviews**

Interviews were used to generate information on the expectations and experience of stakeholders involved in corruption

related court proceedings, as well as to confirm findings from observations and library data collection on the conduct of Anti-Corruption Courts proceedings. In this research there were 28 informants interviewed, comprising stakeholders and key actors in the establishment of the Anti-Corruption Courts and the proceedings conducted at those courts. These informants include the following groups of individuals:

- lawmakers (parliamentarians and government officials)
- leaders and staffs of the Supreme Court
- Chairpersons of the various courts
- career judges
- *ad hoc* judges
- registrars and acting registrars
- public prosecutors from the anti-corruption commission (KPK)
- public prosecutors from the Public Prosecution Office
- research institutions and non-governmental institutions

The interviews were conducted with individuals as well as through group discussions. A number of focused group discussions (FGDs) were held:

- FGD with actors directly involved in the passage of the anti-corruption law. The FGD aimed to identify the initial purpose of and discourses that lead to the establishment of the Anti-Corruption Courts.
- FGD and individual interviews with the lead officials at Anti-Corruption Courts of five jurisdictions (Jakarta, Surabaya, Makassar, Bandung and Medan) to establish the current condition and issues relating to the function and role of judges, administration, facilities, infrastructure, and personnel management.
- FGD involving public prosecutors from the KPK as well as the Public Prosecution Office to gain insight on the challenges faced by other law enforcement bodies when participating in proceedings at the Anti-Corruption Courts.

#### **d. Indexing and Analysis of Court decisions**

A court decision contains a multitude of data, such as the identity of the parties, background of the parties, the criminal charges, alleged loss suffered, location where the crime was committed, legal arguments, composition of the panel of judges, sentence passed, and so forth. When analyzed quantitatively such data yield information on the distribution of corruption offenses, severity of punishment, consistency of indictment, consistency of court decision, history of the offenders, and other information that can serve as the basis for understanding the current condition of the Anti-Corruption Courts. Indexing was conducted on 944 court decisions relating to corruption offenses handled at the district court, appellate court, cassation, and revision levels that have received permanent legal force. A number of decisions of the Anti-Corruption Courts that present interesting features were also analyzed as to the quality of legal arguments put forward by the panel of judges and consistencies or inconsistencies in the interpretation of the verdicts.

### **1.4 Outline of the Report**

#### **Chapter I Introduction**

The chapter explains the background and key issues, research objectives, research methods, and outline of the evaluation research of Anti-Corruption Courts in Indonesia.

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#### **Chapter II Concept, History and Objective of the Court's Establishment**

The chapter describes the concept of specialized judicial bodies, the objectives and purpose of the establishment of Anti-Corruption Courts as specialized judicial bodies and the position of the Anti-Corruption Courts under Law No. 46 of 2009.

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### **Chapter III *Ad Hoc* Judges**

The chapter discusses *ad hoc* judges, including objectives articulated at establishment and issues found at the practical level, covering, among others, the aspect of expertise versus integrity, the rights of *ad hoc* judges, and division of roles between *ad hoc* and career judges.

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### **Chapter IV Career Judges**

The chapter discusses the prevailing conditions and issues related to the management of career judges, covering, among others, certification of judges and their workload.

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### **Chapter V Institution**

The chapter elaborates on the condition and issues relating to the institutional aspect of the Anti-Corruption Courts, such as problems with facilities and infrastructure and development of organizational policies.

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### **Chapter VI Court Proceedings**

The chapter discusses the condition and issues relating to specialized proceedings and procedures at the Anti-Corruption Courts and challenges found during such proceedings relating to external parties.

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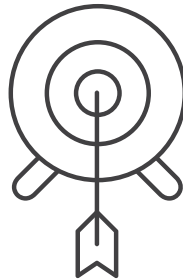
### **Chapter VII Conclusion and Recommendations for Anti-Corruption Reform**

The chapter sets forth conclusions derived from the findings of the previous chapters and lays down a comprehensive set of recommendations to improve future performance of the Anti-Corruption Courts.

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CHAPTER II

# Concept, History and Objective of the Court's Establishment



The second chapter will explain in detail the concept and form of specialized courts that have been established in Indonesia. It will also describe the history surrounding the establishment of the Anti-Corruption Courts prior to the advent of the anti-corruption law and up to the most recent regulatory provisions under the current Anti-Corruption Court Law. The explanation of the concept of specialization for courts is meant to clarify the distinction between Anti-Corruption Courts as they currently exist and the other specialized courts. Additionally, it serves to present other forms of specializations that may be introduced to the Indonesian judicial system, which could be considered in preparing recommendations for the institutional strengthening of the Anti-Corruption Courts.

The chapter also undertakes a review of the history of the establishment of Anti-Corruption Courts in order to determine what the lawmakers expect in terms of the performance of Anti-Corruption Courts. For example, what special features had the lawmakers intended to introduce to courts that examine corruption cases? How do the lawmakers position Anti-Corruption Courts among the other existing judicial bodies? What are the expectations that underlie the decisions made by legislators? Finally, what is the linkage or comparison between the expectations of the legislature and the expectations and assessments of the public on the judicial system?

## 2.1 The Concept of Specialized Courts in Indonesia

As a concept, specialized courts have never been clearly regulated under Indonesian law: do these courts stand separate from the existing courts of first instance and appellate courts, or do they form a part of such first instance and appellate courts? Article 24 of the Third Amendment to the 1945 Constitution of the Republic of Indonesia stipulates that the judicial bodies under the Supreme Court consist of the district courts, religious courts, military courts, and the state administrative courts. This constitutional mandate inhibits the

establishment of a judiciary operating outside the established scope. Consequently, any court that may be subsequently established must be within the jurisdiction as determined by the Constitution.

The term ‘specialized courts’ (pengadilan khusus) was only formally written into a regulatory instrument in 1998, namely in the Government Regulation In Lieu of Law (Peraturan Pemerintah Pengganti Undang-Undang or Perpu) No. 1 of 1998 concerning the Amendment to the Law on Bankruptcy. The Perpu contains a reference to Specialized Courts in point C of its preamble, and goes on to establish the Commercial Court attached to the Central Jakarta District Court with a specific jurisdiction to adjudicate petitions for bankruptcy and suspension of debt payment obligations.<sup>20</sup>

In the General Explanation section of the Perpu it is stated that the formation of the commercial court is allowed under Law No. 14 of 1970 regarding the Basic Provisions of Judicial Power, specifically in its explanation of Article 10 paragraph (1). The provisions affirm that within each area of the judiciary it is possible to introduce specialization/differentiation, and the formation of the commercial court according to the General Explanation of the Government Regulation in Lieu of Law is a differentiation measure undertaken for the general courts.

Law No. 14 of 1970 itself did not go as far as using the term “specialized court”, although it was subsequently understood that the explanation of Article 10 paragraph (1) forms the basis for the establishment of specialized courts. Nevertheless, this particular law does not make further provision as to what form such a “specialized court” or “specialization/differentiation” should take. By tracing further back the history behind the formulation of the explanation of Article 10 paragraph (1) of Law No. 14 of 1970, its birth is closely linked to historical factors, and particularly to the establishment in

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<sup>20</sup> A year later, the Commercial Court was established in 4 cities which are Medan, Ujung Pandang (Makassar), Semarang, and Surabaya, through the Presidential Decree No. 97 Year 1999.

1955 of a new court, the Economic Court by virtue of Emergency Law (UU Darurat) No. 7 of 1955 on the Investigation, Prosecution and Court Adjudication of Economic Crimes. The court was conferred with a special competence to hear cases involving economic crimes as provided under the Emergency Law.

At that time the Economic Court was not declared to be a specialized court. Moreover, there was no sufficiently clear legal framework that determines whether or not a separate court outside the district courts can be established. The Emergency Law, however, did stipulate that at every district court one or more judges and registrars shall be appointed to specifically facilitate the adjudication of economic crimes.<sup>21</sup> A similar provision also regulates the appellate level, pursuant to which at a high court, specifically the Jakarta High Court, an Economic High Court was to be formed. Based on such provisions it was subsequently concluded that the economic court forms a part of the existing district courts and the high courts, with the specialized characteristic of conferring judges with the authority to hear specific cases, and whose scope of competence may be larger than that of the host court.

The gap arising from the absence of clear legislation as to whether or not a court with specialized competence can be formed was eventually addressed a few years later by the passage of the Law on Judicial Power No. 19 of 1964. That law can be said to be the first statute to comprehensively govern the organization of judicial authority. Although the law did not use the term specialized court, in the explanation of its Article 7 paragraph (1) it is stated that the general courts encompass the Economic Courts, the Subversion Courts and the Anti-Corruption Courts.<sup>22</sup> Such a model of organization was replicated in law No. 14 of 1970 as previously discussed.

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21 Article 35 paragraph (1) of Emergency Law No. 7 of 1955.

22 Despite the fact that the explanation section pertaining to this Article refers to subversion and Anti-Corruption Courts, in practice these two bodies were not established until 2004.



Not long following the advent of Law No. 19 of 1964, another new court was formed, namely the *Landreform* Court, according to Law No. 21 of 1964. Slightly different from the Economic Court, the *Landreform* Court does not appear to have been intended as part of the general courts, but rather as a separate independent specialized court. This observation is based on the planned appointment of one of the presiding judges from each of the *Landreform* courts, from the subnational as well as the national levels, by the Minister of Justice to serve as the chairperson of the *Landreform* Courts.<sup>23</sup> This court did not enjoy a long existence, as in 1970 it was dissolved with the revocation of Law No. 21 of 1964 through the enactment of Law No. 7 of 1970.

After Law No. 14 of 1970 came into force, laying down the foundation for the creation of specialized bodies within each judicial area, the manifestation of such specialization was not introduced until 27 years later in 1997, when Law No. 3 of 1997 on the Juvenile Court was enacted. This was followed a year later by the establishment of the Commercial Court in 1998, the Human Rights Court in 2000, and the Anti-Corruption Court and Tax Court in 2002. The first four judicial bodies mentioned above were formed within the environment of the general courts and are adjunct to the district courts. The tax court, however, was placed within the competence of the state administrative courts.<sup>24</sup>

After Law No. 14 of 1970 was superseded by Law No. 4 of 2004 on Judicial Power, the legal basis for specialized courts was consequently strengthened. Unlike the preceding law that used the term “specialization/differentiation”, Law No. 4 of 2004 marked the beginning of the formal use of the term “specialized courts” as can be seen in its Article 15, which affirmed that such specialized courts

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<sup>23</sup> Article 8 of Law No. 21 of 1964.

<sup>24</sup> The Tax Court was initially not intended to be placed within the State Administrative judiciary system, and was to be a separate judicial environment. See Arsil, “Pengadilan-Pengadilan Khusus di Indonesia”, *Jurnal Dictum*, Vol. 4, 2005, 80-81.

can be established at every court. However, similar to the previous law, the legislation failed to elaborate further on what constitutes specialized courts. The recognition of specialized courts was also carried forward in 2009 when Law No. 4 of 2009 was replaced by Law No. 48 of 2009. Subsequently, the government and the House of Representatives (DPR) introduced two other specialized courts, namely the Industrial Relations Court (Pengadilan Penyelesaian Hubungan Industrial or PHI) and the Fisheries court (Pengadilan Perikanan).

All of the specialized courts that are currently existing or have existed in the past share a common characteristic, namely that they possess special competence, whether by virtue of the type of cases that they hear or the persons involved in the cases. For example, in the juvenile court, the qualifications for the judges and the court's jurisdiction are different from that of the host court.

As regards the qualifications of judges, the respective statutes generally require that judges appointed to the specialized courts meet certain criteria. With some of these bodies it is even required that an *ad hoc* judge sit on every convened panel of judges. Among these courts are the Human Rights Court, Anti-Corruption Court, Industrial Relations Court, and the Fisheries Court. Meanwhile, specifically with the Commercial Court, the appointment of *ad hoc* judges is not mandatory but may be effected as necessary.

From an institutional aspect, specialized courts are generally located within a court of first instance, such as the district court. Given the use of this model, these specialized courts are basically a special chamber of a court, in that they do not have a separate organizational structure that features a chairperson and deputy chairperson, registrar or court secretary. The administration of these specialized courts is part of the administration of the host court, with the Tax Court being the exception.

Specifically with regard to tax courts, despite Law No. 48 of 2009 stating that the court operates within the domain of the State

Administrative Court, it is not administratively managed by such court, but rather has its own organizational structure. This difference in characteristics from other specialized courts is more due to the fact that based on the history of its establishment it was initially meant to serve as a separate court rather than operating within the structure of the State Administrative Court.<sup>25</sup>

## 2.2 Establishment of Anti-Corruption Court in Indonesia

### 2.2.1. The Anti-Corruption Court Under KPK Law No. 30 of 2002

As explained in the previous sections, historically the term Anti-Corruption Court has been used in Law No. 19 of 1964 on the Basic Provisions of Judicial Power, namely in Explanation of Article 7 paragraph (1). However, at that time it was not clear as to the body such term refers to, given that the legislation on corruption offenses of that period, namely Perpu No. 24 of 1960, made no mention of the establishment of an Anti-Corruption Court. A number of years thereafter, Law No. 3 of 1971 on corruption offenses that replaced Perpu No. 24 of 1960 also had lacked such a provision on Anti-Corruption Courts. Article 14 of this legislation even states that corruption cases are to be tried by the district courts pursuant to the applicable procedural laws and regulations.

The idea to introduce corruption cases itself only started to become a subject of discourse during the reform era. The public's disappointment with rampant corruption was at an all time high. The Government and the DPR responded by putting into effect a number of regulatory instruments designed to prevent and eradicate corruption, such as Law No. 28 of 1999 on State Governance Clean and Free from Corruption, Collusion and Nepotism, and Law No. 31 of 1999 on the Eradication of Corruption that replaced Law No. 3 of

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<sup>25</sup> Arsil, 2005, 80-81.

1971 which was deemed to be ineffective. Law No. 31 subsequently mandated the establishment of a new court to prevent and eradicate corruption, namely the Corruption Eradication Commission (Komisi Pemberantasan Tindak Pidana Korupsi) to be provided under its own law by no later than two years.

Despite a new law being passed in 1999 to make efforts in combating corruption more effective, no reference was made at that time to the introduction of a special court to specifically try corruption cases. This specialized court finally came into being three years thereafter in 2002 with the advent of Law No. 30 of 2002 on the Corruption Eradication Commission, specifically in its Chapter VII.

The reference to an Anti-Corruption Court in the KPK law was partly brought about by the public's low trust in the courts at that time. In that period, around 1999-2001, there were a number of major cases involving high-ranking officials, including former president Soeharto and his son Tommy Soeharto, where verdicts did not satisfy the public's sense of justice.<sup>26</sup> There was a loud public call for corruption cases not to be adjudicated by the district courts and for a specialized Anti-Corruption Court to be established as a new court. One of its special characteristics is the presence of *ad hoc* judges, namely adjudicators who do not come from among judges and who are temporarily appointed as a special judge to hear corruption cases.<sup>27</sup>

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26 The trial of former president Soeharto on charges of corruption involving the Supersemar Foundation was halted by the South Jakarta District Court on the grounds that the defendant was not able to attend court hearings due to a permanent illness suffered. Meanwhile, in the criminal proceedings involving Tommy Soeharto, the Supreme Court found the defendant not guilty of the alleged corruption offense involving the barter (*ruislag*) of land registered in the name of the company PT. Goro owned by the defendant with land owned by the National Logistics Agency (Bulog).

27 Nizar Zulmi, et al, *Pengadilan Khusus Korupsi, Naskah Akademis dan Rancangan Undang-Undang Pengadilan Tindak Pidana Korupsi*, LeIP, MTI, PSHK dan TGTPK, Jakarta, 2002, 23-31.

The Anti-Corruption Court as governed by the KPK Law is in principle not intended to operate as a separate court, but rather as a part of a district court. This is clearly stated in Article 53 paragraph (2) of Law No. 30 of 2002, which provides that the Anti-Corruption Court will initially be established at the Central Jakarta District Court with a national jurisdiction. Additionally the current KPK Law did not provide an organizational structure for the Anti-Corruption Court, such as the chairperson, deputy chairperson, registrar and secretary, which are all normally present within a court.

The distinguishing characteristics of the Anti-Corruption Court under the KPK legislation are, firstly, the power to hear all corruption cases prosecuted by the KPK, which entails those cases where a KPK officer serves as the prosecuting attorney cannot be heard by a court other than the Anti-Corruption Court. Further, an Anti-Corruption Court shall not have authority to examine corruption cases being prosecuted by the Public Prosecution Office. Secondly, the conduct of court proceedings by the judiciary are imposed with time limitation, namely 90 days from the filing of the case for district courts, 60 days for appellate courts, and 90 days for cassation proceedings. Thirdly, proceedings conducted at the Anti-Corruption Court are to be presided over by panel of judges whose composition is different from that of panels that hear other general cases. The former are comprised of five judges with two being career judges and three *ad hoc* judges. The mandated composition is also applicable to the appellate and cassation levels. However, there still exists ambiguity in the regulation concerning the composition of judges that conduct revisions (Peninjauan Kembali or PK) at the Supreme Court.<sup>28</sup>

In the KPK law it is provided that Anti-Corruption Courts are established at other district courts, such as the Central Jakarta

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<sup>28</sup> Case review proceedings at the MA are conducted by panel of judges that are different from those hearing cassation cases. If case reviews need to be conducted a majority of *ad hoc* judges, then the number of *ad hoc* judges that need to serve at the Supreme Court would be considerable, while the number of available *ad hoc* judges is limited.

District Court. The establishment of Anti-Corruption Courts other than at the Central Jakarta District Court is under the authority of the President and a Presidential Decree is used to invoke such authority.<sup>29</sup> However, in reality the President has never established an Anti-Corruption Court other than which currently exists at the Central Jakarta District Court.

### 2.2.2 Anti-Corruption Court under the Law No. 46 of 2009

Amidst the increased public trust in the constitutional court, in 2006, two years after the Anti-Corruption Court had been established and came into effect pursuant to the KPK Law, the legal foundation of the court was declared as unconstitutional by the Constitutional Court through ruling No. 012-016-019/PUU-IV/2006. The main consideration that led the Court to this conclusion was that provisions on the Anti-Corruption Court found in the KPK Law created a dualism in the hearing of corruption cases, where corruption cases can be heard both before a district court and the Anti-Corruption Court due to the two different institutions having been conferred with the power to undertake prosecution. However, the Constitutional Court did not declare its ruling to come immediately in force. It allowed 3 (three) years for the Government and the Parliament to enact an anti-corruption law which precludes a dualism in the handling of corruption cases by the courts.

To follow up on the decision of the Constitutional Court, in 2007 a number of non-governmental organizations and legal experts coordinated by the National Legal Reform Consortium (Konsorsium Reformasi Hukum Nasional or KRHN) took the initiative to draft a law on the Anti-Corruption Court along with the necessary academic paper. The initiative was part of the effort to encourage the executive and legislative branches to formulate a law on Anti-Corruption Courts, as there was a concern at that time that they would not draft such legislation, with the ultimately view of dissolving

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<sup>29</sup> Article 53 paragraph (3) of Law No. 30 of 2002 on the Corruption Eradication Commission

the Anti-Corruption Court.<sup>30</sup> The initiative was, however, able to yield results. In 2008 the Government formed an Anti-Corruption Court law drafting team led by Prof. Romli Atmasasmita, a criminal law professor at Padjajaran University, who was also involved in the drafting of the legislation initiated by civil society. The draft anti-corruption law was then discussed by the DPR and passed as Law No. 46 of 2009.

In broad terms the concept of the Anti-Corruption Court as provided under the anti-corruption law is not far different from that which is provided under the KPK law. The law maintained the appointment of *ad hoc* judges, albeit the composition no longer comprises three judges per case as was previously required, but is now left to the discretion of the chairperson of the court. In addition, the Anti-Corruption Court would still be under and form a part of the district courts, although the law now states that Anti-Corruption Courts will be established at all district courts in every province capital with a jurisdiction encompassing all districts/municipalities at the respective provinces. The same provision applies to Anti-Corruption Courts at the appellate level.

The most fundamental difference between the Anti-Corruption Courts that were governed by the KPK law and those that were established pursuant to the Anti-Corruption Court Law lies in their authority. Previously the competency of the Anti-Corruption Courts was only to hear corruption cases prosecuted by KPK prosecutors, while in the anti-corruption law their jurisdiction is expanded to cover corruption cases being prosecuted by prosecutors from the Public Prosecution Office. This expansion of authority is a consequence of the ruling made by the Constitutional Court as previously explained.

There are other basic differences that distinguishes the two rules. These include 1) increased and expanded authority, 2) the

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30 HukumOnline, *LSM Tolak Pembubaran Pengadilan Tipikor*, Kamis 8 Februari 2007, <https://www.hukumonline.com/berita/baca/hol16184/lsm-tolak-pembubaran-pengadilan-tipikor/>, accessed in 28 December 2020.

composition of the panels of judges, 3) the period for hearing, and 4) reaffirmation of the organization of the Constitutional Court as explained below.

#### Ad.1. Increased and Expanded Authority of the Anti-Corruption Court

The Anti-Corruption Courts as governed by Law 46/2009 had their powers augmented in two aspects, namely in terms of the institutions that are able to prosecute, and the types of criminal offenses that can be tried. Law 46/2009 provides that Anti-Corruption Courts will no longer hear only cases prosecuted by the KPK, but also those initiated by the Public Prosecution Office. As such the dualism in judicial authority to try corruption cases is eliminated. The consequence of such a measure is that all corruption cases would be adjudicated at the Anti-Corruption Courts, with the one exception being cases of corruption committed by members of the military.<sup>31</sup> Also, where previously the Anti-Corruption Court was only competent to try corruption cases, under the Law its powers were increased to encompass money laundering cases, provided that the predicate crime of the money laundering offense is corruption.

#### Ad.2. Composition of Panel of Judges

The Anti-Corruption Court as governed by Law 46/2009 maintains a panel of judges composition consisting of career and *ad hoc* judges. Nevertheless, it no longer has to be made up of five judges and may be comprised of only three judges. The law also removed the requirement that *ad hoc* judges must form the majority on such panels. The number and composition of members of a bench presiding over corruption cases is left up to the discretion of the Chairperson of the Court or the Chief Justice of the Supreme Court.

#### Ad.3. Period for Hearing

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<sup>31</sup> Corruption offenses committed by members of the military are tried by the Military Court and subject to Law No. 31 of 1997 on the Military Court.



The period for hearing as provided under Law 46/2006 is longer than that allowed for under the KPK law, namely 60 days at the appellate level, 120 days at the cassation level, and 60 days for case revisions.<sup>32</sup>

#### Ad. 4. Reaffirmation of the Organization of the Anti-Corruption Court

The Anti-Corruption Court Law provides for the organization of the court, which consists of the leaders, judges and registrars. The leaders as referred to in this paragraph comprise the chairperson and deputy chairperson of the court. However, although the law determines the court's organization, the positions referred to in the law are those present in the district court to which an Anti-Corruption Court is attached, or who are also referred to as *ex officio* officials.<sup>33</sup>

This chapter illustrates the issues relating to the establishment of the Anti-Corruption Courts and provides an indication of issues that emerge within various aspects of the legal framework of the constitutional courts. Subsequent chapters will discuss in depth the systemic issues and practices faced by the Anti-Corruption Courts in terms of the institution and the judges' (career as well as *ad hoc*), exercise of their functions.

### 2.3 Objective of Court's Establishment

From the elaboration on the history of establishment and the design of Anti-Corruption Court, it can be provisionally inferred that the objectives of establishing the Anti-Corruption Court cannot be separated from 2 (two) contexts: First, as a response to public dissatisfaction concerning rampant corruption allegations. Law No. 31 Year 1999 concerning Eradication of Corruption mandated the existence of a new institution to prevent and eradicate criminal acts

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<sup>32</sup> Period give for case revision is 60 days from the date a case is received by the Supreme Court, and not from its filing at the Anti-Corruption Court .

<sup>33</sup> Articles 8, 9 and 22 of Law No. 46 of 2009

of corruption, namely the KPK. This context is inseparable from the second context, addressing public distrust on conventional law enforcement agencies, which allegedly involved in the practice of corruption, collusion, and nepotism. Public demands on emerging major corruption cases at that time, especially cases involving former president Suharto and his cronies, considered as not fulfilling the sense of justice. So that, the demand to establish a specialized court with judges from outside the court institution were strengthened.

The same is stated in the Blueprint of the Establishment of the Anti-Corruption Court published by the Supreme Court, mentioned that:<sup>34</sup>

“...The establishment of this specialized court departed from the assumption that it was necessary to handle corruption cases through a mechanism that was different from conventional/ordinary judicial mechanisms. In addition, the establishment of this specialized court is also intended as a short cut to address weaknesses of conventional courts in various aspects, such as weaknesses in the quality and integrity of some of its judges, lack of accountability, and so forth.”

Meanwhile, in the elucidation of Law No. 30 Year 2002, which established an Anti-Corruption Court for the first time, stated that:

“...Law enforcement to eradicate corruption cases that was carried out conventionally has been proven to experience various obstacles. Thus, an extraordinary law enforcement method is needed through the formation of a special court that has broad authority, is independent, and free from any power in its effort to eradicate corruption, the implementation of which is carried out optimally, intensively, effectively, professionally and continuously.

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34 Tim Pengarah Pengadilan Niaga dan Persiapan Pembentukan Pengadilan Tindak Pidana Korupsi, *Cetak Biru dan Rencana Aksi Pembentukan Pengadilan Tindak Pidana Korupsi*, Mahkamah Agung, 2004, p. 1.

In addition, **to improve the efficiency and effectiveness of law enforcement against corruption**, this Law regulates the establishment of an Anti-Corruption Court within the general court, which for the first time was established within the Central Jakarta District Court. "

The distrust towards the conventional approach of corruption eradication was implicitly led to the distrust to judicial institutions that is an important part of law enforcement. Although the law mentioned above stated that the extraordinary law enforcement method is directed at the need for the formation of KPK, considering that this Law also regulates the Anti-Corruption Court, it can be interpreted that the Anti-Corruption Court is also part of the solution offered.

Furthermore, it is explicitly stated that the establishment of an Anti-Corruption Court has two objectives: 1) to increase efficiency; and 2) to increase the effectiveness of law enforcement against corruption. In Chapter 1, it has been explained that effectiveness refers to success in achieving goals. In the context of the sentence in the elucidation of Law No. 30 Year 2002, the desired goal is law enforcement against criminal acts of corruption. While efficiency is generally related to the question of whether the given resource (input) has been used appropriately to produce the expected result (output).<sup>35</sup> Efficiency is achieved if the output can be generated with the minimum possible input, or when the maximum output has been generated with the available input. This concept is closely related to the efforts of public organization reform in various countries alongside the increasing demands to be accountable for tax-payer money, which is increasingly contextual in the economic crisis conditions faced by various countries. Input in this case can be interpreted as the personnel, infrastructure, and budget needed to finance. Meanwhile, the output is linked to court decisions. Based on this basic concept, efficiency is also often indicated by the speed

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35 Stefan Voigt dan Nora El-Bialy, "Identifying the Determinants of Judicial Performance: Taxpayers': Money Well Spent?," Salinan elektronik tersedia pada: <http://ssrn.com/abstract=2241224>, download on 16 August 2017, hal. 4

of judging process (timeliness), the number of decisions produced (productivity).

Law No. 46 Year 2009 does not mention the purpose of establishing a Corruption Court, except to respond to the Constitutional Court Decision No. 012-016-019/PUU-IV/2006. Thus, Law No. 46 Year 2009 is an effort to carry out the mandate of the 2006 Constitutional Court Decision and Law No. 4 of 2009 concerning Judicial Powers that specialized courts can only be formed by separate laws. Apart from that, this law also aims to end the dualism of authority in trying corruption cases, now being concentrated only in the Corruption Court.

From various legal framework references and taking into account the context of Anti-Corruption Court establishment, it can be concluded that **the objectives of establishing an Anti-Corruption Court are as follows:**

- 1) Providing solutions to respond public dissatisfaction on the performance of conventional courts through the establishment of a specialized court.
- 2) Improve the efficiency and effectiveness of law enforcement against corruption.
- 3) Providing legal certainty in the handling of corruption cases by ending the dualism of authority to try corruption cases.

Based on 3 (three) objectives that have been reflected above, this research will be directed at efforts to answer whether the Anti-Corruption Court has achieved these goals. Furthermore, in reviewing the performance of the Corruption Court in achieving these objectives, various problems and challenges that surround the Anti-Corruption Court will be identified. Finally, this study will try to offer recommendations for Anti-Corruption Court improvement in the future.

One of the distinguishing characteristics of the anti-corruption court is the composition of its judges. Article 56 paragraph (1) of

CHAPTER III

# Ad Hoc Judge



Law Number 30 of 2002 on the Corruption Eradication Commission (KPK) stipulates that “Anti-Corruption Court judges consist of District Court judges and *ad hoc* judges.” The provision is reiterated in Article 10 paragraph (1) of Law Number 46 of 2009 on the Anti-Corruption Court, requiring that judges sitting on the panel presiding over corruption cases at the Anti-Corruption Courts, High Courts, and Supreme Court shall consist of career and *ad hoc* judges. Pursuant to these regulatory provisions, the composition of a panel of judges at the anti-corruption courts must be made up of career judges specifically certified as anti-corruption judges and *ad hoc* judges who have completed requisite anti-corruption training.

Zain Badjeber, former member of the Indonesian House of Representatives (DPR) involved in discussions leading to the passage of the KPK Law, explained that the reason behind the introduction of *ad hoc* judges into the Anti-Corruption Courts stemmed from the lack of public trust in their career counterparts.<sup>36</sup> Chandra M. Hamzah, advocate and former KPK commissioner who was also involved in the discussions, states that the idea or original intention of the institution of *ad hoc* judges is not to acquire their expertise, but driven more by the need to improve integrity.<sup>37</sup> This was affirmed by several other individuals who asserted that the recruitment of *ad hoc* Anti-Corruption Court judges was the result of the distrust of the public in the ability of career judges to fairly try corruption related cases.<sup>38</sup> The idea to create specialized anti-corruption courts emerged during the early days of reform that was characterized by the high distrust in law enforcement and the strong desire to eliminate corruption. As a consequence, *ad hoc* judges from outside the judiciary were expected to possess greater integrity and render legitimacy to the anti-corruption courts.

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36 Focus Group Discussion (FGD), 8 May 2020.

37 Focus Group Discussion (FGD) 8 May 2020.

38 Elaborated by Nani Indrawati, Deputy Chairperson of the High Court of Palangkaraya. This was also conveyed by Ikhsan Fernandi Z., Prosecutor with the KPK, during a focus group discussion (FGD) held on 17 July 2020 and Soeharto, Deputy Registrar for Special Crimes of the Supreme Court, during an interview on 27 November 2020.

Nevertheless, this paradigm shifted with the enactment of the Anti-Corruption Court Law. The academic paper associated with this law states that the purpose of the recruitment of *ad hoc* judges is the need for specialized expertise of these judges in adjudicating corruption cases as well as addressing public distrust in the judiciary.<sup>39</sup> This has been affirmed in the General Elucidation of the Anti-Corruption Court Law which stipulates that *ad hoc* judges are necessary as their skills are aligned with the complexities of corruption cases, whether with respect to the *modus operandi*, presentation of legal argument, or the extensive scope of corruption cases.<sup>40</sup>

This chapter will discuss the specific characteristics of *ad hoc* judges, including the expected outcome from the introduction of *ad hoc* judges into the anti-corruption courts and whether these expectations have been achieved in practice. To that end, the analysis will focus on the legal framework that govern *ad hoc* judges, their selection process, the role of *ad hoc* judges in a judges' panel, and the challenges faced by policymakers and by the *ad hoc* judges themselves in furthering the performance of the anti-corruption courts on the ground.

### 3.1 Legal Framework for *Ad Hoc* Judges

#### 3.1.1 Criteria of *Ad Hoc* Judges

The criteria to be met by *ad hoc* judges underwent several changes in line with changes to the legislation that regulate anti-corruption courts (formerly the KPK Law before being superseded by the Anti-Corruption Law in 2009). Article 57 paragraph (2) of the KPK Law specifies that requirements that must be met by a person to be appointed as an *ad hoc* judge at an anti-corruption court are:

- a. of Indonesian nationality;
- b. abide in God the Almighty;
- c. of sound physical and spiritual health;

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<sup>39</sup> Konsorsium Reformasi Hukum Nasional (KRHN), Academic Paper on the Anti-Corruption Court Bill, no year stated, p.43.

<sup>40</sup> Law Number 46 of 2009 regarding Anti-Corruption Court, General Elucidation, paragraph 4.

- d. holding a bachelor degree in law or other field of science and possess skills relating to and a minimum of 15 (fifteen) years of experience in the field of law;
- e. of at least 40 (forty) years of age at the time of selection process;
- f. has never committed a contemptible act;
- g. competent, honest, of strong moral integrity and high repute;
- h. is not serving on the board of a political party; and
- i. shall relinquish any public or other position during his/her tenure as an *ad hoc* judge.

As regards the qualifications of an *ad hoc* judge serving on a high court, Article 59 paragraph (3) of the KPK Law stipulates that the above qualifications also apply. Meanwhile, Article 60 paragraph (3) of the KPK Law essentially requires that all of the above qualifications shall also apply to *ad hoc* justice of the Supreme Court, with the exception that experience in the field of law becomes a minimum of 20 (twenty) years and the minimum age is changed to 50 (fifty) years old at the time of the selection process.

The qualifications of an *ad hoc* judge as set forth in the KPK Law do not mention any particular set of skills. This is in line with the legal-political context that prevailed at that time, which indeed put more emphasis on integrity than any specific skills. The education requirement specifies “bachelor degree in other field of science.” The KPK Law, however, was not specific as to what field of science would qualify or as to the nature of experience in law that is being referred to. The Blueprint and Action Plan for the Establishment of Anti-Corruption Court identifies this condition as a factor that can create issues during the recruitment process.<sup>41</sup> To that end, the Blueprint recommends the interpretation of the “bachelor degree in other field of science” clause as “any person having a bachelor degree (in any discipline) who has substantially worked in the field of law and meets the anti-corruption court’s need for a specific competency.”<sup>42</sup>

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41 Tim Pengarah Pengadilan Niaga dan Persiapan Pembentukan Pengadilan Tindak Pidana Korupsi, Cetak Biru dan Rencana Aksi Pembentukan Pengadilan Tindak Pidana Korupsi, Mahkamah Agung, 2004, p. 16.

42 Tim Pengarah, 2004, p. 18.



Another problem associated with the mandatory qualifications for *ad hoc* judges pursuant to the KPK Law was the absence of a distinction between criteria for *ad hoc* judges at the courts of first instance and the appellate courts. The duty of judges at the appellate courts is to review the ruling of judges at the first instance courts, and thus the former should have superior qualities compared to those of judges at the lower courts.<sup>43</sup> In that respect, the Blueprint recommends that the Supreme Court should recruit *ad hoc* justices from appellate courts who possess more extensive qualifications compared to *ad hoc* judges from first instance courts.<sup>44</sup>

In light of such recommendations, the new Anti-Corruption Court Law revised the mandatory qualifications of *ad hoc* judges serving at these courts. Article 12 of the law sets forth these qualifications:

- a. of Indonesian nationality;
- b. abide in God the Almighty;
- c. of sound physical and spiritual health;
- d. holding a bachelor degree in law or other field of science and possess a minimum of 15 (fifteen) years of experience in the field of law in the case of *ad hoc* judges at the anti-corruption courts and high courts, and a minimum of 20 (twenty) years of experience in the case of *ad hoc* justices serving at the Supreme Court.
- e. of at least 40 (forty) years of age at the time of the selection process in the case of *ad hoc* judges at the anti-corruption courts and high courts, and 50 (fifty) years of age in the case of *ad hoc* justices serving at the Supreme Court;
- f. has never been convicted of a crime pursuant to a court decision having permanent legal force;
- g. competent, fair, of strong moral integrity and high repute;
- h. is not serving on the board of a political party;
- i. submits an asset declaration form;
- j. willing to undergo anti-corruption judge training; and

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<sup>43</sup> Tim Pengarah, 2004, p. 17.

<sup>44</sup> Tim Pengarah, 2004, p. 19.

- k. shall relinquish any public or other position during his/her tenure as an *ad hoc* anti-corruption judge.

The new anti-corruption law thus introduced a number of changes and additions to the qualification of *ad hoc* judges. The first of these changes, the qualification of “has never committed a contemptible act” provided under the KPK Law has been changed to “has never been convicted of a crime pursuant to a court decision having permanent legal force”. Secondly, the Anti-Corruption Court Law added the requisite attribute of “fair”, which was absent under the KPK Law. Thirdly, two additional qualifications were added by the Anti-Corruption Court Law, namely “submits an asset declaration form” and “willing to undergo anti-corruption judge training”.

Aside from modifying and supplementing *ad hoc* judges’ qualifications, the Anti-Corruption Court also resolves the lack of clarity presented by the qualification of “holding a bachelor degree in other field of science” and “having experience in the field of law” as originally provided under the KPK Law. Elucidation of Article 12 sub-paragraph d states that “having experience in the field of law” refers to among others experience in financial, banking, administrative, agrarian, capital market laws, and tax laws. The General Elucidation of the Anti-Corruption Court Law also explains that the introduction of *ad hoc* judges is necessary due to their expertise in the finance banking sectors, tax, capital markets, and government goods and services procurement processes.<sup>45</sup> We can therefore see that the Anti-Corruption Court provides a clearer description of the area of expertise and academic disciplines required by an *ad hoc* judge, although it does not explain further the term “holding a bachelor degree in other field of science.” The law thus still provides that a person holding a bachelor degree in any field of science can become an *ad hoc* judge, provided that they have expertise in the field of finance and banking, tax, capital markets, government goods and services procurement processes, and have 15-20 years of experience

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45 Law Number 46 of 2009.

in financial and banking, administrative, agrarian, capital market, and tax laws.

The aforementioned requisite skills and experience that must be possessed by a person with a bachelor degree other than in the field of law to become an *ad hoc* judge also apply to candidates who do hold a law degree. The requirement under Article 12 subparagraph d that states “holding a bachelor degree in law or other field of science and possess experience in the field of law...” should be interpreted as requiring the person to “hold a bachelor degree in law and having experience in the field of law...” or “having a bachelor degree in any other field of science and having experience in the field of law...” Therefore, according to the Anti-Corruption Court Law, law graduates who can be appointed as an *ad hoc* judge are those who have expertise in finance and banking, tax, capital markets, government goods and services procurement processes, and with 15-20 years of experience in financial and banking laws, administrative laws, agrarian laws, capital market laws, and tax laws.

However, similar to the related provisions in the KPK Law, the Anti-Corruption Court Law fails to separate requirements for *ad hoc* judges who are to serve at courts of first instance and requirements for those who are meant to serve at the appellate courts. In fact, based on the blueprint of anti-corruption court 2004, an *ad hoc* judge at the appellate level should have more extensive experience than *ad hoc* judges at the first instance courts<sup>46</sup>.

Qualifications applicable to *ad hoc* judges are also provided under Supreme Court Regulation (Perma) Number 4 of 2009 on Guidelines for the Selection of *Ad Hoc* Judges at the Anti-Corruption Courts, High Courts, and the Supreme Court. The requirements under the regulation are taken from the Anti-Corruption Court Law, with 3 (three) new requirements added: willingness to be assigned to any province throughout the countr;, a written approval from their direct superior for applicants with civil servant status; and willingness to pay selection and training costs should that person decide to resign

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46 Tim Pengarah, 2004, p. 17.

their commission as an *ad hoc* judge, in an amount determined by the committee.<sup>47</sup>

### 3.1.2 *Ad Hoc* Judges Selection Mechanism at the Anti-Corruption Court

The KPK Law provides for the selection process only in broad terms, stating that in appointing and nominating anti-corruption judges the Supreme Court must make the necessary announcements to the public. In practice, however, the Supreme Court conducted its first ever selection of *ad hoc* judges through a transparent and objective mechanism. The selection committee included persons external to the Supreme Court. The committee was initially established by the Supreme Court in 2003, consisting of members from the Supreme Court, members of the Government, academicians, practitioners, and representatives of civil society organizations.<sup>48</sup> Some of the selection committee members also served on the Steering Committee for the Establishment of the Anti-Corruption Court that formulated the Anti-Corruption Court Blue Print.

The first selection of *ad hoc* judges to serve at the anti-corruption court in 2004 was held openly, allowing access to the public. The selection process involved an integrity screening through asset tracing, verification of track record, verification and monitoring of any complaints raised by the public, quality testing through written

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<sup>47</sup> Regulation of the Supreme Court Number 4 of 2009 regarding Guidelines for the Selection of *Ad Hoc* Judges at the Anti-Corruption Courts, High Courts, and the Supreme Court, Article 4.

<sup>48</sup> Decree of the Chief Justice of the Supreme Court No. KMA/056/SK/XII/2003 regarding Establishment of Selection Committee for *Ad Hoc* Judges to Serve on Anti-Corruption Courts at the First Instance, Appellate Level, and Cassation Level. The Selection Committee was chaired by the Deputy Chief Justice for Criminal Law, Iskandar Kamil, and membered mostly by Supreme Court justices, including Abdul Rahman Saleh. External members of the Selection Committee included law practitioner and academician Mardjono Reksodipoetro and representatives of non-governmental organizations such as Mas Achmad Santosa and Rifqi Assegaf from the Indonesian Institute for Independent Judiciary (LeIP). The government was represented in the committee by, among others, Diani Sadiawati from Bappenas.

tests, and interviews by members of the selection committee. At that time the selection mechanism was not laid down in any Supreme Court regulation, but was determined by the Selection Committee in the form of selection rules. After the enactment of the Anti-corruption Court Law, the Supreme Court issued the Supreme Court Regulation No. 4 of 2009 on the Guidelines for Implementation of *Ad Hoc* Judge Selection in the Anti-corruption Court, High Court, and Supreme Court, which regulates similar selection mechanism to the previous rules formed by the Selection Committee before 2009.

Article 13 of the Anti-Corruption Court Law stipulates that in conducting selection of *ad hoc* judges to serve at the anti-corruption courts, the Chief Justice of the Supreme Court shall form a selection committee consisting of members from the Supreme Court and civil society, which should perform its duty in an independent and transparent manner. The Government is no longer given a seat on the committee, as in 2009 the one roof system, in which the power of court administration was transferred from the Government to the Supreme Court, was already effectively being implemented. The transferred of power has influence the view of the legislators, that any matter relating to the organization of the judiciary should entirely fall under the authority of the Supreme Court.

For selection of *ad hoc* judges in the period after 2009, the selection committees formed by the Chief Justice of the Supreme Court were chaired by the Deputy Chairperson of the Criminal Chamber, as that chamber oversees the adjudication of corruption related cases. In addition to the Chairperson of the Criminal Chamber, the selection committee also includes Echelon I officials of the Supreme Court, namely the Registrar, Secretary, Head of the Legal and Judicial Research and Training Department, and the Director General of General Courts.<sup>49</sup> Civil society members sitting on the

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<sup>49</sup> Interview with Soeharto, Secretary of the Supreme Court's Anti-Corruption Court *Ad Hoc* Judges Selection Committee, conducted on 27 November 2020. This is seen in the appointment of Djoko Sarwoko, who was the Deputy Chief Justice for Special Crimes, as Chairperson of the *Ad Hoc* Judges Selection Committee for the second, third, and fourth phases by virtue of Decrees of the Chief of Justice of the Supreme Court No. 055/KMA/SK/III/2010, No. 030/KMA/SK/II/2011,

Selection Committee are usually academicians and practitioners. In around 2013 a controversy emerged when a Commissioner of the KPK also sat on the Selection Committee. Membership of the KPK on the Committee attracted criticisms from various corners. On the one hand, there was a view that a prosecuting body like the KPK should not be involved in the selection of *ad hoc* judges as it could potentially compromise the courts' independence. However, many legal experts did not have any objection to the involvement of the KPK in the selection process.<sup>50</sup> Responding to the controversy, from 2014 onwards the Supreme Court no longer involved the KPK in the selection of *ad hoc* judges.

As regards the stages of the selection process, Article 2 paragraph (1) of the Supreme Court provides that the stages of the *ad hoc* judges selection process consist of the following three elements: a) administrative selection; b) written test; c) competency test. An interview with a member of the Selection Committee clarified aspects of the implementation of the selection process. The administrative selection begins with announcement of the candidates' applications and such announcement is made in the newspapers. The committee would then check for completeness and fulfillment of the administrative requirements and convey the result to the candidates. The candidates would then take the written test. The written test consists of a psychological test, questions concerning criminal offenses related to corruption, and questions on procedural

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and No. 042/KMA/SK/IV/2012.

50 From 2009 through 2014, Bambang Widjojanto sat on KPK's Selection Committee. Widjojanto's tenure on the committee began before his election as a KPK Commissioner, i.e. in his capacity as a law practitioner. Despite his appointment as Commissioner in 2011, the Supreme Court proceeded to make him a member of the Selection Committee. Although criticisms came from among others members of DPR's Commission III, who claimed that KPK's involvement in the selection of *ad hoc* judges would not be appropriate, NGO activists and members of the Judicial Commission gave their support to Widjojanto's involvement. The full account can be found through the following link: HukumOnline, "Pro-Kontra Keterlibatan KPK dalam Seleksi Hakim *Ad Hoc*" ("Support and Objection on KPK Involvement in *Ad Hoc* Judges Selection"), 30 August 2013, <https://www.hukumonline.com/berita/baca/lt522090649ccb9/pro-kontra-keterlibatan-unsur-kpk-di-seleksi-hakim-tipikor>, accessed on 4 January 2021.

law and the technical aspects of judicial procedures.<sup>51</sup> The written test comprises an essay and formulation of a judgment. The written part of the test is held at the High Court within the jurisdiction of the Anti-Corruption Court in question. Results from evaluation of the written test is then presented in a “Nominees List” prepared in the order of the highest scores. Candidates who make it on the nominees list would then have their track records verified. The process involves input and information from other agencies, including the Center for Financial Transactions Reporting and Analysis (PPATK) and the Judicial Commission.

The Selection Committee also engages non-governmental organizations to acquire input relating to the track record of the candidates<sup>52</sup>. Potential ad judges who have passed the written test must then undergo competency screening.<sup>53</sup> The tests conducted at this stage of the selection process are profile and personality tests performed by an independent organization and the results of which are then reported to the Selection Committee. The committee, through interviews, will then test the legal competency and expertise of the candidates relating to corruption as a criminal offense. Results gained from the interview and profile assessment are then tabled at a meeting to determine the selection of participants.<sup>54</sup> Participants who are declared as having passed the series of tests are then required to undergo training as an anti-corruption court judge, as mandated by the Anti-Corruption Court Law and Supreme Court Regulation.<sup>55</sup>

The entire selection process takes place over a period of 4-5 months and is organized one to two times annually. Total budget for each selection process is approximately IDR 1,500,000,000.- (one billion five hundred thousand Rupiah), with the largest portion being

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51 Supreme Court Regulation No. 4 of 2009, Article 8 paragraph (1).

52 Non-governmental organizations that has been involved in track record tracing for the last number of years were the Indonesia Corruption Watch (ICW) and Masyarakat Pemantauan Peradilan (MaPPI).

53 Supreme Court Regulation No. 4 of 2009, Article 11 paragraph (6).

54 Supreme Court Regulation Number 4 of 2009, Article 12 paragraph (5).

55 Supreme Court Regulation Number 4 of 2009 Article 12 paragraph (7), see also interviews with Alexander Marwata, Soeharto, and Daniel Pandjaitan, May – December 2020.

allocated to the profile assessment segment, due to the large number of participants taking part at that stage.<sup>56</sup> The number of participants who apply varies from year to year, although they can be considered to regularly be high. In 2019, for instance, there were 327 applicants, 347 in 2018, and 228 in 2017.

### 3.1.3 Appointment and Assignment of *Ad Hoc* Judges at the Anti-Corruption Court

Judges who pass the selection process will undergo a certification training alongside career judges. Upon completing the training, candidate *ad hoc* judges who have passed selection will be recommended by the Chief Justice of the Supreme Court to the president for appointment as *ad hoc* judges at the anti-corruption courts.<sup>57</sup>

Following their appointment by the President, *ad hoc* judges are then assigned to anti-corruption court determined by the Director General of General Courts. In practice, assignment of an anti-corruption judge at a particularly anti-corruption court is done within 6 (six) months of completion of training and formalized by a Decree of the Chief Justice of the Supreme Court (SK KMA).<sup>58</sup> *Ad hoc* judges who are to serve at first instance courts and appellate courts are assigned to the province capital and those who scored high would be placed in strategic areas, such as the Central Jakarta Anti-Corruption

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<sup>56</sup> Interview with respondent from the Personnel Bureau, Planning and Organization Bureau, and members of the Selection Panel of the Supreme Court, October – December 2020

<sup>57</sup> Appointment of *ad hoc* judges is governed under Article 56 paragraph (3) of the KPK Law. A similar provision is set forth in Article 10 paragraph (4) of the Anti-Corruption Court Law. The clause is also present in Decree of the Chief Justice of the Supreme Court No. 139/KMA/SK/VIII/2013 regarding Revised Procedure for Transfers and Promotions of Career Judges and Procedure for the Capacity Building of *Ad Hoc* Judges at the Specialized Courts Attached to the General Courts, which states that potential *ad hoc* judges are nominated by the Chief Justice of the Supreme Court to the President based on a selection process by the Anti-Corruption Court Judges Selection Committee.

<sup>58</sup> See Decree of the Chief Justice of the Supreme Court No. 159/KMA/SK/X/2011 Decree of the Chief Justice of the Supreme Court No. 160/KMA/SK/X/2011.



Court<sup>59</sup>. Determination of the court where an anti-corruption court judge will be posted is done by taking into account the number of judges needed by a court based on the court's corruption caseload.

<sup>60</sup>Upon receiving the assignment decree, the *ad hoc* judges are sworn in by the Chairperson of the court where they will be serving, or by the Chief Justice of the Supreme Court if they are to be assigned to the Supreme Court.<sup>61</sup>

*Ad hoc* judges are also subject to regulations concerning external positions and are prohibited from concurrently holding the following:  
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- a. executor of court decisions;
- b. guardian, trustee, and officer in connection with a case over which they are presiding;
- c. head or member of a government agency;
- d. head of regional government;
- e. advocate;
- f. notary/land deed officer;
- g. other positions that are prohibited from being held concurrently as determined by applicable laws and regulations; or
- h. business owner

*Ad hoc* judges must also relinquish any public or other position that they hold on a temporary basis or throughout the period during which they serve as an *ad hoc* judge. In the event an *ad hoc* judge holds a position as lecturer at a university and holds civil servant status, then she or he must take an unpaid leave of absence.<sup>63</sup> In practice, a number of *ad hoc* judges have been found to have not dropped their previous tenure, and consequently continue to receive a salary

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59 Decree of the Chief Justice of the Supreme Court No. 159/KMA/SK/X/2011 and Decree of the Chief Justice of the Supreme Court No. 160/KMA/SK/X/2011.

60 Interview with Lucas Prakoso, Director of Development of Judicial Technical Personnel, Directorate General of the General Courts, Supreme Court of the Republic of Indonesia, 26 August 2020.

61 Law Number 46 of 2009, Article 14.

62 Law Number 46 of 2009, Article 15.

63 Law Number 46 of 2009, Article 16 along with its elucidation.

from their previous position. A number of issues that arise from such practices shall be discussed in the subsequent sections.

### 3.1.4 Entitlements of *Ad Hoc* Judges

Article 21 of the Anti-Corruption Court Law provides that judges, including those serving in an *ad hoc* capacity, are entitled to financial and administrative entitlements, granted regardless of the nature of their position. These entitlements are elaborated in a presidential regulation. Specifically in the case of *ad hoc* judges, these entitlements are provided under Presidential Regulation (Perpres) No. 5 of 2013 on Financial Entitlements and Facilities for *Ad Hoc* Judges. Article 2 of the same regulation stipulates that *ad hoc* judges are entitled to the following financial entitlements and facilities:

#### a. Salary

*Ad hoc* judges receive a salary on a monthly basis.<sup>64</sup> Prior to the enactment of Presidential Regulation No. 5 of 2013, salary was referred to as service pay received by anti-corruption judges, including *ad hoc* judges.<sup>65</sup> The article also provides that *ad hoc* judges who are civil servants and receive salary by virtue of their position are prohibited from receiving any salary from their former institution.<sup>66</sup>

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64 Presidential Regulation 5/2013 provides that benefit amounts to IDR 20,500,000.- for *ad hoc* judges serving at first instance anti-corruption courts, IDR 25,000,000.- for *ad hoc* judges serving at appellate anti-corruption courts, and IDR 40,000,000.- for *ad hoc* judges serving at the Supreme Court.

65 See Presidential Regulation Number 49 of 2005, read in conjunction with Presidential Regulation Number 86 of 2010 regarding Honorary Remuneration for Judges at the Anti-Corruption Courts.

66 The provision is in line with the rule governing *ad hoc* judges taking “leave of absence without state remuneration” applicable to lecturers holding civil servant status, namely that a civil servant shall not receive remuneration as civil servant while taking a leave of absence without state remuneration. See Regulation of Staffing Department (Peraturan Badan Kepegawaian) No. 24 of 2017 regarding Procedure for the Granting of Leave of absence to Civil Servants, Section on “Leave of Absence Without State Remuneration”, sub-paragraph 19, p.17.

### **b. State Provided Housing**

*Ad hoc* judges are entitled to occupy government housing during their service. If government housing is not yet available, judges are given a housing allowance as per the state's financial capability. In the implementation of this provision, the Supreme Court has set aside budget for official house rent for every anti-corruption judge, adjusted to the available budget of the Supreme Court,<sup>67</sup> whose amount differs between districts/cities based upon the prevailing cost of living index for the region in question.<sup>68</sup>

### **c. Transport facility**

*Ad hoc* judges are entitled to make use of transport facility during performance of official responsibilities in their duty area, and where such transportation facility is not yet available they shall be given a transport allowance as per the state's financial capability. In the implementation of this provision, the Supreme Court provides transportation compensation to *ad hoc* judges, which amount is computed based on the judge's attendance at the court.<sup>69</sup>

### **d. Health insurance**

The granting of health insurance to *ad hoc* judges is by way of reimbursement or in-kind compensation in the form of goods/

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67 See Circular of the Secretary of the Supreme Court Number 3 of 2017 regarding Official Housing Rent for *Ad Hoc* Judges.

68 These Cost Items (Satuan Biaya Masukan or SBM) have been complied in accordance with the applicable standards and approved by the Ministry of Finance and validated by the Secretary of the Supreme Court. Currently the cost item for official housing rent is set forth in Decree of the Secretary of the Supreme Court Number 1068/SEK/SK/XII/2019 regarding Standard Cost for Official Housing Rent and Transport for Judges and *Ad Hoc* Judges at the Supreme Court and Subordinate Courts for the Fiscal Years of 2020 Through 2022.

69 See Decree of the Secretary of the Supreme Court No. 409/SEK. KU.01/I/III/2020 regarding Explanation on Submission of Transport Costs for Judges. Similar to the regulations on house rent, compensation for transport costs has been validated by the Secretary of the Supreme Court by district/ city, thus such cost item differs among districts/cities.

services, rather than in monetary form.<sup>70</sup> Such health insurance is provided through collaboration with a health insurance provider, in the form of insurance premium payment to such provider.<sup>71</sup>

#### **e. Assurance of security protection in the performance of duty**

*Ad hoc* judges are given security protection. In practice, however, such assurances are not given on an individual basis. It is in fact integrated into the security provisions of the court house, such as the assignment of Security Personnel. In addition, special funds have been allocated to secure hearings of corruption related cases that draw the public's attention, which is implemented with support from the police.

#### **f. Official Travel Expense**

*Ad hoc* judges who undertake official travel are entitled to transport and accommodation cost in accordance with rules that are applicable to Class IV Civil Servants. The amount of cost provided is commensurate to the real cost expended and daily allowance are granted in accordance with the Standard Cost Item set by the relevant Regulation of the Finance Minister.<sup>72</sup>

#### **g. Service pay**

*Ad hoc* judges are given service pay at the end of their service period, amounting to 2 (two) times the amount of their salary. With respect to *ad hoc* judges who have not completed their service period, the amount of service pay is calculated based on the

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70 Regulation of the Secretary of the Supreme Court Number 04 of 2013 regarding Technical Manual for Payment of Health Assurance for *Ad Hoc* Judges at the Supreme Court and Subordinate Courts, Article 2. The amount of the Health Assurance shall be a maximum of IDR 1,000,000.- for *ad hoc* judges serving at the first instance courts and appellate courts, and a maximum of IDR 1,835,000.- for *ad hoc* judges serving at the Supreme Court. See Article 3.

71 The Supreme Court has signed a Memorandum of Understanding (MoU) with a health insurance provider, PT Asuransi Jasa Indonesia (Persero) atau Jasindo, which became effective as per 1 April 2019.

72 The current regulatory instrument that govern this matter is Regulation of the Minister of Justice Number 78/PMK.02/2019 regarding Standard Cost Item for the 2020 Budget.

length of service actually performed.<sup>73</sup> However, such service pay is not granted to *ad hoc* judges choosing to extend their service for a second term. This is due to the absence of a cessation of service pay/allowance from the Office of State Treasurer (KPPN), and thus service pay can only be disbursed at the end of the second term of the *ad hoc* judge in question.<sup>74</sup>

In addition to such entitlements, *ad hoc* judges also receive an additional 13th of their annual salary every year. Initially, *ad hoc* judges were not entitled to such an allowance, as Presidential Regulation 5/2013 provides that *ad hoc* judges shall only receive 12 (twelve) months' salary. The Supreme Court, however, made a recommendation to the Ministry that a 13th month's salary be granted to *ad hoc* judges.<sup>75</sup> They are also entitled to receive a holiday bonus (Tunjangan Hari Raya or THR) as per their faith or religion.<sup>76</sup>

### 3.2 Ad Hoc Judges in Practice: Integrity vs. Specialization

As previously explained, one reason why *ad hoc* judges are recruited externally from outside judicial bodies is the lack of the public's trust in the integrity of career judges in handling corruption related cases. Over the course of time, however, it was found that the integrity of judges serving on an *ad hoc* capacity was not higher than their career counterparts. In parallel to career judges who had to face the law, there have been a number of cases where *ad hoc* judges

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73 Calculation formula of service pay is 0.2 x service pay for a service period of 0-1 years, 0.4 x service pay for a service period of 1-2 years, 0.6 x service pay for a service period of 2-3 years, 0.8 x service pay for service period of 3-4 years, and 1 x service pay for service period of 4-5 years. See Article 7 paragraph (4) of Presidential Regulation 5/2013.

74 See Letter of the Secretary of the Supreme Court Number 336/SEK/KU.01/11/2016 regarding Service Pay for *Ad Hoc* Judges.

75 This issue was mentioned by Emmie Yulianti, Organization & Planning Bureau of the Supreme Court, 1 December 2020.

76 This can be seen in the Technical Guidance of the Drafting of the Financial Work Plan, enacted by the Secretary of the Supreme Court, in which there is specific item of the court budget on the "Allowance of Ad Hoc Judges" which regulated the budget on the Holiday Allowance to *Ad Hoc* Judges.

were caught committing a crime during sting operations conducted by the KPK. *Ad hoc* judges who were involved in corruption cases are as follows:<sup>77</sup>

Table 1 List of *Ad Hoc* Judges Convicted for Corruption

Name of <i>Ad Hoc</i> Judge	Court of Origin	Corrupt Act	Year
Kartini Juliana Magdalena Marpaung	Semarang Anti-Corruption Court	Receiving money or a promise of money in the amount of IDR 150,000,000.- to influence the outcome of a trial of a corruption related case involving the misappropriation of funds to pay for the maintenance of operation vehicles of the District of Grobogan, involving the non-active chairperson of the district's house of representative, M Yaeni.	2012
Heru Kisbandono	Pontianak Anti-Corruption Court	Receiving money or a promise of money in the amount of IDR 150,000,000.- to influence the outcome of a trial of a corruption related case involving the misappropriation of funds to pay for the maintenance of operation vehicles of the District of Grobogan, involving the non-active chairperson of the district's house of representative, M Yaeni.	2012

<sup>77</sup> Data was collected and analyzed from various sources. See MaPPI FHUI, "Korupsi Pengadilan, Forever?", <http://mappifhui.org/2018/03/16/korupsi-peradilan-forever/>, Icha Rastika, "KPK Tahan Hakim Asmadinata di Rutan Cipinang", <https://nasional.kompas.com/read/2013/09/11/1654151/KPK.Tahan.Hakim.Asmadinata.di.Rutan.Cipinang>, "Kasus Suap, Hakim Merry Purba Dituntut 9 Tahun Penjara", <https://www.cnnindonesia.com/nasional/20190425164004-12-389644/kasus-suap-hakim-merry-purba-dituntut-9-tahun-penjara>, accessed in 10 November 2020.

Name of Ad Hoc Judge	Court of Origin	Corrupt Act	Year
Asmadinata	Palu Anti-Corruption Court (former <i>ad hoc</i> judge with the Semarang Anti-Corruption Court	Receiving a bribe in connection with the trial of a corruption case involving maintenance of operational vehicles of the Grobogan House of Representatives in Central java.	2013
Ramlan Comel	Bandung Anti-Corruption Court	Receiving a bribe given to secure outcome of a corruption case involving social assistance provided by the municipal government of Bandung involving former Mayor of Bandung, Dada Rosada.	2013
Merry Purba	Medan Anti-Corruption Court	Receiving a bribe in the amount of SG\$ 280,000 from Tamin, defendant in a corruption case involving the sale of property which was still constituted a state asset, to influence the decision of the presiding panel of judges.	2019

The fact that several *ad hoc* anti-corruption court judges were implicated in corruption related cases demonstrates that the assumption of *ad hoc* judges having stronger integrity compared to career judges is not entirely true and that the objective of recruiting *ad hoc* judges to obtain judges with a higher level of integrity has not been achieved. In the view of career judges and law practitioners the condition also produced the opinion that corruption cases should be entirely left to career judges who are deemed to have better understanding of the law<sup>78</sup> and because it has been found that the integrity of *ad hoc* judges was not better than that of career judges.

Nevertheless, some observers feel that the lack of integrity and quality of some *ad hoc* judges cannot be detached from the process by

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78 Conveyed by Zein Badjeber, former member of House of Representative and Head of the Legislative Body, during a focus group discussion (FGD) on 8 May 2020.

which they are selected, which itself contain some shortcomings, as further explained in the next section. Regardless of the views of the proponents and opponents of *ad hoc* judges, one finding that needs to be underlined is that the idea of introducing *ad hoc* members of the judiciary did not serve as an instant solution. In practice, various key theses regarding *ad hoc* judges were unfounded. A number of areas of ambiguity surrounding the concept and what mechanism should be adopted in order for the idea to achieve the desired outcome still need further development.

The lack of clear elaboration of the *ad hoc* concept began to be apparent during the drafting of the Anti-Corruption Court Bill. The enacted law eventually brought in a new concept for *ad hoc* judges, whereby *ad hoc* judges were no longer seen ‘merely’ on the basis of their integrity, but also their expertise. Under the anti-corruption court legal regime, the recruitment of *ad hoc* judges is now conducted based on the need for expertise and experience of *ad hoc* judges, particularly in relevant areas other than the law, in order to give more weight to judgments on corruption cases.

However, despite these changes made to the concept of *ad hoc* judges, in practice the expectation to acquire *ad hoc* judges who possess the required special skills and experience has not entirely been met. The current Secretary of the Selection Committee for anti-corruption court *ad hoc* judges stated that 95% of the *ad hoc* judges recruited had a legal education background.<sup>79</sup> This result is in line with the observation of anti-corruption courts conducted by the Indonesian Institute for Independent Judiciary (Lembaga Kajian dan Advokasi Independensi Peradilan or LeIP) over the period of 2015-2016.<sup>80</sup> Of the 19 (nineteen) *ad hoc* judges from 5 (five) anti-

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79 Interview with Soeharto, Secretary of Anti-Corruption *Ad Hoc* Judges Selection Committee, 27 November 2021, and interview with Alexander Marwata, 12 June 2020.

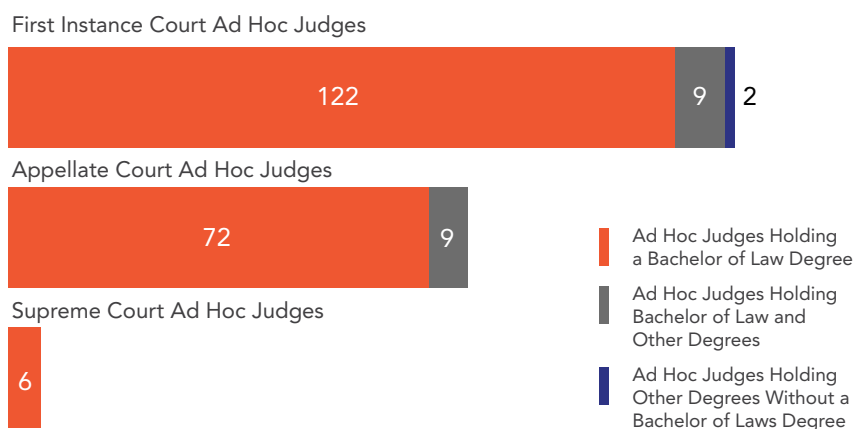
80 The monitoring exercise was carried out from August 2015 through June 2016 at the Medan Anti-Corruption Court, and the Makassar Anti-Corruption Court. During implementation on the ground, the monitoring activity was performed by LeIP’s partners based in the regions, namely SAHDaR (Medan), LBH Bandung (Bandung), MaPPI FHUI (Jakarta), LBH Surabaya (Surabaya), and KOPEL



corruption courts interviewed, all of them hold a bachelor degree in law. Furthermore, 17 (seventeen) of these *ad hoc* judges held a master's or doctorate degree in law. Only 2 (two) held a master's degree in fields other than law, namely geodetic engineering.<sup>81</sup> It is not clear as to the reason why the judges with geodetic engineering background were recruited.

These conditions still continue up to this day. As regards *ad hoc* judges serving at anti-corruption courts of first instance, of all the 133 *ad hoc* judges in Indonesia, only 11 (eleven) hold a degree other than in the field of law. In fact, only 2 (two) *ad hoc* judges hold a degree in another field of science.<sup>82</sup> As to *ad hoc* judges attached to high courts, which totals 84, none of them is not holding a degree in law and only 7 (seven) of the judges hold a degree in areas other than law. Meanwhile, none of the *ad hoc* judges at the supreme court hold a degree other than a law degree.

Table 2 Comparison of the Number of *Ad hoc* Judges According to Their Degrees



(Makassar). One of the focus area of the monitoring activity was the performance of duties of *ad hoc* judges.

81 The two *ad hoc* judges are Rodslowny Lumban Tobing and Denny Iskandar, both attached at the Medan Anti-Corruption Court.

82 The two *ad hoc* judges are Adrian Hasiholan Bagawijn Hutagalung (*ad hoc* judge with the Pekanbaru Anti-Corruption Court), who only holds a bachelor degree in economics, and Nurbaya Lumban Gaol (*ad hoc* judge with the Denpasar Anti-Corruption Court), who only holds a bachelor degree in economics with the profession of accountant.

As a matter of fact, recruitment of law graduates to become *Ad hoc* judges does not contradict the Anti-Corruption Court Law. As previously described, according to the Anti-Corruption Court Law, a person with a law degree can become an *ad hoc* judge, provided that he or she has expertise in finance and banking, tax, capital markets, government goods and services procurement processes, and has 15 to 20 years of experience in financial and banking law, administrative law, agrarian law, capital market law, and tax law. In reality, the majority of *ad hoc* judges have a background as advocates.<sup>83</sup> In fact, there are *ad hoc* judges who previously served as deputy registrars or court staff<sup>84</sup> and there are also *ad hoc* judges who served as judges at military courts.<sup>85</sup>

From these data it can be concluded that the majority of *ad hoc* Judges recruited are not much different in terms of competence compared to career judges. *Ad hoc* judges holding a degree in law generally do not have specific knowledge or skills that can be distinguished from career judges. Thus, the objective of introducing *ad hoc* judges as judges with special expertise has not been achieved. The presence of *ad hoc* judges as yet has not been able to fully bring added value to the panel of judges as the recruited *ad hoc* judges lack

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83 See the interview with Soeharto Secretary of the Selection Committee of *Ad hoc* Judges for Anti-Corruption Courts, 27 November 2021, and the interview with Alexander Marwata, 12 June 2020, and Daniel Panjaitan, *Ad Hoc* Judge of the Anti-Corruption Court, on 3 Desember 2020.

84 This was mentioned by Ibrahim Palino, Deputy Chief of Makassar District Court, on 26 August 2020. Based on the general profile document of Anti-Corruption Court Judges released by ICW, some of the *Ad hoc Judges* are Syamsul Bahri (*Ad hoc Judge* at Palu Anti-Corruption Court), who is a former Deputy Registrar for Criminal Case at Batusangkar District Court, Muhammad Idris Moh. Amin (*Ad hoc Judge* at Mataram Anti-Corruption Court), who is a former Deputy Registrar for Legal Affairs at Sidrap District Court, and Rostansar (*Ad hoc Judge* at Makassar Anti-Corruption Court), who is a former Substitute Registrar at Watansoppeng District Court. Based on the monitoring on anti-corruption courts in 2015-2016, one of the *Ad hoc Judges* is H. Abdul Rahim Saije (*Ad hoc Judge* at Makassar Anti-Corruption Court), who is a retired civil servant at the Makassar State Administrative Court.

85 Based on the monitoring on anti-corruption courts in 2015-2016, *Ad hoc Judge* Sukartono (*Ad hoc Judge* at Central Jakarta's Anti-Corruption Court), is a former Deputy Chief of Madiun's Military Court III - 13.

any specialized area of knowledge or expertise that distinguish them from career judges.

In practice, the committee has set requirements of expertise in certain legal sectors in every announcement of the acceptance of *ad hoc* judges at the Corruption Court. These legal sectors include such as financial and banking law, administrative law, agrarian law, capital market law, and tax law.<sup>86</sup> However, the Supreme Court has never identified the specific needs for expertise and/or experience of the recruited candidates for *Ad hoc* Judge.<sup>87</sup> A source from the Directorate General of Badilum stated that the identification of these needs should be carried out by the Registrar's Office of the Supreme Court as the owner of the data on the decisions of corruption cases. With these data, the Registrar's Office should be able to find out the types of corruption cases that exist and be able to identify what expertise is needed from an *Ad hoc* Judge based on these types of cases. Unfortunately, such needs identification has never been done thus far by either the Registrar's Office or Badilum. This also shows that there is a disconnect in the implementation of the Supreme Court's functions, especially in the selection of *ad hoc* judges which results in the less optimal achievement of the objectives and functions of the Anti-Corruption Court.

### 3.3 The Need to Improve the Selection Process for *Ad hoc* Judges

The search for *ad hoc* judges with integrity continues to be a challenge for the Supreme Court. In the eyes of the public, the selection process for *ad hoc* judges is considered incapable of capturing the integrity of the candidates, This was reflected, among others, in the incident where *ad hoc* judges were caught in the KPK's sting operation. In an effort to trace the integrity of *ad*

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<sup>86</sup> See Selection Committee Announcement No. 04/Pansel/*Ad hoc* TPK/I/2020, can be accessed at <https://www.mahkamahagung.go.id/media/7097>, and Selection Committee Announcement No. 03/Pansel/*Ad hoc* TPK/VII/2020, can be accessed at <https://www.mahkamahagung.go.id/media/7646> .

<sup>87</sup> Interviews with Supreme Court Judges in November and December 2021.

*hoc* judge candidates, the Supreme Court has conducted a track record tracing process applied in the selection process which involves non-governmental organizations engaged in the anti-corruption sector. Indonesia Corruption Watch (ICW) and MaPPI (Indonesian Judiciary Monitoring Society) have been asked by the Supreme Court numerous times to be involved in this track record tracing stage. However, the track record tracking mechanism is not fully able to see the candidate's behavior due to several aspects. First, it is difficult to recognize the track records of candidates who do not have public experience or exposure. Generally, these candidates have not been exposed or do not have the experience in performing jobs that have a great deal of authority which allows opportunities to commit corruption or unethical conduct. Thus, when there is a track record tracing process, the information obtained is quite limited. Secondly, the track record tracing process is not carried out according to an adequate standard. Although several non-governmental organizations often carry out track record tracking processes, it should be noted that in general, they do not have any special expertise or skills in conducting such an investigation. The data obtained is often of a vague nature and requires further confirmation.

As a result, the track record tracing process carried out in the selection process may not necessarily be able to screen the integrity of the candidates. One example of missing important information regarding integrity occurred in the case of *ad hoc* judge Ramlan Comel.<sup>88</sup> Prior to becoming an *Ad hoc* Judge, Ramlan Comel was a defendant in a corruption case involving PT Bumi Siak Pusako's "overhead" funds worth US\$ 194,496 (around IDR1,800,000,000) at Pekanbaru District Court. The Supreme Court acknowledged being caught off guard by Ramlan Comel's election as an *ad hoc* judge. Although Ramlan Comel was eventually acquitted at the level of cassation, his background of being a defendant in a corruption case is considered a negative track record. During the selection of *ad hoc* judges in 2019, the Judicial Monitoring Coalition presented several

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<sup>88</sup> "Secara Moral, Hakim Ramlan Comel Dinilai Harus Mundur", <https://www.republika.co.id/berita/lt99di/Antara>, accessed on 24 December 2020.

findings regarding the monitoring of the selection process. These findings include candidates who do not have 15 years of experience in the legal sector and candidates who did not satisfy the obligation to submit an wealth report (LHKPN).<sup>89</sup> Some of the examples mentioned above demonstrate that the selection process for *ad hoc* judges is not yet rigorous. The track record tracing method that was used has not succeeded in screening the integrity of the candidates.

In addition to integrity screening which is still problematic, skills screening has not been carried out optimally. However, in practice, the Supreme Court has never formulated the need for this special expertise prior to conducting the selection process for *ad hoc* judges. Furthermore, there is no special mechanism in place to select or view the special skills of *ad hoc* judge candidates. Therefore, it would be difficult to assess the specific expertise of *ad hoc* judges and to determine whether those expertises can help career judges in examining cases. At the end, the composition of *ad hoc* judges are dominated by those who are having legal education background without specific expertise.

### 3.4 Fulfilling the need of *ad hoc* judges

Based on data compiled from various sources, the total of *ad hoc* judges in Indonesia reached 223 people, consisting of 133 *ad hoc* judges at the anti-corruption courts at the first instance, 84 *ad hoc* judges at the high courts, and 6 *ad hoc* judges at the Supreme Court.

Detailed composition of *ad hoc* judges at each anti-corruption court of first instance and high courts are as follows:

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89 Adi Briantika, "Koalisi Aktivistis Soroti Rekam Jejak Buruk Calon Hakim *Ad hoc* Tipikor", <https://tirto.id/koalisi-aktivis-soroti-rekam-jejak-buruk-calon-hakim-ad-hoc-tipikor-edLC>, accessed on Friday, 10 April 2020.

Table 3 Number of *Ad hoc* Judges in First Instance  
Anti-Corruption Courts

No.	Anti-Corruption Courts	Total Number of <i>Ad hoc</i> Judges
1.	Banda Aceh Anti-Corruption Court	4
2.	Medan Anti-Corruption Court	9
3.	Padang Anti-Corruption Court	5
4.	Pekan Baru Anti-Corruption Court	7
5.	Tanjung Pinang Anti-Corruption Court	5
6.	Jambi Anti-Corruption Court	4
7.	Bengkulu Anti-Corruption Court	6
8.	Palembang Anti-Corruption Court	4
9.	Pangkal Pinang Anti-Corruption Court	3
10.	Tanjung Karang Anti-Corruption Court	7
11.	Serang Anti-Corruption Court	5
12.	Bandung Anti-Corruption Court	5
13.	Central Jakarta Anti-Corruption Court	5
14.	Semarang Anti-Corruption Court	10
15.	Yogyakarta Anti-Corruption Court	5
16.	Surabaya Anti-Corruption Court	7
17.	Denpasar Anti-Corruption Court	5
18.	Mataram Anti-Corruption Court	1
19.	Kupang Anti-Corruption Court	3
20.	Pontianak Anti-Corruption Court	2
21.	Banjarmasin Anti-Corruption Court	3
22.	Palangka Raya Anti-Corruption Court	3
23.	Samarinda Anti-Corruption Court	2
24.	Gorontalo Anti-Corruption Court	2
25.	Mamuju Anti-Corruption Court	2
26.	Makassar Anti-Corruption Court	4
27.	Palu Anti-Corruption Court	2
28.	Kendari Anti-Corruption Court	2
29.	Ambon Anti-Corruption Court	3
30.	Manado Anti-Corruption Court	2
31.	Ternate Anti-Corruption Court	2
32.	Manokwari Anti-Corruption Court	2
33.	Jayapura Anti-Corruption Court	2
<b>Total</b>		<b>133</b>

Table 4 Number of *Ad hoc* Judges in High Courts

No.	Anti-Corruption Courts	Total Number of <i>Ad hoc</i> Judges
1.	Banda Aceh High Court	2
2.	Medan High Court	3
3.	Padang High Court	3
4.	Pekan Baru High Court	4
5.	Jambi High Court	3
6.	Bengkulu High Court	2
7.	Palembang High Court	4
8.	Bangka Belitung High Court	2
9.	Tanjung Karang High Court	4
10.	Banten High Court	2
11.	Bandung High Court	5
12.	Jakarta High Court	6
13.	Semarang High Court	5
14.	Yogyakarta High Court	2
15.	Surabaya High Court	7
16.	Denpasar High Court	3
17.	Mataram High Court	2
18.	Kupang High Court	2
19.	Pontianak High Court	2
20.	Banjarmasin High Court	3
21.	Palangka Raya High Court	2
22.	Samarinda High Court	2
23.	Gorontalo High Court	2
24.	Makassar High Court	4
25.	Central Sulawesi High Court	2
26.	South East Sulawesi High Court	1
27.	Ambon High Court	2
28.	Manado High Court	1
29.	North Maluku High Court	1
30.	Jayapura High Court	2
Total		84

Amendments to the regulatory regime regarding anti-corruption courts under the KPK Law had the impact of increasing the need for *ad hoc* judges. Under the KPK Law, when there was only the Corruption Court at the Central Jakarta District Court,<sup>90</sup> the number of *ad hoc* Judges needed was limited to those who will serve at the Anti-Corruption Courts of the first instance, the appellate courts, and the Supreme Court, each of which must have at least 3 (three) *ad hoc* Judges.<sup>91</sup> However, as the Anti-Corruption Court Law requires that anti-corruption courts must be replicated at every district court in the provincial capitals throughout Indonesia,<sup>92</sup> the need for *ad hoc* judges increased accordingly.

In reality, the need for *ad hoc* judges in Anti-Corruption Courts has never been satisfied, even though the Directorate General of Badilum noted that it had already identified the need for *ad hoc* judges based on the workload of anti-corruption courts captured on an annual basis.<sup>93</sup> This is closely related to several problems that occurred in the effort to meet the need for *ad hoc* judges.

### 3.4.1 Challenges in Finding the Candidates for *Ad Hoc* Judges

Although the number of applicants for *ad hoc* judges cannot be said to be small, varying from 250 to 400 applicants per year, the candidates do not have ideal profiles. Several members of the Selection Committee said that many of the applicants were job seekers who did not meet the expected criteria. As noted above, even some of

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90 Law Number 30 of 2002 on the Corruption Eradication Commission, Article 54 paragraph (2).

91 Law Number 30 of 2002, Article 58 paragraph (2), Article 59 Paragraph (2), and Article 60 paragraph (2). Based on the aforementioned articles, every trial of corruption cases, whether at the first instance, appeal, or cassation, is tried by a Panel of Judges consisting of 5 (five) judges with a composition of 2 (two) career judges and 3 (three) *ad hoc* Judges.

92 Law Number 46 of 2009, Article 35 Paragraph (1).

93 Interview with Lucas Prakoso, Director of Technical Staff Development for the Judiciary, Directorate General of General Courts, 18 December 2020.



the judges appointed lack the required statutory qualifications. One apparent reason arises from certain disincentives to applying.

When the position of *ad hoc* judges was first introduced, many imagined that this position would be filled by professionally qualified individuals with integrity. However, in reality, this position is less attractive to potential target groups, including to academics or officials in financial and supervisory institutions. For candidates who are academics holding a civil servant status, there is a provision that requires the academics to leave their positions while serving as an *ad hoc* judge and apply for unpaid leave. In addition, there is also a requirement to relinquish other position while in office. With this provision, an *ad hoc* judge with a teaching background is not allowed to carry out his or her academic duties.<sup>94</sup> Moreover, there is no guarantee that the *ad hoc* judge will be reappointed to his previous position as a lecturer after taking an unpaid leave.<sup>95</sup> This is one of the reasons why academics who are civil servants are reluctant to become *ad hoc* judges.<sup>96</sup> Furthermore, the provisions for relinquishing their academic positions with the status of civil servants as set forth in the Anti-Corruption Court Law are not compatible with the regulations

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94 Regulation of the Minister of State Apparatus Empowerment and Bureaucratic Reform No. 17 of 2013 in conjunction with the Regulation of the Minister of State Apparatus Empowerment and Bureaucratic Reform No. 46 of 2013 on Lecturer Functional Position and Credit Score, Article 4 in conjunction with Article 7 letter b number 1.

95 Indeed, there is a provision that lecturers who have finished taking unpaid leave can be reappointed to a functional (academic) lecturer position. However, the provisions regarding civil servants stipulate that vacant positions due to unpaid leave must be filled, hence, during his/her term as an *ad hoc* judge, the position of the lecturer can be filled by someone else. If within 1 (one) year the civil servant has not been posted, he will be honorably dismissed. See Regulation of the Minister for Empowerment of State Apparatus and Bureaucratic Reform No. 17 of 2013 in conjunction with No. 46 of 2013., Article 31 Paragraph (3) in conjunction with Article 30 letter c. See also Joint Regulation of the Minister of Education and Culture Regulation No. 4 / VIII / PB / 2014 and Head of the National Civil Service Agency No. 24 of 2014, Article 34 Paragraph (3) in conjunction with Article 31 Paragraph (1) letter c.

96 These issues have been identified in the Blueprint and Action Plan for the Establishment of a Anti Corruption Court, Tim Pengarah Pengadilan Niaga dan Persiapan Pembentukan Pengadilan Tindak Pidana Korupsi, 2004, p. 16.

applicable to civil servants. The provision regarding "unpaid leave" for civil servants states that the leave can only be given for 3 (three) years and can only be extended for 1 (one) year.<sup>97</sup> Therefore the maximum period of "unpaid leave" for civil servants is 4 (four) years. In fact, however, the office term of an *ad hoc* Judge is 5 (five) years and he/she may be reappointed for another 1 (one) term.<sup>98</sup> An additional reason is that academics in systems like that in Indonesia, where seniority counts, sacrifice years of seniority unless their service as a judge is counted by their university. Further, academic reputations also rely on publications and an *ad hoc* judge might not publish for 10 years if serving 2 terms.

Apart from the foregoing, this position is also considered not attractive enough in terms of salary. Due to this uncompetitive incentive, potential candidates for *ad hoc* judges are reluctant to apply and are eventually absorbed by the job market or choose to remain with their original institution that guarantees a better income. Candidates with specific targeted expertise, for example, those from the Ministry of Finance, the Financial and Development Supervisory Agency (BPKP), the National Public Procurement Agency (LKPP), are still reluctant to apply because the salary of ad-hoc judges are considered to be unappealing.

### 3.4.2. Lack of *ad hoc* judge candidates who meet qualification standards

As a result of the conditions described above, prospective applicants are more likely to be dominated by job-seekers who do not correspond with the expected target group. As a result, only a few candidates have the qualifications to become *ad hoc* judges. The number of applicants for *ad hoc* judges has decreased compared to the early years since the Anti-Corruption Court was established. In 2016-2017, there was a sharp decline with the smallest number of

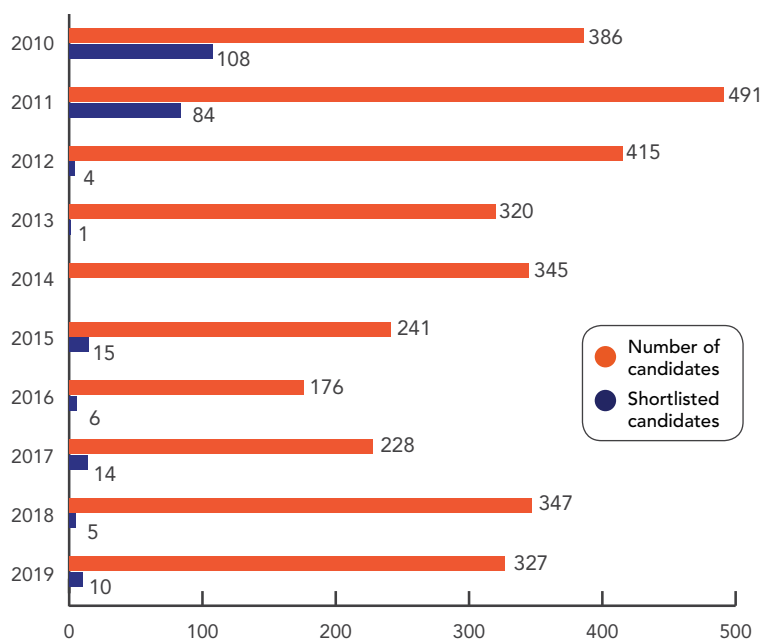
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<sup>97</sup> Regulation of the Civil Service Agency Number 24 of 2017 on the Procedures for Granting Civil Servant Leave, "Unpaid Leave" Section numbers 7 and 8, p. 15.

<sup>98</sup> Law Number 46 of 2009, Article 10 Paragraph (5).

applicants in 2016 (176 applicants). The applicants' show of interest has begun to increase again since 2018. However, in several selection processes, the number of candidates who were shortlisted was quite low. In 2012, the Selection Committee only shortlisted 4 out of 415 applicants, and in 2013 only 1 out of 320 participants was selected.<sup>99</sup> Meanwhile, based on the information from the Supreme Court's Administrative Affairs Department, the annual budget for the selection of *ad hoc* judges reaches Rp. 1,500,000,000, - (one billion rupiah).

Table 5 Number of Shortlisted Candidates for *Ad hoc* Judge in Anti-Corruption Court for each Selection (2010-2019)<sup>100</sup>



<sup>99</sup> Supreme Court of the Republic of Indonesia, Annual Report of the Supreme Court 2010 - 2019. This circumstance occurred in the selection of candidates for *ad hoc* judge at the anti-corruption court stage V in 2013, which only selected Timbul Priyadi as an *ad hoc* judge at the appeal level. See the Decree of the Selection Committee of *Ad hoc* Judge for Anti-Corruption Courts No. 39/Pansel/*Ad hoc* TPK/VIII/2013, can be accessed at <https://www.mahkamahagung.go.id/media/789>.

<sup>100</sup> Data were retrieved from the 2010-2019 Supreme Court Annual Report

Despite the many candidates who applied, the lack of candidates who meet the Supreme Court's quality standards makes it difficult to acquire qualified *ad hoc* judges. Some have alleged that the Supreme Court's effort to meet the required quota has an impact on the decline in the quality of *ad hoc* judges. Many career judges, for example, have raised complaints about the quality of *ad hoc* judges. There are even some *ad hoc* judges who were embroiled in corruption cases which seem to provide justification that the integrity assessment in the selection process was unsuccessful.

The low number of candidates for *ad hoc* judges who passed the selection is still happening today. The year 2020 is the 10th year deadline for the second term of office of the *Ad hoc* Judges who were selected during phase I and appointed in 2010. Furthermore, next February, March, and July are the deadlines for the second term of office of the *ad hoc* judges who were selected in Phase II and appointed in 2011. Currently, there are 108 (one hundred and eight) *Ad hoc* Judges from stages I and II who will enter retirement age and can no longer extend their term of office.<sup>101</sup> However, the two stages of selection in 2020 only succeeded in appointing 58 (fifty eight) new *Ad hoc* Judges.<sup>102</sup> This clearly shows that the number of new *ad hoc* judges is not sufficient to cover the number of vacant *ad hoc* judge positions in 2021. The Anti-Corruption Court is thus currently experiencing a crisis in the availability of *ad hoc* judges.

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101 The number of *Ad hoc* Judges as a result of selection for phase I is 26 (twenty) six people and stage II is 82 (eighty two) people.. See Rosyid Nurul Hakim, "MA Luluskan 82 Hakim *Ad hoc* Tipikor", <https://nasional.republika.co.id/berita/nasional/hukum/148052/ma-luluskan-82-hakim-ad-hoc-tipikor> , accessed on 24 December 2020.

102 The number of *Ad hoc* Judges as a result of stage XIII selection reached (twenty one) people and stage XIB reached 37 (thirty-seven) people. For the results of stage XIII selection, see the Decree of the Selection Committee of *Ad hoc* Judges at the Anti-Corruption Court No. 75/Pansel/*Ad hoc* TPK/IX/2020, can be accessed at <https://www.mahkamahagung.go.id/media/7923> . Meanwhile, for the selection results for stage XIV, see the Decree of the Selection Committee for *Ad hoc* Judge at the Anti-Corruption Court No. 62/Pansel/*Ad hoc* TPK/XI/2020, can be accessed at <https://www.mahkamahagung.go.id/media/8179>

### 3.5 Problems with the quality of *ad hoc* judges in performing their duties

In the previous section, it was explained that there are several *ad hoc* judges who were embroiled in corruption cases. There are also *ad hoc* judges who violated the judge's code of ethics. A number of *ad hoc* judges have received mild, moderate, and even severe disciplinary sentences by the Supreme Court. However, the problems of *ad hoc* judges are not only related to integrity but also related to the quality of *ad hoc* judges in performing their duties in court.

One of the problems identified was the professionalism of *ad hoc* judges. After being selected, apparently there were a number of *ad hoc* judges who were still carrying out their profession as advocates.<sup>103</sup> Yet, Article 15 letter e of the Anti-Corruption Court Law stipulates that *ad hoc* judges may not concurrently serve as advocates while serving as *ad hoc* judges. Moreover, there were *ad hoc* judges who demonstrated a lack of discipline by only coming to court when there was a trial schedule.<sup>104</sup> There are also *ad hoc* judges who abruptly refused to appear at trial and were prioritizing work outside their duties as an *ad hoc* judge.<sup>105</sup> These conditions indicate that there are still problems with the professionalism of *ad hoc* judges and violation of the Anti-corruption Court Law in performing their duties at the Anti-Corruption Court.

Several *ad hoc* judges were also perceived as not having good legal knowledge and skills fundamental to the performance of their duties as judges, such as how to read indictments and the basics of procedural law.<sup>106</sup> Meanwhile, *ad hoc* judges who do not have any

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<sup>103</sup> Anton Aprianto, Kuku S. Wibowo, etc, “Tabiat Miring Hakim Jalur Pengacara”, <https://majalah.tempo.co/read/hukum/140480/tabiat-miring-hakim-jalur-pengacara>, accessed on 24 December 2020.

<sup>104</sup> This was conveyed by a Registrar of the Anti-Corruption Court in an interview on August 26, 2020. See also the interview with the former Anti-Corruption Court judge in the November 2020 interview.

<sup>105</sup> Interview with a high court judge and *ad hoc* judge at the Anti-Corruption Court in August - December 2020.

<sup>106</sup> Interview with a high court judge and *ad hoc* judge at the Anti-Corruption Court August - December 2020.

educational background other than law would not have sufficient preparation to be able to understand the substantive and procedural legal problems that arise in a corruption case.<sup>107</sup> In addition, not many *ad hoc* judges have an understanding of administrative processes in government, for example, processes related to the procurement of goods and services, methods of misappropriations in the procurement of goods and services, and issues related to corporations.<sup>108</sup> In fact, such expertise is highly necessary given the many corruption cases related to the practice of procuring goods and services within the government sector. *Ad hoc* judges have also not been able to cover the need for judges who understand corruption issues in the mining or environmental sectors.<sup>109</sup>

These shortcomings demonstrate that the available *ad hoc* judges have not been able to meet the required expertise as reflected in the various corruption cases that have been filed. This is inextricably linked with the Supreme Court's failure in capturing the required expertise and translating it into a selection process that can meet these needs.

At court hearings, many *ad hoc* judges were also deemed incapable of taking on an important role in the panel. One former *ad hoc* judge admitted that many of his colleagues were not able to properly formulate probing questions. This is due to the lack of understanding among some *ad hoc* judges on matters relating to corruption. In corruption trials, it is not uncommon for *ad hoc* judges to demonstrate a passive attitude both in the trial and in the deliberations of the judges, or not to involve themselves at all in the preparation of judgments, which ultimately has an impact on the quality of the judgments and

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107 This was conveyed by a high court judge at the Supreme Court in an interview in August 2020 and a prosecutor at the prosecutor's office in Jakarta in July 2020.

108 Interview with a former *ad hoc* judge in June 2020. According to the source, this happened to an *ad hoc* judge with a background of an advocate, who did not have much to do with government business processes and issues related to corporations in carrying out their duties as an advocate.

109 Interview with a prosecutor from the KPK on July 17, 2020.

the extraction of facts during the trial.<sup>110</sup> *Ad hoc* judges are also often identified with dissenting opinions. However, the difference that often arises only concerns the level of punishment (*strafmaat*) and not the legal arguments put forward.<sup>111</sup> On the other hand, there are *ad hoc* judges who do not play an active role in the deliberation, and never even involve themselves in arriving at the final judgements.<sup>112</sup>

In addition to the various complaints regarding the quality of *ad hoc* judges, there are also *ad hoc* judges who are of excellent quality. This quality is shown, among others, by the skills in passing judgments that are as good as judgments made by career judges, and also adeptness in preparing dissenting opinions with objective considerations based on the expertise of the *ad hoc* judge.<sup>113</sup> In practice, the huge burden that must be borne by career judges who also decide other cases other than corruption has resulted in *ad hoc* judges frequently receiving the responsibility to draft decisions on corruption cases.<sup>114</sup>

Most of the complaints regarding *ad hoc* judges were made by career judges. However, issues relating to the competencies of *ad hoc* judges are not unique to *ad hoc* judges only. Some career judges also have problems with professionalism and competence, ranging from problems in crafting legal questions or analyzing evidence in trials, to issues of objectivity and impartiality.

These findings indicate that there are two problems involving the quality of judges in the *ad hoc* courts. The first, as discussed already, involves selection of *ad hoc* judges. The existing selection system has not been able to recruit *ad hoc* judges with sufficient competence. This is strongly linked with the second problem, which is the training of *ad hoc* judges. The issue of *ad hoc* judge's unpreparedness to understand

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110 Interview with a prosecutor from the KPK on July 17, 2020.

111 Interview with a High Court Judge at the Anti-Corruption Court on May 8, 2020.

112 Interview with a High Court Judge at the Anti-Corruption Court on May 8, 2020.

113 Interview with an *ad hoc* judge on November 10, 2020.

114 Interview with Ikhsan Fernandi Z, Prosecutor at the KPK on July 17, 2020; Daniel Panjaitan, *Ad Hoc* Judge on 3 December 2020; and Yanto, an Anti-Corruption Court judge on August 26, 2020.

basic issues of procedural law and legal construction in corruption cases should be resolved through a process of training and education in accordance with the requirements to competency among *ad hoc* judges. However, apparently, the training that *ad hoc* judges have been participating in this entire time has been the same as certification training for career judges. While in fact, these two groups of judges have different needs.

The third problem is related to the performance assessment of anti-corruption court judges. If *ad hoc* judges are indicated to have fundamental problems in adjudicating corruption cases, then there should be a mechanism that allows these judges to receive training and coaching. The same should apply to career judges who display similar shortcomings. *Ad hoc* judges generally never receive further education other than that received when they first take office. The Supreme Court's Training and Education Center also does not have a special education program for *ad hoc* judges as part of continuing education. However, the problem of performance appraisal seems to be a problem that not only exists in the development of *ad hoc* judges, but also a problem in the training of judges in general. At this time, there is no performance measurement system that has an impact on the identification of training and coaching needs, so the issue of professionalism and quality of judges in general (both career and *ad hoc*) continues to be a problem.

Based on the explanation above, it can be understood that there are still problems in governing and managing *ad hoc* judges. These problems occur from the beginning of the recruitment/selection stage to the training stage and into adjudicating corruption cases in court. This of course impact their performance and hinders the effective implementation of the duties of the Anti-Corruption Court. For this reason, efforts are needed to resolve the above-mentioned problems, so that the regulation and management of existing Anti-Corruption Court Judges can produce quality judges and a working system that can support the performance of duties of Anti-Corruption Court Judges. In the end, only such measures can improve the quality of decisions in corruption cases.



In the process of this research, several sources, including both judges and prosecutors, argued that the *Ad hoc* Judge approach as a solution in a special court should be considered again. For some, the appointment of *ad hoc* judges is not considered to be a solution in building a better court. This is because several judges are of the opinion that the current *ad hoc* judges no longer correspond with the original intention of their establishment, which is to obtain judges with better integrity than career judges. Some people also argue that the existence of *ad hoc* judges does not bring optimal benefits as is currently the case and therefore results in large budget inefficiencies. They argue that eliminating the position of *ad hoc* judges can provide significant budget savings. However, other groups of people also argue that if the *Ad hoc* Judge approach is needed, then the recruitment process must be carried out based on the workload and distribution of corruption cases so that the recruited *Ad hoc* Judges can meet the needs of the Anti-Corruption Court. The process must be carried out more selectively in order to obtain accomplished *ad hoc* judges.

On the other hand, there are those who argue that *ad hoc* judges are still needed in corruption trials with improvement of the selection process as prerequisite. The selection should be based on an accurate needs assessment. This relates to the opinion that the function of recruited *ad hoc* judges must be in accordance with their original designation, namely having special expertise compare to career judges. Therefore, *Ad hoc* Judges that will be recruited are only those who have special expertise. With that consideration, the existence of *ad hoc* judges can complement Career Judges in examining and deciding corruption cases

Regardless of the differences in views, it appears that there is a consensus that *ad hoc* judges can still serve a needed function as long as there are improvements in the selection mechanism in order to produce *ad hoc* judges who are more qualified and can satisfy the needs of the Anti-Corruption Court. Furthermore, *ad hoc* judges are still needed because the panel of judges cannot always depend on the experts presented in court to explain perspectives other than the required legal knowledge. Based on these rationales, it can be

concluded that *ad hoc* judges at the Anti-Corruption Court need to be retained provided that *ad hoc* judges are selected who possess the professional expertise and integrity needed for improving the performance of the Anti-Corruption Court.

In addition to *ad hoc* judges, the main focus in the discussion regarding the Anti-Corruption Courts is career judges. In fact, one of the reasons for establishing the Anti-Corruption Court in the early days of reform was distrust concerning the integrity of career

CHAPTER IV

# Career Judges



judges. Under the KPK Law regime, the composition of the panel of judges reflects this distrust through the majority role of *ad hoc* judges compared to career judges. In response to the public's distrust of career judges, the Supreme Court introduced a special education or certification system for career judges assigned to the Anti-Corruption Court. This provision for career judges was put in place in the early days of the establishment of the Court and then institutionalized through the Anti-Corruption Court Law. Career judges with special certifications are expected to produce high quality judgments. This also applies to *Ad Hoc* Judges who hold special competence/expertise that is expected to support the performance of Anti-Corruption Career Judges in crafting quality judgments.

At the time of establishment of the first Anti-Corruption Court in Jakarta, public trust in the performance of the Anti-Corruption Court and career judges seemed to have improved. Afterwards, however, the Anti-Corruption Court experienced various problems, including those caused by career judges. These problems ranged from issues of workload and huge pressure on career judges to the quality of decisions that have been deemed unbecoming public expectations. To the extent of which these problems are stand-alone problems of the Anti-Corruption Court, or are common problems experienced by career judges as a whole, is one of the questions that will be addressed below.

This chapter aims to discuss the problems of career judges serving in the Anti-Corruption Court, including the career judge selection system, the placement and fulfillment of career judges' rights, and how they impact the performance of the Anti-Corruption Court. In examining these problems, this chapter will also look at how the general personnel management system for judges affects the performance of career judges at the anti-corruption courts. Before discussing these issues, the legal framework that governs career judges will first be addressed.

## 4.1 Legal Framework Governing Career Judges

As previously explained, the Anti-Corruption Court experienced a transition from the KPK Law regime to the Anti-Corruption Court Law regime. This transition also informed the arrangements regarding career judges. At the beginning of the establishment of the Anti-Corruption Court, KPK Law, Article 57 Paragraph (1) stipulates that the requirements for career judges to become judges for Anti-Corruption Courts are:

- a. has extensive experience as a judge for at least 10 (ten) years;
- b. has experience in handling corruption cases;
- c. competent and have great integrity in performing their duties;  
and
- d. has never been subject to disciplinary sanction.

However, the requirement to have "experience in handling corruption cases" raises problems in practice. This was due to the reason that in the past not many corruption cases went to court. Hence just a few judges had experience in corruption cases.<sup>115</sup> Furthermore, the unequal distribution of corruption cases in the courts caused corruption cases to be decided only by certain judges, who are not necessarily qualified and lack integrity.<sup>116</sup>

The enactment of the Anti-Corruption Court Law in 2011 brought changes to the requirements for career judges appointed as anti-corruption judges. Article 11 of the Anti-Corruption Court Law establishes the following requirements:

- a. has extensive experience as a judge for at least 10 (ten) years;
- b. has experience in handling corruption cases;
- c. honest, fair, competent, and have great moral values and integrity as well as maintaining a good reputation while performing their duties;
- d. has never been subjected to disciplinary sanction and/or committed any crime;

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115 Tim Pengarah Pengadilan Niaga dan Persiapan Pembentukan Pengadilan Tindak Pidana Korupsi, Cetak Biru dan Rencana Aksi Pembentukan Pengadilan Tindak Pidana Korupsi, Mahkamah Agung, , 2004, p.17

116 Tim Pengarah, 2004, p. 17.

- e. has a special certification as anti-corruption court judge issued by the Supreme Court; and
- f. has reported his/her personal assets in conformity with the laws and regulations.

Article 11 also contains a new provision that the KPK Law does not have, which is the requirement to have a special certification (letter e). The law itself does not explain what is meant by this special certification. The elucidation regarding this special certification is found in the Academic Paper of the Anti-Corruption Court Law, however, the Academic Paper does not specify what "special certification" is but only explains the purpose of including the special certification as a requirement. In terms of the objective, it is stated that certification for career judges is intended to assess the integrity and capacity of a candidate judge, and is part of the selection process for candidate judges to serve in the Anti-Corruption Court.<sup>117</sup> This requirement seems to address the problems that are found in practice, for example as noted above, that there are corruption cases that have been tried by judges whose quality and integrity have not been validated. For this reason, in addition to obtaining judges for Anti-Corruption Courts who can produce quality decisions, special certification for career judges is also provided to obtain anti-corruption judges who have great integrity in performing their duties.

In addition to the requirements above, there are no other requirements for career judges, including no requirements for establishing ranks of judges. This is identified as a problem in the Roadmap and Action Plan for the Establishment of an Anti-Corruption Court, specifically related to career development for anti-corruption judges and reflecting the problems that occurred at the Commercial Court.<sup>118</sup> For this reason, the document recommends

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<sup>117</sup> Konsorsium Reformasi Hukum Nasional, Naskah Akademik Undang-undang Nomor 46 Tahun 2009, without year, p. 47. See footnote 53 in the document.

<sup>118</sup> Tim Pengarah, 2004, p. 18. The problem in the Commercial Court is that judges assigned to the Class 1A District Court in Jakarta are judges with an IV/b rank. However, career judges who were appointed as Commercial judges in Jakarta previously were in rank III/c or III/d. Because the pattern of rotation for promotion is not yet in place, this has the potential to cause difficulties in finding the

that the minimum class of career judges to become anti-corruption judges is class IV/b.<sup>119</sup> Nevertheless, in practice, the minimum qualification for a career judge to become an Anti-Corruption Judge is class IV/a.<sup>120</sup> Class IV judges generally have a minimum tenure of 14 years.

Long before the Anti-Corruption Court Law stipulated the need for special certification, the Supreme Court had implemented this certification mechanism for career judges. Despite no explanation regarding certification specified in the law, in practice this certification is linked to training and providing certification for judges who have passed the training. In the Supreme Court's 2009 Annual Report, it was stated that during the 2007-2009 period, the Supreme Court had conducted certification training for 850 judges.<sup>121</sup> Furthermore, it was stated that the purpose of the training (certification) was to provide knowledge on various aspects related to corruption and judicial ethics.<sup>122</sup> In this certification training, the Supreme Court identifies a number of career judges to participate in training, provides materials related to corruption and Anti-Corruption Courts, and carries out examinations to determine the graduation and ranking of the training participants.

In its implementation, this certification is carried out by combining career judges with *ad hoc* judges as participants,<sup>123</sup> although each of these groups of judges has different needs. The material provided is related to corruption, such as the elements of offenses in Article 2 and Article 3 of the Anti-Corruption Law; as well as court

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next placement court for the Commercial Court judges with class III/c or III/d, without having it to look like a demotion.

119 Tim Pengarah, 2004, p. 19.

120 This was conveyed by Gusrizal (Deputy Chairperson of the Banjarmasin High Court) during a Focus Group Discussion (FGD) on May 8, 2020.

121 Supreme Court of the Republic of Indonesia, Annual Report 2009, Supreme Court of the Republic of Indonesia, February 2010, p. 150

122 Mahkamah Agung Republik Indonesia, 2010, p. 151

123 Interview with Soeharto, Secretary of the Anti-Corruption *Ad Hoc* Judge Selection Committee of the Supreme Court, November 27, 2020 and interview with Daniel Pandjaitan (former *ad hoc* judge at the Bandung and Medan Anti-Corruption Court) on December 3, 2020.

technicalities, such as procedural law, trial instruments, decision making, procedures for discussion/deliberation of decisions in the assembly, and other matters.<sup>124</sup> In addition to receiving materials in class, the certification training participants were also instructed in case analysis. Anti-Corruption judge certification is conducted with a minimum of 14 (fourteen) days. The instructors involved in this certification come from many backgrounds, such as Supreme Court judges, Attorney General's Office, KPK, PPATK, and academics.

At the beginning, all career judges were required to take the Anti-Corruption Judge certification test. However, a policy has been recently enacted by the Directorate General of General Courts of the Supreme Court (Ditjen Badilum MA RI), whereby each career judge can only hold 2 (two) certifications. The provisions of the Director-General of General Courts regulate prohibitions for the Chairperson of the District Court and Appellate Court from proposing a judge to be appointed in several positions as Special Court judges, except in urgent circumstances and after consulting the Director-General of General Courts (Dirjen Badilum).<sup>125</sup> As an example, a career judge who has been assigned as an Anti-Corruption Judge cannot be proposed as a Commercial/Industrial Relations judge, or vice versa. With the many types of certification for career judges, such as a mediator, commerce, industrial relations, and corruption, it can be ascertained that in the future not all career judges will be able to take part in the anti-corruption Judge certification because they already hold 2 (two) other previous certifications.

After participating in the certification training, career judges are then placed at the Anti-Corruption Court to be tasked with adjudicating corruption cases. Article 10 Paragraph (2) of the Anti-Corruption Court Law stipulates that assignments of career judges at the Anti-Corruption Court are determined by the decision of

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124 Interview with Soeharto, Secretary of Anti-Corruption *Ad Hoc* Judge Selection Committee of the Supreme Court, November 27, 2020; Interview with Alexander Marwata (Commissioner of the Corruption Eradication Commission for the period 2015-2019 and 2019-2023, former *ad hoc* judge at the Jakarta Anti-Corruption Court) on 12 June 2020.

125 Directorate-General of Badilum Circular No. 05/DJU/KP04.5/7/2015 on the Proposal and Appointment of Career Judges in Special Courts of the General Courts



the Chief Justice of the Supreme Court. This can be seen in the Chief Justice's Decree (SK KMA) No. 166/KMA/SK/X/2011, No. 197/KMA/SK/X/2011, and No. 032/KMA/SK/II/2012, that determines which career judges who hold Anti-Corruption Judge certification will serve as Anti-Corruption Judges. Regulations related to the placement of career judges at the Anti-Corruption Court are also regulated in the Supreme Court Circular No. 02 of 2012 concerning the Proposal, Appointment/Transfer of Career judges and *ad hoc* judges in the Anti-Corruption Court. Under this SEMA, it is stipulated that career judges are proposed to be anti-corruption judges by the Chairperson of the Court after an evaluation/performance appraisal of the judge.<sup>126</sup>

Based on these provisions, it can be concluded that not all career judges who have participated in the Anti-Corruption Court judge certification can examine and adjudicate corruption cases. A career judge can only adjudicate a corruption case if he or she has been proposed as an Anti-Corruption Judge by the Chairperson of the Court based on the results of the evaluation/performance assessment and has been determined through the Decree of the Chief Justice of the Supreme Court to serve in the designated Anti-Corruption Court.

## 4.2 Inefficiency in the Certification Program for Anti-Corruption Judges

Currently, there are 3,760 career judges in the General Courts who serve in first-instance courts and appellate courts throughout Indonesia.<sup>127</sup> Based on data obtained from the official website of the Directorate-General of General Courts<sup>128</sup>, of this number, there are

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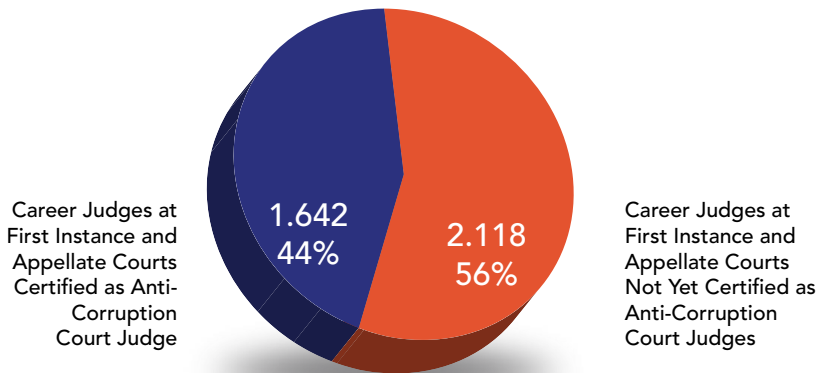
<sup>126</sup> The proposal by the Chairperson of the Court is also reflected in the Circular Letter of the Directorate-General of Badilum No. 05/DJU/ KP04.5 /7/2015 concerning the Proposal and Appointment of Career Judges in Special Courts of the General Courts.

<sup>127</sup> Report on the Implementation of Activities for 2019, Directorate General of the General Courts of the Supreme Court of the Republic of Indonesia, p. 52.

<sup>128</sup> Data as of January 2020. The data can be accessed at <https://badilum.mahkamahagung.go.id/berita/pengumuman-surat-dinas/2891-data-hakim-peradilan-umum-yang-telah-memperoleh-sertifikat-tipikor.html>.

43 percent, or 1,642 career judges in the General Courts who hold Anti-Corruption Judge certification. They consist of 1,009 first-instance court judges and 633 high court judges. This number may still increase because the Technical Training and Education Center held an Anti-Corruption Judge Certification Batch XXI in April-June 2020 and there have as yet been no graduation results from the certification.<sup>129</sup>

Table 6 Comparison of the Number of Career Judges With and Without Anti-Corruption Judge Certification<sup>130</sup>



The relatively high percentage of career judges with certification, especially for first-instance court judges, indicates the direction of the certification policy. At the beginning of the introduction of this certification program, there was an effort to certify as many career judges as possible. However, this policy has had an impact on efforts to provide added value or special privileges to Anti-Corruption Courts. By certifying a large number of career judges, the distinctive character of Anti-Corruption Courts with judges who have greater qualifications than judges in general will diminish. Certification will lose its meaning as a mechanism to improve the quality of Anti-

<sup>129</sup> This information can be accessed at <https://bldk.mahkamahagung.go.id/id/pusdiklat-teknis-peradilan/dok-kegiatan-diklat-teknis/44-pusdiklat-teknis/dok-keg-teknis/1525>.

<sup>130</sup> Data is collected and processed from various resources including Anti-Corruption Courts' website and data from the Directorate General of General Courts, as of November 2020.

Corruption Courts and as a mechanism of selecting highly qualified career judges to serve in them. In practice, the functioning of the certification system is seen as a dilemma. On one hand, it seems that the certification is intended as a “selection” mechanism for career judges, as not all judges can participate in this training and there is a further evaluative graduation mechanism involved. However, in fact, most of the training participants have been declared to have “passed”, except where the participant has experienced obstacles in participating in the training. With the increasing number of career judges receiving certification, at a certain point there will be no distinction between career judges adjudicating corruption cases and other career judges in general courts. The Anti-Corruption Court's approach through the certification system will come to the point of “business as usual.”

Public dissatisfaction with the Anti-Corruption Court reached its peak in 2011 when there was discussion of a freeze and dissolution of the regional Anti-Corruption Courts.<sup>131</sup> In response to the public's view of the deteriorating image of Anti-Corruption Courts, in 2012 the Chief Justice of the Supreme Court Hatta Ali issued a circular note.<sup>132</sup> which requires the Chairperson of the Court to conduct a performance evaluation and examination of decisions of judges who will be proposed to serve in Anti-Corruption Courts. Furthermore, the Chief Justice emphasized that judges should no longer have more than one certification so that they do not have to handle various special cases at one time. For Special Class IA courts that have more than one special court, it is very likely that the judges have a big case workload because they have to handle various special cases including corruption. Thus, this Circular Note not only intends to address the problems surrounding the declining quality of judgments but also aims to address the workload problems of judges.

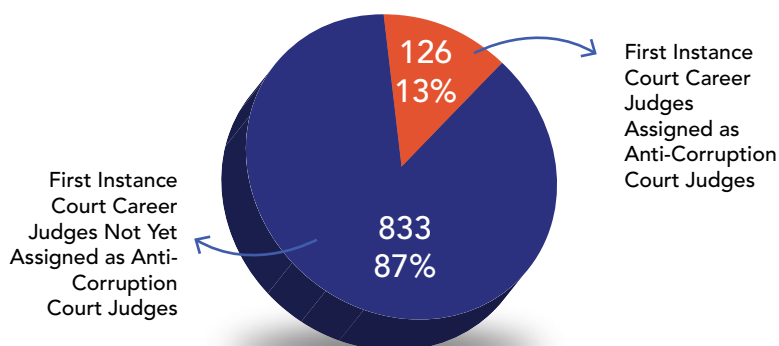
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131 See Ministry of Law and Human Rights' statement on 7 November 2011 here <https://www.liputan6.com/news/read/361653/menkum-ham-dukung-pembubaran-pengadilan-tipikor-daerah>; See the statement of the Head of the Judicial Commission on 6 November 2011 here <https://nasional.kompas.com/read/2011/11/04/23252377/KY.Pengadilan.Tipikor.Daerah.Cacat.Filo>

132 Circular of the Chief Justice of the Supreme Court No. 02 of 2012 on the Proposal, Appointment/Transfer of Career Judges and *Ad Hoc* Judges in Anti-Corruption Court.

Seen from the perspective of the large number of judges who have obtained the Anti-Corruption Court certification, or 43 percent of the total judges in general courts, workload should not be a problem. In reality, however, not all of the 1642 judges who have passed this certification are automatically able to handle corruption cases. As previously explained, these judges must first be assigned to an Anti-Corruption Court. In reality, the number of judges who actually received such an assignment turned out to be very small. Of the 1009 certified judges in first-instance courts, it turns out that only 12 percent, or 126 judges, were actually appointed as judges in the Anti-Corruption Courts. As for high court judges, out of 633 certified judges only 20 percent, or 129 judges, were placed in the Anti-Corruption Courts.<sup>133</sup>

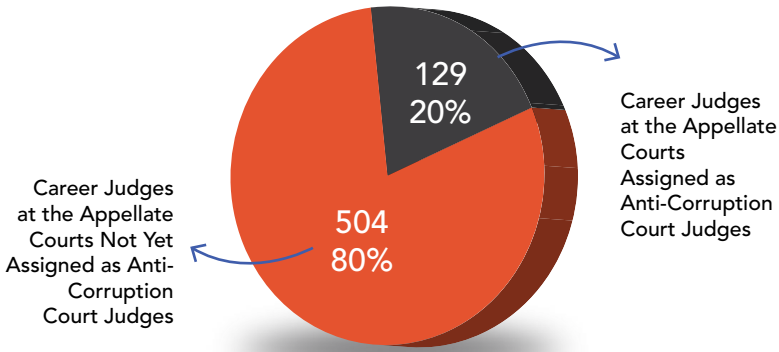
Table 7 Comparison of Number of Career Judges at First-Instance Holding Certified as Anti-Corruption Judges and Those Appointed to Serve at Anti-Corruption Courts<sup>134</sup>



<sup>133</sup> Directorate General of the General Courts of the Supreme Court, 2019 Activity Implementation Report, Directorate General of General Courts, Supreme Court of the Republic of Indonesia, 2020, p. 53.

<sup>134</sup> Data is collected and processed from various resources including Anti-Corruption Courts' website and data from the Directorate General of General Courts, as of November 2020

Table 8 Comparison of Number of Career Judges at Appellate Courts Certified as Anti-Corruption Judges and Those Appointed to Serve at Anti-Corruption Courts<sup>135</sup>



One of the factors preventing anti-corruption certified judges from directly handling corruption cases is an inconsistency between the requirements for participating in certification training and the requirements for placement in Special IA courts or courts that have an Anti-Corruption Court. One of the requirements to become an anti-corruption judge is to have experience as a judge for 10 (ten) years. From the provisions of Article 7 Paragraph (1a) of Government Regulation No. 41 of 2002 on Promotion of Rank and Position of Judges (hereinafter referred to as "PP 41/2002"), which stipulates that judges are given promotions at least once every 4 (four) years, it can be ascertained that judges with 10 (ten) years of experience are those under the category of rank III/c or III/d).<sup>136</sup> This is consistent with the current practice where career judges who are requested to take certification usually have at least 10 years of

<sup>135</sup> Data is collected and processed from various resources including Anti-Corruption Courts' website and data from the Directorate General of General Courts, as of November 2020

<sup>136</sup> This rank/class is computed 10 (ten) years from the first rank/class of career judges, which is III/a. See Appendix I of Government Regulation No. 41 of 2002 on Promotion of Rank and Position of Judges.

experience or are in class III/d.<sup>137</sup> However, judges can only meet the requirements to be assigned to the Anti-Corruption Court at the Special District Court 1A when they have reached the IV/a rank or at least have 14 years of experience. Evidently there is a gap between the requirements of career judges when they get certified, and when they meet the requirements, they are assigned to the Anti-Corruption Court. This means that by referring to Article 7 Paragraph (1) letter a of the above Government Regulation No. 41/2002, career judges who have participated in the certification training for anti-corruption judges must wait for 4 to 8 years before they can be appointed as Anti-Corruption Judges.

In some cases our research found that court chairpersons have appointed an anti-corruption judge at another court within the jurisdiction of the Anti-Corruption Court (provincial area) to hear corruption cases. This occurred, for example, in the appointment of a judge at the South Jakarta District Court to adjudicate a corruption case at the Anti-Corruption Court at the Central Jakarta District Court. With so many certified judges who are not assigned to the Anti-Corruption Court, such similar mechanism or *detasering* scheme is a solution to reduce the workload of the Anti-Corruption Court. Unfortunately, this *detasering* scheme, although allowed by the Supreme Court, is seldom used. One of the reasons that were often put forward by the Supreme Court or court officials was the lack of budget to pay for judges from other courts to adjudicate at the Anti-Corruption District Court. This condition causes certified Anti-Corruption Judges in the jurisdiction of this Anti-Corruption Court to be ineffective in carrying out their function.

Inefficiency in the judge certification program caused by the minimum number of certified judges who can be assigned to the Anti-Corruption Court is a huge waste of money. Each year the Supreme Court receives a budget for training on anti-corruption

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137 Interview with Lucas Prakoso, Director of Director of Technical Personnel Development at the Directorate General of Badilum of the Supreme Court of the Republic of Indonesia

judge certification, but apparently, only a small number of certified judges are assigned to handle corruption cases.

This condition results in the shortage of career judges who are already certified Anti-Corruption Judges to be assigned as Anti-Corruption Judges. Moreover, the waiting period that lasts between 4 to 8 years may result in the judges forgetting knowledge of the material covered during the certification training.<sup>138</sup> This can reduce the quality and competence of career judges when assigned to become judges handling corruption cases. This risk is increasingly real as the judge's certification education is not required to be renewed and is applicable for life. This condition is not ideal given the rapid development of knowledge, the modes of corruption, and the need for judges to obtain continuous education. The inefficiencies in the judge certification program clearly have an impact on the workload in the Anti-Corruption Court. This will be further elaborated in the following section.

### 4.3 Workload of Career Judges

According to several judges, in practice, the workload of anti-corruption judges is still relatively high,<sup>139</sup> though this occurs mainly in courts that have more than one special court. Anti-Corruption Court judges have a very substantial caseload and, as a result, Anti-Corruption Court hearings are often held until late night or even at dawn.<sup>140</sup> The Public Prosecutor also complained about the lengthy trial duration that exceeded working hours at the Anti-Corruption Court.<sup>141</sup> This condition is certainly very time-consuming and

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138 This was conveyed by Joni (Chairperson of the Surabaya District Court) and Lucas Prakoso (Director of Technical Personnel Development at the Directorate General of Badilum of the Supreme Court of the Republic of Indonesia) during a Focus Group Discussion (FGD) on August 26, 2020.

139 This was conveyed by several judges and the Head of the Anti-Corruption Court in an FGD on August 26, 2020.

140 This was conveyed by Joni (Chairperson of the Surabaya District Court) and Lucas Prakoso (Director of Technical Personnel Development at the Directorate General of Badilum of the Supreme Court of the Republic of Indonesia, during a Focus Group Discussion (FGD) on August 26, 2020.

141 Presented during an FGD with Public Prosecutors from the Attorney General's Office and KPK on July 17, 2020.

laborious for the Anti-Corruption Court judges and also for the parties involved in the case, which in turn can affect the quality of consideration of the Anti-Corruption Court judgments.

Even though Article 10 Paragraph (3) of the Anti-Corruption Court Law has stipulated that career judges who are appointed to be Anti-Corruption Judges are exempted from their duties to examine, try and decide other cases while handling corruption cases, in practice, however, anti-corruption judges still have to try other cases that are not related to corruption.<sup>142</sup> This has an impact on the large workload of Anti-Corruption Court judges. In some courts that have more than one special court, career judges have at least two certifications and therefore must examine special cases outside of corruption, not to mention the task of hearing general cases.

This condition is inextricably connected to the policy of the Supreme Court which interprets Article 10 Paragraph (3) of the Anti-Corruption Court Law as an exemption from duty for anti-corruption judges to examine, try and decide other **cases on the day of the corruption trial**. It is expected that on the scheduled trial days, career judges will be relieved of the responsibility of hearing other cases. But in practice, anti-corruption judges still adjudicate other cases on the day of the corruption trial.<sup>143</sup> The Supreme Court's policy is corresponding to the imbalance in workload of one court with another. If the Supreme Court relieves anti-corruption judges of their duties from adjudicating other cases in order to focus on corruption cases only, then in certain courts where the number of corruption cases is fewer, it is feared that there will be inefficiency in the performance of career judges. However, this policy had a negative impact on career judges handling a high number of cases and on the limited number of judges. Under these conditions, the

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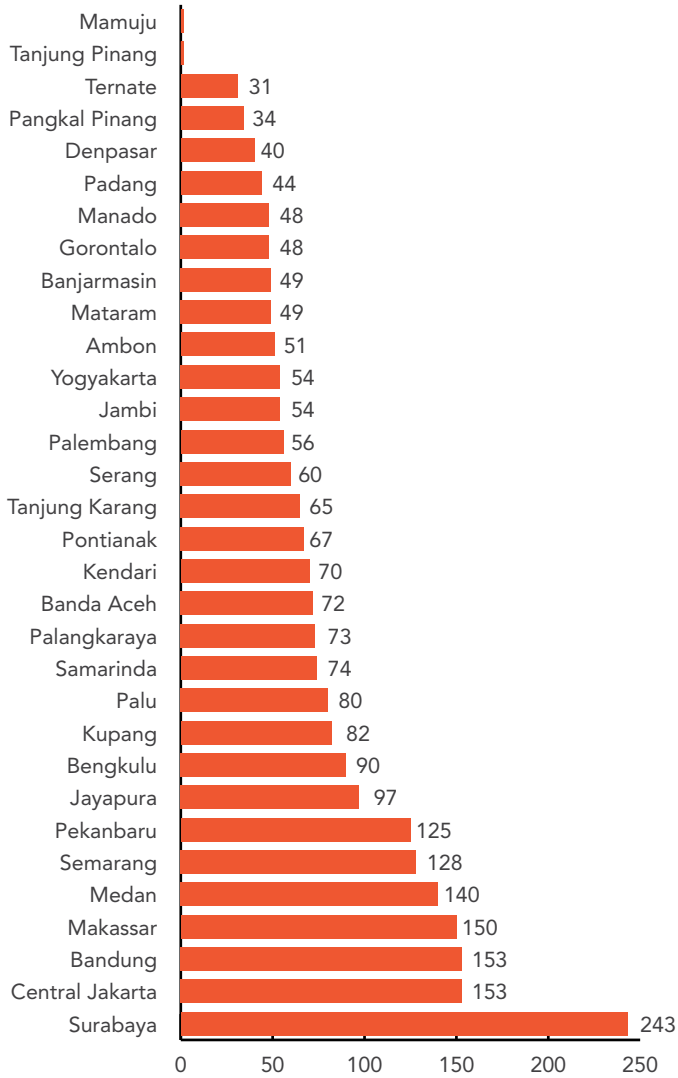
142 Interview with Suharto, Secretary of the Selection Committee of Anti-Corruption Ad-hoc Judge, November 27, 2020.

143 This was conveyed by Nani Indrawati, Deputy Chairperson of the Palangkaraya High Court in an interview on July 17, 2020, and interview with Suharto, Secretary of the Selection Committee of Anti-Corruption *Ad Hoc* Judge on November 27, 2020.



workload of anti-corruption judges in several courts has increased given their obligation to try other cases.

Table 9 Average Number of Cases Heard at the Anti-Corruption Courts<sup>144</sup>



<sup>144</sup> The data is processed from the 2014-2019 Supreme Court Annual Report, the Supreme Court of the Republic of Indonesia

According to the table above, the highest number of cases are found in the Surabaya District Court, with 243 cases per year, followed by Central Jakarta and Bandung District Courts with an average number of cases of 153 per year. Compare that to the Ternate and Pangkal Pinang Courts with 31 and 34 cases per year. The problem of workload at the Anti-Corruption Courts cannot be separated from the problem of unequal workload of all courts throughout Indonesia, where there are courts with a high number of cases but a limited number of judges, and courts with a sufficient number of judges but a small number of cases.

Another underlying reason for the excessive workload of anti-corruption judges is that the number of anti-corruption judges is often disproportionate to the number of cases being tried.<sup>145</sup> This has occurred in several Anti-Corruption Courts such as in Makassar and Pekanbaru. At the Makassar Anti-Corruption Court, there are only 6 (six) anti-corruption judges, while there are an average of 150 corruption cases per year in that court.<sup>146</sup> Meanwhile, at the Pekanbaru Anti-Corruption Court in 2013, there were only 10 (ten) anti-corruption judges, while there were 67 corruption cases in that court that year.<sup>147</sup> This proportionality can certainly not only be assessed from the comparison of the number of anti-corruption judges with the number of corruption cases. Anti-corruption judges have additional workloads, such as adjudicating other than corruption cases. This problem is exacerbated by the limited number of judges in district courts where the Anti-Corruption Court is located. Under such conditions, it is natural that the number of anti-corruption judges is disproportionate to the number of corruption cases resulting in excessive workload.

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145 Interview with Lucas Prakoso (Director of Technical Personnel Development at the Directorate General of Badilum of the Supreme Court of the Republic of Indonesia) on 26 Agustus 2020.

146 Interview with Ibrahim Palino the Deputy Chairperson of Makassar District Court, 26 Agustus 2020.

147 Davit Rahmadan and Sulaiman Fakhrur Razi, Efektivitas Pengadilan Tindak Pidana Korupsi Dalam Pemberantasan Tindak Pidana Korupsi di Pengadilan Negeri Pekanbaru, in the *Journal of Islamic Law Al-Hurriyah* vol. 2 No. July 2-December 2017, p. 143.

In addition to the different number of corruption cases in each Anti-Corruption Court, another factor as to why Article 10 Paragraph (3) of the Anti-Corruption Court Law cannot be implemented as effectively as possible is the shortage of judges in the district court where the Anti-Corruption Court is located.<sup>148</sup> In circumstances where the number of judges in the district court is limited, the anti-corruption judges are needed to try other district court cases. This makes it difficult to relieve anti-corruption judges of their duties from adjudicating other cases.

According to Soeharto, the implementation of Article 10 Paragraph (3) of the Anti-Corruption Court Law is indeed a dilemma. If this provision is applied in a court such as the Jakarta Anti-Corruption Court, which incidentally has a large number of corruption cases, then the application of this article will indeed be effective in reducing the workload of corruption judges. However, if this provision is applied to the Anti-Corruption Court in areas where there are few corruption cases, for example, less than 40 (forty) cases per year, then putting this provision into practice can cause Anti-Corruption Judges to be underemployed as they do not have the burden to hear other cases. In Soeharto's view, the Supreme Court was correct in interpreting Article 10 Paragraph (3) of the Anti-Corruption Court Law to relieve Anti-Corruption Judges of their duties to hear other cases only **on the day of the corruption trial**.<sup>149</sup>

As noted above, this problem is exacerbated by the absence of a proper placement system with the result that many certified judges cannot be employed to examine corruption cases. Apart from that, with the excessive workload in certain anti-corruption courts, there were also cases where there were career judges who were not willing to take certification as anti-corruption judges. The disincentive to take part in the Anti-Corruption Certification was due to, among others, the enactment of Government Regulation No. 94 of 2012 on Financial Rights and Facilities for Judges Under the Supreme

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148 Interview with Joni, Chairperson of the Surabaya Distric Court, on the Focus Group Discussion, 26 August 2020.

149 Interview with Suharto, Secretary of the Selection Committee of Anti-Corruption Ad-hoc Judge, 27 November 2020.

Court.<sup>150</sup> This regulation provides that the income received by anti-corruption judges must be the same as other career judges who do not hear corruption cases. Corruption cases in general are more complex and time-consuming compare to regular cases, and often attract greater public attention and pressure. Furthermore, anti-corruption judges still also have to trial other regular cases, in contrary to what has been regulated by Anti-corruption Court Law. Due to these conditions, career judges are reluctant to participate in the certification of anti-corruption judges because the income they will receive as anti-corruption judges is not considered as an enticing incentive.<sup>151</sup> This condition ultimately causes a deficiency of career judges who can be assigned as anti-corruption judges.

Furthermore, there are also cases where career judges who hold an anti-corruption judge certification do not want to disclose the certification in the Personnel Information System (SIKEP) of the Supreme Court because they are reluctant to be assigned to the Anti-Corruption Court.<sup>152</sup> The personnel information system and the education and training information system that are not integrated enable judges to hide such information from the system. This situation can lead to challenges in assigning career judges to the Anti-Corruption Court because their anti-corruption judge certification is not recorded in the personnel information system. Moreover, this situation consequently wastes the Supreme Court's budget as there are already costs incurred for administering the certification of anti-corruption judges, while in fact some certified judges do not want to handle corruption cases.

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150 Government Regulation No. 94 of 2012 on Financial Rights and Facilities for Judges Under the Supreme Court, Article 12 letter b. This provision revokes Presidential Regulation No. 86 of 2010 in conjunction with Presidential Regulation No. 49 of 2005 on Remuneration for Judges at the Anti-Corruption Court (hereinafter referred to as “Perpres 86/2010 in conjunction with Perpres 49/2005”)

151 Interview with Soeharto, Secretary of Selection Panel of *Ad Hoc* Judges at the Supreme Court, on 27 November 2020.

152 Interview with Emie Yuliati, Planning and Organization Bureau of the Supreme Court; and Muzhar Khatib, staf at the Personnel Bureau, on 1 December 2020.

#### 4.4 Providing incentives and facilities to Anti-Corruption Judges

Article 21 of the Anti-Corruption Court Law stipulates that judges have financial and administrative rights, which are granted regardless of the position of the Judge, the elucidation of these rights will be governed under a presidential regulation. However, after the enactment of the Anti-Corruption Court Law, only 1 (one) Presidential Regulation (PP) which regulates the financial rights of Anti-Corruption Court Judges was promulgated, namely, Presidential Regulation Number 86 of 2010 in conjunction with Presidential Regulation Number 49 of 2005 which regulates the disbursement of service pay for Anti-Corruption Court Judges. Whereas, as previously mentioned, this Presidential Regulation was later revoked with the enactment of Government Regulation No. 94 of 2012. There are thus no special provisions related to the rights of Anti-Corruption Court Judges, any discussion regarding these rights refers to Government Regulation No. 94 of 2012 in conjunction with Government Regulation No. 74 of 2016 concerning Amendments to Government Regulation No. 94 of 2012 (hereinafter referred to as “PP 74/2016”) as a regulation related to the rights of Career Judges in general.

Article 2 of PP 94/2012 in conjunction with PP 74/2016 stipulates that Judges have financial rights and facilities consisting of: a) basic salary; b) position allowance; c) official residence; d) transportation facilities; e) health insurance; f) security guarantee; g) official travel expenses; h) protocol position; i) retirement income; and j) other allowances. Article 9 of PP 94/2012 in conjunction with PP 74/2016 provides that “other allowances” include family allowances and rice for husband/wife and 2 (two) children, as well as a living cost allowance which is determined based on the judge's location of duty. Apart from these rights, there is no provision regarding financial rights and other facilities for Judges, including Judges at the Anti-Corruption Court governed under PP 94/2012 in conjunction with PP 74/2016. Thus, the rights of Anti-Corruption Court Judges are only limited to financial rights and facilities as stipulated in Article 2 of PP 94/2012 in conjunction with PP 74/2016.

Drawing on this, it can be concluded that the financial rights of Anti-Corruption Court Judges are comparable with that of the Career Judges who do not handle corruption cases. Anti-Corruption Court Judges also no longer receive case clearance money for special corruption cases amounting to Rp. 300,000, - per case.<sup>153</sup> Some Judges at Anti-Corruption Courts often have to spend their personal funds to cover transportation and consumption costs even though these costs are incurred because they have to be in the courtroom until dawn.<sup>154</sup> This condition shows that the increase in workload experienced by Anti-Corruption Court Judges is not rewarded with any incentives.

An additional disincentive arises because there is not yet an adequate security system for Anti-Corruption Court Judges. Considering that corruption cases can involve considerable risks, the security guarantee for Judges at the Anti-Corruption Court is currently very minimal and does not even meet required minimum standards. For example, judges often still have direct contact with the general public without any security escorting them when entering the courtroom. Indeed, there are not always direct physical threats to Anti-Corruption Court Judges. However, Judges at the Anti-Corruption Court often experience psychological threats, especially when hearing corruption cases filed by the Corruption Eradication Commission, such as the feeling of being followed. Even though the judges do not experience any physical threats, it still does impose significant psychological burdens and pressure upon them.<sup>155</sup> *Ad hoc* judges also face the same situation.

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153 Interview with Emie Yuliati, Head of the Subdivision of Guidance and Monitoring of the Planning and Organization Bureau of the Supreme Court of the Republic of Indonesia, 1 December 2020.

154 Interview with judges and prosecutors between June to October 2020.

155 Interview with Lucas Prakoso, Director of Technical Personnel Development at the Directorate General of Badilum of the Supreme Court of the Republic of Indonesia on 18 December 2020.

CHAPTER V

# Institution



This section will discuss the institutional aspects of the anti-corruption court. The institutional aspects of the court cover the court's organizational and procedural elements, human resources, planning and budgeting processes, as well as its facilities and infrastructure. The purpose of the discussion from an institutional point of view is to determine how the manner by which the institution is organized has impacted the effectiveness of the anti-corruption court in performing its functions. This section will also address the question of the effectiveness of the initial design and planning of the anti-corruption court, as mandated by the Anti-Corruption Law or the various internal policies of the Supreme Court, by studying the practices or implementation on the ground.

In order to determine the prevailing policies and practices of anti-corruption courts the present research identifies the issues and analyzes them at three levels. The first level is that of the lawmakers, aimed at understanding the established institutional purpose and design. The second level encompasses the Supreme Court, looking at its role as the planner and administrator of the organization, finance and administration of the courts, including the anti-corruption courts. The third level involves the courts to which the anti-corruption courts are attached, and which are in charge of undertaking day-to-day management duties.

There are a number of assumptions that arose following the duplication of anti-corruption courts in all districts and provinces that this research will attempt to substantiate. At the beginning of its establishment in 2004,<sup>156</sup> the anti-corruption court was seen as requiring a functional specificity to distinguish it from the district courts, so as to allow it to function more effectively. Among these institutional specificities is the introduction of ad-hoc judges, as well as the planned separation of courthouse, facilities, infrastructures and registrar's office. The expected outcome of such segregation at the beginning of their formation was to distance the anti-corruption

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156 The Anti-Corruption Court was effectively established pursuant to Presidential Decree No. 59 of 2004 on the Establishment of the Anti-Corruption Court at the Central Jakarta District Court.



court from institutional problems and corrupt practices, which during the early days of the reform era were the main challenges, faced by the judiciary.

This research assesses whether the segregation and introduction of specific attributes have, from an institutional standpoint, been implemented as planned and been able to achieve the purpose of making the function of anti-corruption court more effective. The analysis also strives compares the institutional design of the anti-corruption court as it was during the effective period of Law No. 46 of 2009 with the institutional design that prevailed earlier, following the adoption of Law No. 30 of 2002.

## 5.1 Institutional Transformation of the Anti-Corruption Court

The discussion on the institutional aspect of the anti-corruption court will begin by revisiting the court's design when it was first introduced in the Anti-Corruption Law in 2002. This will be followed by a look at how the institutional design of the anti-corruption court transformed after its duplication as mandated by the Anti-Corruption Court Law in 2009.

Preparation for the establishment of the anti-corruption court occurred during the transition period leading to the one-roof system, during which the administrative authority over the courts (encompassing organizational, staff and financial management) was transferred from the Government to the Supreme Court. During the process of preparation towards establishment of the anti-corruption court, the Government took on a substantial role, in particular through institutions such as the National Development Planning Agency (Badan Perencanaan Pembangunan Nasional or Bappenas), with the involvement of the Ministry of Law and Human Rights (then the Department of Justice) and the Supreme Court.

As set forth in Law No. 30 of 2002 on the Corruption Eradication Commission (KPK), the Anti-Corruption Court is mandated to operate within the general court and initially to be organized within

the Jakarta District Court.<sup>157</sup> The term “initially” indicates that the anti-corruption court was to be duplicated at other courts. The law further stipulates that formation of the anti-corruption courts was to be in phases based upon Presidential Decrees.<sup>158</sup> Interviewees who were involved in the drafting of the Anti-Corruption Law explained that the establishment of subsequent anti-corruption courts was intended to be gradual, the purpose being that it would be in parallel with the needs dictated by the number of corruption cases and their geographical spread.<sup>159</sup>

Two years following its formal inception in the Anti-Corruption Law in 2002, the Anti-Corruption Court was first established at the Central Jakarta District Court through Presidential Decree No. 59 of 2002, signed by then-president Megawati on 26th July 2004. The Decree, among other things, affirmed that the anti-corruption court of Central Jakarta has the authority to hear corruption cases prosecuted by the KPK, with a territorial jurisdiction encompassing all of Indonesia. The Presidential Decree also stipulates that infrastructure and expenditures of the anti-corruption court are to be borne by the Supreme Court’s budget.

The establishment of the anti-corruption court took two years before it was declared to have become operationally effective through the said Presidential Decree, among other reasons, because its preparation process coincided with the setting up of the Corruption Eradication Commission (KPK). Preparatory measures undertaken by the government included, for example, the design of the court and the setting up of the requisite budget for the court’s establishment. The design is set forth in the Blueprint for the Establishment of the Commercial Court and Anti-Corruption Court under the coordination

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157 Article 54 (1) Law No. 30 of 2002 on the Corruption Eradication Commission

158 Article 54 (3) Law No. 30 of 2002 on the Corruption Eradication Commission

159 The remark was made by Zen Badjeber, former member of House of Representative, and Chandra M. Hamzah, former Commissioner of KPK, during a focus group discussion on 8 May 2020

of the National Development Planning Agency (Bappenas) through the Steering Committee, with various stakeholders involved.<sup>160</sup>

The Blueprint discusses aspects involving the organization and institution, human resources, procedural rules, case administration system, accountability, and transparency. The Blueprint also specifically highlighted the formation of anti-corruption courts following the creation of the Central Jakarta Anti-Corruption Court. The Blueprint mentioned that any subsequent establishment of further anti-corruption courts must be undertaken carefully by taking into account the number of cases that are filed and their geographical spread.<sup>161</sup> It also explains the need for prudence in further establishments by recalling the condition of the Commercial Courts at the sub-national level, where they have been regarded as ineffective because the number of incoming cases was very low.<sup>162</sup>

Given that the anti-corruption court's jurisdiction at that time covered the entire country, some of the recommendations given in the Blueprint were intended to anticipate workload. Some of these recommendations are:<sup>163</sup>

- appointment of Deputy Chairman or Senior Judges at the district courts to lead and manage the anti-corruption court, for case distribution, supervision and case administration, among other tasks;
- appointment of a special Deputy Registrar for the anti-corruption court;

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160 The Steering Committee was made up of various elements, including the Supreme Court, the Department of Justice (now the Ministry of Law and Human Rights), the Prosecutor's Office, the Police, academicians and legal analysts, facilitated by the National Development Planning Agency and assisted by a non-government organizations. The committee was chaired by Professor Mardjono Reksodipoetro with Abdul Rahman Saleh and Diani Sadiawati sitting among its members. LeIP was the NGO who served as a part of the steering committee.

161 Tim Pengarah Pengadilan Niaga dan Persiapan Pembentukan Pengadilan Tindak Pidana Korupsi, Cetak Biru dan Rencana Aksi Pembentukan Pengadilan Tindak Pidana Korupsi, Mahkamah Agung, 2004, p. 1

162 Tim Pengarah, 2004. P. 8

163 Tim Pengarah, 2004, p. 59.

- appointment of a special Acting Registrar for the anti-corruption court;
- planning, management and reporting of budget based on budget accounts that are separate from those of the district court;
- the need for an adequate building separate from the Central Jakarta District Court, accommodating at least two courtrooms, a judges' deliberation room, work rooms for judges and registrars, and a case file storage room;
- the need for facilities and infrastructure, including work equipment, operational vehicles, and trial recording equipment.

It cannot be denied that the context in which the anti-corruption court was established during the early days of Reform was plagued with a lack of trust in the capacity of the district courts and the level of corruption that was prevalent. Establishment of a special court as part of the judicial reform process introduced at least two solutions. Learning from experience with the commercial courts, there were two ideas being proposed. Dan Lev, in his comment on Indonesia's judicial reform, states that the first alternative would be to appoint *ad hoc* judges with a strong reputation and commitment to judicial reform, while the second is to separate anti-corruption courts from the general court buildings in order to clearly demarcate and distinguish the two judicial bodies.<sup>164</sup> Despite the prevailing legal framework restricting the establishment of a special court that completely stands apart from the conventional courts, a segregation or specialization up to a certain degree can be considered a rational solution. The desire to separate courts, including anti-corruption courts, from their conventional counterparts was one expectation placed on reform at that time, with the hope that the special courts would exhibit an organizational culture that is superior to that of the regular courts. In practice, however, the implementation of these solutions led to their own consequences and challenges.

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<sup>164</sup> Daniel S Lev, "Comment on Judicial Reform in Indonesia", presented during Seminar on Current Developments in Monetary and Financial Law, Washington, D.C., 24 May-4 June 2004, 5.

When the anti-corruption court was first established at the Central Jakarta District Court, some of the recommendations were put in place by the Government and the Supreme Court, who jointly designated a building separate from the District Court. It should be noted, however, that the importance placed on a separate building for the anti-corruption court at that time was not solely due to the intention of separating it from the district court. The Central Jakarta District Court building was no longer deemed to be adequate to accommodate the existing workload, and thus the implanting of the anti-corruption court was believed to impede the new court's effective functioning. A proposed stopgap measure was to provide an anti-corruption court building that was separate from the district court building. Meanwhile, an intermediary measure was also proposed in the Blueprint, where the entire Central Jakarta District court was to be moved to a new location, thereby allowing it to accommodate all the special courts that were to be established within its premises.<sup>165</sup> As it was housed in a building of its own, the first anti-corruption court in Jakarta also had its own courtroom. However, the judges and registrars did not handle corruption cases exclusively. Nor was a deputy registrar's office established for the anti-corruption court.

These conditions prevailed up to the ratification of the Law on Anti-Corruption Court No. 46 of 2009. Modification of the institutional aspects following the law's establishment was due to the provisions on duplication, which state that anti-corruption courts formed in the district capital/cities are to be undertaken progressively, given the limited availability of facilities and infrastructure. It was also added that at the first stage, anti-corruption courts were to be established at each of the provincial capitals. The different meaning conveyed by the term "progressively" used in Law No. 30 and which was used in Law No. 46 of 2009 produced a significant impact on the institutional aspects of anti-corruption courts in the regions. This will be explained in greater detail in the following section.

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165 Tim Pengarah, 2004, p. 12.

## 5.2 Composition of the Anti-Corruption Courts

Corruption Eradication Commission Law No. 30 of 2002 is silent on the composition of the anti-corruption court. Article 56 paragraph 1 of the law only mentions the serving judges, consisting of district court and *ad hoc* judges. Meanwhile, Article 8 of the Anti-Corruption Law adds a Leadership and Registrar component to the anti-corruption court. According to the article, the court's composition is made up of:<sup>166</sup>

- a. Chairpersons
- b. Judges
- c. Registrar

The term “leadership” as used in the article refers to the Chairperson and Deputy Chairperson of the court, although the two positions are occupied by the Chairperson and Deputy Chairperson of the District Court in an *ex-officio* capacity.<sup>167</sup> The chairperson is tasked with the administration and operations of the Anti-Corruption Court, and in certain cases the authority can be delegated to the Deputy Chairperson.<sup>168</sup> A structure of specialized courts containing a provision for a “leadership” element cannot be found in the Industrial Relations Resolutions Court (PHI) or the Fishery Court.

In response to the mandate of Law No. 46 of 2009 the Supreme Court issued Regulation (Perma) No. 01 of 2010 on the Organizational Structure of the Registrar's Office and Composition of Panel of Judges and Disclosure at the Anti-Corruption Court. The regulation mainly serves as an affirmation or reiteration of the provisions already stipulated in the law. Institutional aspects governed by the regulation are the formation of the registrar's office within the anti-corruption court that is separate from that of the district court. The regulation also provides for a register to be maintained that is separate from the register of other criminal cases, as well as an information disclosure mechanism at the anti-corruption court.

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166 Article 8 of Law No. 46 of 2009 on the Anti-Corruption Court

167 Article 9 (1) (2) of Law No. 46 of 2009 on the Anti-Corruption Court

168 Article 9 (3) (4) of Law No. 46 of 2009 on the Anti-Corruption Court

Provisions on leadership and the registrar's office at the anti-corruption court emphasize the current practice that is found in the Central Jakarta Anti-Corruption Court. At this court, which was set up in 2004, the District Court Chairperson is concurrently performing the function of Chairperson of the Anti-Corruption Court. Among the duties of the District Court/Anti-Corruption Court chairperson are the assignment of cases and the appointment of judges to the bench. This role is stressed in Article 9 paragraph 3 of the Anti-Corruption Law, which stipulates that the Chairperson is responsible for the administration and operation of the anti-corruption court. The Chief Justice of the Supreme Court also appointed six acting registrars to serve at the anti-corruption court,<sup>169</sup> as made further clear in the Anti-Corruption Court Law in its provision on a dedicated registrar for the Anti-Corruption Court.

Despite this interconnected structure, however, the scope of authority of the Chairperson of the South Jakarta District Court differs from that of the Chairperson of the Anti-Corruption Court. The authority of the Chairperson of the South Jakarta District Court is limited to the court's Central Jakarta jurisdiction. In contrast, the authority of the Chairperson of the Anti-Corruption Court encompasses the entire Special Capital Territory Province of Jakarta. The Chairperson of the Anti-Corruption Court can request an Anti-Corruption Judge sitting within its jurisdiction to preside over a corruption related case, even though the judge may be assigned to a different court.<sup>170</sup> The Chairperson of the Anti-Corruption Court can also propose to the Supreme Court for a anti-corruption certified judge serving within their jurisdiction to be assigned to a particular case. In practice, however, the power to request an anti-corruption court judge serving at a different courthouse within their jurisdiction

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169 HukumOnline, "Laporan Tahunan Pertama Pengadilan Tipikor," Monday 09 July 2007, <https://www.hukumonline.com/berita/baca/hol17117/laporan-tahunan-pertama-pengadilan-tipikor?page=all> accessed on 16 November 2020

170 Soeharto during an interview stated that during the period in which he served as the Chairperson of the Central Jakarta Anti-Corruption Court he had requested an anti-corruption court certified judge who was currently assigned to the Anti-Corruption Court to try a corruption related case.

to try a case or to be appointed as an anti-corruption court judge is seldom exercised by the Chairperson of the Anti-Corruption Court. It is more often the case that they rely on judges already serving within their court, and it is very seldom that they propose for a judge serving at another courthouse (although serving within the same jurisdiction) to sit as a judge for the Anti-Corruption Court. The problem is not unrelated to the mechanism by which to appoint anti-corruption judges who are currently assigned to the district courts within the province capital where the anti-corruption court is located. As a consequence, many anti-corruption judges serving within provincial jurisdiction cannot be mobilized by the Chairperson of the Anti-Corruption Court. The issue has been explained in the preceding section on Career Judges. The problem is not only limited to judges; given the jurisdictional scope of the Anti-Corruption Court Chairperson that covers the entire province, he or she should also be able to mobilize other resources within the jurisdiction, such as courtrooms and acting registrars. The mechanism, however, has never been implemented despite being available.

In practice, the leadership personnel of the district courts in several provinces who are acting in an ex-officio capacity as the leadership of the anti-corruption court are concurrently serving as the chairperson of other specialized courts, such as the commercial courts, fisheries courts, industrial relations courts and human rights courts. The situation prevails at the Class IA special courts or those that are located within the province capitals with at least 3 (three) special courts attached to them. Among those designated as Special IA courts are the Central Jakarta District Court, the Bandung District Court, the Surabaya District Court, the Makassar District Court and the Medan District Court. These courts have some of the highest workloads. As a consequence the ex-officio positions place an excessive burden on the Chairpersons and Deputy Chairpersons of the courts.

### **5.3 Establishment of Anti-corruption Courts in the Regions**

As previously discussed, the first phase of the formation of the anti-corruption courts in the regions was at the provincial level. This course of action is different from the one considered for progressive



establishment as contemplated in the legal regime governing the Corruption Eradication Commission, which puts more emphasis on needs. The Anti-Corruption Court Law, specifically its Article 35, provides a transitional period of 2 (two) years for the formation of the sub-national anti-corruption courts. This is further emphasized in Supreme Court Regulation No. 1 of 2010, pursuant to which the two-year period is given to prepare the infrastructure, judge certification and information disclosure system necessary for the anti-corruption court to operate.<sup>171</sup>

At the beginning of the establishment of the anti-corruption courts in all of the provinces as mandated by Law No. 46 of 2009, the Supreme Court encountered various obstacles. In 2010 it was planned that 17 (seventeen) anti-corruption courts were to be set up in several provincial capitals, namely in Bandung, Semarang, Surabaya, Palembang, Medan, Makassar, Samarinda, Padang, Pekanbaru, Yogyakarta, Mataram, Banjarmasin, Pontianak, Banten, Lampung, Kupang and Jayapura. However, the Supreme Court reported that the current budget was insufficient to meet the requirements for constructing the physical facilities and infrastructure and recruitment of ad-hoc judges as required by Law No. 46 of 2009.<sup>172</sup> The Supreme Court submitted a proposal for supplemental budget through the 2010 Supplemental Budget (APBN-P),<sup>173</sup> which was addressed to the Deputy for Development Funding of the BAPPENAS. This request for additional funding was also presented during the Budget Meting of Commission III of the House of Representatives.<sup>174</sup>

Although the transition period prescribed by the Law is only 2 (two) years in duration, by 2010 the Supreme Court still had not received the additional budget. The then Chief Justice of the Supreme Court, Harifin Tumpa, even sent a letter to President Yudhoyono stating that the allocation of budget for the establishment of the anti-

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171 Supreme Court Regulation No. 01 of 2010 Article 20

172 Supreme Court Annual Report 2010, Jakarta, 2010, 345-346.

173 The request for budget was proposed through the Letter of Supreme Court's Secretary No. 009/SEK/01/I/2010, 14 January 2010

174 Supreme Court Annual Report 2010, Jakarta, 2010, 345.

corruption courts had been hampered.<sup>175</sup> The letter was delivered following the rejection of the Supreme Court's budget by the Ministry of Finance in 2010. The communication deadlock regarding budget among the state institutions pointed towards a disconnect between the legislation on the one hand and, on the other hand, the prevailing policies on budget allocation to put this legislation into effect. This indicates the underlying problem that the formulation of Law No. 46 of 2009 had not been preceded by an analysis of existing data and budget needs to ensure effective implementation of the law. Indeed, it was foreseeable that the budget required was substantial and thus was not able to be covered by the current national budget (APBN). As a result, the proposed budget for the Supreme Court in 2010 or following ratification of the Anti-Corruption Court Law of 2009 was not approved. This provides further evidence of the lack of an adequate needs and budget analysis prior to the enactment of the law to decide on duplication/establishment of the provincial anti-corruption courts.

In the end, the Supreme Court was able to establish the anti-corruption courts in all of the provinces in three phases. Of the 17 of such courts planned to be simultaneously established during the first phase, by 2010 the Supreme Court only managed to set up 3 (three), at the Bandung District Court, Semarang District Court, and Surabaya District Court.<sup>176</sup> During the second phase, 13 anti-corruption courts were established whose jurisdiction encompassed 15 provinces,<sup>177</sup> and during the third phase, within the same year 14

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175 Harifin Tumpa states that he has communicated to the President on the impending failure of the establishment of the anti-corruption court as mandated by the Law if budget is not disbursed. See: Tribunews, "Surat MA ke SBY Soal Dana Pengadilan Tipikor Belum Ditanggapi," <https://www.tribunnews.com/nasional/2010/06/04/surat-ma-ke-sby-soal-dana-pengadilan-tipikor-belum-ditanggapi>. accessed on 1 November 2020.

176 See Decree of the Chief Justice of the Supreme Court No. 191/2010, see further the 2010 Annual Report of the Supreme Court, Jakarta, 2010, 346

177 See Decree of the Chief Justice of the Supreme Court No. 022/2011. In Chief Justice of the Supreme Court Decree No. 022/KMA/SK/X/2011 it is stipulated that the jurisdiction of the Pekanbaru Anti-Corruption Court encompass the Riau Province and the Riau Islands Province, while the jurisdiction of the Makassar Anti-Corruption Court includes the provinces of South Sulawesi and West

anti-corruption courts were set up.<sup>178</sup> The three-phase formation of the anti-corruption court was validated through Decrees of the Chief Justice of the Supreme Court No. 191 of 2010, No. 153/2011 and No. 022/2011. Of all the anti-corruption courts mentioned above, only the Central Jakarta court had been established by virtue of a Presidential Decree, namely Presidential Decree (Keppres) No. 59 of 2004. Yet, according to Article 54 paragraph 3 of the Corruption Eradication Commission Law, establishment of an anti-corruption court is to be pursuant to a Presidential Decree.

Unlike other specialized courts whose establishment requires only a Presidential Decree, such as the Industrial Relations Court and Fisheries Court,<sup>179</sup> The Anti-Corruption Court Law does not regulate the procedure for establishing an anti-corruption court. Although Article 35 of the Anti-Corruption Court Law regulates the establishment of an anti corruption court for the first time at the provincial level, there is no mention of the mechanism for establishing an anti- corruption court at the district level. This arrangement is different from the Law No. 30 of 2020 on KPK, which states that the anti corruption court are established through a Presidential Decree. The same mechanism also applied to other special courts. As is the case with the establishment of a new court that ratifies the jurisdiction of a court, the formation of a special court should be regulated with a Presidential Decree.

None of the decrees issued by the Chief Justice of the Supreme Court as referenced above contains the phrase “establishment of anti-corruption courts”, only the phrase “operation of the anti-corruption

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Sulawesi.

178 See Chief Justice of the Supreme Court Decree No. 153/2011. An error is present in Chief Justice of the Supreme Court Decree No. 153/KMA/SK/X/2011 regarding the anti-corruption court that are to be established, where the Banda Aceh District Court is again stated in this decree, while the Aceh anti-corruption court has already been established pursuant to Chief Justice of the Supreme Court Decree No. 022/KMA/SK/X/2011.

179 See Article 71 paragraph 6 UU No. 31 of 2004 regarding Fisheries, and Article 59 paragraph 2 of Law No. 2 of 2004 regarding Resolution of Industrial Relations Disputes

courts". Such phrase is in fact not necessary, as formation of anti-corruption courts at the provincial level has been regulated under a Law. It can be surmised that the decree of the Chief Justice of the Supreme Court was initially intended to designate the operation of anti-corruption court with their own buildings and dedicated facilities. However, more recently there has been no separation of buildings and facilities for the exclusive use of the anti-corruption courts.

This research also found that both decrees giving effect to the operation of the anti-corruption court were drafted without due care and give the impression of being prepared in haste. The anti-corruption courts of Tanjung Karang, Yogyakarta, Kupang and Jayapura were not specified for establishment under both decrees. However, in the Considerations of Decree No. 153/2011 it is remarked that these four anti-corruption courts have been established under Decree No. 022/2011. Meanwhile, Decree No. 022/2011 contains no reference to the four anti-corruption courts. Conversely, there are three anti-corruption courts whose establishment is mentioned in two instruments, namely Decrees No. 022 and No.153. These three courts are the Anti-Corruption Courts of Banda Aceh, Palu and Manado. Fortunately, the establishment and operation of these anti-corruption courts through the various decrees can be taken as mere formalities, because in practice the 33 anti-corruption courts were deemed to be already in place and their jurisdiction affirmed by the Anti-Corruption Law. Thus, such errors have no legal impact.

#### **5.4 Buildings and court facilities**

As mentioned in the previous sections, one of the most foremost discussions during preparations for the establishment of the anti-corruption courts was the need for dedicated buildings for these courts. Given the size of the budget and the needs proposed to the Government and House of Representatives (DPR), the intention of the Supreme Court during the initial establishment of the anti-corruption courts was to construct buildings that are separate from those of the district courts. Nevertheless, in practice such an

institutional approach faced various challenges and brought its own consequences.

In 2002 during the formation of the first of the anti-corruption courts, such segregation of buildings was meant to avoid the already inadequate building of the Central Jakarta District Court from taking on additional burden. However, in the establishment of the anti-corruption courts at the regional level such separation of buildings was also part of an attempt to maintain the specificity of the anti-corruption court with respect to the district court to which it is attached. To respond to such a need for specificity, from 2010-2012 the Supreme Court constructed a number of anti-corruption courthouses separate from the main district court buildings. This separation of anti-corruption court buildings from the district court structures was, however, not actually required by the law or other associated policies.

During the early phases of the anti-corruption courts' inception in 2010-2011 the Supreme Court allocated budget to provide facilities and infrastructure for the new courts, specifically for the procurement of land and office buildings for the 15 anti-corruption courts.<sup>180</sup> The Supreme Court also provided facilities such as vehicles, computers and laptops.<sup>181</sup> According to the 2011 Ministerial/ Agency Budget, the Supreme Court's budget to prepare for the setting up of the anti-corruption courts was as follows:

Facilities and infrastructure	Rp. 167,220,000,000
Salary, honorary remuneration for anti-corruption judges	Rp. 36,089,300,000
Operational cost and rent of residences	Rp. 11,900,000,000
Total	Rp. 215,209,300,000

<sup>180</sup> Supreme Court of the Republic of Indonesia, 2011 Annual Report, Supreme Court, 2012, 261

<sup>181</sup> Supreme Court of the Republic of Indonesia, 2011 Annual Report, Supreme Court, 2012, 262

In furtherance of the affirmation process of the anti-corruption courts in all of the provinces, the Supreme Court attempted to construct anti-corruption court buildings distinct from the District Courts. Accordingly, fifteen buildings were constructed for the courts in 15 provinces.<sup>182</sup> However, aside from requiring a significant amount of budget, in practice the construction of new buildings in several of the regions created budgetary inefficiencies and did not meet the existing needs. Findings from this research have showed, among other things, that: 1) some of the constructed courthouses were not used, and thus are poorly maintained; 2) some of the court buildings are being used by other courts that are in need of a courthouse, such as the religious courts; 3) some of the court buildings have been integrated into the district court, and thus are being used to try other types of cases.<sup>183</sup>

There are a number of factors responsible for this situation regarding the misuse of infrastructure designated for the anti-corruption courts.<sup>184</sup> The first factor involves the very small number of corruption cases received by certain of these courts. This has caused the court buildings to be neglected and in some cases assigned to other courts that have more urgent needs for space. Secondly, some of the new anti-corruption court buildings were constructed at a considerable distance from the associated district court building, while the anti-corruption judges also have to preside over other non-corruption related cases at the district court. In particular, the Chairpersons of the anti-corruption court, who were also serving the associated District Court, were greatly impacted by the inefficiency of the distance between the buildings. A transition in the use of the buildings occurred around 2014. After that date the Supreme Court no longer constructed special or separate new buildings for the other 18 anti-corruption courts.<sup>185</sup>

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182 Supreme Court of the Republic of Indonesia, 2011 Annual Report, Supreme Court, 2012, 261

183 Interview with Emie Yulianti, Planning and Organization Bureau of the Supreme Court, 1 December 2020.

184 Interview with Emie Yulianti, 1 December 2020

185 Interview with Emie Yulianti, 1 December 2020

In reality, career as well as *ad hoc* judges commented that the separation of the anti-corruption court buildings is not the most appropriate solution.<sup>186</sup> For certain courts that see large volumes of cases, what they actually need is a sufficient number of courtrooms to match the caseload. The addition of courtrooms presents a solution to accelerate and maximize efficiency in the processing of corruption cases. However, the provision of additional courtrooms was not in itself an instant solution to expedite the processing of cases. At some of the anti-corruption courts, one of the other major causes of the excessively long processing time is the large workload of the judges because they also have to handle other non-corruption cases. The excessive workload of career judges and acting registrars, particularly those serving at courts with large case intakes, significantly contributed to the prolonged adjudication of cases.

In addition to buildings, the Anti-Corruption Court facilities were initially expected to be designated for its exclusive use. However, in reality the Anti-Corruption Court facilities cannot be seen as a separate part of the associated District Court. In general, if the facilities of the district court are deemed to be in good condition, then the facilities of the anti-corruption court would also share the same condition. From the monitoring of anti-corruption courts conducted by LeIP in collaboration with NGOs in five cities over a period of 2015-2016, it can be seen that anti-corruption courts in five provinces, namely Medan, Jakarta, Bandung, Surabaya and Makassar all had relatively good facilities.

These five courts are arguably the most strategic courts as they are located in major cities in important areas of the country. Nevertheless, our research still found shortcomings in the facilities that hinder the anti-corruption courts' effectiveness. If fundamental problems can be found in these five courts, then the condition of the facilities of the other courts also requires attention. Each of these district courts has allocated a dedicated courtroom for the anti-corruption court. But these courtrooms are sometimes used for non-

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<sup>186</sup> Individual interview and Focus Group Discussion with career and *ad hoc* judges throughout October – December 2020.

corruption related hearings. Registrars for the anti-corruption courts also occupy separate rooms. Some of the larger district courts have a better complement of facilities, such as the Central Jakarta Anti-Corruption Court whose office spaces for career judges and *ad hoc* judges are in better condition. These courts also have a waiting room for prosecutors as well as a special detention room .

Another problem that can be found in the anti-corruption court is on the issue of court security system which is less than optimal. Despite the fact that some courtrooms have been equipped with special doorways for judges that are separate from those used by the public, some courts, for example, still have courtrooms without separate doors for judges to enter the courtroom. Furthermore, not all courts have a special waiting room for witnesses. Of the five sample courts above, the anti-corruption courts in Makassar and Bandung do not have a special witness room. There is no special security system for witnesses who are under the protection of the LPSK (Witness and Victim Protection Agency). The absence of such security features and a special room for witnesses can pose a security risk to witnesses in corruption cases. Moreover, during the long trials, the parties (public prosecutors, defense attorneys, defendants and witnesses) have to wait a long time without specially designated holding places or entrances, thus creating an even greater potential risk.

## 5.5 Budget

Pursuant to Article 33 of the Anti-Corruption Court Law, funding for anti-corruption courts is borne by the Supreme Court's budget, and the Supreme Court is required to prepare a work and budget plan for the anti-corruption courts on an annual basis. The provisions of this law suggest that a special budget will be allotted for the anti-corruption courts. In reality, budget for these courts is not a separate item and is instead integrated into the various budget components of the Supreme Court, whether or not specifically stated as being allocated for the anti-corruption courts.

In the initial preparations for the establishment of the anti-corruption courts, the Supreme Court indeed submitted a specific



budget to the Government. The proposed budget components were for facilities and infrastructure, *ad hoc* judge selection, salaries and honorarium allowances for anti-corruption judges, operational costs and house rent. However, over time, the Supreme Court no longer submitted a budget for the construction of anti-corruption court buildings. The Supreme Court's consideration for no longer proposing a budget for courthouse construction was already explained in the previous section. Apart from that, the Supreme Court also annually proposes a budget for training and certification of anti-corruption judges.<sup>187</sup> In addition to this budget item, several other budget components whose benefit is enjoyed by the anti-corruption courts cannot be separated from the budget of district courts. These budget components include funding for case clearance, court facilities, security, transportation, salaries and allowances for career judges and registrars who serve at the anti-corruption courts.

There are, however, budget components provided for the anti-corruption courts. They provide for *ad hoc* judge selection, training and certification for anti-corruption judges, salaries and allowances for *ad hoc* judges. Meanwhile, other components, such as salaries for career judges and registrars, facilities, security, are budgets that are integrated into the budget of the district court in which the Anti-Corruption Court is embedded. The same situation applies to the budget for district court buildings and facilities that are also utilized by the anti-corruption courts. Therefore, the availability of budget for anti-corruption courts basically cannot be separated from the adequacy of the Supreme Court's or the district courts' budget in general.

Since 2017, the Supreme Court has established a standard case processing fee for anti-corruption cases.<sup>188</sup> Use of a standardized case processing fee is useful so as to facilitate the process of measuring the

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187 Interview with Emie Yuliaty, Planning and Organization Bureau of the Supreme Court, 1 December 2020; and Bambang Heri Mulyono, Head of the Judicial Technical Education and Training Center, 21 December 2020.

188 Stipulated by the Decree of the Secretary of the Supreme Court No.10/SEK/SK/III/2017 on Guidelines for the Implementation of Case Clearance.

performance of Anti-Corruption Courts in terms of case clearance because the case processing fee is calculated from the number of cases multiplied by the standard cost per case that has been established. Furthermore, the utilization of the budget for corruption cases can be easily measured using the clearance rate of cases handled by the court. The cost components included in this standard processing fee include, among other things, the cost of registering cases, trials, summons, preparing case dockets, and sending court decisions.<sup>189</sup>

Unit cost financing that provides standardized case processing fees helps the court to have flexibility in the application of its budget. This includes funding to invite certified judges from other courts, if the court experiences a shortage of judges. But this flexibility has not been fully utilized by the courts in the most effective way possible. Interviewees who are judges and registrars, for example, maintain the view that one of the problems in inviting judges from other courts (*detasering* scheme) is difficult due to the absence of the appropriate item in the court's budget. A *detasering* scheme is the assignment of judges for a specific period to handle cases outside the court where they are posted. In courts that have a high caseload and limited number of judges, the scheme can greatly help ease their burden. However, in reality, not many court chairpersons have implemented this mechanism. One of the reasons is mentioned by those judges are the lack of budget to pay for the judges' travel, accommodation and operational costs while serving in the court to which he/she is seconded. A judge who was seconded to a district court indicated having paid his/her own travel expenses, which fortunately was not high because the court where he/she was originally serving was not far from the court to which he/she was seconded.<sup>190</sup> In another instance, a judge who was seconded to a court had difficulty accessing the operating budget to cover his official expenses because the court staff did not consider him as a judge serving at that courthouse.<sup>191</sup>

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189 Decree of the Secretary of the Supreme Court No. 10/SEK/SK/III/2017 on the Guidelines for the Implementation of Case Clearance.

190 Interview with a Judge of the Court of First Instance, on December 2020

191 Interview with a Judge of the Court of First Instance, on December 2020

Prior to the adoption of the standardized case processing fees, the reluctance of the Chairperson of the District Court to exercise the *detasering* scheme was probably justified. There was difficulty in allocating budget for such a system that had not been planned in advance due to the less flexible budgeting system. Once the standardized case processing fees were put into effect, the need for a *detasering* scheme should have been able to be accommodated. However, given that as yet such a scheme has not yet been applied by the Supreme Court as a solution to overcome the uneven workload of judges among the courts, it is necessary to ensure that the standardized case processing fee for handling cases, including corruption cases, are sufficient to fund this mechanism.

Budget inefficiency is also believed to occur in the selection of *ad hoc* judges. Indeed, in the recruitment process, budget inefficiencies occurred to an astonishing degree. In the *ad hoc* judges selection process in 2015 or 2016, although only one or two persons were selected, the budget spent for each of the selection stages amounted to 1 to 1.5 billion Rupiah.<sup>192</sup> In the *ad hoc* judge selection process, the Supreme Court is often faced with a situation where the selected candidates are deemed as not meeting quality standards. But, on the other hand, the budget has been disbursed and there is a need to meet the number of required *ad hoc* judges. In subsequent selections, there were even allegations that the passing standards of *ad hoc* judge candidates had to be lowered to meet the required quota for *ad hoc* judges.<sup>193</sup>

Budget inefficiency also eventuates in the career judge certification system that is currently ongoing. As discussed in the Chapter III, the number of career judges at the court of first instance who received assignments to handle corruption cases turned out to be only 12 percent of the total number of judges who had received certification

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<sup>192</sup> Interview with Suharto, Secretary of the Selection Committee for Anti-Corruption *Ad Hoc* Judges on 27 November 2020, Hannan Tauqiefie and Muzhar Khatib from the Personnel Bureau of the Supreme Court of the Republic of Indonesia as well as Emie Yuliati from the Planning and Organization Bureau on 1 December 2020.

<sup>193</sup> Interview with the High Court *Ad Hoc* Judge on November 2020.

education, while the career judges at the court of appeal only reached 20 percent.<sup>194</sup> This is because certified judges do not immediately get the assignment as judges in the Anti-Corruption Court. In addition, judges who have received certification education can also avoid being assigned to Anti-Corruption Courts.

There is no integrated data pertaining to certified judges at the Research and Development Department of the Law and Judiciary Education and Training Center, the Personnel Bureau at the Administrative Affairs Agency, and the Directorate General of the General Courts. Chairpersons of Anti-Corruption Court may not know which judges who have passed the certification training are serving in various other courts under her jurisdiction, other than judges who have been appointed to serve in the anti corruption court. On the other hand, judges also do not have the motivation to provide information that they have passed the certification training, as no incentives are given to them when they are appointed as anti-corruption judges and assigned to decide corruption cases at the Anti-Corruption Court. The various problems regarding the placement of certified judges above show that although the Supreme Court has spent a large amount of budget for certification training program, in practice it has not achieved its intended goal..

## 5.6 Registrars of the Anti-Corruption Court

Referring to Law No. 46 of 2009, the Anti- Corruption Court should be assigned a dedicated Registrar's Office led by a registrar, which is further provided under a Supreme Court regulation.<sup>195</sup> According to the legislators, the establishment of a Registrar's office at the Anti-Corruption Court is one of the specific characteristics of the Anti-Corruption Court from the standpoint of procedural law.<sup>196</sup>

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194 Of the 1,009 first instance court judges who have been certified as Anti-Corruption Court Judges, only 126 Judges are appointed through the KMA Decree and serve as Judges of the Anti-Corruption Court. Meanwhile, out of the 633 judges at the Appellate Court who have earned their certification, only 129 judges were appointed and served as Anti-Corruption Court Judges.

195 Article 22, Law No. 46 of 2009 on Anti-Corruption Cases

196 General Elucidation, Law No. 46 of 2009 on Anti-Corruption Cases

Supreme Court Regulation No. 01 of 2010 stipulates that the the Registrar's Office of the Anti-Corruption Courts consists of:<sup>197</sup>

- a. Registrar
- b. Deputy Registrar
- c. Deputy Registrar for Law
- d. Deputy Registrar for Special Crimes

The first three positions above are held in an ex-officio capacity by the Registrar, Deputy Registrar, and Deputy Registrar of Law of the district court, respectively. Only the position of Deputy Registrar for Special Crimes is held by a person who is specifically appointed by the Chairperson of the Court to carry out duties in an Anti-Corruption Court. Aside from governing matters relating to deputy registrars of the anti-corruption courts, the Supreme Court Regulation also governs the appointment of special acting registrars specifically appointed for the anti-corruption courts. The Perma requires certification education and three years of experience in carrying out duties as an Acting Registrar before being appointed as Acting Registrar assigned specifically for the the Anti-Corruption Court.

In practice, the structure of the Registrar's Office at the district court is in accordance with the Perma. In various district courts that oversee Anti-Corruption Courts, a Junior Registrar for Special Crimes has been appointed to manage case administration at the Anti-Corruption Court. However, in some special class IA courts which have several special courts, the Junior Registrar for Special Crimes is not only responsible for corruption cases but also for other special criminal cases such as cases in fisheries courts.

In addition, an Acting Registrar assigned specifically for the Anti-Corruption Court has been appointed. However, based on the interview, even though the Acting Registrar received a letter of appointment from the Chairperson of the District Court, he/she

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<sup>197</sup> Article 5 Supreme Court Regulation (Perma) No. 1 of 2010 regarding the Administrative Structure of the Registrar's Office and the Composition of the Panel of Judges as well as Transparency of the Anti-Corruption Crime Court.

does not specifically handle corruption cases. As with career judges at the anti-corruption courts, acting registrars are also still carrying out jobs as acting registrars during non-corruption related proceedings. One of the reasons for the existence of concurrent positions in performing the duties as acting registrars at anti-corruption courts is resource efficiency. The generally limited number of acting registrars is considered to cause work inefficiency if they are only appointed to handle corruption cases.

In addition to uncovering the holding of concurrent positions by acting registrars, our study also found that acting registrars at anti-corruption courts do not undergo certification trainings as mandated by Supreme Court Regulation No. 01 of 2010. Monitoring carried out by LeIP at courts in 5 major cities in Indonesia, shows sad results because of the many acting registrars at these courts, only one person claims to have received training in handling corruption cases. The only instance when a registrar received this training was when the training was held by the Supreme Court during the initial establishment of the Anti-Corruption Court. However, following that training, the Supreme Court has never provided special education and training or certification for Anti-Corruption Courts as mandated in Perma No. 1 of 2010.<sup>198</sup> Even more seriously, in general, acting registrars do not seem to have received the necessary training, both for competency in handling corruption cases and for other competencies. In general, acting registrars gained knowledge through coaching programs (general capacity building) that do not systematically target competency development. Meanwhile, the education program for registrars prepared by the Supreme Court is very limited and the focus of training has so far been centered on judges.

The issue of workload experienced by judges is also experienced by acting registrars. In some anti-corruption courts that are busy or have high caseloads, such as the District Courts of Central Jakarta and Surabaya that see between 100-150 cases per year, there is a

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<sup>198</sup> Interview with Lucas Prakoso, Director of Judicial Technical Staff Development, Directorate General of General Courts Development, 18 December 2020.

shortage of acting registrars. This shortage results in the lengthy time in preparing trial minutes which is the duty of the acting registrar. In reality, case clearances in court do not only depend on the judges, but also on the acting registrars. Acting registrars are also not given special training and therefore registrars who are asked to serve at the Anti-Corruption Court are often senior registrars who are considered competent. The process of selecting acting registrars and providing specific training was only carried out when the Anti-Corruption Court was first established.

In addition to the problems discussed above, there were also complaints from acting registrars in terms of inadequate remuneration when compared to the large workload.<sup>199</sup> In carrying out their duties, in general, the allowance for acting registrars at the district court level is Rp. 375,000.00/month and the amount has not changed since 2007. Acting registrars also do not receive transportation or housing allowances. In the early days of the Anti-Corruption Court, acting registrars received additional income from the operational funds for case clearances which were calculated based on the number of cases successfully completed. However, the additional income has now been written off. Although the Anti-Corruption Court judges also do not get additional special income calculated from their ability to clear cases, the allowances for career judges and *ad hoc* judges are quite adequate. In addition, judges also receive official housing allowances which acting registrars do not receive. In fact, the workload of judges and acting registrars is the same. If the judge is in session for prolonged periods, then the registrar will experience the same thing. The absence of sufficient incentives for acting registrars has contributed to the minimum performance of case administration at the Anti-Corruption Courts. Issues related to high workloads and incentives generally occur in district courts that have high caseload. Inequality in workloads is also a serious issue among Anti-Corruption Courts.

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199 Extracted from information obtained during the FGD with a number of chairpersons and former chairpersons, and registrars of anti-corruption courts, 26 august 2020.

## 5.7 Personnel Management

As indicated above, an issue that appears in the aspect of personnel management is the imbalance in workloads in various Anti-Corruption Courts. This imbalance occurs at several levels:

- At the inter-court level - there is a difference in workload between the anti-corruption courts which results in an imbalance in the workload between anti-corruption judges in one court and another
- At the court level - there is a difference in workload between career judges who also decide corruption cases and non-corruption cases, and other career judges who only decide non-corruption cases

In Chapter IV, it has been shown that there are problems regarding the workload of Anti Corruption Court judges. Some courts have a high number of corruption cases with a limited number of judges and a double burden of handling corruption and non-corruption cases. While some other courts have a much smaller number of corruption cases. Differences in workloads between courts can cause problems, such as unequal workloads between judges of different courts, or within the same court. Career judges basically have the same pay and benefit entitlements, regardless of whether the judge adjudicates more or fewer cases at one time. Anti-corruption judges serving at courts with different workloads would not receive a different salary based on the number of cases he or she adjudged. Similar, between anti-corruption judges and non-corruption judges, there is no difference between the income earned, even though anti-corruption judges are also handling non-corruption cases at the same time. The absence of a proper reward system based on workload contributes to this problem.

The problem of workload imbalance among the anti-corruption courts, and the courts in general, is caused among



others by poor coordination and implementation of the strategic function of court staff management at the Supreme Court. At the Supreme Court level there are at least three units that also determine the quality of the anti-corruption courts' performances. The first is the General Administration Agency (BUA), the second is the Directorate of General Courts (Badilum) and the third is the Education and Training Research and Development Agency (Balitbangdiklat). The duties and functions of each of these bodies can be shown as follows:

Table 10 Duties and Functions DG of General Courts, RND and GAA Related to Anti Corruption Courts

Directorate General of General Courts	Education and Training Research and Development Agency	General Administration Affairs Agency
<ul style="list-style-type: none"> <li>● Determining the needs for anti-corruption judges</li> <li>● Selection of <i>ad hoc</i> judges carried out together with BUA</li> <li>● Determining the outcome of the selection of <i>ad hoc</i> judges</li> <li>● Placement of <i>ad hoc</i> judges in courts</li> <li>● Determining career judges who participate in anti-corruption judge certification training</li> <li>● Assigning anti-corruption judges to court</li> <li>● Monitoring and assessment of case performance, starting from the incoming of cases to case clearances, includes corruption cases</li> </ul>	<ul style="list-style-type: none"> <li>● Providing training on corruption judges certification</li> <li>● Determining the outcome of the selection of (career) judges' certification training</li> </ul>	<ul style="list-style-type: none"> <li>● Organizing selection of <i>ad hoc</i> judges together with Badilum</li> <li>● Budget provision for the implementation of Anti-Corruption Judge certification</li> <li>● Budget provision for the placement of <i>ad hoc</i> and career judges</li> <li>● Budget provision to fulfill the rights of judges in the form of salaries, allowances and honorarium</li> <li>● Planning and budgeting for Supreme Court and lower-level courts in general, including for the Anti-Corruption Courts</li> </ul>

The findings in this study show the absence of a methodical and systematic process in determining the needs of anti-corruption judges, both career judges and *ad hoc* judges. In the context of *ad hoc* judges, in determining the need is simply carried out by looking at the number of judges who have completed their work period and replace them with new judges. The absence in determining the needs is not only in terms of numbers, but also in terms of competence. In the elucidation of Article 12 letter d of Law no. 46 of 2009, it is stipulated that *ad hoc* judges are required to have experience in specific areas of the law, including financial and banking laws, administrative laws, property laws, capital market laws and tax laws. However, determining the needs related to competence has not become a concern of policymakers in the Supreme Court. As a result, the *ad hoc* judge selection process carried out by the BUA and the Selection Committee also did not accommodate these specific needs. This has been previously explained in the Chapter on *Ad Hoc* Judge.

The same situation can also be found with regard to placement. Essentially, the assignment of career judges is not fully based on the need for the number of certified judges in a court based on the volume of corruption cases. One of the findings in the analysis of court workload analysis carried out by the Supreme Court states that in general there has been a shortage of certified judges (including anti-corruption judges) in various courts, although some courts have experienced an excess number of judges. In reality, there is a significant number of certified judges but in fact only less than 20% are posted at anti-corruption courts. This is a clear illustration of how ineffective it has been for HR in carrying out their planning function at the strategic level. This function should be carried out by the General Courts.

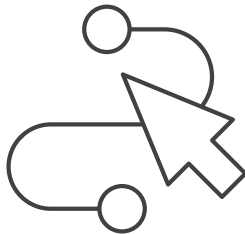
If we reexamine the various problems that occurred at the Anti-Corruption Court, we can see that there are underlying problems in the courts in general that affect the anti corruption courts. These problems include: First, the problem of general workload imbalance that occurs in all courts due to the fact that the placement policy has not been integrated with staff planning and data collection. Such problem is also reflected in the imbalance in workload in the

anti-corruption courts; Secondly, the issue of budget adequacy and facilities for the anti-corruption courts also generally depends on the adequacy of the budget at the district court where the Anti-Corruption Court is located. Thirdly, Problems relating to weak strategic function of managing the technical functions of the judiciary both for organization and human resources also affects the institutional effectiveness of the Anti-Corruption Court. This is demonstrated by, among others, the lack of synchronicity between personnel placement policy and the anti-corruption judge certification; or the gap between the need for *ad hoc* judges with specific skills and the actual *ad hoc* judges who are eventually selected.

Thus, the idea of a special court, which was originally intended to prevent anti corruption courts from being infected with the problems of conventional courts and have a new organizational culture, did not achieve its objectives. In fact what happened is the opposite, where problems in the courts in general, became the cause of the problems experienced by the anti corruption courts.

CHAPTER VI

# Court Proceedings



This chapter aims to determine to what extent the Anti-Corruption Courts have been effective as part of the anti-corruption judicial system or law enforcement in Indonesia. Given that the objective of this research is to formulate recommendations for policymakers in improving the anti-corruption courts, the review will not only be limited to the conditions and activities within the courts. On the contrary, it will also be linked to the procedures and aspects that occurred before the anti-corruption court tried and decided the case.

Criminal expert Topo Santoso (Topo Santoso) pointed out that the various criminal offenses that occur in society cannot be handled by only one institution (such as a court). Instead, it requires a number of institutions to undertake different roles in addressing corruption cases. These institutions need to work together within a system with the purpose of addressing crimes to the limits that can be tolerated by society. This system is eventually referred to as the criminal justice system. Quoting Bryan A. Garner, Topo Santoso elaborates<sup>200</sup> that the criminal justice system consists of three components, namely (1) law enforcement (police and other officers with law enforcing duties)<sup>201</sup>, (2) judicial process (judges, prosecutors, and defense attorneys), and (3) corrections (correctional facility officers, parole officers, and probation officers).

Understanding this concept, this study is focused on the institutional condition of the corruption courts and at the same time, also seeing the courts as part of the criminal justice system. A court

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200 Santoso, Topo, Urgensi Pembenahan Pengadilan Tindak Pidana Korupsi dalam Mewujudkan Good Governance (Urgency of Anti-Corruption Court Reform to Achieve Good Governance), Jakarta: National Law Development Agency (Badan Pembinaan Hukum Nasional - BPHN) and the Center for Research and Development of the Ministry of Law and Human Rights, 2011, p. 34.

201 In the view of Topo Santoso, in some countries the term law enforcement is commonly taken as referring to the police and other law enforcement officers whose task is to enforce criminal law. In the Comprehensive Dictionary (Kamus Besar Bahasa Indonesia), law enforcement is defined as “An officer involved with matters of the judiciary.” In the context of this research, law enforcement can be interpreted as the police or public prosecutor undertaking investigation, case-building, and submission of case documents to the courts.

of justice is an institution that cannot be separated from the roles and processes already performed by other institutions before the case arrives to be adjudicated. These earlier roles and processes are executed by the public prosecutor from the Attorney General's Office and the Corruption Eradication Commission during investigation and prosecution.

The factors that are deemed to affect how the anti-corruption courts perform include the legal framework for its establishment, regulations governing the courts' judges and acting registrars, provision of institutional support for the courts, and how the public prosecutors interact with the current court systems as external stake holders.

To evaluate how effectively the anti-corruption courts discharge their functions, this study will first examine the expectations of the groups that are traditionally considered to have the mandate to evaluate the anti-corruption courts' performance. This group is identified as the main stakeholders consists of the public, legislators, and policymakers at the Supreme Court. In addition to stakeholders' expectations, the criteria and indicators derived from the framework that has been generally accepted as a means to assess the courts' performance will also be applied.

This approach is employed to strike a balance between the expectations of the stakeholders and the basic principles that are valid in the working of the courts. Among others are the independence and impartiality that must be observed by judges. As an example, common expectation of the public is to have the courts pass the most severe sentence on the defendant in a corruption case. Meanwhile, at the same time, judges are called upon to show impartiality and objectivity in evaluating the evidence and statements presented by the prosecutors and defense lawyers during the trial.

The tensions inherent in this situation will be be mitigated by the use of criteria and indicators from the particular framework widely recognized and applied in evaluating the performance of the courts. These criteria and indicators are usually built upon the basic principles of a universally accepted concept of the ideal judicial

body. Results from ICW's monitoring of the anti-corruption court judgements during the period from 2005 to 2019,<sup>202</sup> are significantly utilized in this chapter as a source of empirical data. Additional data is derived from the indexing of 941 judgments conducted by LeIP in 2020.

At the end of this chapter, the challenges faced by the courts and other actors in the corruption justice process will be identified. The identification of challenges is intended to provide sufficient explanation and argument for the policy recommendations that will be included in the last chapter of this research report.

## 6.1 Reviewing the Effectiveness of the Anti-Corruption Courts: Stakeholders' Expectations

### 6.1.1 Conviction Rate

Nearly all of the references available to review the public's expectations of the anti-corruption courts identify conviction rates as an indicator to determine whether the court has fulfilled its intended functions. Indonesia Corruption Watch (ICW) has monitored the verdicts handed down by the corruption courts since 2005 where one of the main aspects evaluated is the percentage of cases that have been convicted or acquitted.<sup>203</sup> Findings regarding the decreasing trend of acquittals in court decisions are considered positive. In this way, a guilty verdict is thus also identified as a positive indicator of court performance. The lower the percentage of acquitted sentences

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<sup>202</sup> The source of information in the monitoring conducted by ICW as stated in the notes from the 2013 monitoring results are data on court judgements taken from the Supreme Court and the District Courts' websites, charges contained the Public Prosecutors' Office's website, and news reports of national and regional media outlets.

<sup>203</sup> See presentation "Laporan Pemantauan ICW, Vonis Kasus Korupsi di Pengadilan Pasca 3 Tahun Pembentukan Pengadilan Tipikor (ICW Monitoring Report, Court Verdicts in Corruption Cases in the Three Years of Establishment of the Anti-Corruption Courts)(Sem. II 2010 Sem. II 2010–Sem. I 2013)", accessed from <https://www.antikorupsi.org/sites/default/files/dokumen/trenvoniskorupsi2013.pdf> and other monitoring reports from 2013 through 2019 at [antikorupsi.org](http://antikorupsi.org), accessed in December 2020.

handed down by the courts, it is as if the better the performance of the courts, and vice versa. This can explain why the performance of the corruption court in Jakarta prior to the promulgation of UU 46/2009 was widely respected by the public—in particular, corruption eradication activists. At that period, the court never passed a not-guilty judgment.<sup>204</sup>

From the perspective of the public, the conviction rate is an important indicator to measure effort in combating corruption. Comparing the public trust to Anti-Corruption Court and conventional courts in the regime of Law 30 of 2002, the trust toward the Anti-Corruption Courts seems to be higher. The Anti-Corruption Court was considered as more trusted, because of its 100% conviction rate. On the contrary, public trust in the conventional courts was low due to its high percentage of acquitted or dismissal judgments. It is found that from 2007 to 2009, the percentage of acquitted and dismissal judgments from conventional courts are namely 56.84%, 62.38%, and 59.26% respectively. After the establishment of corruption courts in all provinces based on Law 46/2009, the conviction rate continues to be the main concern of the public in determining the success of the anti-corruption courts.

This view seems to be adopted by the national media quite widely. It is indicated by the frequent appearance of news reports questioning acquittal and dismissal decisions on corruption cases handled by other courts outside Jakarta at that time. Due to the extent of media coverage, this view affects the public's view in general. This is thought to be one of the factors that undermine the trust and authority of the judiciary in the eyes of the public.

Meanwhile, demanding the courts to always pass a guilty judgment for every graft charge would be akin to requiring the court to disregard any defense arguments and evidence that the defendant may have against the charges. Such a stance taken by the court is highly undesirable and would actually be in contradiction with the universal principles of judicial power, causing the court to violate the

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204 Santoso, 2011, p. 49.



principles of a fair trial and thereby violating the fundamental rights of the accused in a corruption case.

This public demand may have stemmed from the increasing prevalence of corrupt practices and dissatisfaction on the performance of the judiciary. Thus, judging from the various documents describing the views of stakeholders around the time of the establishment of the anti-corruption court in 2002, there can consistently be found expectations that the court needs to operate using more progressive methods. Nevertheless, the principles of human rights protection in the judicial process must not be compromised.

It is as emphasized in “Anti-Corruption Court: Academic Paper on Draft Law on the Anti-Corruption Court” initiated by LeIP, Masyarakat Transparansi Indonesia (Transparency Society of Indonesia or MTI), Pusat Studi Hukum dan Kebijakan (Centre for Law and Policy Studies or PSHK), and Joint Team for the Eradication of Corruption (*Tim Gabungan Pemberantasan Tindak Pidana Korupsi* or TGPTK), published in 2002. The academic paper highlights that corruption enforcement efforts not only require the functioning of the Corruption Eradication Commission and the Anti-Corruption Courts, but should also be supported by a sound criminal legal regime to facilitate the prosecution of the crime while at the same time avoiding violating basic human rights.<sup>205</sup>

Although the most prevalent view is the expectation that courts always convict alleged corruption offenders in corruption cases, a number of researchers and academicians have stressed that the ultimate goal of law enforcement in the combatting of corruption does not rely solely on the judiciary, nor does it constitute a responsibility to be borne by such institution alone. Wiratraman, et. al,<sup>206</sup> for instance, states that a court’s judgment does not stand alone.

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205 Zulmi, Nizar. et al. *Pengadilan Khusus Korupsi, Naskah Akademis dan Rancangan Undang-Undang Pengadilan Tindak Pidana Korupsi*. Jakarta: LeIP, MTI, PSHK dan TGTPK, 2002.

206 Wiratraman, Herlambang, et. al., *Laporan Penelitian Komisi Pemberantasan Korupsi Republik Indonesia tentang Evaluasi Efektivitas Pengadilan Negeri Tindak Pidana Korupsi (Report of Study by the Indonesian Corruption Eradication Commission on Evaluation*

A judgment must be based upon facts established at the trial in the presence of the Public Prosecutor pursuant to the formal charges. Formal charges drawn up by the Public Prosecutor are based on the investigation report (*berita acara penyidikan*) compiled by the police and investigations from the prosecutor's office. As such, where an opinion states that measures to eradicate corruption through the anti-corruption court have not been optimal, the issue does not lie within the judiciary alone.

Lately this view appears to begin to be accepted by the media, as indicated, among other things, by the coverages on the judgment passed by the anti-corruption court of the Jakarta District Court, which acquitted Hotasi Nababan, former President Director of PT Merpati Nusantara, and Tony Sujiarto,<sup>207</sup> one of the company's former managers, in February 2013.<sup>208</sup> The media even tended to criticize the judgement of the cassation and review (*peninjauan kembali*) judgments passed by the Supreme Court, which overturned the decision of the first instance court and found Hotasi guilty. From the above elaboration, it can be concluded that using the conviction rate to measure the effectiveness of the anti-corruption court is not a suitable approach. However, conviction rate should be more acceptable to measure the effectiveness of corruption court prosecution, which is the task of the Public Prosecution Office and the KPK.

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*of Effectiveness Anti-Corruption Courts*), Jakarta: KPK and Faculty of Law of Bengkulu University, 2013, p. cxix.

207 Acquittal of Hotasi Nababan and Tony Sudjiarto is the second not-guilty verdict passed by the anti-corruption court of the Central Jakarta District Court after the 2011 which released Mieke Henriett Bambang, secretary of former Indonesian Central Bank Governor Burhanudin Abdullah from charges of Article 21 of Law No.31/1999, read in conjunction with Law No.20/2001 regarding Eradication of Corruption for alleged obstruction of justice. Prosecution of Mieke was undertaken by the public prosecutor from the Prosecutors' Office. Among others *jpnn.com*, *Pertama Kali Pengadilan Tipikor Membebaskan Terdakwa* (First Acquittal of the Anti-Corruption Court), <https://www.jpnn.com/news/pertama-kali-pengadilan-tipikor-bebaskan-terdakwa> accessed in December 2020.

208 *Tempo Magazine*, *Perlawanan Hotasi (Hotasi's Defense)*, <https://majalah.tempo.co/read/hukum/145419/perlawanan-hotasi>, and *Penolakan PK Hotasi (Rejection of Hotasi's Case Review Petition)*, <https://kolom.tempo.co/read/1002319/penolakan-pk-hotasi>, both accessed in December 2020.

### 6.1.2 Giving of the Maximum Sentence

Concurrent with the demand placed on the courts to always pass a guilty judgment on the defendant of corruption cases is the demand to impose the maximum sentence for such crimes. According to Topo Santoso, this demand is ubiquitous among anti-corruption activities as it is expected to create a deterrent effect<sup>209</sup> on potential perpetrators. ICW in its monitoring notes categorizes 0.1- to 4-year prison sentence as lenient, 4.1 to 10 years as moderate, and above 10 years as severe punishment.<sup>210</sup> The categorization of severity of punishment is based upon, among others, the punishments prescribed under Article 3 of the Anti-Corruption Law.<sup>211</sup>

Taking from ICW monitoring reports on the court judgments, one could draw a conclusion that the courts' performance is quite below the expectation. This is due to the fact that the average sentence passed by the judges, for instance from 2013 through 2019, ranged from 24 to 35 months. If measured against the categories of penalty suggested by ICW, the anti-corruption courts have been lenient in their passing of sentences (under four years). Using this severity scale for punishments, even prison sentences passed by the Anti-Corruption Court of the Central Jakarta District Court prior to Law 4 of 2009, which as reported by Topo Santoso was passing punishment averaged three to four years,<sup>212</sup> would not be considered as adequate.

Regardless of research findings which reveals that severe punishments—even the death penalty, do not necessarily create a deterrent effect and reduce the rate of corruption-related crimes,<sup>213</sup>

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209 Santoso, 2011, p. 49.

210 ICW, Catatan Pemantauan Perkara Korupsi yang Divonis oleh Pengadilan selama Tahun 2013: Hukuman Koruptor Belum Menjerakan (ICW Notes on Monitoring of Corruption Cases Receiving Court Judgments in 2013: Punishments for Corruption Offenders Lack Deterrent Effect), Jakarta: ICW, 2014, p. 2.

211 ICW, 2014, p. 2.

212 Santoso, 2011 p. 49.

213 See among others Zhu, Jiangnan, Do Severe Penalties Deter Corruption? A Game Theoretic Analysis of China Case, *The China Review*, Vol. 12, No. 2 (Autumn 2012), p. 1–32

there are many other aspects that must be reviewed conclusively to determine whether a punishment given by a court is adequate or proportional.

There are several other relevant factors that need to be considered in any corruption case before concluding that the sentence handed down by the judge was too lenient. Among others are the role of the defendant in the case,<sup>214</sup> amount of state losses caused by the crime, the impact of the crime to the interests of wider society. Further, in international best practices, aggravating and mitigating factors should always be taken into account in sentencing.

As the illustration, monitoring by ICW from 2018 to 2019 found a significant number of village officers among the defendants in various corruption cases, specifically 158, or 13.6%, of the 1162 defendants in 2018, and 188 defendants, or 22.3%, in 2019. Given their position, it can be surmised that the corruption cases these officials are involved with can hardly be categorized as major cases. An *ad hoc* judge at an anti-corruption court with the Bandung High Court reported that based on his experience, corruption cases filed by the prosecutors to the court are generally small cases.<sup>215</sup>

In addition, there is another type of important factor that can generally affect the severity of a sentence given by a judge. It is the performance of the prosecutors in preparing the case before submitting it to the court, as well as in proving the case during the trial. Findings from ICW's monitoring show that in 2018 the average length of sentence in court decisions for defendants prosecuted by the KPK is 4 years 7 months, while average imprisonment given to defendants who prosecuted by the Public Prosecutor's Office is 2 years 2 months.<sup>216</sup> Meanwhile, in 2019, the average length of sentence given with respect to cases prosecuted by the KPK is 5 years

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214 Wiratraman, et. al., 2013, p. cxvii.

215 Interview with *Ad Hoc* Judge, Lilik Sri Hartati, 10 November 2020.

216 ICW, *Catatan Penantauan Perkara Korupsi yang Divonis oleh Pengadilan Selama 2018: Koruptor Belum Dihukum Maksimal (ICW Notes on Monitoring of Corruption Cases Receiving Court Verdicts in 2018: Corruption Offenders Not Being Given Maximum Sentence)*. Jakarta: ICW, 2019, p. 12.

2 months of imprisonment, while cases prosecuted by the Prosecutor's Office resulted in an average of 3 years 4 months imprisonment for the defendants.<sup>217</sup> These findings corroborate the view of Alexander Marwata, a former *ad hoc* judge of the anti-corruption court, who disclosed that there are differences between the standards of criminal charges and prosecutorial pleadings (*tuntutan*) put forward by the Corruption Eradication Commission as opposed to those submitted by the Prosecutor's Office.<sup>218</sup>

Finally, in Indonesia's context, the text of Article 2 and Article 3 of the Anti-Corruption Law as the articles most commonly invoked by Public Prosecutors, are recognized by many as containing a number of issues. One of these relates to the penalties set by the articles, where many see that Article 3 provides for the compounding of the sanction contained in Article 2 when abuse of power is found to be an element in the commission of the crime. The problem lies with the fact that the punishment set in Article 3 is actually less severe than that provided under Article 2.<sup>219</sup>

As such, assessing the effectiveness of anti-corruption courts based on the severity of punishment imposed by the court creates the same problem as using conviction rates to measure court effectiveness.

### 6.1.3 Consistency in Sentencing

Severity of punishment for a criminal offense is naturally associated with the public's sense of justice. People have an instinctual tendency to demand that the most severe punishment should be imposed on corruption offenders and that defendants

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217 ICW, *Catatan ICW Tren Vonis Pengadilan Tindak Pidana Korupsi Selama 2019: Vonis Tanpa Efek Jera (ICW Notes on Monitoring of Corruption Cases Receiving Court Verdicts in 2019)*, Jakarta: ICW, 2020, p. 11.

218 Interview with a Prosecutor, June 2020.

219 The opinion is expressed among others by Luhu t Pangaribuan during a public discussion with the topic "Construction of Article 2 and Article 3 of the Anti-Corruption Law: the Norms and Practices", organized by the Jentera Law University in Jakarta, 29 March 2016.

committing crimes of similar nature should receive sentences of consistent length.

Unlike the demand for defendants to be given the most severe punishment, which creates various conceptual problems, the demand for courts to impose similar punishments for cases that present comparable circumstances, has conceptually stronger grounds. It is a fundamental principle of criminal justice that similarly situated individuals should be treated in a similar manner. This also invokes the principle of equality before the law. Further, Ian Manson (2001) as quoted by Langkun, et. al. (2014), states that the concept of parity is closely related to the principle of proportionality as proposed by Beccaria.<sup>220</sup> This principle calls for the punishment given to the offender to be in proportion to the crime committed.

If on every occasion where a judge is to decide the punishment, he/she considers thoroughly the severity of the crimes and the extent of the harm caused by the defendant, consistency of sentencing should develop over time. Likewise, if judges are consistent in carefully deliberating sentencing, one expects disparity in sentencing in cases of a similar nature to be avoided. Therefore, the quality of judges' legal consideration, as well as the consistency and minimum sentencing-disparity in the decisions, are more acceptable to assess court performance.

To quote Langkun, et.al., disparate levels of punishment in cases sharing similar characteristics is basically a normal tendency, as no two case can completely share the same features. However, disparity becomes a problem when the difference in level of punishment is so significant among the cases that it causes a sense of injustice and raises a question among the public as to whether the courts have put careful thought into the sanctions

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<sup>220</sup> Langkun, Tama. S., et. al., *Studi Atas Disparitas Putusan Pidanaan Perkara Tindak Pidana Korupsi (A Study on Disparities in Corruption Case Verdicts)*, Jakarta: ICW, 2014, p. 9.

given. Such questions can ultimately undermine the authority or legitimacy of the courts' sentence in the public's view.

Possibly due to the risks that may be posed by such disparities to the legitimacy of a court's judgments, the Supreme Court has given significant attention to the problem. This is reflected in Supreme Court Circular Number 14 of 2009 on Capacity Building of Judicial Personnel, through which the Chief Justice of the Supreme Court orders the Chairpersons of the Appellate Courts to take measures to prevent disparity in sentencing.

Unfortunately, various studies and monitoring of the judgments rendered by the anti-corruption courts, have found significant disparities in the sentences given. An example is the case involving graft in the election of the Central Bank Deputy Governor, Miranda S. Goeltom in 2012. The case involved at least 29 (twenty-nine) members of the People's House of Representatives (DPR) who were charged with basically the same offense, namely receiving a bribe to elect Miranda. The interesting part is that the sentence given to the twenty-nine members of the parliament by the court are of different lengths, with the shortest being 1-year 3-month imprisonment, and the longest 2 years and 5 months.<sup>221</sup> Other examples during the years after 2012 were also found in the results of the monitoring conducted by ICW on the anti-corruption courts' judgments. The most current example from 2019 can be seen in the following Table 11.

Table 11 Example of Sentencing Disparity in Corruption Cases in the ICW Monitoring

No	Judgment Number	Name of Defendant	Occupation of Defendant	Loss Suffered by State / Graft	Prison Sentence	Underlying Article
1	76/Pid.Sus-TPK/2019/PN Mks	MUH. SAID BIN SANGKILANG	Head of Bategulung Village	Rp542,168,459	2 years 6 months	Article 2
2	16/Pid.Sus-TPK/2019/PN Bjm	DATMI, ST Bin ASPUL ANWAR	Head of Hambuku Village, Hulu Sungai Utara District	Rp43,408,582	4 years	Article 2

<sup>221</sup> Langkun, Tama. S., et. al. 2014, p. 24.

No	Judgment Number	Name of Defendant	Occupation of Defendant	Loss Suffered by State / Graft	Prison Sentence	Underlying Article
3	5/Pid.Sus-TPK/2019/PN Jap	JAFET ARNOLD SAMPUL, SH	Director of PT Bina Karya Junior	Rp1,745,694,560	1 year 4 months	Article 2
4	6/Pid.Sus-TPK/2019/PN Bjm	H. RUSMAN ADJI Bin (Alm) HABIRIN S.	Director of PT. Citra Bakumpai Abadi	Rp500,000,000	4 years 6 months	Article 2
5	26/Pid.Sus-TPK/2019/PN Sby	MAHTUM SHALEH	Village Secretary of Prenduan Village, Pragaan Subdistrict, Sumenep	Rp245,000,000	1 year	Article 11
6	21/Pid.Sus-TPK/2019/PN Sby	KHOLIQ WICAKSONO, ST.	Head of Mining Evaluation and Reporting Section, Office of Energy and Mineral Resources Office of East Java Province	Rp30,000,000	1 year	Article 11

To address the problem of disparity in sentencing at the anti-corruption courts, in July 2020 the Supreme Court issued Supreme Court Regulation Number 1 of 2020 on Guidelines for Sentencing Under Articles 2 and 3 of the Anti-Corruption Law. Although there are some points that warrant attention relating to challenges in the implementation of the Regulation,<sup>222</sup> the public generally welcomed its enactment<sup>223</sup> as it sets forth quite detailed considerations for

<sup>222</sup> Assegaf, Rifqi. *Catatan terhadap Perma Pidanaan Korupsi (Notes on Supreme Court Regulation on Corruption Case Sentencing)*. HukumOnline, 8 August 2020, <https://www.hukumonline.com/berita/baca/lt5f2e43f870610/catatan-terhadap-perma-pedoman-pidanaan-korupsi-oleh--rifqi-s-assegaf> accessed in November 2020.

<sup>223</sup> Mardatillah, Aida. *Catatan ICW terhadap Pidanaan Perkara Tipikor (ICW Notes on Corruption Case Sentencing)*. HukumOnline, 7 August 2020, <https://www.hukumonline.com/berita/baca/lt5f2d4cfd29be7/catatan-icw-terhadap-perma-pidanaan-perkara-tipikor> accessed in November 2020.



sentencing to be applied by judges in determining punishments for charges under Article 2 and Article 3 of the Anti-Corruption Court Law. Additionally, among anti-corruption activists who call for more severe sanctions for corruption offenders, the Regulation brings a wind of change as it provides guidelines for more severe sentencing compared to the average length of prison sentence for commission of crimes under Article 2 and Article 3 that have been applied thus far.<sup>224</sup>

#### 6.1.4 Recovery of State Loss

Recovery of loss suffered by the state through enforcement of corruption cases came up in several studies on the effectiveness of anti-corruption courts in eliminating corruption. This issue was raised, among others, by Wiratraman, et. al. (2013) and ICW in their analyses of results from the observations made on corruption related cases. The role that the courts are expected to play is to determine the compensatory as closely as possible to match the loss suffered by the state. Unfortunately, both Wiratraman, et. al. and ICW report that the compensation set by court judgments in general are still very far below the actual losses suffered by the state. This conclusion has been drawn from the comparison of the compensation set by the courts and the actual state losses estimated by ICW, covering the period from 2013 through 2019, as shown in Table 12 below.

Table 12 Amount of State Losses compared to Compensation Money in Court Decisions<sup>225</sup>

Year	State Loss (Trillions Rp)	Restitution (Billions Rp)	Percentage
2013	3.460	515.55	14.9%
2014	11.299	1,493.2	13.2%
2015	1.740	1,542.3	88%

<sup>224</sup> Assegaf, 2020.

<sup>225</sup> Compiled from ICW's monitoring report for the year 2013 to 2019

Year	State Loss (Trillions Rp)	Restitution (Billions Rp)	Percentage
2016	3	720.27	24%
2017	29.42	1.45	0.005%
2018	9.3	850.9	9.15%
2019	12	748.16	6.23%

Although they argue that the courts have not been optimally determining reparation amounts, Wiratraman, et. al., and ICW acknowledge that this shortcoming is influenced by the way prosecutors conduct the case. To be more clear, Wiratraman, et. al. identify the following three situations that contribute to the courts' inadequacy in determining restitution in corruption cases.<sup>226</sup> First, investigators are reluctant to seize assets and funds gained from corruption that are in the possession of third parties, and therefore the court is unable to impose a large fine or restitution without sufficient assets having been confiscated by investigations. Second, investigators seize assets that are not related to the corruption offense being tried, thus causing the court to surmise that it would be difficult ultimately to enforce such restitution. And the last one is, investigators and prosecutors are still reluctant to link corruption cases with money laundering offenses.

## 6.2 Specificity of the Anti-Corruption Court and Problems in Discharging Its Function

In the preceding sections, discussion of the effectiveness of the anti-corruption courts is based on stakeholder expectations. These expectations are usually related to the substance or content of judgments rendered by the anti-corruption courts. This section will review the effectiveness with which the functions of the anti-corruption courts are performed from a procedural perspective, with a focus on how their performance is adversely affected by special attributes conferred by the provisions on anti-corruption courts

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<sup>226</sup> Wiratraman, et. al., p. cxxviii.

contained in Law 30/2002 and Law 46/2009. As previously described in Chapter II of this report, the special attributes conferred by the lawmakers upon the anti-corruption courts under Law 30/2002 and Law 46/2009, consist of the following.

*Firstly*, specific authority to adjudicate corruption cases. According to Law 30/2002, there are two types of courts that can adjudicate cases of corruption in Indonesia. They, in the first instance, are the Anti-Corruption Courts located at the Central Jakarta District Court that examine corruption cases prosecuted by the public prosecutors within the Corruption Eradication Commission. The second type encompasses the District Courts located throughout the country, including the Central Jakarta District Court, which has jurisdiction over cases prosecuted by public prosecutors in the Public Prosecutors' Office. This arrangement underwent some changes after the Constitutional Court declared that the establishment of the anti-corruption courts under Article 53 of Law 30/2002, creating two distinct judicial systems with jurisdiction over corruption cases in Indonesia, is in conflict with the 1945 Constitution (Constitutional Court Decision No. 012-016-019/PUU-IV/2006.)<sup>227</sup> Responding to this Constitutional Court Decision, Law No. 46/2009 on Anti-Corruption Court was subsequently promulgated.

Under the Anti-Corruption Court Law, all cases relating to corruption must be heard by anti-corruption courts established in all districts/cities, which courts would initially be formed in the provincial capitals. With the advent of this provisions, and the consequent establishment of the anti-corruption courts in 33 provincial capitals, district courts at the district/city level no longer had authority to handle corruption cases. All corruption cases, whether prosecuted by prosecutors with the KPK or with the Public Prosecutors' Office, can now only be heard by anti-corruption courts at the province capitals having relevant jurisdiction over the case based on the location where the crime is committed. In terms of numbers, where there were previously 382 courts with jurisdiction to hear corruption related cases throughout Indonesia, following the enactment of Law 46 of 2009 only 33 courts have such jurisdiction.

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227 Supreme Court Judgment No. 012-016-019/PUU-IV/2006, p. 282-283.

*Secondly*, composition of judges' panel presiding over corruption cases. The number of judges to sit on a panel to adjudicate corruption cases under Law 30/2002 is five persons. The law requires the majority of the members to be composed of *ad hoc* judges, i.e. three *ad hoc* and two career judges. The mandatory composition was subsequently amended by Law 46 of 2009. The number of judges to hear corruption cases is no longer five, but may consist of only three judges. In addition to amending the number of judges, Law 46 of 2009 also provides that the majority of judges on a panel is no longer required to consist of *ad hoc* judges. The Court Chairperson or the Chief Justice of the Supreme Court is given free rein to determine the majority composition, consisting of either career or *ad hoc* judges.<sup>228</sup>

*Thirdly*, setting of the corruption case adjudication period and specific stages of case administration at the courts. Law 30/2002 determines that anti-corruption courts must resolve the examination of corruption cases within 90 days at the first instance, 60 days at the appellate level, and 90 days at the cassation phase. The maximum periods were subsequently increased through Law 46 of 2009, to become 120 days for the first instance courts, 90 days for the appellate courts, and 120 days for the cassation stage. In addition to provisions on the temporal limit for case examination, Law 46 of 2009 also determines the maximum period by which the judges' panel is to be formed, as well as the time for convening the first hearing, namely, seven business days upon receipt of the case dossier by the court.

*Fourthly*, release of career anti-corruption judges from other duties. Law 46 of 2009 requires that career judges appointed to serve at anti-corruption courts shall be released from the duty to examine, try and adjudicate other cases for the duration of his/her office as an anti-corruption judge. This provision did not previously exist in Law 30/2002. The special provisions described above, which regulates

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228 Based on findings from indexation conducted by LeIP of 149 corruption related verdicts of the first instance courts in the period of 2011 to 2016, the composition of judges panel with a majority *ad hoc* judges is not significant compared to the number of judges panel composed mostly of career judges. See <https://leip.or.id/laporan-indeksasi-putusan-pengadilan-tindak-pidana-korupsi/>.

the procedural and administrative aspects and allocation of judges for the anti-corruption courts, appear to have been introduced due to concerns over the performance of conventional courts in the past.

These provisions can be understood as measures taken by lawmakers to create special conditions that will enhance the performance of the anti-corruption courts. The mandatory timeline to be met by the courts to form a panel and for the convening of the first hearing and the overall resolution of the cases, can be interpreted as underscoring their intention to avoid unnecessary delays in the administration and hearing of corruption cases. Meanwhile, the introduction of *ad hoc* judges to the panel of judges adjudicating corruption cases can be inferred as an attempt of the lawmakers to bring in expertise that was considered lacking among the current career judges.

Although various sources report that the introduction of *ad hoc* judges was also driven by low public trust in the integrity of career judges<sup>229</sup>, from the articles and elucidation of Law 46 of 2009 it can be seen that another reason was the need for judges to have specific skills. The fourth paragraph of the general elucidation of Law 46 of 2009 states that *ad hoc* judges are needed for the skills that they bring, commensurate to the complexity and scope of the corruption case, which may be in the fields of finance and banking, tax, capital markets, or government procurement of goods and services.

The question then becomes whether the special provisions in the law has proven to improve the performance of the corruption courts? This study finds that the special conditions regulated in the law, in fact have not been able to contribute in improving the performance of the corruption courts. From a number of aspects, the special conditions created by legislation, when combined with the specialized character of corruption cases and the institutional condition of the courts and Public Prosecutor's Office, would in fact introduce a complexity or become an impeding factor in the resolution of corruption cases. The

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<sup>229</sup> *Focus Group Discussion* on 8 May 2020; Assegaf, Rifqi, et. al., *Pengadilan Khusus Korupsi: Naskah Akademis Rancangan Undang-Undang Pengadilan Tindak Pidana Korupsi*.

following is a description of the empirical findings of the research that demonstrate the current situation.

### 6.2.1 Reduced Number of Courts, Limited Availability of Courtrooms, and Geographical Access and Budget of Public Prosecutors

As noted above, since the enactment of Law 46 of 2009, all corruption offenses investigated and prosecuted by prosecutors from the Public Prosecutors' Offices and previously examined by the district courts in the same cities/districts where the District Prosecutor's Offices are located, can now only be tried at anti-corruption courts in the provincial capital. The reduced number of courts that are able to hear corruption cases has thus decreased from around 382 district courts throughout Indonesia to only 33. This has inevitably resulted in a bottle neck of cases at the district courts to which the anti-corruption courts are attached. The backlog of cases reaches an extreme at anti-corruption courts whose jurisdiction covers a large number of districts/cities or Public Prosecutors' Offices. The Anti-Corruption Court attached to the Surabaya District Court, for example, provides one of these extreme cases because its jurisdiction encompasses 37 District Prosecutors' Offices in East Java. Another example is the Anti-Corruption Court attached to the Semarang District Court, whose jurisdiction covers 36 Public Prosecutors' Offices in Central Java.<sup>230</sup>

This situation is exacerbated by the inadequate number of courtrooms at certain anti-corruption courts. The limited availability of courtrooms and the use of the courtrooms for cases other than corruption related cases contribute to the lengthy queues for their use.<sup>231</sup> It is therefore not surprising when a public prosecutor reports

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230 Annex to Decree of the Attorney General Number KEP-088/A/JA/6/2012 regarding Organization and Work Procedure of the District Prosecutor's Office of Tebing Tinggi Within the Jurisdiction of South Sumatera High Prosecutor's Office, District Prosecutor's Office of Limapuluh within the Jurisdiction of the North Sumatera High Prosecutor's Office, and District Prosecutor's Office of Boroko within the Jurisdiction of the North Sulawesi High Prosecutor's Office.

231 FGD with the Public Prosecutors, 17 July 2020, Wiratraman, et. al., 2013, p. cxxvi.

that at one time he was only able to start his argument in the late afternoon despite waiting at the courthouse since 9 in the morning.

In addition to the backlog of cases at the anti-corruption courts, the change of jurisdiction to the the anti-corruption courts at the provincial capitals also significantly affects geographical access for prosecutors who are based in locations throughout Indonesia. The increased distance and limited modes of transportation that can be used by prosecutors to reach the anti-corruption court at the provincial capital should be considered as potential hindrances in the litigation of corruption cases in a number of regions.

A review of case data presented in the Annual Report of the Directorate General of General Judicial Bodies covering the period of 2014 to 2019 shows that regions with the lowest numbers of corruption cases are those that feature long distances between the District Prosecutors' Office and the Anti-Corruption Court at the provincial capital, or whose geographical area is relatively small, such as the provinces of Bali, Banten, and Yogyakarta. For example, the average distance between the District Prosecutors' Office and the Anti-Corruption Court in Kupang Province, North Maluku, West Papua and East Nusa Tenggara are 381.6 km, 387.78 km, and 340.69km, respectively. The Anti-Corruption Court at the Ternate District Court in North Maluku Province since 2014 to 2019 has consistently been one of the provinces with the lowest corruption caseloads nationally.

Table 13 Average Distance Between Prosecutors' Office and the Anti-Corruption Court in Provinces with Lowest Case Volume

Year	Province	First Instance Anti-Corruption Court	Incoming Cases	Number of Prosecutor Offices in Jurisdiction	Avg. Dist. To District Court (Kms)
2014	Papua Barat	Manokwari DC	13	5	340.69
	Maluku Utara	Ternate DC	19	8	387.78
	Jawa Tengah	Semarang DC	22	35	113.70
	Bali	Denpasar DC	28	8	45.52
	Sulawesi Utara	Manado DC	30	10	127.50
	Nusa Tenggara Timur	Kupang DC	30	19	381.60

Year	Province	First Instance Anti-Corruption Court	Incoming Cases	Number of Prosecutor Offices in Jurisdiction	Avg. Dist. To District Court (Kms)
2015	DI Yogyakarta	Yogyakarta DC	22	5	19.26
	Sumatera Barat	Padang DC	29	20	98.40
	Gorontalo	Gorontalo DC	34	6	57.45
	Maluku Utara	Ternate DC	38	8	387.78
	Bangka Belitung	Pangkalpinang DC	39	8	341.19
2016	DI Yogyakarta	Yogyakarta DC	25	5	19.26
	Banten	Banten DC	34	6	37.38
	North Maluku	Ternate DC	35	8	387.78
	Bali	Denpasar DC	36	8	45.52
	Gorontalo	Gorontalo DC	36	6	57.45
2017	Gorontalo	Gorontalo DC	20	6	57.45
	Bangka Belitung	Pangkalpinang DC	21	8	341.19
	DI Yogyakarta	Yogyakarta DC	21	5	19.26
	North Maluku	Ternate DC	25	8	387.78
	North Sulawesi	Manado DC	30	10	127.50
2018	DI Yogyakarta	Yogyakarta DC	9	5	19.26
	North Maluku	Ternate DC	16	8	387.78
	Bangka Belitung	Pangkalpinang DC	19	8	341.19
	South Sumatera	Palembang DC	24	12	159.28
	Bali	Denpasar DC	25	8	45.52
2019	DI Yogyakarta	Yogyakarta DC	10	5	19.26
	Bangka Belitung	Pangkalpinang DC	20	8	341.19
	Gorontalo	Gorontalo DC	22	6	57.45
	North Maluku	Ternate DC	22	8	387.78
	Bali	Denpasar DC	24	8	45.52

\*Including Public Prosecutor Branch Offices (Cabang Kejaksaan Negeri/Cabjari), if any, in the given province.

The issue of geographical access that has arisen since the advent of Law 46 of 2009 also had consequences for budgetary requirements to enable prosecution of corruption cases by the District Prosecutors' Offices. The main operational support needed is for travel and lodging expenses for prosecuting teams in such cases, as well as for witnesses who must be presented by the prosecutor during the hearing. Operating costs for prosecution can reach a significant amount due to the number of witnesses involved, that are usually higher than with other criminal cases. For example, the budget required to cover



transportation and accommodation expenses in the handover of case dossiers and trials of a corruption case at the first instance court at one of the District Prosecutors' Office in Central Kalimantan is as follows:

Table 14 Example of Elucidation on Budget Allocation for Transportation and Accommodation for Case Dossier Handover to Court and Trial

No	Item	Allocation	Cost
<b>Handover of Case Dossier</b>			
1	Daily allowance for handover of case dossier to the anti-corruption court	2 persons, 1 trip	Rp500,000
2	Transport/ticket/taxi, etc.	2 persons, 1 trip	Rp2,000,000
<b>Trial</b>			
3	Daily allowance for travel (prosecutors, prisoner escort)	5 persons, 15 hearing sessions	Rp18,750,000
4	Transport/ticket/taxi, etc. (witnesses, expert)	20 persons, 1 hearing sessions	Rp6,000,000
5	Transport/ticket/taxi, etc. (prosecutor, prisoner escort)	4 persons, 15 hearing sessions	Rp18,000,000
6	Accommodation (prosecutor, escort)	3 persons, 1 day, 15 hearing sessions	Rp13,500,000
7	Accommodation (witness, expert)	20 persons, 1 hearing session	Rp6,000,000
Total			Rp64,750,000

Although, based on Table 14 above, budget allocated for transport and accommodation of the public prosecutor, witnesses and experts may appear to be significant, in reality they are insufficient.<sup>232</sup> In terms of unit cost, for instance, public prosecutors with a District Prosecutors' Office in Central Kalimantan<sup>233</sup> reported that the allocated funds to cover accommodation or lodging, which amounts to IDR 300,000/day, does not always suffice to provide facilities with adequate comfort and security for certain expert witnesses,

<sup>232</sup> FGD with public prosecutors, 17 July 2020.

<sup>233</sup> Interview, 23 December 2020.

particularly for experts with high level of expertise or position. Where the expert is from a government ministry/agency, they would sometimes arrange accommodations at the expense of their office.

In addition to the unit cost, the amount actually expended is often higher than the ceiling set in the Budget Item (DIPA) of the Public Prosecutors' Office. For example, in the sample budget set forth in Table 14 above, the number of witnesses and experts planned for in the budget is 15 persons. Meanwhile, referring to the indexation of 149 corruption case judgements at the first instance courts compiled by LeIP, there have been 72 cases where the public prosecutor presented 11 up to 25 a charge witnesses, and 33 cases had witnesses from 26 to 50 persons.<sup>234</sup> Meanwhile, in addition to witnesses, prosecutors usually present expert witnesses during prosecution. Among the 149 cases, LeIP found 97 cases where the prosecutor also brought forward one to five experts, and there were three cases where the experts numbered more than five people.<sup>235</sup>

The necessity to undertake long distance official travel to the courthouse during the prosecution of corruption cases, while also coordinating the logistical requirements of the trip and preparing for the hearing, have been reported by prosecutors as placing a tremendous burden upon them. The logistical challenges in submitting the case dossier and the trial can be seen from the following situations revealed in the research.<sup>236</sup>

- The distance that has to be traveled and the frequent necessity to use more than one mode of transportation. In some areas, such as in Central Kalimantan, a combination land, sea and/or air transport often needs to be arranged.

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234 See <https://leip.or.id/laporan-indeksasi-putusan-pengadilan-tindak-pidana-korupsi/>.

235 See <https://leip.or.id/laporan-indeksasi-putusan-pengadilan-tindak-pidana-korupsi/>.

236 Digested from interview with three public prosecutors assigned at a District Prosecutors' Office in Central Kalimantan on 23 December 2020, Focus Group Discussion with Public Prosecutors from the Attorney General's Office and the Corruption Eradication Commission on 17th July 2020, and referring to Wiratraman, et. al., 2013, p. cxxiv.

- The prosecuting team must also arrange for the transportation of the defendant and witnesses.
- In certain situations, the prosecutor must make substantial compromises on security and comfort in undertaking official travel and the presentation of the case at the court hearing. For instance, due to limited funds and logistical resources, the prosecutor would sometimes have to take a long trip with the defendant or witness. If the defendant is remanded in a prison inside the city where the courthouse is located, upon their arrival the prosecutor must collect them and go through all the procedures that apply at the prison before being able to take the defendant to the courthouse.

The pressure felt during the trip to the courthouse and the logistical burden of preparing for the trial, added to the lengthy waiting time at the courthouse prior to commencement of the hearing, are genuine grounds for concern over the quality of the arguments put forward by the prosecutor in the prosecution of corruption cases.

### 6.2.2 Limited Time for Case Handling, Complexity of Corruption Cases, and Lack of Judges and Deputy Registrars for Corruption Cases

The limited time available for anti-corruption courts to adjudicate corruption cases under Law 30/2002 as well as Law 46/2009 can be taken as a response to the assessment of lawmakers of the inadequate performance of the conventional courts. The lengthy delays in the processing of cases by the Anti-Corruption Court during the early days of its establishment were often raised in public discussions. A number of presumed reasons for the prolonged handling of cases were also put forward, one being the perception that judges do not have the required competence, or a corruption-related motive that encourage court officials to delay the hearing of cases. As such, in addition to setting a maximum length of time to process cases, lawmakers also introduced *ad hoc* judges to the panel that would be presiding over corruption cases.

For the courts, the setting of a maximum period in which a case must be processed imposes a large burden on the institution. This challenge appears to have been raised during the drafting of Law 46 of 2009, which may have resulted in changes that give more time in the processing of corruption case being incorporated in the final version of the law. The period provided under Law 46 of 2009 became 120, 90, and 120 days for adjudication at the first instance, appellate court, and cassation. These periods are each 30 days longer than the time set under Law 30/2002. In addition to the additional time given, the institutional challenge faced by the Supreme Court has been addressed by releasing career judges from their other responsibilities while performing their duty adjudicating corruption cases. Despite amendments being made to Law 46 of 2009 as outlined above, the courts' challenges in meeting the statutory timeline, particularly the anti-corruption courts at the first instance, are still difficult to overcome. The results of this research show that the cause derives from the following three conditions.

The first challenge is that corruption cases present a higher level of complexity compared to other cases. Although not all corruption cases are complex in terms of their substance, what is certain is that corruption cases generally involve massive quantities of evidentiary material and a larger number of witnesses compared to other offenses. A workload analysis performed by the Supreme Court in 2016 concluded that the average time required to process a corruption case at the first instance is 131.83 hours, while regular criminal cases only require 39.46 hours.<sup>237</sup> At the appellate level, the time needed for the court to adjudicate a corruption case is 49.8 hours, compared to only 28.9 hours in other criminal cases.<sup>238</sup>

In addition to the large number of witnesses to be examined, a second challenge faced by the courts is the inadequate facilities and infrastructure available at the anti-corruption courts, particularly the limited number of courtrooms as mentioned above. Due to the

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<sup>237</sup> Mahkamah Agung dan Daya Dimensi Indonesia, *Penguatan Kapasitas untuk Analisis Beban Kerja Hakim di Empat Lingkungan Peradilan Mahkamah Agung (Capacity Building for Analysis of Judges' Workload in the Four Types Courts Under the Supreme Court)*, Jakarta: Mahkamah Agung, 2017. p. 30.

<sup>238</sup> Mahkamah Agung dan Daya Dimensi Indonesia, 2017. p. 30.

limited availability of courtrooms, which are also used to hear other cases at the courthouse to which the anti-corruption court is attached, judges often have to try cases until late into the night, even continuing through to the next day.<sup>239</sup> In such a situation, it is of course difficult for everyone to focus and follow the hearing with a clear mind.

The third challenge faced by the courts is the indication that there is currently an inadequate number of judges and acting registrars to handle corruption cases. The term ‘indication’ is used due to the fact that over the course of this research, no structured calculation process has been found to have been performed by the Supreme Court with regard to the number of judges and acting registrars needed to manage the adjudication of corruption cases. On the other hand, during interviews with a number of resource persons, in response to the question regarding the sufficiency of career judges and acting registrars for corruption cases, one answer consistently given is that their number is still not adequate. *Ad hoc* anti-corruption judges who were interviewed in the course of this research also remarked on the unequal workloads among *ad hoc* and career judges at the anti-corruption courts, particularly at the courts of first instance. Similarly, during interviews with a number of personnel from the Supreme Court’s Personnel Bureau, respondents reported that on more than one occasion they received information from the Directorate General of General Judicial Bodies regarding shortages of career judges at the anti-corruption courts. Unfortunately, however, there is currently no comprehensive workload analysis report to support such information.<sup>240</sup>

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239 The secretary of the Anti-Corruption Court Ad-Hoc Judges Selection Committee, who previously served as an anti-corruption court judge, during an interview on 27 November 2020, recounted his experience as the chairperson of a panel of judges presiding over a corruption case hearing that lasted until the beginning of the next day. In such a situation, before midnight, the Chairperson would adjourn the hearing and reconvene the session upon the start of the next day.

240 Report on result of analysis of workload compiled by the Supreme Court and PT Daya Dimensi Indonesia in 2016, which serves as a reference in this research, according to the Personnel Bureau, cannot fully support the claimed shortage of career judges to hear corruption cases. This is due to the fact that the compilation of the workload analysis used as sample only a few first instance and appellate courts.

According to several resource persons the shortage of career judges according is also caused by the parallel duty of anti-corruption court judges to examine and adjudicate other cases. A number of Supreme Court officials interviewed for this research stated that the Supreme Court does not consider the release of career judges serving at the anti-corruption courts from their other duties as feasible, given the current caseload. Due to such a high workload of the career judges and deputy registrars, case dossiers may not be adequately prepared, forcing the latter to spend time searching for case documents when they become needed during the proceedings.<sup>241</sup> Additionally, members of the judges' panel may not be focused on the examination of witnesses and defendants and other evidentiary instruments during the trial.<sup>242</sup>

From the aspect of case processing time, as a consequence of the three challenges only a small portion of cases examined by the anti-corruption courts were able to be processed within the time set by law. For example, of the 4,811 corruption cases handled by the first instance courts throughout the country, only 37% or 1,786 of them were able to be processed by the courts within 4 (four) months or less. Meanwhile, the remaining 67%, or 3,025 cases, were resolved in five to seven months.<sup>243</sup> As such, the prescribed time for the processing of corruption cases as stipulated in the law has not been able to be enforced consistently in practice.

### 6.3 Separation of Court's Jurisdiction and Preclusion of Cumulative Charging by Public Prosecutors

The establishment of anti-corruption courts with their special power to adjudicate corruption cases and money laundering offenses predicated on corruption<sup>244</sup> raises the issue of preclusion for the Prosecutor to bring cumulative charges or charges relating to an offense other than the above. As an illustration, in addition to being suspected of committing the crime of corruption, a suspect may

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241 Wiratraman, et. al., 2013, p. cxxiv.

242 Wiratraman, et. al., 2013, p. cxxiv.

243 2019 Annual Report of the Directorate General of the General Courts (Badan Peradilan Umum) of the Supreme Court, p. 31.

244 See Article 6 of Law on Anti-Corruption Court.

also have committed another offense such as terrorist funding. In such a case, the suspect cannot be tried for both crimes in the same proceeding before the anti-corruption court. The situation is different from the time prior to the establishment of the anti-corruption courts, where both offenses could be charged using cumulative charges.

This problem arose, for example, in the Gayus Tambunan case, a tax officer who committed corruption and falsification of immigration documents in the period between 2008 and 2011. In this case the three offenses could not be tried before one court and had to be charged and tried before different courts. For the corruption charges, the defendant was tried at the Jakarta Anti-Corruption Court<sup>245</sup>, while in relation to the falsification of immigration documents he was tried at the Tangerang District Court<sup>246</sup> within short time intervals. The inability to bring cumulative charges may cause an inefficiency problem, even more so if the charges fall under the jurisdiction of different courts and the distance between them is significant.

A more serious problem would occur if the crime committed by the defendant involves another crime which is not corruption-related. In such a case the prosecutor would usually file alternate charges. For example, a government building collapses resulting in loss of life. In the incident, if the contractor in the construction of such building committed a fraud which caused the buildings structure to be deficient, the contractor may be charged with corruption. However, if the error was due to negligence, it would be a crime under the Building Construction Law (Law No. 28 of 2002). Using the above illustration, prior to the enactment of the Anti-Corruption Court law, a prosecutor would be able to bring alternate charges: if during the course of the trial it is found that fraud was committed, the conviction can be that of corruption. However, if it is due to negligence, the crime would constitute an offense under the Building Construction Law.

Following the enactment of Law 46 of 2009, the resultant limited jurisdiction of the anti-corruption court has caused the preclusion of

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245 See Court Decision No.34/Pid.B/TPK/2011/PN.Jkt.Pst.

246 See Court Decision No. 848/PID.SUS/2011/PN.TNG

alternate charges as described in the above illustration. The prosecutor must choose which charge will be brought before the court. The risk posed by such a situation would be that if the prosecutor chooses to bring a particular charge before the anti-corruption court and the offense is found as not being caused by a deliberate act but rather due to negligence, the court would declare the defendant cleared of the corruption charge. Meanwhile, despite any evidence of negligence on the part of the defendant, he/she would not be able to be charged at a district court under the Building Construction Law as it would violate the *ne bis in idem* principle.

Such complications have actually been acknowledged by civil society in submissions regarding the Draft Anti-Corruption Court Law and also in an accompanying Academic Paper in 2008. In the proposed draft, an additional clause was included in the article on the jurisdiction of the anti-corruption courts. This clause provided that in addition to adjudicating corruption cases the court would have the power to examine other categories of cases provided that the charges for such other offenses are submitted concurrently with the corruption charges.<sup>247</sup> Unfortunately, however, the text was not accepted by the Government or the House of People's Representatives.

The present study began with a question on the performance of the specialized anti-corruption court, particularly following its replication throughout the provinces as mandated by Law No. 46 of 2009 on the Anti-Corruption Court. The question becomes relevant with the increasing demand by the public placed on the court to resolve corruption related cases. However, regardless of the vast criticisms directed towards this specialized court and numerous studies conducted upon it, it has never undergone a comprehensive evaluation since its establishment in 2004. A number of reviews have only touched upon specific issues or the performance of specific anti-corruption courts.

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<sup>247</sup> See Article 5 of Draft Law on the Anti-Corruption Court, Taskforce, Jakarta: Konsorsium Reformasi Hukum Nasional (National Justice Reform Consortium), 2007, p. 92.



CHAPTER VII

# Conclusions and Recommendations on Anti-Corruption Court Reform



This study tries to look at the anti-corruption court in a more comprehensive manner from the standpoint of its organizational structure as well as the performance of its functions, and attempts to answer a number of key questions, including: Is the approach using a specialized court an appropriate solution to respond the lack of public trust in conventional courts at the time of its inception? Is the design of the anti-corruption court able to address the various issues encountered in measures to resolve corruption cases in a more efficient and effective manner? These questions have been discussed in the previous sections by looking at the various aspects of the anti-corruption court, namely the legislations, judges, institution, and performance of the court's functions. The last section of this study submits the conclusions derived from the evaluation of the anti-corruption court's performance and the factors that impede and facilitate a successful outcome. The chapter will also formulate recommendations for improving the anti-corruption court by reflecting on the problems and challenges currently faced by the court on the ground.

## 7.1 Conclusion: Reflection and Challenges of the Anti-Corruption Court as a Specialized Court

There are a number of fundamental aspects that set apart the anti-corruption court established under Law No. 30 of 2002 and those set up pursuant to Law No. 46 of 2009. The first of such differences is the expansion of the court's jurisdiction. Anti-corruption courts no longer try only cases prosecuted by KPK prosecutors, but also those prosecuted by the Public Prosecutor's Office. This ended the dualism of authority to examine corruption related cases. Secondly, the anti-corruption court that was initially centralized in Jakarta has been replicated at the district courts located at each provincial capital, whose jurisdiction covers the districts/cities within the respective province. Thirdly, although the presence of *ad hoc* judges on a panel of judges is retained, they are no longer required to be the majority. This is now left up to the chairperson of the court in question. Additionally, the current law attempts to clarify the qualification of *ad hoc* judges, which was initially focused on integrity but which now also requires specific expertise or area of specialty.

All of these features are ultimately an attempt to achieve the goals of the corruption court. As mentioned earlier in the second chapter there are three objectives of the Anti-Corruption Court establishment: first, to provide solutions to public dissatisfaction on the performance of conventional courts; second, to improve efficiency and effectiveness of law enforcement against corruption; and lastly, to end the dualism of authority to try corruption cases.

The first purpose behind the establishment of the anti-corruption court, which was to enhance public trust in the resolution of corruption cases, is deemed to have been met, especially by the first anti-corruption court that was set up in Jakarta under Law No. 30 of 2002. The success of the initial anti-corruption court became a factor that drove the establishment of the regional anti-corruption courts as a means to replicate the success of the court in Jakarta. However, the public trust towards the anti corruption courts at the provincial level under the Law No. 46 of 2009, compare to the first anti corruption court in Jakarta, has fallen drastically. While the second goal to end the dualism of authority to try corruption cases has been executed with the enactment of the Law No. 46 of 2009. The implementation of this mechanism is also not without impact to the access and efficiency of judicial processes. This leads us to the third goal, namely the efficiency and effectiveness of corruption cases proceeding. The study shows that efficiency has been one of the fundamental problems on the implementation of anti corruption court. Inefficiency is stemmed from the problem of distribution of certified career judges, the trial of corruption cases that require prosecutors to take the case to provincial court which requires high costs, and other aspect that will be elaborated in the paragraphs below. In general it can be said that despite these efforts to introduce improvements, result of reviews on the performance of anti-corruption courts in the various provinces show that such measures have not produced a successful outcome. Even the establishment of anti-corruption courts in the subnational level has not shown significant success nor have they improved public trust in the judicial process involving corruption cases at the level enjoyed by the anti-corruption court first established in Jakarta. This is indicated among

others by the large criticisms voiced by the public directed towards the regional courts' decisions and their performance.

This study also attempts to identify factors that contribute to the lack of achievement of the set objectives for the establishment of the anti-corruption courts, which will be elaborated below.

The first factor is the ambiguity of the roles and functions of *ad hoc* judges at the anti-corruption courts. Given the realities surrounding this specialized court, it can be concluded that currently the most significant distinguishing characteristic of the anti-corruption courts is merely the introduction of *ad hoc* judges. It is not, however, clear-cut whether the presence of *ad hoc* judges have brought real contribution to quality of judgments rendered by anti-corruption courts. During the process leading to inception of the anti-corruption court, the idea of *ad hoc* judges emerged from distrust on the integrity of career judges. Law No. 46 of 2009 eventually requires the appointment of *ad hoc* judges based on the need to introduce specialized skills. The combined need to appoint the adequate number of *ad hoc* judges and bringing in the required specialized expertise creates difficulties for the Supreme Court in appointing the right *ad hoc* judges that would allow anti-corruption courts to carry out its mandated functions. The problem is compounded by the lack of consideration of specialized skills as reference during the selection process. In reality, the added value expected to be generated by the expertise of *ad hoc* judges over career judges has not been apparent. At the end, *ad hoc* judges play a role that is not much more than being a supplementary resource at the anti-corruption courts. These problems led to complaints on the weak role of *ad hoc* judges in the adjudication of corruption cases.

The expectation that *ad hoc* judges would possess higher integrity than their career counterparts also proved to be problematic. The replication of anti-corruption courts in the subnational regions demands that these courts be able to provide *ad hoc* judges to preside over every corruption case throughout Indonesia. In reality, however, the number qualified candidates who meet the integrity and quality requirements falls short from the quantity needed. This has created a dilemma for the Supreme Court, whether to prioritize the fulfillment

of required number judges or to maintain the standards of quality and integrity.

The second problem is the management of workload of the provincial district courts that is imposed with the additional burden of administrating specialized courts such as the anti-corruption courts. There has also been an inequality of workloads between career judges – who not only have to try corruption related cases but also other cases – and ad hoc and other career judges. The unequal workload causes dissatisfaction among career judges and served as a disincentive for them to adjudicate corruption related cases. The disproportionately high workload of certain anti-corruption courts also resulted in the prolonged court hearings, which can last way up into the night or even continue into the next morning. There is also the issue of distance that must be travelled by public prosecutors when they have to escort the accused and witnesses to the provincial capital where the anti-corruption court is situated. This condition creates fatigue among the judges, prosecutors, defendants and other parties involved in the proceedings. Such circumstances also have the effect compromising the quality of the court sessions and placing the quality of the judgments in jeopardy.

The third issue relates to the inefficiency of the process through which career judges are certified as anti-corruption judges. The problem described in the previous paragraph regarding the excessive workload of judges is partly caused by the inefficient certification program for career judges. This study found that around 43% of judges at district courts are certified anti-corruption judges. This constitute a significant number, as the Supreme Court has allocated funds to provide certification training to judges every year. Nevertheless, of the many judges who have undergone certification training, only a few among them are effectively appointed as anti-corruption judges. This study found that of all certified district court judges, only 12 percent have been appointed and effectively serve as anti-corruption judges. Meanwhile, among high court judges only 20 percent of certified judges are serving on appellate anti-corruption courts. From a budgetary standpoint, this constitute a significant inefficiency, as every year certification is conducted for anti-corruption judges, yet

they are not deployed effectively to serve their specialized duties. The workload of anti-corruption judges in certain district courts, especially those located in major cities such as Jakarta, Medan, Surabaya, is excessively high. In the other hand, however, most certified judges are left idle and are not assigned by the Supreme Court.

Fourthly, the end of dualism in the processing of corruption related cases through centralization at the anti-corruption courts and the establishment of such courts in the provincial capitals, has affected access of prosecutors to proceedings. State attorneys from the Public Prosecutor's Office who in the past were able to argue their cases before the district court of the jurisdiction where the crime occurred, are now required to present the case to the competent anti-corruption court in the provincial capital. The uneven geographical terrain of Indonesia and the existing gaps in infrastructure in certain regions necessitates a significant budget and longer times for prosecutors in prosecuting corruption cases. The budget has to cover the cost of bringing witnesses to the courthouse, which sometimes are at quite a distance, which cost can multiply if more witnesses are involved. In more complex cases, the number of witnesses that must be put on the stand can be significant. Additionally, prosecutors are no longer able to combine corruption charges with other charges, such as tax related offenses, as tax cases do not fall within the jurisdiction of anti-corruption courts. This has created inefficiency in court proceedings and presentation.

Fifthly, some issues and challenges faced by anti-corruption courts are in fact the same problems that have been plaguing other courts in general. Upon its inception, anti-corruption courts were expected to do away with the usual problems that typically hamper courts in general, and develop a different work culture. However, experience has proven otherwise. At the beginning, anti-corruption courts were expected to have their own buildings and facilities separate from the district courts. Such an arrangement is intended to distance anti-corruption courts from the problems of conventional courts. This study, however, shows that the specialized nature of these courts has yet to contribute significantly to the enforcement of anti-corruption laws in Indonesia. In fact, some problems found at anti-

corruption courts are caused by deficiencies found at other courts in general. Problems with the quality of judgements, for instance, stems from weak legal arguments contained in the decisions, which in turn is caused by inadequacy in the competence of judges in general. Unequal workload of anti-corruption judges serving at one particular court, or among judges working at different courthouses, is also an underlying problem experienced by courts of law in general regardless of the type of case. Problems with competence of registrars and the associated inadequacies in their capacity building system have also resulted from the less than optimal support for judges at the anti-corruption courts. This is a problem experienced by registrars in general, as it is often the case that they are overlooked by capacity building policies and systems targeting the judiciary.

## 7.2 Recommendations for Anti-Corruption Court Reforms

Based on the findings elaborated and summarized above, this study attempts to identify recommendations for improving anti-corruption courts in the future. These recommendations are explained in the following sections.

### 7.2.1 Limit the Establishment of Anti-corruption Courts at the Provincial Level, Without Replication at the District/City Level

It is recommended that anti-corruption courts remain at the provincial level, without replication at the district/city level. Replication of anti-corruption courts in districts/cities may bring more adverse impact, namely the further degradation of the quality of *ad hoc* judges, as it would be more difficult to find *ad hoc* judges in sufficiently large numbers. The problem of quality of *ad hoc* judges was already apparent following the setting up of anti-corruption courts in each of the provinces as discussed in Chapter 3. Another possible impact is budgetary inefficiency. The creation of specialized judicial bodies to handle corruption cases in every district/city would undoubtedly involve substantial cost, such as for the selection of *ad hoc* judges, payment of their salary and benefits, establishment of a

dedicate registrar's office, etc. Meanwhile, the volume of cases that will eventually be handled is not yet determined. Thus, it is likely that budgetary inefficiency would occur. A similar problem is currently already experienced by several anti-corruption courts due to the disparity between the cost expended and the number of cases that are processed. This inefficiency would become more prevalent if replication is conducted at the district/city level, which currently numbers 412 (four hundred twelve).

In any event, regulatory provisions are required to strengthen the position of anti-corruption court at the provinces. Such regulations are expected to be able to provide a solution to the issue of workload, shortage of courtrooms, and facilitate access for prosecutors, defendants and persons involved in court hears convened at the provincial capital. Some of these regulations will be explained in the next recommendation.

### **7.2.2 Enhancing Access to Anti-Corruption Courts by Allowing Court Sessions at the Nearest District Court**

Currently the Supreme Court Decree on the operation of anti-corruption courts states that the jurisdiction of the anti-corruption courts covers the territory of the province in which it is located. Hearings are held at the district court located in the province's capital. This mechanism actually provides access to a greater pool of resources, covering all certified judges and courthouses located within the provincial territory. The mechanism where any judge serving within the province can be assigned to try cases at the anti-corruption court in the province's capital (referred to as *detasering*) is already in place. Unfortunately, it is not accompanied by technical arrangements that would ensure adequacy of budget and better mobility for judges. Meanwhile, the use of courtrooms in other courts within a province has never been implemented.

The implementation of such mechanism would resolve the problem of access and limited supply of judges as well as courtrooms. The complaints voiced by prosecutors that proceedings involve very high cost due to the distance needed to be travelled in order to reach



the courthouse in the provincial capital (especially true in provinces with a large geographical area) and accommodations that need to be arranged for the defendants and witnesses would be resolved if hearings can be conducted at the nearest courthouse. Such mechanism would be able to address the problem of limited courtrooms available at the courthouse in the province's capital. Court hearings can be conducted, for instance, once every week before a panel consisting of judges from the nearest courts. Request from the prosecutors can be made through the Chairperson of the Anti-Corruption Court. The chairperson would then check whether there are certified judges serving within their jurisdiction. For this to be possible, a list of anti-corruption judges serving within the jurisdiction needs to be maintain and updated to reflect any transfers within the jurisdiction. To support the development of this system, the mechanism needs to be designed more comprehensively that would allow the assignment of judges to be conducted more expeditiously and to ensure availability of budget to cover the secondment of judges. This mechanism will be discussed in the next section.

### **7.2.3 Maximizing the Utilization of Certified Career Judges Serving at Any District Court Within the Jurisdiction of the Anti-Corruption Court**

The judge certification system should be viewed as an integral part of the anti-corruption court judge selection system. Thereby, passing of the certification training for anti-corruption court judges should be followed by the issuance of an Appointment Decree designating such judge as an anti-corruption court judge. The judge would then be able to be called upon at any time to examine a corruption related case at the anti-corruption court whose jurisdiction encompasses the court where such judge is original serving. A career judge certified to examine corruption cases can be ordered to examine such cases without having to be assigned at the district court of the province's capital. Such arrangement has actually been adopted in a number of cases under the *detasering* scheme. For example, the Chairperson of the Central Jakarta Anti-Corruption Court can request for a certified judge serving at the South Jakarta District Court to adjudicate a case at the anti-corruption court.

Through such mechanism, certified judges assigned at district courts located in areas other than the provincial capital can be mobilized as necessary to the anti-corruption court to examine cases, whether at the district court where he/she is originally serving (if approved by the chairperson of the anti-corruption court), or at the anti-corruption court in the provincial capital. The mechanism would alleviate the excessive workload of anti-corruption judges as well as eliminating the prevailing inefficiency in the anti-corruption judge certification system.

In order for such mechanism to work effectively, an updated list of certified judges needs to be maintained to allow the anti-corruption court chairperson to map all certified judges within the jurisdiction. This *detasering* system is actually already in place at the Supreme Court. Unfortunately, it has not been well-developed. Budget to implement the system is also still unavailable. This serves as a disincentive for court chairpersons from forming panels of judges consisting of seconded judges. As such, a clearer mechanism needs to be built to accommodate the *detasering* arrangement, which provides the necessary procedure for requesting and approving the secondment request, as well as the necessary facilities and budget.

However, the chairperson of an anti-corruption court would rarely have such list of certified judges serving within the court's jurisdiction, except for those who are serving at the district court in the provincial capital. The list of judges would be an important instrument to help anti-corruption court chairpersons to determine judges who will examine a corruption case and determine the location of the hearings, by taking into account the available pool of judges within the jurisdiction. Further, the anti-corruption court chairperson can submit a secondment request with the chairperson of the High Court of such province.

Another problem faced by career judges is the unequal workload between anti-corruption judges and other judges serving at a specific a courthouse, or among anti-corruption judges serving at different courts. Article 10 (3) of Law No. 46 of 2009 stipulates that career judges should be exempted from having to examine, try and adjudicate other cases. Such mechanism should be implemented

consistently to avoid excessive workload borne by anti-corruption judges at courthouses that handle high volumes of corruption cases. The scheme under which anti-corruption judges should exclusively examine corruption cases can be adopted by taking into account the corruption caseload of the specific court.

#### **7.2.4 Developing a Data Driven Anti-Corruption Judge Management System**

This study has identified several issues in the management of anti-corruption judges and anti-corruption courts, which involve personnel, budget, and other organizational resources. These issues originated from gaps in the strategic policies of the Supreme Court, in this case those formulated by the Directorate General of the General Courts of the Supreme Court (Direktorat Jenderal Badan Peradilan Umum) as the focal point for general court management. Directorate General as the responsible department to manage the judges, needs to take strategic roles that lays down policy guidelines for other relevant units– including for the Supreme Court’s Administrative Affairs Bureau (BUA) with regard to budgeting and selection, as well as the Research and Development, and Education and Training Department with regard to judge certification. The strategic policies and directions that need to be communicated by the Directorate General include matters on the number of judges needed, the expertise required to be possessed by judges, training to equip the judges, budget, as well as other policy interventions needed to strengthen the anti-corruption courts. The Supreme Court has developed various information system for the management of the courts, such as the Case Tracking Information System (*Sistem Informasi Penelusuran Perkara* or SIPP), Staff Management Information system (*Sistem Informasi Manajemen Kepegawaian* or SIMPEG), as well as others. Data generated by these various systems need to be utilized, not only as instruments for monitoring and supervision, but also as a tool to help the policy making process and formulation of organizational planning and strategy, to ensure that such processes can be performed accountably.

As previously explained in the preceding chapters, the problem of unequal workload among judges within a specific court, or among judges serving at different anti-corruption courts, is a problem commonly faced by all courts. In general, the problem of maldistribution of judges is a prevalent problem faced by judicial bodies in Indonesia, indicated by sharp disparity in workloads between judges serving at one court and judges serving at another. Particularly with regard to anti-corruption courts, data driven calculation or mapping of needs should first be carried out by the Directorate General before initiating an *ad hoc* judge selection or career judge certification process. To map the need for *ad hoc* judges, attention should be given to the quantity and expertise needed based on data regarding the volume and composition of corruption cases that are received by a court. Mapping of the number of judges needed should refer to the applicable regulations that govern the composition of the panel of judges to preside over corruption related cases. Given that corruption court hearings are conducted before a panel of three judges, the minimum *ad hoc* judges to serve at a court should be two persons. Another consideration for determining the number of judges that needs to be supplied is the volume of corruption related cases that come before the court within a one-year period. Moreover, the types of corruption cases being processed based on the legal issue in dispute also need to be identified. The mapping of the types of corruption cases helps in determining the expertise that the recruited *ad hoc* judges would need to have. The criteria that must be met by *ad hoc* judges based on the mapping exercise must be reflected in the *ad hoc* judge selection system that will be implemented. During the announcement of the selection process, information on the expertise criteria must be made clear to ensure that candidates with the proper competence apply. Finally, the selection process should be carried out in accordance with the identified needs of expertise.

### 7.2.5 Strengthening the Anti-Corruption Judge Certification Training System

In addition to the inefficiency of the judge certification system, which is proposed to be corrected through the adoption of the mechanism described in the previous section, certification training for judges also needs to be improved. Judge certification should be limited by a validity period, which can be 5 years, and thus judges would be continually be prompted to improve and update their skills on anti-corruption. Certified judges can renew their certification by partaking in advanced trainings organized by the Supreme Court's Judicial Training Center. If, for example, over a period of five years a judge does not undergo any training or education on anti-corruption, the certification would be considered void. As a consequence of this change, the Judicial Training Center would be required to develop a continuing certification and education system for judges in a more systematic and integrated manner. So far, the continuing education system has not been structured in a long-term program related to the career development of judges at different seniority levels.

Quality of the certification mechanism must also be enhanced, by focusing on basic issues of legal interpretation skills relating to various legal problems arising from corruption offenses, and the elaboration of legal arguments in court decisions. Additionally, continual updating of training materials also needs to be done to enable judges to keep abreast of new developments in knowledge and enforcement of anti-corruption legislations. Updating of materials can also be done by studying the anatomy of corruption offenses that are prosecuted before the courts in order to ensure that the need for expertise is based upon the actual cases adjudicated.

The existing e-learning platform managed by Judicial Training Center should also be continually developed to help judges anticipate the latest developments in anti-corruption laws. To maintain the quality of certification training, in addition to efforts to continuously update modules and keep up with legal developments, standardization of tutors/trainers is also very important. The involvement of trainers in the certification training of anti-corruption judges must be done carefully by taking into account the competence and experience of trainers in handling corruption related cases.

Not only for career judges, education for *ad hoc* judges should also be given attention. Currently the only education available for *ad hoc* judges is the anti-corruption judge certification training. The certification program developed by the Supreme Court is designed to meet the needs of career judges prior to becoming anti-corruption judges. It is not necessarily in line with the specific needs of *ad hoc* judges. Where an *ad hoc* judge did not go through formal legal education, for example, an education program that is heavily oriented towards the need of career judges would make it not suitable for the *ad hoc* judges. Given the understanding that career and *ad hoc* judges fulfill different functions, *ad hoc* members of the judicial bodies do not need to be made as judges who share the same skills as their career counterparts. Not all skills of career judges need to be possessed by *ad hoc* judges. However, *ad hoc* judges should supplement and bring added value to a panel of judges. *Ad hoc* judges should of course possess basic legal knowledge and the skill to formulate decisions, although they might have a different set of competencies from career judges. Therefore, it is advisable that training programs for *ad hoc* judges be formulated specifically to cater to their unique needs.

### 7.2.6 Strengthening the Specialized Function of *Ad Hoc* Judges

Article 12 of Law 46 of 2009 and the corresponding elucidation of such article provides that *ad hoc* judges are selected from among law school graduates or graduates of other discipline of knowledge and has experience in law where they are needed due to their expertise in line with the complexity of corruption cases. In reality, however, the paradigm of *ad hoc* judges as persons having specific expertise has not been fully translated into the selection process and the profile of the recruited *ad hoc* judges. Meanwhile, the need for the specific knowledge of *ad hoc* judges to bring added value to a panel of judges examining corruption cases becomes more conspicuous. The Supreme Court have to clarify the criteria needed from an *ad hoc* judge to be applied in the selection process. It should be noted, however, that not all corruption cases require specific set of skills or knowledge. In this context, *ad hoc* judges are needed to provide

perspective and strengthen the legitimacy of anti-corruption court decisions.

Therefore, the process of determining the need for *ad hoc* judges must be clearly articulated by the Supreme Court. Not only covering the number, but also the expertise needed. Determination of these needs can be based on the anatomy of corruption cases submitted to the courts. The Directorate General should provide information on the needs and/or expertise based on the data before it can carry out the *ad hoc* judge selection process. To meet the need for expertise, *ad hoc* judges are proposed to be selected from institutions such as BPKP, LKPP, and the Ministry of Finance which have suitable expertise in resolving corruption cases in the procurement of goods and services. In this context, the Supreme Court can utilize "the talent-scouting" method to the relevant institutions. Efforts to find *ad hoc* judges based on expertise can also be opened to the public as long as the criteria for the expertise sought have been determined.

In order to become more efficient, the Supreme Court needs to assigned *ad hoc* judges to a particular court but with regional or even nationwide jurisdiction. The coverage of their assignment will be depending on the scarcity of expertise they possessed. The expertise of the *ad hoc* judges can be classified into two types, namely general and special expertise. General expertise is the expertise needed to examine most corruption cases submitted to the court. While special expertise is highly required in the examination of corruption cases but very unlikely to be possessed by a large number of *ad hoc* judges (rare skills). *Ad hoc* judges with special expertise do not have to be on duty full time, but can be called upon to serve when needed. He/she would work full-time only during the examination of a particular case. To implement this system, the Supreme Court needs to maintain a list of *ad hoc* judges' names and their expertise. When needed, an anti-corruption court can communicate its need for an *ad hoc* judge with specialized expertise to the Directorate General, and the judge would then be assigned by the Supreme Court.

The measure is expected to gradually strengthen the role of the expertise of *ad hoc* judges serving at anti-corruption courts. The

approach also has the effect of keeping the selection process free from candidates who are merely looking for a job, but lacking the specialized skill needed to bring added value to the panel of judges formed at anti-corruption courts, as has often been complained by the public and court personnel.

The methods by which to select and assign *ad hoc* judges proposed above affects the concurrent holding of multiple positions by and remuneration for *ad hoc* judges. In the case of *ad hoc* judges having specific skills and nationwide jurisdiction, a different compensation scheme needs to be applied, which should be adjusted to their work hours. The concurrent holding of positions needs to be specifically provided in order to allow a person not currently serving as an *ad hoc* judge (for example, as there are no case being examined that require his/her special expertise) to not having to relinquish his/her position. Additionally, this mechanism requires the Supreme Court to allocate adequate budget to cover the cost of mobilizing *ad hoc* judges to different anti-corruption courts.

### 7.2.7 Strengthening of Registrar's Office of the Anti-Corruption Courts

The performance of the anti-corruption courts also depends on the support of good case administration and management system, which is the responsibility of the Court Registrar. Currently, the Special Registrar's Office for the anti-corruption court has been formed. However, the responsibility of this special Registrar's Office is expanding to reach other special cases in the court besides corruption cases. Unlike other special cases, the number of corruption court cases is quite large. Therefore, a special Deputy Registrar for corruption cases needs to be established in courts. This is in accordance with the mandate of Law 46 of 2009.

Another issue that needs attention is the capacity of acting registrars (Panitera Pengganti) in corruption cases. Complaints about the high workload of acting registrars at the corruption court are also found. Similar to the judges, the high workload is assumed to



be caused by the coverage of their responsibility which is not limited to corruption cases only. Therefore, it is necessary to consider appointing special acting registrars for corruption cases. The number of the acting registrars is adjusted to the number of cases that are tried by each anti-corruption court. The provision of acting registrars in the anti-corruption court can be done gradually by weighing the workload. Finally, to be able to carry out their functions effectively, acting registrars for corruption cases should also receive special training and education that can boost their productivity.

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The result of this comprehensive analysis is a Report that does much to explain the public perception that the provincial courts are not living up to the standard previously set by the sole Jakarta Anti-Corruption Court before the expansion of the system. It demonstrates why the perceived failings of the system are not simply due to individuals but rather to the strains placed upon the institution as a whole after the requirement of a too-rapid expansion. Based upon the exposure of these systemic features, the Report is able to arrive at sound recommendations for reform and change that should guide the Supreme Court and policy makers in addressing the current shortcomings of anti-corruption adjudication in Indonesia..." (DAVID COHEN)

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