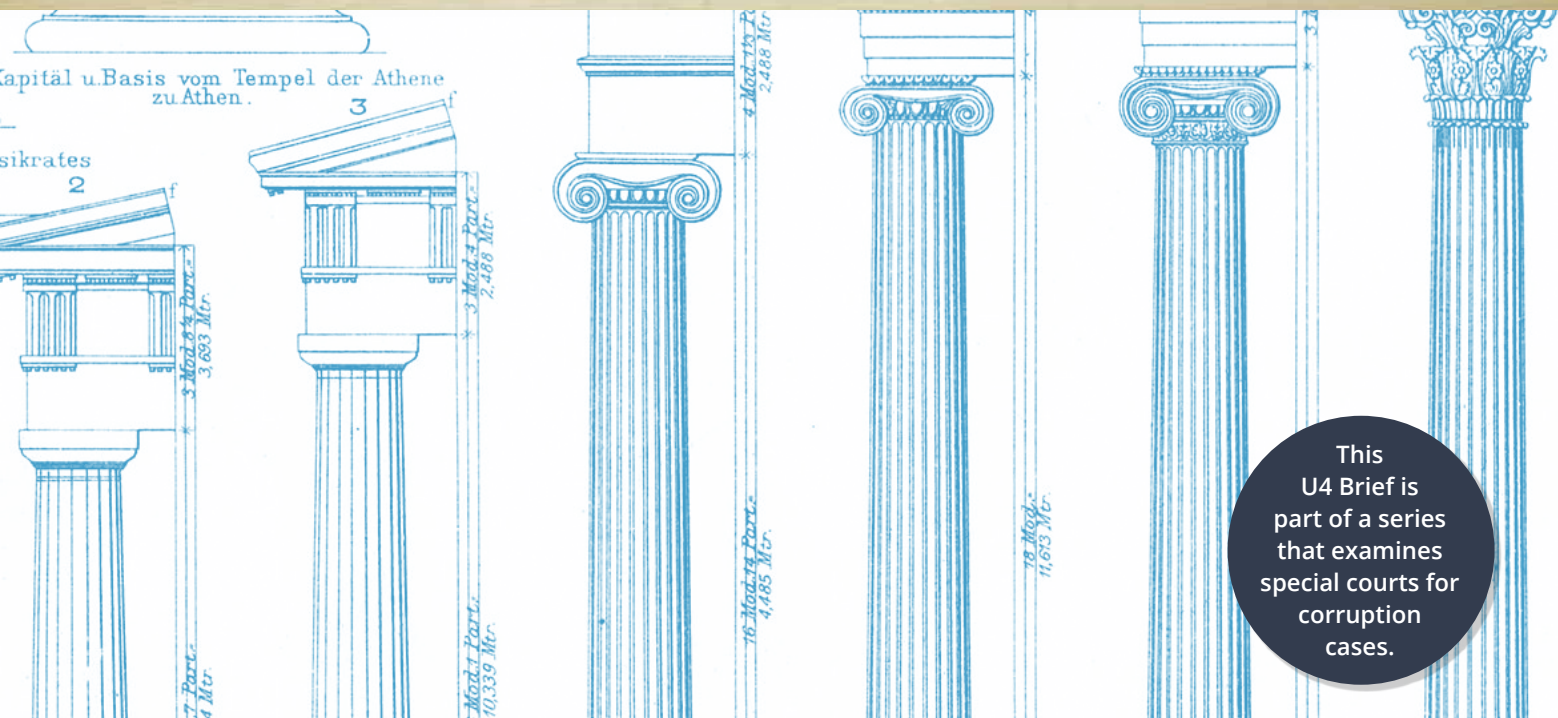


## Specialised anti-corruption courts: Indonesia



This U4 Brief is part of a series that examines special courts for corruption cases.

The Indonesian Court for Corruption Crimes, or Tipikor court, has handled corruption cases for more than a decade. Initially there was only one Tipikor court in Jakarta, exclusively hearing cases from the Corruption Eradication Commission (KPK). Now, all 34 Indonesian provinces have Tipikor courts, which take on cases from both the KPK and the public prosecution service. One challenge in expanding the court to the regional level has been human resource constraints. The court's original rationale was to ensure maximum integrity on the judges' panel, but a lack of highly qualified and dedicated judges has undermined this goal. One solution to retain integrity and competence could be to assign ad hoc judges on a case-by-case basis rather than giving judges fixed-time contracts.

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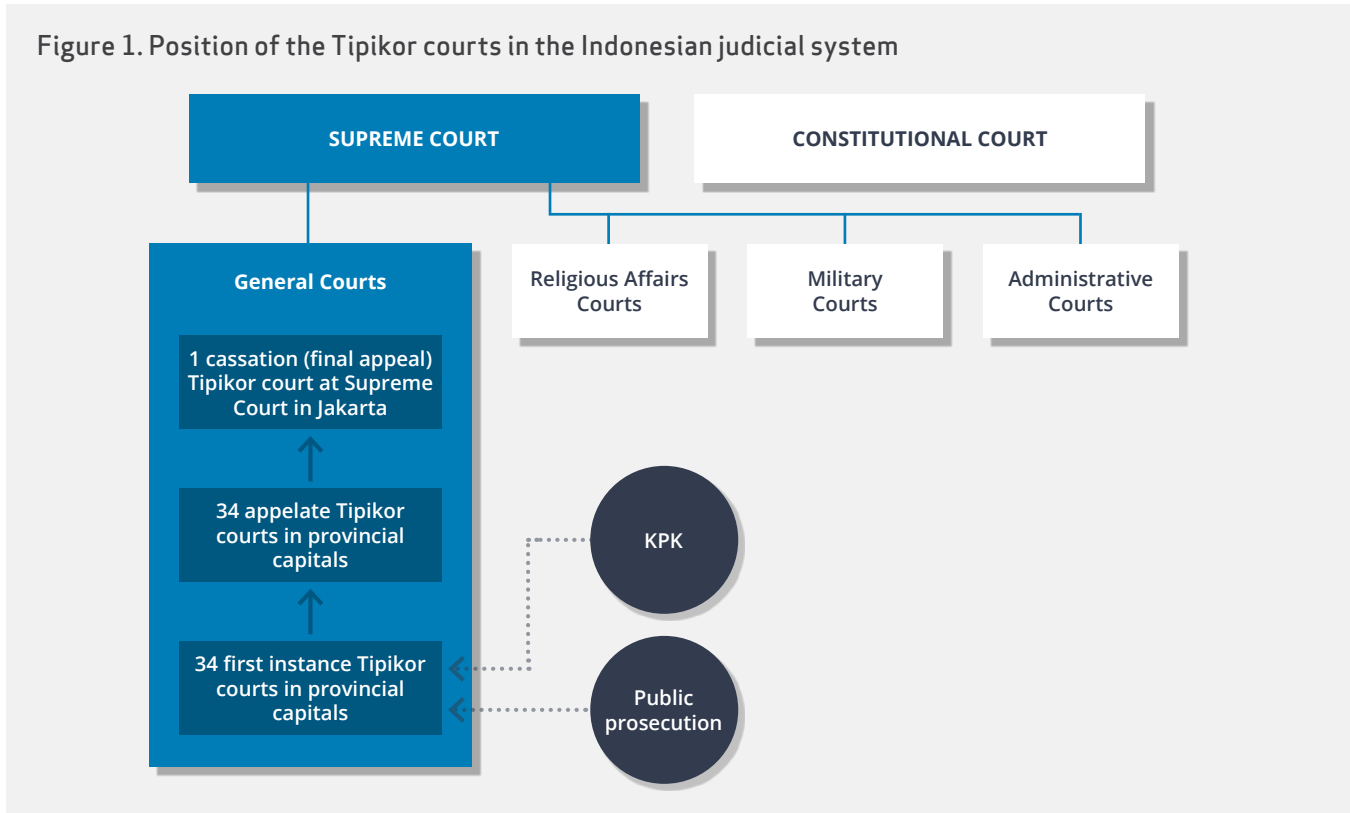
Tipikor court) was established by law in 2002 as part of the general court system, and began operating in 2004.

Until 2010, the Tipikor court of first instance was located at the Central Jakarta District Court, with appeals going to special Tipikor panels at the Jakarta High Court and ultimately the Supreme Court. There were five judges at each of these levels: two career judges and three ad hoc judges.<sup>2</sup> Ad hoc judges were (and still are) selected in a multi-tiered process by the Supreme Court from outside the current judiciary, with a tenure of five years. The 2002 law also established the Indonesian Corruption Eradication Commission (Komisi Pemberantasan Korupsi, or KPK), and the original Tipikor court only heard cases prosecuted by the KPK. The public prosecution service also brought corruption cases, but these went to trial in the general courts.

### Background and key features

In the Indonesian judicial system, ordinary cases are heard in the general courts – in the first instance by district-level courts, with appeals to provincial high courts and from there to the Supreme Court.<sup>1</sup> The Court for Corruption Crimes (Pengadilan Tindak Pidana Korupsi, commonly known as Pengadilan Tipikor, or

Figure 1. Position of the Tipikor courts in the Indonesian judicial system



With two tracks for handling corruption cases, different procedures and stark differences in conviction rates led to accusations of legal dualism. The same defendant was likely to experience a different fate depending on whether he or she was prosecuted by the KPK and tried in the Tipikor court or, alternatively, prosecuted by the Attorney General’s Office and tried in the general courts. Together with the KPK, the Tipikor court gained prominence and built public support with a nearly 100% conviction rate in over 250 cases. Every time the KPK prosecuted a case in the Tipikor court, the defendants were found guilty and sentenced to a term of imprisonment. This conviction record was primarily attributed to two factors. First, the quality of KPK prosecutions was considered high. Second, a fixed majority of ad hoc judges sat on all anti-corruption court panels. This meant that the career judges on the panel – whose integrity might be questionable – would be overruled in a split decision. The high rate of convictions in the Tipikor court contrasted with the much lower conviction rates in the general courts that still handled most corruption cases. Indonesia Corruption Watch, a leading nongovernmental watchdog, reported that from 2005 to mid-2009, only 51% of the corruption cases prosecuted by the Attorney General’s Office resulted in a conviction. And when general courts did convict, sentences were typically much lower than those handed down by the Tipikor court.<sup>3</sup>

In 2006, the Constitutional Court held that this dual-track system was unconstitutional. The legislature responded in 2009 by passing a new law that expanded the Tipikor court’s jurisdiction to hear all corruption cases (as well as cases involving money laundering and the underlying predicate offenses), whether investigated and prosecuted by the KPK or by the public prosecution service. Regional anti-corruption courts were to be established within two years in all 34 provincial capitals and later in all districts and municipalities (more than

350 across the archipelago). The 34 courts were set up in the provincial capitals, but this expansion of Tipikor has already posed logistical and human resource challenges. It is unlikely that more courts will be established at district level in the near future because of a lack of specialised career judges and ad hoc judges.

Figure 1 shows the current position of the Tipikor courts within the general court system. Corruption cases are heard at first instance at the district court level, with appeals at the high court level and cassation at Supreme Court level. The Tipikor court at the Jakarta District Court retains special authority to hear cases of corruption committed by Indonesian citizens abroad.

The new law also did away with the fixed ratio of two career and three ad hoc judges that the original Tipikor court in Jakarta had. Instead, the panel composition is now left to the discretion of the head of the general court that hosts each Tipikor court. Each panel still needs an uneven number of judges (to prevent tie votes) and must include both career and ad hoc judges.<sup>4</sup>

## Rationales and performance

The main rationale for creation of the KPK and the Tipikor court in 2002, as stated in the law, was that existing law enforcement agencies were “not yet effective and efficient” in addressing corruption, which had resulted in losses to the state budget, damaged the country’s economy, and impeded national development. The official commentary accompanying the 2002 law begins by declaring corruption an “extraordinary crime” and affirming the need for “extraordinary law enforcement methods by the establishment of a special body that has broad powers, is independent and free of any [outside] dominance in its efforts to combat corruption optimally, intensively, effectively, professionally and continuously.”<sup>5</sup>

### Efficiency

The 2002 law established strict timelines for the Tipikor court: 90 days for trials, 60 days for first appeals, and 90 days for cassation appeals to the Supreme Court. These deadlines were meant to avoid a backlog of undecided cases.<sup>6</sup> During the time when the single court in Jakarta only heard cases brought by the KPK (2004–10), the court was never in danger of developing a backlog. If anything, the capacity of the KPK to investigate and prosecute cases (never more than 40 a year) was the limiting factor.<sup>7</sup>

This has changed considerably since the 2010 revisions. The time limits for corruption cases have been amended to 120–60–120 days, and the workload of the Tipikor courts has increased with the expansion of their jurisdiction to all corruption cases, not only those prosecuted by the KPK. The public prosecution service, with offices all over the country, prosecutes far more corruption cases than does the KPK, although they are often smaller cases against lower-profile defendants. For example, in 2014 the public prosecutors brought over 600 cases before the special courts, while the KPK brought only about 50. The same year a total of 382 cases received a final verdict, with the majority of cases going to appeal.

Unfortunately, there are no disaggregated data on the length of court processes in corruption cases. Approximately 80% of special crime cases (including narcotics cases) took less than 12 months at first instance level in 2014, although clearance levels go down at appeals level: the higher the court level, the more likely it is that a special crimes trial will take more than a year.<sup>8</sup> The statistics published by the Supreme Court do not allow for a more reliable assessment of the efficiency of the Tipikor courts, or of backlogs at specific courts in the regions.

In practice, the Tipikor courts are not immune to inefficiencies observed at other courts, including the challenge of scheduling trials. Parties to ongoing cases are invited to appear at 9 a.m. on a particular day. The case whose parties (defendants, lawyers, prosecutors, witnesses, and judges) are fully assembled first is the case that gets heard first. This produces chaotic scenarios in the waiting area, with hours of waiting involved for those whose parties have not all appeared. This is highly inefficient for everyone but is reportedly a common practice throughout the Indonesian court system (and in other countries as well).

Another potential inefficiency relates to the practice of career judges on the Tipikor panels continuing to hear other, non-corruption-related cases in the general courts. Although the law releases them from deciding other cases while handling corruption cases, this is reportedly not done in practice. From the perspective of the efficiency of overall case assignment, it makes sense to let judges hear other cases when there are few corruption cases at their court. On the other hand, the degree to which this impedes the speedy resolution of the courts' many corruption cases needs to be evaluated.

### Integrity and independence

The main reason for the establishment of the Tipikor court was a lack of trust in the existing judiciary to handle corruption cases impartially and effectively. Lawmakers believed that having a majority of ad hoc judges, with decisions by majority vote,

would help insulate the court from improper influence. On the small scale of the original court in Jakarta, this seems to have worked. There were no concerns about the integrity of the ad hoc judges until 2010; if anything, there were concerns about their "overzealousness" in convicting defendants.<sup>9</sup> However, the post-2010 decentralisation made it necessary to recruit a much larger number of ad hoc judges, and their reputation has deteriorated considerably since then. While many applications have been submitted, there has been public concern about the qualifications and integrity of the applicants.<sup>10</sup>

Ad hoc judges must relinquish any government position they may hold and are explicitly prohibited from concurrently holding a number of other positions.<sup>11</sup> Despite these explicit provisions against potential conflict of interests, cases of ad hoc judges at the regional level "moonlighting" as lawyers have brought disrepute to the position. The convictions of several ad hoc judges (as well as career judges) for receiving bribes have undermined the image of ad hoc judges as clean and trustworthy outsiders to the system.<sup>12</sup> When the 2009 law left the decision on the ratio between ad hoc and career judges up to the head of each court, there was an outcry by anti-corruption activists, because they saw the assignment of ad hoc judges as a means of ensuring the impartiality and integrity of the Tipikor courts. As it turns out, ad hoc judges can be corrupted as well. While there was a carefully selected and highly motivated majority of ad hoc judges on the bench of the original Tipikor court in Jakarta, this has not always been the case in the decentralised post-2010 system. Reasons include less immediate oversight by the Supreme Court and national media, and a limited talent pool from which to draw. Incentives do not work in favour of integrity: the total income of ad hoc judges is much lower than that of career judges, who are entitled to special benefits and have security of tenure.

The decentralised Tipikor courts did not uphold the 100% conviction record of the original Jakarta-based court. As some of the acquittals coincided with instances of judicial impropriety, as mentioned above, the conviction record of the courts has unfortunately often been equated with the integrity of the courts. A more nuanced assessment of both judicial integrity and performance is required. A 100% conviction record does not guarantee a judge's integrity, nor does an acquittal necessarily mean that a panel of judges has been corrupted. If the quality of an indictment and the supporting evidence are so weak that judges are left with no choice but to acquit, then scrutiny and criticism should be directed towards the law enforcement agencies that investigated the case.<sup>13</sup>

### Expertise

Specialised expertise played a lesser role than integrity in providing a rationale for the creation of the original Tipikor court. From the beginning, career judges have been required to undergo special training and obtain a certificate in order to hear corruption cases. Ad hoc judges are selected based on their qualifications by a committee composed of Supreme Court staff and representatives of civil society, and they are also required to undergo some training. However, with the decentralisation of the Tipikor Court and the elimination of special allowances as part of general civil service reform in Indonesia, it has become more difficult to attract the most qualified candidates.





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Anecdotal evidence suggests that career judges are reluctant to become certified and take on the additional workload of corruption cases. The low salaries of the ad hoc judges are not competitive with salaries in a private law firm and thus not attractive to many with the required experience; as noted above, those who do fill the positions may be prone to moonlighting, especially in regions with few corruption cases. The general perception conveyed by those interviewed for this study is that being a judge, whether career or ad hoc, on a Tipikor court has become less prestigious than previously and that the qualifications and motivations of some ad hoc judges are not adequate.

## Challenges and controversies

The early challenges to the Tipikor court, such as the constitutional review and the polarised debate over its 100% conviction record and the alleged overzealousness of its ad hoc judges, have been discussed elsewhere.<sup>14</sup> In the second decade of the court's existence, operational and human resource challenges have become more apparent, in particular the need for qualified and motivated judges. The rationale for having ad hoc judges has been undermined by problems with their integrity and qualifications. A possible solution suggested by various stakeholders during the research for this study is the assignment of ad hoc judges on a case-by-case basis from a pool of certified experts across the archipelago. Ad hoc judges would not work full-time for the Tipikor court, but would pursue their ordinary professions and be called upon by the Supreme Court to hear cases when the need for their particular expertise arose. If this process were carefully managed, the risk of conflict of interests would be lower than now, as judges could be assigned to

regions distant from their homes. This might also make working as an ad hoc judge more interesting to qualified jurists who wish to continue pursuing their careers in well-resourced law firms while hearing cases occasionally.

## Lessons learned

In sum, Indonesia's experience with the Tipikor court suggests the following lessons:

- In recent years, problems with judges' integrity and qualifications have rendered the original rationale for ad hoc judges obsolete. One way to diminish the risk of conflict of interests and moonlighting, and to increase the pool of expertise, would be to assign ad hoc judges on a case-by-case basis from a roster of experts across the country.
- More data on the court's performance (e.g., length of trials, sentencing) and comparative analysis are needed in order to identify bottlenecks and possible solutions. Some non-governmental organisations and universities have undertaken such research and could step up their efforts with financial and technical support from donors.<sup>15</sup>
- The Tipikor court is just one link in the criminal justice chain. The performance of Indonesian law enforcement agencies is beyond the scope of this paper, but concerns about acquittals and sentencing need to be addressed holistically, including a review of the incentives and operations of the investigating and prosecuting agencies.

*The author would like to thank the Reform Team at the Supreme Court as well as staff members at Indonesia Corruption Watch, the Tipikor court in Jakarta, and the KPK for sharing their experiences and insights on the matter during semi-structured interviews in September 2015.*

## Endnotes

1. In addition to the general courts, the judicial system also includes administrative courts, religious courts, and military courts, as well as a separate constitutional court.
2. The main requirement to qualify for the position is a law degree, or another degree, and at least 15 years' legal experience for ad hoc judges at first and second instance, or at least 20 years' legal experience for ad hoc judges at Supreme Court level.
3. Indonesia Corruption Watch, *Hakim Karir Juara Bebasan Terdakwa Korupsi* (Jakarta, 2009). Cited in S. Schütte and S. Butt, *The Indonesian Court for Corruption Crimes: Circumventing Judicial Impropriety?*, U4 Brief 2013:5 (Bergen, Norway: U4 Anti-Corruption Resource Centre, 2013).
4. S. Butt, "Asian Law in Transition: Translator's Note on the Indonesian Corruption Court Law," *Australian Journal of Asian Law* 11, no. 2 (2010): 302–17.
5. Law 30 of 2002 on the Indonesian Corruption Eradication Commission.
6. S. Fenwick, "Measuring Up? Indonesia's Anti-Corruption Commission and the New Corruption Agenda," in *Indonesia: Law and Society*, ed. T. Lindsey (Annandale, NSW: Federation Press, 2008), p. 413.
7. KPK, "Rekapitulasi Penindakan Pidana Korupsi," Portal Pengetahuan Antikorupsi (Anti-Corruption Clearinghouse), 30 April 2016, <http://goo.gl/nMHMgk>.
8. Mahkamah Agung Republik Indonesia (Supreme Court of Indonesia), *Laporan Tahunan 2014* [Annual report 2014] (Jakarta, 2015), <https://mahkamahagung.go.id/>. Notably, it was the first time that corruption cases were outnumbered by narcotics cases in the special crimes category at first instance, although corruption cases still hold the record for going on appeal in this category.
9. S. Butt and S. Schütte, "Assessing Judicial Performance in Indonesia: The Court for Corruption Crimes," *Crime, Law and Social Change* 62, no. 5 (2014): 603–19.
10. Koalisi Masyarakat Sipil Pemantau Peradilan, "Meragukan, Kualitas Calon Hakim Ad Hoc Tipikor," 2013, <http://goo.gl/NfuUm4>.
11. These positions include enforcer of judicial decisions; guardian, trustee, or official connected with a case they are hearing; leader or member of a state institution; head of a region; lawyer; notary or land title official; business person; or leader or member of a political party (author's translation of Tipikor Law 46/2009, art. 15).
12. Butt and Schütte, "Assessing Judicial Performance in Indonesia."
13. Ibid.
14. Schütte and Butt, *The Indonesian Court for Corruption Crimes*; Butt and Schütte, "Assessing Judicial Performance in Indonesia."
15. S. Schütte, P. Reddy, and L. Zorzi, *A Transparent and Accountable Judiciary to Deliver Justice for All*, UNDP/ U4 joint report (Bangkok: UNDP, 2016), 37–39, <http://goo.gl/fPc4dC>.