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When anti-corruption norms lead to undesirable results: learning from the Indonesian experience

Richo Andi Wibowo[1]

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Abstract This paper analyzes how and why adverse side-effects have occurred in the implementation of two articles of Indonesia's anti-corruption law. These articles prohibit unlawful acts which may be detrimental to the finances of the state. Indeed, the lawmakers had good intentions when they drafted the two articles. They wanted to make it easier to convict corrupt individuals by lowering the standard of evidence required to prove criminal liability. The implementation of these articles has raised legal uncertainty. The loose definition of the elements of the crime enables negligence and imperfection of (public) contracts to be considered as corruption. The Constitutional Court has issued two rulings to restrict and guide the interpretation of these articles. However, law enforcement agencies (Supreme Court and public prosecutors) have been unwilling to adhere to the rulings. There are two possible reasons for this. First, as has been argued by several commentators, the law enforcement agencies have misinterpreted the concept of "unlawfulness". Besides, the law enforcement agencies wish to be seen to be committed to prosecuting and delivering convictions in corruption cases. To do so, they need to maintain looser definitions of the elements of the offence. This paper endorses the Constitutional Court rulings and provides additional reasons in support of their stance. The paper can be considered as a case study for other countries that may be contemplating similar legislation.

Introduction

Indonesia has suffered seriously from corruption for many years. The first Corruption Perceptions Index released in 1995 ranked Indonesia as the most corrupt of 41 countries [1]. The likely reason for this extreme level of corruption was the Soeharto dictatorship (1965–1998). Soeharto centralized power, suppressed opposition parties [2], and restricted freedom of expression [3]. He granted business monopolies to

✉ Richo Andi Wibowo
richo.wibowo@ugm.ac.id

[1] Faculty of Law, Universitas Gadjah Mada, Jl. Sosio Justitia 1, Yogyakarta 55231, Indonesia

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relatives and cronies, and tolerated widespread corruption among his subordinates in exchange for their loyalty [3]. Fortunately, Indonesia has displayed a consistent trend of reducing corruption since Soeharto fell in 1998, although a large degree of corruption remains today [4].

A year after the collapse of the Soeharto dictatorship, Indonesia reformulated its Anti-Corruption Act by issuing Law No. 31 of 1999 on the Eradication of Criminal Acts of Corruption, as improved by Law No. 20 of 2001 ('Anti-Corruption Act'). This Law identifies seven legal categories of corrupt acts [5]: (i) bribery, (ii) embezzlement, (iii) extortion, (iv) fraud, (v) conflict of interest in public procurement, (vi) personal gratification and (vii) unlawful acts which may be detrimental to the finances of the state.

This paper will argue that the last category is problematic. It has caused serious problems for public officials; they are afraid that any risky decision which may (or has the probability to) harm the finances of the state will lead to their imprisonment [6, 7]. Also, it has been reported that many civil servants are reluctant to take decisions regarding public procurement [8, 9]. The negative impact of the provision is illustrated by reports that some public officials prefer to resign rather than fulfill public procurement duties [10]. There are also claims that civil servants have intentionally failed a national test on procurement procedures in order to avoid being assigned to such work [11]. As a result, some public institutions have possibly been understaffed and unable to conduct public tendering normally [12].

This paper will begin by elaborating the elements of the two relevant articles and their original intent. The author will then explain the first ruling made by the Constitutional Court to narrow the interpretation of the articles. It will also discuss three cases in which the Supreme Court and lower courts have ignored the ruling of the Constitutional Court. The paper will continue by discussing the second ruling issued by the Constitutional Court to restrict the interpretation of the articles. It will be argued that the two rulings made by the Constitutional Court are clear and robust and that there is no justification for circumventing them. The author will also suggest additional legal reasons to support the implementation of these rulings.

Elements of the offences and their original intent

Unlawful acts detrimental to the finances of the state are regulated by Articles 2 (1) and 3 of the Anti-Corruption Act. In essence, the elements of Article 2 (1) are that anyone who; (i) performs an unlawful act; (ii) to enrich himself, or another person, or corporation; (iii) in such a way which *may* be detrimental to the finances of the state, shall be liable to life imprisonment or imprisonment for up to twenty years and a fine not exceeding IDR one billion. Article 3 imposes similar penalties on anyone who: (i) intentionally enriches himself, or another person, or corporation; (ii) by abusing his power; (iii) that he holds due to his position as a public official; (iv) in such a way which *may* be detrimental to the state finances (bold emphasized by the author). Since 1999, these two Articles have been the most frequently used by the public prosecutor's office to trial cases of alleged corruption [5, 13].

According to the official elucidation of Article 2 (1), the term "unlawful act" has both a formal and a substantive (material) sense. The formal sense means an action that

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satisfies all of the elements of a crime. The material sense means an action can be punishable, even though it is not specifically prohibited in the law, if it violates the sense of justice or social norms.

The elucidation of this article also states that the word "may" before the phrase "be detrimental to the state finances" means that it is not necessary to prove whether the action is really detrimental to state finances. The elucidation of Article 3 gives the same interpretation to the word "may".

According to parliamentarian Mrs. Nursyahbani Katjasungkana, the lawmakers intended the articles to have a "deterrence effect for corruptors and to prevent actions which can be harmful to state finances" [14]. Thereby, these Articles were designed to be flexible in preventing various activities, including prohibiting unethical actions. She stressed that these articles should enable, for example, prosecution of members of regional parliaments who had unethically decided to increase their salaries when allocating the annual budget.[1]

The first constitutional court ruling and responses

Articles 2 (1) and 3 have been used to convict defendants even though it may be questioned whether their actions were detrimental to state finances or abhorrent to a sense of justice or social norms. That motivated one suspect, Dawud Djatmiko, to petition the Indonesian Constitutional Court in 2006 [14].

Before continuing the discussion, it is relevant to explain the role of Indonesia's Constitutional Court and its relationship with the other courts. According to Law No 48/2009 concerning Judicial Power, there are two categories of Indonesian courts. In the first category is the hierarchy of "normal" courts, headed by the Supreme Court, which decide questions of fact. In the second category is the Constitutional Court which has jurisdiction, inter alia*,* to review whether or not the legislation is compatible with the Indonesian Constitution. The Court was officially established on August 13, 2003 by Law No 24/2003 concerning the Constitutional Court. According to Article 24C of the Indonesian Constitution, Article 10 (1) of the Law 24/2003 and Article 29 (1) of the Law 48/2009, Constitutional Court rulings are "final and binding".

In practice, the Constitutional Court rulings are respected. One example of the Constitutional Court's ruling is that the education sector shall be allocated at least 20 % of the national annual budget; this ruling has been consistently followed by the Government and the House of Representatives [15]. Nevertheless, as it will be argued below, rulings regarding Articles 2 (1) and 3 of the Anti-Corruption Act have not been consistently adhered to by the "normal" courts.

Djatmiko requested the Court to annul the word "may" as stipulated in Articles 2 (1) and 3 and to annul the elucidation of those articles. The grounds of the petition were, among other things, that the word "may" led to legal uncertainty; one can be convicted

[1] The context of her illustration was that after Soeharto fell in 1998, the Indonesian government tried to change from a highly centralized style of government to what is called extensive decentralization. This strengthened the power of regional parliaments to, among other things, prioritize the allocation of local government budgets. Nonetheless, local representatives in some regions cut subsidies for education and healthcare in favor of higher salaries for themselves. The central government has issued Government Regulation No 21/2007 to minimize such abuses of power.

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of causing loss of state finances based on probable loss instead of actual loss. He also argued that the elucidation of Articles 2 (1) and 3 infringes the principle of legality because it applies vague moral standards as the benchmark for conviction.

The Constitutional Court ruled partially in favor of the petitioner. The Court decided to annul the elucidation of Articles 2 (1) and 3 of the Anti-Corruption Act. The Court reasoned that it is a matter of concern that actions not explicitly prohibited by law can be grounds for conviction, as this creates legal uncertainty. The Court explained that the elucidation contradicts Article 28 D of the Indonesian Constitution which states "every person shall be entitled to (…) equitable legal certainty as well as to equal treatment before the law." Moreover, the Court argued that social norms vary geographically; therefore, social norms cannot be utilized as a benchmark to determine legality. Finally, the Court found that the elucidation may create confusion at the operational level. It could lead law enforcers to apply private law standards (*onrechtmatigedaad*) to criminal law (*wederrechtelijkheid*), because the benchmark definition of unlawfulness is based on vague standards.

The Constitutional Court, however, regarded that it is hard to prove and estimate the extent of state financial loss in corruption cases. Therefore, the Court decided to retain the word "may" in the phrase "may be detrimental to the state finances" as a means of easing the burden of proof. The court considered that this phrase does not obstruct legal certainty provided that law enforcers can show sufficient evidence that the defendant has enriched himself/herself, another individual(s), and/or a corporation by conducting an unlawful act.

In practice, the Supreme Court has circumvented the Constitutional Court ruling by issuing its own interpretation. One example involved a commissioner of the (Komisi Pemilihan Umum) KPU or the General Election Committee [16]. This case was decided by the Supreme Court approximately two months after the Constitutional Court ruling in *Djatmiko*.

The Kantraprawira case

The KPU needed to acquire election ink used to mark voters' fingers. On February 17, 2004, Kantaprawira - as the head of a KPU procurement committee - invited four companies to submit a tender. However, their bids were all above the budget limit. He then summoned them one by one for further negotiations. A week later, Kantaprawira directly appointed three different companies. While the four companies firstly mentioned offered to supply imported ink, the three appointed companies quoted for domestically produced ink.

Kantaprawira was accused of breaching Presidential Decree 80/2003 concerning Public Procurement Guidelines because he opened negotiations before the cost estimate (*harga perkiraan sendiri)* had taken place. The guidelines explain that the cost estimate is used as the benchmark to assess whether or not the price offers are reasonable; therefore, the procurement committee should be aware of the cost estimate before assessing the bids. Also, Kantaprawira was accused of infringing the guidelines by directly appointing suppliers without competitive tender. Further, the public prosecutor highlighted that a visit by Kantaprawira to ink producers in India was financed by the four ink importing companies whereas he had received an official travel support from the KPU.

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Kantaprawira argued that the KPU had had insufficient time to acquire the ink through competitive tendering. He also argued that, due to the limited time, it was too risky to select merely one supplier. Thereby, he claimed that he should have been permitted to conduct a non-competitive tender under a clause in the guidelines regarding exceptional circumstances. However, Kantaprawira's plea was silent on the facilities and accommodation provided to him by the four companies; this matter also was not contested in the court rulings. Instead, the courts focused on the issue of unlawful actions which may be detrimental to state finances.

In essence, the District Court of Central Jakarta considered that Kantaprawira had committed an unlawful act by breaching the procurement guidelines. The courts also regarded that the ink price was too expensive; thereby, his action was considered as enriching a corporation to the detriment of state finances. The Court instructed him to pay IDR 1.38 billion to replace the probable loss which the state may have incurred due to the award of an overpriced contract. Besides, the Court sentenced him to four years and three-months' imprisonment and a fine of IDR 200 million.

The Appeal Court of Jakarta Province agreed with the ruling of the District Court except for the instruction to pay IDR 1.38 billion. According to the Appeal Court, Kantaprawira never utilized or enjoyed the IDR 1.38 billion (as the money was transferred to all seven suppliers). The Supreme Court upheld the decision of the Appeal Court. In its decision, the Supreme Court explicitly acknowledged that the elucidation of "unlawfulness" had been annulled by the Constitutional Court, but decided to circumvent the Constitutional Court ruling by insisting that unlawful acts shall be seen from the material sense. Hence, as Kantaprawira had breached procurement procedure, enriched tenderers, and caused harm to state finances, he was guilty [16].

This Supreme Court decision is questionable, as it boldly violates the Constitution and laws stating the Constitutional Court ruling is final and binding. Few if any Indonesian scholars have criticized the ruling. One Western scholar has argued that Kantaprawira appeared to act in good faith by ensuring successful delivery of essential electoral supplies; therefore, he should not have been found criminally culpable [17]. Butt also cites other cases in which he argues that public officials were wrongfully charged with a criminal offence under Articles 2 (1) or (3).

The author will not repeat Butt's arguments, but will instead posit that these articles also have similar negative consequences for private companies who engage in public tenders. They can be found to have committed corrupt acts due to an imperfection in the tender contract. This is illustrated by two cases: *Bintang Timur* (Surabaya District Court 2014) and *Ahmadi* (Supreme Court 2016). The *Ahmadi* case is discussed because it attracted public attention. The *Bintang Timur* case is discussed because the defendant has frequently conducted training for civil servants on public procurement and has contributed to government publications on procurement. Therefore, although this case is not well known among the public, it has gained attention from public procurement practitioners.

The Bintang Timur case

This case concerns the failure of a company named CV Bintang Timur ('Bintang Timur') to build a working customs office in Indonesia's East Java province. Two

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individuals were found guilty by the court: the commitment officer (the project leader) of the Customs Office and the director of Bintang Timur.[2] The following paragraphs summarize the case and the ruling of the Surabaya District Court [18].

In February 2012, the Customs Office called for a tender to construct an office in Surabaya. Following assessment of the bids, Bintang Timur was awarded the contract on June 30, 2012. Six weeks later, the project leader (Kuncoro) and Bintang Timur signed a deal worth IDR 6.6 billion. According to the contract, construction was to be completed by December 27, 2012.

Bintang Timur used the award decision and the contract to apply for a standby loan of IDR 3.2 billion from Bank Jatim, a bank owned by the government of East Java Province. A standby loan can be requested by a supplier/contractor to help perform a contract; the bank gives a company that has been awarded a government contract a certain amount of credit which can be adjusted based on the terms of the contract [19].

By mid-December 2012 (the precise date is not given), just before the completion deadline, Bintang Timur had only completed 35% of the project. The project leader gave them a 50-day extension (until February 2013). According to Article 93 (1) (a1) and (a2) of Presidential Regulation No 70/2012 concerning Public Procurement, and Ministry of Finance Regulation Number 25/PMK.05/2012, the project leader may grant one extension for a maximum of 50 days. Such extension can only be granted if the project leader believes that the supplier/contractor can finalize its obligations.

The work was still incomplete by the beginning of March 2013. The project leader decided to grant Bintang Timur a further 45 days. He argued that he was justified in deviating from the regulations in order to have the work completed. However, by the end of April, Bintang Timur were still only at 70% completion. The project leader then decided to terminate the contract and reported Bintang Timur to the national blacklisting system.

The judges considered that the project leader and the director of Bintang Timur had fulfilled the elements of corruption classified as "unlawful acts." First, they had breached regulations regarding extensions of time to complete the contract mentioned above. Second, the act of infringing the regulations potentially gave financial benefit to Bintang Timur. Third, the judges deemed that the unlawful acts may have caused a financial loss to the state. According to the judges, if the case had not been detected, Bank Jatim would have continued extending credit to Bintang Timur. This could have harmed the state's finances because the loan would have been classified as a non-performing loan (NPL). According to the judges, the NPL constitutes a probable loss, and in this instance the probability was sufficient to deem that the act (of extending the completion deadline) may harm state finances. The judges explicitly stated that they would not follow the 2006 Constitutional Court ruling. Instead, they adhered to the Supreme Court interpretation of Article 2 (1) and 3 in the Supreme Court circular letter (*Surat Edaran Mahkamah Agung (Sema))* No 07/2012.

This circular will be discussed below. At this point, the author wishes to emphasize that the offence of the director of Bintang Timur relates to imperfections

[2] The court decision regarding Agus Kuncoro is detailed in No. 99/Pid.Sus/TPK/2014/PN.SBY. The official record of this ruling is incomplete. However, the summary information can be found in the court decision database system: https://putusan.mahkamahagung.go.id/putusan/1be160621c51addce14deb3ae902a879, accessed May 19, 2017. The elaboration in this paper is based on the judicial decision of the Director CV Bintang Timur [18], Court Decision No 100/Pid.Sus/TPK/2014/PN.SBY.

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in a (public) contract. It is doubtful that the case was really about corruption, especially because: (i) the judges acknowledged that the loan from Bank Jatim was spent solely on the construction work; and (ii) there was no allegation that the director of CV Bintang Timur made any illegal payment to the project leader in return for the extension.

The Ahmadi case

The Minister of state-owned enterprises (SOEs) initiated a project to produce 16 electric vehicles to be used at the Asia Pacific Economic Cooperation XXI summit in October 2013 (hosted by Indonesia). The cars were to highlight Indonesia's commitment to using renewable energy. The Minister invited SOEs to provide financial sponsorship for the project. Three SOEs, namely PT Perusahaan Gas Negara, PT Bank Rakyat Indonesia, and PT Pratama Mitra Sejati, confirmed their willingness to allocate funds from their corporate social responsibility and sponsorship budgets.

PT Sarimas Ahmadi Pratama - a private company owned and directed by Mr. Ahmadi - was contracted by those SOEs to produce the vehicles. Indeed, there were only a few companies in Indonesia (including Ahmadi's) with the capacity to produce electric vehicles [20]. However, the case does not concern how this company was awarded the contract; it is focused on the "unlawful act" which may be detrimental to the finances of the state – as discussed below.

The judges ruled that the defendant (Ahmadi) was guilty because three elements of the offense in Article 2 (1) of the Anti-Corruption Law were fulfilled. Ahmadi was found to have enriched himself or his corporation (the first element of the offence) because he was paid almost IDR 29 billion to produce 16 electric cars, whereas the cost of producing those cars was likely to have been much lower because, it was argued, they were merely modifications of existing vehicles.

The judges were also satisfied with the prosecutor's argument that the defendant fulfilled the second element of the offense: committing an unlawful act. It was argued that the company improperly produced the electric car; the company was only able to produce four of the required 16 units. The prosecutors also highlighted a range of malfunctioning parts in the cars that were produced. Moreover, the car was considered to be a modification of the Toyota Alphard, and permission had not been obtained from Toyota to make the changes.

On this point, the judges explicitly declared that they were circumventing the Constitutional Court's decision in *Djatmiko* and that they were following Supreme Court jurisprudence in defining unlawfulness in a material sense. The faulty and incomplete products and the absence of permission were sufficient to consider Ahmadi had conducted an unlawful act.

The judges also accepted the prosecutor's argument that the defendant's failure to produce all 16 cars had created financial loss for the state (thereby fulfilling the final element of the offense). The Supreme Court followed the opinion of some Indonesian legal scholars [21, 22], disputed by others [23, 24], that a financial loss to a SOE is a financial loss to the state. Regardless of the rights and wrongs of this issue, the judges of the Central Jakarta District Court found the defendant had caused financial loss to the state, and sentenced him to seven years' imprisonment and a fine of IDR 200 million [25].

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The defendant appealed, but the Appeal Court of Jakarta Province upheld the sentence given by the district court judges [26]. The defendant then submitted a petition to the Supreme Court which increased Ahmadi's sentence to nine years plus the fine of IDR 200 million [27].

The second constitutional court ruling

On January 25, 2017, the Constitutional Court issued its second ruling related to Articles 2 (1) and 3 of the Anti-Corruption Law. A petition was submitted to the Constitutional Court in February 2016 by one ex-civil servant and six active government employees from different provinces in Indonesia. The ex-civil servant, Mr. Firdaus, had been convicted under Article 3 of the Law. Two out of the other six petitioners had been accused of infringing Articles 2 (1) or (3) of the Law while the remaining four claimed that their constitutional rights might be violated by the existence of Articles 2 (1) and 3.

All the petitioners requested the Constitutional Court to re-examine the constitutionality of the phrase "(…) or other persons or corporations (…)" and the word "may" embodied in the Articles 2 (1) and (3) of the Law [28]. They argued that the phrase means civil servants are liable to prosecution for corruption whenever they take a decision which can enrich other persons and/or corporations. They reasoned that no individual or company would enter a contract to become a government supplier/ contractor without the prospect of financial benefit. In addition, the petitioners claimed that the word "may" had caused legal uncertainty. A criminal investigation can be conducted based on probable loss; whereas according to the petitioners, it must be based on actual loss to the state.

The Constitutional Court declined the first request, without stating reasons for doing so. However, it granted the second request. According to the Court, the word "may" has created legal uncertainty because one can be found to have acted corruptly based on a probable or potential loss, rather than an actual loss. In addition, the court considered that the word "may" infringed the principles of *lex scripta* (punishment must be based on written law), *lex stricta* (it has to be interpreted as it is written (strict interpretation)), and *lex certa* (it shall not be multi-interpretative) and, therefore, it violates the Constitution. Moreover, the Court concurred that the word "may" had created undesirable fear among decision makers. They had become reluctant to take important decisions or to exercise discretion related to government spending. The Court stated that, as government spending may trigger economic multiplier effects, this unwillingness to take decisions may hamper Indonesia's economic development.

Although the Constitutional Court declined to annul the phrase "(…) or other persons or corporations (…)," the ruling on the *Firdaus* et al. case should still be welcomed. It narrows the interpretation of Articles 2 (1) and (3) of the Anti-Corruption Law. By so doing, it gives stricter guidance to law enforcers when applying the articles, and will thereby enhance legal certainty. However, it is unknown whether the Supreme Court will welcome this ruling or if it will continue to circumvent the Constitutional Court's decisions concerning these two articles.

It is important to emphasize that not all judges have been circumventing the Constitutional Court rulings on Articles 2 (1) and (3). A leading center of research

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on judicial reform, Lembaga Indepedensi untuk Peradilan (LeIP), found that some judges adhere to the Constitutional Court decision [29], but these are probably in the minority. This may be due to the Supreme Court's circular letter No 07/2012.

Such circulars provide guidance as to how the Supreme Court has interpreted the law, or how it wishes lower courts to interpret the law [30]. Circular letter No 07/2012 contains questions and answers on numerous issues. Two relevant questions include: (i) If a defendant is accused of corruption for breaching a (public) contract, can the defendant be acquitted as he did not commit a crime? (ii) How should a judge regard the elucidation of Article 2 (1) of the Anti-Corruption Law? According to the letter, "acts of the imperfection of a (public) contract which has caused the state financial loss shall be seen as corruption." Moreover, the letter also explicitly declares that "although the elucidation of Article 2 (1) has been annulled by the Constitutional Court, the judges are not bound by that ruling."

Why the supreme court insists on circumventing the constitutional court ruling, and why this should cease

There are at least two possible reasons why the Supreme Court does not adhere to the Constitutional Court ruling. In what follows, the author will start with the arguments put forward by Supardjaja [31], and then suggest another possible reason.

According to Supardjaja [31], many judges and legal scholars misunderstand the concept of unlawfulness in a substantive or material sense. She shows that unlawfulness in a material sense was firstly acknowledged in the Netherlands on *Vee-arts arrest*. In essence, the concept is used to exclude the culprit from culpability because s/he had a lawful excuse; the action is not considered to be contrary to a sense of justice. As the concept excludes culpability, it is considered to have a *negative* function [32]. In the Netherlands, this concept was only applied once and since then has been consistently ignored by the Dutch Supreme Court; therefore, Dutch courts will find a defendant guilty whenever all the elements of an offense are found to have been fulfilled, even if the defendant had substantial reasons to breach the law [31].

Supardjaja explains that, by contrast, in Indonesia, the concept of unlawfulness in a material sense has been interpreted to have a *positive* function - to expand the coverage of norms. Meaning, an action is punishable even if it is not prohibited in the law as long as it is considered to be contrary to a sense of justice or social norms. Supardjaja argues the interpretation by the Indonesian courts seriously infringes the principle of legality. Butt [17] has also echoed the same point; he then stated that the interpretation of the Supreme Court has breached the law and exceeded its jurisdiction.

In addition to the above argument that Indonesia's Supreme Court has misinterpreted the concept of "unlawful in a material sense", this paper suggests that public prosecutors and judges may also be attempting to increase their standing with the public by being seen to be tough on corruption. Annual reports from the Attorney General's Office (the Attorney General is the chief prosecutor in Indonesia) for 2013 and 2015 use the number of prosecutions for corruption as a performance indicator. The 2013 annual report, for instance, declares that the prosecutors had had a target to investigate and prosecute 1430 cases of corruption during that year and that the target had been exceeded, as the office had

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investigated 1653 cases and prosecuted 2023. The report hailed this performance as an “extraordinary achievement” [33].

A similar line of thinking can be seen in the 2015 annual report which states that a target of 1445 cases had been exceeded with 1988 cases investigated and 2446 prosecutions [34]. The report also explicitly states that “conducting enforcement (in the anti-corruption area) should be seen as a strategic approach to recover public trust for the Attorney General’s Office” [34].

Since the Attorney General’s Office considers the number of corruption cases to be an indicator of their success, they have an interest in maintaining the loose interpretation and uncertain meaning of Articles 2 (1) and (3) of the Anti-Corruption Law. In other words, it may be easier for the prosecutors to achieve their target and restore public confidence by circumventing the Constitutional Court ruling.

When the prosecutors have brought corruption cases before the courts, the judges may have been aware of public demands for convictions. A leading legal practitioner, who is also an ex-Minister of Law and Human Rights, argues that the outcomes of corruption cases that go before the courts with less substantial evidence are a *fait accompli* [35]. If the judges deliver a lenient ruling on a corruption case, they may face criticism from the public that the ruling does not deter corruptors [36, 37].

It is noteworthy to stress that the public prosecutors mentioned above are those who work under the Attorney General’s Office and not those affiliated with the independent state body which has the task of eradicating corruption - the Corruption Eradication Commission (Komisi Pemberantasan Korupsi, KPK). A study of cases brought by the KPK shows they rarely use Articles 2 (1) and 3; they usually employ articles related to the prohibition of bribery [38]. Besides, the cases handled by the KPK are usually equipped with strong and valid evidence [39]. However, it is admitted that the KPK prosecutors have occasionally employed less substantial evidence as they did in the *Kantaprawira* case.

In short, in an effort to restore public confidence, prosecutors and the courts have been trying to prosecute and convict as many corruptors as possible. The Constitutional Court rulings are not favorable to their strategy.

Other reasons to endorse the constitutional court rulings

Considering the above situation, it is pivotal to educate the public to view corruption cases with more wisdom and proportionality. Conceptually speaking, corruption is a crime. Thus, an accusation of corruption must be based on a higher criminal standard of proof (beyond a reasonable doubt); the application of sanctions is based on strong reasoning rather than speculation [40].

This is different from the standard of evidence that is required under civil and administrative law, where evidence must be “more likely than not true” (sometimes termed “preponderance of evidence”) [41]. The difference between these two standards of proof is accepted widely in both Anglo-American and Continental European jurisdictions [41–43].

The conceptual justification for requiring “strong reasoning” is that the legal system may justifiably convict an individual only if it has done its best to protect that individual from the risk of erroneous conviction and if it does not provide better

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protection to other persons [44]. Moreover, according to Dworkin, "a wrongful conviction is a particularly grave species of moral harm, one that is significantly worse than a wrongful acquittal" [40]. Therefore, it is no wonder that lawyers are familiar with the legal maxim "it is better ten criminals should escape conviction than that one innocent man should without cause be found guilty of a crime" [45].

The Indonesian legal system also recognizes different standards of proof in criminal law and administrative or private law cases [46]. In criminal cases, a judge is directed to actively seek *kebenaran hakiki* or the ultimate truth [47, 48]. This is stipulated in Article 183 of the Indonesia Criminal Procedure Act (KUHAP): "a judge shall not penalize a person except with two legal evidence materials he has come to the conviction that an offense has really been committed and that [it] is the defendant who is guilty [of] perpetrating it."

Article 183 of the KUHAP emphasizes two cumulative points to conclude that the defendant is guilty: the judge shall be equipped not only with a minimum of two legal pieces of evidence but also with the confidence that the defendant is guilty [49]. This derives from the Dutch legal concept - *negatief wettelijk stelsel* which stresses that even when there is sufficient formal evidence of guilt, as required by the law, the judge shall not convict unless s/he has a belief that the defendant is guilty [50]. Indeed, some Indonesian legal scholars also utilize the term of "beyond reasonable doubt" to illustrate that the standard of evidence applied in a criminal case is higher than in other cases [51]. Hence, the statement in the Supreme Court circular letter 07/2012 that "the acts of the imperfection of a (public) contract which has caused the state financial loss shall be seen as corruption" has infringed this legal concept enshrined in Article 183 of the KUHAP.

By contrast, in civil law cases, it is sufficient for the judge to find the formal truth [51]. The judge in civil law cases is bound to accept certain evidentiary material, such as confession in the trial, notarial deed, or oath whenever these are not contradicted by the opposing party [48]. The rationalization behind this is that the judge shall handle the case passively; s/he shall not interfere in the infringement of private rights as long as those who feel aggrieved do not claim their rights before the court [47, 51].

The Constitutional Court rulings which have set a higher standard of evidence for findings of guilt under Articles 2 (1) and (3) of the Anti-Corruption Act should be followed. Doing so would prevent contractual and administrative mistakes from being classified as corruption. As mentioned at the beginning of this paper, there have been much discussion and evidence regarding the adverse impact on civil servants as a result of the failure to follow the Constitutional Court rulings. However, it is not so commonly acknowledged that failure to do so may also effect commercial suppliers/contractors. If the courts and prosecutors continue to circumvent the Constitutional Court ruling, classifying imperfection of public contracts as corruption, sooner or later, private companies may no longer be interested in participating in public tenders.

Another reason to support the Constitutional Court rulings is that they are in line with the United Nations Convention against Corruption (UNCAC). As an UNCAC ratifying country, Indonesia should ensure that the substance and the implementation of its anti-corruption law is in line with this convention. Guidelines on implementing the UNCAC stipulate that knowledge and intention are essential

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elements in deriving an objective conclusion from factual circumstances [52]. While the Constitutional Court rulings do not explicitly address issues of knowledge and intention, the Court has nevertheless set the higher standard of proof for conviction under Articles 2 (1) and 3. By contrast, the Supreme Court circular letter 07/2012 which considers imperfection of contract to be corruption explicitly denies the necessity of knowledge and intention as the pivotal elements of the offense. Thereby, the circular letter should be revised.

Conclusion

In order to address some of the problems arising from Articles 2 (1) and 3, the Indonesian parliament enacted Law Number 30/2014 concerning Government Administration which is intended to, among other things, protect public officials in exercising their discretion [53]. However, it is doubtful that this law will achieve its objective.

The fundamental problem is not the necessity to equip public officials with discretionary power. The problem is caused by the wording and implementation of Articles 2 (1) and (3) of the Anti-Corruption Law. These articles loosely define the elements needed to prove guilt. Consequently, law enforcers may easily classify administrative mistakes as acts of corruption. More recently, the Articles have even been used to classify imperfection of (public) contracts as corruption.

It may be true that the law makers were well intentioned, wishing to accelerate the process of eradicating corruption. However, as the Constitutional Court has shown, this good intention infringes the concept of legality.

It is unfortunate that the Constitutional Court rulings pertaining to these Articles have been disregarded by the Supreme Court. According to certain academics, this has occurred because of a misunderstanding of the concept of unlawfulness. This paper agrees with that argument, but suggests that the courts and the prosecutors may also be influenced by the pressure of public opinion and by their desire to restore public confidence in their institutions.

This paper calls on the Supreme Court and the public to respect and adhere to the Constitutional Court rulings. It is unfair and not proportional to sanction administrative and contractual mistakes as corruption. It violates concepts of lawfulness and will potentially deter private companies from tendering for government contracts. Additionally, the Constitutional Court's rulings are in line with (i) accepted standards of criminal liability; and (ii) the guidelines for implementation of the UNCAC, which Indonesia has ratified.

It has been shown that Indonesia has taken an undesirable path by loosely defining the elements of offences under Articles 2 (1) and 3 of the Anti-Corruption Law. Efforts to rectify this matter are hindered by the interests of the prosecutors and courts to maintain the *status quo*. Other countries also desiring to curb corruption should avoid taking the same problematic path.

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