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# REBUILDING THE JUDICIARY IN INDONESIA: THE SPECIAL COURTS STRATEGY

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## ABSTRACT

*One reform strategy to improve judicial performance has been to establish special courts. While hailed by some as an effective tool, others have pointed at the dangers to 'sidestep' the general judiciary in this manner. Indonesia provides an interesting case to examine these claims as in probably no other country have those seeking to reform the judiciary invested so much in special courts. The present paper evaluates the performance of some of Indonesia's special courts. Its main focus is the administrative courts, as the oldest and most 'trialled' of the list. It identifies to what extent the special court nature has been relevant to their performance and on this basis formulates four theses. These are then tested from the experiences with two other special courts: the tax courts and the commercial courts. In the conclusion these findings are summarily related to data of the other special courts. The analysis will demonstrate that it depends on the conditions under which special courts evolve whether they can actually contribute in a positive manner to judicial performance. On the one hand serious problems with access and jurisdiction are associated with some of them, but on the other these courts perform relatively well on political independence and expertise. Carefully considered and introduced, specialisation of courts may be beneficial indeed.*

**Key words:** special court, judicial performance, jurisdiction.

## INTRODUCTION

In many countries, in particular in Asia, reformers have embarked upon a course of establishing new specialised courts in an attempt to reinforce the role of their judiciaries and improve their performance. The most conspicuous example are constitutional courts, which twenty years ago were still a typically

Western European-Japanese phenomenon, but have since found their way into the state structures of countries as diverse as South Africa, Guatemala, Kazakhstan, Thailand and Indonesia.<sup>1</sup> Parallel to the establishment of constitutional courts many countries have adopted administrative courts, commercial courts, land courts, fisheries courts, tax courts, etc. Malaysia even established a

special court for criminal suits against its Sultans, which has heard one case since it opened its gates.<sup>2</sup>

The amount of scholarly work comparing these court policies stands in remarkable contrast to their popularity. Although much has been written about individual cases, little attention seems to have been paid to this approach in a more comparative manner—with the already mentioned constitutional courts as an exception.<sup>3</sup> This paper intends to offer a modest incentive for taking up such research. It will start with a so-called 'internal comparison', looking at special court establishment and performance in a single country. On that basis it will formulate a few assumptions which may then serve as the point of departure for comparative work across countries.

The paper's focus will be on Indonesia, where the special court policy has been particularly prominent. It takes the administrative courts as the 'baseline' for the comparison proposed. Administrative courts were the first in a long line of specialised courts to be established in Indonesia in order to revamp a court system generally held to be dysfunctional. Although this development only gained speed with the demise of the New Order in 1998, the reasons to establish the administrative courts in 1986 were in many ways similar to those underlying the establishment of the tax courts (1994), the commercial courts (1998), the human rights courts (2000), the constitutional court (2004), the anti-

corruption court (2005), the labour courts (2006), and the fisheries courts (2007). In all of these cases new courts were thought of as an effective way to improve a special section of the administration of justice.<sup>4</sup> It moreover seems that this development has not ended yet, given current policy discussions about establishing special courts for land affairs and environmental matters.

The popularity of this diversification suggests that the specialised courts established so far must have been quite successful. Why would the Indonesian legislator put so much effort in creating new types of court if the experience available would indicate that they fail to achieve their objectives? Neither should one overlook the wide support for new courts in civil society circles critical of the government. The idea of environmental courts, for instance, comes from environmental NGOs,<sup>5</sup> just as the ideas for the new labour courts are not mainly from the politically influential employers' associations, but rather from the trade unions.<sup>6</sup> Although the political motivation behind each court differs and although in each case different political interests coalesce, there nonetheless seems to be a commonly held belief in the effectiveness of specialised courts as such.

In order to judge whether the special courts' record actually gives reasons to support this conviction, it makes sense to look at various aspects of their performance. Central are what might be called efficiency and effectiveness.

<sup>2</sup> Lee, H.P. (2007) Malaysian Royalty and the Special Court, paper presented at the conference 'New Courts in Asia', 13 July, University of Victoria.

<sup>3</sup> E.g. Ginsburg, T. (2003) *Judicial Review in New Democracies: Constitutional Courts in Asian Cases*, New York, Cambridge University Press. Commercial courts have also received comparative attention, e.g. Tomasic, R. (ed.) (2006) *Insolvency Law in East Asia*, London, Ashgate.

<sup>4</sup> One could add the reform of the Islamic courts in 1989 to this list.

<sup>5</sup> Among them prominently the Indonesian Centre of Environmental Law, see e.g. *Kompas* 16-12-2003.

<sup>6</sup> Personal communication from labour law activist and lecturer Surya Tjandra (16-10-2007).

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<sup>1</sup> For an (incomplete) list see <[http://en.wikipedia.org/wiki/Constitutional\\_Court](http://en.wikipedia.org/wiki/Constitutional_Court)>.

By efficiency I mean a proper balance between costs in terms of efforts, time and money on the part of the litigants and a well-informed judgment which provides a potentially effective remedy. It is the perception of efficiency that to a large extent determines whether citizens will make use of a court. Effectiveness, the way I use it, is closely related to the notion of efficiency, but it looks beyond the final judgment of the court, referring to the situation that a dispute is effectively resolved. This does not necessarily mean that the judgment is implemented, but is also the case if the parties negotiate an agreement 'in the shadow of the judgment'.

Important factors determining efficiency and effectiveness are judicial independence (political and social), expertise (professionalism), and accessibility. Judicial independence, the main underpinning of judicial impartiality can be divided into political and social independence. While under Soeharto's New Order regime most attention went to the political influence of the regime on the administration of justice, the advent of a democracy has to a large extent shifted worries to the issue of social independence. This concerns the question to what extent judges decide cases without being subject to (improper) influence by the parties to a dispute or those siding with them. The two may be closely connected, but in many cases they are not and therefore require separate discussion.

Expertise refers to the professional knowledge of judges in interpreting the law. It is related to independence, as lack of expertise tends to reinforce the influence of factors external to the law and external to the facts of the case. The quality and relative importance of expertise not only depend on legal education and training, but

also on more structural issues as quality of legislation and jurisprudence.

The third factor underlying efficiency and effectiveness is accessibility, which has both a legal and a practical side. It is beyond the scope of this paper to look at the relation of court litigation with other forms of dispute resolution, even if this admittedly is a major determinant of whether courts are used or not. In this paper I will mainly limit myself to look at the jurisdiction of the state courts concerned and their physical accessibility.

The paper proceeds as follows. It starts with a relatively detailed analysis of the administrative courts, which to some extent served as a pilot project for the others. On this basis I will formulate four theses regarding the results of the special court strategy, which I will test on the basis of brief analyses of the subsequently established tax courts and commercial courts. In the conclusion I will relate these findings summarily to data on the other special courts in Indonesia and present some tentative notes regarding the potential of specialised courts as a means of improving the performance of the judiciary.

### The Administrative Courts

Indonesia's administrative courts opened their gates in 1991 on the basis of the Administrative Court Act no. 5 of 1986. To many they came as a surprise, for the Soeharto regime was neither known as very supportive of critique on its performance nor as particularly concerned about the quality of judicial performance. It would therefore be incorrect to view them as a straightforward answer to the problems of the civil courts in dealing with cases against the government. Instead, their genesis can be explained by a complex of reasons, some

of which relate to the wish for improving judicial performance more in general, but others certainly not.<sup>7</sup>

Nonetheless, the reason cited most often during the period preceding the enactment of the Administrative Court Act was that the civil courts would be ineffective in redressing unlawful acts by the government. The jurisdiction of the civil courts in administrative matters was indeed limited and the opinion prevailed that they had failed to exercise the powers assigned to them to the full.<sup>8</sup> Administrative courts with specialised judges were thought to be the most logical answer to overcome this problem. This idea had its roots in civil law history where since long administrative courts have been promoted as the most proper institution to deal with claims against the government and which travelled to Indonesia with colonial jurists.<sup>9</sup>

A more formal reason was the legal blueprint for the organisation of the judiciary in Indonesia, laid down in Act no. 14 of 1970. By enacting this law the government had refused almost all of the demands of the coalition of advocates and judges fighting for the rule of law during the first years of the New Order.<sup>10</sup> Neither constitutional review nor court administration by the Supreme Court, the two main items on the wish list of the rule of law supporters, were

part of Act no. 14. However, as a sort of eyewash it introduced a specialised branch of administrative courts into the judicial structure.

It took another 16 years before the Administrative Court Act was finally promulgated. While some Ministers of Justice serving under Soeharto supported the introduction of administrative courts for the same reasons as the rule of law supporters, this was not the case with Minister Ismail Saleh who would finally introduce them. Saleh was convinced that administrative courts would not constitute a serious threat for the executive's dominance under the New Order, but that they would be an effective means to boost its legitimacy.<sup>11</sup>

There is little doubt that this was the main political reason to establish the administrative courts, and the only one acceptable to Soeharto himself.<sup>12</sup> Both domestically and internationally visible judicial control of the executive would reinforce the image of the New Order as a basically benevolent regime, allowing for ordered and lawful redress of some of its less appropriate actions.

This obviously had consequences for the form of the institution to be established. First, the jurisdiction of the courts and their powers of review had to be limited. Control that could effectively hamper projects held

<sup>7</sup> I have described this process in detail elsewhere, see Bedner, A.W. (2001) *Administrative Courts in Indonesia: A Socio-Legal Study*, The Hague/London/Boston, Kluwer Law International, in particular pp. 49–51.

<sup>8</sup> A survey of reported general court cases on government tort shows that the general court record was in fact not as bad as often assumed (Bedner (2001) Chapter 1).

<sup>9</sup> Bedner (2001), pp. 11–15. The irony of the situation was that The Netherlands constituted the single exception among civil law countries in Europe which by that time had not established administrative courts or tribunals.

<sup>10</sup> Lev, D. (1978) 'Judicial Authority and the Struggle for an Indonesian Rechtsstaat', *Law & Society Review*, 13, pp. 37–71.

<sup>11</sup> Here it may be useful to recall that Saleh himself was responsible for censoring the press, without any clear legal basis.

<sup>12</sup> Bedner (2001), pp. 29–30, Bouchier (1999) 'Magic Memos, Collusion and Judges with Attitudes: Notes on the Politics of Law in Contemporary Indonesia', in Jayasuriya, K. (ed.) *Law, Capitalism and Power in Asia: The Rule of Law and Legal Institutions*, London and New York, Routledge, pp. 233–252.

dear by the New Order was out of the question, as had been made clear in those cases where general courts had attempted something of the sort. Never again a *Kedung Ombo*, the court case against the government on account of insufficient compensation for land clearance that turned into a publicity nightmare for the government.

Second, the courts needed to be visible. Although separate courts were expensive and entailed a host of organisational problems such as staffing, housing, etc., they would be more effective in obtaining the legitimising effect Ismail Saleh aimed for.<sup>13</sup>

In addition, the establishment of specialised administrative courts made it possible for the government to control their number. Viewed from a citizens' perspective, the new courts were in fact a substantial step backwards in protection for most of them. Since the civil courts lost their jurisdiction over cases involving administrative decisions – or at least over that part of the case brought before them concerned with such decisions – plaintiffs now had to bring cases to administrative courts of first instance that in theory could be thousands of miles away from their domicile, as initially only five of them were established.

Others involved in establishing the administrative courts – notably academics – would have liked a broader jurisdiction, but supported separate courts because this would create an independent pool of judges, better educated than those in the general courts and less susceptible to corruption and political pressure.<sup>14</sup>

The same logics underlied the decision, unsupported by most career judges, to allow for so-called 'judges in ad hoc'. These were outsiders who could be appointed to serve incidentally as judges on the new administrative courts. In this manner the court system would be opened to fresh perspectives in its councils of judges.

A decisive factor in shaping the new courts, finally, was the programme of legal co-operation with The Netherlands, and the fact that this country presented a system so limited in jurisdiction that it was acceptable to the New Order regime. The co-operation programme was instrumental in drafting the Administrative Court Act, modelling it on the Dutch *AROB*-procedure, which only allowed for reviewing individual, concrete and final government decisions. It still took a lot of persuasion by reformers to allow for proper principles of administration as a ground for review, which in the end were more or less smuggled in through the backdoor.<sup>15</sup>

It is important to acknowledge that various sides held different reasons to support the establishment of specialised administrative courts. Establishing special courts usually is a highly politicised issue and can hardly ever be considered as a straightforward move towards improving court performance. In the case of the administrative courts, those who had been driving the process for most of the time were the ones who thought that insulation from the general courts in combination with strict selection policies, special education and ad-hoc judges would create

an elite kind of court which would be sufficiently independent to stand up against the government. They consisted of idealistic advocates, independent-minded judges and officials within the Ministry of Justice, later joined by the Dutch donors.<sup>16</sup> The more cynical side was represented by Minister of Justice Ismail Saleh. Although he may have believed that the administrative courts in the long run would assist in disciplining officials at lower levels of the administration, his fundamental objective was political: the administrative courts would buy the New Order regime legitimacy, both nationally and internationally, as a token of the Indonesian commitment to establish the rule of law.

The result of this process was a mixed bag of limitations and opportunities. There were high expectations of the courts, but they also enjoyed much goodwill. Newspaper comments showed awareness of the political constraints they had to face and emphasised the intrepidity required for serving on them.<sup>17</sup> Unsurprisingly, the performance of the courts turned out to be mixed as well.

### Administrative Court Practice

As indicated above, the jurisdiction assigned to the administrative courts was quite limited. They were only allowed to review administrative decisions of an individual, concrete and final nature, which left out all 'real' acts and their consequences, as well as all regulations of a general nature. This is not to say that these latter two were

not subject to any form of judicial review, as both could still be submitted to the civil (general) courts in the framework of an action based on government tort.<sup>18</sup> Officially the reason not to give this jurisdiction to the administrative courts was that they lacked the expertise required to deal with damages, which would be often involved in such suits, but this is not very convincing as the same applies to individual decisions. More likely, it was the uncertainty of the government as to what they could expect that motivated this choice and seriously restricted the new courts' potential caseload.

Indeed, after they opened their gates, it soon became clear that the administrative courts were not going to be flooded by cases. Rather on the contrary, from the start the case numbers have been low, even in large cities as Jakarta and Surabaya. This has provoked a predictable reaction from the courts: from the start they have tried to broaden their jurisdiction, be it unfortunately in a rather erratic and tentative manner and unsupported by the Supreme Court which in almost all cases has struck down these attempts.

As an example we may consider the first target of judicial expansion: the definition of administrative decisions, meaning decisions taken by an administrative official (Art. 1(3) of the ACA). Literally any decision maker who could be possibly considered an administrative official has been brought under this definition one or several times. Thus, the courts have allowed claims against

<sup>13</sup> Just as the National Human Rights Commission, established a few years later.

<sup>14</sup> Interviews with the major drafter of the ACA Indroharto (December 1994), co-drafter Paulus Lotulung (August 1994) and prof. P. Hadjon (November 1996).

<sup>15</sup> The minutes of the parliamentary debates on the ACA show that these were not included explicitly for political reasons – as this would have antagonised certain powerful segments of the political establishment – but that the government did not altogether disapprove of their application (Bedner (1991), p. 42).

<sup>16</sup> On this issue see also Otto (1992) 'Conflicts between Citizens and the State in Indonesia: The Development of Administrative Jurisdiction', Leiden, Van Vollenhoven Institute, Working Paper no. 1.

<sup>17</sup> This appears from a survey of newspaper comments in 1991, when the courts became operative.

<sup>18</sup> In 1993 the Supreme Court introduced a novelty in the form of a special action against general regulations, with the exception of acts of parliament. This action straightly addresses the Supreme Court (Pompe, S. (2005) *The Indonesian Supreme Court: A Study of Institutional Collapse*, Ithaca, New York, Cornell University Press, p. 146. Until that date civil courts could not invalidate general regulations, but they could in the framework of a government tort case declare unbinding a particular provision of a general nature in a regulation below the level of acts of parliament.

decisions by state-owned limited liability companies, private universities, local government co-ordination boards without any decision-making powers, secret service agencies, notaries, and political parties.<sup>19</sup> Similar stories can be told about the other elements of the definition of administrative decisions, while administrative courts have incidentally also accepted claims against administrative decisions of a general nature.<sup>20</sup>

The courts have also tried to circumvent the 90 days' term of limitation. The most outstanding example is *Dahniar and others v. Head of the National Land Agency*. In this case the judges were asked to implement a 1967 sales contract concerning a plot of land in Central Jakarta. This involved a whole series of decisions, the first one being a 1972 certificate of ownership and only the last one – a land use permit – falling inside the 90 days' term. The court decided that if the government issued a decision that bore a connection to earlier decisions, the entire 'chain' of decisions would fall within the jurisdiction of the court. Just as in the other cases, this judgment was later overturned by the Supreme Court.<sup>21</sup>

As hinted at in the introduction, administrative court jurisdiction has also been progressively limited in the field of litigation concerning decisions taken on administrative appeal, which are subject to administrative court review on the basis of

Art. 48. Such appeals constituted the bulk of cases in the Administrative High Court in Jakarta, where both the Tax Tribunal (*Majelis Pertimbangan Pajak*) and the Central Tribunal for Labour Disputes (*Panitia Penyelesaian Perselisihan Perburuhan Pusat*) resided. However, both tax and labour disputes have now been brought under the powers of more specialised courts, the former in 1994 and the latter in 2007.<sup>22</sup> In the first case this led to critique by administrative court supporters that such a change violated the formally prescribed structure of Indonesia's court system,<sup>23</sup> but in the second they even referred explicitly to the consequences of the drop in caseload this would mean for the Jakarta Administrative High Court.<sup>24</sup>

The only field where the Supreme Court has allowed the administrative courts to assume jurisdiction over cases that in most jurisdictions would not qualify as administrative decisions are those concerning land law. The objects in such cases are usually land certificates and related decisions, which are only corollary to civil law relations. Consequently, the administrative courts in fact have little to decide. However, instead of referring cases back to the civil courts for the civil law questions, they tend to answer these questions themselves – and here the Supreme Court has done little to redress such flaws.<sup>25</sup>

Thus, at present the administrative courts receive few cases and the relative number of land law cases has risen. According to the estimation of an administrative court judge, today about 95% of all the cases in the administrative courts concern land<sup>26</sup> and most of them should in fact be heard by the civil courts. While administrative courts in the cities of Jakarta, Bandung, Semarang, Surabaya, Makassar and Medan still receive sufficient cases to keep their judges busy (80 to 100 a year), this is certainly not true for those in more outlying areas such as Denpasar, Mataram, Kupang etc. These courts have from the start confronted a serious lack of cases which has continued until the present.<sup>27</sup> The average number of cases per administrative judge in that same year was six.<sup>28</sup> As one judge remarked, 'I like to go fishing [...]. But if you don't have any hobbies, like fishing, tennis, sports, etc., well, you get stressed. You just wait in your office every day.'<sup>29</sup>

One can therefore imagine that the administrative courts are tempted to continue their search for new cases and to ignore the Supreme Court. Thus, more recently administrative courts have also assumed jurisdiction over administrative decisions clearly outside their powers such as Environmental Impact Assessments,<sup>30</sup> a decision to repeat a tendering procedure,<sup>31</sup> a decision to build a road,<sup>32</sup> a decision to use money from the district budget for new cars

for members of the District Parliament,<sup>33</sup> or a decree to raise parking tariffs.<sup>34</sup>

The positive side of this coin is the degree of judicial political independence it has stimulated. The administrative courts have obviously not been afraid to extend their jurisdiction to the detriment of the executive. This even applied during the authoritarian days of the New Order, when certain judges went as far as hearing cases against the feared secret service. The number of judgments deviating from Supreme Court case law moreover demonstrates that a high degree of judicial independence has also been present at the level of the individual court.<sup>35</sup> First instance courts in particular apparently do not fear the consequences of stepping out of line from the Supreme Court. However, as I will argue later in this article, this does not mean that Indonesian judges are well insulated from external, 'social' influences.

A similar expansion as noted regarding jurisdiction can be perceived when looking at the review powers of the administrative courts. They can officially declare unlawful administrative acts for contravention of laws and regulations, misuse of power, or arbitrariness. As indicated earlier, general principles of proper administration were not explicitly listed in the ACA, but the courts have from the start applied this important ground for review, orienting themselves on the list of principles advocated by Indrohartono

<sup>19</sup> Bedner (2001) pp. 54–60.

<sup>20</sup> E.g. *Wijaya v. Mayor of Medan*, no. 16/G/1991/PTUN-Mdn. (Direktorat, *Himpunan Putusan-Putusan Pengadilan Tata Usaha Negara dan Pengadilan Tinggi Tata Usaha Negara*).

<sup>21</sup> The administrative courts of appeal have not always sided with the courts of first instance in these cases, but they have mostly left their judgments in place (see Bedner, (2001) pp. 53–92).

<sup>22</sup> On the basis of Act no. 9 of 1994 (later replaced by Law no. 14 of 2002) and by Act no. 2 of 2004.

<sup>23</sup> E.g. Lotulung, P. (1996) Development of the Administrative Jurisdiction on Tax Cases in Indonesia', *Indonesian Law and Administration Review*, no. 1, pp. 28–31.

<sup>24</sup> *Hukumonline* 24-1-2005. According to the registrar of the Jakarta Administrative High Court about 80% of the court's caseload concerned labour disputes.

<sup>25</sup> Bedner (2001) pp. 169–170.

<sup>26</sup> Interview with Irfan Fachrudin, June 2007.

<sup>27</sup> *Ibid.*

<sup>28</sup> Supreme Court report 2007.

<sup>29</sup> Interview, July 1999.

<sup>30</sup> *Tempo Interaktif* 14-2-2004.

<sup>31</sup> *Kompas* 1-8-2000 and 4-8-2000.

<sup>32</sup> *Kompas* 6-3-2000.

<sup>33</sup> *Kompas* 13-10-2000.

<sup>34</sup> *Kompas* 16-5-2002.

<sup>35</sup> One might assume that this independence extends to the level of councils of judges or even individual judges. This is not the case, however.

in his influential book on administrative litigation.<sup>36</sup>

An initial problem with their application has been a lack of uniformity in interpretation. The Supreme Court has failed to give much guidance in this matter, as it has published only two judgments in which it applied principles of proper administration, nor has it provided any guide lines in the form of circular letters.<sup>37</sup> Remarkably, though, and in spite of the somewhat problematic communication between higher and lower courts, the problem has become less apparent in later years.<sup>38</sup> This shows the other side of the coin of a limited number of cases, being that (legal) information gets around more easily, by means of courses and perhaps by the cassation judgments that get back to judges of the lower courts. In other words, specialisation in this case leads to a higher degree of uniformity in the administration of justice, even if for various reasons judges may be tempted to follow their own course. In that case at least they know that they are digressing from more widely shared or authoritative interpretations.

That extension of its powers has somehow become the hallmark of the administrative courts is thrown into even starker relief if we look at their remedial powers. The first of these concerns suspension of the litigated act. It finds its basis in the fact that a litigated decision in principle maintains its validity. This is obviously a serious problem in those cases where the said decision licenses the

government to perform actions that cannot be undone, or only at great cost or difficulty. A good example is demolition or eviction orders, which indeed have been frequently addressed in court for this purpose.<sup>39</sup>

However, it has not only been these kinds of orders which have been suspended. During the first years the administrative courts developed a suspension practice that almost equalled its jurisdictionary expansion. Although it has controlled the most exuberant uses made of the provision, it is virtually impossible for the Supreme Court to control the reasoning underlying suspension orders. In many cases judges have simply granted suspension without giving any reasons at all (which goes straight against the law), or with providing statements such as 'the case is not entirely clear yet'<sup>40</sup> or 'because it has not been clearly proved during the preparatory investigation where the faults of both parties lie'.<sup>41</sup>

The main explanation for judges from the lower courts' unruliness in this matter is that in some cases to obtain suspension is itself the main objective of the plaintiff. The simplest reason is that it can reinforce a party's bargaining position, but it may also allow the plaintiff to perform certain actions on time before the litigated decision takes effect.

Suspension, therefore, is an interesting service for many litigants in the administrative courts and judges fully realise this. Hierarchical control on the use of suspension cannot include all of its aspects

and as a consequence the practice is neither consistent nor well-argued.

The remedies other than suspension the administrative courts can offer on the basis of the ACA are rather limited. As stated earlier in this article, the main difference with the situation as it existed before the administrative courts were established is that they can actually order the plaintiff to revoke his decision. An important development has been the interpretation by the administrative courts of Article 116's paragraph 9, which allows the administrative court to order the defendant to issue a new decision. Given the general tendency of the administrative courts to widen their powers, it will not come as a surprise that the courts have interpreted this provision in a very liberal manner. This has not gone as far as that judges have themselves issued an administrative decision *in lieu of* the original one, but in some cases they have actually prescribed the plaintiff what should be the contents of the new administrative decision.<sup>42</sup> This has certainly made them more attractive from the point of view of litigants.

That does not hold for the article on damage compensation in the 1986 Administrative Court Act.<sup>43</sup> Damage compensation has been provided for by Article 97(10), which says nothing more than that this matter is to be further arranged in a government regulation. The required regulation was enacted with remarkable speed – in 1991 – but it turned out to be

an empty shell: damage compensation is limited to 5 million Rp, at that time the equivalent of 2000 USD, today reduced to a mere 530 USD. For additional compensation the plaintiff has to start a separate suit at the civil court.<sup>44</sup> In short, the inability of the administrative courts to administer damage compensation is a good example of the effective reduction of citizens' protection against the government by introducing complex procedures.<sup>45</sup>

Thus, from a legal perspective the administrative courts have provided an extension for citizens' protection against the government regarding the grounds for compensation, but apart from this they have little more to offer to plaintiffs than the civil courts had. Moreover, they have complicated jurisdiction and effectively limited access. It therefore seems that they have reduced rather than improved the position of those seeking justice against the government.

On the other hand, we have seen some advantages as well. In addition to increased political independence, visibility and professionalism may to some extent have outweighed the negative aspects of administrative court establishment and performance as sketched above. The question is to what extent the administrative courts have upheld claims of litigants and whether these judgments have in practice led to the desired outcome, i.e. to what extent they have contributed to 'real legal certainty'<sup>46</sup> for citizens defending their

<sup>36</sup> These included formal carefulness, fair play, justification, formal legal certainty, substantive legal certainty, trust, equality, substantive carefulness and proportionality.

<sup>37</sup> This is the more influential form of oversight by the Supreme Court on the lower courts. See Pompe (2005), pp. 255–262.

<sup>38</sup> See for instance Hamidi, J. (1999) *Penerapan Asas-Asas Umum Penyelenggaraan Pemerintahan Yang Layak (AAUPPL) Di Lingkungan Peradilan Administrasi Indonesia*, Bandung, Citra Aditya Bakti.

<sup>39</sup> Bedner (2001) p. 112.

<sup>40</sup> No. 140/G/1991/PTUN-Jkt.

<sup>41</sup> No. 45/G/1993/PTUN-Jkt.

<sup>42</sup> Some examples are no. 04/G/TUN/1994/PTUN-Smg., no. 25/G/PTUN-Bdg./1993, no. 06/G/TUN/1994/PTUN-Smg.

<sup>43</sup> Bedner (2001), p. 47.

<sup>44</sup> I have found no indications that this actually happens.

<sup>45</sup> It is moreover exceedingly difficult to calculate the amount of damage incurred because of the above-mentioned problems in determining the day from which the litigated decision must be deemed to have lost its legal consequences.

<sup>46</sup> The term is Otto's, see Otto, J.M. (2002) *Towards an Analytical Framework. Real Legal Certainty and its Explanatory Factors*, in Chen, J. Li, Y. and J.M. Otto (eds) *Implementation of Law in the People's Republic of China*, The Hague/London/Boston, Kluwer Law International, pp. 23–34.

rights. I have already paid some attention to this matter in the context of suspension, but in most cases in the end the plaintiff looks for a final settlement of the case by a judgment that is actually implemented. This starts with an assessment of administrative court case outcomes or in other words: in how many cases have courts upheld claims by litigants?

This is hard to examine, since such data are not commonly accessible. The Supreme Court website now features a search engine for case law, but unfortunately at the time of writing this paper it was not operative yet. I therefore have to mainly rely on my data of the 1990s. These indicate that following an administrative court procedure is a somewhat unpredictable but not completely vain effort to redress unfavourable government actions.

The first question is whether plaintiffs stand any chance at all of winning their cases in first instance. Even if under the New Order the political odds were very much against them, in order to survive the courts had to demonstrate that they dared to defy officials. Rejecting all claims would have been a bid for doing nothing. For the period 1991-1995 the result was that in the Jakarta, Bandung and Semarang administrative courts almost 50 percent of the cases judged on substance were upheld.<sup>47</sup>

However, neither plaintiffs nor defendants easily accept a negative judgment of the first instance court. For instance, between 1991 and 1995 out of 405 cases decided by the Jakarta administrative court 346 were submitted to the appellate court,

which is more than 85 percent. That lodging an appeal makes sense is clear from the fact that almost 40 percent of these were overturned (1991-1995).<sup>48</sup>

Cassation is not as popular as appeal, but still more than half of the appellate judgments are submitted to the Supreme Court.<sup>49</sup> The relative number of judgments overturned stands at about 15 percent. This was achieved by the end of the 1990s and was somewhat higher during the first five years of administrative courts practice, which seems to indicate that legal certainty has moderately increased. However, a judgment in cassation in Indonesia is not as final as it should be. Originally intended as a remedy for extraordinary cases, review of cassation judgments has matured into a sort of fourth instance in Indonesia. Between 1991 and 1999 more than 20 percent of cassation judgments in administrative litigation were submitted for revision and one in ten cases was overturned. This clearly shows the inconsistency in Supreme Court judging and provides a clear incentive to parties to go all the way down the litigation road.

What does this eventually mean for the prospects of the plaintiff? Data taken from a PhD-dissertation by Irfan Fachrudin, concerning cases at the Bandung administrative court between 1994 and 1999, indicate that the percentage of cases won by the plaintiff drops radically through the appellate and cassation procedures.<sup>50</sup> Only one out of 25 plaintiffs wins his case. If we disregard cases that are clearly outside the jurisdiction of the administrative courts this means about 8 percent.

The length of the procedure is moreover considerable, although shorter than in civil procedure. On average, a case going through the entire procedure takes between one to four years.<sup>51</sup>

The next stage concerns the implementation of the judgments upheld. This is a critical issue, viewed by administrative courts judges themselves as a kind of a nightmare - which is quite understandable given the damage non-execution does to both the perception of their status and their effectiveness in providing remedies. Given the dearth of cases administrative courts have to face, such a challenge to their authority is in fact a direct threat to their existence.

When I did research in Indonesia in the administrative courts in the early 1990s, few judgments were in the stage yet that they could be implemented. Press reports indicated that in three cases - two concerning certificates of land ownership and one concerning the license to harvest birds' nests - the defendant did not implement the judgment. At that time already many judges complained about execution problems, but this actually concerned suspension orders, of which I recorded 26 cases of non-obedience.<sup>52</sup>

Relying again on Fachrudin's data, execution takes place in 38 percent of the entered judgments won by the plaintiff. This means that ultimately approximately one out of 40 plaintiffs wins his case and sees the judgment implemented.

These numbers should obviously be treated with caution, as information about the precise nature of the cases and the legal

issues involved could make them look more positive. However, they seem quite disappointing in view of the reputation of the Indonesian government and seem to reinforce the view that the administrative courts are not very effective.

#### FOUR THESES

The case of the administrative courts gives rise to the following conclusions about the potential of specialised courts for promoting judicial performance.

First and foremost, when we look at effectiveness and efficiency, the main finding is that ultimately the administrative courts do not seem to have brought what the rule of law supporters hoped for. The number of claims upheld and implemented is discouraging, certainly in view of the amount of time needed to attain this result. I have not discussed the issue of costs, but should add here that there is much corruption in the courts and that even if a plaintiff has a strong legal position, to win a case often means to pay a substantial amount.<sup>53</sup>

Nonetheless, although they may not have produced the results wished for, in certain regards the courts have meant an important step forward compared to the situation in the civil courts.

The first thesis formulated on the basis of this evaluation relates to political independence and access. It is that creating a specialised court with a specific, limited segment of jurisdiction is likely to reinforce the activism of this court. Some would argue that in the case of the administrative courts the main incentive has been the judges'

<sup>47</sup> One should realise that certainly during that period many claims were introduced that made no sense at all. Therefore I have left out those cases dismissed on procedural grounds.

<sup>48</sup> 12 out of 26 cases.

<sup>49</sup> 167 appeals from 321 cases from 1991-1995.

<sup>50</sup> Fachrudin, I. *Pengawasan Peradilan Administrasi Terhadap Tindakan Pemerintah*, Bandung, Alumnus, 2004.

<sup>51</sup> The reason is that the caseload at the Supreme Court is quite high. Although backlogs are not nearly as serious as in the case of the civil courts, since 1999 the backlog for administrative court cases stands at approximately 700 cases waiting to be judged, with the judges just about keeping up with the number of incoming cases.

<sup>52</sup> Bedner (2001), pp. 230-232.

<sup>53</sup> For more details see Bedner (2001), pp. 234-240.



own pockets, but this is too shallow an explanation.<sup>54</sup> Few judges like to sit idly. In the case of the administrative courts an important consequence of this situation has been that judges have had to reinforce their (political) independence vis-à-vis the executive, which has been noticed both by the executive itself and by the media.<sup>55</sup> In the most outstanding case dealt with by the administrative courts so far – concerning the rescission of the publication permit of the weekly *Tempo* – it was clear that the Supreme Court could not assert itself against the Soeharto government as the administrative courts of first instance and appeal had done.

It should be noted, of course, that the problems with jurisdiction outlined above indicate that one should be very careful by designating a certain scope of jurisdiction. When it is too narrow, as has been the case with the administrative courts, this will induce the judges concerned to 'irresponsible' activism and jurisdictional fights with other courts. Here we should note the role of the highest judge of appeal. If this is a general Supreme Court overseeing the various judicial branches, they may attempt to strike down such policies by the lower specialised courts. It will depend on the authority they command whether their policies will be obeyed or not. In the case of the administrative courts the results have been mixed, with cases concerning land rights and land certificates as notable problem areas. If the highest court is

specialised as well, this obviously changes the stakes. In that case there is a serious chance that jurisdictions may be severely mixed up.

The other side of submitting specialised courts to the jurisdiction of a general Supreme Court is that at the level of this Supreme Court the incentive for activism is absent. Under the authoritarian New Order regime this was quite evident in some political cases (*Tempo* being the best-known example). The effect of establishing specialised courts under a general Supreme Court therefore largely depends on the quality of that Supreme Court. This also applies to such issues as length of the procedure, which is largely determined by the Supreme Court system for its case management.<sup>56</sup>

The second thesis is that specialised courts by their nature do not offer any special advantage over general courts as regards social independence. The administrative courts were set up as an 'elite' project, which should only attract the most independent-minded judges from the general courts, as demonstrated by their record of administering justice. They were given special educational facilities, and good prospects for promotion. While that was basically a good idea, it did not work because the status of an elite cannot be based on 'esprit de corps' only. Moreover, the special educational facilities were gradually closed down and in the course of a few years all attractive positions had been filled.

<sup>54</sup> This finding is supported by the fact that in several cases where judges did extend their jurisdiction the plaintiff ultimately lost his case. These include cases where I am positive after in depth interviewing of those involved and on the basis of the reputation of the judges concerned that no bribes were paid.

<sup>55</sup> Bedner (2001), p. 261.

<sup>56</sup> For instance, if the Supreme Court has a separate section of judges dealing with a certain type of cases it may well be that backlogs only develop within certain sections. The Indonesian Supreme Court has a somewhat mixed system, with a number of judges appointed for administrative cases, but also adjudicating civil or criminal matters. If such a system had not been in place, the backlog in administrative court cases would have been far larger.

In the absence of better salaries or other amenities the decision to set up too many courts where no cases were to be expected, the administrative courts were simply not competitive enough to attract judges willing to resist the temptations of accepting illicit payments.<sup>57</sup> The worst is perhaps that the Supreme Court – initially together with the Ministry of Justice – has corrupted the system of promotions itself, which has brought judges of dubious reputations to positions of authority.<sup>58</sup> As remarked earlier, resistance from the judiciary as a 'corps' prevented the appointment of judges in ad hoc to remedy this situation.

The third thesis is the obvious one that specialised courts tend to promote the professionalism of judges. As they only have to focus on a more limited field they will sooner acquire expertise in it. My findings on the administrative courts described elsewhere indicate that the strength of this effect is reduced by the influence of bribes and a lack of accessibility of legal information. To some extent this combination of factors has led to a vicious circle, with judges preferring to remain 'unknowledgeable' because this reinforces their discretion in cases submitted to them. If we look at the administrative courts, yet, some progress can be distinguished none the less. Exchange of legal information is more common than in the general courts. The limits in size and numbers of judges involved support more commonly held interpretations. It should also be noted that the lower number of court cases enables the Supreme Court to better perform its function of guaranteeing legal unity, even

if the Supreme Court itself is susceptible to social and political pressure in part of the cases involved.

Finally, the fourth thesis claims that because special courts generally deal with fewer cases, they hold a more serious stake in ensuring that they are accessible and that they will do whatever they can to ensure that their judgments are implemented. Unfortunately, in the case of the administrative courts the issue of implementation has been largely beyond their powers. Regarding access there is also a negative side, as in fact establishing special courts for cases that were first part of the jurisdiction of the civil (or general) courts likely will reduce access. In the present case that was clearly something not carefully considered by the proponents of the new courts.

### The Tax Court

The Indonesian tax court was established in 1994, under pressure from the Ministry of Finance to speed up procedures and to reduce the number of judicial instances they had to deal with. As the Director General of Taxes is part of this Ministry and the defendant in most tax disputes, it is easy to see why this organisation put so much effort in this matter. Since the enactment of the Administrative Court Act the Ministry had to deal with a special administrative body of appeal, the administrative high court, and the Supreme Court – instead of the first one mentioned only. Until 1991 this specialised Tax Council (*Majelis Pertimbangan Pajak*) adjudicated tax disputes in administrative appeal in a single instance. After the administrative courts were established,

<sup>57</sup> It should be noted that the government may also be willing to pay for a favourable decision. Nonetheless, I would consider this as evidence of the political independence of courts rather than the opposite.

<sup>58</sup> Given the influence of court chairmen in particular in what happens within their courts, this has serious consequences for the informal rules of conduct.



the central and regional branch offices of the Tax Agency – the former falling under the Ministry of Finance – suddenly saw themselves confronted with appeal to the Administrative High Court in Jakarta in many cases and subsequently cassation to the Supreme Court in quite a few of those. Therefore, the creation of the tax courts basically meant a return to the old system.

This situation lasted until 2002 when Act no. 14 of 2002 semi-integrated the tax court into the judicial structure. The compromise nature of the law is clearly visible in the provisions dealing with the role of the Supreme Court: an appeal for cassation against a judgment by the Tax Court is not allowed, but if the judgment 'clearly does not conform to prevailing tax regulations' it can be submitted for special review (Art. 77(3)).<sup>59</sup> Apparently this is a form of 'marginal appreciation' hitherto unknown in Indonesian court procedure, although it comes close to the procedure followed before the administrative high court in cases decided on administrative appeal.<sup>60</sup>

The case of the tax court thus clearly differs from the administrative courts, as it had not branched off from the general courts. The Tax Council had always been a special semi-court and consequently it had become used to fight for its turf. Moreover, there is only one tax court for all of Indonesia, which deals with approximately 2000 cases a year: a sufficient number to keep the tax judges at work and hence little need for

increased judicial activism.<sup>61</sup> If we look at accessibility from this perspective, the fact that there is only one tax court in Jakarta certainly is a problem, but as this had always been the case already it cannot be labelled as a step back.<sup>62</sup>

Ultimately, the Ministry of Finance's coup has not been much of a success in terms of regaining control of the judges dealing with tax cases. Under the old regime the Ministry had enjoyed full powers of management, while now this authority lies with the Supreme Court. The removal of the administrative high court from the line up for adjudication has meant but a meagre compensation for this, in particular because in practice a full appeal for cassation is effectively possible.

With these differences in mind we can make the following observations on the theses advanced earlier. First, the political independence of the tax courts has been reinforced, though not so much for the turf battles they have had to wage, but because they have been integrated into the judiciary and under the Supreme Court. In a way the case of the tax courts is much more conventional than the administrative court case: a specialised body for appeal has been integrated into the judiciary, while maintaining its specialised character. Consequently, jurisdiction has not become a problem.

Critical support for this thesis comes from the number of cases won by plaintiffs. According to the US Embassy, 75% of

all plaintiffs won their case in the court in 2003, the first year of its existence as an independent judicial instance.<sup>63</sup> The newspapers *Kompas* and *Pikiran Rakyat*, citing the secretariat of the Tax Court, give somewhat less exuberant and likely more reliable figures, going up from 22 percent of cases won in 2000, via 40 in 2001, 42 in 2002, to 47 in 2003 and 2004.<sup>64</sup> Still, this makes the tax court rather attractive, as implementation of the judgment is far easier than with the administrative courts. Since taxpayers only have to pay 50 percent of the disputed tax they at least gain half of what they would have been liable to pay if the defendant refuses to return this amount.

As regards the expertise of the tax courts not much has changed, since the practice has been maintained that former officials of the Ministry of Finance form part of the staff of the tax courts. Although incomplete, the data on the new Supreme Court directory<sup>65</sup> provide some useful information on the tax court practice. It contains 39 tax court cases, 31 of them from 2004, meaning approximately one fourth of the total number of cases of that year. This overall number shows in the first place that the relative number of appeals is far lower than in the case of the administrative courts, only about five percent. Assuming that the cases in the directory are representative, we can also conclude that there is much consistency in the outcome: the large majority of appeals were from plaintiffs (27 out of 31) and unsuccessful. Only a single appeal was upheld and that concerned one of the four appeals made by the Director General of Taxes. This seems to confirm

that in terms of expertise the situation is certainly more favourable than when the administrative high court still held jurisdiction, which is obvious, as these judges were – certainly initially – not well versed in this field of law.

There are hardly any data available to judge the 'social independence thesis'. It is certain that the imposition of cassation has reduced the potential for judicial discretion and thereby judicial leeway for corruption. We should also note that the judges staffing the tax courts are drawn from the general courts and may pursue their careers as judges at the higher levels of the general courts, a situation that in fact already existed when the tax court was still the Tax Council.

Summarising, we can say that the tax courts confirm the main theses formulated at the end of the first section. While their political independence has been reinforced and their expertise been maintained, their social independence is unclear. The presence of former officials of the Ministry of Finance does not provide the kind of outside influence needed to counter this situation, nor is their remuneration sufficient. We will now consider these issues from the results of one of the most controversial attempts at court specialisation.

### *The commercial courts*

The commercial courts were established in the aftermath of the financial crisis hitting Indonesia in 1997. Their objective was to create a reliable mechanism for dealing with bankruptcy cases and to restore the trust of foreign investors in Indonesia. It is therefore not surprising that no other special courts

<sup>59</sup> This extraordinary procedure is normally reserved for cases which have already been decided on cassation.

<sup>60</sup> In 004/PUU-II/2004 the Constitutional Court has upheld the Tax Court Law with the argument that this means that this reason is 'substantially the same as the reason for filing for cassation'.

<sup>61</sup> Research note on the Indonesian Tax Court by Fatahillah, dated 27 August 2006.

<sup>62</sup> Article 3 of the Tax Court Act establishes the court in Jakarta, but leaves open the possibility for additional courts. Article 4 allows for sessions of the court in other places than Jakarta. I have not found any information that this opportunity has been used. If so, in any case not on a regular basis.

<sup>63</sup> Cited in Van der Eng, P. (2004) 'Business in Indonesia: Old Problems and New Challenges', in Chatib Basrih, M. and P. Van der Eng, *Business in Indonesia*, Singapore, Institute of Southeast Asian Studies, p. 16.

<sup>64</sup> *Kompas* 31-5-2004, *Pikiran Rakyat* 1-10-2007.

<sup>65</sup> <http://www.putusan.net/ann-mari/putusan/index.php?cevid=>

established so far have received so much donor support, in this case from the IMF and the Dutch government.<sup>66</sup>

This is not to say that there was no support within Indonesia for setting up the commercial courts. Just as in the case of the administrative courts, pro-rule of law groups saw the commercial courts as an opportunity to shake up the corrupt and incompetent civil courts and to create a judicial elite that could serve as an example for reform.<sup>67</sup>

While support for the commercial courts was thus considerable, they had to face even more formidable resistance. Indonesia's technically bankrupt conglomerates had a great interest in preventing formal bankruptcy. For good reasons, they were hoping that by warding off such threats they would in the end be helped by the Indonesian government to restructure their debts and continue or resume business. Given the economic interests of much of Indonesia's political elite, one can say that threats to judicial independence were not only social but also political in nature.

The commercial courts were created as part of a reform of bankruptcy law. Dutch technical assistance was provided to both create a new bankruptcy law and train the judges for the new courts. The project team not only included Dutch bankruptcy law experts, but also scholars and advocates who were highly knowledgeable about Indonesian law in general and the Indonesian judiciary in particular. They could assist to bridge the gap between the Dutch and Indonesian

sides in order to adjust this legal transplant to Indonesian conditions.<sup>68</sup>

The result of the project differed somewhat from that of both the administrative and the tax court. Unlike these, the commercial courts have not become physically unlinked from the general courts. In fact they constitute a division of the latter, where only judges with special training can be admitted. However, these judges no longer serve on the general courts and therefore they are dependent on their own jurisdiction for their workload.<sup>69</sup> In one regard they are like the tax court: there is only appeal for cassation to the Supreme Court. This has an important consequence for judicial careers, as the judges in the commercial courts cannot be promoted to a court of appeal, which allegedly makes it less attractive to start a career in this division.<sup>70</sup> As regards their number, the commercial courts are somewhere in between the single tax court and the 27 administrative courts: there are five of them, in Makassar, Surabaya, Medan, Semarang and Central Jakarta.

Before we continue to look at the commercial court record, we need to touch on two issues. First, the 'reformers' were fully aware of the need to make sure that in order to guarantee their social independence the judges of the commercial courts should be better paid than their colleagues. However, in the end substantive measures to realise this foundered on the resistance of the Supreme Court leadership,

for reasons similar to those in the case of the administrative courts. Tough negotiation initially led to higher salaries being paid, but later on the differences were reduced and in fact vanished altogether.<sup>71</sup>

The second issue concerned the involvement of 'judges in ad hoc'. This was a matter of great concern to the Indonesian and Dutch experts on the judicial system, who were convinced of the potential of this measure, not only from a social independence perspective, but also in order to increase the courts' expertise. As a result of their efforts, the Supreme Court leadership – at that time still under the conservative Soeharto appointee Sarwata – could not prevent the inclusion of a provision on judges in ad hoc into the law, but later on it has used all defences available against its effective realisation. This started with delaying the adoption of an implementing regulation on judges in ad hoc and continued with efforts to prevent judges in ad hoc from being effectively appointed. As a result, the majority of cases has been decided by councils of career judges only and in no case have judges in ad hoc formed the majority on a council.

In spite of a wide range of literature dealing with the performance of the commercial courts it is not easy to determine to what extent they have realised the objectives set out at the start. Opinions vary from those who claim that the courts have done rather well,<sup>72</sup> to some who claim that

they have been an almost complete failure.<sup>73</sup> If we look at these analyses, the conclusion is that they do not so much disagree about facts, but that they differ mainly in their definition of success, as in fact noted in both the official Evaluation Report and the article by Schroeder-Van Waes and Sidharta.

These have noted that the commercial courts have done rather well, with some abominable exceptions. The so-called 'Team of Seven', appointed by the Steering Committee of the project to review 'the soundness of 300 Commercial Court decisions', found that more than two thirds of these decisions were defensible under the law,<sup>74</sup> while Schroeder-Van Waes and Sidharta speak of a 'large majority of well motivated rulings on complex legal issues'. According to the Evaluation Report there were in fact more problems with cassation than with the procedure before the commercial courts of first instance.<sup>75</sup>

The fact is, however, that the abominable exceptions have tended to eclipse the regular cases. Most notorious is the Manulife case, where the court decided to declare bankrupt the Indonesian daughter of Canadian assurance giant, on the basis of a highly unlikely claim from one of its former business partners supported by flimsy evidence. The case elicited a sharp reaction from the Canadian government and the world press, and in a clear demonstration of lack of political independence the Supreme Court leadership suspended the three judges

<sup>66</sup> IMF/Netherlands Program Legal and Judicial Reform in Indonesia 2000–2004: External Evaluation Final Report, January 16, 2005, p. xii.

<sup>67</sup> Cf. Sadiawati, D. (n.d.) 'Eksistensi Pengadilan Niaga Dan Perkembangannya Dalam Era Globalisasi', Unpublished Paper, Bappenas.

<sup>68</sup> Externa Evaluation Final Report (2005).

<sup>69</sup> Although apparently more recently commercial court judges have been called in on civil and criminal cases again (External Evaluation Report (2005)).

<sup>70</sup> Sadiawati, (n.d.) p. 15.

<sup>71</sup> Personal communication by one of the project managers (October 2007), cf. External Evaluation Report (2005), p. 13.

<sup>72</sup> E.g. Schroeder-Van Waes, M.C. and K. Sidharta (2004) 'Upholding Indonesian Bankruptcy Legislation', in Chatib Basrih, M. and P. Van der Eng, *Business in Indonesia*, Singapore, Institute of Southeast Asian Studies.

<sup>73</sup> E.g. Lindsey, T. (2000) 'Black Letter Law, Black Market and Bad Faith: Corruption and the Failure of Law Reform', in: Manning, C. and P. Van Diermen (2000) *Indonesia in Transition: Social Aspects of Reformasi and Crisis*, Singapore, Institute of Southeast Asian Studies, pp. 278–292.

<sup>74</sup> External Evaluation report, p. 15.

<sup>75</sup> External Evaluation Report, p. iv.

involved in the case.<sup>76</sup> Other cases showed clear signs of corruption. According to one expert involved in the project, judges who in most cases applied the rules in a clear and unequivocal manner in a few others used quite different interpretations of these same rules.<sup>77</sup> The fact that all cases dealt with by the commercial courts are published and made available to both the judges themselves and whoever is interested in them has clearly reinforced the uniformity of legal interpretation – to the extent that it is easy to see whether a judgment really makes no sense at all.<sup>78</sup>

The critics of the commercial courts obviously point at the 'bad' cases, but their argument goes further. They claim that the commercial courts have been a failure because they have not achieved what they had been established for: a swift and reliable procedure to clear the debts of defaulting firms in order to allow for the restructuring of the Indonesian economy and to restore confidence of foreign investors. This has not happened. In the words of David Linnan, 'creditors voted with their feet' and stopped using the commercial courts.

It is questionable, however, if the commercial court can be blamed for this. The Evaluation Report, for instance, noted that most of the problems occurred only after bankruptcy had been declared. In the model adopted a crucial role is played by the 'receivers', who actually settle the debts. In practice these receivers have not functioned well and it turned out that a bankruptcy

declaration was merely a prelude to a long and windy trajectory with little effective gains for the creditor who had applied for the bankruptcy.

There have been some problems concerning the jurisdiction of the commercial courts as well. In fact one encounters the reverse of the administrative court practice: in this case the civil courts have intruded upon the jurisdiction of their colleagues in the commercial court division. It concerns cases where the commercial courts imposed seizure on goods of the debtor, where the civil courts had already ordered seizure on the basis of the Code of Civil Procedure. Whereas the latter is no longer valid after the general seizure on the basis of the bankruptcy has been imposed, civil courts have continued to treat them as if they were still valid, or even imposed seizure *after* the commercial court had declared bankruptcy.<sup>79</sup>

Another issue which reminds us of the administrative courts is the fact that the commercial courts have effectively managed to deal with cases rather swiftly, keeping within the strict time limits imposed by the law, but that the Supreme Court has not observed these in several cases and hence cases slow at least a bit down (though not as badly as ordinary civil cases).<sup>80</sup>

In any case, whether the cause is the damage done to public trust by the widely publicised incomprehensible judgments or the availability of swifter and more adequate alternatives, the number of bankruptcy cases

lodged at the commercial courts has seriously declined. While in 1999 100 petitions were filed at the Jakarta Commercial Court, the number had dropped to 38 in 2003.

This does not mean, however, that the commercial courts have manoeuvred themselves out of business. In 2001 their mandate was extended to also include disputes concerning intellectual property, and here we see the reverse trend: from 63 claims in 2002 to 84 in 2004. Generally speaking, the way in which the courts deal with these cases is described as satisfactory, even if it only concerns rather simple trade mark cases.<sup>81</sup> This means effectively that the courts have not run out of business altogether, or at least not in Jakarta.

Comparing these findings with the theses advanced earlier, we find that they are more or less supported. The most interesting issue concerns the political independence of the commercial courts. Although not a specific court for deciding cases against the government, as the administrative court and the tax court, the political nature of bankruptcy cases has been clear from the start. The need for Indonesia to restore trust of foreign investors, in combination with the amount of media attention they received, has put much pressure on the judges to apply the law in favour of plaintiffs. However, the interests of those representing the Indonesian 'shadow-state' – referring to those intimately linked to state officials but only pursuing their private objectives – have gone flatly against this. It seems that the latter have outweighed the former; if not represented in numbers of cases then at least in the trust in the courts and their attractiveness for potential plaintiffs.

This does not much undermine the political independence thesis, not only because so many cases have been decided correctly – and against vested interests – but also because the courts had the alternative of intellectual property rights. As a result they could in any case continue to hear cases, at least the court in Jakarta. Unlike the administrative courts, the commercial courts have had no opportunity to extend their jurisdiction against the civil courts and therefore jurisdictional fights have been the consequence of civil court behaviour rather than the other way round. In fact, making themselves more accessible has been mainly outside the power of the commercial court.

No matter how negative some perceptions of the commercial courts are, no one seems to deny that the expertise of the commercial courts has increased. It should be said that in the case of the commercial courts every effort has been made to achieve this and that perhaps in this light the results have been unimpressive. This view is supported by David Linnan's observation that in the field of intellectual property rights the courts mainly deal with the relatively simple trademark cases.<sup>82</sup> But still, when compared to the civil courts the commercial court record seems much better – even if only because the matter can be scrutinised from the judgments published.

As to the 'social independence thesis', the transparency of the courts has certainly made judges more cautious in this respect – with the exception of course of the glaring misjudgements made. Given that these have been overturned at the cassation level indicates that results of corruption can be

<sup>76</sup> This procedure has been riddled with inconsistencies. It is unclear on what basis these judges were suspended and they have since been waiting to appear before an official honorary council.

<sup>77</sup> Personal communication, July 2007. See also Schroeder-Van Waes and Sidharta (2004).

<sup>78</sup> There have been some differences in interpretation in ordinary cases, none the less, see e.g. Sadiawati (n.d.). However, most of them have been relatively inconsequential and a harmonising tendency has been clearly discernible.

<sup>79</sup> Sadiawati (n.d.), p. 6.

<sup>80</sup> Sadiawati (n.d.) p. 4.

<sup>81</sup> Liman, D.K. 'The Indonesian Commercial Court, or How to Account for Vastly Differing Court Performance by Substantive Area?', paper presented at the 'New Courts in the Asia-Pacific Region Conference, University of Victoria, 15 July 2007.

<sup>82</sup> Liman (2007).

restored at this level. This obviously also applies to civil cases, but then these are seldom published and by their special nature the commercial courts have received more attention from the media. It thus seems that social independence has been somewhat increased, but not seriously.

### Conclusion

The strategy to establish special courts in order to improve judicial performance has been central to Indonesian policies pertaining to the administration of justice. In combination with attempts to reinforce dispute settlement outside the court system – for instance by regulating and promoting mediation, and by establishing a Human Rights Commission and an Ombudsman – this should ultimately lead to a complete restructuring of the judiciary.

It is clear that this strategy has not been entirely successful so far, something already evident from the experience with its first result, the administrative courts. These have themselves become part of the problem, having been labelled as 'dysfunctional' in various cases, and provided the reason to establish new specialised courts, such as the tax court and the industrial relations courts. This gives fuel to the idea that establishing special courts is just a way of transferring problems from one institution to the other.

Nonetheless, depending on the conditions under which these courts evolve and the form they have been given, some of the alleged advantages may actually contribute to an improved performance.

First, political independence of the courts tends to be reinforced. This is most clear if courts for their case load depend on cases against the government, or if the government holds a clear stake in them. In this case specialised courts have an institutional interest in political independence: if they do not decide any

cases against the government they will lose their legitimacy and run out of business. This has been most clear in the cases of the administrative courts and the tax court, and is confirmed by findings on the performance of the constitutional court. One might be tempted to add the human rights courts here, but then the evidence is limited to the human rights court in ad-hoc concerning East Timor, where this did not play much of a role because of the extraordinary nature of this institution.

Second, the relatively small scale of most special courts makes judges more aware of the decisions of their colleagues, even in the absence of an ordered publication system for judgments, while the relatively limited jurisdiction of special courts also makes it easier to obtain legal expertise. Indeed, expertise seems to have increased in all three cases discussed. In fact it is difficult to conceive of a situation where specialisation would not reinforce expertise. This is also determined by accounts of the human rights courts, the industrial relations courts, and most of all the constitutional court.

The main downsides of the specialised court strategy, as it has been implemented in Indonesia, concern entangled jurisdictions and problems with implementation. Harmonising jurisdictions may be very difficult, as demonstrated by the administrative court experience over the past 17 years. Specialised courts tend to fragment jurisdiction across various judicial institutions in systems where often judicial power is already fragmented. This is not only a matter of law, but also one of judicial interests, which tend to go unchecked through the absence of effective hierarchical controls. For someone seeking justice, it will mean that he has to address one court for every aspect of his case and as a consequence the good performance of one court can be outdone by another.

A more neutral finding is that specialised courts by their nature do not offer any particular advantage regarding social independence. Both in the case of the administrative courts and the commercial courts corruption has remained entrenched. I think this points needs to be nuanced, however. First, special courts are usually more 'visible' than general courts. They draw public attention and scrutiny, which goes against social dependence. A good example is the commercial courts, which have been perceived very negatively in spite of their relatively reasonable performance. The Constitutional Court and the anti-corruption court also come to mind as examples where this visibility may have had positive effects.

Accessibility concerns a more problematic issue. In principle, special courts are more difficult to access than general courts because usually there are fewer of them. Certainly in developing countries such as Indonesia, funding for a large number of new courts will not be available. In the case of the administrative courts, which were assigned a jurisdiction formerly belonging to the civil courts, this has been quite obvious. The commercial courts caused a similar problem, although bankruptcy as an institution had fallen almost entirely into disuse anywhere, and therefore the need for it was not as clear. It therefore depends much on the legal and practical situation prior to the establishment of special courts to what extent accessibility is reduced.

As I have sketched above, there is also another side to accessibility: given the wish for cases, special courts may tend to reduce the barriers to access them. This may cause jurisdictional problems, but it may also be beneficial, in the sense that plaintiffs are treated with more regard than in the civil courts.

This leads to the conclusion that on its own establishing specialised courts will have limited effect only. It therefore makes sense to reinforce certain of its positive features by combining this strategy with others, which will be easier to introduce in new courts than in already established organisations, because vested interests will be less entrenched. This has indeed been attempted in Indonesia. Thus, expertise and independence have been reinforced by the publication of judgments. The best example is the commercial courts, with the administrative courts as an initially hopeful case which has later dropped behind again. The tax courts have very recently become part of this innovation, while the Constitutional Court is the most outspoken example of the success of this measure.

Secondly, political and social independence can be reinforced by introducing judges in ad hoc. The cases of the administrative courts and the commercial courts have demonstrated how much opposition there is among career judges against this phenomenon, but those of the human rights court and the constitutional court provide clear cases of the difference judges in ad hoc can make. An alternative for this is the use of lay judges in the industrial relations courts, where councils of judges consist of a professional judge as the president of the council of judges, and two representatives of viz. the trade union and the employer's association.

One can obviously think of many other measures as well, such as needs assessments, examination of judges, dissenting opinions, etc. In all these cases it seems that experimenting with special courts before introducing such reform into the general court system makes sense. However, the case of Indonesia demonstrates that too high expectations will be thwarted. The institutional environment within which special courts function seriously affects

what they can do. We have seen this clearly in the case of the administrative courts with their problems in having judgments implemented and the commercial courts with the receivers in bankruptcy cases, while the problems have been even more glaring in the case of the East Timor trials in the ad-hoc human rights court and the related performance of the Public Prosecutor's Office. The position and performance of the Supreme Court itself also need careful consideration, as this institution may undo everything achieved in the special courts residing under them.

Therefore, special courts are certainly not the Holy Grail in judicial reform, but they do have certain intrinsic features which may make them the best possible way forward towards an efficient and effective judiciary. It would be helpful if the experiences in Indonesia would be taken into account when this strategy is applied elsewhere.

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