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Leslie Gielow Jacobs

University of the Pacific, McGeorge School of Law

Benjamin B. Wagner

U.S. Attorney's Office, Eastern District of California

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Limits to the Independent Anti-Corruption Commission Model of Corruption Reform: Lessons from Indonesia

Leslie Gielow Jacobs* and Benjamin B. Wagner**

Various strategies have proliferated to combat the plague of public corruption, which exists everywhere, but wreaks its most debilitating havoc in developing countries. A wide range of entities are now involved in the worldwide anti-corruption campaign, including international organizations, governments of developed and developing countries, development banks and international financial institutions, multinational corporations, business associations, non-governmental organizations (NGO's), the media and civil society bodies within corruption-ridden countries.¹

From these entities' many experiences and insights have emerged various "models" of reform, built upon "pillars" comprised of categories of measures necessary to address the systemic and entrenched corruption that exists in many developing countries.² These general types of efforts that make up robust or "holistic" models of corruption reform include prevention, state-building, activating civil society, and, necessarily and inevitably, enforcement.³ Even as observers opine that criminal law alone cannot do the job or that other types of measures are more fundamental, these observers agree that effective criminal law enforcement is one essential element in a successful anti-corruption campaign.⁴

* Leslie Gielow Jacobs is a Professor of Law, Pacific McGeorge School of Law and the Director of the Institute for the Development of Legal Infrastructure, Center for Global Business and Development. Thanks to Kim Clarke for her excellent research assistance.

** Benjamin B. Wagner is Assistant U.S. Attorney and Chief of the Special Prosecutions Unit for the U.S. Attorney's Office, Eastern District of California. He has also served as U.S. Department of Justice Resident Legal Advisor in Indonesia from 2005-2006. The views expressed herein are the authors' views, and do not necessarily reflect those of the U.S. Department of Justice.

1. BUREAU FOR INTERNATIONAL NARCOTICS AND LAW ENFORCEMENT AFFAIRS, U.S. DEPARTMENT OF STATE, FIGHTING GLOBAL CORRUPTION: BUSINESS RISK MANAGEMENT (May 2001), <http://www.state.gov/p/inl/rls/rpt/fgcrpt/2001> ("Many international organizations have been making strides in addressing international bribery in business transactions, official public corruption, and transparency issues. In addition to the OECD, the Organization of American States (OAS), the Council of Europe (COE), the Stability Pact for South Eastern Europe, the Organization for Security and Cooperation in Europe (OSCE), the Asia Pacific Economic Cooperation (APEC) forum, the Global Coalition for Africa (GCA) and the United Nations have launched a variety of anticorruption and transparency initiatives. . . . U.S. and international legal, business and accounting associations and non-governmental organizations (NGOs)—such as the American Bar Association (ABA), the U.S. Chamber of Commerce, the International Chamber of Commerce (ICC), the Ethics Officer Association (EOA), the Committee of Sponsoring Organizations (COSO), and Transparency International (TI) - have played key advisory roles in the development of various anticorruption initiatives.").

2. See Transparency International's National Integrity System, http://transparency.org/policy_research/ach/introduction ("Represented by the image of a temple, where key institutions form pillars which rest on the foundations of public awareness and values, and which, in turn, support the country's integrity, the National Integrity System illustrates the interdependence of institutions in the fight against corruption.").

3. Jeremy Pope, *Elements of a Successful Anti-Corruption Campaign*, in CURBING CORRUPTION 97-104 (Rick Staphenurst & Sahr J. Kpundeh, eds. 1999) ("CURBING CORRUPTION"); Ben W. Heineman, Jr. & Fritz Heimann, *The Long War Against Corruption*, FOREIGN AFFAIRS May-June 2006, at 75.

4. See Susan Rose-Ackerman, *Corruption and the Criminal Law*, 2 Forum on Crime and Society 3, (2002) ("[T]he criminal law can play a role as a backstop lying behind the needed structural changes."); Daniel

To accomplish these multiple objectives, and particularly to centralize and invigorate criminal enforcement, creating an independent anti-corruption agency has been a popular strategy. Two prominent corruption-reform models—the World Bank and Transparency International’s “National Integrity System”⁵ and the OECD’s “Ethics Infrastructure”⁶—recommend this strategy, with the Asian-Pacific examples of Hong Kong’s Independent Commission Against Corruption (ICAC) and Singapore’s Corrupt Practices Investigation Bureau (CPIB) widely hailed as success stories.⁷

However, as most acknowledge, corruption-reduction is not a one-size-fits-all endeavor. Reform strategies must be tailored to corruption’s history, culture and manifestations in particular countries. Moreover, our observations indicate that an anti-corruption agency mechanism that works in the small, relatively homogenous city-states of Hong Kong and Singapore should be transported with great care into nations where the law enforcement challenges are broader and more diverse, both geographically and numerically. Specifically, creating and privileging an anti-corruption agency in a sprawling country like Indonesia risks undermining the possibility of effective, independent law enforcement more generally, where the law enforcement agencies are a crucial pillar of good governance and upon which sustained corruption reduction depends.⁸

Kaufmann, *Revisiting Anti-Corruption Strategies: Tilt Towards Incentive-Drive Approaches*, in CORRUPTION AND INTEGRITY IMPROVEMENT INITIATIVES IN DEVELOPING COUNTRIES 63 (1998) (“While ex post (“curative”) measures would be expected to be a component in any anti-corruption strategy, we argue that excessive focus on such ex post legal and institutional enforcement perspective, at the expense of ex ante preventative approaches will not be effective.”); Claes Sandgren, *Combating Corruption: The Misunderstood Role of Law*, 39 Int’l Law. 717, 728 (2005) (“In order to effectively combat corruption, it is necessary to focus on the workings of institutions, not individuals. Penal law is therefore of less importance than one might think. This is not to deny, however, that the criminal prosecution of corrupt activities—and associated activities such as money laundering—may give the business community a strong signal. . . . To charge high-level individuals, whether in business, public institutions or politics, with collusive corruption increases the trust of ordinary people in the system and consequently their support in the fight against corruption.”).

5. Jeremy Pope, *Confronting Corruption: The Elements of a National Integrity System*, 95-104 (2000), available at <http://www.transparency.org/publications/sourcebook>.

6. Janos Bertok, *Getting the Public Ethics Right*, OECD Observer (July 2000), <http://www.oecd.org/server.org/news/fullstory.php/aid/293>.

7. B.E.D. de Speville, *The Experience of Hong Kong, China*, in *Combating Corruption*, in CURBING CORRUPTION, *supra* note 4, at 51-58; Tan Ah Leak, *The Experience of Singapore in Combating Corruption*, in CURBING CORRUPTION, *supra* note 4, at 59-66; Chua Cher Yak, Resource Material Series No. 65, *Corruption Control: More than Just Structures, Systems and Processes Alone* 229-237 (March 2005), http://www.unafei.or.jp/english/pdf/PDF_rms/no65/RESOURCE-DivisionNo15.pdf.

8. Others have noted the difficulty of transporting the Anti-Corruption Agency models of Hong Kong and Singapore into other countries. See United Nations Development Programme, *Institutional Arrangements to Combat Corruption: A Comparative Study* 5 (2005) (“[S]everal countries have opted for or are currently considering creating an independent commission or agency charges with the overall responsibility of combating corruption. However, the creation of such an institution is not a panacea to the scourge of corruption. There are actually very few examples of successful independent anti-corruption commissions/agencies.”); African anti-corruption commissions, *Why ACCs Succeed*, www.u4.no/themes/aacc/accsuccesses.cfm (last visited Nov. 7, 2007) (“Hong Kong and Singapore [may] serve as examples of good practice but their exceptionalism as city states and broader preventive anti-corruption measures also need to be weighed in the balance when assessing the impact of ACCs [anti-corruption agencies].”).

The creation of an anti-corruption agency is a politically attractive measure, an achievement that a government can cite as a tangible step in furthering an anti-corruption agenda. But the prototype of the *independent* anti-corruption agency also responds to the real need in many developing countries to isolate corruption reform implementation from government bureaucracies that are themselves riddled with corruption, including law enforcement and the judiciary, and to put substantial financial and dedicated professional commitment behind an objective that has before received only lip service. Certainly, both of these circumstances exist in Indonesia. Corruption pervades the police,⁹ the prosecutors of the Attorney General's Office¹⁰ and the judiciary, from regional judges¹¹ up to Supreme Court justices.¹² Within existing institutional structures, therefore, it is difficult to achieve the sort of honest and efficient law enforcement efforts necessary to punish perpetrators, deter future offenders, and change the culture of corruption.

Consistent with the model mechanism, Indonesia's Corruption Eradication Commission or KPK¹³ was formed to operate "independently, free from any and all influences," with the "primary purpose of improving the effectiveness and efficiency of efforts to eradicate criminal acts of corruption."¹⁴ The same law that created the KPK mandated the creation of a Special Court for Corruption, to try corruption cases brought by the KPK.¹⁵ The KPK's responsibilities include prevention, state-building and public education, but the primary thrust of its activities thus far has been law enforcement—investigating and prosecuting major corruption cases. Both the KPK and the Special Court for Corruption were created for the express purpose of circumventing the historically corrupt and ineffective law enforcement agencies and judiciary.¹⁶

9. Indonesia Corruption Watch, *Getting Rid of Corruption in Indonesia: The Future* (Feb. 14, 2005), <http://www.antikorupsi.org/eng/mod.php?mod=publisher&op=viewarticle&artid=345> (noting that "[i]t is widely believed that the issuance of an SP3 [Letter for the Termination of an Investigation] often depends on a bribe.").

10. *Indonesian A-G Signals Crackdown on Corrupt Prosecutors*, ABC News Online, May 14, 2007, <http://www.abc.net.au/news/stories/2007/05/14/1922751.htm> ("Indonesia's new Attorney-General has admitted four out of five prosecutors in Indonesia are open to corruption but says he will root out the wrongdoers.").

11. Adrian Verity, *Skewed Justice in Indonesia's Tainted Courts*, ASIA SENTINEL, Aug. 21, 2006, http://www.asiasentinel.com/index.php?option=com_content&task=view&id=97&Itemid=31 ("[A]ccording to Asep Rahmat Fajar, head of the Indonesian Judicial Monitoring Society, . . . 'buying court verdicts has been a systematic and organized crime in the country's legal system. It involves people from the highest levels, such as high court judges, down to the lowest levels, such as administrative staff in the Supreme Court.'").

12. SEBASTIAN POMPE, *THE INDONESIAN SUPREME COURT, A STUDY IN INSTITUTIONAL COLLAPSE* 416 (2005) ("It is currently common knowledge that the Supreme Court is affected by corruption, and judges in private conversation have referred to it for many years as a routine matter.").

13. Komisi Pemberantasan Korupsi.

14. Law Number 30 of 2002 on the Commission for the Eradication of Criminal Acts of Corruption, Arts. 3 and 4, http://www1.oecd.org/daf/asiacom/pdf/indonesia_302002_KPK.pdf [Hereinafter "Law 30/2002"].

15. Law 30/2002, Arts. 53-62.

16. The preamble to the 2002 law specifically observes that existing government agencies had not been effective in handling corruption cases.

The KPK has the power to initiate investigations and prosecutions and to take over from the Attorney General's Office investigations that are lagging. Although its attention to other types of reform efforts was less substantial, the KPK posted a number of prosecutorial accomplishments during its first several years of operation.¹⁷ Current challenges include the need to reauthorize the Special Court for Corruption after a successful challenge to the constitutionality of its existence,¹⁸ and charges that, in the face of upcoming elections, the KPK's focus has become politically motivated.¹⁹ Still, early signals suggest that in Indonesia the independent anti-corruption agency can have an important role to play, particularly in jump-starting corruption reform efforts that could not—or would not—be implemented by the current corruption-ridden government agencies.

But enforcement reforms focused outside of the existing investigatory and prosecutorial agencies is not a healthy long-term solution for a country as vast and complicated as Indonesia. With 235 million people, it is the fourth largest country in the world, spread across approximately 6,000 of the 18,000 islands of its equatorial archipelago. Indonesia's former leader, Suharto, centralized government operations in the capital of Jakarta, leaving the legacy of pervasive and entrenched corruption, but more recent constitutional reforms have reversed this concentration. The salutary effect is greater regional autonomy; the negative consequence has been increased government corruption at the local level as opportunities for rent-seeking become more widely available. A single anti-corruption agency, even if well staffed and sufficiently funded (which the KPK currently is not) cannot hope to reach beyond a relatively few instances of high profile corruption which are likely centered in the capital.²⁰

17. SOREN DAVIDSEN, VISHNU JUWONO & DAVID G. TIMBERMAN, *CURBING CORRUPTION IN INDONESIA, 2004-2006: A SURVEY OF NATIONAL POLICIES AND APPROACHES* : 53 (2006) (crediting the KPK with "initiating a growing number of investigations and prosecutions . . . (which resulted in the convictions of former Aceh Governor Puteh and members of the KPK)"; Tim Lankester, *Reform of Indonesia's Governance: Myth or reality?*, The Straits Times Interactive, Apr. 9, 2007, <http://www.ytlcommunity.com/commnews/shownews.asp?newsid=28804> ("The [KPK] has held hundreds of investigations and prosecuted former ministers, business leaders, governors and legislators."). There has been steady growth in the number of corruption cases brought by the KPK. In 2004, the year the Court came into existence, a single case was filed. Sixteen new cases were filed in 2005, and 25 new cases were filed in 2006. Anti-Corruption Court, *Annual Report 2006* 14. See also KPK, *Annual Report 2006* 4.5-4.12, http://www.kpk.go.id/modules/wmpdownloads/files/Annual_Report_2006_4.pdf.

18. Fabio Scarpello, *Reversing Indonesia's Anti-Corruption Drive*, Asia Times Online, May 6, 2007, http://www.atimes.com/atimes/Southeast_Asia/IC06Ae01.html.

19. Bill Guerin, *Politics of Corruption in Indonesia*, Asia Times Online, Mar. 29, 2007, http://www.atimes.com/atimes/Southeast_Asia/IC29Ae01.html (noting "[g]rowing opposition complaints of discriminatory justice" being aimed at the KPK); and Ary Hermawan, *Has Politics blunted anticorruption campaign?*, Jakarta Post.com, Nov. 13, 2007, <http://www.thejakartapost.com/review/nat04.asp>.

20. At the end of 2006, the KPK had fewer than 100 investigators and prosecutors. KPK, *supra* note 14, at 3.6, http://www.kpk.go.id/modules/wmpdownloads/files/Annual_Report_2006_3.pdf (figures for employees in the "Repression Unit").

For a number of reasons, Indonesia's KPK and independent corruption agencies in other countries with similar geographic reach and diversity-of-crime challenges, must be seen as a limited and likely short-term supplement to the permanent governmental investigatory and prosecutorial services, which must receive the more fundamental and sustained corruption reform attention. One concern is that, while anti-corruption agencies may work well in small nations like Hong Kong and Singapore, the very things that make them effective—they are small, elite, and nimble—mean that they cannot effectively reach into every province to attack public corruption at the roots. In Indonesia, the KPK has taken on several large, high profile cases, predominantly involving government agencies in Jakarta. In those cases, it has done well, but its reach is necessarily limited. Indeed, the KPK charter is specifically restricted to cases involving significant state losses, law enforcement or other high government officials, or cases which have otherwise achieved widespread notoriety.²¹ To reach corruption by judges, local agency and customs officials, as well as the petty but entrenched corruption in various administrative bureaucracies, law enforcement needs local investigators and prosecutors who are familiar with local conditions and have real access to local witnesses and evidence.²² Such cases cannot be effectively investigated and prosecuted from the capital; only the prosecution service, which has a presence in every province and district in the country, is equipped to tackle such cases.²³

An additional issue arises from the necessarily limited scope of an anti-corruption agency's jurisdiction. While corruption may be the focus of investigatory efforts, it is very often a symptom or cause of other criminal activity, such as tax evasion, customs violations, bank fraud, prostitution, money laundering, and particularly in Indonesia, illegal logging. Even if not apparent at the outset of an investigation, these links between criminal activity often lead investigators in corruption cases to evidence of other crimes, and vice versa. Leads in corruption investigations, new witnesses and testimony can arise out of the investigation of these and other substantive crimes. On a strategic level, stamping out corruption requires that law enforcement also take steps to eradicate the criminal activity that spawns corruption. Tactically, such crimes should be prosecuted together, so that cases involving, for example, illegal smuggling and corrupt payments to customs officials are more effectively prosecuted when criminal charges relating to the full panoply of conduct can be brought against defendants in a single case, or at least by a single prosecution team. Only the

21. Law 30/2002, Art. 11.

22. DAVIDSEN, *supra* note 17, at 35 (quoting complaint of Eryvn Kaffah, National Coalition of NGOs Against Corruption that the current President Yudhoyono's "shock therapy on corruption . . . is only happening in Jakarta.").

23. In contrast to the relative handful of prosecutors at the KPK, Indonesia's prosecution service has at least 5600 prosecutors stationed in dozens of offices around the country. PRICE WATERHOUSE COOPERS & BRITISH INSTITUTE OF INT'L AND COMP. LAW, FOCUS ON PEOPLE, THE FINAL REPORT OF THE GOVERNANCE AUDIT OF THE PUBLIC PROSECUTION SERVICE OF THE REPUBLIC OF INDONESIA '49 (2001).

national prosecution service has the authority (in Indonesia) to prosecute such other crimes, and only it has prosecutorial experience in those areas.

Finally, and most fundamentally, focusing on building the anti-corruption agency may have the paradoxical effect of weakening law enforcement generally, as good prosecutors and resources are diverted to the anti-corruption agency. In Indonesia, the combined mandates that the KPK's investigators and prosecutors be lent from the Attorney General's Office and police, and that they be of high competence and integrity, leads to an "institutional 'zero-sum game' . . . , wherein the KPK draw[s] staff resources away from th[e other] two organizations."²⁴ Such skimming may leave the police and prosecution service demoralized, less effective, and potentially more corrupt than before, undermining the broader state-building and public confidence-lifting strategies.

These many concerns indicate that creation of, and support for, anti-corruption agencies in large developing countries that present the same types of institutional challenges as Indonesia should not come at the expense of reform of the core police and prosecution services.²⁵ These institutions, unlike anti-corruption agencies with limited mandates, are structured to address the wide range of law enforcement efforts that good governance requires. Competent professionals with the will to combat corruption currently exist within them, and more importantly, an appropriate commitment of resources combined with efforts to shift the tide of embedded expectations and practices, may induce more dedicated, skilled individuals to join.²⁶

In developing countries like Indonesia, the formation of anti-corruption agencies should not be viewed as the long-term solution to problems with anti-corruption enforcement. Establishing and maintaining the rule of law over the long term is dependent upon a functioning and respected justice system. The traditional police and prosecution service should be equipped with appropriate powers to investigate and prosecute public corruption offenses, and reform of the prosecution service itself to make it more professional, productive, transparent, and effective, is a necessary ingredient of sustainable corruption reform.

24. DAVIDSEN, *supra* note 17, at 52. The KPK has attracted considerable support from foreign donors, which is not undeserved. KPK, *supra* note 14, at 3.7-3.10. By contrast, donor support for the much larger Indonesian National Police and Attorney General's Office, although increasing, remains marginal.

25. See ADB/OECD Anti-Corruption Initiative for Asia-Pacific, *Anti-Corruption Policies in Asia and the Pacific: Progress in Legal and Institutional Frameworks in 25 Countries* 45 (2006) <http://www.oecd.org/dataoecd/32/31/36832820.pdf> (noting that many countries in the Asia-Pacific region have set up ACCs, but in many of these same countries "general law-enforcement agencies have not yet benefited from particular attention and reform.").

26. Leonard Ginocchi, *Accountability Matters in Anti-Graft Drive*, Jakarta Post.com, July 26, 2007, <http://www.thejakartapost.com/yesterdaydetail.asp?fileid=20070726.F05>; Davidsen, *supra* note 17, at 1 ("President Yudhoyono is committed to punishing corruption, and there is a small but significant constellation of reform-minded actors inside and outside the government who have the potential to make a difference.").