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RESEARCH ARTICLE

What Makes a Good Judge? Perspectives from Indonesia

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Abstract

In May 2018, Artidjo Alkostar retired from the Supreme Court of Indonesia after a judicial career spanning almost two decades. Over this period, he presided over many of Indonesia's most prominent and controversial criminal cases and became renowned for routinely rejecting corruption appeals and increasing prison sentences. In the celebratory publications that marked his retirement, Alkostar was held up as a model judge, with senior legal figures, including Supreme Court judges, singling out his strong work ethic, integrity, simplicity of character, and firmness. Curiously absent from the list of praiseworthy attributes were pre-requisites for effective judging, including adequate legal knowledge, transparent legal reasoning and decision-making, objectivity and avoiding the perception of bias. An analysis of Alkostar's most notorious decisions suggests that he, and the judges who served with him, did not always clearly display these pre-requisites. This article considers what this says about judging in Indonesia and what might, in practice, be the defining characteristics of a good judge there.

Keywords: Indonesia; courts; corruption; criminal law; judicial performance

1. Introduction

> His devotion and full responsibility had created huge trust in him. In the eyes of the public, Alkostar's decisions are certainly correct, even though academically they might be wrong, Alkostar's sense of justice is the public's sense of justice, and the public's sense of justice is Alkostar's sense. There has never been another Supreme Court judge who has obtained as much public trust as that obtained by Alkostar. (Supreme Court Justice Salman Luthan[1])

During his 18-year career as a Supreme Court judge, Artidjo Alkostar presided over many of Indonesia's "biggest" cases of the post-Soeharto period, becoming one of Indonesia's best-known judges. He retired from the bench in May 2018 amid great fanfare. The print and electronic media widely reported his retirement, and he gave numerous television interviews. To mark it, several biographies detailing his pre-judicial life and time on the bench were published.[2] The Supreme Court itself released a 425-page book of interviews in which Indonesia's most senior legal figures gave their impressions of him, usually in hyperbolically-glowing terms.[3] These figures included every Supreme Court judge

[1] Safitri (2018l), p. 153.
[2] Musyafa (2017); Windrawan (2018).
[3] Safitri (2018k).

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serving when he retired, senior judges from other courts, the Attorney General, the police chief, commissioners of the Anti-corruption and Judicial Commissions, and high-profile legal reformists, among many others. With few exceptions, they expressed deep admiration for his performance; and described him as a model judge, who all other Indonesian judges should emulate.

Each of these media reports and books lauded Alkostar for having a strong work ethic, integrity, simplicity of character, and firmness. Of course, these observations could have simply been made out of politeness to one of Indonesia's most respected and senior legal figures. But the repeated mention of these values and skills conveyed an impression that having them was exclusive to Alkostar, or at least that other Indonesian judges did not share some or any of them. If these values and skills were commonplace among judges, one might not have expected Alkostar to be considered so exceptional, and far less would have been made of his possession of them. Confirming this impression were the many interviewees who portrayed Alkostar as irreplaceable, implying that serving and future judges could not reach the standards Alkostar had set. Many observers, including Supreme Court judges themselves, expressed concern about the future of the court and the Indonesian judiciary without Alkostar, and expected public support for the Supreme Court, and the judiciary in general, to fall after his retirement.

While most public sentiment surrounding Alkostar's retirement expressed praise for his performance and disappointment at his departure, a few figures criticized particular decisions, and several others appeared glad about his retirement. For example, some former judges, academics and lawyers suggested that Alkostar revelled in public popularity and, to that end, almost always increased sentences on appeal and very rarely acquitted, particularly in cases that drew public attention or outrage. Alkostar became particularly notorious for doing this in corruption appeals, leading to some potential appellants delaying lodging their appeals until he retired, or even withdrawing their appeals once they discovered he was allocated to their case. Other critics feared that he sympathized with Islamist groups and that his decisions reflected this.

At the heart of these criticisms lies the perception that Alkostar might have been more concerned with delivering popular outcomes than considering the merits of each case through an objective assessment of all relevant evidence and legal arguments, including those put forward by the defence. Put more crudely, these criticisms imply that he was biased against criminal defendants. This would seem to contravene various provisions of the Supreme Court's Judicial Ethics Code,[4] which is based on the Bangalore Principles of Judicial Conduct (2002).[5] It requires that judges be just, independent, responsible, and professional, in addition to other characteristics, such as self-respect, discipline, and integrity. The Code requires judges to treat parties equally and fairly, to avoid bias, to respect the presumption of innocence, and to give the same opportunities to both parties to present their cases. It also expressly requires judges to "provide justice to all parties and not intend to simply convict [or punish (menghukum)]."

The criticisms of Alkostar's decision-making have thus far been made primarily in response to outcomes rather than the reasoning Alkostar employed to reach those outcomes, or have focused only on one or two cases. In this article, I seek to test these criticisms about Alkostar's decision-making, by examining key cases he decided. I will demonstrate that, overall, these criticisms have some merit, with many of his judgments not clearly indicating an evaluation of the interpretation and application of the law by the lower courts, which is the official function of Supreme Court judges, at least in cassation cases.

[4] Joint Decision of the Supreme Court Chief Justice and Judicial Commission Chairperson No. 047/KMA/SKB/IV/2009 dan 02/SKB/P.KY/IV/2009, 8 April 2009.

[5] Hukumonline (2009).

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The media, and almost all judges and lawyers, did not identify these shortcomings in the reports and books marking Alkostar's retirement. But, even adjusting for some exaggeration associated with his retirement, it seems remarkable for a judge to be lauded as a "model" if even some decisions he helped produce have these shortcomings. How can this be simply ignored and, instead, his other values praised? After all, providing adequate justification for decisions and avoiding bias are basic judicial standards followed, or at least aspired to, in most countries, including Indonesia. Does this mean that, in fact, proper judicial process and reasoning are not valued, or are undervalued, in the Indonesian context, or are other factors at play? If, as this article will suggest, judicial reasoning is not, in practice, considered a "model" judicial attribute in Indonesia, then why not? And how, then, are we to properly assess judicial performance?

To answer these questions, this article begins with a discussion of Alkostar's career—first as a lawyer and academic, then as a Supreme Court judge. In Section 2, I discuss Alkostar's appointment and introduce key aspects of Indonesia's judicial system, including career progression and appeal processes, to provide context for the cases discussed in Sections 3 and 4, and discuss the characteristics for which Alkostar was applauded on his retirement. In Section 3, I examine some of the corruption cases upon which Alkostar built his reputation, and outline some of the key criticisms of his decision-making in them. Section 4 focuses on other types of cases, many of which rank among the most high-profile and controversial in Indonesian legal history. These cases are discussed in detail, to enable a full critique of the problematical judicial reasoning he employed, usually to maintain convictions based on suspect prosecution arguments and scant evidence, and in the face of compelling evidence and arguments presented by the defence. I conclude with some observations about what Alkostar's decision-making on the one hand, and fame on the other, tells us about how judicial performance is assessed in Indonesia.

2. Introducing Artidjo Alkostar and the Indonesian Supreme Court

Alkostar left the Supreme Court after reaching the mandatory retirement age of 70.[6] Unlike most Supreme Court judges, he was a so-called non-career judge, having worked for almost 30 years as a lawyer.[7] (The vast majority of Indonesian judges are "career judges" and, like judges from most civil-law countries, begin their judicial careers soon after they complete their law degree and judicial training. They usually cannot be directly appointed to the Supreme Court like non-career judges, needing instead to work their way up the judicial hierarchy through a series of promotions.[8]) Indeed, he was part of the first ever batch of non-career judges,[9] appointed in 2000. Several other well-known legal practitioners, academics and judges from other courts joined the Supreme Court bench at the same time, including Professor Bagir Manan (who later became Chief Justice), reformist administrative court judge Benjamin Mangkoedilaga (who, when working in the administrative courts, famously overturned the Soeharto regime's cancellation of Tempo magazine's publishing licence),[10] Abdul Rahman Saleh (who later became Attorney General) and Muhamad Laica Marzuki (who later served on the Constitutional Court).[11] The main reason for employing non-career judges has not been formally explained, but appeared

[6] Art. 11(b) of Law 14 of 1985 on the Supreme Court (as amended).
[7] Mahkamah Agung (2018).
[8] Mahkamah Agung (2003).
[9] Safitri (2018j), pp. 80–1.
[10] Millie (1999).
[11] Presidential Decision 241/M/2000; Jakarta Post (2000).

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intended to increase the likelihood of post-Soeharto judicial reforms taking hold, with many career judges considered resistant to those reforms.[12]

One of Alkostar's biographies explains that former Justice Minister Yusril Mahendra personally called to offer him the position. Initially, Alkostar said that he was reluctant to accept the job, citing the high levels of corruption in the Supreme Court, which he called "the place where any person seeking truth and justice in fact [encounters] legal deviations and violations."[13] Indeed, Alkostar said that he was afraid that taking the position would force him into the very "dirty deeds" he had long opposed, observing that lawyers saw the Supreme Court as "very bad."[14] But, after some reflection, he took up the offer and was installed by Indonesia's third president, Abdurrahman Wahid.

2.1 Career as a lawyer

Why the government identified Alkostar for a position as a non-career Supreme Court judge has, to my knowledge, never been publicly explained. But one can speculate that he was selected because of his deserved reputation for being a hardworking, fearless, and honest lawyer and academic. Alkostar had worked for many years as a public defender for the Legal Aid Institute during the Soeharto era; he even directed the Yogyakarta branch from 1983 until 1989.[15] In his work, he represented clients in cases where significant government and military interests were at stake.

For example, he helped to defend clients against government appropriation of their land such as in the controversial *Kedungombo* and *Tanah Ohee* cases.[16] The *Kedungombo* case involved the government taking land in Central Java to build a dam, apparently offering little or no compensation to communities who had long held that land under customary title (*hak ulayat*).[17] The *Tanah Ohee* case was a dispute in West Papua between customary law communities and the local government, which had allegedly been using 62 hectares of customary land for government offices. Both cases involved lengthy legal proceedings and alleged military intimidation against plaintiff land holders. Both are significant because, while the government effectively won them, and they continue to be cited as examples of Soeharto-era government control of the judiciary, the plaintiffs did win some victories along the way. In *Kedungombo*, for example, the plaintiffs were unsuccessful at first instance and on appeal,[18] but they won in the Supreme Court on "cassation"—a process I discuss below. Here, the Supreme Court not only upheld their claim against the government, but also increased the amount of compensation beyond their claim.[19] This decision was celebrated as one of the few Supreme Court cases that went against the government at the height of Soeharto's power. But this victory was short-lived. The government asked the Supreme Court to "reopen" the case—also discussed below—which it did and then duly sided with the government. By contrast, in the *Ohee* case, the plaintiffs won at first instance, then lost on cassation, but won the Supreme Court reopening. This case became notorious when, in early April 1995, before execution was ordered, the Supreme Court Chief Justice Soerjono instructed the Jayapura District Court chairperson not to enforce the decision.[20]

[12] Butt & Lindsey (2018), p. 82.
[13] Musyafa (2017), p. 20.
[14] *Ibid.*, p. 23.
[15] Lev (1987); Lindsey & Crouch (2014).
[16] Hukumonline (2000).
[17] World Bank (1995), pp. 50–3.
[18] Semarang District Court Decision 117/Pdt/G/1990; Semarang High Court Decision 143/Pdt/1991.
[19] Fitzpatrick (1997), pp. 199–200.
[20] Pompe (2005), p. 125; Butt (2008a).

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Alkostar also defended victims of military violence during the Soeharto period. For example, he defended several East Timorese demonstrators charged with subversion after the so-called Santa Cruz Massacre in 1991. He claimed to have been "continually and repeatedly ... threatened and terrorised" during his four months in Dili. He even said that a "ninja" was sent to kill him at his hotel one night, explaining that, because his room was registered under his assistant's name, the would-be assassin could not locate him.[21] As director of the Yogyakarta Legal Aid Institute from 1983 to 1998, he was also involved in legal responses to the so-called Petrus (*penembakan misterius*, or mysterious shootings) killings of 1982–85.[22] This was a state-sanctioned military programme under which alleged criminals were extra-judicially executed or detained. He advised and represented many people detained without trial.[23] Artidjo allegedly protected criminal figures on a military hit list, even letting one gangster stay at his house for three months.[24] This brought him into direct confrontation with powerful military figures, amid rumours that he, too, had become a target and would be murdered in his sleep.[25]

Like other Supreme Court judges, Alkostar sat on both "cassation" (*kasasi*) and case reopenings (*peninjauan kembali*, or PK). Cassation processes are, in essence, appeals, usually from provincial appeal courts (*pengadilan tinggi*).[26] Formally, their main purpose is to ensure that the lower courts—the first-instance court (*pengadilan negeri*) and appeal court—have applied the law correctly[27] but sometimes, in practice, the presiding judges will also re-evaluate factual issues and how the lower courts applied them.

By contrast, PKs are reviews of the "final" decision of a lower court, or even of the Supreme Court itself. (If the decision being reopened is a Supreme Court decision, then the panel of judges hearing the review must be different to the panel that initially decided the case.) The grounds for a PK in criminal cases are: a new circumstance has emerged that, if known, would have resulted in an acquittal or a lesser charge; an obvious error; or a fact or situation established in the decision that contradicts an aspect of another case.[28] Even though they were initially intended to be used in exceptional circumstances, PKs are now almost inevitably lodged by well-resourced defendants. They have nothing to lose because, unlike appeals and cassations, PK panels cannot increase penalties—they can only reduce or acquit. In recent years, defendants have even lodged multiple PKs, after a decision of the Constitutional Court declared unconstitutional provisions allowing only one PK.[29]

Both cassation and PK applications are decided "on the papers." The parties lodge their memoranda (*memori*), containing the legal arguments that support what they ask the court for—usually an acquittal or a more lenient sentence from the defence and a heavier penalty from the prosecution. The parties can rarely make oral representations. They must, therefore, anticipate the other party's arguments and refute them in their own documents.

[21] See interview with Alkostar on: https://www.youtube.com/watch?v=twBnOFu86Tk.

[22] During this period, he also (unsuccessfully) pursued police over the alleged murder of Fuad Muhammad Syafruddin, a Yogyakarta journalist, who was well known for reporting on corruption, including corruption involving military personnel in positions of political power.

[23] Alkostar (2000), p. 256.

[24] Yeung (2016).

[25] Liputan 6 (2018).

[26] First-instance decisions of some courts are appealed directly to the cassation court rather than first to a provincial appeal court. These include commercial and industrial relations courts: Butt & Lindsey (2018), p. 92.

[27] Law 14 of 1985 on the Supreme Court (as amended).

[28] Art. 263(2) of the Code of Criminal Procedure (*Kitab Undang-undang Hukum Acara Pidana* or KUHAP). This paragraph draws on Butt & Lindsey (2018), p. 94.

[29] Butt & Lindsey (2018).

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Decisions are made behind closed doors, which has led to complaints about the process lacking accountability and transparency.[30]

Importantly, the process prevents Supreme Court judges from directly assessing witness testimony. They can order fresh evidence to be heard, but this task will usually be delegated to the lower court at which the case commenced, which will send a report on that evidence to the Supreme Court. This system is a product of the Supreme Court's main function—ensuring the proper application of the law. But, as we shall see, the Supreme Court often goes beyond assessing the legality or admissibility of evidence to assess the credibility and veracity of evidence. Critics, including some judges, say that the Supreme Court exceeds its jurisdiction when it does this.

2.2 The panel system

Like most Supreme Court judges, Alkostar served as a member of a judicial panel during his career. As a general rule, these panels comprise three judges,[31] but sometimes five judges will sit.[32] Judges sit alone only in extreme circumstances.[33] The panel will commonly produce a single decision, signed by all of the judges on the panel. Judicial dissents are permissible, albeit relatively rarely in all courts, except the Constitutional Court. Sometimes, the identities of dissenting judges are not specified in the judgment.

In these circumstances, one might ask how the cases discussed in Sections 3 and 4 can illuminate Alkostar's decision-making. It is, indeed, impossible to isolate his appraisal of facts and legal reasoning from those of the other members on the panel. After all, judges' deliberation meetings (*rapat permusyawaratan hakim*), where cases are discussed and decisions reached, are confidential.[34] However, in my view, these decisions can, in a general sense, be used for this purpose, for two main reasons.

The first is that Alkostar would likely have been highly influential on these panels. He appears to have chaired most of the panels he worked on, particularly after being appointed Junior Supreme Court Chairperson for Criminal Law in 2009. Undoubtedly, as a panel chairperson, his views would have carried more weight than those of an ordinary panel member. Even on panels that he did not chair, his views would have been very influential, given his seniority and revered status. His influence on judicial panels was confirmed in an interview with Supreme Court judge Margono, who, referring to the decisions that increased sentences for corruption convicts, said that "If Alkostar makes that decision, then automatically judges under his coordination must follow it."[35]

The second is that, as mentioned, Supreme Court judges, including panel chairs, are free to dissent. If Alkostar did not agree with the majority of a panel on which he sat, he could have simply expressed this in a dissenting opinion. Given his model-judge attributes, discussed below, he could be expected to have had no hesitation in doing this. Indeed, he has issued strong dissents in high-profile cases and claims to have issued Indonesia's first judicial dissent. As I argue below, many cases he helped to decide contained glaring legal errors, highly problematic evidence, or no discussion of issues worthy of detailed consideration. Had he identified these problems, he could have highlighted them in a dissent, even if other members of the panel were willing to overlook them.

[30] Hukumonline (2000).

[31] Art. 11(1) of Law 48 of 2009 on Judicial Power specifies that at least three judges are required for each case unless otherwise determined by statute.

[32] See Art. 26 of Law 46 of 2009 on the Corruption Eradication Courts.

[33] Usually only in regional areas experiencing a shortage of judges.

[34] Art. 14(1) of Law 20 of 2009 on Judicial Power.

[35] Safitri (2018e), p.189.

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2.3 Alkostar's "characteristics"

As mentioned, the Supreme Court released a book to commemorate Alkostar's retirement, in which interviewees expressed their views about Alkostar, as both a judge and an individual. A common theme was that Alkostar was a "model" judge—apparently embodying the characteristics to which Indonesian judges should aspire.[36] Almost all interviewees, and many media reports, praised him for having the following traits or strengths (*kelebihan*).

2.3.1 Hard-working

Alkostar was known for working late into the night and for his very large case-load.[37] In particular, he is reported to have decided 19,708 cases during his 18-year tenure, which equates to 1,095 cases per year or 30 per day.[38] These bare figures are somewhat misleading because Alkostar did not decide these cases alone, but rather as a member of a panel. It is, therefore, more accurate to say that he *helped* to decide this number of cases. Nevertheless, he is often credited with drastically reducing the backlog of criminal cases.[39] This is telling of his productivity given that non-career judges, most of whom lacked previous judicial experience, were often criticized for failing to help to reduce the Supreme Court's backlog of many thousands of cases.[40] This backlog was considered a primary indicator of the Supreme Court's dysfunction in the early post-Soeharto era alongside other administrative problems, including slow disposition times, non-transparent processes, failure to inform parties of decisions, and the like.[41]

The media also celebrated that Alkostar never took leave while working at the Supreme Court and that, when he spent nine months studying in the US, he refused to draw a salary because he felt that he was not working.[42] Instead, he is said to have donated his salary to build a mosque at the Supreme Court.[43]

*2.3.2 Simple (*sederhena*)*[44]

Alkostar was well known for eschewing the lavish lifestyle attached to high judicial office. For example, in his early years at the court, rather than using an official car to travel to work, he was said to take a *bajaj*, which is a three-wheeled, cheaply made passenger car, usually powered by a scooter motorcycle engine.[45] This means of transport is among the cheapest, dirtiest, and most uncomfortable in Jakarta, and is usually taken only by people who cannot afford a taxi. According to one account, Alkostar was even turned away by security guards when he attempted to enter the front gate of the court's premises in a *bajaj* and instead used a side entry.[46] Some of his judicial colleagues also commented on his dress sense, which was drab, sometimes sloppy, and generally unbecoming of a

[36] See e.g. Safitri (2018o), p. 85; Safitri (2018x), p. 89; Safitri (2018f), p. 94; Safitri (2018s), p. 101; Safitri (2018g), p. 225; Safitri (2018u), p. 231.

[37] Safitri (2018k) p. 67; Safitri (2018x), p. 89; Safitri (2018g), p. 225.

[38] Sukmana (2018).

[39] Safitri (2018q), p. 125.

[40] Fibri (2002).

[41] Of course, in the early post-Soeharto period, the Supreme Court faced numerous other problems, not least decades of dependence on government and corruption: Butt & Lindsey (2010).

[42] Saputra (2018e).

[43] Saputra (2018c). Nevertheless, the timing of his trip drew criticism, because he had only been working for three months before taking study leave, which, according to one report, violated Supreme Court regulations: Fibri (2002).

[44] Safitri (2018g), p. 85; Safitri (2018t), p. 91; Safitri (2018v), p. 274.

[45] Windrawan (2018), pp. 144-5. Though eventually he used a car and driver.

[46] Saputra (2018a).

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Supreme Court judge. He was also said to have preferred eating at cheap roadside food stalls (or *warung*) rather than in restaurants and, when travelling on court business, insisted on carrying his own bags.[47]

The characterization of Alkostar as frugal and unassuming is reinforced in his biographies and the reportage surrounding his retirement, which discussed his modest rural upbringing, his love of gardening, and his retirement plans: running a restaurant, tending to goats, and farming fish and alligators.[48] Some sources even discussed a failed romantic relationship that he had with an American. After he met her parents, she promised to travel to Indonesia with him to meet his family, but reneged at the last minute.[49]

These reports appear to make Alkostar "relatable" to ordinary Indonesians, many of whom can only afford a modest lifestyle and face numerous economic and social disappointments. The descriptions of him run counter to the general image of many Supreme Court and other Indonesian judges, who dress impeccably (or at least attempt to) and are renowned for enjoying the perks of office. Indeed, one can speculate that many Indonesians believe that most judges live "beyond their means"—that is, their lifestyles far exceed what their salaries can support—indicating that they must be supplementing their income through bribery. Implicit in this praise for Alkostar's frugality is that he refrained from these illicit practices; and his contentment with his modest existence indicates that he was not tempted by such practices.

*2.3.3 Quiet (*diam*) and awkward (*kaku*)*

Many described Alkostar as socially awkward, particularly with people he did not know well, and portrayed him as introverted, preferring to work quietly in his office rather than to make friends or socialize with colleagues.[50] One judge said that Alkostar "finds it difficult to make new friends and to adapt to new environments"[51] and another observed that he was "incapable of improvising in his social life, as if Alkostar closes space for interaction, both with his colleagues in the Supreme Court and with the general public."[52] He was also perceived as disliking "small talk." These characteristics might be considered unusual in the Indonesian context, where there appears to be a cultural perchance for idle banter, conversation, and preferring the company of others to being alone. Nevertheless, avoiding people in this way limits opportunities to receive bribes and perhaps even signals a lack of receptiveness to them.

2.3.4 Religious

Many interviewees also highlighted that Alkostar had an impressive knowledge of Islam.[53] Deeply religious, and a strict worshipper,[54] he was said to often arrive before, and leave after, other attendees at Friday prayers[55] and gave numerous presentations at Islamic universities and fora for Islamic scholars (*ulama*).[56] Even when presenting at judicial training

[47] Safitri (2018r), p. 129; Safitri (2018l), p. 153; Safitri (2018n), pp. 145–6.

[48] Safitri (2018k), p. 69; Mahkamah Agung (2018).

[49] One of his biographies even revealed that her nickname for him was "artichoke". See Musyafa (2017); Saputra (2018a).

[50] Saputra (2018d).

[51] Safitri (2018l), p. 150.

[52] Safitri (2018m), p. 285.

[53] Safitri (2018z), p. 161; Safitri (2018n), p. 145.

[54] Safitri (2018i), pp. 121–2.

[55] Saputra (2018b); Saputra (2018e). pp. 219–20.

[56] Safitri (2018k), p. 68.

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courses, Alkostar was known for providing "special religious content" as well as the relevant training material.[57]

2.3.5 Resistant to influence

Interviewees and reports also emphasized that Alkostar could not be influenced in his decision-making, identifying three potential types or sources of influence. First, he was said to be immune to bribery attempts, with many highlighting his integrity and honesty.[58] Even the police chief praised him for resisting temptation and not taking material benefits from his position.[59] As Professor Indriyanto Senoadji said in his interview: "For me, his strengths are his integrity and honesty, which are not in abundance among his colleagues in the Supreme Court."[60]

Supreme Court judges variously described him as an "icon of integrity"[61] and "Mr Clean."[62] One judge said: "I have never heard any negative news about Alkostar. About money issues or about manipulating cases. These things are not in Alkostar's dictionary of principles."[63]

Second, Alkostar was portrayed as being unswayable by intimidation. As mentioned, he was often threatened during his career as a lawyer, particularly when representing clients who had come into conflict with the military. But he also attributed his fearlessness to his upbringing in Madura, where, by his own account, witchcraft is practised, and he learned martial arts (*silat*), got into fights, raced bulls, and even played with sickles (*celurit*).[64] He was, therefore, unperturbed after being told that an unsuccessful litigant had sent a photo of him to a witch doctor in Banten for use in black magic against him. He dismissed this as "kindergarten witchcraft" compared with what he had had to face in his hometown in his youth.[65]

The third type of influence he was known to resist came from other judges with whom he served on panels, with different views to his own about the case they were handling. He was well known for issuing dissenting opinions. However, some interviewees emphasized his tolerance of other viewpoints and that he encouraged junior judges to dissent if they disagreed with the majority view on a panel.[66]

2.3.6 Firm (tegas)

While the press and interviews did not clearly explain what "firm" means in this context, the term appears to be a reference to Alkostar's hard or firm line on crime, especially during his last few years on the Supreme Court. This is when Alkostar developed a reputation for dealing harshly with those who appealed their corruption convictions.

It may be surprising that legal reasoning, impartiality, and knowledge of the law—widely expressed as fundamental pre-requisites of functioning courts and judges in Indonesia, as elsewhere[67]—were not emphasized in the narrative about Alkostar conveyed through these sources. Rather, aspects of his personality that are not commonly associated with judging were emphasized—such as quietness, religiosity, and modesty. Emphasizing

[57] Safitri (2018c), p. 223; Safitri (2018u), p. 231.
[58] Safitri (2018o), p. 85; Safitri (2018aa), p. 119; Safitri (2018k), p. 129.
[59] Safitri (2018f), p. 94.
[60] Safitri (2018d), p. 103.
[61] Safitri (2018b), p. 139.
[62] Safitri (2018h), p. 131; Safitri (2018ab), p. 179.
[63] Safitri (2018p), p. 215.
[64] Liputan 6 (2018).
[65] Farhan (2018).
[66] Safitri (2018y), p. 137; Safitri (2018a), pp. 141–2.
[67] See e.g. Hammergren (2014), p. 60.

characteristics that do not appear to be strictly essential for judges is not unique to Indonesia, however. For example, it resonates with two of the four ideal traits of Thai judges identified by Somanawat: being a good person (with particular reference to having strong Buddhist beliefs and practices) and being proper (polite, kind, and socially refined).[68] By contrast, another trait of the ideal Thai judge—having legal knowledge superior to that of others in society[69]—appears to be less highly valued in Indonesia: it was not identified as an element of a model judge in the praise for Alkostar.

I now turn to discuss some of the corruption cases that Alkostar handled, through which he is widely regarded to have developed his reputation for firmness and resistance to influence. However, an analysis of these cases also suggests that a concern to uphold convictions and increase sentences prevailed over the need to rigorously interrogate the available evidence and the legal conclusions, which might otherwise be expected of a "good judge."

3. Corruption cases

Alkostar presided over some of the most important corruption trials in Indonesian legal history. Early in his judicial career, for example, he was involved in Supreme Court panels handling cases involving former President Soeharto and his family. When Soeharto himself was pursued for corruption, Alkostar disagreed with the views of the other judges on the panel who decided that Soeharto should not face trial due to illness. Alkostar instead suggested that Soeharto should be given state-funded medical treatment until he was sufficiently healthy to stand trial.[70] Alkostar also served on the panel that convicted Soeharto's son, Tommy, of corruption and sentenced him to 18 months of imprisonment.[71] (The chairperson of that panel, Syafiuddin Kartasasmita, was later murdered on his way to work; Tommy Soeharto was later convicted of ordering the assassination.[72])

Alkostar was the sole dissenter in the 2001 cassation appeal of Joko Tjandra,[73] who was accused of securing around Rp 900 billion from IBRA (the Indonesian Bank Restructuring Agency), which was established in the aftermath of the Asian Financial Crisis. Tjandra extracted that money from IBRA on behalf of Bank Bali, which claimed to be owed the money by one of the collapsed banks that IBRA was managing. A large portion of those funds were then transferred to various figures, including politicians and Tjandra himself. Although the decision is not publicly available, media reports indicate that Alkostar would have imposed a 20-year prison sentence and a Rp 30 billion fine.[74] The majority, however, decided that Tjandra's act was a civil debt transfer, rather than a criminal matter.[75]

Alkostar became more prominent after Indonesia's Anti-corruption Commission (*Komisi Pemberantasan Korupsi*, or KPK) established in 2003, began prosecuting. He presided over the cassation of Abdullah Puteh, former governor of Nanggroe Aceh Darussalam, found guilty of marking up, in 2002, the price of a Russian helicopter by over $US 1 million.[76]

[68] Somanawat (2018).

[69] *Ibid.*, p. 102.

[70] Komara (2018).

[71] Though Tomi Soeharto was successful in a PK appeal: Liputan 6 (2001).

[72] Hukumonline (2002); Loppies, Sianipar, & Rahadiana (2006).

[73] Supreme Court Decision 1688 K/PID/2000.

[74] He claims that he issued this dissent, even before they were formally permitted by statute in 2004: Safitri (2018k), p. 68.

[75] Hukumonline (2001). Ultimately, however, this case was reopened by the prosecution, which secured a conviction and a two-year prison sentence: Supreme Court Decision 12 PK/Pid.Sus/2009. However, Tjandra fled to Papua New Guinea, out of reach of Indonesian law enforcers: Fox (2018).

[76] Jakarta Anti-corruption Court Decision 01/Pid.B/TPK/2004/PN.JKT.PST; Jakarta High Anti-corruption Court Decision 01/PID/TPK/2005/PT.DKI.

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The cassation panel confirmed the lower-court sentence of ten years' imprisonment.[77] This was a symbolically important decision, being the KPK's first prosecution.

Alkostar's reputation grew as he increasingly came to preside over cases involving high-profile defendants, which roughly coincided with his appointment as Junior Supreme Court Chairperson for Criminal Law in 2009. His notoriety came not only from the fact that he sat on many, if not most, of these cases, but also because, in some widely reported cases, he increased sentences and fines, sometimes significantly. Although the corruption cases he handled during this period are too numerous to describe here, some of these high-profile cases are worth recalling.

For example, Alkostar chaired the cassation panel that confirmed the life sentence of former Constitutional Court Chief Justice Akil Mochtar for taking bribes to fix regional electoral disputes.[78] This is the longest sentence metered out for corruption in Indonesian legal history and was justified on the basis of Mochtar's position and the impact of his crimes on the reputation of the Constitutional Court and its other judges.[79]

Other notable cases that Alkostar chaired include the following:

- Prosperous Justice Party (PKS) Chairman Luthfi Hasan Ishaaq, for involvement in a beef-import quota-fixing scandal. Initially sentenced to 16 years, the Alkostar cassation panel increased his jail term to 18 years.[80]
- Democrat Party chairperson Anas Urbaningrum, for receiving kickbacks from companies awarded contracts to work on various government projects. The Alkostar panel doubled his sentence to 14 years from seven years.[81]
- Head of Commission VII of the national parliament Sutan Bhatoegana for taking bribes in the oil and natural-gas sector. The Alkostar panel increased his sentence from ten years to 12 years.[82]
- Banten Governor, Ratu Atut Chosiyah, for bribing Akil Mochtar. The Alkostar panel increased her sentence from four years to seven years.[83]
- Head of Indonesia's traffic police and police academy Joko Susilo, for receiving kickbacks from the provision of driving simulators for driving-licence testing. The panel upheld his sentence of 18 years.[84]

3.1 Criticisms

While his hard-line approach undoubtedly made Alkostar publicly popular, various commentators have questioned his decision-making in some of these cases, particularly where he has increased prison terms.[85] Although perhaps the most sustained criticism has come from lawyers whose clients' punishments were increased, other notable legal figures have also publicly criticized Alkostar.

One is former Constitutional Court Chief Justice Hamdan Zoelva. At a widely reported forum entitled "Artidjo: Adjudicating or Punishing?," held at a Jakarta restaurant in mid-2015, he suggested that Alkostar's decisions violated limitations on the Supreme Court's

[77] Supreme Court Decision 1344 K/PID/2005. Puteh went on to lodge an unsuccessful PK: Supreme Court Decision 64 PK/PID.SUS/2013.

[78] Supreme Court Decision 336 K/Pid.Sus/2015. Both the prosecution and the defence made cassation applications. The panel could find no grounds to disturb the lower-court decisions.

[79] Jakarta High Anti-corruption Court Decision 63/PID/TPK/2014/PT.DKI, p. 445.

[80] Supreme Court Decision 1195 K/Pid.Sus/2014.

[81] Supreme Court Decision 1261 K/Pid.Sus/2015.

[82] Supreme Court Decision 532 K/PID.SUS/2016.

[83] Supreme Court Decision 285 K/Pid.Sus/2015.

[84] Supreme Court Decision 537 K/Pid.Sus/2014.

[85] Huzaini (2018).

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jurisdiction, particularly in cassation hearings, which can only examine the lower courts' "interpretation, construction and application" of the law.[86] Zoelva suggested that Alkostar often ignored this limitation to re-examine or reassess factual aspects of cases. It is dangerous for the Supreme Court to increase penalties on appeal, Zoelva continued, because its judges were not present while the evidence was given and thus "did not understand the atmosphere in the courtroom."[87] Here, it bears recalling that Supreme Court decisions are made primarily on the papers. Its judges cannot, therefore, directly observe witnesses to assess their credibility, for example.

Zoelva also suggested that Alkostar was emotional, subjective, and lacked independence. He said: "Judges should not just decide cases for their personal satisfaction, for their name to be recorded in history. This is a crazy judge, who knows no forgiveness and is truly perpetrating injustice."[88]

He suggested that increasing a sentence simply indicates that the judge was "angry" (*marah*).[89] Zoelva even identified 17 of Alkostar's decisions that were questionable on these grounds and might, therefore, require academic re-examination.[90]

Another figure critical of Alkostar is Yusril Mahendra, who, as mentioned above, called Alkostar to convince him to join the Supreme Court. Mahendra has since said that he regrets appointing him, because Alkostar treats people as "corruptors" even when they are still only suspects.[91] Although not saying this directly, Yusril's comments appear to imply that Alkostar has ignored the presumption of innocence in some cases. It must be said that Alkostar has himself supported this view in interviews he has given about the cases he has handled. For example, in one interview, he pledged: "If a corruptor's file comes across my desk, he or she will not get away."[92]

Although not as critical as Zoelva and Mahendra, Judicial Commission Head Marzuki Suparman has also subtly expressed disquiet about Alkostar's decision-making:

> Almost no PN [district court] or PT [high court] corruption verdicts have not been increased with the banging of his gavel .... [T]here are some who question this and mention that Artidjo simply doubles court decisions without reading the case file carefully, so that not a few corruption convicts choose to accept the decision of the PN or PT or revoke their cassation application because they are afraid of an increased verdict by the gavel of an Artidjo panel.[93]

Suparman explained that the Judicial Commission often asked Alkostar to clarify the reasoning in his decisions, given his well-known dislike for "corruptors" and penchant for increasing their punishments.[94]

Alkostar is unapologetic about these sentences, instead asserting that corruption is a "crime against humanity" that "brings international shame to Indonesia" and severely damages the nation, impoverishes the people, and eats into the funds available for public educational and health.[95] When pressed, he has also attempted to justify increasing sentences by saying that he simply uses different, but equally applicable, provisions against

[86] Forum Keadilan (2016), p. 24.
[87] Rakhmatulloh (2015).
[88] Fauzi (2015); Forum Keadilan (2016), pp. 24–5.
[89] Artidjo: Mengadili atau Menghukum? at https://www.youtube.com/watch?v=2rlqMvlbsDw (accessed 17 September 2020).
[90] Fauzi (2015).
[91] Forum Keadilan (2016), p. 25.
[92] Marzuki (2018), p. xxii.
[93] *Ibid.*
[94] *Ibid.*
[95] Safitri (2018k), p. 68; Safitri (2018w), p. 153; Safitri (2018u), p. 231.

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defendants compared with those used by the lower courts. The Anti-corruption Law has long been criticized for having multiple provisions prohibiting the same action but imposing different penalties. This gives police, prosecutors, and judges discretion to choose between provisions. Some have been known to use the lure of a provision with a lower associated penalty to extract confessions or even bribes and to use a higher-penalty provision to intimidate or extort.

In particular, Alkostar has said that he disagreed with serious corruption cases involving government officials being pursued under Article 3 of the 1999 Corruption Law, rather than Article 2. Both Articles 2 and 3 require damage to state finances and enrichment of the perpetrator or another. But key differences between them are that Article 2 captures any "unlawful act" and, for most offences, allows judges to impose a penalty of 4–20 years' imprisonment, life imprisonment, or, in particular circumstances, the death penalty, whereas Article 3 applies to those who "misuse their power" and imposes a penalty of 1–20 years' imprisonment and does not permit the death penalty. Alkostar's objection appears to be that officials who misuse their power and engage in corrupt activities by definition also engage in an "unlawful act" and so they can and should be pursued under Article 2, with its more severe punishments. Instead, many courts applied Article 3 against public officials because of its reference to misuse of power.[96] In one interview, he said: "It is strange if the loss of however-many billions of rupiah is only punished with one year [of imprisonment] … I often say that judges should not be defeated by corruptors."[97]

Alkostar's claim that Article 3 is more lenient compared to Article 2 is supported by a 2012 Supreme Court Practice Note, which suggests that judges apply Article 2 rather than Article 3 in cases involving alleged state loss of Rp 100 million or more.[98] So, for example, in one Supreme Court case chaired by Alkostar, the panel applied Article 2 against the defendant, a public servant from Medan, for causing loss of over Rp 5 billion.[99]

There is very little to commend Alkostar's views about Articles 2 and 3 and the Practice Note because it assumes that judges will impose the minimum sentence of one year's imprisonment under Article 3. But judges can issue up to 20 years' imprisonment under Article 3. To be sure, Article 2 allows judges to meter out life or death sentences. But judges have never used it to impose a death sentence and only once issued a life sentence, in the *Mochtar* case. Indeed, anti-corruption courts are commonly criticized for handing down lenient sentences, including in Article 2 cases, despite having an exceptionally high conviction rate.[100] Except for this one case of life imprisonment, then, judges could have handed down exactly the same prison sentences in cases involving misuse of power, under either Article 2 or Article 3.

It also bears noting that in none of the high-profile cases in which Alkostar famously increased sentences, mentioned above, was Article 2 or Article 3 actually applied. Instead, these cases involved the application of Article 12a. This provision imposes life imprisonment, or a prison term of between four and 20 years, and a fine of between Rp 200 million and Rp 1 billion for "civil servants or state administrators who receive a gift or promise even though they know or should know that the gift or promise is given so that they perform or do not perform something as part of their office and which contradicts their obligations." It is almost identical to the combined effect of Articles 5(1) and (2). Article 5(1) imposes between one and five years' imprisonment and a fine of Rp 50–250 million for

[96] Huzaini (2018).

[97] Sukoyo (2018).

[98] The Practice Note to which Alkostar seemed to refer was Supreme Court Circular 7 of 2012. The Rp 100 threshold appears to have been doubled by Practice Note 3 of 2018, which gives "changes in the currency rate" as the reason for the increase.

[99] Supreme Court Decision 1038 K/Pid.Sus/2015, p. 59.

[100] Butt (2012a).

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those who "give or promise something to a public servant or state administrator with the intent that the public servant or state administrator does or does not do something as part of their office and which contradicts their obligations." Article 5(2) makes the recipient of such a gift or promise subject to the same penalties. The provisions under which the defendants in these cases were initially charged, prosecuted, and convicted in each proceeding is not clear from the available documents. But, given that, except for Chosiyah, they all received sentences greater than five years' imprisonment, they could not have been initially convicted under Article 5(2). Alkostar could not, therefore, have justified increasing the sentence by applying Article 12a instead of Article 5(2). They must have been pursued under Article 12a from the beginning.

3.2 Overturned decisions

Some of those people whose sentences were increased by an Alkostar cassation panel have successfully appealed against the toughness of those sentences. These cases tend to confirm the view that Alkostar was too harsh on defendants, at least in some cases. One was Angelina Sondakh. In 2013, the first-instance Jakarta Anti-corruption Court found her guilty of corruption and sentenced her to four and a half years' imprisonment.[101] This decision was upheld on appeal to the High Anti-corruption Court in Jakarta.[102] Sondakh appealed the conviction and KPK prosecutors appealed the perceived leniency, having initially sought 12 years' imprisonment. Two of the three judges on the cassation panel, led by Alkostar, sided with the prosecution.[103] The judges found that Sondakh had secured state-budget allocations for projects of the Ministry of Youth and Sports and the Ministry of National Education and then ensured that those projects were awarded to the Permai Group, owned by former Democrat Party Treasurer Nazaruddin. She did this by using her political influence, including her membership of the national parliamentary Commission that determined budget allocations. In return, she received 5% of the value of the projects. The two judges were satisfied that these allegations had been validly proved, including through Blackberry Messenger transcripts in which the plan was discussed and through witness testimony. The majority found that she had received over $US 3 million and ordered that she repay this amount. However, Professor Mohammad Askin, an ad hoc judge, dissented, finding that the evidence suggested receipt of less than half this amount: $US 1.35 million. Askin decided that, because of this error, her sentence and fine should be maintained, but not the repayment.[104]

Sondakh lodged a PK. A unanimous panel appeared to share Askin's view that the KPK had only proven that she had received $US 1.35 million, not over US $3 million as the majority on the cassation panel had found. The judgment says the smaller amount could be proved by witness testimony and Blackberry Messenger transcripts, but the larger amount, though supported by testimony and a hard disk, required further evidential substantiation.[105] Even though this point appeared to constitute the crux of the panel's decision, it was not explained in further detail. The panel ordered her to repay this lower amount but did not reduce her sentence in the same proportion. This was because the court found that she had misused a position of responsibility for personal gain. But the PK panel still reduced her sentence from 12 years to 10 years, finding that she was not entirely responsible for the allocation of budgets and was a single mother with young children.[106]

[101] Jakarta Anti-corruption Court Decision 54/PID.B/TPK/2012/PN.JKT.PST.
[102] Jakarta High Anti-corruption Court Decision 11/PID/TPK/2013/PT.DKI.
[103] Supreme Court Decision 1616 K/Pid.Sus/2013.
[104] *Ibid*., pp. 132–3.
[105] Supreme Court Decision 107 PK/PID.SUS/2015, p. 166.
[106] *Ibid*., pp. 165–7.

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Similarly, high-profile lawyer O. C. Kaligis successfully appealed against an Alkostar-led cassation decision. He was convicted for ordering the bribing of a judge hearing a case involving one of his clients. Kaligis was sentenced to five and a half years in prison at first instance[107] and seven years on appeal.[108] A cassation panel chaired by Alkostar increased this to ten years.[109] In response, Kaligis brought civil proceedings against Alkostar, claiming compensation for an unlawful act.[110] He accused Alkostar of illegally ordering an extension to his detention after the cassation decision was read out, which resulted in his being held in Anti-corruption Commission detention rather than in prison. He also suggested that Alkostar had refused to allow him to receive medical attention during the cassation. The Central Jakarta District Court decided in favour of Alkostar, holding that the detention was valid, that Kaligis had provided no evidence of the need for an overnight medical stay, and that, in any event, it was inappropriate to individually target Alkostar, given that the decision was made by a panel of judges.[111] Kaligis unsuccessfully appealed to the Jakarta High Court[112] and lodged a cassation that was still pending at the time of writing.

Kaligis also lodged a PK against his criminal conviction. The Supreme Court reinstated the seven-year sentence issued by the lower courts, pointing out that the cassation court had used the defendant's age—74 years old—as a reason to increase his sentence, but should have instead reduced it.[113] The PK panel also accepted that others involved in the bribery received sentences significantly lower than Kaligis had: the three judges who received bribes were sentenced to four years each and the person who paid the bribe to two years.[114] Further, the bribe amount in this case was comparatively small, with the average sentence in similar cases being seven years.[115]

Of course, it is not uncommon for judicial decisions to be overturned or for sentences to be adjusted. After all, the main function of appeal courts is to correct errors made by lower courts. But the subsequent judicial reduction of sentences issued by Alkostar-led panels did not appear to undermine the generally held view of him as a model judge, conveyed in the praise for him discussed in Section 2. Far from raising doubts about the quality of his decision-making, these successful appeals against Alkostar's decisions may well have *consolidated* his reputation for being a good judge, perhaps at least partly based on the assumption that the appeal judges were not as free from interference or as firm as he was. For reasons explained below, there has long been no public sympathy in Indonesia for those given harsh sentences for corruption and Alkostar's willingness to impose them appears to have significantly contributed to his popularity. In this context, criticisms of his decision-making—along the lines of those made by Zoelva, Mahendra, and Suparman—largely fell on deaf ears.

4. Other controversial cases

Alkostar has been a member or chairperson of panels that have handled many of the criminal cases that have drawn intense international and domestic attention in the post-Soeharto era. Earlier in his career, Alkostar heard cases that emerged out of the violence surrounding the seceding of East Timor (now Timor-Leste) from the Indonesian Republic

[107] Jakarta High Anti-corruption Court Decision No. 89/Pid.Sus/TPK/2015/PN.Jkt.Pst.
[108] Jakarta High Anti-corruption Court Decision 14/Pid/TPK/2016/PT.DKI.
[109] Supreme Court Decision 1319 K/Pid.Sus/2016.
[110] Central Jakarta District Court Decision 500/Pdt.G/2016/PN.Jkt.Pst.
[111] Mardatillah (2018b).
[112] Jakarta High Court Decision 440/PDT/2017/PT.DKI.
[113] Supreme Court Decision 176 PK/PID.SUS/2017.
[114] Mardatillah (2018a).
[115] *Ibid.*

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in 1999. These cases came to Alkostar on appeal from the ad hoc human-rights courts, established after the Indonesian government came under significant international pressure to pursue credible allegations of Indonesian military abuses. All of these army officers were acquitted, if not at first instance or on appeal, then by the Supreme Court at the cassation or PK level,[116] in flawed legal processes, apparently designed to avoid any findings of Indonesian culpability.[117] In one of his biographies,[118] Alkostar said that he would have convicted many officers and sentenced them to around ten years' imprisonment for failing to protect victims despite being aware of, and sometimes even supporting, militia attacks.[119] Accordingly, he—often with another judge, former diplomat Soemaryo Suryokusumo—issued dissenting opinions on panels that acquitted various defendants, including Herman Sedyono, Abilio Soares, and Hulman Gultom.[120]

Alkostar was also a panel member who decided Pollycarpus Priyanto's cassation appeal against his conviction for the murder of one of Indonesia's most prominent human-rights activists: Munir Said Thalib. He died on a Garuda flight from Singapore to Holland. This case drew significant controversy, not least because of allegations that Indonesia's State Intelligence Agency (*Badan Inteligen Negara*, or BIN) was behind the murder. Priyanto was a former Garuda Indonesia pilot, who worked as a corporate security officer and had been assigned by BIN to Munir's flight.[121] At first instance and on appeal, Priyanto was found guilty of placing arsenic in Munir's drink.[122] However, on cassation, the Supreme Court decided, by a two-judge-to-one majority, to acquit him of the murder charge because no witnesses saw him lace Munir's beverage.[123] The majority only found evidence that he forged a document, for which it convicted him and issued a two-year sentence that was almost equivalent to time already served. Alkostar issued a sole dissent, holding that there were various indications of Priyanto's involvement,[124] even though there were no eyewitnesses. Priyanto's murder conviction was reinstated by two successive PK panels, which did not expressly follow Alkostar's dissent.[125]

Alkostar's dissents in the *East Timor* and *Priyanto* cases were well received by human-rights activists and civil-society groups, who had long protested against the legal immunity enjoyed by state-backed military and intelligence forces for human-rights abuses and other serious crimes. They knew only too well that attempts to hold the military to account required courage and resolve, because many of them had also experienced the military intimation and force that such attempts drew.[126] In his biographies, these dissents appear to have been portrayed as extensions of his dedication to justice, exemplified by his pre-judicial career as a human-rights lawyer, and as reflecting his inability to be intimidated, particularly in cases against powerful opponents such as the military.

[116] The decisions in these cases have, to my knowledge, not been made available on the Supreme Court website.

[117] Cohen (2003), p. 5.

[118] Windrawan (2018), pp. 172–7.

[119] Powell (2004).

[120] Although Alkostar admits to being head of a panel that threw out the case of Colonel Tono Suratman. Prosecutors appealed his acquittal, but did not lodge a memorandum of cassation outlining arguments indicating his guilt. Alkostar says that he therefore had no choice but to dismiss the case.

[121] Lindsey & Parsons (2008).

[122] Central Jakarta District Court Decision 1361/Pid.B/2005/PN.Jkt.Pst; Jakarta High Court Decision 16/PID/2006/PT.DKI.

[123] Supreme Court Decision 1185 K/Pid/2006.

[124] Hukumonline (2006).

[125] In Supreme Court Decision 109 PK/Pid/2007, a PK panel sentenced him to 20 years; in Supreme Court Decision 133 PK/Pid/2011, the sentence was reduced to 14 years.

[126] On these abuses, see Lubis (1993); ICG (2001).

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However, also consistent with these dissents are subsequent decisions in which Alkostar appeared to display an anti-defendant disposition. This is apparent from the five cases discussed below: the *Bantleman* case (involving sexual assault of young students by school staff), the *Siska Makelty* case (involving medical malpractice during emergency surgery), the *Antasari Azhar* case (the murder trial of a former head of the Anti-corruption Commission), the *Ahok* case (a politically motivated blasphemy trial of a serving governor of Jakarta), and the *Jessica Wongso* case (a sensational cyanide murder case that arguably became Indonesia's "trial of the century").[127]

A close examination of the facts, the evidence and arguments put forward by the prosecution and defence, and the decisions reached in these cases reveals several similarities between them. All five cases resulted in convictions, most of them unanimous. (Although high courts reversed lower-court convictions in the *Bantleman* and *Makelty* cases, these acquittals were themselves overturned by the Supreme Court.) Also, in all of them, I argue, prosecution arguments were based on no admissible or reliable evidence. Meanwhile, the defendants were represented by lawyers ranking amongst Indonesia's best, who put forward convincing arguments based on strong counterevidence but were flatly ignored, including by Alkostar-led panels.

In these five cases, Alkostar only played a relatively minor role in the overall judicial process: he was only one of several judges deciding each matter, from the district court up to the Supreme Court. These, and the corruption cases discussed in Section 3, also make up a very small fraction of the several thousand cases that Alkostar decided in his career. But the similarities between these cases suggest that none of them are aberrations—rather, they appear to indicate a pattern of upholding convictions without objectively assessing the evidence of either party.

It is difficult to reconcile Alkostar's reputation as a model judge with such flawed decisions and with a lack of a concern to prevent the manifest injustice of wrongful convictions, particularly in a constitutional democracy such as Indonesia's, where judges are not mere extensions of the state. Indonesian judges should not convict defendants on evidence that does not meet the minimum evidentiary thresholds under the applicable laws of criminal procedure and must hear both parties. These types of convictions also appear to contradict various parts of the Judicial Ethics Code, which, as mentioned, requires judges to be impartial and to not simply convict or punish. Worse, in almost all of these cases, Alkostar (and the other judges) seemed to ignore clear ulterior or political motives behind each prosecution.

4.1 The Bantleman *case*

In February 2016, Alkostar chaired the cassation appeal of Neil Bantleman, a Canadian who had worked at Jakarta International School (JIS). The South Jakarta District Court had convicted him of sexually assaulting kindergarten boys from the school and imprisoned him for ten years,[128] but the Jakarta High Court acquitted him on appeal.[129] Prosecutors then lodged a cassation appeal with the Supreme Court. The cassation panel overturned the high-court decision, reconvicted him, and increased his initial sentence by one year.[130] A different panel of Supreme Court judges confirmed this decision when Bantleman applied for a PK.[131]

[127] Butt (2021).

[128] South Jakarta District Court Decision 1236/Pid/Sus/2014/PN.JKT.SEL, 2 April 2015.

[129] Jakarta High Court Decision 152/PID/2015/PT.DKI, 10 August 2015.

[130] Supreme Court Decision 2658 K/Pid.Sus/2015, 24 February 2016.

[131] Supreme Court Decision 115 PK/PID.SUS/2017, 14 August 2017.

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The first-instance and Jakarta High Court judgments are not publicly available[132] and the proceedings were closed to the public due to the sensitive nature of the case. But the cassation and PK transcripts appear to reveal the main points of contention between prosecutors and the defence: the veracity and legality of the testimony given by the alleged victims, aged between five and seven years old, and how that evidence could be used, if at all, against Bantleman. This testimony was central to the case against him; indeed, the indictment, which prosecutors read out in the South Jakarta District Court at the commencement of the trial, was largely based on that testimony.

The case against Bantleman was extremely weak, primarily because none of the prosecution evidence was credible or pointed to his guilt. The children claimed that eight adults anally raped them on numerous occasions and that they were, on some of these occasions, punched in the stomach beforehand. But many aspects of the children's testimony appeared to be concocted. One child said that Bantleman made a magic stone appear, which was inserted into the victim's anus to act as an anaesthetic. Another testified to being drugged with a blue liquid that the school principal made in a blender. The victims claimed to have been pulled out of class during school hours and being raped in different places, including: Bantleman's office, which had glass walls and was located in the middle of the school, into which staff and students could easily see; the staff kitchen; and a "secret room" that, despite extensive searching, police never found. The boys could not identify the times or dates of the alleged incidents.

Bantleman's supporters suggest that judges led the child witnesses, setting out the prosecution version of events and then asking the children for confirmation of them, rather than encouraging them to give evidence freely.[133] There were indications, too, that parents may have coached their children to give incriminating testimony: during a reconstruction of the alleged crimes at the school in July 2014, one child asked his mother, "I was attacked here, right, Mum?" and "Which direction should I point to, Mum?"[134]

Medical examinations were conducted, but none found clear evidence of physical trauma that proved that the boys had been raped. The police hospital examination of one alleged victim found that he had a "funnel-shaped anus" with some scar tissue and a red area on his skin.[135] Another victim's examination, conducted in March 2014, revealed a bruise on his stomach, but no anal wounds.[136] Another examination of the same child, on 21 April, found proctitis, but noted that this could equally have been caused by an infection, diarrhoea, or hard stools.[137] The Indonesian police examination of a third child found no evidence of anal rape—a finding that was confirmed by a comprehensive medical examination of the same child conducted at a specialist women's and children's hospital in Singapore soon after the alleged incidents.[138]

Early in the controversy, the mother of that third child alleged that her son had contracted herpes from the rapes. The police medical examination refused to exclude the possibility and recommended further testing.[139] But a test later performed in Europe detected

[132] Despite extensive searching, I was unable to locate these judgments. What appears here is accordingly based on press reports and references to the lower-court decisions in the cassation and PK decisions, which I accessed on the Supreme Court website.

[133] JIS (2015).

[134] Cited at Supreme Court Decision 115 PK/PID.SUS/2017, p. 38. See also the video of this shown in Hawley (2016).

[135] Supreme Court Decision 115 PK/PID.SUS/2017, pp. 3–4.

[136] *Ibid*., p. 7.

[137] *Ibid*., p. 7.

[138] However, relying on the testimony of an expert in Indonesian criminal law, the district court ruled the Singapore report inadmissible because it was a copy of the report, rather than the original document: Utami (2015).

[139] Supreme Court Decision 115 PK/PID.SUS/2017, p. 9.

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no herpes, suggesting that the initial test result was a false positive[140] or that the report itself was manipulated. In any case, whether Bantleman was tested for herpes was not disclosed in the judgment. Surely, the prosecution needed to prove that Bantleman had herpes to justify any finding that he had passed it on to the child.

Adding to the farcical progression of the trial was expert testimony, given by a "Sexologist Psychiatrist" about Bantleman's sex life, which he labelled "inappropriate" (*tidak wajar*) and "abnormal." The witness claimed that Bantleman had been having sex only once a week—sometimes less—with his wife since they were married and no longer masturbated. He concluded that normal regularity would be at least two or three times per week, if not daily, and suggested that Bantleman must have needed to channel his sexual needs elsewhere.[141] Without further explanation, the witness concluded that Bantleman's sex life was "divergent," which, combined with the testimony of the children, led him to classify Bantleman as an "inclusive" paedophile—that is, someone with a sexual preference for children but who is also capable of sexual intercourse with adults.[142]

The district court did not appear to give any weight to witnesses called by the defence—particularly schoolteachers who testified that the students had neither been pulled out of class nor appeared traumatized over the period when the abuse was alleged to have occurred. The panel also ignored strong legal arguments, made by the defence, that the testimony of the children, their parents, and their psychologists was inadmissible. The defence argued that most of the testimony of the parents and psychologists was hearsay, because it merely recounted the children's allegations, rather than what the parents or psychologists saw themselves. The parties and the court seemed to agree that children under the age of 15 cannot, under Indonesian law, give sworn testimony, so their accounts cannot be classified as stand-alone "valid legal evidence." As mentioned, the main issue of dispute, raised during the trial and appeals, was whether their testimony could be used at all and, if so, for what purpose.

To understand the controversy, a brief discussion of the concept of "valid legal evidence" may assist. This is evidence that can formally be used to prove guilt under Indonesian law. It encompasses more traditional types, such as witness evidence, evidence from the defendant, documentary evidence, and expert witness evidence,[143] and more modern types such as video and sound recordings and electronic information.[144] It also includes *petunjuk*—literally, "clue," but commonly translated as "circumstantial evidence." The Code of Criminal Procedure (*Kitab Undang-undang Hukum Acara Pidana*, or KUHAP) defines it as "an act, event or circumstance which, because it is consistent with another [act, event, or circumstance], or with the crime itself, indicates that a crime has been committed and the identity of the perpetrator" (Article 188(1)). This definition clarifies that *petunjuk* evidence cannot "stand alone;" a sole piece of *petunjuk* evidence does not qualify as "valid legal evidence." It must be corroborated by at least one other form of *petunjuk* evidence or another type of valid evidence before it can have this status.

This is important, because judges formally may not convict unless they have at least two "valid pieces of evidence" (*alat bukti yang sah*) that support a "strong belief" (*keyakinan*) that the accused committed the alleged crime (Article 183). In other words, judges must be subjectively convinced of guilt, but based on objective standards (that is, a minimum

[140] Hawley (2016).

[141] Supreme Court Decision 2658K/Pid.Sus/2015, pp. 50–1.

[142] *Ibid*., p. 23.

[143] Art. 184 of the KUHAP. For more detail about what falls into each category, see Butt & Lindsey (2018), pp. 227–8.

[144] Art. 5(1) of Indonesia's 2008 Electronic Information and Transactions Law (as amended) states that "electronic information" and "electronic documents" are valid evidence and Art. 5(2) states that Art. 5(1) is intended to expand the type of evidence that can be used in criminal procedural law. Art. 44(b) restates that electronic information and documents can be used for investigations, prosecutions and trials.

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amount of evidence).[145] This rule is said to provide safeguards for defendants, while retaining some judicial flexibility. It prevents judges convicting on anything less than two pieces of evidence, but also allows judges to acquit if they are not convinced of guilt, even if the prosecution has produced more than two pieces of valid evidence.

But how the courts apply these rules is rarely transparent and significant uncertainty exists, particularly about whether two pieces of *petunjuk* evidence that corroborate each other constitute a single piece of evidence or two pieces. Some uncertainty exists about whether *petunjuk* evidence corroborated by another valid piece of evidence, such as witness testimony or an official document, constitute two pieces or only one. Remarkably, there is even uncertainty about whether unsworn testimony (*petunjuk*) needs to be corroborated by valid witness testimony, or whether any other type of valid evidence will suffice. To be sure, Indonesian courts, particularly at first instance, often do discuss the various types of evidence adduced by the parties and their admissibility, sometimes at length. But they almost never clearly identify the two pieces of evidence upon which they base their convictions. Precisely what they relied on to meet the objective standard is, therefore, rarely specified. This vagueness makes it difficult for appeal courts to uncover any errors made in the lower courts relating to that evidence.

Because the first-instance decision involving Bantleman is not available and the trial was closed to the press, it is impossible to discuss precisely how that court ultimately justified admitting the child, parent, and psychologist testimony. However, one can speculate that the court must have classified the unsworn testimony of the children as *petunjuk* and then treated it as valid evidence because it corresponded with the sworn testimony given at trial by the parents and psychologists, even though much of the sworn parental and psychologist testimony merely regurgitated the unsworn child testimony. The panel declared that it was convinced of Bantleman's guilt and sentenced him to ten years' imprisonment.

Bantleman appealed to the Jakarta High Court. While the court was considering the appeal, the Singapore High Court issued a decision in defamation proceedings, brought by JIS and some of its teachers against the mother of one accuser.[146] From Singapore, she had sent messages to other parents at the school, accusing staff members of the assault. The Singapore Court found that these had defamed the school and the teachers, and noted that "the objective evidence suggests that [the child] was never sexually abused." The court pointed to: evidence that the child repeatedly denied being sexually abused; the physical examination at the Singapore KK Women's and Children's Hospital revealing no signs of injury or scarring; and a text message that the mother sent to a friend after receiving the test results saying, "Thank God everything is okay" and "we're more than happy because at least we can close this chapter and start a new chapter in Singapore." Against this background, the court noted, the defendant then began alleging that her child had been raped over 20 times.[147] Of course, these defamation proceedings were foreign and civil, and Indonesian courts did not have to pay them heed. But the Singapore High Court's conclusion that the child was not abused raised further doubts about the correctness of the South Jakarta District Court's decision.

The Jakarta High Court acquitted Bantleman after finding that the unsworn testimony of the three children did not stand alone and was not supported by any other valid witness testimony. It was not, therefore, "valid legal evidence" that could be used to determine Bantleman's guilt. In concluding this, the court must presumably have decided that the parental evidence was not admissible, perhaps because it constituted hearsay. For the court, that the testimony of the children was consistent with another type of

[145] Butt (2008b).

[146] The Singapore High Court decision was handed down on 16 July 2014, which fell between the Indonesian first-instance decision (issued on 2 April) and appeal decision (10 August).

[147] *ATU and others v. ATY* [2015] SGHC 184, at [63]–[64].

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evidence—here, the expert psychologist testimony or the equivocal medical examination reports—was irrelevant.[148] The judges also found it inconceivable that the children would have kept returning to school after repeated abuse.

Within days,[149] prosecutors announced that they would appeal to the Supreme Court and lodged a cassation application. As mentioned, Alkostar chaired the three-judge panel, which reached its decision with astounding swiftness. According to defence lawyers, the case was decided within two days of the panel being chosen to handle it, amid concerns that a travel ban on Bantleman was due to expire.[150]

In their memorandum of cassation, which appears in the judgment, prosecutors argued that, as a matter of evidence law, the unsworn witness testimony did not need corroboration with sworn witness testimony in order to become one of the two pieces of evidence needed for a conviction; rather, consistency with any type of valid evidence (including expert evidence or the medical examinations) would suffice. This argument requires a rather large interpretative stretch of the plain words of Article 185(7) of the KUHAP, which specifies that unsworn evidence is not valid unless it is consistent with other sworn evidence:

> Evidence from a witness who has not been sworn in, even if consistent with another, does not constitute [valid] evidence, but if the evidence accords with the evidence of a sworn witness, it can be used to add to that other valid evidence.

Unsurprisingly, prosecutors argued that the children's unsworn testimony alleging rape was supported by the parents' sworn evidence, which gave the unsworn testimony status as a "valid piece of evidence." They also argued that the parents' evidence was otherwise "valid"—it was not hearsay, because it conveyed what the parents heard and saw of their children's trauma, including when they witnessed their children identifying Bantleman from photographs in a school yearbook.[151] (Prosecutors also mentioned, later in the memorandum, that the parent testimony was derived from "listening to the stories" of the children,[152] which suggests hearsay. But the Supreme Court did not appear to pick this up.) Prosecutors also alleged that the high court had, in effect, disregarded the testimony of four psychologists, who had done more than just repeat what the children had told them; for example, they had also used their expertise to assess whether the children were being truthful and suffering from trauma.

As mentioned, the Alkostar panel upheld the appeal and reinstated Bantleman's conviction. In a threadbare decision, taking up only a few pages of the 85-page judgment, the panel held that the high court had mistakenly acquitted. The reason given was that the testimony of the children could be used as *petunjuk* and that, when viewed beside the expert evidence (particularly the evidence from psychologists who had examined the boys) and the medical reports, the formal requirement of two pieces of valid evidence was met. The court did not attempt to address the main legal issues that this case raised: the unsworn testimony's evidential value or permissible use. To be sure, the court mentioned that Article 171 of the KUHAP allows children who are under 15 or unmarried to give unsworn testimony and that the Elucidation to Article 171 states that this testimony can be used as *petunjuk*. But this was not in dispute in the lower courts. The panel avoided specifying whether unsworn testimony needed to be corroborated by

[148] Jakarta High Court Decision 152/PID/2015/PT.DKI, p. 23, cited in Supreme Court Decision 115 PK/PID.SUS/2017, p. 58.

[149] Hawley (2016).

[150] Yeung (2016).

[151] Supreme Court Decision 2658 K/Pid.Sus/2015, p. 27.

[152] *Ibid*., p. 33.

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sworn testimony, or whether corroboration with some type of other valid evidence would suffice. The panel appeared to proceed using the latter interpretation, but did not expressly recognize this, much less explain why those other forms of valid evidence were sufficient to prove guilt in this case. The court also did not identify the parts of the medical reports that conclusively demonstrated that the boys had been raped, let alone who raped them. The panel also added a year to Bantleman's sentence, with no explanation.

Within a few months of the cassation decision being handed down, Bantleman launched a PK, which was decided in 2017. According to the parts of the application in the PK judgment, the defendant's lawyers focused on how the cassation panel had dealt with the evidentiary problems that the case presented.[153] Like the cassation panel, however, the PK judges almost summarily rejected these arguments, without discussing the main evidentiary controversies, declaring that it was satisfied that Bantleman had been proved guilty.

Neither the PK panel decision nor the Alkostar-led cassation decision was convincing. Neither squarely addressed whether the parents' testimony was valid (because it contained hearsay) or even whether it corresponded with the children's testimony (and hence whether it could convert that children's testimony to valid evidence). In this context, the Supreme Court may well have neglected its obligation to ensure due process, particularly by ensuring the objective application of Indonesia's rules of evidence. The cassation panel's increase in the sentence was also highly problematical. The panel did not even attempt to establish that Bantleman's initial sentence was inadequate, much less explain why it added the additional year, and the judgment contains no prosecution arguments supporting the increase. The court did not even acknowledge increasing the penalty; it simply stated that its decision replaced the high court's and included the 11-year sentence.[154]

Unfortunately, circumstances surrounding the case have fuelled suspicions of impropriety and injustice, and, indeed, prompted statements of condemnation of the legal process by the Canadian foreign minister and the US ambassador.[155] The complaint against Bantleman came after one parent alleged that her child had been sexually assaulted by school cleaners. She obtained a medical report, which she claimed proved that her son had contracted herpes after multiple rapes, and initiated legal proceedings against the school, claiming $US 12.5 million. In this civil action, her lawyer was the notorious OC Kaligis—the most senior Indonesian lawyer ever to have been convicted for corruption, by an Alkostar-led panel, no less, as mentioned. Her allegations were widely reported, prompting a public backlash against the school. She also reported the allegations to police, who interrogated the cleaners and extracted confessions from them, apparently using torture.[156] Indeed, one cleaner died in police custody, allegedly from

[153] They argued, *inter alia*, that the testimony needed to be corroborated by sworn testimony, rather than some other evidence, as the cassation panel appeared to hold, and that, because it was not, no two pieces of valid evidence existed to demonstrate Bantleman's guilt. Again, they argued that the parent's testimony did not qualify as valid evidence and should have been excluded because it merely recounted what the children allegedly said to them. But, despite being hearsay, the cassation panel had, they argued, used it to "indicate the legal fact" of the rape: Supreme Court Decision 115 PK/PID.SUS/2017, pp. 40–4. And, because the medical examinations could not, therefore, be connected to anything Bantleman was proven to have done, then they were irrelevant: Supreme Court Decision 115 PK/PID.SUS/2017, p. 47. They also pointed to valid evidence, ignored by the cassation panel, which suggested that the facts outlined in the indictment did not actually happen. This included testimony from teachers of the school that the boys were not removed from class and that the students had exhibited no signs of trauma, even during the peak of the alleged abuse: Supreme Court Decision 115 PK/PID.SUS/2017, pp. 59–68.

[154] The final figure may well have been a compromise between the sentence initially requested by the prosecution (12 years) and the sentences metered out at first instance (ten years), but no explanation was given.

[155] Topsfield & Rompies (2016c).

[156] This was apparently confirmed by an unpublished report produced by Indonesia's National Human Rights Commission: *ibid*.

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that torture.[157] They were ultimately convicted and received sentences of between seven and eight years' imprisonment. Only after it emerged that the cleaners were contractors and that the mother could not, therefore, sue the school for their alleged assaults did she pursue Bantleman and an Indonesian teacher, and increase her civil claim to $US 125 million. Some observers, sceptical of the evidence and legal process, suspect that the entire criminal complaint and trial, including the prosecution evidence, were manufactured at the behest of the mother, to extort money from the school. If this is true, then she could not have gotten so far without the complicity of many key players in the investigations, prosecutions, and the convictions. The Indonesian judges (including Alkostar) who heard Bantleman's trial and appeals also appeared to pay no attention to the parallel civil litigation in Singapore and the credible evidence adduced there about the motivations for bringing criminal proceedings.

Causing even more controversy was Bantleman's successful clemency application, release from prison after serving only five years of his sentence, and his return to Canada in 2019, all of which was publicly announced only after he had arrived in Canada. His release, it seems, came from high-level discussions between officials of Canada and Indonesia, including Prime Minister Trudeau and President Jokowi at the G20 summit in China in September 2016.[158] While one can hardly disagree with the outcome, the circumstances of his release also raise questions about political interference in Indonesian law enforcement.

4.2 The **Siska Makelty** *case*

Alkostar was involved in one of Indonesia's most famous medical-malpractice cases, which arose out of the death of patient Siska Makelty, after an emergency caesarean operation, in Manado, North Sulawesi, in 2010. For reasons not explained, this was treated as a criminal matter, with a trial commencing in the Manado District Court in 2011.[159] The prosecution indicted three doctors for violating Article 359 of the Criminal Code, which provides up to five years' imprisonment for negligence resulting in death, pointing to three alleged negligent acts or omissions. The first was that the doctors had not informed the deceased's family of the worst possible outcomes of the caesarean procedure, including death, before performing it. The second was that the doctors had not performed "supporting examinations" (*pemeriksaan penunjang*) such as chest x-rays before the procedure.[160] Third, they argued that the doctors negligently performed the operation itself—particularly by allowing air to enter the right ventricle of the patient's heart, which impeded blood flow into the lungs, causing heart failure.[161]

The Manado District Court rejected all three claims. As for failure to warn, the deceased's parents claimed that they had not been informed of the risks, but the doctors testified that they did in fact provide that information, including to the patient herself,[162] and produced a signed consent form.[163] Faced with these conflicting accounts, the court concluded that, on balance, prosecutors had not proved that doctors had failed to inform the

[157] Police claimed that he killed himself by drinking bleach, but pictures emerged of his face, beaten and bruised: Kelley (2016).

[158] Topsfield & Rompies (2016c).

[159] There are many reasons why some cases that, in other countries, might be considered civil claims for which compensation might be recoverable are treated as criminal in Indonesia. See Butt & Lindsey (2007).

[160] Manado District Court Decision 90/PID.B/2011/PN.MDO, p. 78.

[161] *Ibid*., p. 79.

[162] *Ibid*., p. 80.

[163] *Ibid*., p. 81. Prosecutors had claimed that the signature on the form had been forged, but the court found that prosecutors had not convincingly proved this claim.

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deceased and her family of the risks.[164] In any event, several expert witnesses, including a prosecution witness, testified that consent was not required for emergency operations such as this one.[165] Several experts also testified that "supporting examinations" could not always take place during emergencies, thereby disposing of the prosecution's second argument.

Finally, as for the operation itself, the court cited health regulations suggesting that doctors would not be negligent if they followed standard operating procedures and noted that several witnesses had testified that doctors followed such procedures.[166] One was a prosecution witness, who added that the defendants had saved the life of the deceased's baby and that the deceased's death was unforeseeable.[167] Another prosecution witness testified that the death "was not the fault of the operator."[168] The court also referred to a Health Ministry Regulation that stipulates that the Medical Discipline Honour Council is to determine whether medical negligence has occurred in any given case.[169] The defendants called the chairperson of that council as a witness; he testified that the council had investigated the case and found no wrongdoing.[170]

The prosecution appealed by way of cassation to the Supreme Court. Alkostar was chair of the panel of judges that decided this appeal. The judges found that the doctors had been negligent and sentenced them each to a term of ten years' imprisonment. In contrast to the Manado District Court, the cassation panel decided that the doctors had been negligent for not consulting the patient's health records, for failing to warn of the operation's risks, and for negligently performing the operation itself. The panel also found that the signature on the consent form had been forged. This decision was not well received in the medical community, and was even condemned by some politicians. Thousands of doctors engaged in strike action and threatened to stop operating, fearing that mistakes might lead to their criminal prosecution.[171]

The doctors lodged a PK application with the Supreme Court. A new five-judge panel overturned the cassation decision that Alkostar had chaired and ordered that the doctors be released from prison. In their application, the doctors argued that the cassation panel had ignored exculpatory evidence presented at first instance, including the findings of the Medical Board and expert witnesses. The PK panel agreed that the Medical Board's no-negligence finding should have been accorded significant weight, as should the testimony of the expert witnesses who found no fault in the performance of the operation. The panel also accepted that additional tests and risk warnings were unnecessary in emergencies, into which category the caesarean operation in this case fell.

The first-instance and PK judgments raise questions about whether Alkostar and the other cassation panel members adequately considered defence arguments. The cassation case file, available on the Supreme Court's website, comprises a summary of the Manado District Court's holding (but not its reasoning) and the grounds of appeal from the prosecution. It contains no defence submissions, nor any evidence adduced or arguments made by the defence at first instance. No explanation was given for this, leaving the impression that the cassation panel might not have considered defence evidence or arguments when deciding the appeal.

[164] Manado District Court Decision 90/PID.B/2011/PN.MDO, p. 82. Although the point was not made expressly in the case transcript, prosecutors have the burden of proof under Indonesian law and it appears here that the court found that the burden had not been discharged.

[165] *Ibid.*, pp. 83–4.

[166] *Ibid.*, p. 85.

[167] *Ibid.*, p. 86.

[168] *Ibid.*, p. 86.

[169] *Ibid.*, p. 85.

[170] *Ibid.*, p. 86.

[171] Asril (2013).

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The PK judgment also does not clearly demonstrate that the judges objectively assessed witness testimony. The prosecution's description of the witness testimony, upon which the cassation court apparently solely relied, did not accurately capture the testimony as it appeared in the first-instance judgment. In particular, the witness statements included in the cassation documents described the operation, but did not include the witness conclusions that the death was neither foreseeable nor preventable. The Alkostar panel also appeared to rely on the arguments made by prosecutors without regard to the evidence upon which those arguments rested. Prosecutors claimed that the testimony indicated that the doctors were negligent, but the witness testimony summaries they provided in their cassation submissions did not suggest that the doctors had made errors. The cassation panel simply asserted that the first-instance court had made mistakes, without identifying those mistakes, and without providing any reasons.

It is difficult to see how the cassation panel could have concluded this had it read the first-instance decision, even cursorily. The expert testimony heard in the Manado District Court—from both prosecution and defence witnesses—pointed unequivocally away from any finding of negligence. Not a single medical witness found fault with anything the doctors did in the lead-up to or during the operation. And, as for the failure-to-warn claim, only the Manado Court was able to see the deceased's parents testifying and, therefore, was able to judge their credibility as witnesses. Surely, the Manado judges were in the best position to determine whether to believe them or the doctors. As in *Bantleman*, this decision appears to provide the opposite of what one might expect from a model judge.

4.3 The **Antasari Azhar** *case*

An Alkostar-led cassation panel treated defence evidence and arguments in a similarly dismissive way in a case involving former Anti-corruption Commission head Antasari Azhar.[172] The South Jakarta District Court had convicted and sentenced him to 18 years in prison for ordering the assassination-style murder of Jakarta businessman, Nasruddin Zulkarnaen, on 14 March 2009.[173] He was shot twice in the head through the window of his car after playing golf.

Prosecutors alleged the following. Azhar had experienced a paid sexual encounter with Zulkarnaen's wife, Rhani Juliani.[174] Zulkarnaen then threatened to publicly reveal the incident unless Azhar helped him get a senior position in a state-owned pharmaceutical company and to obtain licences and tenders. Zulkarnaen's threats and intimidation intensified, prompting Azhar to act. Azhar first asked the chief of police to investigate Zulkarnaen and Juliani for using narcotics. The police conducted raids but found no evidence.[175] He then ordered Anti-corruption Commission employees to tap Zulkarnaen's phone, but discovered nothing to use against him. Becoming increasingly desperate in the face of continuing threats, Azhar sought help from Sigid Haryo Wibisono, who ran a newspaper. Wibisono arranged a meeting between Azhar and Williardi Wizar, former South Jakarta police chief. Azhar told Wizar of the blackmail and asked Wizar to protect him from Zulkarnaen. In return, Azhar would help Wizar to get promoted. Wibisono offered to provide the necessary "operational funds." Through a middleman, Wizar identified two people who could

[172] This discussion develops Chapter 5 of Butt (2012b). This contains detailed discussion of the controversy surrounding Azhar, additional arguments from the prosecution and defence, consideration of a conspiracy against Azhar, and allegations of the coercion of key players.

[173] South Jakarta District Court Decision 1532/PIDB/2009/PN.JKT.SEL.

[174] Their true marital status was unclear, but it is suspected that Zulkarnaen and Juliani's marriage was unregistered. According to prosecutors, Zulkarnaen set up Azhar, after discovering that he had met with Juliani, who was a golf caddy, and she resisted his advances. Zulkarnaen then told her to meet with Azhar again and to record the encounter.

[175] Baskoro & Kustiani (2009).

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carry out the murder, if requested. After Azhar's wife received a phone call hinting at an extramarital encounter involving her husband, Azhar sent a threatening SMS to Zulkarnaen. Clearly, Zulkarnaen paid no heed. Through various intermediaries, Wibisono paid the hitmen. But, before he finalized the transfer, he called Azhar to clarify that the money was a loan. Azhar replied that he would "repay it later." All this, prosecutors said, fulfilled the elements of the crime of premeditated murder at Azhar's behest.

The two hitmen, Wibisono and Wizar, were convicted for their respective roles in the assassination[176]; at issue in this trial was Azhar's connection to that assassination. However, as with other cases discussed in this article, there were glaring holes in the prosecution's case. In particular, it had no hard evidence suggesting Azhar's guilt, and even the evidence it had was of questionable validity or probative value.

At trial, serious doubts were raised about whether the murder weapon produced by the prosecution was the weapon used to murder Zulkarnaen. The gun produced was a Smith and Wesson .38 in such poor condition that, according to a ballistics expert, it could not have been accurately fired twice into the victim's head.[177] Worse, according to the autopsy, the bullets that killed Zulkarnaen were 9mm, which cannot be fired from a Smith and Wesson .38. The person who performed the autopsy claimed that senior police asked him to remove the reference to 9mm bullets from his report, but he refused. Of course, all this raises questions about the fundamentals of the prosecution case against not only Azhar, but also the others found guilty of involvement in the alleged plot.

Of central importance to the case against Azhar was the testimony of one witness: Sigid Haryo Wibisono. Only he testified that Azhar had asked Wizar to help him with Zulkarnaen and that Wibisono loaned Azhar the funds to pay for the assassination. Without this testimony, very little, if any, evidence indicated that Azhar asked Wizar to do anything. Both Wizar and Azhar denied that any such request was made or received. But the testimony of a sole witness is insufficient to establish guilt under Indonesian law. To be considered "valid evidence," and hence usable to demonstrate guilt, witness testimony must be corroborated by at least one other witness (Article 185(2) of the KUHAP) or another piece of valid evidence (Article 185(3)). One witness means no witness (*unus testis nullus testis*).[178]

Also noteworthy is that the testimony that Wizar gave at trial contradicted his police record of interview, which states that Azhar asked Wizar to have Zulkarnaen killed. At trial, Wizar testified that senior police pressured, and eventually ordered, him to change his initial police statement (which did not incriminate Azhar) to implicate Azhar.[179] He later revoked that statement, but it remained in the case dossier.[180] During the trial, prosecutors argued that Wizar's record of interview should be admitted as stand-alone documentary evidence. This is a commonly attempted tactic employed by prosecutors if a person interviewed by police does not attend to give evidence, or attends but gives evidence inconsistent with the content of the statement. However, a plain reading of the KUHAP suggests that a record of interview is not valid documentary evidence. Article 184(1)(c) specifies that "official documents" are produced by "public officials" about "events or circumstances they heard, saw or experienced." They include official reports (*berita acara*) (Article 187(a)); documents containing expert opinions (Article 187(b)), including affidavits; and "other documents," provided they "have a connection with the substance of another piece of evidence" (Article 187(c)). The problem with treating

[176] *Ibid.*; Baskoro & Sutarto (2010).

[177] As the expert testified, the trigger was particularly stiff and the recoil heavy, making the gun almost impossible to fire accurately, particularly into a moving car.

[178] Handayani & Aprianto (2009).

[179] Tempo English Edition (2009).

[180] It bears noting that many others found guilty of involvement in the murder, including middlemen and the alleged hitmen, also claimed that they were coerced into making admissions when in fact they were not involved and formally retracted the statements in which they implicated Azhar.

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a record of interview as a document is that a police officer (a "public official") who witnesses or draws up a record of interview cannot possibly verify the accuracy or truth of what the interviewee declared therein; after all, the officer will not usually have personally experienced the events or situation described in the statement as Article 184(1)(c) requires. Rather, the officer can only attest that the interviewee made that statement. In any event, the court should probably not have accorded much weight to Wizar's statement, given that he claims to have significantly revised and withdrawn it.

Even in the indictment itself, many of Azhar's alleged statements, which prosecutors claimed indicated an intent to kill, were equivocal and vague, referring only to "pacifying" Zulkarnaen, "stopping the terrorising," or safeguarding Azhar. These statements, if they were made at all, could easily be references to pursuing Zulkarnaen for narcotics offences or taking other action against him. Similarly, at trial, the two Anti-corruption Commission employees whom Azhar asked to tap Zulkarnaen's phone testified that they heard Azhar say: "It is either him or me that will be dead." The court relied almost exclusively on this statement as evidence that Azhar had the requisite intent to kill Zulkarnaen.[181] Yet, the court did not explain the significance of this alleged statement. Azhar's words certainly did not unequivocally indicate that he planned to order Zulkarnaen's killing; and the prosecution led no evidence of a threat to kill Azhar, which might equally be inferred from his statement.

The SMS that prosecutors alleged Azhar sent to Zulkarnaen after Azhar's wife received the phone call was also ambiguous. The SMS read: "Sorry, Mas, only the two of us know about this problem. If you blow it up, you know the consequences." Again, concluding that this message carries a threat of murder requires a major interpretative stretch. The message is too ambiguous to be considered threatening itself without, at the very least, evidence being led to identify the consequences that Azhar intended. Azhar could well have been threatening that, if Zulkarnaen continued harassing him and his family, he would perform no favours that the prosecution alleged Zulkarnaen sought. Worse, prosecutors could not conclusively demonstrate that Azhar sent the message, if it was sent at all, or even whether an SMS was a type of admissible evidence.[182]

Nevertheless, Azhar was convicted and lost appeals to Jakarta's high court and the Supreme Court in both a cassation and a PK. Azhar chaired his cassation, which will be the focus of analysis here.[183]

A two-judge-to-one majority of the cassation panel, which included Alkostar, accepted the entirety of the prosecution case, deciding that the lower courts had "considered relevant legal issues correctly, that is, that there was a causal connection between the acts of

[181] South Jakarta District Court Decision 1532/PIDB/2009/PN.JKT.SEL, p. 172.

[182] Whether SMSs could be used as evidence was, at the time of Azhar's alleged crime and trial, an open question. SMSs are now valid evidence by virtue of the Electronic Information Law, discussed in the context of the *Ahok* case, below.

[183] Incidentally, Azhar also brought a constitutional review application before the Constitutional Court, focusing in provisions in the KUHP that limited the bringing of more than one PK. Whether defendants could or should be able to lodge more than one PK had been a matter of significant debate: Maulidi (2017). Several statutes appeared to prohibit it (see Arts 24(2) of Law 48 of 2009 on Judicial Power; 66(1) of Law 1 of 1985 on the Supreme Court (as amended); 268(3) of the KUHAP). Azhar successfully argued that the limitation imposed in the KUHAP could unjustifiably lead to injustice and a violation of human rights: Constitutional Court Decision 34/PUU-XI/2013, para. [3.16.1]. The Supreme Court argued that the Constitutional Court decision's application was limited and that it did not affect other statutes that imposed the same one-PK limitation. It initially refused to allow registration of PKs from defendants who had already had one. However, after the Constitutional Court reviewed these statutes too and invalidated the one-PK restriction, the Supreme Court began to allow convicts to lodge more than one PK (see Constitutional Court Decisions 108/PUU- XIV/2016, 1/PUU-XV/2017, and 23/PUU-XV/2017): Butt & Lindsey (2018), p. 95. Indeed, this happened for the first time in the *Pollycarpus* case, discussed above.

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the defendant and the death of the victim."[184] It identified no flaws in the prosecution's arguments or evidence, which the defence had highlighted in its memorandum of cassation. The majority simply set out the facts as the prosecution had alleged at the outset,[185] mentioning the meetings between Azhar, Wibisono, and Wizar at which Azhar had asked for help to "stop the terror," and the payment of Wibisono's funds to the hitmen via Wizar and a middleman. For the majority, this demonstrated "close co-operation" between the three. Here, the cassation panel ignored entirely the inconsistency of the evidence provided at trial and the evidentiary controversies about the retraction of statements and the murder weapon. The majority did not mention these inconsistencies and controversies, much less explain why it did not consider them. It also accepted the testimony from the two Anti-corruption Commission employees as evidence that Azhar intended to kill Zulkarnaen, as was Azhar's promise to repay Wibisono.

The sole dissenter on the panel was Prof Dr Surya Jaya. He disagreed with the lower courts' ignoring the ballistic expert who testified that the gun that prosecutors had produced could not have been used to kill Zulkarnaen. For Jaya, this raised questions about whether those convicted of the assassination were guilty and should not have been blindly ignored by the lower courts. This was central to the prosecution's case against Azhar; he could hardly be found guilty of ordering a murder if the people he allegedly conspired with did not commit the crime.[186] Regardless, Jaya found, the evidence at trial did not prove that Azhar ordered anyone to murder Zulkarnaen.[187] None of Azhar's alleged statements even indicated a clear intent or plan to kill anyone.[188] Jaya also found that the SMS could not be used as evidence, but that, even if it could, it did not indicate that the defendant had ordered the killing.[189] He would have acquitted Azhar.

The case against Azhar was so deeply flawed, and the evidence presented so weak and equivocal, that it is difficult to understand how Alkostar could have found him guilty of masterminding Zulkarnaen's assassination. There was not one piece of incontrovertible evidence upon which he, along with other judges who had heard Azhar's trial and appeals, hung their decisions. Surely one of their main functions is protecting defendants from such prosecutions. Particularly relevant here is that the success of Indonesia's Anti-corruption Commission under Azhar's leadership had made him many powerful and well-connected enemies, particularly in law enforcement. Rumours circulated that prosecutors had targeted him in revenge for the Commission's successful pursuit of prosecutor Urip Tri Gunawan, discussed above, which had exposed entrenched corruption in the public prosecution service. This seems to be reflected in the appointment of 27 prosecutors to work on Azhar's prosecution[190] and their pursuit of the death penalty, which is usually reserved for narcotics offenders, terrorists, and the most sadistic of murderers.

Around the same time as Azhar's trial, the Anti-corruption Commission had also been targeting senior police, which prompted the police to charge two other commissioners with offences that were later proved beyond doubt to be trumped up.[191] It is probably not such a stretch to assume that police also helped to manipulate the case against Azhar, this time successfully. After all, prosecutors returned the file of evidence on Azhar to the police four times, seeking additional evidence.[192] This suggests that the

[184] Supreme Court Decision 1429 K/Pid/2010, p. 56.
[185] *Ibid.*, pp. 56–7.
[186] *Ibid.*, p. 58.
[187] *Ibid.*, p. 59.
[188] *Ibid.*, p. 59.
[189] *Ibid.*, p. 61.
[190] In response, Azhar appointed around 40 lawyers to work on his defence, including some former prosecutors: Baskoro & Sutarto (2010).
[191] Butt (2012b), Chapter 6.
[192] Baskoro & Kustiani (2009).

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evidence against Azhar was weak, leading the police perhaps to feel pressure to manufacture some. The courts, too, undoubtedly felt threatened by the Commission and Azhar, which had become more assertive and had the judiciary in its sights. Yet, still, one might have expected Alkostar to have lent greater support to Azhar and the Commission by taking a more critical view of the evidence presented by the prosecution in Azhar's case. This would have been consistent with both his then-growing reputation for supporting the anti-corruption movement and the proper objective exercise of judicial power.

Since his release on parole in 2017, Azhar has publicly accused former President Susilo Bambang Yudhoyono of being behind his conviction, pointing to the Commission's investigation, under his leadership, of Aulia Pohan, whose daughter is married to Yudhoyono's oldest son. Pohan was ultimately convicted of corruption and sentenced to four and a half years in prison.[193] Giving weight to claims that Azhar's conviction was political was his pardoning, in early 2017, by Yudhoyono's successor, Joko Widodo, even though he was already out on parole.[194] On one view, this might constitute implicit acknowledgement that Azhar should not have been convicted in the first place.

4.4 The Ahok *case*

One of the most politically polarizing cases in Indonesian legal history was the *Ahok* case—the blasphemy trial of the then-serving governor of Jakarta, Basuki Tjahaja Purnama (known as Ahok).[195] Before becoming president of Indonesia, Joko Widodo had been governor of Jakarta, with Ahok as his deputy. Ahok became Jakarta governor when Widodo ran for the presidency. While in office (November 2014–April 2017),[196] Ahok was widely considered effective and honest but, because he was Christian and Chinese-Indonesian, more conservative Muslim groups despised him and urged Muslims not to vote for him in the 2017 gubernatorial elections.[197] Senior Muslim figures even suggested that the Koran prohibited Muslims from voting for him, pointing to Surat Al Maidah 51 ('Verse 51') of the Koran, which warns against Muslims having Jews and Christians as their *auliya*. There is much debate about what *auliya* means—particularly whether it means "allies," "friends," "protectors," or "leaders." But some influential Muslims began using it to mean "leaders,"[198] including governors.

In late September 2016, Ahok gave a speech to a group at a fish market about his administration's programmes. Finding the attendees inattentive, he goaded them by saying that they probably would not vote for him anyway because they had been "misled by those *using* Verse 51" (emphasis added). This drew no reaction from the audience, but a major furore erupted when the speech was uploaded to YouTube, with the word "using" edited out. Without "using," what Ahok said could be interpreted to imply that the Koranic verse itself was misleading or a lie, rather than that people were using it to mislead.[199] Either way, it was alleged that Ahok had insulted the Koran, Islamic scholars (who were primarily responsible for interpreting or "using" the Koran), or both. The *Majelis Ulama Indonesia* (Indonesian Council of Islamic Scholars, or MUI) voiced public outrage about the speech and demanded his prosecution for blasphemy, using the opportunity to repeatedly

[193] Septiar (2017). He claims that Yudhoyono sent Hary Tanoesoedibjo to warn him not to proceed against Pohan: Prasetyo & Arnaz (2017).

[194] Manan, M.P., Rafiq & Cipta (2017). The reasons for granting the pardon were not publicly expressed, although his lawyer revealed that the application was supported by various public figures and even the victim's family: *ibid*.

[195] This section develops parts of Butt (2018).

[196] Pausacker (2015).

[197] Lindsey (2017).

[198] Marcoes (2016).

[199] *Ibid*.

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emphasize that Muslims should not elect him. The *Front Pembela Islam* (Islamic Defenders' Front, or FPI) group—long associated with campaigns and protests, some of them violent, to promote goals of more conservative Islam—organized mass rallies in Jakarta in November (attended by about 150,000–250,000 people) and in December (about 500,000–750,000) that demanded Ahok's prosecution for blasphemy (the common translation of *penodaan agama*, literally "denigration of a religion").[200] Police and prosecutors duly met these demands and Ahok was brought to trial in the North Jakarta District Court.[201] He also lost the election.

Many rightly presumed that the threat implicit in the ability of conservative groups to mobilize en masse would ultimately lead the court to convict him. Less predictable was the final demand (*tuntutan*) of prosecutors, read at the end of Ahok's trial, in which they asked the court to find him guilty of a lesser offence under Article 156 (which prohibits publicly expressing enmity, hate, or contempt towards a particular group) and to impose a suspended sentence. The court refused, deciding that the evidence supported the conclusion that Ahok had denigrated a religion as prohibited under Article 156a of the Criminal Code (*Kitab Undang-undang Hukum Pidana*, or KUHP) and, in May 2017, sentenced him to two years' imprisonment. In reaching this decision, the court accepted forensic evidence from police that the video of his speech uploaded to YouTube had not been doctored. But the court found that, even if it had been, Ahok had still used the verse in connection with the concept of deception, which had belittled, degraded, and offended the Koran itself.

Ahok lodged an appeal with the Jakarta High Court,[202] but then withdrew it, citing concerns that pursuing it might incite further protests and instability.[203] Instead, he waited for the outcome of the trial of the person who uploaded the YouTube video of his speech, Budi Yani, and then lodged a Supreme Court PK. In 2018, the Bandung District Court imprisoned Yani for 18 months for "spreading information directed at causing hate or enmity based on religion or ethnicity" and "altering a video owned by another person or the public"—both offences under Indonesia's Electronic Information and Transactions Law.[204] Ahok's legal team's strategy was using Yani's conviction to attack Ahok's, focusing on the contradictory conclusions reached in the different trials about the same uploaded video. While the North Jakarta District Court had found that the video was not doctored, the Bandung District Court found Yani guilty of doctoring that very same video.

Unfortunately for Ahok, the *Yani* case did not ultimately assist him, with the PK panel, chaired by Alkostar, finding that the lower court had made no judicial error, having based its decision on the available evidence and the applicable law.[205] The lower court had also been "independent, honest [and] impartial."[206]

Importantly, the PK judges decided that the Yani video was irrelevant, because Ahok's speech itself contained the blasphemy.[207] The panel stated that "the people who reported

[200] Fealy (2016).

[201] North Jakarta District Court Decision 1537/Pid.B/2016/PN.Jkt Utr.

[202] Jakarta High Court Decision 117/PI/2017/PT.DKI/JKT of 13 June 2017.

[203] Hukumonline (2018).

[204] Specifically, Arts 28(2) and 32(1) of Law 11 of 2008 (as amended). Bandung District Court Decision 674/Pid.B/2017/PN.Bdg of 14 November 2017. Budi Yani appealed to the West Java High Court (Decision 370/PID.SUS/2017/PT BDG) and the Supreme Court on cassation (Decision 1712 K/PID.SUS/2018), but was unsuccessful.

[205] Supreme Court Decision 11 PK/PID/2018, p. 30.

[206] *Ibid.*, pp. 28–9.

[207] *Ibid.*, p. 27. Also irrelevant for the court was Ahok's assertion that he did not intend to offend Islam and that Muslim figures, such as former President Abdurrahman Wahid, expressly rejected the interpretation of *aulia* that MUI espoused. The court said this was irrelevant and that intent was established because he made the comments consciously and under no duress. Whether he caused offence to a religion was to be objectively, not subjectively, determined: Supreme Court Decision 11 PK/PID/2018, pp. 31–2.

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the applicant to police in the blasphemy case did not base their reports on the uploaded information from Budi Yani, but from a variety of other sources."[208]

For the court, Ahok's crime was simply a precursor to Yani's and there was no causal connection between them.[209] Worse, the panel declared that Ahok had not "genuinely used his right to object to the *judex facti* decision—that is, by employing avenues of appeal" to the Jakarta High Court. For the panel, by withdrawing his appeal to the high court, Ahok had signified that he "already accepted the reasoning and holding" of the decision of the North Jakarta District Court.[210]

The PK panel's decision, which was reportedly completed within only 13 days of Ahok's lawyers' lodging the application,[211] was unconvincing, for several reasons. Most problematic was the PK panel's finding that the doctoring of the video was irrelevant. For the judges, blasphemy occurred regardless of that video. But this conclusion is not supported by the evidence presented in Ahok's trial and in fact directly contradicts it. A close reading of the witness testimony reported in the trial documents clarifies that not one person who directly heard his speech noticed any statement that was offensive to Islam in it. Rather, the witness testimony about what Ahok said came from those who saw the video and was drawn solely from their viewing of the video. But for that video, there would have been no witness testimony presented at trial about what Ahok said.

The PK panel ignored this evidentiary obstacle and relied on the video for proof of the content of Ahok's speech. Far from being irrelevant, the video was, therefore, more central to the case against Ahok than the North Jakarta District Court and the PK panel recognized. Its providence and veracity should, therefore, have been critical to the case against him, and the PK panel should have examined more closely what Budi Yani did to it before uploading it. Given that the uploading of the video was a criminal act, it is unclear why the PK panel did not consider excluding it altogether.

The PK panel's reference to Ahok having "accepted the decision" was, in my view, quite spurious. To be sure, Article 234(1) of the KUHAP does say that, if the defendant or prosecution does not appeal a decision within seven days, they are "considered to have accepted the decision." However, this does not mean that the parties have accepted the correctness of that decision—it just means that they have decided not to appeal. Equally questionable was the PK panel's claim that Ahok had not used his PK rights "genuinely" because he did not appeal to the Jakarta High Court first. Nowhere does Indonesian law require a defendant to appeal to a high court before launching a PK; all that is required is that the decision sought to be reopened is final and enforceable, which, for a first-instance decision, occurs seven days after the decision is handed down. Had Ahok immediately appealed, he could not have used the *Budi Yani* case as a ground for appeal, because that case had not concluded.

When Alkostar was announced as the chairperson of the panel of judges to hear Ahok's PK, questions were raised about whether he should recuse himself. As mentioned, Alkostar is known for being a devout Muslim. But he has also been linked to FPI—the very group that called for Ahok's arrest and organized the demonstrations against Ahok in Jakarta.[212] FPI's leader, Rizieq Shihab, who was prominent in condemning Ahok, even called on the Supreme Court to reject Ahok's PK,[213] while also claiming to having been "close" to Alkostar. Shihab had, for example, been invited to speak at an event in March 2014 celebrating Alkostar's achievements held by the Alumni Association of the Islamic University

[208] Supreme Court Decision 11 PK/PID/2018, p. 27.
[209] *Ibid.*, p. 28.
[210] *Ibid.*, p. 33.
[211] Redaksi Kumparan (2018).
[212] Mietzner & Muhtadi (2018), p. 1.
[213] Taher (2018).

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of Indonesia (UII), with which Alkostar has long been associated, including as a lecturer. Shihab also claimed that, before Alkostar's appointment to the Supreme Court, Alkostar had approached FPI in response to media reports alleging that FPI had engaged in illegal activities. According to Shihab, Alkostar then became a legal adviser to FPI, including its board, and at one stage was visiting FPI headquarters every week or so, including to teach FPI personnel about criminal and constitutional law. Shihab also said that Alkostar eventually led FPI's Department of Justice and Human Rights until his appointment to the Supreme Court.[214] The truth of Shihab's claims has been disputed, but Alkostar has not, to my knowledge, publicly commented on his connection with Shihab and FPI, even to reject it.[215] Nevertheless, there appears nothing to suggest a continuing connection when Alkostar was handling Ahok's PK.[216]

While the media reporting this alleged connection did not openly claim that Alkostar would be biased against Ahok, the implication was clear enough to prompt the Supreme Court public relations manager to allay concerns about Alkostar's objectivity. To the media, he announced that, while Alkostar and Shihab may have been close in the past, there was no intervention in this case and Alkostar would handle the case impartially.[217] Nevertheless, it is unclear why the case was allocated to him or why, once the alleged connection was revealed in the media, he did not recuse himself, to avoid the perception of bias. After all, there are many Supreme Court judges who could have replaced him on the panel. Unfortunately, as discussed, the court's reasoning in Ahok's PK was highly problematical from a legal perspective. This does nothing to dispel suspicions of bias. Of course, on any view, a model judge should not convey bias, or give the impression of it. Yet, again, Alkostar's involvement in this case—and his panel's decision to uphold Ahok's conviction—did not appear to fundamentally alter perceptions of him as a good judge.

4.5 The **Wongso** *case*

Few of Alkostar's appeals have attracted more intense domestic and international controversy than the *Jessica Wongso* case. In 2016, after a four-month trial, the Central Jakarta District Court found Wongso, an Australian permanent resident, guilty of the premeditated murder of her friend, Mirna Salihin, and sentenced her to 20 years' imprisonment. The court accepted the main threads of the prosecution's version of events contained in the indictment, read out at the beginning of the trial. Put briefly, this version was: Wongso arranged to meet Salihin and their friend, Hani Juwita, for coffee at an upmarket mall, arrived early, bought Salihin a coffee, laced it with cyanide in the café after obscuring the view of the café's CCTV cameras with shopping bags, and then watched on as Salihin drank the coffee and collapsed. Salihin died en route to hospital.

Although the incident was not initially considered suspicious, police began investigating Wongso for the murder, apparently for five main reasons. First, police thought she had acted suspiciously at the café. The café's CCTV footage showed Wongso arriving well before Salihin and Juwita, and walking around the café looking for a table, which she reserved. She left the café and returned with three large shopping bags, which she put on the table directly obscuring the CCTV camera covering that table. She ordered drinks for her friends

[214] Hukumonline (2014).

[215] Coconuts (2018).

[216] If any association existed between Alkostar and FPI, it would appear to have been many years ago and could only have been for a relatively short period—that is, after FPI was formed in 1998 and before he joined the Supreme Court in 2000. It is feasible that he was drawn to help the organization because, as a devout Muslim, he was concerned that the organization was violating criminal laws by engaging in thug vigilantism and violent raids on nightspots around that time.

[217] Hukumonline (2000); Hukumonline (2014).

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before they arrived, and the CCTV footage appears to show her making some movements behind the bags, perhaps near the drinks. When Salihin drank the coffee and collapsed, Wongso did not help her, but stood idly by, wringing her hands. Second, Juwita and café staff tasted the coffee after Salihin collapsed. They said it tasted horrible and felt sick afterwards. Third, police thought Wongso might have disposed of evidence. After Salihin's death, Wongso returned to her parents' house in Jakarta (where she was staying) and reportedly asked the housekeeper to throw out the pants she wore to the café, saying that she had ripped them when she got into the car to take Salihin to hospital.[218] Police alleged that she did this so that they could not test her clothes for cyanide. Fourth, police thought she had a motive to kill Salihin. They had been friends during their studies at a design school in Sydney, Australia, but their relationship appeared to break down, primarily because Wongso was jealous of Salihin for having a fiancé. Finally, police uncovered what they thought were violent tendencies and several suicide attempts in Australia. Police heard these things about Wongso from Australian colleagues and friends, who also opined that she was mentally unstable. Australian Federal Police confirmed the suicide attempts and also revealed that Wongso's former boyfriend had obtained an Apprehended Violence Order against her.

Unlike *Bantleman*, which was heard in a closed court because it involved allegations of child sexual assault, and the *Ahok* case, which was partly closed because of fears that coverage could trigger public unrest, Wongso's trial was broadcast live on three national television stations. Media coverage and analysis of the trial were intense, with many criminal-law practitioners and academics providing almost continuous commentary on court procedures, legal arguments, and the evidence presented against her. But, as in the other cases discussed in this section, the evidence against the defendant was very slim. Like *Antasari*, there was so little of it that prosecutors were initially reluctant to prosecute, sending back the case dossier to the police several times and asking for more evidence.[219]

Perhaps the most glaring hole in the prosecution case was the inability to definitively establish that Salihin died of cyanide, or any type of, poisoning.[220] No autopsy was conducted and toxicology tests conducted by police 70 minutes after her death revealed no cyanide in her gastric fluid, bile, liver, or urine.[221] One National Police Hospital expert testified that Salihin's intestines were corroded and her mouth was blackened, which was consistent with cyanide poisoning. Small traces of cyanide were found in her stomach fluid in tests conducted several days after her death, but, as University of Indonesia forensic pathologist Jaya Surya Atmaja testified, this was probably from embalming chemicals used to preserve her body.[222]

No one saw Jessica put cyanide into the coffee that Salihin drank and Jessica never admitted to doing so. In the absence of direct evidence, prosecutors relied heavily on café CCTV footage that showed Wongso's movements behind the shopping bags that she had put on the table. Prosecutors alleged that she was putting cyanide in the coffee at this time, but could not prove this, much less demonstrate what form the cyanide took and how she could have administered it. They could not even prove that she took anything from her bag, nor refute defence evidence that she was sending text messages at the time.

The only indication that cyanide might have been involved was a police forensic report that detected a lethal dose of cyanide in a coffee sample that the café staff gave police. But serious questions were raised at trial about the handling of that evidence, which caused doubt about precisely what was tested and where it came from. Café staff testified that

[218] Central Jakarta District Court Decision 777/Pid.B/2016/PN.JKT.PST, p. 143.
[219] Pratama (2016).
[220] Yozami (2016).
[221] Topsfield & Rompies (2016a).
[222] Heriani (2016a).

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they gave police the cling-wrapped glass that Salihin had drunk from, with the contents poured into an empty water bottle for transportation.[223] However, the laboratory results indicated that tests had been conducted on coffee in the glass and coffee in the bottle, and that there were slightly different concentrations of cyanide in each. No explanation was given as to why any coffee was poured back into the glass and tested separately from the coffee in the bottle. Worse, it appears that the amount of coffee tested exceeded the capacity of the glass, at least after Salihin and others had drunk from it.[224]

Again, like *Bantleman*, because there was very little reliable physical evidence, the prosecution relied on expert witnesses, primarily from doctors and psychologists, who opined about Wongso's mental state and drew implications from the CCTV footage.[225] Their testimony, and the court's use of it, were highly questionable. For example, one testified that the movements behind the shopping bags were "suspicious."[226] Another testified that it was unusual for someone to place their bags on a table when the seat beside them was vacant. It is hard to see how this testimony falls within the expertise of those witnesses.

Particularly concerning was the evidence of one expert who testified that Wongso's former boss in Australia reported hearing Wongso say: "If I wanted to kill anyone, I know how to do it. I could use a gun. And I know the right dosage."[227] Unfortunately, Wongso's former boss did not appear at trial, so her statement was likely hearsay, even though it was conveyed through the testimony of the expert. (The reader may recall that the judges in Bantleman's case similarly accepted the evidence of psychologists, which was also likely hearsay, because it was really only what the alleged victims told them.) But the court seemed to accept the statement of Wongso's former boss as valid evidence, and drew implications about Wongso's mental state from it, including that she was capable of murder and knew how to administer poison. Even if the statement was not hearsay, drawing these implications is hard to justify. Wongso's alleged statement to her former boss was particularly vague. She did not, for example, mention using cyanide or any other drug by name. Worse, Wongso's statement was a response to hospital staff's refusing to discharge her after she had allegedly attempted suicide, perhaps because they were concerned that she would try again. She could well have been referring to killing herself, rather than another person. Yet the court did not convey this context when it set out this quote in its judgment.[228]

Another clear parallel with *Bantleman* was the claim, made by the defence, that their arguments and evidence were ignored without explanation from the judges. For example, several experts testified that more cyanide would have been detected in the stomach of a person fatally poisoned and cyanide would also have been present in the bowels and liver. One expert also explained that the onset of cyanide poisoning typically occurred up to 30 minutes after ingestion, not two minutes, as the prosecution had claimed.[229] Other typical indications of cyanide poisoning mentioned by defence experts, including red skin, the burnt-almond smell of cyanide, and poison in the stomach, were not present, but the court did not address this.[230] The court also failed to reconcile other evidence that seemed inconsistent with the allegations made against Wongso in the indictment. These included that others, such as Juwita and the café owner, tried the coffee but did not suffer the same fate; and no cyanide was ever detected at the café or on Wongso. Her pants were never found and her housekeeper did not testify.

[223] Pratiwi (2016).
[224] Heriani (2016d).
[225] Heriani (2016c).
[226] Heriani (2016b).
[227] Central Jakarta District Court Decision 777/Pid.B/2016/PN.JKT.PST, p. 63.
[228] *Ibid*., pp. 316, 334.
[229] Topsfield & Rompies (2016b).
[230] Heriani (2016a).

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The Central Jakarta District Court convicted Wongso. She then appealed to the Jakarta High Court but was unsuccessful,[231] so her lawyers appealed to the Supreme Court. Although their arguments were numerous, one theme ran through many of them: the Central Jakarta District Court had ignored key defence-led evidence that cast significant doubt on whether Salihin had died of cyanide poisoning and, if she had, whether Wongso had administered it. Indeed, the defence asserted, the district court had ignored the testimony of all ten of its witnesses, but did not explain why the prosecution's evidence was preferable.[232] The defence gave many examples of this, including the district court's rejection of its evidence about Salihin's cause of death. As mentioned, no autopsy was performed. The district-court judges had acknowledged that an autopsy should have been conducted[233] because it could have determined Salihin's cause of death. But, rather than concluding that Salihin's cause of death was therefore unknown, the court preferred to use the stomach-content toxicology test that the police conducted 70 minutes after Salihin's death to conclude that Salihin had died of cyanide poisoning.[234] In the cassation memorandum, the defence emphasized that it had demonstrated, using highly credible expert testimony, that more cyanide would have been detected in Salihin's stomach if she had died from cyanide poisoning; and the small amount detected was the likely result of chemicals used in the embalming process. The district court should not, therefore, have concluded that Salihin died from cyanide.

For the defence, the only way to reconcile the negligible amount of cyanide in Salihin's stomach with the lethal amount found in the coffee itself was for the cyanide to have been added to the coffee after Salihin had drunk it. Adding weight to this view was that Hani and café staff tasted the coffee but did not collapse and die, as did Salihin.[235] Yet, if the coffee had the high levels of cyanide detected in the laboratory test—7,400 mg/l and 7,900 mg/l of cyanide in the glass and bottle, respectively—then they too would likely have perished.[236] Also consistent with this claim was the discrepancy between the amount of coffee in the glass—at least after consumption by Salihin, Juwita, and the café staff—and the amount of coffee tested by the police laboratory. The capacity of the glass was 370 ml, but café staff testified that café practice was always to leave 1 cm of empty space at the top of the glass, meaning that only 320 ml of coffee would have been poured into it.[237] Each sip of coffee was estimated to have removed a further 20 ml. If the three people who tasted the coffee had sipped this amount, then only 260 ml would have remained for testing. But the laboratory report specified that the volume of coffee in the glass was 150 ml and the volume in the bottle was 200 ml.[238]

Unfortunately, the Supreme Court cassation panel, chaired by Alkostar, did not attempt to directly address the defendant's contentions, or even acknowledge weaknesses in the evidence that the prosecution had put forward. Of course, the defence had, in their *memori*, complained about the very same treatment from the lower courts. The Supreme Court's decision was a boilerplate response, holding that the district court had:

> considered legally relevant issues correctly, by verifying the testimony of witnesses, experts and the defendant, documents, circumstantial evidence and exhibits

[231] Jakarta High Court Decision 393/PID/2016/PT.DKI, p. 18.
[232] Manan & Kurniawan (2016).
[233] Central Jakarta District Court Decision 777/Pid.B/2016/PN.JKT.PST, p. 311.
[234] Cassation decision, pp. 19, 38.
[235] Supreme Court Decision 498 K/PID/2017, p. 52.
[236] Indonesia Lawyers Club (2016).
[237] Supreme Court Decision 498 K/PID/2017, p. 62.
[238] *Ibid.*, p. 63.

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> appropriately and correctly, so that correct legal facts about the case were obtained that were relevant to the indictment of the public prosecutor.[239]

The court reached this decision in only a few pages, first setting out the facts that it accepted to have been proved, which followed the prosecution's version.[240] So, for example, the court rejected the defence claim that, because Salihin's initial stomach-content tests did not contain cyanide, Salihin could not have died from cyanide poisoning. This was because cyanide was found in the coffee samples and there were traces of cyanide in her stomach several days after her death (even though those amounts were negligible).[241] The Supreme Court ignored the problems with the forensic testing of the coffee raised by the defence and that others who tasted the coffee did not fall ill. The court flatly stated that it would not consider any more of the defence's arguments, labelling them as "mere repetition of facts brought forward at the trial that were dealt with by the district court."[242] A new legal team lodged a PK in 2018, but the Supreme Court did not disturb the cassation judgment.[243] Her trial lawyers plan to lodge another appeal in 2020.[244]

Perhaps the most problematical aspect of the entire Wongso saga was a conversation between Alkostar and then-police chief General Tito Karnavian. This conversation took place at a wedding while Wongso's case was on foot in the Central Jakarta District Court. The discussion was reported widely,[245] including in Karnavian's interview for the book produced by the Supreme Court to celebrate Alkostar's retirement.[246] Karnavian said that he asked Alkostar about the case, who replied:

> After observing several sessions, I can already conclude that Jessica Wongso is guilty. The reason is that the poisoned coffee was held by many people: the maker, the waiter, Jessica and the drinker. Of these four people, in my analysis, it is not possible that the drinker did it, leaving three people. The maker and the waiter had no motive to do this. But Jessica had a motive and a close connection with the drinker.[247]

Of course, this conversation was arguably improper, and could be taken to indicate prejudgment by Alkostar, who, as discussed, upheld Wongso's conviction on cassation. It also seems to clearly violate the Supreme Court's own ethics code, which prohibits judges from talking extra-judicially about a case that they or other judges have handled or are handling.[248]

5. Concluding remarks

How can a Supreme Court judge be held up as a model—by other judges, legal reformists, academics, and the media—but be involved in cases that appear to demonstrate a concern to "punish" rather than objectively adjudicate, such as seems to have occurred in the corruption cases discussed in Section 3? How, too, can a judge become Indonesia's most revered judicial figure after convicting defendants on the basis of legally suspect or

[239] *Ibid.*, pp. 76–7.
[240] *Ibid.*, p. 77.
[241] *Ibid.*, pp. 78–9.
[242] *Ibid.*, p. 84.
[243] Supreme Court Decision 69 PK/PID/2018. This decision is not available on the Supreme Court's website. Despite extensive searching, I was unable to obtain a copy of it.
[244] Interview with Otto Hasibuan, Jakarta, 2 December 2019.
[245] Pratisto (2018).
[246] Safitri (2018k).
[247] Safitri (2018f).
[248] Points 3.2.2 and 3.2.5.

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insufficient evidence, and simply ignoring credible defence evidence and arguments, such as in the *Bantleman*, *Ahok*, *Azhar*, *Wongso*, and *Malekty* cases, discussed in Section 4? As Alkostar himself expressed it, judges must not "make decisions using their guts. There must be reasoning."[249] In my view, the decisions of Alkostar and his panel in these cases were problematical, but not because they offered a view of the facts or law about which reasonable judicial minds could legitimately differ. Rather, the decisions were objectionable because the panels appeared to ignore flaws in prosecution evidence so central to the case against the defendant that conviction should have been legally impossible on any objective view: the murder weapon in *Azhar*, the doctored video in *Ahok*, the lack of an autopsy and hence a conclusive cause of death in *Wongso*, and the lack of any physical evidence of rape in *Bantleman*. These decisions, where judges side with the prosecution, appear to make a mockery out of the presumption of innocence and other defendants' rights, which Indonesian law provides and judges are formally required to uphold.[250]

These criticisms have even greater potency in light of the various political or ulterior motives at play and the public pressure to convict in these cases. In the decades since Soeharto's fall from power, public pressure appears to have largely replaced government interference as a significant threat to the independence of many courts in Indonesia, with corruption remaining the primary threat. But this pressure, which appears to be brought to bear on judges through increased media scrutiny and protests outside of courtrooms, almost always results in their convicting defendants, not acquitting them. The reasons for this have not, to my knowledge, been conclusively determined, but I suspect they are numerous and complex, having something to do with long-held public perceptions that powerful defendants have long been able to manipulate the judiciary to fix their preferred outcomes and judges lacking confidence in their ability to interpret and apply the law objectively. Whatever the reasons, judges seem to prefer to convict based on suspect evidence than be seen to be tricked into acquitting by nefarious defendants and their lawyers.

But it is not just these decisions themselves that raise questions about Alkostar's model-judge label. Other behaviour raises them. How, for example, can a good judge express a view about the guilt of a defendant to a senior policeman and then, later, preside over an appeal brought by that very defendant? How, also, can one be publicly associated with a militant Islamic group and then hear a politically motivated prosecution strongly supported by that group? Whether Alkostar's conversation with Karnavian or his association with the Islamic Defenders' Front was real or affected his decisions is beside the point. Problematical here is the public perception of bias or predetermination that may have been created.

The decision-making in these cases, and this behaviour outside of the courtroom, are certainly not endorsed under Indonesia's Judicial Ethics Code. But some might argue that the deficiencies in professionalism, impartiality, and objectivity apparently displayed in the cases discussed in this article are almost universally shared by Indonesian judges,[251] which suggests that these Code principles have never really been strictly followed, and perhaps even that their routine violation has made them purely aspirational. After all, judges are rarely sanctioned for breaching the Code, despite the efforts of the Judicial Commission.[252] It is perhaps even hypocritical to hold judges to standards that the most

[249] Hukumonline (2000).

[250] Art. 8(1) of Law 48 of 2009 on Judicial Power states that every person suspected, arrested, detained, prosecuted, or summoned before the courts must be considered not guilty until a judicial decision of binding legal authority establishes guilt.

[251] Butt & Lindsey (2010); Pompe (2005); Butt (2018); Butt (2019).

[252] Colbran (2009).

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senior judicial officers cannot maintain themselves. But where these judicial deficiencies are the norm, then attention can shift towards judicial attributes that set some judges apart from others. Here, Alkostar has been held out, quite rightly, as having a unique combination of honesty, integrity, industriousness, and modesty.[253] As argued above, the praise heaped on Alkostar for having these qualities—many of which correspond with Judicial Ethics Code principles—suggests that, by contrast, other judges are thought to have few or none of them.

Paradoxically, while Alkostar was known for being tough on corruptors and refusing bribes, he has not always enforced a zero-tolerance approach towards corruption, even by his own standards. This seems clear from his own descriptions of attempts by people to bribe him, particularly near the beginning of his tenure at the Supreme Court. He relayed these encounters during press conferences and interviews to mark his retirement. In one press conference, held at the Supreme Court's own Media Centre in May 2018, Alkostar explained that a businessperson had come to his office in 2000 and attempted to bribe him, offering him a blank cheque and saying "the others already have." (In a separate interview, a presenter asked him whether this was a reference to the other judges in the case and whether it implied that they had already accepted a bribe to fix the outcome. Alkostar replied "maybe, but I don't know.") Alkostar then told the businessperson to leave and to never do that again, saying, angrily, that, if he did, "this would become another matter" (*menjadi urusan lain*).[254] This encounter prompted him to put a sign on the door of his office at the court that stated: "Guests connected with a case will not be received" (*Tidak menerima tamu yang berhubungan dengan perkara*).[255] This was apparently the first time that a Supreme Court judge had put up such a sign. Many judges disapproved but, over time, the Supreme Court adopted this as its official policy.[256]

On another occasion, Alkostar was sent a letter asking for his bank account details, with a photocopy of a cheque. He said that he replied to this by letter, saying that "he felt offended by this, and asked for this not to continue, because it would become a problem."[257] One biography also explains that an old friend—a lawyer and a campus activist whom he had not seen for many years—met with Alkostar in 2001 and asked for help to "close the case" for his client, in return for a luxury car and as much cash as Alkostar wanted. According to the account in the biography, Alkostar was outraged by this request. However, the account stops there, with the biographer asking, "Who knows what happened next in that room?" and describing the lawyer emerging from Alkostar's office as "white-faced with fear."[258]

The biography that contains this account is entitled *Sogok Aku Kau Kutangkap* (*Bribe Me and I'll Catch You*). Ironically, when faced with offers for a bribe, Alkostar did nothing of the sort. He did not report the alleged bribery. This is perhaps surprising, given that he was a judge specializing in criminal law who directly witnessed a serious offence. Even his biography noted that this was a crime, saying that what the lawyer had asked of him "violated the statutes applicable in the country."[259] And, in the case of the letter asking him for his

[253] Incidentally, he also met the requirement, superfluous to the Bangalore Principles but listed in the preamble of the Indonesian Code, that judges believe in God and follow the teachings and demands of their respective religion or belief. While this might be controversial in many other countries, in Indonesia it is not. This is because Indonesia's national ideology or philosophy, the *Pancasila*, has as its first principle "Belief in Almighty God." Accordingly, Indonesian citizens have, since independence when Pancasila was first constitutionally entrenched, been required to have a religion or belief.

[254] The story is also recounted in Windrawan (2018), p. 165; Sukmana (2018).

[255] Sukmana (2000).

[256] Safitri (2018k), p. 67.

[257] Alam (2018).

[258] Musyafa (2017), pp. 9–12.

[259] *Ibid.*, p. 10.

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account number, he had physical evidence of the crime—enough, alongside any testimony that he could have given, to convict the sender for corruption. Yet it appears that he did not even report these incidents to the authorities.

These encounters might reflect the normalization of bribery, but should certainly not be taken to suggest that Alkostar has engaged in it. I have never heard or read even the slightest suggestion of this. Perhaps this is really the reason why Alkostar is so highly revered, despite all the problems with his decisions that this article has uncovered. After decades of Indonesian judicial decrepitude, and in particular very high levels of perceived corruption, maybe resisting bribery attempts was all Alkostar needed to do to distinguish himself from his judicial brethren.

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