

# CONSTITUTIONAL COURT DECISIONS ON THE JUDICIAL INDEPENDENCE OF OTHER INDONESIAN COURTS

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## Abstract

Judicial independence is a foundational principle of the Indonesian Constitution. It guarantees the independence of all Indonesian courts. However, most of the cases the Constitutional Court has handled relating to judicial independence have concerned the Constitutional Court's own independence, focusing, for example, on issues of judicial tenure and terms. This paper examines the handful of Constitutional Court decisions about the judicial independence of other courts and judges in Indonesia – that is, non-constitutional courts and judges. It examines what the Constitutional Court has said about judicial independence in relation to these other courts. It then considers whether, by emphasising (perhaps overly) strict observance of judicial independence, these Constitutional Court decisions compromise effective judicial accountability and administration.

**Keywords:** Constitutional Court; Corruption; Judicial Commission; Judicial Independence; Supreme Court; Tax Court.

## I. INTRODUCTION

Before the fall of Soeharto in 1998, Indonesia's courts were often described as lacking independence from government. From the last few years of the reign of Indonesia's first president, Soekarno, and through the New Order regime of

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Indonesia's second president, Soeharto, the government largely controlled the judiciary. Interference was even expressly authorised by law. For example, the 1964 Judicial Power Law called courts an instrument of the 'national revolution', and authorised the president to 'interfere' (*melakukan campur tangan*) in judicial affairs, including in individual cases.<sup>1</sup> Under that Law, the president could, by decree, direct courts to decide cases as he wished, requiring them to suspend proceedings and deliberate with prosecutors to give effect to his wishes.<sup>2</sup>

Under Soeharto (1966-1998), government control over the judiciary became more systematic and comprehensive. Judges' continuing employment, pay, promotion, and favourable postings became contingent on their compliance with the will of the state.<sup>3</sup> As a result, the courts almost always sided with the government. Judges reported receiving telephoned instructions from the presidential palace, dictating the decisions for them to issue in cases involving state interests.<sup>4</sup> Promotions were made on loyalty and time served, not on merit. At the same time, judges were underpaid and courts woefully under-resourced, encouraging (or even necessitating) corruption. Delay became a major problem, with litigants waiting years for cases to be heard and decided. By the end of the New Order, the Supreme Court's case backlog had reached almost 20,000 cases and was continuing to increase by 50 to 100 cases per month.<sup>5</sup>

When Soeharto fell in 1998, legal reformists pushed to have the judiciary disentangled from government. One of the main ways this was achieved – by most accounts, quite successfully<sup>6</sup> – was by transferring control over judicial administration from government departments (now called ministries) to the Supreme Court (*Mahkamah Agung*). Both the adjudicative functions and the

<sup>1</sup> See Article 19 of the General Courts Law and its Elucidation.

<sup>2</sup> Judicial Power Law of 1964, Articles 23(1)-(3).

<sup>3</sup> Daniel S. Lev, "Judicial Authority and the Struggle for an Indonesian Rechtsstaat," *Law and Society Review* 13 (1978): 37–71, <https://doi.org/10.2307/3053242>.

<sup>4</sup> Simon Butt and Tim Lindsey, *Indonesian Law* (Oxford: Oxford University Press, 2018), 81.

<sup>5</sup> Suara Pembaruan, "Tajuk Rencana: Negara Hukum Bukan 'Negara Undang-Undang [Editorial: The State of Law is Not a 'State of Laws']," Suara Pembaruan, published November 14, 1996; Jakarta Post, "Court Can't Review Law Says Oetoyo," The Jakarta Post, published June 4, 1997.

<sup>6</sup> Simon Butt and Nicholas Parsons, "Judicial Review and the Supreme Court in Indonesia: A New Space for Law?" *Indonesia* 97 (2014): 55–85, <https://doi.org/10.5728/indonesia.97.0055>. For discussion of cases raising doubt about judicial independence from government, see Rifqi Assegaf, "The Supreme Court Reformasi, Independence and the Failure to Ensure Legal Certainty," in *The Politics of Court Reform: Judicial Change and Legal Culture in Indonesia*, ed. Melissa Crouch (Cambridge: Cambridge University Press, 2019), 40–2.

administration of the courts thereby came to be under ‘one roof’ (*satu atap*) of the Court – the common term for this reform.<sup>7</sup> Also significant was the creation of the Constitutional Court (*Mahkamah Konstitusi*) to exercise higher-order constitutional functions. As a new judicial institution, it quickly asserted its independence and established itself as a credible and independent check on the exercise of government power. Even though both the Supreme and the Constitutional courts have faced their own controversies and scandals, both have been able to maintain a level of independence from the government over the past two decades that surpasses any similar period in Indonesian history.

The Constitutional Court has played a particularly important role in ensuring these higher levels of judicial independence. During its 20-year existence, the Court has heard many constitutional challenges to national statutes touching on issues widely accepted as being critical to establishing and maintaining judicial independence. The Court has heard these cases under its constitutional review powers. Because judicial independence is a constitutional principle (Article 24(1) of the Constitution), the Court can examine whether national legislative provisions undermine it and, if necessary, invalidate those provisions.

Many of these constitutional review decisions have concerned the independence of the Constitutional Court itself – particularly, how its judges are appointed, their tenure, and the like.<sup>8</sup> These decisions generally result from constitutional challenges to the Constitutional Court’s governing law – Law 24 of 2003 on the Constitutional Court, as amended. Decisions such as these have already attracted some scholarly and other attention.<sup>9</sup> In this paper, I instead focus on Constitutional Court decisions about the judicial independence of *other* courts and judges in Indonesia – that is, *non-constitutional* courts and judges.

<sup>7</sup> Mahkamah Agung [Supreme Court], *Blueprint for the Reform of the Supreme Court of Indonesia* (Jakarta: Supreme Court of Indonesia, 2003).

<sup>8</sup> See, for example, Constitutional Court Decisions 48/PUU-IX/2011; 49/PUU-IX/2011; 7/PUU-XI/2013; 1-2/PUU-XII/2014; 93/PUU-XV/2017; 56/PUU-XX/2022.

<sup>9</sup> Ibnu Sina Chandranegara, *Hukum Acara Mahkamah Konstitusi [Constitutional Court Procedural Law]* (Sinar Grafika, 2021), 79; Yanis Maladi, “Benturan Asas Nemo Judex Idoneus in Propria Causa dan Asas Ius Curia Novit [The Clash of the Principle of Nemo Judex Idoneus in Propria Causa and the Principle of Ius Curia Novit],” *Jurnal Konstitusi* 7, no. 2 (2010): 1–18, <https://doi.org/10.31078/jk721>; Hukumonline, “Diminta Hati-Hati, MK Berpotensi Langgar Asas Nemo Judex Idoneus in Propria Causa [Asked to Be Careful, MK Has the Potential to Violate the Principle of Nemo Judex Idoneus in Propria Causa],” Hukumonline, published December 8, 2016.

While there are far fewer of these decisions compared to those on the judicial independence of the Constitutional Court, the ramifications of these decisions are potentially larger. This is because these decisions involve the independence (and hence the operation) of the Supreme Court and its several dozen judges, as well as the several hundred courts and several thousand judges the Supreme Court administers.<sup>10</sup> Together, these courts hear several million cases per year,<sup>11</sup> compared to the Constitutional Court's one or two hundred.<sup>12</sup>

As this paper will demonstrate, the Court has generally accorded great weight to judicial independence as a constitutional concept. I argue, however, that the Court may have over-prioritised judicial independence to the detriment of equally-important principles – particularly judicial accountability. I develop this argument through an analysis of two cases in which the Constitutional Court was required to balance judicial independence against these other principles.

The first and most important of these was the 2006 *Supreme Court v Judicial Commission case*.<sup>13</sup> In it, the Court decided, amongst other things, that the Judicial Commission – established under the Constitution to ensure judicial transparency and accountability – lacked power to oversee the exercise of judicial authority by any court, such as by assessing decisions. Statutory provisions purporting to allow the Commission to exercise this power were unconstitutional for violating judicial independence. According to the Constitutional Court, to maintain judicial independence, only the Supreme Court could detect impropriety in the exercise of judicial power and then act against errant judges. For the Constitutional Court, the only appropriate way to assess judicial decisions was through the ordinary appeal process.

This decision has arguably undermined efforts to improve judicial quality and integrity in Indonesia, which are long-standing problems. The Supreme Court has since used the judicial independence the Constitutional Court granted

<sup>10</sup> Gumanti Awaliyah, "Jubir MA: Indonesia Kekurangan 4.000 Hakim [Supreme Court Spokesperson: Indonesia Short of 4,000 Judges]," *Republika.co.id*, published July 18, 2018.

<sup>11</sup> For example, in 2019 alone, Indonesian lower courts decided over 6.5 million cases: Supreme Court, *Supreme Court Annual Report 2019* (Jakarta: Supreme Court, 2020).

<sup>12</sup> Constitutional Court of the Republic of Indonesia, "Recapitulation of Law Cases," Constitutional Court of the Republic of Indonesia, accessed August 18, 2023.

<sup>13</sup> Constitutional Court Decision 005/PUU-IV/2006.

to it as a shield to avoid outside scrutiny of its own judges and the judges it administers. This shield appears to have been effective to block Commission-led investigations into judges and assessments of decision quality. This seems to have at least contributed to an environment in which judicial corruption has been able to flourish and high-profile decisions that make very little legal sense have emerged.

The second decision is the 2013 *Tax Court* case. Although clearly of a lesser order than *Supreme Court v Judicial Commission*, the *Tax Court* case demonstrates that, two decades later, the Constitutional Court still places great importance on judicial independence – perhaps even too much. In this case, the Constitutional Court decided that the Tax Court, previously administered by the Finance Ministry, needed now to be brought under the administrative control of the Supreme Court, for reasons of judicial independence. While this decision might make the Tax Court institutionally independent of government, it may well result in the Tax Court suffering some of the problems of the courts that the Supreme Court already administers, including lack of accountability for corruption. This is particularly significant, given that the Tax Court tends to hear high value disputes, which may be a fertile ground for increasing corruption.

This article is structured as follows. I begin in Part I by discussing the constitutional and statutory bases for judicial independence in Indonesia, before examining how the Constitutional Court has described and applied the concept in its decisions, focusing on the two case studies. In Part II, I explain and analyse *Supreme Court v Judicial Commission* and *Tax Court*. In Part III, I then argue that the preoccupation with judicial independence in these decisions, and the corresponding removal of outside scrutiny, has likely negatively affected (in the case of *Supreme Court v Judicial Commission*) and will likely negatively affect (in the case of *Tax Court*) judicial performance. Foundational principles such as judicial independence and accountability are difficult to balance, particularly when they come into conflict. However, I conclude that the Constitutional Court could now consider refocusing attention on accountability. I make this argument by drawing on international literature suggesting that judicial accountability

– including by analysing and assessing judicial decisions – can be effectively performed without judicial independence being damaged. However, even if increased accountability were to undermine judicial independence, this could be defensible, given that the Supreme Court has been unable to exercise that independence in a way that justifies its grants.

## II. DISCUSSION

### 2.1. Judicial Independence

Judicial independence is an established principle of Indonesian law. It is reflected in the Constitution, in various statutes and in decisions of the Constitutional Court, which I discuss in this section.

#### 2.1.1. The Constitution and Statutes

Article 24(1) of the Indonesian Constitution states that:

Judicial power is an independent power to maintain a system of courts with the objective of upholding law and justice.

Article 3 of the 2009 Judiciary Law<sup>14</sup> states that:

- (1) In performing their tasks and functions, judges and constitutional judges must guard judicial independence.
- (2) Interference in judicial affairs by extra-judicial parties is prohibited, unless provided for by Indonesia's 1945 Constitution.

Article 3(3) of the Judiciary Law adds that anyone who deliberately breaches Article 3(2) is to be punished for committing a criminal offence.

An important plank of judicial independence is the guarantee of judicial tenure, so that the government cannot simply sack judges for making decisions unfavourable to it. In Indonesia, various statutes regulate suspension, honourable discharge and dismissal from judicial office. Judges of the general courts and the Supreme Court may be honourably discharged 'upon their own request';<sup>15</sup> if they are 'continuously physically or mentally ill',<sup>16</sup> to the extent that they are

<sup>14</sup> Law No. 48 of 2009.

<sup>15</sup> Article 19(1)(a) of Law 2 of 1986 on General Courts (as amended) (the 'General Courts Law'); Article 11(1)(c) of Law 14 of 1985 on the Supreme Court (as amended) (the 'Supreme Court Law').

<sup>16</sup> Article 19(1)(b) of the General Courts Law; Article 11(1)(d) of the Supreme Court Law

‘unable to adequately perform [their] work obligations’;<sup>17</sup> if they ‘clearly do not have the capacity to perform their duties’;<sup>18</sup> for example, if the judge ‘has made many substantial errors when performing his or her duties’;<sup>19</sup> or if they die.<sup>20</sup> Judges will also be honourably discharged if they reach the mandatory retirement age. The mandatory retirement age for district court judges is 65 years of age, for high court judges is 67,<sup>21</sup> and for Supreme Court judges is 70 (Article 11(b)).

Article 20 of the General Courts Law and Article 11A of the Supreme Court Law provide the following grounds for dishonourable discharge from office for general court and Supreme Court judges:

- a) Improper conduct.<sup>22</sup>
- b) Continual neglect of their work.<sup>23</sup>
- c) Breach of their oath or pledge of office.<sup>24</sup>
- d) Breach of Article 18 of the General Courts Law or Article 10 of the Supreme Court Law.<sup>25</sup> These provisions prohibit judges from holding judicial office and also working as an enforcer of judicial decisions; a guardian or a trustee connected to a case which he or she is hearing; a legal advisor; or a businessperson.

General court and Supreme Courts judges may also be dishonourably dismissed if they are convicted of an offence.<sup>26</sup> Judges must generally be given the opportunity to defend themselves before an Honour Council before being dishonourably removed.<sup>27</sup>

<sup>17</sup> Elucidation to Article 19(1)(b) of the General Courts Law; Article 11(1)(e) of the Supreme Court Law.

<sup>18</sup> Article 19(1)(d) of the General Courts Law; Article 11(1)(e) of the Supreme Court Law.

<sup>19</sup> Elucidation to Article 19(1)(d) of the General Courts Law; Elucidation to Article 11(1)(e) of the Supreme Court Law.

<sup>20</sup> Article 19(2) of the General Courts Law; Article 11(1)(a) of the Supreme Court Law. In the event of death, judges are to be honourably discharged by the President (Article 19(2) of the General Courts Law; Article 11(1)(a) of the Supreme Court Law).

<sup>21</sup> Article 19(1)(c) of the General Courts Law.

<sup>22</sup> Article 20(1)(b) of the General Courts Law; Article 11A(1)(b) of the Supreme Court Law.

<sup>23</sup> Article 20(1)(c) of the General Courts Law; Article 11A(1)(c) of the Supreme Court Law.

<sup>24</sup> Article 20(1)(d) of the General Courts Law; Article 11A(1)(d) of the Supreme Court Law.

<sup>25</sup> Article 20(1)(d) of the General Courts Law; Article 12(1)(d) of the Supreme Court Law.

<sup>26</sup> Article 20(1)(a) of the General Courts Law; Article 12(1)(a) of the Supreme Court Law.

<sup>27</sup> Article 20(2) of the General Courts Law and its Elucidation; Article 12(2) of the Supreme Court Law. As for the process of dismissal, Supreme Court judges are to be honourably discharged by the President on the recommendation of the Supreme Court Chief Justice and dishonourably dismissed by the President on the recommendation of the Supreme Court (Article 11A of the Supreme Court Law).

### 2.1.2. Judicial Independence According to the Constitutional Court

As mentioned, in *Supreme Court v Judicial Commission* (2006), the Constitutional Court gave its fullest discussion of judicial independence yet. In its reasoning, the Court decided that judicial independence:

- Was a prerequisite to the *negara hukum* (literally ‘law state’, commonly translated as ‘rule of law’) and the separation of powers, which the Constitutional Court described as the ‘soul’ of the Constitution.<sup>28</sup>
- Was a pre-requisite to legal guarantees, justice and citizens’ human rights. These included the right to a fair trial (but presumably also any other rights that might be upheld in trials).
- Was an inherent right of judges.
- Applies to individual judges and judicial institutions.
- Requires that judges be able to be impartial, and follow their own beliefs about the law and its application, even if this contradicts the interests of powerholders. Judges must, therefore, not fear retaliation for their decisions.
- Requires, therefore, that judges be free from pressure, coercion, threats and offers of recompense (in the form of benefits, including economic benefits and benefits of office).

The Court also pointed to Indonesia’s history of judicial dependence on government. The Court noted that while the pre-amended Constitution required that judicial power be independent, ‘structural’ independence was not achieved until 2004, when the *satu atap* reforms were completed. Under them, the administration of most Indonesian courts was brought under the Supreme Court.<sup>29</sup>

*Supreme Court v Judicial Commission* has been widely cited by the Court in many of its subsequent cases that touch on judicial independence, some of which also contain several-paragraph excerpts from the judgment. The Court has made significant supplementary comments about the concept in those subsequent

<sup>28</sup> Supreme Court v. Judicial Commission (2006), 169. See also Constitutional Court Decision 43/PUU-XIII/2015 [3.7.1].

<sup>29</sup> Supreme Court v. Judicial Commission (2006), 172, 182–3.



cases. The Court has, for example, reiterated that judges must exercise their independence responsibly – that is:

within the corridor of the order of the law, according to procedures ... and without being influenced by the government, interests, pressure groups, the media, and influential individuals.<sup>30</sup>

As the Court has put it, independence goes ‘hand in hand’<sup>31</sup> with accountability realised by supervision.

In a 2011 case, the Constitutional Court also acknowledged that judicial independence requires adequate infrastructure, funds for hearings, and welfare guarantees for judges.<sup>32</sup> This case was brought by a Semarang administrative court judge, who argued that his constitutional right to judicial independence in handling cases was impeded by these institutional and budgetary impediments. While emphasising the importance of judicial independence, the Constitutional Court rejected the application for two reasons. First, the case related to the ‘concrete’ practical impediments that the applicant faced (over which the Court lacks jurisdiction), rather than an unconstitutional statutory norm (over which the Court has jurisdiction). Second, judicial independence was not merely an inherent right of judges; it was also an obligation. Judges (such as the applicant) must guard themselves against intervention, even from court chairpersons and deputy chairpersons. This legal obligation remained regardless of any practical impediments.<sup>33</sup>

In other cases, the Court has also linked judicial tenure and terms to judicial independence of other courts, and has considered the ramifications of that independence of the Judicial Commission’s involvement in selecting ad hoc and Supreme Court judges.<sup>34</sup>

<sup>30</sup> Constitutional Court Decision 10/PUU-XVIII/2020 [3.13.1.1].

<sup>31</sup> The Constitutional Court observed that judicial independence is counterbalanced by judicial accountability, and that both principles are essential in a *negara hukum*: Constitutional Court Decision 39/PUU-XIII/2015 [3.7].

<sup>32</sup> Constitutional Court Decision 28/PUU-IX/2011. Ibid [3.12].

<sup>33</sup> The Court made similar findings in Constitutional Court Decision 37/PUU-X/2012 [3.18].

<sup>34</sup> Constitutional Court Decision 85/PUU-XVIII/2020 [3.12.4]. Here, the Court has pointed to international standards including the UN Basic Principles; Constitutional Court Decision 85/PUU-XVIII/2020; Constitutional Court Decision 10/PUU-XVIII/2020 [3.13.1.1], where the Court discussed the process of appointment of the chairperson and deputy chairperson of the Tax Court.

## 2.2. The Two Cases

### 2.2.1. Supreme Court v. Judicial Commission

#### 2.2.1.1. Background

The Constitutional Court's most important decision on judicial independence – *Supreme Court v Judicial Commission* – was handed down on 16 August 2006, around the time of its second anniversary. The decision arose from a constitutional challenge brought by 31 Supreme Court judges against provisions of the Judicial Commission Law that authorised the Commission to supervise Supreme Court judges, including by assessing judicial decisions. By way of background, the Supreme Court had, since the Commission's establishment, generally refused to act on any Judicial Commission recommendations to take action against judges over which it had administrative control. Then, the Supreme Court refused to cooperate with a Commission investigation into corruption allegations involving several Supreme Court judges. Chief Justice Bagir Manan explained that the Anti-Corruption Commission (*Komisi Pemberantasan Korupsi*, or KPK) was already investigating the allegation and the Commission, therefore, did not need to intervene. In response, the Judicial Commission met with President Susilo Bambang Yudhoyono, asking him to endorse a comprehensive performance assessment of all Supreme Court judges. He did not oblige. In the meantime, a list of so-called 'problematic judges' (*hakim bermasalah*) was leaked to the media.<sup>35</sup>

In retaliation, the Supreme Court judges lodged this challenge in the Constitutional Court, arguing that the Judicial Commission lacked constitutional jurisdiction to monitor their performance, particularly by assessing the exercise of judicial power, including by reviewing decisions or calling judges to account for their decisions. According to the judges, these types of monitoring and assessment compromised judicial independence.

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<sup>35</sup> "Sampai Kapan Pintu Rekonsiliasi MA Dan KY Tertutup? [How Long Will the Door to Reconciliation Between MA and KY Be Closed?]" *Hukumonline*, published March 15, 2006.

#### 2.2.1.2. Decision

After discussing the importance of judicial independence, as described above, the Court emphasised that it can never be absolute. According to the Court, it must ‘remain within the limits prescribed by law’, and justice and fairness, and should not be misused ‘as a means to hide from supervision’.<sup>36</sup> Nevertheless, according to the Court, ‘sensitivity’ about judicial independence meant that care was required when devising accountability mechanisms so as not to ‘adversely affect ongoing judicial processes’. Indeed, the Court noted that maintaining judicial independence was particularly important in Indonesia, given that levels of public trust in the courts were, in the words of the Constitutional Court, in a ‘critical state’. For the Court, even these very low levels of trust needed to be protected, apparently so that judicial decisions would be respected (and hence obeyed and accepted).

...[n]o matter how thin, the level of remaining trust must be guarded so that it does not disappear completely, so that the intention to maintain the honour, dignity, and behaviour of judges, actually becomes counter-productive and in turn creates legal chaos.

This view led the Constitutional Court to decide that the Judicial Commission could not formally examine the Supreme Court’s exercise of judicial power, including by reviewing its judges’ decisions. The Court said:

[E]ven though assessing the technical-judicial skills of judges by reading judicial decisions might assist the Judicial Commission to identify a breach of a code of conduct or ethics, reviewing judicial decisions might place unjustifiable pressure on the judges, thereby breaching judicial independence.<sup>37</sup>

If a decision was wrong, then, according to the Court, it could be corrected using legal avenues, namely appeals. And, the Court stated, citizens and legal experts could continue to evaluate judicial decisions in academic seminars and writings.

Nevertheless, the Constitutional Court was critical of the Supreme Court for failing to impose sufficient accountability mechanisms of its own to ensure that its judges remained free from impropriety, particularly corruption. The Court said:

<sup>36</sup> Supreme Court v. Judicial Commission (2006), 201–2.

<sup>37</sup> Ibid.

It is hoped that the Supreme Court increases supervision, especially by being more open in responding to criticism, hopes and suggestions from various parties. The principle of judicial independence must be interpreted by judges as [including] an obligation to realise *fair trials*, which is a prerequisite for upholding the *rule of law*. Therefore, the principle of judicial independence embodies an obligation for judges to free themselves from persuasion, pressure, coercion, threats, or fear of retaliation because of certain political or economic interests from the government or political forces in power, groups or factions, with recompense or promises of recompense in the form of benefits of office, economic benefits, or other forms, and not to abuse the principle of the freedom of judges as a shield to protect against supervision [emphasis in original]<sup>38</sup>

In the course of reaching its decision, the Constitutional Court also observed that the Judicial Commission lacked authority to review or assess the performance of *Constitutional Court* judges. The Court gave various reasons for reaching this conclusion, which was controversial because it involved the Court passing judgment on its own interests (and even though the applicants made no arguments about the Judicial Commission's supervision of the Constitutional Court). One reason was that Judicial Commission scrutiny might compromise the Court's ability to impartially adjudicate disputes between state institutions – particularly if the Judicial Commission was one of the parties to the dispute, as in this case.<sup>39</sup> The Court observed that the independence of the Constitutional Court might be compromised, either in fact or in perception, if a decision against the Judicial Commission resulted in an adverse evaluation by the Commission. In any event, the Court noted, a mechanism already existed to monitor Constitutional Court judges and process alleged improprieties, predating the Judicial Commission Law and the establishment of the Judicial Commission: an Honour Council.<sup>40</sup>

## 2.2.2. Tax Court Case<sup>41</sup>

### 2.2.2.1. Background

In 2023, the Constitutional Court issued another decision involving judicial independence – this time about the Tax Court. A single court, located in Jakarta,<sup>42</sup>

<sup>38</sup> Ibid., 192.

<sup>39</sup> Ibid., 175–6, 199.

<sup>40</sup> Ibid., 199.

<sup>41</sup> Constitutional Court Decision 26/PUU-XXI/2023.

<sup>42</sup> Although it can hear cases in other places: Article 4, Law 14 of 2002 on the Tax Court.

the main function of the Tax Court is resolving disputes between citizens and the government about tax liability.<sup>43</sup> For around two decades, it had been an outlier in the Indonesian judiciary for two main reasons.

First, it was the only court administered by a government department – here the Finance Ministry. As mentioned above, this was true of all courts before the *satu atap* reforms were completed in 2004. More specifically, throughout the Soeharto and early post-Soeharto eras, the general and administrative courts were administered by the Justice Department (now called the Ministry of Law and Human Rights), the religious courts by the Religious Affairs Department, and the military courts by the Defence and Security Department.

Second, the system of appeals from Tax Court decisions is different to those from other courts. The Supreme Court is responsible for the technical-legal competence of Tax Court judges – a responsibility it has in relation to all courts it administers.<sup>44</sup> One of the main ways it meets this responsibility in relation to most of these other courts is by overseeing appeals to high courts and itself hearing appeals on cassation and then on final appeal (reconsideration or *peninjauan kembali*). However, unlike most of these other courts, Tax Court judgments are not subject to appeal through the high courts or cassation. Instead, dissatisfied applicants have only one judicial avenue: a direct application to the Supreme Court for a final appeal.<sup>45</sup> The applicants in the *Tax Court* case asked the Constitutional Court to bring the administration of the Tax Court under the Supreme Court.

### 2.2.2.2. Decision

Like in *Supreme Court v Judicial Commission*, the Court pointed out that Indonesia is a *negara hukum*, and that a *negara hukum* requires judicial independence. This was, in part, because courts needed to decide disputes

<sup>43</sup> The Tax Court is not the first tax court to be established in Indonesian territory – the Dutch established one, in 1915. See: Hary Djatmiko, “Problematik Sengketa Pajak dalam Peradilan Pajak [Problematic Tax Disputes in Tax Court],” in *Putih Hitam Pengadilan Khusus [White Black Special Court]*, ed. Rojito and Titik Ariyati Winahyu (Jakarta: Judicial Commission, 2013), 323.

<sup>44</sup> Formally, Tax Court decisions are classified as ‘special decisions within the judicature of the administrative courts’ (Article 27(2) of Law 6 of 1983 on General Tax Rules and Procedures, as amended by Law 28 of 2007).

<sup>45</sup> Article 77(3) of Law 14 of 2002 on the Tax Court. Even the grounds upon which a Reconsideration can be lodged are different to those available in other cases: see Article 91 of the Tax Court Law.

between the govern-*ers* and the govern-*ed*. The applicants had pointed to significant ‘cross-over’ between the Tax Court and the Finance Ministry. For example, the secretariat of the Tax Court was in the Finance Ministry and the Tax Court’s website was hosted on the Finance Ministry’s website. Perhaps the most problematic connection was that the Directorate General of Taxation (which was part of the Finance Ministry) was almost always a party in disputes the Tax Court heard. Many retired Tax Director Generals also served on the Tax Court.

The Constitutional Court decided that this crossover and administrative control interfered – or could potentially interfere – with judicial independence. For the Court, then, administrative and technical-legal functions needed to be integrated, primarily because they could not be disentangled. In other words, the tasks and supervision exercised by the Supreme Court and the Ministry necessarily overlapped; judicial independence required that they be performed by only the Supreme Court.

The Court noted that independence was particularly important in tax cases, because it could affect tax compliance levels. The Court did not explain this argument. Presumably, the suggestion was that tax subjects are unlikely to readily comply with a Tax Court decision imposing tax liability if they think the government controls the Tax Court and its decisions. The Court said:

Without actual independence in judicial institutions or at least if judicial institutions can be potentially influenced by the government or the executive, this can expand opportunities for misuse of power or arbitrariness in government, including by ignoring human rights and the constitutional rights of citizens by the rulers, as a result of the independence of judicial bodies being ignored.<sup>46</sup>

This was certainly not the first case in which the Constitutional Court was asked to rule on the constitutionality of Article 5 of the Tax Court Law – the provision under which the Finance Ministry exercised administrative, organisational and financial control over the Tax Court.<sup>47</sup> Of particular importance

<sup>46</sup> Constitutional Court Decision 26/PUU-XXI/2023, 66.

<sup>47</sup> Previous constitutional challenges to the Ministry’s control include Constitutional Court Decision 10/PUU-XVIII/2020 and Constitutional Court Decision 57/PUU-XVIII/2020. However, the Court pointed out that they were argued on a sufficiently different basis to distinguish them from this application, thereby allowing this case to proceed.

was a 2016 case, in which the Constitutional Court raised concerns that the Finance Ministry's control over the Tax Court had:

already reduced the independence of tax court judges in examining and deciding tax disputes. According to the Constitutional Court, to guard the dignity of the tax court in efforts to create independent judicial power, it is appropriate for the tax court to be pointed toward efforts to create an independent judicial system, also known as the 'one roof system' ... This has already been done in respect of the other branches of the judicature under the Supreme Court, whose technical-administrative development and organisation, administration and financial affairs fall under the authority of the Supreme Court and not the Ministry ... This must be noted as a matter of importance for lawmakers in the future.<sup>48</sup>

In the 2023 *Tax Court* case, the Court observed that lawmakers had taken no action in response to these decisions. To prevent the 2023 decision also being treated as a 'mere message' (*sekadar pesan-pesan*), the Court ordered the administration of the Tax Court to be brought under the one roof of the Supreme Court by the end of 2026 – a deadline that the Court described as 'just and rational'.<sup>49</sup>

### 2.2.2.3. Critique

While this decision is certainly a boon for judicial independence, additional aspects of the decision were problematical, three of which I discuss here. First, because the decision's ultimate effect is bringing the Tax Court under the administration of the Supreme Court, the most significant ramifications of this decision resemble those that flowed from *Supreme Court v Judicial Commission* in respect of other non-constitutional courts. All courts (including, now, the Tax Court) fall under the Supreme Court's supervision. As covered in more detail below in Part III, this does not bode well for the future of the Tax Court. The Supreme Court tends to shield judges working in these courts from outside scrutiny and does very little to lift judicial quality.

<sup>48</sup> Constitutional Court Decision 26/PUU-XXI/2023.

<sup>49</sup> Constitutional Court Decision 26/PUU-XXI/2023, [3.13]. Formally, the decision was that Article 5(2) of the Tax Court Law was unconstitutional unless it was read to mean that the Tax Court is administered by the Supreme Court, which is to take place in stages before 31 December 2026: *Ibid*, 72.

The second problematic aspect relates to how the Constitutional Court used a *draft* of the 2002 Tax Court Law to reach its conclusion. Article 5(3) of this draft stated that the administration of the Tax Court was to be transferred from the Finance Ministry to the Supreme Court ‘in stages’. The Constitutional Court decided that this indicated that lawmakers always intended that the Supreme Court would become responsible for the administration of the Tax Court.

This argument is not convincing. Article 5(3) of the Draft was removed before the Tax Court statute was enacted. Presumably, then, lawmakers intended the *precise opposite* to what the Constitutional Court concluded. Because lawmakers left Article 5(3) out, it can be safely presumed that they deliberated the provision and deliberately chose to reject it. They would have included Article 5(3) if they wanted the Supreme Court to eventually administer the Tax Court.

The third problematic aspect is that the Constitutional Court did not provide details about how its decision should be complied with, stating only that:

When this decision is read out, stakeholders are, in stages, to immediately prepare regulations related to all legal necessities, including procedural law within the framework of increasing the professionalism of Tax Court human resources, and prepare other issues related to the intended integration of jurisdiction under the Supreme Court. Accordingly, by 31 December 2026 at the latest, all administration of the Tax Court is to already be under the Supreme Court.<sup>50</sup>

While the Court very rarely specifies which institutions must take action in response to its decisions,<sup>51</sup> I argue that it should have done so in this case, given the complexity of the task of transferring administrative control over the Tax Court. Instead, the Court was vague, referring to unspecified stakeholders. The Finance Ministry and the Tax Directorate General will need to consider (and probably revoke) the suite of regulations and orders they have made that relate to the Tax Court and its operation. The Supreme Court will need to make significant institutional adjustments (and issue new regulations) to accommodate the Tax Court (and the Supreme Court’s new responsibilities in respect of that Court).

<sup>50</sup> Ibid., [3.13].

<sup>51</sup> Simon Butt and Prayekti Murharjanti, “What Constitutes Compliance? Legislative Responses to Constitutional Court Decisions in Indonesia,” *International Journal of Constitutional Law* 20, no. 1 (January 2022): 428–53, <https://doi.org/10.1093/icon/moac014>.



Presumably, to affect the required change, the national legislature will also need to significantly amend or replace the Tax Court Law (with extensive input from relevant ministries). Many provisions of the current Tax Court Law deal with ministerial control over aspects of the Tax Court and its judges, including their salaries, allowances, appointments and dismissals.<sup>52</sup> In this context, more specific directions to the legislature about how compliance with the Court's decision could have been effected may have made compliance more likely.

Given the large number of Tax Court Law provisions that presuppose or give effect to ministerial control, it is surprising that the Court did not invalidate the Law in its entirety, as it has done in several cases, one of which was its first case. This was the *Electricity Law* case (2003),<sup>53</sup> where the Court decided, by allowing excessive private-sector involvement in the electricity industry, the state had relinquished its control over an important branch of production or industry. The maintenance of this control was required by Article 33(3) of the Constitution. Because so many of the Law's provisions reflected the privatisation goal, the Court found that the 'spirit' of the law violated the Constitution and, accordingly, invalidated the entire statute.<sup>54</sup>

Instead, the *Tax Court* decision seems to follow a similar approach to the one taken in the *Anti-Corruption Court* case (2006).<sup>55</sup> Here, the Constitutional Court decided that the Anti-Corruption Court was unconstitutional, and imposed a three-year deadline for the enactment of a new, constitutional, governing law for the Anti-Corruption Court. The legislature met this deadline. However, the major difference between the Tax Court case and the *Anti-Corruption Court* case, was that the Constitutional Court was specific in its order to the legislature (*pembuat undang-undang*) in the *Anti-Corruption Court* case.

<sup>52</sup> See, for example, Articles 13(1) and (2), 14, 16, 17, 22 and 25. Indeed, in a 2020 constitutional challenge brought by three judges, the Constitutional Court removed the Minister's statutory ability to suggest to the president who should be appointed as chief and deputy chief justice of the Court: Constitutional Court Decision 10/PUU-XVIII/2020.

<sup>53</sup> Constitutional Court Decision 001-021-022/PUU-I/2003.

<sup>54</sup> Simon Butt and Tim Lindsey, "Economic Reform When the Constitution Matters: Indonesia's Constitutional Court and Article 33," *Bulletin of Indonesian Economic Studies* 44, no. 2 (2008): 239–62, <https://doi.org/10.1080/00074910802169004>.

<sup>55</sup> Constitutional Court Decision 012-016-019/PUU-IV/2006.

### 2.3. Observations

Putting aside some of these criticisms, the basic thrust of the Supreme Court's decisions in *Supreme Court v Judicial Commission* and *Tax Court* is entirely defensible. Judicial independence is clearly a prerequisite to a functioning judiciary and hence democracy, the rule of law and human rights protections.<sup>56</sup> Judges the world over emphasise its importance and legitimately resist intrusions (actual or perceived). There is a basis for the fear that outside assessment of the exercise of judicial power could undermine judicial independence, because assessment might make judges decide cases in ways they think their assessors will like, rather than according to their own conviction about the relevant facts and law. Judicial independence is not the only concern. Some argue that having judicial assessments at all suggests that judges *need* assessing, which might reduce faith in the judiciary – even more so if the assessment is negative.<sup>57</sup> Others wonder whether, if judges really are the legal leaders (with superior legal knowledge) that they should be, any assessor would be sufficiently credible or competent to assess them. The Constitutional Court expressed all these concerns in *Supreme Court v Judicial Commission*, as mentioned.

Yet judicial independence can provide too much protection for judges if they use it to insulate themselves from criticism of their decisions, performance or actions. In some systems, it is even feared that judges use the strong theoretical ground of judicial independence to avoid investigation for outright illegal behaviour such as corruption or to avoid detection of lower-than-ideal levels of competence.<sup>58</sup>

This seems to be precisely what is happening in Indonesia. Legitimate concerns are often expressed about whether Indonesian courts exercise the independence the Constitutional Court has guaranteed for proper purposes. Since 2010, more than 20 judges have been convicted of judicial bribery in open court proceedings,

<sup>56</sup> Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge Mass: Harvard University Press, 2004), 31–2.2004

<sup>57</sup> Troy Riddell, Lori Hausegger, and Matthew Hennigar, "Evaluating Federally Appointed Judges in Canada: Analyzing the Controversy," *Osgoode Hall Law Journal* 50, no. 2 (2012): 403, 10, 23, <https://doi.org/10.60082/2817-5069.1025>.

<sup>58</sup> Maria Dakolias and Kimberley L. Thachuk, "Attacking Corruption in the Judiciary: A Critical Process in Judicial Reform," *Wisconsin International Law Journal* 18 (2000): 354, <https://heinonline.org>.

after relatively rigorous investigation and prosecution by the KPK. The convicted judges, both career and ad hoc, came from almost all branches of Indonesia's first instance judiciary, as well as higher courts and the Constitutional Court itself. The judges, some senior, were found guilty of accepting bribes in a wide variety of cases and disputes, sometimes after being caught red-handed receiving the bribe. The revelations from the cases have been damning. Most judges were proactive, not hesitating to negotiate and receive bribes in their chambers, and using their judicial discretion as leverage to extract bribes. The decisions also reveal other practices, such as bribes being sought and paid for favourable pre-trial decisions; payments being made by provision of 'entertainment services' rather than cash; judges nominating themselves to chair panels after being offered a bribe to better control the process and the decision; judges being willing to accept or even extort money for cases which they have no power to influence; and first instance judges acting as intermediaries to assist parties with their appeals, including by connecting them to corrupt high court judges.

Worse, the Supreme Court has done very little to identify errant judges and to bring them to heel. Because the Judicial Commission has been resoundingly marginalised – mainly because of *Supreme Court v Judicial Commission* – pursuing judicial misconduct is a largely Supreme Court-controlled endeavour. Several consequences of this have emerged.

### 2.3.1. Few Allegations Pursued

First, only a relatively small proportion of misconduct allegations are pursued, despite many thousands of reports of judicial impropriety being received annually by the Supreme Court, the Judicial Commission, and the national Ombudsman. The Ombudsman and the Judicial Commission can only *recommend* that the Supreme Court investigate and issue sanctions. The Commission cannot even compel judges to attend for questioning, as the facts leading up to *Supreme Court v Judicial Commission* amply illustrate.<sup>59</sup> The Supreme Court is notorious for ignoring Commission recommendations: for example, in 2019, the Commission

<sup>59</sup> Karina M. Tehusijarana, "Supreme Court Snubs Most Judicial Commission's Recommendations," *The Jakarta Post*, published January 4, 2019.

complained that the Court had followed up on only 10 of the 130 judges it recommended for punishment.<sup>60</sup> For its part, the Supreme Court maintains that many of the complaints the Commission receives, and many of the allegations the Commission investigates, relate to technical-judicial matters, which, for reasons of judicial independence (and supported by the Constitutional Court's decision in *Supreme Court v Judicial Commission*), the Commission lacks authority to pursue.<sup>61</sup>

### 2.3.2. Protecting Errant Judges?

Second, the Supreme Court appears to have misused its control over misconduct processes. The Supreme Court Supervisory Body (*Badan Pengawasan*, or *Bawas*) can impose punishments on errant judges, including recommending their dismissal to the President.<sup>62</sup> Judges upon whom sanctions have been imposed can then defend themselves before the Judicial Honour Council (*Majelis Kehormatan Hakim* or MKH).<sup>63</sup> The Supreme Court usually discloses the outcome of punishments and Council processes in its annual reports, including indicating how many were dismissed, suspended, or admonished. Between 2009 and 2020, for example, a total of 35 judges were dismissed and 16 were suspended and admonished. Almost 50% of the 50 or so Council hearings between 2009 and 2017 concerned alleged bribery, and almost 35% concerned 'adultery and harassment' (*perselingkuhan-pelecehan*). Of the remainder, three

<sup>60</sup> Agus Sahbani, "2019, MA Hanya Tindak Lanjuti 10 Usulan Sanksi Hakim [2019, The Supreme Court Only Followed Up on 10 Judges' Sanction Proposals]," *Hukumonline*, published December 26, 2019.

<sup>61</sup> To be sure, the Supreme Court does not reject all of the Commission's recommendations. Indeed, a reading of the more recent annual reports of the Judicial Commission and the Supreme Court reveals that a significant proportion of Judicial Honour Council proceedings are initiated by the Judicial Commission – usually just under half. See, for example, Mahkamah Agung [Supreme Court], *Laporan Tahunan 2014 [Annual Report 2014]* (Jakarta: Mahkamah Agung, 2015), 146; Mahkamah Agung [Supreme Court], *Laporan Tahunan 2015 [Annual Report 2015]* (Jakarta: Mahkamah Agung, 2016), 133; Mahkamah Agung [Supreme Court], *Laporan Tahunan 2016 [Annual Report 2016]* (Jakarta: Mahkamah Agung, 2017), 360.

<sup>62</sup> Article 11A(1), Supreme Court Law (as amended); Article 20(1), General Courts Law (as amended).

<sup>63</sup> Article 11A(6), Supreme Court Law (as amended); Article 20(6), General Courts Law (as amended). The MKH comprises four members from the Judicial Commission, and three from the Supreme Court (usually Commissioners and judges). If the initial proposal to sanction the judge comes from the Commission, then the Commission nominates the panel chair; if the proposal comes from the Supreme Court, then it chooses the chairperson. If the decision of the Council is not unanimous, a majority vote suffices. These composition rules may appear to tilt the balance of decision-making in the Judicial Commission's favour. But the Supreme Court ultimately retains power to determine whether sanctions should be imposed on a judge and, accordingly, whether a misconduct case ever reaches the MKH. If the Supreme Court wishes to prevent the Commission from passing judgment on a judge, it can impose either no sanction, or a sanction lighter than a dismissal.

involved narcotics.<sup>64</sup> While these processes are sometimes reported in the press or by the Supreme Court itself, the Supreme Court does not disclose the names of judges the MKH sanctions, but merely provides their initials. Precisely why is unclear. If the Court's goal is to maintain the anonymity of errant judges and other officials, then this is not achieved. It is easy to identify sanctioned judges from a list of judges working in the court, which is specified.

Two clear patterns emerge from an examination of MKH processes and outcomes. First, judges who were not pursued for corruption were often sanctioned for acts that bear no relation to their judicial functions. Most of these judges were punished for an extramarital affair, with no clear link drawn between this and their judicial performance. Adultery might conceivably affect judicial performance where it involves judges or officials from the same court, particularly if it becomes scandalous and distracting. Otherwise, however, it is doubtful whether sanctioning consenting adults for activities in their personal lives serves any legitimate purpose.

Second, MKH processes appear to divert corrupt judges away from the criminal process. Most judges found to have received bribes were merely either dismissed or suspended as judges, with no further action, even in serious cases. In only two cases were judges sanctioned by the Council also prosecuted before an anti-corruption court. The impression that emerges is that a two-track system is now operating. A judge who manages to have an allegation dropped by the Supreme Court, handled internally by the Supreme Court, or decided by the MKH, will likely avoid criminal trial and punishment. This is significant because the heaviest punishment the Council can issue is dismissal; unlike Indonesia's anti-corruption courts, it cannot impose imprisonment for corruption. If this impression is correct, then even if the Council process is genuinely intended to punish and discourage misconduct, it may be having the opposite effect. It diverts judges from the ordinary criminal process and its more severe punishments, including for receiving bribes.

<sup>64</sup> Agus Sahbani, "13 Tahun Berkiprah, KY Telah Usulkan 657 Hakim Dijatuhi Sanksi [13 Years of Operation, KY Has Proposed 657 Judges to be Sanctioned]," *Hukumonline*, published August 16, 2018.

### 2.3.3. Failure to Reduce Corruption and Miscarriages of Justice

The reported cases of judicial corruption and the sanctions imposed for integrity-related misconduct mentioned above, as well as the various admissions of chief justices and other senior officials about the extent of judicial corruption, support the conclusion that corruption is widespread.<sup>65</sup> It may even be the norm rather than the exception, if the overwhelming number of anecdotal accounts conveyed to the author over the past two decades are to be believed. It can be concluded, then, that if the Supreme Court had genuinely attempted to reduce corruption, then its efforts have been unsuccessful. The lack of success is brought into sharp relief by the prosecution, ongoing at the time of writing, of a number of Supreme Court judges and staff for corruption.

Even where corruption is not a factor, decisions with incomplete or absurd reasoning, or based on weak or no evidence, raise suspicions that they might have been driven by considerations other than the law and relevant facts – such as judicial bias or public pressure. These suspicions legitimately arise even in high profile cases, where the courts reached decisions not reasonably open to them on the evidence presented.<sup>66</sup> Many of these cases have been simply confirmed by the Supreme Court, without much evidence of scrutiny.<sup>67</sup>

These problems also put pay to suggestions that judicial assessments would undermine public trust – a concern the Constitutional Court raised in *Supreme Court v Judicial Commission*. Indonesian courts and judges already fare badly in public-perception surveys conducted in Indonesia,<sup>68</sup> and conducted elsewhere but published in Indonesia.<sup>69</sup> In any event, many judicial decisions are already the subject of publicly available and highly critical scholarly and practitioner analysis.

<sup>65</sup> Simon Butt and Tim Lindsey, "Judicial Mafia: The Courts and State Illegality in Indonesia," in *The State and Illegality in Indonesia*, ed. Edward Aspinall and Gerry van Klinken (Leiden: KITLV Press, 2011).

<sup>66</sup> For a discussion, see Simon Butt, "What Makes a Good Judge? Perspectives from Indonesia," *Asian Journal of Law and Society* 8 (2021): 1–42, <https://doi.org/10.1017/ajls.2020.27>.

<sup>67</sup> For example, Simon Butt, "Indonesia's Criminal Justice System on Trial: The Jessica Wongso Case," *New Criminal Law Review* 24, no. 1 (2021): 3–58, <https://doi.org/10.1525/nclr.2021.24.1.3>.

<sup>68</sup> Hukumonline. "Kepercayaan Publik Terhadap Pengadilan Masih Lemah [Public Trust in the Courts is Still Weak]," Hukumonline, published March 25, 2013.

<sup>69</sup> Jon Vrushi, *Global Corruption Barometer Asia 2020: Indonesia* (Jakarta: Transparency International Indonesia, 2020), 10; Muhamad Yasin, "Antara Definisi dan Praktik Rule of Law di Indonesia [Between the Definition and Practice of the Rule of Law in Indonesia]," Hukumonline, published April 23, 2021.

### 2.3.4. Accountability Without Compromising Independence?

As mentioned, in *Supreme Court v Judicial Commission*, the Constitutional Court suggested the best way to ensure judicial accountability without compromising judicial independence was through the appellate system. This is a ‘solution’ – commonly voiced in the international literature – to the judicial independence/accountability conundrum.<sup>70</sup> However, it is unconvincing, particularly in the Indonesian context, for various reasons. First, it assumes that the quality of the appeal court is superior to that of the lower court. But there is very little evidence to support this assumption, which in any event seems to be dispelled by the much higher rate of appeal against high court decisions compared with other court decisions.<sup>71</sup> It is, therefore, quite possible – even likely – for a lower court judge’s decision to be wrongly assessed as incorrect in an appeal decision that is itself incorrect. Also possible is that the appeal decision may have been distorted or fixed through bribery, in which case that decision should certainly not be used to guide, much less impose any accountability on, lower court judges.

In any event, there appears to be increasing acceptance in the international literature that the judicial quality and competence embodied in a judgment *can* be assessed without undermining judicial independence.<sup>72</sup> Indeed, some scholars have argued persuasively that adjudication can be ‘broken down into smaller parts and the quality of these can be assessed with measurable criteria’ independent of the particular outcome in a given case.<sup>73</sup> These include whether the decision interpreted the law correctly, whether it employs appropriate jurisprudence and legal sources, whether the reasons are sound, and whether the decision is clearly written, structurally comprehensible, and the like.<sup>74</sup>

<sup>70</sup> Many of these weaknesses in the appellate-system-as-quality-control approach have been widely discussed in the general literature (that is, outside the context of Indonesia). See, for example, Matyas Bencze and Gar Yein Ng, *How to Measure the Quality of Judicial Reasoning* (Springer: Berlin Heidelberg, 2018), 13-5.

<sup>71</sup> The average appeal rate against district court decisions and against Supreme Court cassation decisions sat at just under and just over 10% respectively, according to the Supreme Court’s annual reports (2017-2020). However, the average appeal rate against high courts appears to tell another story. On average, appeals against their decisions occur far more regularly – in around 60% of cases.

<sup>72</sup> Joe McIntyre, “Evaluating Judicial Performance Evaluation: A Conceptual Analysis,” *Oñati Socio-Legal Series* 4, no. 5 (2014): 916, <https://ssrn.com/abstract=2533854>.

<sup>73</sup> Matyas Bencze and Gar Yein Ng, *How to Measure*, 7.

<sup>74</sup> *Ibid.*, 14.

Applied to the Indonesian context, there should be nothing objectionable about imposing a bare minimum standard for decision quality – without compromising independence. The standard should be a legally defensible decision that addresses all arguments of the parties, and is made within the shortest possible time. In reaching their decisions, judges must demonstrate that they have considered all relevant evidence and arguments. If they reject evidence or arguments, they must explain why – rather than simply dismissing them out of hand or ignoring them altogether. Meeting this standard should not affect their independence, if it is understood that there can be more than one legally defensible conclusion in any given case. This approach should minimise, or even remove, the scope for judges to cherry-pick arguments and evidence to suit the result they wish to reach, while ignoring arguments and evidence that might point to a contrary result. As far as is practicable – without imposing any formal system of precedent – Indonesian judicial decisions must also follow like cases. And sentencing guidelines should become the norm – as in some corruption cases.

### III. CONCLUSION

How the Judicial Commission might have fared had the Constitutional Court rejected the Supreme Court's application in *Supreme Court v Judicial Commission* is something about which observers can only speculate. There is certainly no guarantee that judicial accountability in Indonesia today would be markedly better if the Constitutional Court had decided the case differently. The Supreme Court may well have simply found another way to circumvent the Commission.

But perhaps it is time for the Constitutional Court to reconsider the balance between judicial independence and accountability, when or if an opportunity like that presented in *Supreme Court v Judicial Commission* next arises. After all, the Constitution itself does not prefer judicial independence over judicial accountability. It requires both judicial independence and that Supreme Court judges have 'unblighted integrity and character, be just and professional' (Article 24A(2)). The current system is not reliably ensuring that non-constitutional judges exhibit these characteristics.



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