

Supervision of Constitutional Court Judges after Decision No 005/PUU-IV/2006: A Reassessment in the Light of Later Developments

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Abstract

In Decision No 005/PUU-IV/2006 the Constitutional Court removed its own judges from the ethical supervision of the Judicial Commission, leaving them to an internal Honour Council. The decision has been widely criticised, but the criticism has rarely been tested against the record of internal supervision since then. This study asks whether the Court's reasoning was sound and what model of supervision the record of 2006–2023 supports. It is normative research using statutory, case and conceptual approaches to the 1945 Constitution, the Judicial Commission and Constitutional Court Laws and their amendments, the 2006 decision and later decisions of the Court and its Honour Council. The Court's argument that its judges are not 'judges' under Article 24B(1) is weak, but its concern for its impartiality in disputes involving the Commission is real. The later record shows that internal supervision did not prevent two judges from being convicted of corruption, that the Court twice struck down legislative attempts to add external members, and that an Honour Council with outside members was able, in 2023, to remove the Chief Justice from office for a serious ethical violation. The ethics of Constitutional Court judges should therefore be supervised by a permanent, statutory Honour Council with a majority of members from outside the Court and binding powers of sanction.

Keywords

Supervision; Ethics; Judges; Accountability; Independence; Constitution

Introduction

Lestari and others, "Supervision of Constitutional Court Judges after Decision..."



The Judicial Commission was created by the third amendment of the 1945 Constitution in 2001, with power to propose appointments of Supreme Court justices and to safeguard and uphold the honour, dignity and conduct of judges.¹ It was a response to the failure of internal supervision in the courts: supervisors of uneven quality and integrity, closed disciplinary examination, little access for public complaints and weak follow-up.² Structurally equal to the Supreme Court and the Constitutional Court, it supports judicial power by guarding judicial conduct. Law No 22 of 2004 extended its supervision to all judges, including Supreme Court justices and Constitutional Court judges.³ Thirty-one Supreme Court justices sought review of that Law, and in Decision No 005/PUU-IV/2006 the Constitutional Court held that Constitutional Court judges are not ‘judges’ within Article 24B(1), that Supreme Court justices are, and that the supervision provisions of the Law were unconstitutional and of no binding force.⁴ Constitutional Court judges were left to their own Honour Council.

The decision has been criticised as a breach of checks and balances,⁵ and studies of the supervision of Constitutional Court judges describe a system that, after 2006, became wholly internal.⁶ When the legislature later added members from outside the Court to its Honour Council, the Court struck them down, and that ruling was itself attacked as a ‘constitutional tyranny’.⁷ What is missing is a reassessment of the 2006 decision against the record that has accumulated since: the convictions of two Constitutional Court judges for corruption, two further rulings in which the Court defended its exemption, and the Honour Council’s 2023 decision against the Chief Justice. This article provides that reassessment. It asks (1) whether the Court’s reasoning in Decision No 005/PUU-IV/2006 was sound, and (2) what model of supervision of Constitutional Court judges the record of 2006–2023 supports. Its purpose is to propose a model that answers both the Court’s concern for its independence and the public need for accountability.

Research Method

¹ Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 [1945 Constitution of the Republic of Indonesia], art 24B(1).

² Jawahir Thontowi, “Kedudukan dan Fungsi Komisi Yudisial Republik Indonesia” (2011) 18:2 *Jurnal Hukum Ius Quia Iustum*, DOI: <10.20885/iustum.vol18.iss2.art8>.

³ Law No 22 of 2004 on the Judicial Commission (Indonesia), arts 1(5), 20.

⁴ Constitutional Court of the Republic of Indonesia, Decision No 005/PUU-IV/2006 (2006).

⁵ Sunarto, “Prinsip Checks and Balances dalam Sistem Ketatanegaraan Indonesia” (2016) 45:2 *Masalah-Masalah Hukum* 157, DOI: <10.14710/mmh.45.2.2016.157-163>.

⁶ Al Amin Syayidin Ali Mustopa, “Pelaksanaan Sistem Pengawasan Hakim Konstitusi di Indonesia” (2022) 2:2 *Jurnal Konstitusi dan Demokrasi*, DOI: <10.7454/jkd.v2i2.1209>.

⁷ Nur Agus Susanto, “‘Tirani’ Konstitusional: Kajian Putusan Mahkamah Konstitusi Nomor 49/PUU-IX/2011” (2013) 6:3 *Jurnal Yudisial* 284.

This is normative legal research using statutory, case and conceptual approaches. The case approach examines the ratio decidendi of Decision No 005/PUU-IV/2006, namely the reasons essential to its holding on the meaning of 'judge' in Article 24B(1), together with Decisions No 49/PUU-IX/2011 and No 1-2/PUU-XII/2014 and Honour Council Decision No 2/MKMK/L/11/2023, as published by the Constitutional Court. The statutory approach covers the 1945 Constitution, Law No 22 of 2004 on the Judicial Commission and Law No 24 of 2003 on the Constitutional Court with its amendments of 2011, 2014 and 2020. The conceptual approach concerns judicial independence, accountability and the distinction between supervising conduct and reviewing decisions. Secondary materials are books and journal articles on judicial supervision. The analysis is qualitative and prescriptive; a brief comparison with the ethics arrangements of the United States Supreme Court is added to test the model.

Results and Discussion

The Petition and the Court's Reasoning

The petitioners, Supreme Court justices, argued that the provisions of Law No 22 of 2004 on supervision and on proposals for sanctions infringed their constitutional rights and powers, because they made justices and Constitutional Court judges objects of the Commission's supervision. The Court has jurisdiction at first and final instance to review statutes against the Constitution.⁸ Its reasoning on its own judges rested on four propositions: the Commission's powers are arranged in the Constitution before, and without reference to, the Constitutional Court; Constitutional Court judges are supervised internally by their Honour Council; they are not judges by profession but judges by office for a fixed term; and the Commission has no role in their selection, since three are nominated each by the Supreme Court, the House of Representatives and the President.⁹ To these it added a fifth: if the Commission supervised Constitutional Court judges, the Court could not be impartial in a dispute over powers between state institutions to which the Commission was a party.¹⁰ On the Supreme Court justices, the Court held that they remain within the Commission's supervision, but it declared the whole set of supervision provisions void for legal uncertainty, so that supervision of all judges had to be legislated again.

⁸ 1945 Constitution, *supra* note 1, art 24C(1).

⁹ *Ibid*, art 24C(3).

¹⁰ Decision No 005/PUU-IV/2006, *supra* note 4.

Analysis of the Decision

The textual argument is the weakest part of the decision. Article 24B(1) speaks of the honour, dignity and conduct of 'judges' without qualification, and its purpose, drawn from the reform demand to end the abuse of judicial office, applies to every holder of judicial power.¹¹ That Constitutional Court judges hold office for a term does not make them less judges, and the order in which the Constitution lists institutions says nothing about their relations. Nor does supervision of conduct infringe independence: independence is accompanied by accountability and impartiality, and these require that judges' behaviour can be examined.¹² The Commission supervises judges in order to prevent judicial corruption,¹³ and that purpose does not change with the court in which a judge sits.

The argument from impartiality deserves more weight than critics have given it. The Court decides disputes over powers between state institutions,¹⁴ and a body that could sanction its judges might also be a party before them. The answer, however, is recusal of the affected judges and a design that keeps the supervising body away from the substance of decisions, not exemption from all external supervision. The line between ethics and decisions is the real difficulty. In 2006 the Court treated the Commission's examination of decisions as a threat to judicial independence, and rightly so if the examination concerns the correctness of a ruling; a decision may, however, be evidence of misconduct, as when it reveals a conflict of interest, and supervision of conduct may look at it for that purpose without reviewing it. The claim that the Court made itself a 'super body' must also be qualified. Its decisions are reviewable by no court, but its judges remain subject to the criminal law and to dismissal for ethical violations found by the Honour Council.¹⁵ The real question is whether that internal accountability works, and the record since 2006 answers it.

The Record since 2006

Table 1 summarises the main developments. In 2011 the legislature gave the Honour Council members from the House, the government, the Supreme Court and the Commission,¹⁶ but the Court struck down the first three, leaving only a judge and a

¹¹ OM Iksan, "Efektivitas Pengawasan Hakim oleh Komisi Yudisial" (2018) 13:1 *Jurnal Varia Justicia*.

¹² A Suherman, "Implementasi Independensi Hakim dalam Pelaksanaan Kekuasaan Kehakiman" (2019) 1:1 *SIGn Jurnal Hukum* 42, DOI: <10.37276/sjh.v1i1.29>.

¹³ Brama, "Optimalisasi Fungsi Pengawasan Komisi Yudisial" (2020) 5:1 *Jurnal Ilmiah Pendidikan Pancasila dan Kewarganegaraan*.

¹⁴ Nurul Qamar, "Kewenangan Judicial Review Mahkamah Konstitusi" (2012) 1:1 *Jurnal Konstitusi*.

¹⁵ Law No 24 of 2003 on the Constitutional Court (Indonesia), art 23.

¹⁶ Law No 8 of 2011 on the Amendment to Law No 24 of 2003 on the Constitutional Court (Indonesia), art 27A(2).

member of the Commission.¹⁷ In October 2013 the Chief Justice, Akil Mochtar, was arrested for taking bribes in regional election disputes; he was later sentenced to life imprisonment. The President then issued an emergency regulation creating a permanent honour council formed with the Commission, enacted as Law No 4 of 2014,¹⁸ which the Court annulled in its entirety, relying on its 2006 reading of Article 24B.¹⁹ In January 2017 another judge, Patrialis Akbar, was arrested for taking a bribe in connection with the review of a statute and was sentenced to eight years.²⁰ Law No 7 of 2020 retained the Honour Council in the statute,²¹ and studies of the Council have questioned whether its position is strong enough to secure accountability.²²

The 2023 case shows what an Honour Council with outside members can do. In Decision No 2/MKMK/L/11/2023 the Council, chaired by a former Chief Justice and including a member from outside the Court, found that the Chief Justice, Anwar Usman, had committed a serious ethical violation in hearing the case on the minimum age of presidential and vice-presidential candidates, in which he had a conflict of interest, and removed him from the office of Chief Justice.²³ The record therefore supports two conclusions at once. Purely internal supervision did not prevent corruption at the highest level of the Court. But an Honour Council with outside members and a public procedure proved able to sanction the most senior judge, which the 2006 decision's critics had assumed an internal body could not do.

Table 1. Supervision of Constitutional Court judges, 2006–2023

Year	Instrument or event	Effect on supervision
2006	Decision No 005/PUU-IV/2006	Constitutional Court judges removed from the Judicial Commission's supervision
2011	Law No 8 of 2011; Decision No 49/PUU-IX/2011	Honour Council given outside members; members from the House, government and Supreme Court struck down
2013	Arrest of the Chief Justice for bribery	Failure of internal supervision exposed
2014	Law No 4 of 2014; Decision No 1-2/PUU-XII/2014	Permanent honour council formed with the Commission annulled
2017	Arrest of a judge for bribery	Second conviction of a sitting judge
2020	Law No 7 of 2020	Honour Council retained in the statute
2023	Honour Council Decision No 2/MKMK/L/11/2023	Chief Justice removed from office for a serious ethical violation

Source: compiled from the statutes, decisions and reports cited.

Ideal Supervision of Constitutional Court Judges

¹⁷ Constitutional Court of the Republic of Indonesia, Decision No 49/PUU-IX/2011 (2011).

¹⁸ Law No 4 of 2014 on the Enactment of Government Regulation in Lieu of Law No 1 of 2013 on the Second Amendment to Law No 24 of 2003 on the Constitutional Court into Law (Indonesia).

¹⁹ Constitutional Court of the Republic of Indonesia, Decision No 1-2/PUU-XII/2014 (13 February 2014).

²⁰ "Setelah Akil Mochtar, Menyusul Patrialis Akbar", *CNN Indonesia* (26 January 2017), online: <<https://www.cnnindonesia.com/nasional/20170126130107-12-189189/setelah-akil-mochtar-menyusul-patrialis-akbar>>.

²¹ Law No 7 of 2020 on the Third Amendment to Law No 24 of 2003 on the Constitutional Court (Indonesia), art 27A.

²² Zuhad Aji Firmantoro, "Menimbang Kedudukan Majelis Kehormatan Mahkamah Konstitusi Setelah Terbitnya Undang-Undang Nomor 7 Tahun 2020" (2020) 17:4 *Jurnal Konstitusi* 899, DOI: <10.31078/jk1749>.

²³ Constitutional Court Honour Council, Decision No 2/MKMK/L/11/2023 (7 November 2023).

Supervision in law ensures that action conforms to legal norms, and in a state of law no official may refuse it, since it guards against arbitrariness and the abuse of power. It may be internal, by an organ within the institution, or external, by an organ outside it. Judicial ethics adds that supervision must be carried out by a body with its own ethical authority, through a procedure that is itself fair and public.²⁴ A comparison shows how unusual external supervision of a constitutional court is: the United States Supreme Court adopted a code of conduct for its justices only in 2023, and the code contains no enforcement mechanism.²⁵ The choice is therefore not between internal and external supervision in the abstract, but about the design of the body that supervises.

The record supports the following model. The supervising body should be a permanent Honour Council established by statute, not by the Court's own regulation, so that the Court cannot redesign it. A majority of its members should come from outside the Court, among them a member nominated by the Judicial Commission, a former judge and an academic, with one sitting judge. It should supervise conduct and ethics only, and may examine a decision only as evidence of misconduct, never to review its correctness. It should have power to investigate on complaint or on its own motion, to hold public hearings and to impose binding sanctions up to dismissal, with an internal appeal. Members with a conflict of interest, and judges whose conduct is examined, should be excluded from any case in which the Council or the Commission is a party. This model needs no constitutional amendment: it leaves the 2006 reading of Article 24B(1) intact, since it does not make the Judicial Commission itself the supervisor, but gives the Commission a seat in a body whose independence is secured by statute. Its weakness is that the Court can still review the statute that creates it, as it did in 2011 and 2014; the model is therefore feasible only if the Court accepts that a statutory council with outside members is consistent with its independence, as its own 2023 Council has shown in practice.

Conclusion

Decision No 005/PUU-IV/2006 removed Constitutional Court judges from the Judicial Commission's supervision on a textual argument that does not hold, but its concern for the Court's impartiality in disputes involving the Commission is real and can be met by recusal and design. The record since 2006 shows that purely

²⁴ Jimly Asshiddiqie, *Peradilan Etik dan Etika Konstitusi* (Jakarta: Sinar Grafika, 2014).

²⁵ Supreme Court of the United States, *Code of Conduct for Justices of the Supreme Court of the United States* (13 November 2023).

internal supervision did not prevent two judges from being convicted of corruption, that the Court twice struck down statutory attempts to add external members, and that an Honour Council with outside members was able in 2023 to remove the Chief Justice for a serious ethical violation. The ethics of Constitutional Court judges should therefore be supervised by a permanent, statutory Honour Council with a majority of members from outside the Court, a mandate confined to conduct and binding powers of sanction. The study relies on published decisions and secondary sources and does not examine the Honour Council's unpublished proceedings or the practice of other constitutional courts in depth.

Ethics and Data Availability

This normative legal research did not involve human participants or personal data, so ethical approval was not required. All legal materials used are publicly available.

Use of Generative AI

Generative AI was used only to improve the language of this article (grammar, clarity and style). The authors reviewed the output and are responsible for the content of the article.

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