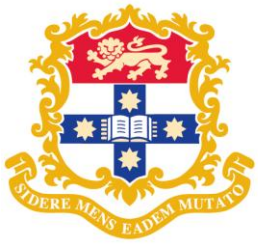

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Simon Butt

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This chapter discusses Indonesia's main recent judicial reforms, particularly those that appear to have been designed to increase judicial independence and judicial accountability, and the teetering balance that had been struck at the time of writing. I will focus on three institutions—the Constitutional Court (Mahkamah Konstitusi), the Supreme Court (Mahkamah Agung) and the Judicial Commission (Komisi Yudisial)—and the dispute in which they were involved for much of 2006.

The United Nations' basic principles on the independence of the judiciary (UN 1985) require governments to provide conditions that enable judges to decide cases impartially, that is, 'without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason' (article 2). Judicial independence requires that 'the term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement … be adequately secured by law' (article 11). The principles also require that judges be immune from civil suits for 'improper acts or omissions in the exercise of their judicial functions' and that their decisions not be 'subject to revision' (article 16). Moreover, judicial independence permits judges to be removed from office before their term has expired only for conduct that is inconsistent with their role as a judge (such as a serious criminal conviction) or that indicates that they are incapable of continuing in office (such as incompetence or illness) (article 18; see also Volcansek 1996: 9).

Judicial independence is often justified on the basis that an impartial third party is necessary to resolve disputes between individuals, entities and governments that they cannot resolve themselves (Shapiro 1981: 1, 7). If judges are not independent, then the public is unlikely to have confidence in the courts, and such confidence is essential to a legal system that depends for its effectiveness on voluntary compliance with judicial decisions (Holland and Gray 2000: 117). Moreover, many scholars

accept that judicial independence is crucial to a functioning democracy, the rule of law and human rights protection. Hirschl notes the 'growing acceptance and enforcement of the idea that democracy is not the same thing as majority rule' and that minorities must be protected by a bill of rights, enforced by judges 'removed from the pressures of partisan politics' (Hirschl 2004: 1–2; see also Ginsburg 2003: 2, 96). He adds that 'by its very nature' democracy requires a set of:

> procedural governing rules and decision-making processes to which all political actors are required to adhere. The persistence and stability of such a system in turn requires at least a semiautonomous, supposedly apolitical judiciary to serve as an impartial umpire in disputes concerning the scope and nature of the fundamental rules of the political game. … Moreover, the transition to and consolidation of democracy entails the establishment of some form of separation of powers between the major branches of government and between the central and provincial or regional legislatures (Hirschl 2004: 31–2).

Perversely, however, judicial independence is often criticised as being an anomaly in a functioning democracy. Judges in many countries hold significant power—sometimes even more power than legislators. For example, because judges interpret and apply the laws of democratically elected parliaments, they often have the final say on the way a law will operate in practice. In many countries, judges are permitted to create law—a function that some democratic theorists argue is more properly done by democratically elected legislatures. Moreover, many constitutional and supreme courts around the globe have powers of judicial review, often enabling their judges to invalidate the laws or actions of democratically elected officials. Yet, in most countries outside the United States, judges are not directly elected by citizens. Rather, they are appointed by parliament or, in many civil law countries, by government departments. Of course, many of these parliaments or governments are themselves democratically elected, but this is no guarantee that the judges they appoint will reflect the views of their constituents for the duration of their judicial terms.

In this context, some commentators argue that judicial independence provides too much protection for judges, because judges often use it to insulate themselves from criticism of their decisions, performance or actions. To ensure that public confidence in the judiciary is maintained, critics argue that the competence and impartiality of judges must be checked periodically. Without accountability mechanisms, judicial corruption and impropriety are more likely (Dakolias and Thachuk 2000: 354).

Striking an appropriate balance between judicial independence and judicial accountability can be difficult, and is a matter of significant academic debate.[1] Countries around the world achieve the balance differently. In most countries, judges are granted statutory or constitutional judicial independence. However, in most states of the United States they are held publicly accountable through elections; and in many European countries, judicial commissions have been established with varying responsibilities, some of which include assisting with judicial appointments and promotions and supervising judicial performance. In most countries, judges who are proven to have been involved in corruption or the commission of a crime, or are ill, can be censured or removed (Wallace 1998: 344), but countries differ on whether parliament should take action (perhaps more justifiable from an accountability standpoint) or whether the judiciary should control the process (perhaps more justifiable from a judicial independence perspective) (Volcansek 1996). Many of the world's judges are subject to appraisal and criticism by the media, civil society and academics, and most of their decisions are reviewable through the appeals process (Dakolias and Thachuk 2000: 363, 380).

Balancing judicial independence and accountability is more difficult in countries in which the judiciary is widely perceived to be, or is in fact, largely incompetent, corrupt or both. If strong levels of independence limit the action that can be taken to investigate and sanction errant judges, then will the courts use their independence as

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[1] See, for example, Volume 61(3) of *Law and Contemporary Problems* (1998) and Volume 28(1) of *University of Arkansas at Little Rock Law Review* (2005) on judicial independence and accountability.

a 'shield' to allow themselves to run rampant? In such circumstances, should accountability be prioritised until judicial competence and prestige are sufficiently high and corruption less prevalent? Or should judicial independence be prioritised over accountability? That is, will the judiciary be utterly ineffective without adequate levels of judicial independence, particularly in disputes between citizens and government (Wallace 1998: 343–4)? If the judiciary is susceptible to outside influences—whether from the government, private parties or another source—will this not reduce its community support and respect, causing parties to avoid the courts for fear of biased decisions? In particular, will the judiciary's credibility plummet if the executive or legislature uses 'investigations as retaliation for unpopular decisions or to exert subtle pressure on judges through hints or threats of investigation' (Wallace 1998: 344)?

This chapter explores the balance between judicial independence and judicial accountability that has been struck in Indonesia—virtually unilaterally by the Constitutional Court. After discussing the Constitutional Court, the Supreme Court and the Judicial Commission, it will explain the dispute that arose between the Judicial Commission and the Supreme Court in 2006 over the extent to which the former could legitimately investigate the latter's judges for alleged impropriety. The Judicial Commission, clearly concerned to increase levels of judicial accountability in Indonesia, had attempted to call several Supreme Court judges to account for their actions. These judges refused to comply with this request, setting in motion public hostilities between the two institutions. Eventually, in March 2006, the Supreme Court asked the Constitutional Court to rule on the dispute. The Constitutional Court's decision, handed down in August 2006, will be discussed and analysed below.

THE CONSTITUTIONAL COURT, SUPREME COURT AND JUDICIAL COMMISSION

The Constitutional Court

Indonesia's judicial system has undergone significant legislative reform since 2003. In that year Indonesia's national parliament established a constitutional court,[2] as required by the third amendment to the constitution of 9 November 2001.

Clearly this was a very significant judicial reform. The Constitutional Court is the first court in Indonesia's history with the jurisdiction to assess whether legislation conforms with the constitution. The court therefore has a prominent human rights function, given that the newly amended constitution contains an impressively extensive bill of rights—a list of human rights that the state must protect.

The court also has the power to settle disputes between state institutions and over electoral returns, and to decide on parliamentary impeachment motions against the president and vice-president.[3] The court is therefore an important institutional feature of Indonesia's new constitutional 'separation of powers', which replaces the executive-heavy 'sharing of powers' put in place by the pre-amended constitution. The Constitutional Court's judicial review power provides a check on the legislature; its impeachment power provides a check on the executive; and its decisions on electoral results help ensure the integrity of the democratic process.

In its first three years of operation, the Constitutional Court has shown impressive levels of independence and has exhibited competence far higher than that of other Indonesian courts. It is beyond the scope of this chapter to discuss the court's performance in detail. However, several of its decisions deserve brief treatment here.[4]

First, the Constitutional Court has indicated that the prime reference point for its decisions is the constitution, not government or legislative preferences. In a series of

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[2] Law No. 24 of 2003 on the Constitutional Court.

[3] Articles 24C(1) and 24C(2) of the constitution; articles 10(1) and 10(2) of Law No. 24 of 2003 on the Constitutional Court.

[4] The following discussion of about some of the Constitutional Court's decisions draws on Butt (2006).

cases, a majority of the court's judges have held that article 50 of the Constitutional Court Act contradicts the Constitution. This is significant, because the Constitutional Court Act is the very statute that established the court and that deals with its composition and procedures. Article 50 attempted to prevent the Constitutional Court from reviewing the constitutionality of statutes enacted before the first amendment to the constitution in 1999. The Court found this provision to be unconstitutional because the constitution does not impose any such restriction.[5] The Constitutional Court has therefore reviewed several statutes enacted well before 1999.

Second, in a 2003 case, the Constitutional Court invalidated legislation that would have prohibited former members of the Indonesian Communist Party or other prohibited organisations, or people involved in the 1965 coup, from being nominated for candidature in local, regional and national elections.[6] According to the court, this legislation breached the constitutional right of Indonesians to participate in government and to be free from discrimination.[7]

Third, the Constitutional Court has upheld the constitutional right of citizens to be free from prosecution under retrospective laws.[8] Controversially, in 2003 a majority of the Constitutional Court invalidated a statute that would have permitted the investigation and prosecution of those involved in the 2002 Bali bombings using an

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[5] Constitutional Court Decision No. 004/2003, reviewing Law No. 14 of 1985 on the Supreme Court (the *Mahkamah Konstitusi Law case No. 1*); Constitutional Court Decision No. 013/2003, reviewing Law No. 16 of 2003 (the *Bali Bombing case*); Constitutional Court Decision No. 066/2004, reviewing Law No. 1 of 1987 on Kadin and Law No. 24 of 2003 on the Constitutional Court (the *Kadin Law case*).

[6] Constitutional Court Decision No. 011-017/2003, reviewing Law No. 12 of 2003 on General Elections for Members of the DPR, DPD and DPRD (the *PKI case*).

[7] In particular, the legislation was said to breach article 27(1) of the constitution, which gives citizens to right to equal treatment before the law; and article 28I(2), which provides the right to be free from discriminatory treatment.

[8] This right is contained in article 28I(1).

anti-terrorism law that had been enacted after the bombings took place (Butt and Hansell 2004; Clarke 2003). The court was strongly criticised for being soft on terrorism, but undeniably the majority's concern to uphold the text of the constitution in the face of domestic and international pressure indicates its strong levels of independence, matched with sound legal reasoning.

Fourth, the Constitutional Court has imposed obligations on the state that the court found to be implicit—even though not explicitly expressed—in the constitution. The court has primarily used two provisions as a basis to imply these obligations. The first is the preamble to the constitution, which states that the government is to 'protect all Indonesians and their native land and, to further public welfare, the intellectual life of the people, and to contribute to the world order of freedom, peace and social justice'. The second is article 1(3), which states that Indonesia is a law state (*negara hukum*). From these provisions, the Constitutional Court has implied apparently broad state obligations, including the obligation to protect citizens from corruption,[9] to protect the domestic broadcasting industry from foreign domination[10] and to provide for a fair trial, access to justice and legal aid.[11]

The Supreme Court

In 2004, the Indonesian national parliament replaced or revised many of the country's judiciary laws, including the statute covering the exercise of judicial power generally,[12] and the statutes relating to the Supreme Court[13] and to Indonesia's

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[9] Constitutional Court Decision No. 006/2003, reviewing Law No. 30 of 2002 on the Corruption Eradication Commission (the *KPK Law case*).

[10] Constitutional Court Decision No. 005/2003, reviewing Law No. 32 of 2002 on Broadcasting (the *Broadcasting Law case*).

[11] See, for example, Constitutional Court Decision No. 006/2004, reviewing Law No. 18 of 2003 on Advocates (the *Advocates Law case No. 2*).

[12] Law No. 4 of 2004 on Judicial Power.

[13] Law No. 5 of 2004, which amended Law No. 14 of 1985 on the Supreme Court.

general and administrative courts.[14] The new statutes introduced a number of reforms, perhaps the most important of them being to bring the administration, organisation and finances of these courts under Supreme Court control—the so-called 'one roof' (*satu atap*) reforms. For most courts, previously, these tasks were carried out by the Justice Department.[15] This kind of government-controlled administrative structure is commonly employed by countries adhering to a civil law tradition. However, proponents of legal reform during the Soeharto period often claimed that the Justice Department was misusing its managerial and administrative control over the judiciary to ensure that the courts delivered decisions that favoured the government and its officials. Legal reformists had therefore been pushing for *satu atap* for decades (see, for example, Lev 1978).

The *satu atap* reforms appear to have achieved one of their intended purposes: improved judicial independence from government. Allegations of government interference in cases before the courts were very common during the Soekarno and Soeharto periods, but are now encountered much more rarely.

Other aspects of the reforms appear to have been less successful, however. In 2003 the Supreme Court composed a four-volume 'blueprint' for Indonesian judicial reform—directed particularly towards its own reform—in collaboration with the Institute for an Independent Judiciary (LeIP), a respected Jakarta legal NGO (Supreme Court 2003). The blueprint aimed to provide a step-by-step strategy for the Supreme Court to take over the court-related functions of the Justice Department and made many sensible suggestions, such as how the Supreme Court should tackle its new responsibilities to train, appoint and promote judges.

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[14] Law No. 8 of 2004, which amended Law No. 2 of 1986 on the General Courts; Law No. 9 of 2004, which amended Law No. 5 of 1986 on the Administrative Courts.

[15] The Department of Religion handled these affairs for the religious courts and the Department of Defence and Security for the military courts.

But the magnitude of the required administrative, structural and managerial reforms seems to have been underestimated, particularly given the budgetary constraints within which the Supreme Court must operate. The Soeharto regime's deliberate subjugation of the judiciary as an institution, and judges as individuals, by intruding into cases and judicial administration, and by failing to ensure reasonable levels of judicial competence and integrity, has dramatically lowered the capacity of the judiciary to manage itself, implement change or, indeed, carry out its core adjudicative tasks. As a result, at the time of writing very little of the blueprint had been put into practice, and progress appeared to have stalled.

Meanwhile, the Supreme Court and the courts below it continue to suffer from a raft of significant problems that have brought the judicial system to the brink of complete dysfunction. One problem is corruption.[16] Commentators have described courtrooms as auction houses, where the highest bidder wins the case (Lindsey 2001). Aspandi (2002: 145) claims that some trials are conducted in a farcical manner, often because a bribed judge must somehow direct the trial towards a predetermined outcome. He notes also that some lawyers have complained of being 'ambushed' by decisions that do not reflect the evidence adduced and legal arguments presented in the case, blaming their opponents for bribing the presiding judges (Aspandi 2002: 140). According to one lawyer, illicit payments determine judicial decisions so regularly that the 'law' is almost entirely irrelevant:

> I no longer feel it's important to read law books, no longer important to prepare an argument based on precedents. That kind of thing is no longer important. It's more important that I know whether my client has enough money to pay the judge (Pemberton 1999: 202).

A second serious problem is the judiciary's generally low level of competence. Under Soeharto's New Order regime, judicial standards were deliberately

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[16] See, for example, Asia Watch (1988): 170; Indonesian Corruption Watch (2001); Aspandi (2002); World Bank (2003).

sabotaged, with very low budgets provided for orientation training and continuing education for judges, and for other necessary expenditures.[17] The bureaucratic promotion systems put in place emphasised seniority and loyalty over achievements, knowledge and ability, ensuring that judges in positions of relative power would be extremely likely to obey instructions from the government. An unfortunate legacy of the Soeharto period was therefore more than an entire generation of judges with only rudimentary legal and judicial skills (Pompe 2002, cited in World Bank 2003: 89). Despite the *satu atap* reforms, and the corresponding shift of responsibility for judicial education from the government to the Supreme Court, very little has been done to remedy this neglect.

Third, enforcement of judicial decisions in Indonesia is often difficult and sometimes impossible. Even litigants who obtain a decision untainted by corruption or incompetence may find the decision of little practical benefit. If a losing party in a civil suit fails to comply with a judicial decision, the winning party must usually file a further application to compel the losing party to comply. Only if this order is ignored will a court seize property to pay any compensation required by the decision (Butt 2007). However, this process too is significantly flawed: the court can indefinitely delay the hearing of the application, or the execution of the decision itself, for any reason (Butt 2007). The phenomenon of the 'magic letter' (*surat sakti*) has compounded the problem. Often accompanied by accusations of corruption against those who issue them—usually senior judges—these letters strongly urge lower courts to delay the execution of particular decisions (Butt 2007).

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[17] Pompe cites recent reports estimating that only 30 per cent of the judiciary's institutional needs, including electricity, phone use, postage, paper and cost of transfers, are met by the national budget (Pompe 2002, cited in World Bank 2003: 89). This, it is said, forces courts to engage in corruption simply to meet expenses and pay staff (Asia Watch 1998: 170).

The Judicial Commission

A judicial commission law was enacted in 2004.[18] In 2005 the Judicial Commission was established, as required by the third round of amendments to Indonesia's constitution, introduced in 2001. The Judicial Commission is an independent institution made up of seven members drawn from the ranks of former judges, legal practitioners, legal academics and community members.[19] Its two main functions are to propose Supreme Court appointments to the People's Representative Council (DPR) and to supervise the performance and behaviour of Indonesia's judges as part of its function to 'uphold the honour and dignity, and to ensure the [good] behaviour, of judges'.[20] The commission receives community complaints about judges and investigates suspected breaches of proper judicial behaviour.[21]

Significantly, the Judicial Commission's powers are limited. If it determines that a judge has acted inappropriately, it cannot itself impose a sanction, such as a reprimand, suspension or dismissal, upon the errant judge; it can only send its findings, including a proposed sanction, to the Supreme Court or Constitutional Court for further action.[22] The Judicial Commission's efficacy therefore depends heavily on its relationships with the Supreme Court and the Constitutional Court—specifically, the willingness and ability of those courts to act on the commission's proposals and recommendations.

The Judicial Commission has indicated a strong desire to perform its functions with some vigour. In its first year it received 820 complaints and reports about judicial conduct ['misconduct'?] (*Jakarta Post*, 29 August 2006), called 74 judges to account for their actions, and recommended that the Supreme Court take action against 18

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[18] Law No. 22 of 2004 on the Judicial Commission.

[19] Articles 6(1) and 6(3) of Law No. 22 of 2004 on the Judicial Commission.

[20] Article 24B(1) of the Constitution; articles 13–20 of Law No. 22 of 2004 on the Judicial Commission.

[21] Article 22(1) of Law No. 22 of 2004 on the Judicial Commission.

[22] Article 23 of Law No. 22 of 2004 on the Judicial Commission.

judges (Hukumonline,[23] 3 August 2006). At the time of writing, however, the Judicial Commission appeared still to be finding its feet, and to be having difficulty attracting support from other institutions—particularly the Supreme Court. Although the Supreme Court has accepted some of the Judicial Commission's recommendations for Supreme Court appointments (Hukumonline, 4 August 2006), it has not accepted *any* of its recommendations relating to judicial impropriety or misconduct (Hukumonline, 3 August 2006). The Judicial Commission's attempts to 'compel' the Supreme Court to act—particularly against its own judges—have resulted in great controversy, as will be discussed below. The net result is that the Judicial Commission has not as yet been able to make any tangible improvement to the problems plaguing the Supreme Court and the lower courts.

THE DISPUTE BETWEEN THE JUDICIAL COMMISSION AND THE SUPREME COURT

Background

The public 'war' between the Judicial Commission and the Supreme Court is said to have begun when Bagir Manan, the Supreme Court chief justice, rejected a Judicial Commission request that the Supreme Court investigate several of its judges, including himself, for alleged corruption in cases they had handled. The chief justice stated that he had already provided explanations on these cases to the Anti-Corruption Commission (KPK), so the Judicial Commission need not make its own enquiries (Hukumonline, 15 March 2006, 8 June 2006). Tension between the court and the commission had probably been brewing even before this; the Supreme Court had rejected several Judicial Commission recommendations to take action against particular judges in several earlier cases as well (Hukumonline, 29 June 2006).

In response, the members of the Judicial Commission visited President Bambang Susilo Yudhoyono, accompanied by Justice Minister Hamid Awaluddin. They are

[23] Hukumonline (Lawonline) is a specialist online news service focusing on issues of interest to the Indonesian legal community (see <www.hukumonline.com>).

said to have asked the president to issue an interim law (*perpu*)[24] requiring the reselection or rigorous performance assessment of all 49 Supreme Court justices as the first stage of a comprehensive overhaul of the entire judiciary (Hukumonline, 15 March 2006). The call for the reselection was leaked to the media, as was a list of allegedly 'problematic' or corrupt judges, leading to media attacks on the judiciary (Hukumonline, 15 March 2006). In response, several Supreme Court judges reported the chair of the Judicial Commission, Busyro Muqoddas, to the police for defamation (Hukumonline, 15 March 2006).

Finally, 31 Supreme Court judges lodged an application with the Constitutional Court seeking a review of the constitutionality of the provisions of the judicial commission law covering the commission's supervision of Supreme Court judges. It is to this case, and the Constitutional Court's decision—Constitutional Court Decision No. 005/PUU-IV/2006; henceforth SC vs JC 2006—that I now turn.

The Constitutional Court Decision

In their application to the Constitutional Court, the Supreme Court judges argued that the Judicial Commission lacked constitutional jurisdiction to monitor their performance. They pointed to article 24B(1) of the constitution, which sets out the Judicial Commission's jurisdiction:

[24] Article 22 of the constitution permits the president to issue government regulations in lieu of law (*perpu*), which have authority equivalent to a statute. These laws are relatively rare, and must be ratified by the DPR in its following sitting to remain valid.

> The Judicial Commission is independent and can propose judges for appointment to the Supreme Court, and has other powers within the framework of maintaining and upholding the honour, dignity and behaviour of *judges* [emphasis added].

The judges put forward two main arguments. First, they argued that the word 'judges' did not encompass Supreme Court and Constitutional Court judges; rather, it referred only to first-instance and appeal judges (SC vs JC 2006: 159).

According to the applicants, this interpretation brought the constitutionality of several provisions of the judicial commission law into question. In particular, they argued that article 1(5) of the judicial commission law defined 'judges' as 'Supreme Court judges and judges in all courts under the Supreme Court and Constitutional Court', thereby unconstitutionally expanding the meaning of 'judges' contained in article 24B(1) of the constitution, and providing the Judicial Commission with greater powers than the constitution permitted (SC vs JC 2006: 159). The judges therefore asked the Constitutional Court to invalidate all provisions of the judicial commission law that allowed the Judicial Commission to supervise Constitutional Court judges and suggest punishments for them.[25]

Second, the applicants argued that the Judicial Commission's supervision of Supreme Court judges—in particular its attempt to call several Supreme Court judges to account for their decisions in controversial cases—constituted 'interference' with the independence guaranteed to the Supreme Court by article 24(1) of the constitution (SC vs JC 2006: 154, 160). Further, the Supreme Court judges argued that, because the Judicial Commission was the Supreme Court's partner in supervising the lower courts, it was not appropriate for the Judicial Commission to supervise the Supreme Court (SC vs JC 2006: 160).

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[25] These provisions included articles 21, 22(1e), 23(2), 23(3), 24(1), 25(3) and 25(4).

Judicial Commission Supervision of Constitutional Court Judges

The Constitutional Court first turned to a matter that appeared unrelated to the Supreme Court's application: the Judicial Commission's jurisdiction to monitor the Constitutional Court itself. The court found that the definition of 'judge' contained in article 1(5) of the judicial commission law did not include Constitutional Court judges, and therefore that the Judicial Commission lacked authority to investigate Constitutional Court judges (SC vs JC 2006*:* 176).

The court put forward several arguments to support this conclusion, only four of which will be critiqued here for reasons of space. First, the Constitutional Court emphasised that, unlike most other judges in Indonesia, Constitutional Court judges were not 'career judges' and should therefore not fall under the supervision of the Judicial Commission (SC vs JC 2006*:* 174). Unfortunately the court did not explain this argument in any detail, nor did it clarify the relevance of the distinction between career and non-career judges.

For those unfamiliar with the Indonesian judicial career structure, some explanation is necessary. Like judges in many countries with a civil law tradition, most Indonesian judges begin their careers soon after they complete university, and make their way up the judicial ranks through promotions and transfers. For so-called career judges, the Supreme Court is the pinnacle of career progression. Although three Constitutional Court judges worked as judges before appointment to the Constitutional Court, the remaining six were former academics or parliamentarians, and all Constitutional Court judges are appointed for a maximum of five years.

The Constitutional Court did not provide a legal basis for differentiating between career and non-career judges. In fact, there appears to be no reason to make such a distinction, given that all judges—whether career or non-career—are provided with judicial independence, perform a crucial adjudicative function and arguably require only minimum levels of accountability imposed upon them.

Perhaps the thrust of the court's argument was that if the Judicial Commission's supervisory function was mainly intended to provide information to the Supreme Court about matters relevant to career judges—appointments, promotions and so forth—then the commission should monitor only career judges. On this view, there would be no need to supervise Constitutional Court judges, who are appointed only once and are not promoted. However, a stronger counterargument is that the judicial commission law, as noted above, allows the Judicial Commission also to suggest punishments for errant 'judges'. Given that all judges—including Constitutional Court judges—can be sanctioned or dismissed for misconduct before their terms have expired or they have reached retirement age, providing such supervisory powers to the Judicial Commission would appear to have some benefit.

Furthermore, the Constitutional Court appears to have neglected to consider its argument in the context of the increasing number of *ad hoc* judges employed in Indonesia. In the last several years, a number of Indonesian courts—such as the human rights, anti-corruption and labour courts—have employed non-career judges with legal experience or specialised knowledge to preside over particular cases alongside career judges. Given that *ad hoc* judges, like Constitutional Court judges, are clearly not career judges, would the Judicial Commission be precluded from supervising their performance too?

Second, the Constitutional Court noted that the Judicial Commission had a say in the appointment only of Supreme Court judges—not of Constitutional Court judges. Why then, the court asked, should the Judicial Commission have a say in the supervision of Constitutional Court judges (SC vs JC 2006*:* 174)? Again, this argument does not withstand scrutiny. The Judicial Commission only *proposes* Supreme Court candidates to the DPR; it does not have the final say in their appointment. Also, it does not necessarily follow that the body that appoints judges should ultimately be responsible for ensuring that they perform their functions properly. Two separate institutions can, quite legitimately, perform these functions separately. Indeed, to ensure the impartiality of political judicial appointees, it might

in fact be preferable for supervision to be performed by a body that is not involved in their appointment.

Third, the Constitutional Court noted that a mechanism already existed to monitor Constitutional Court judges and process alleged improprieties before the judicial commission law was enacted and the Judicial Commission established: an Honour Council under article 23 of the constitutional court law (SC vs JC 2006*:* 199). However, the mere pre-existence of such a mechanism does not constitute a particularly strong argument. By enacting the judicial commission law, the DPR could well have intended implicitly to replace Honour Council with Judicial Commission investigations.

The Constitutional Court's strongest argument for excluding itself from Judicial Commission supervision appears to have been that this 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 (SC vs JC 2006*:* 175–6, 199). The court noted that if the Judicial Commission could supervise the Constitutional Court, then the latter's credibility and legitimacy to adjudicate a case involving the Judicial Commission would be questionable. It argued 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 (SC vs JC 2006*:* 199). The court's apparent concern to uphold judicial independence at all costs is analysed below.

Judicial Commission Supervision of Supreme Court Judges

In its discussion of whether the Judicial Commission could monitor and investigate Supreme Court and other non-Constitutional Court judges, the Constitutional Court rejected the Supreme Court judges' argument that the 'judges' referred to in article 24B(1) of the constitution did not encompass Supreme Court judges. The Constitutional Court refused to invalidate article 1(5) of the judicial commission law to the extent that it applied to Supreme Court judges (SC vs JC 2006*:* 199).

The Constitutional Court accepted that article 24B(1) could be broken into two separate clauses. The first referred to the recruitment of 'Supreme Court Judges' (*Hakim Agung*); the second referred to the Judicial Commission's powers to maintain and uphold the honour, dignity and behaviour of 'judges' (*hakim*). Because the first clause referred specifically to *Hakim Agung* (capitalised), the Constitutional Court found that *hakim* (not capitalised) in the second clause was intended to apply to judges in general—including those of the Supreme Court (SC vs JC 2006*:* 177).

The Constitutional Court argued also that the Supreme Court should not be removed from supervision simply because it was at the pinnacle of the judicial hierarchy It pointed out that Supreme Court judges were members of the Indonesian Judges' Association (Ikatan Hakim Indonesia) and had not disputed their status as mere 'judges' within that organisation (SC vs JC 2006*:* 178).

Almost in passing, the Constitutional Court mentioned that judicial accountability needed to go hand in hand with judicial independence, the necessity for which was universally recognised (SC vs JC 2006*:* 178). However, as will be discussed below, the court did not discuss judicial accountability in detail, or explain the appropriate balance that should be struck between independence and accountability.

What Supervision Can the Judicial Commission Perform?

Despite holding that Supreme Court judges are 'judges' within the meaning of article 1(5) of the judicial commission law, the Constitutional Court decided that the provisions in the law authorising the Judicial Commission to supervise Supreme Court judges were unconstitutional, for two reasons.

The first was judicial independence. Although the Constitutional Court certainly did not prohibit the Judicial Commission entirely from supervising the Supreme Court, it stated that the Supreme Court's constitutional judicial independence prevented the Judicial Commission from supervising the Supreme Court's exercise of judicial power (SC vs JC 2006*:* 181). Unfortunately, the Constitutional Court did not define

'exercise of judicial power'; presumably this would include judicial processes and decisions.

The second was that, according to the Constitutional Court, the judicial commission law caused legal uncertainty. In particular, the law failed to provide details on how the Judicial Commission should supervise Supreme Court judges. For example, it did not cover fundamental issues such as how honour and dignity were to be assessed, or what constituted reviewable behaviour (SC vs JC 2006*:* 193, 200). Were judicial standards to be measured by reference to a code of conduct or ethics? If so, which code (SC vs JC 2006*:* 187)? The Constitutional Court noted that this not only made the Judicial Commission's function unclear, but could confuse judges about what they could and could not do ethically, which might in turn affect the way they decided cases (SC vs JC 2006*:* 190).

Indeed, the Constitutional Court stressed that, at least in part due to this uncertainty, the Judicial Commission had interpreted the judicial commission law improperly so as to allow it to review judicial behaviour through a review of judicial decisions. The court declared that it was a universal norm of all legal systems that:

> [evaluating] judicial decisions for the purposes of supervision outside the mechanisms of procedural law conflicts with the principle of *res judicata pro veritatem habetur*, which means that what is decided by judges must be considered correct (*de inhoud van het vonnis geld als waard*). Therefore, if a judicial decision is thought to contain an error, the supervision—through an evaluation of, or correction to, the decision—must be performed through legal avenues in accordance with the applicable procedural law. This principle does not reduce the rights of citizens, particularly legal experts, to evaluate a judicial decision … in an academic forum or media, such as a seminar or a commentary in a law review (SC vs JC 2006*:* 188–9).

In other words, even 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 (SC vs JC 2006*:* 190, 193), reviewing judicial decisions

might place unjustifiable pressure on the judges, thereby breaching judicial independence (SC vs JC 2006*:* 193). Only the courts could review judicial decisions, and then only through the appeals process—not by evaluating and directly interfering with decisions or by influencing judges (SC vs JC 2006*:* 190).

Hopes Dashed of a Return to Eksaminasi*?*

In the mid to late 1960s, the Supreme Court developed a system of supervision of judicial competence (*eksaminasi*) under which the superior of each judge periodically examined three criminal and three civil decisions handed down by that judge.[26] Some of the decisions examined were those that attracted public attention; others were chosen by the judges being examined (Pompe 1996: 222). Feedback would be provided to judges, and the results of the examination used to determine whether they should be promoted (Pompe 1996: 222; Supreme Court 2003: 107). However, *eksaminasi* was abandoned in the 1970s under then Justice Minister Seno Adji, and a system evolved in which judicial career advancement depended not on ability but rather on connections with Justice Department or Supreme Court officials (Pompe 1996: 222; Aspandi 2002: 75). Ever since, many Indonesian judges are said to have used judicial independence as a defence against allegations of corruption or incompetence, or in the face of calls for increased accountability (Aspandi 2002: 101). In response to the problems plaguing the Indonesian judiciary discussed above, some, including the Supreme Court itself (Supreme Court 2003: 117), have called for the reintroduction of the *eksaminasi* system of judicial supervision, or a variation of it.[27]

The *eksaminasi* system has several obvious flaws. First, it presumes that the superior of the judge being examined has a higher level of knowledge or experience than that

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[26] See Supreme Court Memo (*Surat Edaran*) No. 1 of 1967 on Examinations, Monthly Reports and Appeals Lists; Pompe (1996: 222); DJBPUPTUN (1997: 45–6); Aspandi (2002: 80, 127).

[27] For example, Bismar Siregar, a former Supreme Court judge, said that if *eksaminasi* was reinstated, then 'we will not have the strange decisions we get now' (cited in DJBPUPTUN 1997: 45–6).

judge. Given Indonesia's standards of judicial education and competence, seniority and experience are no guarantee of greater legal knowledge or understanding, particularly in modern areas of law such as intellectual property, information technology and complex commercial transactions. Second, most trials in Indonesia are presided over by a panel of three judges. Although all three are in theory responsible for the content of the decision, in practice it may have been reached through negotiation and compromise. Therefore, the final written decision may not accurately reflect the precise analysis or decision favoured personally by the judge under review. Third, courts in many civil law countries—including Indonesia—do not always disclose all the relevant facts of a case, or the competing arguments raised, in their decisions. Without reference to the broader context in which the decision was made, the reviewing judge may find it difficult to effectively assess the decision. Fourth, the process may be open to manipulation; that is, within the culture of judicial corruption in Indonesia, it may quickly become possible to buy and sell the favourable *eksaminasi* required for a promotion.

Now, perhaps the greatest impediment to the reintroduction of *eksaminasi*—or a modified version that addresses some of the flaws identified in the previous paragraph—is the Constitutional Court's decision in the case discussed above. It seems quite clear from the decision that the Constitutional Court is likely to declare invalid any statutory scheme under which judicial decisions are formally reviewed outside the formal judicial appeals framework—even if that system is run exclusively by judges. The Constitutional Court would likely hold that such a system would potentially interfere with the independence of judges, because it might make judges decide a case in a way they think will be most acceptable to their superiors, rather than according to their own conviction about the relevant facts and law.

In theory, the alternative proposed by the Constitutional Court—the formal appeals system—may appear to address the need for judicial independence while also ensuring that judges make sound decisions. However, in practice it is not a reliable means of supervision, for several reasons. First, the Supreme Court blueprint itself acknowledges that the appeals process does not, in fact, impose real accountability

upon errant lower court judges (Supreme Court 2003: 90). Although some judges may be shamed by having their decision overturned by a higher court, they are unlikely to suffer any more tangible consequences, such as having a promotion postponed.

Second, although lower court judges may receive some form of feedback through the appeals process, its value is likely to be limited. Many appeals court decisions that overturn first-instance court decisions do not contain extensive explanations of the reasons for doing so. It is therefore possible that the lower court judge being reviewed may be left wondering why his or her decision was overturned.

Third, the appeals process will not 'catch' decisions that are not appealed (Supreme Court 2003: 90).

Finally, the Supreme Court blueprint itself notes that the appeals approach may suffer from one of the flaws in the *eksaminasi* system noted above: it presumes that judges at the higher levels of the judicature are more capable than those at the lower levels, when this may not necessarily be so (Supreme Court 2003: 90). Unfortunately, it also presumes that appeals court decisions are not regularly distorted by corruption.

CONCLUDING REMARKS

The Constitutional Court's decision has been poorly received by the media and legal observers alike.[28] Most have focused on the apparent effect of the decision, that is, that the Supreme Court and lower courts will remain virtually immune from punishment for corruption or incompetence (Hukumonline, 27 August 2006). In particular, the Constitutional Court has drawn criticism for unilaterally prohibiting the Judicial Commission from supervising its own judges. When viewed alongside another recent decision of the court that appears to make corruption investigations

[28] See, for example, *Jakarta Post*, 25 August 2006, 28 August 2006, 29 August 2006, 4 September 2006; Hukumonline, 24 August 2006, 27 August 2006, 31 August 2006, 1 September 2006.

and prosecutions more difficult (*Jakarta Post*, 4 September 2006; Hukumonline, 26 July 2006), this decision has been seen by some as evidence of the court's 'soft' stance on corruption (Hukumonline, 27 August 2006; *Jakarta Post*, 25 August 2006).

In my opinion this view is rather overstated, and ignores the Constitutional Court's legitimate position, supported by some (albeit probably inadequate) reasoning, that judicial independence should, at this stage in Indonesia's judicial reform process, be prioritised over judicial accountability. In choosing this balance, the court emphasised the importance of judicial independence to a functioning state, legal system and judiciary. It stated that judicial independence was a crucial aspect of *negara hukum* and of the separation of powers, which the Constitutional Court described as the 'soul' of the constitution (SC vs JC 2006*:* 169). Judicial independence was, according to the court, indispensable to the protection of citizens' human rights and their right to a fair trial (SC vs JC 2006*:* 172, 182–3).

The Constitutional Court certainly did not completely ignore the need for judicial accountability. It was strongly critical of the Supreme Court for failing to impose sufficient accountability mechanisms of its own to ensure that its judges remained free from impropriety. Recognising that judicial corruption was one of the biggest problems facing the Supreme Court (SC vs JC 2006*:* 192), the Constitutional Court stated:

> It is hoped that the Supreme Court increases supervision, particularly through opening itself more to respond to criticism, hopes and suggestions from various quarters. Judges must define the principle of judicial independence as…an obligation to create free courts (fair trials), which is a prerequisite for the rule of law. Therefore, within the principle of judicial independence, there is an obligation on judges to free themselves from persuasion, pressure, force, threats or fear of retribution [from] particular government, political or economic interests, other political forces, or particular groups; or for recompense or the promise of recompense… or an

> advantage—financial or otherwise; and to not misuse the principle of judicial independence as a means to hide from supervision (SC vs JC 2006*:* 201–2).

Stating that accountability mechanisms must be devised carefully so that they do not affect the conduct, and outcome, of trials, the court continued:

> These days … [community faith in] judicial decisions is in a dismal state. But, even though the faith remaining is low, it must not disappear altogether, rendering the intent to maintain the honour, dignity and behaviour of judges counterproductive and eventually causing legal chaos (SC vs JC 2006*:* 172–3).

In other words, the Constitutional Court appears to have taken the view that, if further intrusions are made into judicial independence—even through the supervision of judges—then the already low confidence of Indonesians in the judicial system will fall even further.

However, in addition to the questionable arguments referred to earlier, the Constitutional Court's decision contained a number of shortcomings that significantly undermine the veracity of what might otherwise have been a legitimate stance on judicial independence and judicial accountability. First, the Constitutional Court failed to discuss comprehensively the difficulties of striking a balance between judicial independence and accountability for corruption and incompetence that it could point to in the face of criticism. Regrettably, the court did not adequately consider the consequences of providing very high levels of judicial independence in countries such as Indonesia that have strong traditions of abuse of judicial power and low levels of competence.

Second, the Constitutional Court did not consider the argument that the constitution's provision of judicial independence carries with it a corresponding need for judges to have adequate levels of competence and integrity; if judges did not need to be competent and honest, then how could the Supreme Court and other courts effectively perform their function as a check on the exercise of government power?

Third, the court also failed to consider a previous decision in which it had hinted that the state had an obligation to protect the people from corruption, to assist it to define the boundaries of judicial independence.[29] If it had applied this apparent obligation to the case, the court may have found that the state was justified in adopting more 'intrusive' accountability mechanisms aimed at reducing corruption.

Finally, the Constitutional Court could have questioned whether the Judicial Commission's investigations did, in fact, constitute interference. The Supreme Court is able to ignore the Judicial Commission's protestations; like most ombudsmen, the commission has powers of recommendation only. If the commission cannot compel the Supreme Court to act, then how can it be said that it is undermining judicial independence? It may well be that conducting an investigation into a judge's behaviour or decision in itself constitutes illegitimate pressure, as may the media frenzy that surrounds allegations of judicial impropriety. However, because the Constitutional Court did not define 'interference', these questions remain unanswered.

The Constitutional Court's decision places Indonesia's parliament in a difficult position. Some commentators, such as Kuok (2006), Susanti (2006), and Panjaitan (2006), have emphasised that the decision highlights inadequacies in Indonesia's judiciary laws, particularly their lack of harmonisation, certainty and detail on judicial supervision. They argue that the decision has the advantage of placing pressure on the national parliament to amend these laws, and therefore provides a starting point for further judicial reform. However, this optimism presumes that the national parliament will respond to the decision in a timely fashion, even though the parliament has as yet never enacted a statute or amendment in response to any Constitutional Court decision. Furthermore, the court has provided very little guidance as to what amendments the Constitutional Court would find constitutionally acceptable in future legislation. The potential constitutional scope of

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[29] Constitutional Court Decision No. 006/2003, reviewing Law No. 30 of 2002 on the Corruption Eradication Commission (the *KPK Law case*).

the Judicial Commission's supervisory powers therefore remains almost as unclear as the judicial commission law itself.

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Glossary items:

DPR	Dewan Perwakilan Rakyat (People's Representative Council)
Ikatan Hakim Indonesia	Indonesian Judges' Association
JC	Judicial Commission
Komisi Yudisial	Judicial Commission
KPK	Komisi Pemberantasan Korupsi (Anti-Corruption Commission)

LeIP	Lembaga Kajian dan Advokasi untuk Independensi Peradilan (Institute for an Independent Judiciary)
Mahkamah Konstitusi	Constitutional Court
Mahkamah Agung	Supreme Court
perpu	*peraturan pemerintah sebagai pengganti undang-undang* (government regulation in lieu of a statute)
satu atap	'one roof' (reforms)
SC	Supreme Court
UN	United Nations