



Constitutionality of Judicial Observation as Evidence in the New KUHP: Reconstructing Evidentiary Discretion Limits

Rifki Saputra

¹Magister Hukum, Universitas Diponegoro, Semarang, Indonesia

Correspondence: rifkysaputra2904@gmail.com

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ABSTRACT

This study examined the constitutional limits of judicial observation under Article 235(1)(g) of Indonesia's new Criminal Procedure Code. Normative legal research employed statutory, constitutional, case, conceptual, and comparative approaches. Judicial observation serves a legitimate function by enabling judges to perceive facts disclosed at trial, yet its undefined scope threatens legal certainty, impartiality, adversarial testing, and the prosecution's burden of proof. The study found that judicial observation is constitutionally defensible only as derivative and corroborative evidence, rather than proof generated from a judge's private knowledge or subjective impressions. It proposes five cumulative safeguards: limitations on source and forum, verifiable objects, corroboration by independent lawful evidence, disclosure with an opportunity to object and rebut, and reasoned appellate review. Observation must occur in a lawful hearing or court-ordered site inspection, be recorded, tested by the parties, and expressly justified in the judgment. These safeguards preserve an active judicial role without transforming the judge into an evidentiary witness.

Kata Kunci:

pengamatan hakim; hukum pembuktian; diskresi hakim; peradilan yang adil; hukum acara pidana; pengujian konstitusional

ABSTRAK

Penelitian ini mengkaji batas konstitusional pengamatan hakim berdasarkan Pasal 235 ayat (1) huruf g KUHP baru melalui pendekatan perundang-undangan, konstitusional, kasus, konseptual, dan perbandingan. Hasil penelitian menunjukkan bahwa pengamatan mendukung hakim dalam mengenali fakta yang terungkap di persidangan, tetapi rumusannya yang tidak terbatas mengancam kepastian hukum, ketidakberpihakan, pengujian kontradiktur, dan beban pembuktian penuntut umum. Pengamatan hanya dapat dipertahankan sebagai bukti derivatif dan konfirmatif, bukan bukti yang lahir dari pengetahuan pribadi atau kesan subjektif hakim. Penelitian ini menawarkan lima batas kumulatif: sumber dan forum resmi, objek yang dapat diverifikasi, kesesuaian dengan bukti sah yang independen, pengungkapan serta kesempatan membantah, dan pertanggungjawaban melalui putusan serta upaya hukum. Pengamatan wajib dilakukan dalam persidangan atau pemeriksaan setempat yang sah, dicatat, diuji para pihak, dan dijelaskan secara rasional dalam putusan. Susunan ini mempertahankan hakim aktif tanpa mengubah hakim menjadi saksi pembuktian.



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A. Introduction

Law Number 20 of 2025 concerning the Criminal Procedure Code replaced Law Number 8 of 1981 and entered into force on January 2, 2026. Article 235(1) expands the forms of evidence to include physical exhibits, electronic evidence, judicial observation, and anything capable of proving a fact, provided that it was not obtained unlawfully.¹ The inclusion of judicial observation in subparagraph (g) changes the evidentiary structure because judges may no longer be confined to assessing evidence introduced by the parties, but may potentially generate an evidentiary basis through their own sensory experience. This change reaches a particularly sensitive point in criminal adjudication: the relationship between truth-seeking, the institutional separation of prosecution and adjudication, and protection of the accused from conviction shaped by the decision-maker's subjective impressions.

The first problem concerns normative incompleteness. Article 235 does not define the object, place, time, recording procedure, evidentiary weight, or method by which the parties may challenge judicial observation. The elucidation of Article 235(1)(g) merely states that the provision is "sufficiently clear," although the term had no settled technical meaning under the previous KUHAP.² This regulatory gap permits divergent interpretations. A narrow reading treats observation as what a judge sees or hears while examining evidence in court. A broader reading may extend it to body movements, facial expressions, silence, conditions at a location, information learned before trial, or impressions about a person's credibility. The distinction determines whether observation functions as a method for examining evidence or as a new form of proof originating from neither the prosecution nor the accused.

¹. Republik Indonesia, Undang-Undang Nomor 20 Tahun 2025 tentang Kitab Undang-Undang Hukum Acara Pidana, Lembaran Negara Republik Indonesia Tahun 2025 Nomor 188, Tambahan Lembaran Negara Republik Indonesia Nomor 7149, art. 235(1); Badan Pemeriksa Keuangan Republik Indonesia, "Undang-Undang Nomor 20 Tahun 2025 tentang Kitab Undang-Undang Hukum Acara Pidana," accessed July 22, 2026.

². Republik Indonesia, Undang-Undang Nomor 20 Tahun 2025 tentang Kitab Undang-Undang Hukum Acara Pidana, Lembaran Negara Republik Indonesia Tahun 2025 Nomor 188, Tambahan Lembaran Negara Republik Indonesia Nomor 7149, Elucidation of art. 235(1)(g).



The second problem arises from the hybrid design of the proceedings. Article 4 of the new KUHAP combines an active-judge system with a balanced contest between opposing parties. Its elucidation grants judges a substantial role in directing the examination, identifying facts, and assessing evidence, while requiring equilibrium among the rights of investigators, prosecutors, suspects, and accused persons.³ An active role does not entail unlimited freedom. Judicial activity must remain within a structure that preserves impartiality, the right to know adverse material, the right to respond, and the prosecutor's responsibility to prove the charge. Without those limits, the judge may move from managing the trial to curing deficiencies in the prosecution's case. Such a position creates tension between the truth-finding function and the duty to maintain equal distance from the prosecution and the accused.

Constitutional controversy emerged soon after the statute entered into force. Article 235(1)(g) was challenged in Case Number 118/PUU-XXIV/2026. The Constitutional Court declared the petition inadmissible because the relationship between the grounds and the requested relief was inconsistent and the application lacked sufficient clarity. The decision did not substantively assess the constitutionality of the provision.⁴ Constitutional review subsequently continued in Case Number 92/PUU-XXIV/2026, filed by Hanter Oriko Siregar. As of July 22, 2026, the case remained under examination, with the applicant's objections centered on legal certainty, evidentiary theory, and fair-trial guarantees.⁵ The central issue therefore had not yet received a final judicial answer.

The constitutional proceedings reveal two opposing positions. The Government and several law-enforcement institutions view judicial observation as an instrument for strengthening factual assessment within an active-judge system. The Prosecutor's Office proposed a restricted interpretation linking observation to

³. Republik Indonesia, Undang-Undang Nomor 20 Tahun 2025 tentang Kitab Undang-Undang Hukum Acara Pidana, Lembaran Negara Republik Indonesia Tahun 2025 Nomor 188, Tambahan Lembaran Negara Republik Indonesia Nomor 7149, art. 4 and its Elucidation.

⁴. Mahkamah Konstitusi Republik Indonesia, Putusan Nomor 118/PUU-XXIV/2026, May 12, 2026, 38–39.

⁵. Mahkamah Konstitusi Republik Indonesia, "Tracking Perkara Nomor 92/PUU-XXIV/2026," accessed July 22, 2026.



what the judge objectively sees, hears, or experiences in court, requiring consistency with other evidence and explanation in the judgment.⁶ The applicant argues that an unrestricted formulation permits the judge to become an evidentiary source and shields outcome-determinative material from adversarial testing. These positions indicate that the available choices need not be confined to total invalidation or unconditional acceptance. The provision may instead be interpreted to preserve truth-seeking while closing opportunities for arbitrary use.

Empirical research on judicial decision-making supports the need for limitations. Judges possess professional knowledge and experience, yet may still be influenced by heuristics, information order, visual impressions, anchoring, and tendencies to infer credibility from behavior that does not necessarily correspond to testimonial truth.⁷ Experiments involving judges further demonstrate that legally irrelevant information may affect decisions even when judges attempt to apply evidentiary rules professionally.⁸ These findings do not establish that every judicial observation is erroneous. They demonstrate why an untested internal impression must be converted into a transparent and reviewable factual proposition.

Indonesian scholarship on criminal evidence has addressed the dominance of judicial reasoning, variations in the use of expert testimony, and the need to develop an active-judge system compatible with an adversarial model. Based on a review of seventy-four criminal judgments, Butt and Nathaniel identify significant variation in how courts admit and use criminal-law expert testimony, including ambiguity in the relationship between the evidence presented and the reasons stated

⁶. Mahkamah Konstitusi Republik Indonesia, *Risalah Sidang Perkara Nomor 62, 69, 89, 92, dan 104/PUU-XXIV/2026*, July 8, 2026; Mahkamah Konstitusi Republik Indonesia, “Kejaksanaan Minta Norma Pengamatan Hakim Dimaknai Konstitusional Bersyarat,” July 8, 2026.

⁷. Jeffrey J. Rachlinski and Andrew J. Wistrich, “Judging the Judiciary by the Numbers: Empirical Research on Judges,” *Annual Review of Law and Social Science* 13 (2017): 203–229, <https://doi.org/10.1146/annurev-lawsocsci-110615-085032>; Adebola O. Olaborede and Liriek Meintjes-Van der Walt, “Cognitive Bias Affecting Decision-Making in the Legal Process,” *Obiter* 41, no. 4 (2021): 806–830, <https://doi.org/10.17159/obiter.v41i4.10489>.

⁸. Holger Spamann and Lars Klöhn, “Justice Is Less Blind, and Less Legalistic, than We Thought: Evidence from an Experiment with Real Judges,” *Journal of Legal Studies* 45, no. 2 (2016): 255–280, <https://doi.org/10.1086/688861>; Daniel L. Chen, Tobias J. Moskowitz, and Kelly Shue, “Decision Making under the Gambler’s Fallacy: Evidence from Asylum Judges, Loan Officers, and Baseball Umpires,” *Quarterly Journal of Economics* 131, no. 3 (2016): 1181–1242, <https://doi.org/10.1093/qje/qjw017>.



in judgments.⁹ Wisnubroto, Lay, and Soumokil examine the prospects of applying an active-judge system within an adversarial model, but do not specifically reconstruct the limits of judicial observation as evidence.¹⁰ Scholarship on digital evidence likewise stresses that evidentiary reliability must be situated within a fair-trial framework based on disclosure, authentication, and a meaningful opportunity to challenge the material.¹¹ Existing studies have not integrated constitutional validity, the epistemic limits of observation, adversarial procedure, and the legal consequences of non-compliance into a single operational model.¹²

This study addresses two questions. First, how should the constitutionality of judicial observation as evidence be assessed within the evidentiary structure of the new KUHAP? Second, what limits on evidentiary discretion can preserve an active judicial function without reducing legal certainty, impartiality, and the rights of the accused? The study's contribution lies in a structured model of evidentiary discretion that treats observation as derivative and corroborative evidence. The model consists of five limits relating to source, object, corroboration, adversarial testing, and reasoned accountability. It also identifies the legal consequence of failing to satisfy each limit, permitting the model to be applied and reviewed at trial and on appeal rather than remaining an abstract concept.

B. Research Method

This study applies normative legal research using statutory, conceptual, case, constitutional, and comparative approaches. Primary legal materials include the 1945 Constitution of the Republic of Indonesia, Law Number 20 of 2025, Law

⁹. Simon Butt and Andreas Nathaniel, "Evidence from Criminal Law Experts in Indonesian Criminal Trials: Usurping the Judicial Function?," *International Journal of Evidence & Proof* 28, no. 2 (2024): 129–153, <https://doi.org/10.1177/13657127231217319>.

¹⁰. Aloysius Wisnubroto, Frisca Regina Ferreira Lay, and Yohana Margareth Soumokil, "The Active Judge System in the Adversary Model: Prospects for Its Application in Indonesia," *International Journal of Science and Environment* 5, no. 4 (2025): 46–54, <https://doi.org/10.51601/ijse.v5i4.239>.

¹¹. Radina Stoykova, "The Right to a Fair Trial as a Conceptual Framework for Digital Evidence Rules in Criminal Investigations," *Computer Law & Security Review* 49 (2023): 105801, <https://doi.org/10.1016/j.clsr.2023.105801>.

¹². Muhammad Abdul Azis, Pujiyono, and Riski Ananda Kusuma Putri, "Reconstructing Reliability Standards for Deepfake Detectors as Electronic Evidence in Indonesia's Criminal Justice System," *West Science Law and Human Rights* 4, no. 3 (2026): 299–309, <https://doi.org/10.58812/wslhr.v4i03.3022>.



Number 48 of 2009 concerning Judicial Power, Constitutional Court decisions and hearing records, Dutch and German evidentiary provisions, the United States Federal Rules of Evidence, and the jurisprudence of the European Court of Human Rights. Secondary materials comprise journal articles concerning active judges, evidentiary reasoning, cognitive bias, digital evidence, and the right to a fair trial. Comparative sources were selected for three distinct functions: judicial observation as a recognized form of evidence in the Netherlands, holistic freedom of evidentiary assessment in Germany, and the prohibition against a presiding judge testifying in the United States. The analysis is interpretive and prescriptive, testing the provision against fair legal certainty, impartiality, the right to be heard, and the allocation of the burden of proof. Comparative rules are not transplanted directly, but are used to identify safeguards compatible with the hybrid design of the new KUHAP.¹³

C. Discussion

1. Constitutionality of Judicial Observation in the New KUHAP Evidentiary System

a. Judicial Observation within a Hybrid Evidentiary System

Article 235(1) textually places judicial observation alongside witness testimony, expert testimony, documents, statements of the accused, physical exhibits, electronic evidence, and the open category in subparagraph (h). Inclusion in the statutory list gives observation a stronger normative status than a mere method of assessment. That status, however, does not establish its evidentiary weight. The new KUHAP expressly provides that a single witness is insufficient unless supported by other evidence and that the statement of the accused alone cannot prove guilt.¹⁴ No equivalent provision states whether judicial observation may stand alone. The silence is dangerous if interpreted as permission to treat a

¹³. Terry Hutchinson and Nigel Duncan, “Defining and Describing What We Do: Doctrinal Legal Research,” *Deakin Law Review* 17, no. 1 (2012): 83–119, <https://doi.org/10.21153/dlr2012vol17no1art70>; Terry A. Christiani, “Normative and Empirical Research Methods: Their Usefulness and Relevance in the Study of Law as an Object,” *Procedia: Social and Behavioral Sciences* 219 (2016): 201–207, <https://doi.org/10.1016/j.sbspro.2016.05.006>.

¹⁴. Republik Indonesia, Undang-Undang Nomor 20 Tahun 2025 tentang Kitab Undang-Undang Hukum Acara Pidana, Lembaran Negara Republik Indonesia Tahun 2025 Nomor 188, Tambahan Lembaran Negara Republik Indonesia Nomor 7149, arts. 237(1)–(2) and 240(3).



single observation as decisive proof of guilt, particularly because the judge both characterizes the observation and assigns its weight.

Article 235 must be read systematically with Articles 244 and 250. Article 244 requires the charge to be proved lawfully and convincingly, while Article 250(1)(d) requires a conviction to contain clear and complete reasoning regarding the facts, circumstances, and evidentiary materials obtained from the trial examination. Non-compliance with the required reasoning renders the judgment null and void.¹⁵ This statutory sequence produces two initial limits. Observation must originate from the trial examination, and its use must be traceable through the reasons for judgment. An impression retained only in the judge's mind cannot satisfy those requirements because its authenticity, relevance, and exposure to challenge cannot be assessed.

Judicial observation must also be distinguished from evidentiary assessment. When a judge watches a video, reads a document, examines an object, or hears an audio reconstruction in court, sensory perception is the means through which the judge accesses evidence already introduced. The perceptual result does not automatically become a separate item of evidence. The color of a vehicle visible in a recording continues to derive from electronic evidence, while the dimensions of a weapon derive from the physical exhibit. Treating the act of seeing as separate evidence may artificially duplicate the weight of a single source. One recording could be counted first as electronic evidence and again as judicial observation, then used to satisfy a corroboration requirement that should depend on independent sources. Such a reading undermines evidentiary rationality because confirmation would arise from relabeling the same object rather than from distinct information.

Observation has a limited independent function where an object or condition can be identified only through direct examination before the judge, such as correspondence between a physical item and its description in an official record, the results of a court-ordered site inspection, or an openly conducted technical

¹⁵. Republik Indonesia, Undang-Undang Nomor 20 Tahun 2025 tentang Kitab Undang-Undang Hukum Acara Pidana, Lembaran Negara Republik Indonesia Tahun 2025 Nomor 188, Tambahan Lembaran Negara Republik Indonesia Nomor 7149, arts. 244 and 250(1)(d), (2).



demonstration. Even then, observation remains derivative because the object originates from the case and is presented through a lawful procedure. Observation cannot create facts from the judge's personal knowledge. A judge who previously visited the location, read media coverage, or knew one of the parties cannot convert that knowledge into evidence. Such information lies outside the trial record and places the judge in the position of an unsworn witness who cannot be cross-examined.

An active-judge design permits questioning, clarification, examination of objects, and direction of the evidentiary process. These functions prevent the trial from becoming a contest of party resources detached from the search for truth. An active judge, however, does not assume the prosecutor's burden. The prosecutor must continue to present lawful material proving each element of the charge. The judge may clarify uncertainty arising from that material but may not fill a fundamental evidentiary gap through personal observation. The prosecutor, rather than the accused, must bear the consequences of insufficient proof. If observation is used to rescue a deficient prosecution, the presumption of innocence is transformed into an obligation on the accused to overcome the judge's private conviction.

b. Review under Legal Certainty and Fair-Trial Guarantees

Article 28D(1) of the 1945 Constitution guarantees recognition, protection, and fair legal certainty. In criminal procedure, legal certainty requires both a legal basis for authority and foreseeable limits on its exercise. An evidentiary rule must at least identify the information source, the manner of acquisition and presentation, the opportunity to challenge it, and the weight that may be assigned. Standing alone, the phrase "judicial observation" does not satisfy these elements. The absence of a definition prevents the accused from anticipating what material must be answered and when an objection should be raised. Divergent use among judicial panels may also produce inconsistent evidentiary standards for comparable cases.¹⁶

16. Muhammad Abdul Azis, Riski Ananda Kusuma Putri, and Nur Rahman, "Keping Puzzle Yang Hilang: Menelaah Hak Yang Sirna Terhadap Narapidana," *Jurnal Hukum & Pembangunan* 52, no. 3 (2022): 674–684, <https://doi.org/10.21143/jhp.vol52.no3.3367>.



The Constitutional Court has consistently treated due process as a limitation on state action in criminal proceedings. In Decision Number 21/PUU-XII/2014, the Court linked protection of suspects' rights to effective mechanisms for controlling law-enforcement measures. The principle is equally relevant to proof because a criminal conviction constitutes an especially intensive restriction of rights. Every material fact capable of determining guilt must therefore be processed through procedures that permit scrutiny and correction.¹⁷ An observation not disclosed during trial may emerge for the first time when judgment is pronounced. At that stage, the accused has lost an effective opportunity to explain the context, demonstrate error, call an expert, or request re-examination.

The right to a fair trial is also protected by Article 14 of the International Covenant on Civil and Political Rights, ratified through Law Number 12 of 2005. The Human Rights Committee emphasizes equality of the parties, adjudication by a competent, independent, and impartial tribunal, and a genuine opportunity to respond to material relied upon in criminal proceedings.¹⁸ These standards do not prevent judges from perceiving facts directly. They prevent reliance on decisive information that cannot be known and answered by the person affected. Adversarial testing converts observation from an internal belief into a contestable factual proposition.¹⁹

The jurisprudence of the European Court of Human Rights provides a useful formulation. In *Jasper v. United Kingdom*, the Court stated that adversarial proceedings require both prosecution and defense to have an opportunity to know and comment on observations and evidence submitted with a view to influencing the court's decision. In *Brandstetter v. Austria*, equality of arms required each party

¹⁷. Mahkamah Konstitusi Republik Indonesia, Putusan Nomor 21/PUU-XII/2014, April 28, 2015, especially the Court's reasoning on due process of law and the protection of suspects' rights.

¹⁸. International Covenant on Civil and Political Rights, art. 14; Republik Indonesia, Undang-Undang Nomor 12 Tahun 2005 tentang Pengesahan International Covenant on Civil and Political Rights, Lembaran Negara Republik Indonesia Tahun 2005 Nomor 119, Tambahan Lembaran Negara Republik Indonesia Nomor 4558; United Nations Human Rights Committee, General Comment No. 32, "Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial," CCPR/C/GC/32, August 23, 2007, paras. 13, 19, and 30.

¹⁹. Alya Synthia Kurniawati, Riski Ananda Kusuma Putri, Muhammad Thufail Ariiq, and Muhammad Abdul Azis, "Kesenjangan Keadilan Perawatan bagi Perempuan Pekerja Informal di Indonesia: Analisis Gender dan Hukum," JES: Jurnal Ekonomi dan Sosial 1, no. 4 (2026): 251–257.



to receive a reasonable opportunity to present its case without substantial disadvantage.²⁰ These principles can govern judicial observation through a duty of disclosure in open court. A judge who notices an inconsistency in an object must identify it before the evidentiary phase closes, invite the parties' responses, and ensure that those responses are recorded.

Impartiality has subjective and objective dimensions. Subjectively, the judge must not hold personal prejudice. Objectively, the structure of the proceedings must not create a reasonable appearance that the judge has assumed a party's role. Law Number 48 of 2009 requires courts to adjudicate according to law without discrimination and permits recusal where a judge has a direct or indirect interest.²¹ When a judge generates a decisive fact and then evaluates its reliability, the roles of witness and adjudicator converge. The structure creates objective doubt because no external examiner can test the source of the judge's knowledge.²²

The risk to impartiality is most apparent when observation concerns the demeanor of the accused or a witness. Nervousness, eye contact, response speed, language use, disability, trauma, and cultural differences do not have a single relationship with deception. Recent research indicates that judges recognize some heuristic risks, but awareness alone does not necessarily eliminate their influence.²³ Treating demeanor as independent evidence is also difficult to replicate on appeal or cassation. A transcript may capture words but not the complete context producing

²⁰. *Jasper v. United Kingdom*, App. No. 27052/95, European Court of Human Rights, Grand Chamber Judgment of February 16, 2000, para. 51; *Brandstetter v. Austria*, App. Nos. 11170/84, 12876/87, and 13468/87, European Court of Human Rights, Judgment of August 28, 1991, paras. 66–67.

²¹. Republik Indonesia, Undang-Undang Nomor 48 Tahun 2009 tentang Kekuasaan Kehakiman, Lembaran Negara Republik Indonesia Tahun 2009 Nomor 157, Tambahan Lembaran Negara Republik Indonesia Nomor 5076, arts. 4(1), 5(1), and 17.

²². Dafirly Salsadilla Dosanto, Riski Ananda Kusuma Putri, Alya Synthia Kurniawati, Muhammad Thufail Ariiq, Siti Fadila Nuramelia, Misshouw Meilany Putri, and Muhammad Abdul Azis, "Tanggung Jawab Hukum Pemerintah Atas Ketimpangan Fasilitas Pelayanan Kesehatan dalam Pemenuhan Hak Atas Kesehatan di Indonesia," *Jurnal Multidisiplin Indonesia* 4, no. 1 (2026): 258–274, <https://doi.org/10.62007/joumi.v4i1.849>.

²³. Alexandra-Christina Malegiannaki, Athanasios Chatzopoulos, and Konstantinos Tsagkaridis, "Assessing Judges' Use and Awareness of Cognitive Heuristic Decision-Making," *Frontiers in Cognition* 4 (2025): 1421488, <https://doi.org/10.3389/fcogn.2025.1421488>; Australian Law Reform Commission, *Cognitive and Social Biases in Judicial Decision-Making*, Background Paper JI6 (Brisbane: ALRC, 2021), 10–24.



the trial panel's impression. The reviewing court may then confront only the first-instance conclusion without the ability to evaluate its empirical basis.

Procedural legality requires especially strict limits where an evidentiary category is open-ended. Article 235(1)(h) permits anything useful for proof so long as it was not obtained unlawfully. Articles 235(3)–(5), however, continue to require authentication and lawful acquisition and prescribe exclusionary consequences. Judicial observation cannot be authenticated in the ordinary sense because its immediate source is the judge's sensory experience. Authentication must therefore be translated into procedural verification: identification of the object, time, place, method of observation, and correspondence with the trial record. Without such verification, authentication would constrain only party-produced evidence and not the material closest to the formation of the judgment.

c. Conditional Constitutionality as an Intermediate Solution

The purpose of judicial observation is not constitutionally objectionable. Judges must see, hear, compare, and assess the materials introduced. A site inspection or courtroom demonstration may also produce understanding unavailable from written descriptions alone. Unconstitutionality arises when the provision is read as authority to create evidence from personal knowledge or impressions. Distinguishing a legitimate objective from impermissible methods allows the provision to be preserved through a conditional interpretation. This approach is more proportionate than total invalidation because it retains direct examination while preventing procedure-free use.

A conditional interpretation is consistent with the position advanced by the Prosecutor's Office in Case Number 92/PUU-XXIV/2026. The Prosecutor's Office linked observation to what is objectively seen, heard, or experienced in relation to facts disclosed at trial, required consistency with other evidence, and demanded clear, rational, and accountable explanation in the judgment.²⁴ That formulation provides an appropriate foundation but requires further safeguards prohibiting out-

²⁴. Mahkamah Konstitusi Republik Indonesia, Risalah Sidang Perkara Nomor 62, 69, 89, 92, dan 104/PUU-XXIV/2026, July 8, 2026, statement of the Kejaksaan Republik Indonesia.



of-court knowledge, limiting reliance on demeanor, establishing notice and objection procedures, and specifying consequences for non-compliance.

Conditional constitutionality should begin from one proposition: judicial observation is not independent in source, but a means by which the judge perceives facts from a lawful object or evidentiary process. Its derivative character prevents duplication. Its corroborative character prevents observation from standing alone to prove an element of the charge. Observation may assist in assessing relationships among items of evidence but cannot replace the originating evidence. If a video is unauthenticated or unlawfully obtained, what the judge sees in that video loses its foundation. The judge cannot preserve the impression by relabeling it as separate observation after the electronic evidence has been excluded.

This interpretation does not reduce judicial freedom to assess evidence. Evaluative freedom operates only after material has passed through legality, authentication, and adversarial testing. It does not authorize creation of a new evidentiary gateway not regulated by law. Separating freedom of assessment from freedom to generate proof keeps the judge active in analysis without allowing the court to assume one party's burden. The Constitution does not require judicial passivity. It requires judicial activity that is foreseeable, contestable, and accountable.

2. Reconstructing the Limits of Evidentiary Discretion

a. Comparative Lessons

Dutch law offers the closest comparison because it recognizes *eigen waarneming van den rechter* as evidence. Article 339(1) of the *Wetboek van Strafvordering* includes judicial observation in the statutory list, while Article 340 limits it to an observation personally made by the judge during the trial examination.²⁵ The strength of the Dutch model lies less in the evidentiary list than in a definition binding source, actor, and forum. Observation must be personal and occur during the judicial hearing. This limitation excludes private knowledge and enables the parties to know the same object. Decisions of the *Hoge Raad* also refer

²⁵. *Wetboek van Strafvordering* [Dutch Code of Criminal Procedure], arts. 339(1) and 340.



to Articles 339 and 340 when reviewing direct observation, requiring the object to remain identifiable in the case file and reasons for judgment.²⁶

German law adopts a different approach. Section 261 of the Strafprozessordnung does not establish judicial observation as an independent form of evidence, but directs the court to decide the outcome of proof according to its free conviction derived from the entirety of the main hearing.²⁷ The provision situates the judge's trial experience within the overall evidentiary process rather than as a new object outside that process. Free conviction is constrained by reasoned judgment, the prohibition on private knowledge, and the parties' right to participate in the examination. The relevant lesson is not unrestricted freedom, but the integration of observation into a single reviewable trial record.

The United States imposes a more explicit restriction on role convergence. Federal Rule of Evidence 605 prohibits the presiding judge from testifying as a witness at the trial. A party need not object in order to preserve the issue.²⁸ This prohibition distinguishes judicial knowledge from factual testimony. Rule 201 on judicial notice permits a court to accept certain facts not subject to reasonable dispute, but entitles the parties to be heard on the propriety and nature of the noticed fact.²⁹ The two rules express a consistent principle: judges may use judicial mechanisms to manage facts, but cannot become a factual source immune from challenge.

The comparison yields three rules. First, the forum for observation must be confined to the hearing or another judicial act forming an official part of the case. Second, observation must attach to an object available to the parties rather than to the judge's personal knowledge. Third, the observational result must be disclosed for response before it is used. The Netherlands provides a forum limitation, Germany locates perception within the totality of the hearing, and the United States prevents the judge from becoming a witness. These rules are compatible with

²⁶. Hoge Raad der Nederlanden, ECLI:NL:HR:2023:920, June 20, 2023; Hoge Raad der Nederlanden, ECLI:NL:HR:2019:1414, September 24, 2019.

²⁷. Strafprozessordnung [German Code of Criminal Procedure], § 261.

²⁸. Federal Rules of Evidence, Rule 605.

²⁹. Federal Rules of Evidence, Rule 201(b), (c), and (e).



Article 4 of the new KUHAP because they preserve an active judge while maintaining adversarial balance.

b. A Five-Limit Model of Evidentiary Discretion

The proposed reconstruction consists of five cumulative limits. The first is the source-and-forum limit. Observation may arise only from something genuinely seen, heard, or otherwise perceived by the judge during an open hearing, a lawfully closed hearing, an audiovisual examination, or a court-ordered site inspection. Pre-case knowledge, out-of-court communications, news reports, social media, experience adjudicating the accused in another case, and information from third parties cannot be used. If a judge receives such information and it may affect the decision, the judge must disclose it and assess whether recusal is required.

The second is the object limit. The object must consist of a physical item, condition, demonstrative event, or technical characteristic capable of specific description and recording. Observation cannot rest solely on nervousness, facial expression, eye contact, clothing, social status, language, silence, or moral impressions of the accused or a witness. Conduct may be considered only when it has clear legal relevance, is supported by expert knowledge where necessary, and has been debated by the parties. This limitation reduces stereotyping and prevents psychological conditions, trauma, disability, or cultural difference from being converted into indicators of guilt.

The third is corroboration and the prohibition against stand-alone use. Observation must relate to at least one other item of lawful, authentic, and independently obtained evidence. Corroboration cannot be generated by assigning different labels to the same object. What appears in a single recording cannot be counted first as electronic evidence and second as judicial observation to create artificial corroboration. Observation also cannot be the sole basis for proving an offense element, the perpetrator's identity, intent, causation, or an aggravating circumstance. If all other evidence is insufficient, observation cannot fill the deficiency.

The fourth is adversarial testing. Before the evidentiary phase closes, the presiding judge must openly state the object observed and the factual proposition

derived from it. The clerk must record the time, object, method, and judicial statement in the official minutes. The prosecutor, accused, and counsel must be allowed to agree or object, request re-examination, call an expert, submit counter-evidence, and explain context. If the observation arises after the evidentiary phase has closed, the hearing must be reopened. A decisive observation cannot be disclosed for the first time in the judgment.

The fifth is reasoned accountability and review. The judgment must separately identify what was observed, when and through what procedure the observation occurred, the independent evidence providing support, the parties' responses, the reasons for accepting or rejecting those responses, and the weight assigned. The explanation cannot stop at the phrase "based on the panel's observation." An appellate court must be able to determine whether the object was recorded and whether the inference follows from that object. An omission preventing meaningful review requires exclusion of the observation. If a procedurally defective observation became a principal basis for conviction, the judgment must be quashed or the case reheard according to the character of the violation.

Table 1. Reconstructed Limits on Judicial Observation

Dimension	Risk Addressed	Procedural Safeguard	Legal Consequence
Source and forum	Private knowledge, media information, or out-of-court communication	Limited to a lawful and recorded hearing or court-ordered site inspection	Cannot be used
Object	Impressions concerning character, nervousness, silence, expression, or stereotypes	Concrete, describable, relevant, and re-examinable object	Excluded if based only on impression
Corroboration	Stand-alone observation or duplication of one source	Supported by other lawful and independent evidence	Cannot independently prove an element
Adversarial testing	Decisive material is unknown or cannot be challenged	Disclosed in court, recorded, and open to objection and counter-evidence	Reopen the hearing or exclude the observation
Accountability	Unmeasurable and unreviewable reasoning	Object, procedure, responses, corroboration, and weight explained in the judgment	Quashing or rehearing if decisive to conviction

Source: Prepared by the authors based on Article 235 of the new KUHP, Article 340 of the Wetboek van Strafvordering, § 261 of the Strafprozessordnung, and Rules 201 and 605 of the Federal Rules of Evidence.



The five limits in Table 1 are cumulative because each protects a distinct interest. The source limit protects the integrity of the case record. The object limit reduces stereotyping and immeasurable impressions. Corroboration preserves the burden of proof. Adversarial testing guarantees party participation. Accountability permits correction through appellate review. Compliance with four limits cannot compensate for the absence of the fifth. An observation made in court remains unusable if it was not disclosed to the parties. A disclosed observation remains insufficient if it stands alone to prove an element of the charge.

The model may be expressed through the following constitutional construction: “Judicial observation means a judge’s personal sensory perception of an object, condition, or evidentiary process disclosed during a lawful hearing or court-ordered site inspection. It may be used only when recorded in the official minutes, notified to the parties and open to response, corroborated by other lawful evidence, not derived from private knowledge outside the case or subjective impressions concerning a person’s character or mental state, and clearly and rationally explained in the judgment.” This construction retains the statutory term while converting it into a measurable authority.

c. Institutional Implementation and Procedural Consequences

The Constitutional Court can make the five limits conditions for the provision’s constitutionality. A conditional ruling is appropriate because the principal defect lies in the scope of meaning rather than in the purpose of observation itself. The Court need not prescribe every technical procedure, but should establish binding minimum elements: an official forum, a verifiable object, a prohibition against stand-alone use, the parties’ right to respond, and reasoned judgment. These elements would guide the Supreme Court in preparing implementing rules without allowing fundamental protection to depend entirely on administrative policy.³⁰

30. Muhammad Abdul Azis, Siti Fadila Nuramelia, Muhammad Thufail Ariiq, Alya Synthia Kurniawati, Riski Ananda Kusuma Putri, Misshouw Meilany Putri, and Dafirly Salsadilla Dosanto, “Causative-Based Integral Policy as a Response to Criminogenic Factors in the Distribution of Subsidized Fuel,” *Punggawa Law Review* 1, no. 3 (2026): 142–148.



The Supreme Court should issue a Supreme Court Regulation governing proof under the new KUHAP. At a minimum, the regulation should prescribe notice of observation, a format for recording it in the official minutes, reopening of the evidentiary phase, requests for re-examination, use of experts, a prohibition on treating demeanor as an indicator of deception without a scientific basis, and standards for appellate review. The guidance should distinguish observation of admitted evidence, a site inspection, a courtroom demonstration, and judicial notice. These distinctions prevent a single term from being applied to activities carrying different procedural consequences.

At trial, recording may use a standardized form containing the case number, date, object, location, observational conditions, persons present, provisional factual proposition, prosecution response, response of the accused or counsel, requests for additional examination, and the panel's ruling. The form should become part of the official minutes and remain accessible to the parties. For digital evidence, the court should record screenshots, timestamps, relevant metadata, and the device used to display the material. Digital presentation may change through software, resolution, cropping, or compression. What the judge saw must be reproducible by a reviewing court.³¹

A site inspection requires additional safeguards. The court must define its purpose and scope before the visit, notify the parties, secure their presence or meaningful opportunity to participate, create audiovisual documentation, and prohibit ex parte communications with persons at the location. Judges may observe only matters relevant to the order authorizing the inspection. New findings outside that purpose must be disclosed and, if material, justify reopening the evidentiary phase. A site inspection cannot become a second investigation conducted by the judicial panel.

Observation of testimony requires the greatest caution. Credibility should be assessed through internal consistency, correspondence with other evidence, the

31. Muhammad Abdul Azis, Riski Ananda Kusuma Putri, Alya Synthia Kurniawati, and Muhammad Thufail Ariiq, "Governing Traditional Cultural Expressions as Artificial Intelligence Training Data: Reconstructing Communal Consent and Data Transparency in Indonesia," *Societa: Journal of Society and Change* 1, no. 1 (2026): 186–199, <https://doi.org/10.67964/4gbwhv96>.



witness's opportunity to know the event, and proven interests or pressures. Demeanor cannot independently establish truthfulness or deception. This approach protects witnesses with disabilities, trauma survivors, children, interpreter users, and persons who communicate differently. The new KUHAP expressly recognizes equal legal force for testimony given by witnesses or victims with disabilities.³² Treating differences in expression as evidence of dishonesty would conflict with that inclusive objective.³³

Consequences of non-compliance should vary according to severity. Observation derived from private knowledge, out-of-court communication, or an unlawful object must be excluded completely. Observation from a lawful source that has not been disclosed requires reopening the evidentiary phase where still possible. If the violation is discovered only after judgment and the observation did not affect the outcome, the appellate court may apply a strictly reasoned harmless-error analysis. If the observation was a principal basis for conviction, the violation cannot be treated as minor because it affects the right to challenge evidence and judicial impartiality. The judgment should be quashed or the case reheard before a different panel where the prior panel's objectivity has been compromised.

Appellate supervision is ineffective without a reasoning standard. The reviewing court should ask five questions: whether the source arose in an official forum, whether the object is verifiable, whether independent evidence supports the observation, whether the parties received an effective opportunity to respond, and whether the judgment explains the logical relationship between the observation and an element of the charge. A negative answer to any question requires the corrective consequence identified in Table 1. This standard prevents appellate review from merely repeating that the *judex facti* has authority to assess evidence without examining whether that authority was exercised through lawful procedure.

³². Republik Indonesia, Undang-Undang Nomor 20 Tahun 2025 tentang Kitab Undang-Undang Hukum Acara Pidana, Lembaran Negara Republik Indonesia Tahun 2025 Nomor 188, Tambahan Lembaran Negara Republik Indonesia Nomor 7149, art. 236(3).

³³. Siti Fadila Nuramelia, Riski Ananda Kusuma Putri, Muhammad Abdul Azis, Alya Synthia Kurniawati, and Misshouw Meilany Putri, "Reorientasi Perlindungan Saksi dan Korban dalam Sistem Peradilan Pidana Indonesia dari Pengaturan Parsial Menuju Model Perlindungan Terpadu," *Hakim: Jurnal Ilmu Hukum dan Sosial* 4, no. 3 (2026): 112–125, <https://doi.org/10.51903/j66vnn80>.



Judicial training remains necessary but cannot replace rules. Education may address cognitive bias, the limits of demeanor assessment, communication with persons with disabilities, reproducibility of digital evidence, and evidence-based judicial reasoning. Research on bias indicates that effective interventions should combine decision structures, recording duties, and corrective mechanisms rather than relying only on exhortations to remain objective.³⁴ A five-limit checklist can require judges to separate what was actually observed from the inference drawn and then determine whether the inference has independent support.³⁵

This reconstruction also clarifies the relationship between judicial observation and the open category in Article 235(1)(h). The open category should accommodate emerging forms of evidence not otherwise listed, whereas observation should function as a judicial means of perceiving facts from evidence present before the court. Neither category may be used to evade the requirements governing the other. Unlawfully obtained information cannot be rescued through judicial observation. Conversely, observation of a lawful object must still satisfy disclosure and corroboration. Distinguishing the categories prevents a double expansion that would turn the evidentiary system into a completely open structure without procedural safeguards.³⁶

The five-limit model does not eliminate judicial conviction. Conviction remains the final assessment after lawful evidence has been tested. The model regulates how that conviction is formed so that it can be justified. An inexplicable conviction is not judicial independence, but an unreviewable decision. Judges remain free to determine weight but must identify source, process, and reasoning. This obligation is consistent with Article 250 of the new KUHAP, which demands

³⁴. Australian Law Reform Commission, *Cognitive and Social Biases in Judicial Decision-Making*, Background Paper JI6 (Brisbane: ALRC, 2021), 25–41; Alexandra-Christina Malegiannaki, Athanasios Chatzopoulos, and Konstantinos Tsagkaridis, “Assessing Judges’ Use and Awareness of Cognitive Heuristic Decision-Making,” *Frontiers in Cognition* 4 (2025): 1421488, 1–15, <https://doi.org/10.3389/fcogn.2025.1421488>.

³⁵. Muhammad Abdul Azis and Pujiyono, “Causative-Victim Tracing for Integrative Criminal Policy on AI Deepfake Face and Voice Crimes in Indonesia,” *KRTHA BHAYANGKARA* 20, no. 2 (2026): 518–537, <https://doi.org/10.31599/krtha.v20i2.5666>.

³⁶. Muhammad Abdul Azis, Nur Rahman, and Riski Ananda Kusuma Putri, “Between the Future or Just Utopia: A Critical Analysis of the Legal Personhood of Artificial Intelligence on the Claim as a Patent Inventor,” *Critical Legal Review* 1, no. 5 (2024): 1–25.



clear and complete reasons and makes reasoning a condition for the validity of a conviction.

D. Conclusion

Judicial observation under Article 235(1)(g) of the new KUHAP pursues a legitimate purpose by supporting direct examination and an active judicial role in fact-finding. An undefined provision, however, would conflict with fair legal certainty, impartiality, the accused's right to know and challenge adverse material, and the allocation of the burden of proof if interpreted as independent evidence created by the judge. Its constitutionality can be preserved only conditionally by treating observation as a derivative and corroborative means of perceiving facts from a lawful evidentiary process. The limits must include an official source and forum, a concrete and verifiable object, corroboration by independent evidence, disclosure and adversarial testing, and accountability permitting meaningful review. Observation cannot arise from private knowledge, impressions concerning character or mental state, or artificial duplication of one source. It also cannot independently prove an element of the charge.

The Constitutional Court should condition the constitutionality of Article 235(1)(g) on those five minimum safeguards. The Supreme Court should implement them through a Supreme Court Regulation governing notice, recording, objections, re-examination, expert involvement, reopening of evidence, and appellate correction. Trial courts must disclose every observation before the evidentiary phase closes and explain the object, procedure, party responses, corroborating evidence, and assigned weight in the judgment. A violation concerning source, testing, or reasons must result in exclusion, reopening of proof, or quashing of the judgment where the observation determined the conviction. This structure preserves the active judge as manager and evaluator of evidence without transforming the judge into a witness who cannot be examined.



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