

DISSENTING OPINION IN JUDGES' DECISIONS LINKED TO THE PRINCIPLE OF JUSTICE

Eti Koerniati

Prgram Studi Doktor Ilmu Hukum Fakultas Hukum Universitas Islam Bandung

Mail: eti.koerniati73@gmail.com

DOI : <https://doi.org/10.29313/shjih.v20i1.9810>

Submitted : May 2022

Accepted : November 2022

Published : December 2022

ABSTRACT

Judge's decision-making often invites problems because it is considered less transparent and justice seekers often question accountability issues besides the extent of their position in influencing sanctions in determining verdicts. This study aims to analyze the implementation of the effect of dissenting opinion on determining the weight of sanctions in making transparent judge decisions and determining the position of dissenting opinions in making rational judge decisions in the context of strengthening transparency and fair accountability. This research method uses a normative juridical approach that analyzes secondary data and with qualitative analysis techniques that produce conclusions. The results showed that the implementation of the inclusion of dissenting opinions in the formulation of judge's decision-making encountered various problems such as the varying quality of judges' abilities, the problem of guaranteeing the safety of judges, the culture of seniority so that it had little influence on the severity of the sanctions (strafmaat) that the defendant had to accept. The position of dissenting opinion in making transparent and accountable judge decisions is a means for judges to assess and explore case material with their own knowledge so that the public can evaluate the decision (exst-post). The inclusion of different opinions from minority judges in the decision is useful as a reference material for justice seekers (justitiabelen) if they are not satisfied with the decision to take legal action and put these different opinions into the memory of appeal/cassation so that the correction curve for the decision is quite large.

Keywords: *Differences of Opinion, Transparency, Accountability, Justice.*

A. INTRODUCTION

The term "*dissenting*" in the English dictionary is a verb from the word "*dissent*," which means to disagree, and "*opinion*" means thoughts and feelings. If put together, it will become a "dissenting opinion," which means different opinions on a legal issue.¹

The current problem of dissenting opinion is the binding nature of the decision. Suppose a judge with a different opinion considers that the defendant's actions based on the available evidence deserve weighting. In that case, that opinion should influence the weight of the sanctions imposed on the defendant or vice versa. That opinion should influence decision-making is free if the argument has a truth that can be accounted for compared to the majority of judges who have the same opinion.²

Sometimes, the opinions of different judges were not accommodated by the panel's chairman. In this case, these opinions had no value or influence even though several dissenting opinions had material truth compared to the majority judges' opinions. The reality of rejecting the dissenting opinion of minority judges in making decisions impacts not achieving a sense of justice for perpetrators, society, and victims. Thus, the problem of positioning dissenting opinions in judicial decision-making is significant to analyze from the justice framework because a judicial crown is a judgment. Suppose the judicial decision is fairly decided. It will increase public trust in the Indonesian judiciary system.

Furthermore, the dissenting opinion is more about appreciating a judge's opinion regarding the a quo case. It can stimulate a change in statutory law and

¹Pamalongo, Nawawi. *Dissenting opinion (The Necessary Evil)* , Jakarta: Varia Perjudi, No. 323, 2012. Pg 57

² Achmad Sodiki, *Dissenting opinion Towards a Living Constitution* , UB Press, 2008, page 54

the possibility that other judges will follow it in trying similar cases.³ Another issue with dissenting opinions is transparency and accountability because Article 182 paragraph (7) of the Criminal Procedure Code (KUHAP) stipulates that a judge's decision is recorded and confidential. The term confidential indicates that dissenting opinion is unpublished by the court even though it can become a material source and the reference for filing an appeal. In other words, dissenting opinion is beneficial to the defendant to strengthen the basis and reasons to file legal remedies.⁴

Suppose the court wants to implement transparency and accountability, the records and minutes of judicial decisions should be made public so that the parties involved in the criminal justice process know the basis and considerations of each judge's opinion in making decisions. Dissenting opinion occurs due to different interpretations of case law, using different principles or interpretations of facts.

Furthermore, in the decision issued, the judge can state agree in specific parts and disagree in certain parts. Judges who disagree or have different opinions should not write that they agree in the note because their position is contrary to the decision. This fact shows that judges have independence in determining attitudes, opinions, and arguments. So far, what has happened is that judges disagree. Instead, they have to sign the record of decision-making, even though they disagree with the contents. This condition requires effort and thought to carry out reforms and breakthroughs so that the decision-making process can accommodate different judges' opinions and influence decisions. Based on the abovementioned problems, the author will review two problems: (1) the implementation of the effect of dissenting opinion on determining the weight of sanctions in making transparent judge decisions? (2) the position of

³ Ahmad Kamil. *Philosophy of Freedom of Judges*. Kencana Prenada Media Group . Jakarta . 2012. p83

⁴ Raymond Ali, *Need Dissenting opinion at the Supreme Court* , Judicial Observer. 2007 , p. 74

the dissenting opinion in making a rational judge's decision in the context of strengthening transparency and accountability?

B. RESEARCH METHODS

The research uses a normative juridical approach because it uses a statutory review and legal principles as stipulated in the Criminal Procedure Code. The data used in this research is secondarily gathered from books, journal articles, papers, and research related to dissenting opinions. The data obtained were then analyzed qualitatively by describing the existing secondary data and directed at the conclusions drawn from the analysis results.

C. DISCUSSION

1. Implementation of the Effect of Dissenting opinion on the Imposition of Sanctions in Making a Transparent Judge's Decision

It is undeniable that the existence of a dissenting opinion in a panel of judges under the Indonesian judicial system is still debatable. Especially since there is no apparent reward and punishment system that strictly serve as a legal basis for judges who commit dissenting opinion. In practice, the judges' motivation to make a dissenting opinion is still lacking, plus there is a feeling of inappropriate (*ewuh pakewuh*) when a junior judge carries out the dissenting opinion against a member of the panel of judges who are considered more senior.⁵

In the author's opinion, the appearance of a dissenting opinion included in the judge's decision has a function as a means of controlling each judge to supervise fellow members of the other panel of judges in maintaining the purity of a decision.⁶ Dissenting opinion is expected to be a means for a judge to show

⁵ R. Achmad S. Soema in Pardja, *Criminal Law in Jurisprudence*, Armico, Bandung, 1990. P. 57

⁶ HM Laica Marzuki, *Building an Accountable Law Enforcement System*, Journal of Justice, Vol 4 No.2 Center for Law and Justice Studies, 2005, p.9

the general public that there are still judges who try to decide honesty and conscience, who truly uphold truth and honesty when making a decision.

The dissenting opinion made by a judge in a criminal case decision is essential for assessing the integrity of the judge concerned. Of course, the dissenting opinion in question is based on an in-depth analysis of a case being examined so that there is no impression that the dissenting opinion made by minority judges who have different opinions is forced for an individual's particular interests or specific group.

The basis for these considerations shows the educational background and professionalism of Supreme Court Justice Djunaedi in human rights. Even though the Supreme Court judges handling the case are the best judges who are competent in their respective fields, it is evident here that there is an influence from the educational factor of the formation of the Supreme Court justices concerned.⁷

This difference in professionalism and background can also be seen in the Non-Budgeter Fund case involving Akbar Tandjung. The Chief Judge of the Panel, Paulus Effendi Lotulung, who has expertise in State Administration, assessed Akbar Tandjung's actions and based his considerations from a legal perspective on state administration. In contrast, Abdul Rahman Saleh, who made a dissenting opinion with a background of experience in Non-Governmental Organizations and Legal Aid Institutions, was more base his considerations on the perspective of individual responsibility, which should make every effort to prevent the leakage of state funds.

This imbalance or difference in the ability of judges to analyze a case can be minimized by streamlining training for judges to improve the quality of judges in making new legal discoveries through court decisions which are used as the basis for legal considerations. Implementation of Dissenting Opinion in making judges' decisions, the author's research found several things:

⁷Endang Ali Ma'sum. *The Role of Judges as Law Reformers in Realizing the Supreme Court* . Paper, 2018. Pg 73

1. There are no standard provisions regarding the position of a dissenting opinion in a decision.

The absence of provisions regarding the position of the dissenting opinion in this judge's decision has led to differences of opinion and application by judges in practice. Differences of opinion regarding the position of a dissenting opinion in this judge's decision include:

- a. Some argue that dissenting opinion is published after the verdict or is attached, and only the main objections are loaded, and this opinion is an integral part of the decision. In practice at the Supreme Court level, one of the well-known forms of dissenting opinion is Decision Number: 572 K/Pid/2003 in the case of alleged corruption in non-budgetary funds BULOG cassation of the Corruption case with the defendant Winfried Simatupang. The Dissenting Opinion was read by a member of the Supreme Court judge named Abdul Rahman Saleh.
 - b. Another opinion states that dissenting opinion is included in consideration of the decision after the main subject matters, for example, in a criminal case after outlining the elements of the accused which have been proven or not proven, while in civil cases, after a discussion of the main case. The differences that are loaded are principle differences and not gradual.
2. There are differences in ability among judges to analyze a case.

The preparation of a dissenting opinion by a judge is closely related to the technical capacity of the judge concerned. A dissenting opinion must be made by explaining appropriate legal reasoning in line with logic and must be able to explain the background and moral reasons. Opinions must be made straight and concise so that people who read dissenting opinions understand what the purpose of these dissenting opinions is. Thus, it is not easy to make a dissenting opinion because it involves the credibility of the judge concerned. The reasons and arguments presented must be clear and coherent so as not to cause various interpretations from those who read them. The arguments in this dissenting opinion reflect the mindset of the judge who made it. By

understanding this thought, one can judge the honesty and sincerity of the judge in examining the case he is handling.

The effort to minimize dissenting opinion is to provide sufficient opportunity to the members and chairman of the assembly, especially if there is a difference of opinion in principle, by allowing reviewing the case file in question and if, after several delays, deliberation cannot be reached with a unanimous consensus, the opinion must be included in the decision.⁸

3. Lack of guarantees for the safety of some judges' lives, especially in conflict areas

A judge stated this in a seminar in the Maluku area, where there were still many riots at that time. The judge expressed his concern about the safety of his life when he was about to decide on a conflict area, especially in cases involving influential people in the area concerned.

Regarding this matter, of course, it is necessary to increase the support of facilities and infrastructure in the field of law, especially for Courts, Prosecutors' Offices, Police, Correctional Institutions, State Detention Centers, Correctional Centers, State Storage of Confiscated Goods, Skills development for inmates and other legal services.

4. Creating a conducive, safe community life atmosphere, not taking the law into their own hands

This is, of course, not only the responsibility of the police but the obligation of all components of society to create an orderly and safe atmosphere. Suppose an orderly society has been created, not taking the law into their own hands. In that case, the judge will be calmer in expressing his opinion on a case without feeling anxious about his soul's safety.

5. A career system

⁸Kartini Kartono, *Media Advocacy and Enforcement of Child Rights*, Indonesian Child Advocacy Journal, Vol II No 2, 1998.

A career system in the judicial appointment and promotion is also an obstacle that creates a feeling of *ewuh pakewuh* among the judges when they express their opinions in the decision.

This is especially felt by judges whose rank and experience are younger than judges on other panel members in the same panel. This feeling of *ewuh pakewuh* still often arises in practice which is also influenced by the attitude of the arrogance of power from a judge who feels he is more senior to judges who are members of the panel who are younger. This attitude certainly affects whether or not a member of the panel of judges issues a dissenting opinion.

Even more extreme, Cappelletti argues that: "career judges are less prominent in personality and tend to have a bureaucratic mentality". The obligation for judges to always base their decisions on existing regulations also causes judges to be uncreative.

2. Position of Dissenting opinion in Judge Decisions to Strengthening Transparency and Accountability with Justice

Transparency in making judges' decisions has at least three critical aspects: (1) related to the availability of information; (2) clarity of roles and responsibilities between the court and other institutions as part of processes that require transparency; (3) the system and capacity of the judge behind the decision as well as systemic information guarantees.⁹ These three critical aspects are interrelated because the availability of an information system alone is insufficient if there is no explanation of the roles and responsibilities of the courts and the institutions involved. All of these subjects must be guaranteed based on a definite system.

What is done at each stage by the institutions and law enforcers who play a role and are responsible for it must show their accountability. According to the

⁹Motivation, *Transparency and Accountability in Investment Journal of Capacity Building & Good Governance Innovation Forum* . Journal of Democracy Vol. 8: September-November 2003. Pg 21

authors, accountability is the obligation of judges as judicial officials to deliver their decisions to the public and the public's right to reject decisions if it is seen as giving satisfaction to the community as the main element or perhaps it is essential in a democracy. In this case, the accountability for decision-making by judges includes the transparency dimension.¹⁰

The above description provides direction to judges that transparency and accountability are important. First, the dimension of the judge's obligation to (a) be accountable for what has been decided openly (transparently); (b) shows what it does in the form of reports or explanations, all of which are obligations to fulfil community rights. Second, in the form of the community's right to (a) obtain information in the form of accountability and (b) feel satisfied with the decision because every stage of the decision-making process always informs the community and vice versa, the community also has the right to carry out control over each process. In this case, it cannot be separated between what is done by the judge and the interests of justice seekers. When a judge does not inform the community about what he is doing, does not satisfy the community or cannot accommodate the interests of the community so that it is disappointing, then that automatically means that he has committed a violation against the community.¹¹

Transparency and accountability of judicial power will never materialize in a totalitarian or authoritarian country. In this model state, the direction in which the country is directed or how government policies are taken are all determined unilaterally by the policy-making elites. They position themselves as smart people who no longer need to listen to the people's aspirations and no longer need to reveal what they are doing to the public, especially since, in a certain process, they are considered to be representatives of the interests and aspirations of the people. The people, in other words, are considered to know nothing or no longer need to be informed or asked for their aspirations because everything has been

¹⁰Bagir Manan, *Restorative Justice (An Introduction)*, Varia Judicial Law Magazine, Year XXI No. 247 June 2006, p. 75

¹¹Dey Ravena, *Discourse on Progressive Law Concepts in Law Enforcement in Indonesia*, in *Law for Humans*, Main Pillars of Mandiri, Jakarta, 2012. Pg 54

considered completed by the ruling elites. In short, everything has been considered completed by the ruling elite. Thus, the capacity of the state (represented by the government) to shape and control individual life in society is truly maximized so that, at the same time, it negates the right of the people to participate in the processes of state life. In this explanation, the state has violated people's rights because it is neither transparent nor accountable.

The concept of transparency refers to a situation where all aspects of the service delivery process are open and can be known easily by users and stakeholders who need them. Suppose all aspects of the service delivery process, such as the requirements, costs and time required, method of service, and the rights and obligations of service providers and users, are published to the public so that they are easily accessible and understood by the public. In that case, providing these services can be considered highly transparent. Conversely, if some or all aspects of the service delivery process are closed, users and other stakeholders find the information difficult to obtain. The implementation of the service does not meet the principles of transparency.¹² Therefore, at least according to the author, three indicators can be used to measure the transparency of judges, namely :

The first indicator measures the openness of the decision-making process, especially at the first level. The assessment of the level of openness here covers the entire process, including examining witnesses, perpetrators, evidence and the mechanisms or procedures for making decisions that must be fulfilled. The process must be published openly and easily known by justice seekers. The court must provide service facilities to the public to obtain a copy of the decision.

The second indicator of transparency refers to how easily regulations and service procedures are accessible to the public. An explanation regarding legal considerations and differences of opinion among the panel of judges is, as a matter of fact, very important for justice seekers. If the rationality of all these

¹²Hariyoso, S. *Bureaucratic Renewal and Public Policy* . Civilization. Jakarta, 2002, page 54

things can be known and accepted, obedience to the messenger will be easily realized.¹³

The third indicator of service transparency is the ease of obtaining information regarding copies of decisions. The easier it is for the public to obtain information about a copy of the decision, the higher the transparency. For example, when the public can easily obtain copies, the public service can be assessed as having high transparency. Likewise, when information on how to obtain a decision can be obtained easily by the public, it can be said to have a high level of transparency.

In this regard, the authors identify four forms of transparency implications that are needed, including (1) that all information relating to the judge's decision-making process must be open to anyone. Non-disclosure of information will encourage fraud; (2) the control mechanism will not occur if there is no transparency in obtaining access to information; (3) the public must have access to all information/documents related to the decision; and (4) all of this information must be understandable/easily understood by the community.¹⁴

In addition to transparency, accountability is a professional standard that must be achieved/implemented by judges in deciding a case. Accountability can be used as a tool/means to assess the quality of a decision so that it can correctly identify its strengths and weaknesses. This is in line with what Jabbra and Dwivedi say: public accountability is the basis for administering government. It is needed because government officials must be accountable for their actions and work for the public and the organization where they work. With public accountability, every official must be able to present correct and complete information to assess their performance, whether the community does it, their work organization/agency, their service user groups, or their profession. The aim is to explain how accountability is to be carried out, what methods are used to

¹³Ansori, *Analysis of the Judge's Decision on the Crime of Physical Violence in the Household*, Syiar Hukum Journal of Legal Sciences | Volume 19 Number 1. 2021, p. 30

¹⁴*Ibid.*, p. 64

carry out the task, how is the reality of its implementation and what the impacts are.¹⁵

Accountability is often stated as an operational form of *responsibility*; *therefore*, the two are related. Every judge must be *responsible* for carrying out his duties effectively, namely by maintaining the continuity of his duties properly and smoothly, managing them professionally and carrying out various roles that can be trusted. Judges are expected to work honestly and enthusiastically and carry out their duties on the basis of expertise and in accordance with their professional standards. In this regard, the authors argue that there are two forms of accountability implications that are needed, including: (1) judges as upholders of justice must be responsible for carrying out their authority properly; (2) the community, especially justice seekers, have the right to control, question, and hold judges accountable in exercising this authority, including in terms of decision-making mechanisms.

The position of the dissenting opinion in the decision-making of judges is carried out transparent and accountable, reflecting a sense of justice for the community, especially perpetrators and victims. For perpetrators, if the dissenting opinion benefits their position, it can be used as a reference to file an appeal and include the judge's different opinion in the appeal memory because it is not impossible for a judge at the high court level to agree with the minority opinion in the first decision.

In certain cases, dissenting opinion can be positioned as a means to create a sense of justice for parties who do not agree with the judge's decision issued with a majority voting system so that transparency and accountability of decisions containing dissenting will provide an opportunity to correct possible errors in the decision will be open because the public, especially parties in the justice system, will obtain complete information.

¹⁵Jabbara, J.G dan Dwivedi, O.P. *Public Service Accountability*. Connecticut: Kumarian Press, Inc. 1989, hlm 83

D. CONCLUSION

1. The implementation of the inclusion of dissenting opinions in the formulation of judge decision-making encounters various problems. There are no implementing regulations that require the inclusion of dissenting opinions, so in practice, it creates various forms, the quality of judges' abilities varies in analyzing cases, the problem of guaranteeing the safety of judges when different opinions are published, the existence of seniority issues makes judges who are relatively younger and have different opinions not be accommodated and give preference to the most opinions. This practice makes dissenting opinions less influential on the severity of the sanctions (*strafmaat*) that must be received by the accused and does not reflect the implementation of the principle of transparency in the criminal justice process.
2. The position of the dissenting opinion in making transparent and accountable judge decisions is a means for judges to evaluate and explore case material independently with their knowledge so that the community can evaluate decisions (*exst-post*). Including different opinions from minority judges in decisions is useful as reference material for justice seekers (*justitiabelen*) if they feel dissatisfied with the decision to take legal action and put these different opinions into the appeal/cassation memory so that corrections to decisions are determined based on votes. Most open the opportunity to be corrected by a higher court. Thus the resulting decision is expected to provide a sense of justice to the litigants and society.

BIBLIOGRAPHY

A. Book

- Achmad Sodiki, *Dissenting Opinion Menuju Living Constitution*, U.B. Press, 2008.
- Ahmad Kamil. *Filsafat Kebebasan Hakim*. Kencana Prenada Media Group. Jakarta. 2012.
- Raymond Ali, *Perluakah Dissenting Opinion di Mahkamah Agung, Pemantau Peradilan*. 2007.
- R. Achmad S. Soema di Pardja, *Hukum Pidana Dalam Yurisprudensi*, Armico, Bandung, 1990.
- Endang Ali Ma'sum. *Peran Hakim Sebagai Pembaharu Hukum Dalam Mewujudkan Peradilan Yang Agung*. Makalah, 2018.
- Dey Ravena, *Wacana Konsep Hukum Progresif Dalam Penegakan Hukum di Indonesia, dalam Hukum Untuk Manusia, Pilar Utama Mandiri*, Jakarta, 2012.
- Hariyoso, S. *Pembaharuan Birokrasi dan Kebijakan Publik*. Peradaban. Jakarta, 2002.
- Jabbara, J.G dan Dwivedi, O.P. *Public Service Accountability*. Connecticut: Kumarian Press, Inc. 1989.

B. Papers / Journals / Magazines

- Bagir Manan, *Restorative Justice (Suatu Perkenalan)*, *Majalah Hukum Varia Peradilan*, Tahun XXI No. 247 Juni 2006
- H.M. Laica Marzuki, *Membangun Sistem Penegakan Hukum Yang Akuntabel*, *Jurnal Keadilan*, Vol 4 No.2 Pusat Kajian Hukum dan Keadilan, 2005.
- Motik, *Transparansi dan Akuntabilitas dalam Berinvestasi* *Jurnal Forum Inovasi Capacity Building & Good Governance*. *Jurnal Demokrasi* Vol. 8: September-Desember 2003.
- Kartini Kartono, *Media Advokasi dan Penegakan Hak-Hak Anak*, *Jurnal Advokasi Anak Indonesia*, Vol II No 2, 1998.
- Pamalongo, Nawawi. *Dissenting Opinion (The Necessary Evil)*, Jakarta: *Varia Peradilan*, No. 323, 2012.

Ansori, Analisis Putusan Hakim Terhadap Tindak Pidana Kekerasan Fisik Dalam Rumah Tangga, Syiar Hukum Jurnal Ilmu Hukum | Volume 19 Nomor 1. 2021.

C. Legal Materials

Constitution of 1945

Law No. 8 of 1981 concerning the Criminal Procedure Code

Law No. 48 of 2009 concerning Judicial Power