

THE FUNCTION OF JUDICIAL DISSENT IN INDONESIA'S CONSTITUTIONAL COURT

Simon Butt

Sydney Law School
simon.butt@sydney.edu.au

Abstract

Indonesian judges are permitted to issue dissenting opinions. Constitutional Court judges regularly hand them down. However, neither judges nor academics have outlined the purposes of dissenting opinions in Indonesia. This article aims to promote discussion about what these purposes are, or should be, in Indonesia, with a view to increasing the utility of dissents. It begins by considering the international scholarly literature details some purposes recognised in other countries, such as increased transparency and accountability, but also some disadvantages, such as the perceived weakness of a divided court. It then considers how the Constitutional employs dissents, before exploring some of the uncertainties and unanswered questions about dissents and their use in Indonesia.

Keywords: Constitutional Court, Indonesia, Judicial Dissent

I. INTRODUCTION

The judgments of Indonesia's Constitutional Court often contain 'dissenting opinions' (*pendapat berbeda*). In them, one of more judges writes reasons indicating why they would have decided the case differently to the way a majority of the Court decided it. However, there is, to my knowledge, no consensus amongst Indonesian judges and academics about the significance and purpose of dissents. In one sense, this is unsurprising: publishing dissenting opinions alongside majority or other opinions in a single judgement document have long been a feature of the common law tradition. Yet Indonesia is a civil law country. And while there appeared to be good reasons to introduce dissenting opinions into the Indonesian legal system after the fall of Soeharto in 1998, they were introduced very quickly, as part of broader reforms prompted by foreign donors.

There was very little accompanying discussion in Indonesia about what dissents were and what they could achieve.

Yet despite the lack of discussion about their significance and purpose, dissenting judgements (or *pendapat berbeda* as they are sometimes called in Indonesia) are now entrenched parts of judicial practice in Indonesia. All Indonesian judges accept that they have the freedom and authority to issue dissents. However, they appear to be rarely issued by most Indonesian courts. The main exception of the Constitutional Court, which appears to issue them in roughly 13% of cases. Yet even here, dissents are not always used for the same purposes as they are used for in courts of other countries, particularly common law countries, but also some civil law countries. In this article, the author aims to demonstrate how the Constitutional Court uses dissents and how it could use them to further enhance the transparency and accountability of its decision-making.

In section 1, the discussion is begun by explaining the common law's approach and the civil law tradition's general aversion to dissenting judgments, noting the movement in many civil law countries towards allowing dissents. The author also examines some of the scholarly literature that covers perceived advantages and disadvantages of dissents. Furthermore, in section 2, the circumstances behind the introduction of dissenting opinions in Indonesia are outlined, first in the commercial courts (*pengadilan niaga*), then in the ordinary courts and, of course, the Constitutional Court. Finally, in section 3, the author considers how the Indonesian Constitutional Court uses dissenting opinions and highlights two fundamental but unanswered questions: what is the weight of a dissenting opinion and when should the Constitutional Court consider itself to be 'split'?

II. DISCUSSION

2.1. Dissents in the Civil Law Tradition and the Literature

The main purposes of dissents, expressed in legal scholarship, are numerous, though how they are used in a particular country, if at all, is often a matter of legal tradition and legal practice.

Of course, dissenting judgments derive from the English common law tradition, and are deeply ingrained in countries following that tradition, like Australia, Malaysia and the United States. Dissenting opinions developed in the English courts from the end of the 16th century and then spread to other common law countries.¹ In these places, it is virtually inconceivable for judge to be prevented from expressing their own views if they differ from other judges on the bench. Most common law judges previously worked as barristers, most of who will have built a successful career by making their own legal arguments and being fiercely independent, so being forced to 'conform' feels deeply inappropriate, perhaps even dishonest. Common law judges demand that they must feel free to express their opinions about – say, the identification of the relevant law, the interpretation of that law, and the relevant facts – if they differ from other judges on the panel. Of course, dissents do not create binding precedent, but they have important functions, discussed below, including forming the basis for future legal change.

By contrast, countries following the civil law tradition, including Indonesia, have traditionally prohibited dissents. Some countries even consider it 'unethical' for a judge to openly disagree with other members of the Court.² This seems to follow French views on the law and the role of judges in applying it. During the Napoleonic period, a Civil Code was developed that was thought to be so perfect and complete, and so easy to apply, that it resulted in only one answer to a legal problem. Judging was conceived as a mathematical process that could be performed by a relatively low-ranked administrator. According to the theory, because case outcomes were inevitable, disagreement on the bench was inconceivable, and so judges did not need to be able to give dissenting opinions. So, to borrow the words of Ginsburg, former Justice of the United States Supreme Court, many civil law courts: issue a collective judgment, cast in stylised, impersonal language. The author of the judgment is neither named

¹ Andrew Lynch, "Is Judicial Dissent Constitutionally Protected?," *Macquarie Law Journal* 4 (2004): 81–104.

² John Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America.*, 2nd ed (Stanford California: Stanford University Press, 1985), 121.

nor otherwise identifiable. Disagreement, if it exists, as it sometimes does, is not disclosed.³

Obviously, if judges eschew doubt or controversy and 'speak with one voice',⁴ it is easier to maintain the ideal that judges are instruments or 'mouths' of the law and are merely espousing the single true application of the Code.

Of course, these civil law views of codes and courts are now quite old and most civil law countries now recognise that codes are not perfect, and that judging is not a simply mechanical process. Accordingly, many countries have considered giving judges power to issue dissents, at least in some of their courts. Yet even in these courts, disagreements are not always 'visibly displayed in the published decision'.⁵ There are some exceptions, however: notably the Constitutional Courts of Germany and Spain, and some courts in South America.⁶

2.1.1. Scholarly Literature about Dissents

As mentioned, the scholarly literature identifies various advantages and disadvantages of permitting judicial dissents.

2.1.1.1 Transparency and Legitimacy

If judges can dissent, then they will not usually be required to follow a majority view they think is incorrect. Judges can, therefore, 'do their job', which is to impartially apply the law. As Lynch describes it:

While certainly 'identification of the applicable law, followed by an application of that law' can occur with unanimity, the reality is that it very often does not – and to no particularly ill effect. This is because there is much legitimate scope for disagreement over the law. As Ginsburg has stated, '[d]isagreement on the law or its proper application nowadays is almost universally admitted to be inevitable some of the time'. The presence of dissenting judgments provides assurance that the judges are conducting a *legal* debate in fulfilling their tasks of identification and

³ Ruth Bader Ginsburg, "The Role of Dissenting Opinions," *Minnesota Law Review* 95(1) (1999): 2.

⁴ Erhard Blankenburg, *Dutch Legal Culture*, 2nd rev. and enl. ed. (Deventer; Boston: Kluwer Law and Taxation Publishers, 1994), 75.

⁵ Markesinis, "Conceptualism, Pragmatism and Courage: A Common Lawyer Looks at Some Judgments of the German Federal Court," *American Journal of Comparative Law* 34 (1986): 349–50.

⁶ Carl Beudenbacher, "Some Remarks on the Method of Civil Law," *Texas International Law Journal* 34 (1999): 333.

application of the law. In short, the possibility of dissenting opinions ensures that judicial power is in fact – and is seen to be – exercised with an appropriate focus upon the law, rather than being simply a smokescreen for decisions based upon morality, economics or public policy.⁷

Any divisions in the court are not hidden from the public, who can see who disagrees with what, why there is disagreement, and the extent and depth of that disagreement.⁸ As one Australian High Court Judge has expressed it:

[t]he determination in accordance with the judicial process of controversies as to legal rights and obligations and as to the legal consequences attaching to conduct is vital to the maintenance of an open, just and free society. Quite apart from the public's right to know what matters are being determined in the courts and with what consequences, open and public proceedings are necessary in the public interest because secrecy is conducive to the abuse of power and, thus, to injustice.⁹

Some scholars argue that this transparency function is more important for Constitutional Courts in particular, because their function is highly political.¹⁰ This means Constitutional Courts might be expected to provide more compelling and explanatory decisions that seem to take account of competing views.

Related benefits appear to be judicial independence, or at least an enhanced perception of independence. Again, Lynch points out:

The presence of dissenting judgments is one factor which provides reassurance that the courts are staffed by judges beholden to nothing more powerful than their own individual appreciation of the state of the law. If the judges are prepared to disagree with each other on occasion, then it seems reasonable to presume they will have no qualms about disagreeing with the executive and legislature as well when the need arises.¹¹

⁷ Lynch, "Is Judicial Dissent Constitutionally Protected?"

⁸ RF Blomquist, "Dissent, Posner-Style: Judge Richard A Posner's First Decade of Dissenting Opinions, 1981-1991 – Toward an Aesthetic of Judicial Dissenting Style," *Missouri Law Review* 69 (2004): 77.

⁹ *Re Nolan; Ex parte Young* (1991) 172 CLR 460, 496-7, per Gaudron J.

¹⁰ Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000).

¹¹ Lynch, "Is Judicial Dissent Constitutionally Protected?"

2.1.1.2 Enhanced Judicial Accountability

Many scholars argue that dissents perform an important accountability function too.¹² In many common law countries, judges circulate draft decisions for other judges to read before they are finalised. Many judges say that this process forces majority judges to better justify their decisions before they issue them.¹³As former Ginsburg puts it:

My experience teaches that there is nothing better than an impressive dissent to lead the author of the majority opinion to refine and clarify her initial circulation. An illustration: the Virginia Military Institute (VMI) case, decided by the Court in 1996, held that VMI's denial of admission to women violated the Fourteenth Amendment's Equal Protection Clause.⁸ I was assigned to write the Court's opinion. The final draft, released to the public, was ever so much better than my first, second, and at least a dozen more drafts, thanks to Justice Scalia's attention-grabbing dissent.¹⁴

Justice Ginsburg continues:

On occasion—not more than four times per term I would estimate—a dissent will be so persuasive that it attracts the votes necessary to become the opinion of the Court. I had the heady experience once of writing a dissent for myself and just one other Justice; in time, it became the opinion of the Court from which only three of my colleagues dissented.¹⁵

2.1.1.3 Basis for Legal or Interpretative Change

Dissents are sometimes used as a basis for legal change in common law countries. This might happen if a court in a later case uses or adopts the reasons contained in a dissent from an earlier case.¹⁶ In these types of cases, a majority discusses the previous dissent and then explains why it is better than the majority decision in the previous case.

¹² Ugo Mattei, "Why the Wind Changed: Intellectual Leadership in Western Law," *American Journal of Comparative Law* 42 (1994): 206.

¹³ RF Blomquist, "Dissent," 77.

¹⁴ Ginsburg, "The Role of," 2.

¹⁵ *Ibid.*

¹⁶ A. J Jacobson, "Publishing Dissent," *Washington and Lee Law Review* 62, no. 4 (2005): 1631; RG Simmons, "The Use and Abuse of Dissenting Opinions," *Louisiana Law Review* 16 (56 1955): 404–6; RB Stephens, "The Function of Concurring and Dissenting Opinions in Courts of Last Resort," *University of Florida Law Review* 5 (1952): 498.

Cole provides some examples of this in the context of the United States:

Justice John Marshall Harlan's lone dissent in *Plessy v. Ferguson* in 1896, proclaiming that the Constitution is "colour-blind," was vindicated 58 years later in *Brown v. Board of Education*, which declared segregated schools unconstitutional. Louis Brandeis's 1928 dissent in *Olmstead v. United States*, declaring a "right to be let alone," led the court, years later, to recognize privacy rights not only in the specific setting presented by that case — wiretapping — but also with respect to the rights to contraception and abortion. Modern First Amendment doctrine can be traced to a pair of dissents penned by Oliver Wendell Holmes Jr. and Brandeis in the early part of the 20th century. Furthermore, Justice Harry Blackmun's compelling articulation of privacy principles in refusing to join the Supreme Court's upholding of a Georgia law making homosexual sex a crime became the law of the land 17 years later, when a majority of the court reversed *Bowers v. Hardwick* in *Lawrence v. Texas*.¹⁷

In some cases, the legislature has also adopted reasoning contained in a dissenting opinion.¹⁸

2.1.1.4 Disadvantages of Dissent

Dissent also brings with it several consequences which, in many countries – both civil and common law – are considered disadvantages. Perhaps the most significant problem is that it indicates a divided court, with some commentators taking this to mean that the Court is weak or that its decisions lack authority, or at least appears to be.¹⁹ By contrast, unanimous courts can create an impression of strength and stability, and security in the law interpreted and even created by that court.²⁰ In courts where dissent is permitted and is commonly employed, unanimous decisions can be used to 'make a statement' – about an important area of law or to resolve long-standing uncertainty, for example – simply because all of the judges agree with it. Even though this view is commonly associated with the

¹⁷ David Cole, "The Power of a Supreme Court Dissent," *Washington Post*, October 29, 2015, https://www.washingtonpost.com/opinions/the-power-of-a-supreme-court-dissent/2015/10/29/fbc80acc-66cb-11e5-8325-a42b5a459b1e_story.html?utm_term=.b392c62038be.

¹⁸ Claire L'Heureux-Dube, "The Dissenting Opinion: Voice of the Future?," *Osgoode Hall Law Journal* 38(3) (n.d.): 495–512.

¹⁹ Michael Wells, "French and American Judicial Opinions," *Yale Journal of International Law* 19, no. 1 (1994): 98.

²⁰ Ginsburg, "The Role of," 2.

civil law tradition, many courts in the common law world also see value in unanimity. Perhaps most famously, decisions of the United States Supreme Court under Chief Justice John Marshall were usually unanimous.

2.2. History of Dissents in Indonesia

In the lead-up to dissenting opinions being permitted in Indonesia in commercial courts (from 2000 and more generally from 2004), there was relatively little advocacy or discussion about the utility of allowing dissents. Dissenting opinions were proposed in the Supreme Court blueprint, produced during the Reformation (*Reformasi*) era, as a method to help improve judicial accountability and transparency.²¹ According to the Blueprint, judges could not 'hide behind the Panel', which would make it easier to monitor or supervise the quality of individual judges.²² In a piece arguing for the introduction of dissenting opinions, a respected Indonesian lawyer suggested that dissenting opinions might help Indonesian judicial reform in several ways.²³ For example, they would help scholars and lawyers to better analyse the logic behind each ruling. Introducing dissents might also help develop the careers of dissenters, if their personal legal opinions could become more widely known.²⁴ It was also claimed that dissents might reduce opportunities for bribery of judges.

However, the Blueprint expressed some concerns about dissents. One related to sensitive cases involving race and religion, suggesting that in some cases it might be preferable to keep any minority decisions confidential, to avoid conflict or the impression that some of the judges 'sided' with or was biased against parties for religious, ethnic or racial reasons.²⁵

For example, for one case related to *adat* inheritance in Padang, there is a panel consisting of a person from Padang and two from Java. The two judges

²¹ Mahkamah Agung, *Blueprint for the Reform of the Supreme Court of Indonesia* (Jakarta: Supreme Court of Indonesia, 2003), 202.

²² *Ibid.*, 204.

²³ Erman Rajagukguk, "Judicial Reform: A Proposal for the Future of the Commercial Court," in *Indonesia: Bankruptcy, Law Reform & the Commercial Court: Comparative Perspectives on Insolvency Law and Policy*, ed. Tim Lindsey (Sydney: Desert Pea Press, 2000), 57.

²⁴ *Ibid.*, 58.

²⁵ Mahkamah Agung, *Blueprint for the Reform of the Supreme Court of Indonesia*, 204.

from Java find that the part of the woman is half of the part of the estate, whereas the Padang judge issues a dissenting opinion that is known to the public. In this case, it is possible that those who feel defeated (Padang) will say that because the majority of judges are Javanese, their case was defeated (regional sentiment emerges).²⁶

It was also predicted that the paternalistic tradition whereby junior judges agree with the opinions of senior judges and Associate Justices routinely follow the Chief Justice would impede the 'take up' of dissenting judgments in Indonesia's courts and undermine their utility. This concern was echoed by another commentator, who also highlighted that the potential for disagreement on the bench might not be well received by the public, because it gave the impression of inconsistency in judicial decision-making and must undermine the legitimacy of the courts.²⁷

Before 2000, judges in some Indonesian courts could disagree with their brethren, but this disagreement was not included in the judgment itself. The dissenting opinion could be noted in a special book, held by the Chief Justice of the relevant court.²⁸ Given that these 'special books' have not been publicly released, it is impossible to know whether many dissenting opinions, if any, were recorded in them. Dissenting opinions were first permitted to be included in the judgments of the commercial courts, under Supreme Court Regulation 2 of 2000 on Amendments to Supreme Court Regulation 3 of 1999 on Ad Hoc Judges. However, given the title of the Regulation, there was some confusion about whether this Regulation applied only to ad hoc judges or to all commercial court judges. On the one hand, most of the Regulation appeared directed towards ad hoc judges in the commercial courts, but, on the other, the provisions dealing with dissenting opinions (Articles 9-11) were cast in general terms and could be interpreted as applying to all judges in the commercial courts. Some interpreted

²⁶ Mahkamah Agung, *Blueprint for the Reform of the Supreme Court of Indonesia*, 204.

²⁷ Raymond Ali, "Perluakah Dissenting Opinion Di Mahkamah Agung?," *Pemantau Peradilan*, April 7, 2003, <http://www.pemantauperadilan.com/detil/detil.php?id=68&tipe=opini>.

²⁸ Supreme Court Chief Justice Decision No KMA/039/SK/X/1994 related to *Memberlakukan Buku III Pedoman Pelaksanaan Tugas dan Administrasi Pada Mahkamah Agung RI* (translation: *The Enacting of Book III about Guideline for Duties and Administration at the Supreme Court of the Republic of Indonesia*).

this as indicating that non-ad hoc judges – that is, career judges – were still expected to side with each other, but that ‘outside’ judges had freedom to diverge from the career judge opinion.²⁹

However, any uncertainty about whether career judges could issue dissenting opinions was dispelled a few years later. In 2004, a new Judicial Power Law³⁰ was enacted, as were amendments to the 1985 Supreme Court Law.³¹ Articles 19(2), (3) and (4) of the Judicial Power Law and Articles 30(3), (4) and (5) of the Supreme Court provide for what are often referred to as dissenting opinions. Both laws contain almost identical provisions on this issue.³²

- (4) During their deliberations, each judge must convey his or her written opinion about the case being heard. This becomes an inseverable part of the decision.
- (5) If the deliberations do not yield unanimous agreement, the judges' differing opinions must be included in the decision.
- (6) Further matters relating to Articles 19(4) and (5) are to be regulated by the Supreme Court.

These laws extended the ability to dissent to all Indonesian judges. However, these statutes did not explain the rationale for doing so. There was, therefore, very little context for these reforms: while judges knew they could dissent, they did not necessarily know why this reform had been made and why it might be important. This might help explain why so few Indonesian courts tend to issue dissents, at least on a regular basis.

2.2.1 Indonesia Dissent Data

There is very limited data about the rate of dissents in Indonesian courts, but it seems clear that they are generally rare, except in Constitutional Court. For example, the only available study where non-constitutional court dissent data could be obtained indicated that, in Yogyakarta District Court from 2004 until 2010, only one dissenting judgment was issued in 615 civil cases, and

²⁹ Ali, “Perlukah Dissenting”

³⁰ Law 3 of 2009 on Judicial Power.

³¹ Law 5 of 2004 on Amendments to Law 14 of 1985 on the Supreme Court.

³² The main difference is numbering of the sections. The Supreme Court Law also refers to Supreme Court judges and the Judicial Power Law applies to judges in general.

one in 2256 criminal cases.³³ In Sleman District Court over the same period, no dissents were issued in 892 civil cases, and two in 2871 criminal cases.³⁴

By contrast, judges of the Constitutional Court have issued many more dissenting decisions, at least relative to the number of cases they hear.

Table 1. Dissents in the Constitutional Court³⁵

Year	Number of dissenting opinions	Number of cases decided per year	Percentage of dissents
2004	8	35	23
2005	15	28	54
2006	11	29	38
2007	10	27	37
2008	10	34	29
2009	8	51	16
2010	14	61	23
2011	3	94	3
2012	7	97	7
2013	8	110	7
2014	7	131	5
2015 (as of mid year)	14	157	9
Total	115	854	13

As can be seen, a relatively larger number of decisions contained dissents from 2004-2008, with a few less from 2008-2010, and the number of dissents fell dramatically from 2011.

These figures seem to support observations that under Asshiddiqie, the Court was more academic in its decision-making. Not only was it more discursive, but perhaps also more encouraging of differences of opinion in the Court. It could be argued that such diversity of views on the bench was

³³ Tata Wijayanta and Hery Firmansyah, *Perbedaan Pendapat Dalam Putusan Pengadilan* (Yogyakarta: Pustaka Yustisia, 2011), 86.

³⁴ *Ibid.*, 88.

³⁵ <http://www.mahkamahkonstitusi.go.id/index.php?page=web.RekapPUU&menu=5>; Veri Junaidi, Adelline Syahda, and Adam Mulya Bunga Mayang, *Tiga Belas Tahun Mahkamah Konstitusi Dalam Memutus Pengujian Undang-Undang* (Jakarta: Kode Inisiatif, 2016), 22.

not as strongly supported by Mahfud, who might have been more interested in the Court providing more decisive solutions to the matters brought before it. But this is mere conjecture. What appears certain is that in the past several years the rate of dissents has dropped significantly, though the reasons for this are not known.

2.3. How the Constitutional Court has Used Dissents

The Indonesian Constitutional Court appears to use dissents very effectively to make its decisions more transparent and legitimate. Judges seem free to make their own decisions, and can explain the reasons for them. This enables the public to see who agrees with what, and shows the losing side that the court seriously considered at least some of their arguments. This signifies that the court understands that its functions are particularly important and that it has enormous responsibilities –including to interpret the constitution and to judge compliance by a democratically elected legislature. Constitutional interpretation is highly contested, and subject to change over time, and so the Court realises the importance of giving air to different views. Further, other Indonesian courts can point out that their decisions do not formally create law, and argue that accountability and transparency mechanisms are, therefore, less critical for them because their decisions affect only the parties. By contrast, Constitutional Court decisions are binding – not just on the parties before the Court, but on all Indonesian citizens, entities and government institutions.

But there is one feature of the Constitutional Court's decision-making that seems to reduce some of the transparency benefits from dissents. A dissenting judge can request that his or her dissent not be included in the decision (Article 32(6) of Constitutional Court Regulation No. 6 of 2005). This has happened in a few cases. For example, in the *Manoppo* case,³⁶ two judges believed that the applicant had no legal standing to bring the case because his constitutional rights were not damaged by the operation of the law. The names of these two judges were not mentioned in the decision. When the press asked Jimly who

³⁶ Constitutional Court Decision 069/PUU-II/2004.

the judges were, he responded, 'That is secret'.³⁷ This approach undermines the transparency and accountability rationale for dissenting opinions.

The use of dissents for judicial accountability is arguably less clear in Indonesia. This is because the majority and minority very rarely mention each other's arguments when making their own. So, for example, a dissenting Constitutional Court of the Republik of Indonesia (*Mahkamah Konstitusi* or MK) judges will not even refer to – let alone rebut – the majority's argument. Nor will the majority address any minority argument. There is, therefore, not the exchange of judgements that seems to occur in other countries, as discussed by Ginsburg, above. The Court has not explained why it has adopted this approach. However, it is possible to speculate that MK judges are struggling with the concept of confronting other members of the bench in their decisions. In a 2003 edition of *Berita Mahkamah Konstitusi*, Marzuki stated that he thought that it would be unethical for a dissenting judge to comment on the majority opinion, and for a majority decision to comment on a dissenting opinion.

However, there are some indications that the Court may be willing to adopt the reasoning of minority judgments in previous cases, at least in some limited circumstances. This appears to have happened in one case – the *Simultaneous Election case* (2003)³⁸ – but the observation can only be tentatively made, given that the majority that appeared to adopt some of the reasoning of the minority did not refer directly to that minority decision. I now turn to discuss the *Simultaneous Election case* (2003) and the case it appeared to follow – the *Saurip Kadi case* (2008).

2.3.1 Simultaneous Presidential and Legislative Election Case³⁹

Since 2004, Indonesia's presidents and vice-presidents have been directly elected, in elections held around three months after national legislative elections. This practice has been hotly contested in the Constitutional Court, which has been asked to review the constitutionality of holding legislative

³⁷ "Kontroversi Sebutir Pertimbangan," *Tempo Interaktif*, February 21, 2005, <http://www.tempointeraktif.com/hg/mbmtempo/arsip/2005/02/21/HK/mbm.20050221.hk1.id.html>.

³⁸ Constitutional Court Decision 14/PUU-XI/2013.

³⁹ The following discussion draws on Simon Butt, *The Constitutional Court and Democracy in Indonesia* (Brill, 2015).

and presidential elections separately. The first case to squarely address the constitutionality of non-simultaneous elections was the *Saurip Kadi case* (2008).⁴⁰ There, the applicants challenged various provisions of the 2008 Presidential Election Law, including Article 3(5), which states that 'The election of the President and the Vice-President is to be conducted after the election of members of the People's Representative Council (*Dewan Perwakilan Rakyat* or DPR), the Regional Representative Council (*Dewan Perwakilan Daerah* or DPD) and Regional People's Representative Council (*Dewan Perwakilan Rakyat Daerah* or DPRD). They pointed to Article 6A(2) of the Constitution, which requires that presidential candidates be nominated by political parties before the general election.

A six-judge majority decided that holding presidential elections after legislative elections had developed as state practice or 'convention'. Under Article 3(2) of the Constitution, the People's Consultative Assembly (*Majelis Permusyawaratan Rakyat* or MPR) inaugurates (*melantik*) presidents and vice presidents. Because the MPR comprises DPR and DPD members, the DPR and DPD elections had been held first in order to constitute the MPR that would inaugurate the president. According to the Court, this practice had 'ultimately replaced legal provisions' – something that regularly occurred in Indonesia and other countries. Article 3(5) of the Law was consistent with this practice and hence was neither illegal nor unconstitutional, even though it admitted that this practice had established what it described as an 'illogical order' (though the Court did not explain this).⁴¹

Justices Fadjar, Siahaan and Mochtar issued a joint dissent. They pointed to various previous decisions of the Court, including the *Independent candidate's case* (2008)⁴² and the *Parliamentary Threshold case* (2009).⁴³ In those decisions, the Court had endorsed particular methods of constitutional

⁴⁰ The issue was raised in the first case lodged with the Court in the *Fathul Hadie case* (Constitutional Court Decision 001/PUU-II/2004), but the Court did not consider the merits of the argument, holding that the applicants lacked standing.

⁴¹ *Saurip Kadi case*, 2008, (Op.Cit) para [3.16.5]. *Saurip Kadi case*, 2008, para [3.16.5].

⁴² Constitutional Court Decision 56/PUU-VI/2008.

⁴³ Constitutional Court Decision 3/PUU-VII/2009.

interpretation, including 'textual meaning' and 'original intent'. Referring to these cases and applying these methods, the dissenters would have upheld the application, requiring that presidential and general legislative elections be held simultaneously.

Their reasoning was as follows. Article 6A(2) of the Constitution requires that presidential candidates be nominated by political parties 'before the general election'. The meaning of 'general election' in Article 6A(2) should be determined by reference to Article 22E(2), which states that 'general elections are conducted to elect members of the DPR and DPD, the President and Vice President, and members of the DPRD'. In other words, 'general election' means a single election administered by the General Election Commission (*Komisi Pemilihan Umum* or KPU), encompassing both presidential and legislative elections.⁴⁴

The minority also rejected the argument finding that holding separate elections had become convention. For the minority, convention could not be established if only practiced once. (As mentioned, direct presidential elections were held for the first time in 2004.) The dissenting judges also appeared to attack the basis upon which this convention was said to have developed: that DPR and DPD elections needed to be held first because the MPR inaugurated the president and vice president. According to the minority, DPR and DPD members could be installed, and the MPR then constituted, immediately before the president and vice president were inaugurated. Holding separate elections for them was therefore unnecessary. Finally, the dissenters also referred to the efficiency gains and cost savings that would be achieved by holding elections simultaneously. Nevertheless, the minority judges stated that they would not have insisted on simultaneous elections until 2014 due to time constraints and the KPU having already commenced organisation of the 2009 elections.

The Court revisited its decision in *Saurip Kadi* four years later in the *Simultaneous Election case* (2013). This challenge was brought by Professor

⁴⁴ *Saurip Kadi case*, 2008, (Op.Cit) p. 191. *Saurip Kadi case*, 2008, page 191.

Effendi Gazali, noted communications expert and University of Indonesia academic, who is known for his political parodies. Like the applicants in *Saurip Kadi* (2008), he argued that the Constitution required that presidential and general legislative elections be held simultaneously. In particular, he argued that both Articles 3(5) and 112 of the 2008 Presidential Election Law were unconstitutional. Article 112 specifically requires that the Presidential and Vice-Presidential elections be held within three months of the general election results being announced.

A majority of the Court overruled the majority decision in *Saurip Kadi* (2008), although it did not explicitly acknowledge doing so. As mentioned, in *Saurip Kadi*, the Court held that holding separate elections had become convention, which could 'replace law'. In the *Simultaneous Elections* case (2013),⁴⁵ the Court reached the opposite conclusion, explaining that in *Saurip Kadi* the majority had made a 'choice of interpretation based on the context at the time the decision was made'.⁴⁶ Contrary to its previous decision, the majority held that the constitutionality of holding the presidential and legislative elections separately could not be determined by reference to convention, which was not equivalent to a constitutional provision. Convention was not even legally enforceable, having only 'moral' weight.⁴⁷ Breaking it might be constitutionally inappropriate, but it was not unconstitutional. Echoing the minority in *Saurip Kadi*— although not explicitly referring to it — the majority declared that even presuming convention could develop such authority, it could not emerge after being practiced only once.

Having established that it was bound by neither the convention it had recognised in *Saurip Kadi* nor the *Saurip Kadi* case itself, the majority held that having separate presidential and legislative elections was unconstitutional. The majority gave three primary justifications, as follows.

⁴⁵ Constitutional Court Decision 14/PUU-XI/2013.

⁴⁶ *Simultaneous Election Case*, 2013, para [3.16].

⁴⁷ The Court observed that in some common law countries, convention is neither enforceable in the courts nor binding upon its judges.

The first was the strong presidential system the amended Constitution had established. While the Constitution gives the president significant power, it imposes various checks and balances upon its exercise, beginning with the way the president is chosen and maintains office. The president relies primarily upon public support for legitimacy, being directly voted in by the people. He or she is neither selected by the winning party from amongst its own members, as occurs in parliamentary systems, nor able to be removed by parliament, at least without the Constitutional Court finding him or her guilty of a serious offence. However, this does not mean that the president can ignore the political parties represented in parliament. On a practical level, the president and parliament will often find it convenient to cooperate with each other, to make government run smoothly (though parliament might be reluctant to follow the direction of a president who becomes unpopular, fearing loss of support from the electorate in forthcoming general elections).

Furthermore, potential presidential and vice presidential candidates cannot stand without nomination by political parties, which often emerges after negotiation between the candidate and the party. However, this negotiation process was problematic. For the majority, the Article 6A(2) nomination requirement was aimed at encouraging parties to form stable coalitions. If parties merged or consolidated, this would simplify the party system, and encourage the president and the parties nominating him or her to work together in the interests of the nation.⁴⁸ However, in practice the primarily purpose of the negotiation process had become short-term strategic advantage. Parties would form a coalition purely to support a particular candidate and then fracture after disagreeing about other issues. In the majority's assessment, the system, therefore, had failed to encourage political parties who might otherwise be natural allies from merging or coming together in coalition. In short, holding separate legislative and presidential elections did not promote the checks and balances or the system of government that the Constitution sought to establish.

⁴⁸ *Simultaneous Election case*, 2013, p. 81.

The majority's second justification was that the Constitution stipulated that presidential and legislative elections must be held simultaneously. This was clear from the 'original intent' of the drafters of the Constitutional amendments. The Court pointed to statements made by Slamet Effendy Yusuf, a member of Ad Hoc Committee I of the MPR Working Group that prepared the draft amendments to the 1945 Constitution. The Court cited transcripts of debates in which Mr Yusuf said: 'what is intended by 'election' is election for the DPR, DPD, president and vice president, and the DPRD. So they fall within a single election regime'. The Court referred to another of Mr Yusuf's statements indicating that general elections would have five boxes. 'Box 1 would be the DPR box, box 2 would be the DPD box, box 3 would be the president/vice president box, box 4 would be the DPRD box, and box 5 would be the county/city box'.⁴⁹ According to the Court, this original intent was consistent with Article 22E(2), which defines general elections to include presidential elections. Article 6A(2)'s reference to 'general elections' therefore referred to both legislative and presidential elections.

Finally, the Court justified requiring simultaneous elections by reference to efficiency and cost savings, emphasising that if elections were held together, then more money would be available to meet the core objective of the state – improving public welfare.⁵⁰ Voters could also make a more informed about which party to vote for in legislative elections, because parties would need to disclose, before the elections took place, which presidential candidates they supported.

Despite holding that separate presidential and legislative elections were unconstitutional, the Court did not require that elections be held simultaneously in 2014, fearing that this would cause disruption. The KPU had already begun organising separate elections. Perhaps more importantly, Article 22E (6) of the Constitution required that election rules be established

⁴⁹ *Simultaneous Election case*, 2013, p. 83, citing *Naskah Komprehensif Perubahan Undang-Undang Dasar Negara Republik Indonesia tahun 1945: Latar Belakang, Proses, dan Hasil Pembahasan, 1999-2002 - V: Pemilihan Umum*, Revised edition (Jakarta: Sekretariat Jenderal dan Kepaniteraan, Mahkamah Konstitusi, 2010), 602.

⁵⁰ *Simultaneous Election case*, 2013, p. 84.

by statute, meaning that the KPU could not bring the Court's decision into effect by issuing regulations. Yet new legislation would undoubtedly take significant time and, if insisted upon by the Court, would likely delay forthcoming elections. Pointing to previous cases in which it had postponed the implementation or limited the legal consequences of its decisions,⁵¹ the Court declared that its decision would not come into operation until after the 2014 elections had been completed.

Justice Maria Farida Indrati issued a sole dissent. Her primary argument appeared to be that Article 22E(6) of the Constitution delegated power to parliament to regulate how elections, including presidential elections, would be carried out. This was an 'opened legal policy', that gave parliament significant discretion, including to determine the timing of the elections. She also criticised the majority's reliance upon 'original intent', which had led to the opposite decision in the *Saurip Kadi* case (2008). She appeared to disapprove of using original intent as a method of constitutional interpretation, stating that it 'was not everything' and pointing out that 'initial ideas can completely change after being formulated as a norm, so in my view, original intent is not always appropriate to use in the interpretation of the norms of the constitution'.⁵²

These cases demonstrate that the Court may consider adopting a previous dissent as the majority view. However, the Court's decisions could be clearer if they employ dissents to capture more of the transparency and accountability advantages, described above. This would have probably involved the majority in *Simultaneous Election* referring more explicitly to the reasoning of the minority of *Saurip Kadi*, and more clearly justifying its departure from the majority view in *Saurip Kadi*. As it stands, the departure was far from convincing because the Court did not explain how the context

⁵¹ The Court referred to its decision in the *Anti-corruption Court* case (Constitutional Court Decision 012-016-019/PUU-IV/2006) (3 year deadline) and in the *Budget cases* (Constitutional Court Decision 43/PUU-X/2012; Constitutional Court Decision Constitutional Court Decision 013/PUU-VI/2008; Constitutional Court Decision 024/PUU-IV/2007; Constitutional Court Decision 026/PUU-IV/2005; Constitutional Court Decision 012/PUU-III/2005), where it limited the legal consequences of the MK's decision.

⁵² *Simultaneous Election case*, 2013, p. 90.

surrounding the decision had 'changed' in the four years that passed between the two decisions.

For example, directly engaging with the reasoning of Indrati's dissent, and the majority and minority in *Saurip Kadi*, may have helped the majority in *Simultaneous Election* clarify and sharpen its reasons and reasoning. In establishing 'original intent', the Court referred only to the recorded statements of one member of the drafting committee. Without more explanation, this could not possibly represent the views of all MPR members, or even a majority of them, as the Court appeared to accept. Further, resort to original intent was strictly unnecessary, because the words of Article 6A(2) viewed in light of Article 22E(2) were clear. Indrati's critique of the use of 'original intent' in this way was incisive and far more convincing than the majority's application of it. Yet because the majority and minority did not engage, the majority was able to 'get away with' this. The judicial accountability purpose of dissents was not taken advantage of.

2.3.2 Unanswered Questions About Dissents in the Constitutional Court; What is the Weight of a Dissent?

Instinctively it is tempting, particularly from a common law perspective, to consider that the 'strength' of a majority judgment is diluted the more dissenting opinions that are issued against it. While this issue is considered fundamental in many countries, there has been no discussion, let alone agreement, in Indonesia about the relative weight or authority of unanimous decisions compared with split decisions. Indeed, in some cases previous dissents have been given no weight.

For example, does a four-judge dissent, such as in the *Bali Bombing case* (2003),⁵³ have more persuasive force than a single-judge dissent, such as that in the *Simultaneous Elections case*? Do dissenting opinions merely represent a forum in which dissenting judges can highlight their views, or are they intended to assist in the 'development of the law' by being adopted by a

⁵³ Constitutional Court Decision 013/PUU-I/2003.

majority in the future? For example, the *Bali Bombing* minority judgment – almost twice the length of the majority judgment – is as detailed and as well-considered as any Constitutional decision. Did the minority judges intend their decision to have no tangible impact and slip into obscurity, or did they, in fact, harbour hope that their reasoning would be applied in future cases?

A related question is whether the strength of a majority judgment is diluted by dissenting opinions, and, if so, whether a majority decision becomes less authoritative depending on the number of judges who dissent. So, for example does the *Bali Bombing* five-judge majority decision carry less weight – and is it, therefore, less likely to be followed in the future – than a majority decision against which only one judge dissents, or indeed a unanimous decision? More specifically, if *pertimbangan hukum* can create binding legal rules is the strength of the rule diluted by one or more minority decisions? Again, these questions have not been answered in Indonesia.

2.3.3 When should the Constitutional Court consider itself ‘split’?

Two Constitutional Court cases issued in 2017 – *City/county Perda* case and the *Provincial Perda* case⁵⁴ – raise important questions about the functions of dissents in the Constitutional Court, and how the Court handles cases where it is ‘split’ – that is, because one judge is ‘missing’, there are four judges in the majority and four in the minority. To explain this case, and its significance, I first provide some background.

As is well known, decentralisation reforms enacted following the fall of Soeharto gave local governments unprecedented powers to govern their own affairs, including by issuing bylaws, commonly called Perda (*peraturan daerah*).⁵⁵ These powers were entrenched in the 1945 Constitution with its second amendment in 2000. Article 18(2) states that:

⁵⁴ Constitutional Court Decisions 137/PUU-XIII/2015 and 56/PUU-XIV/2016.

⁵⁵ Simon Butt, “Regional Autonomy and the Proliferation of Perda in Indonesia: An Assessment of Bureaucratic and Judicial Review Mechanisms,” *Sydney Law Review* vol 32(2) (2010): 177; Simon Butt and Nicholas Parsons, “Reining in Regional Governments? Local Taxes and Investment in Decentralised Indonesia,” *Sydney Law Review* 34, no. 1 (2012): 91–106.

Provincial, county and city governments regulate and administer matters of government themselves under the principles of autonomy and assistance [to other tiers of government] (*pembantuan*).

Articles 18(5) and (6) read:

- (5) Regional governments are to exercise wide-ranging autonomy, except in matters that national legislation reserves for the Central Government.
- (6) Regional governments have power to enact regional regulations (Perda) and other regulations in the exercise of their autonomy and assistance.

From the outset, the designers of regional autonomy recognised that provincial, county and city lawmakers would need help to draft Perda. After all, these lawmakers had very few skills or experience in formulating policy, let alone drafting laws to give legal effect to it. The 1999 Law therefore required subnational governments to send their Perda after enactment for 'evaluation'. This practice was retained in the 2004 Law and in the 2014 Law, which requires that bills be sent for review within seven days of a local government finishing its deliberations, and the legislature and regional head agreeing to it. City and county governments must send their Perda to their provincial governor for review (Article 242(4) 249(3)); and provincial governments must send their Perda to the Ministry of Home Affairs (Article 242(3), 249(1)). The criteria by which the governor or Minister assesses Perda are: conflict with a higher-level law, the public interest or morality (Article 250(1)).

In two decisions issued in early-mid 2017, the Constitutional Court invalidated these provisions in the 2014 Law under which provincial governors and the central government had been able to review and invalidate Perda after their enactment. The first case was brought by over 40 county governments and the Indonesian Association of County Governments.⁵⁶ One of the reasons for the invalidation was that this form of 'executive review' was essentially

⁵⁶ Constitutional Court Decision 137/PUU-XIII/2015.

a judicial function that should be performed by the Supreme Court using its 'judicial review' powers.⁵⁷

However, the decision-making process in both the *City/county Perda* case was rather controversial, although this seemed to go largely unnoticed in Indonesia's legal community.⁵⁸ This is because the Court appeared to be evenly split at key points during the process. Included on the nine-judge panel hearing the City/County Perda case was Patrialis Akbar, formerly a Minister for Justice. Akbar also participated in a judge's meeting about the case on 20 August 2016. However, by the time the court met on 2 February 2017 and 30 March 2017 to discuss the case again, he had been suspended from office and was being prosecuted for taking a bribe to fix the outcome of another Constitutional Court case.⁵⁹ Yet without him and his vote, the Court was split four judges to four.

If the Court had considered itself to be 'split' (as I think perhaps it should have), the chief justice should have the casting vote.⁶⁰ Yet, in this case, Chief Justice Arief Hidayat was in the minority.

Similar issues arose in the *Provincial Perda* case. This time, Akbar's replacement, Saldi Isra, was not appointed until after the Court had finished hearing the case but the decision states that he participated in the sole judges' deliberation meeting. Again, this raises questions about whether judges must participate in hearings and the judicial deliberations where the decision is made if they are to have their vote count. The case seems to indicate that judges do not need to be present at both. Yet, once again, if Isra's vote was excluded, then the Court would have been split four judges to four.

⁵⁷ For a full discussion of the Court's reasoning, see Simon Butt and Tim Lindsey, *Indonesian Law* (Oxford: Oxford University Press, 2018).

⁵⁸ Simon Butt, "Constitutional Court Lets Local Governments off the Leash," *Indonesia at Melbourne*, July 4, 2017, <http://indonesiaatmelbourne.unimelb.edu.au/constitutional-court-lets-local-governments-off-the-leash/>.

⁵⁹ Patrialis Akbar was removed on 27 January 2017: From <<http://jakartaglobe.id/news/patrialis-akbar-dismissed-constitutional-court/>>.

⁶⁰ Article 45 (8) of Law No. 24 of 2003 on the Constitutional Court as amended by Law No. 8 of 2011.

III. CONCLUSION

Dissenting opinions can, if properly employed, assist to improve judicial transparency and accountability, and can help shape future judicial decisions. While introducing them into Indonesia's judiciary, including its Constitutional Court, has undoubtedly been beneficial for its transparency-enhancing benefits, its utility as a means to ensure the accountability of judges vis-à-vis other judges in terms of judicial reasoning, is less clear. Further, there remain some important unresolved problems about the significance of dissents within the Indonesian judicial system. These types of issues could be considered as the Constitutional Court forges ahead with further reforms in the future.

BIBLIOGRAPHY

- Ali, Raymond. "Perlukah Dissenting Opinion Di Mahkamah Agung?" *Pemantau Peradilan*, April 7, 2003. <http://www.pemantauperadilan.com/detil/detil.php?id=68&tipe=opini>.
- Beudenbacher, Carl. "Some Remarks on the Method of Civil Law." *Texas International Law Journal* 34 (1999): 333.
- Blankenburg, Erhard. *Dutch Legal Culture*. 2nd rev. and enl. ed. Boston: Kluwer Law and Taxation Publishers, 1994.
- Blomquist, RF. "Dissent, Posner-Style: Judge Richard A Posner's First Decade of Dissenting Opinions, 1981-1991 – Toward an Aesthetic of Judicial Dissenting Style." *Missouri Law Review* 69 (2004): 73.
- Butt, Simon. "Constitutional Court Lets Local Governments off the Leash." *Indonesia at Melbourne*, July 4, 2017. <http://indonesiaatmelbourne.unimelb.edu.au/constitutional-court-lets-local-governments-off-the-leash/>.
- . "Regional Autonomy and the Proliferation of Perda in Indonesia: An Assessment of Bureaucratic and Judicial Review Mechanisms." *Sydney Law Review* vol 32(2) (2010): 177.
- . *The Constitutional Court and Democracy in Indonesia*. Brill, 2015.

- Butt, Simon, and Tim Lindsey. *Indonesian Law*. Oxford: Oxford University Press, 2018.
- Butt, Simon, and Nicholas Parsons. "Reining in Regional Governments? Local Taxes and Investment in Decentralised Indonesia." *Sydney Law Review* 34, no. 1 (2012): 91-106.
- Cole, David. "The Power of a Supreme Court Dissent." *Washington Post*, October 29, 2015. https://www.washingtonpost.com/opinions/the-power-of-a-supreme-court-dissent/2015/10/29/fbc80acc-66cb-11e5-8325-a42b5a459b1e_story.html?utm_term=.b392c62038be.
- Ginsburg, Ruth Bader. "The Role of Dissenting Opinions." *Minnesota Law Review* 95(1) (1999).
- Jacobson, A. J. "Publishing Dissent." *Washington and Lee Law Review* 62, no. 4 (2005): 1607-36.
- Junaidi, Veri, Adelline Syahda, and Adam Mulya Bunga Mayang. *Tiga Belas Tahun Mahkamah Konstitusi Dalam Memutus Pengujian Undang-Undang*. Jakarta: Kode Inisiatif, 2016.
- "Kontroversi Sebutir Pertimbangan." *Tempo Interaktif*, February 21, 2005. <http://www.tempointeraktif.com/hg/mbmtempo/arsip/2005/02/21/HK/mbm.20050221.hk1.id.html>.
- L'Heureux-Dube, Claire. "The Dissenting Opinion: Voice of the Future?" *Osgoode Hall Law Journal* 38(3) (n.d.): 495-512.
- Lynch, Andrew. "Is Judicial Dissent Constitutionally Protected?" *Macquarie Law Journal* 4, (2004): 81-104.
- Mahkamah Agung. *Blueprint for the Reform of the Supreme Court of Indonesia*. Jakarta: Supreme Court of Indonesia, 2003.
- Mahkamah Konstitusi. *Naskah Komprehensif Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945: Latar Belakang, Proses, dan Hasil Pembahasan, 1999-2002 - V: Pemilihan Umum*. Revised edition. Jakarta: Sekretariat Jenderal dan Kepaniteraan, Mahkamah Konstitusi, 2010.

- Markesinis. "Conceptualism, Pragmatism and Courage: A Common Lawyer Looks at Some Judgments of the German Federal Court." *American Journal of Comparative Law* 34 (1986): 349.
- Mattei, Ugo. "Why the Wind Changed: Intellectual Leadership in Western Law." *American Journal of Comparative Law* 42 (1994): 195.
- Merryman, John. *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America*. 2nd ed. Stanford California: Stanford University Press, 1985.
- Rajagukguk, Erman. "Judicial Reform: A Proposal for the Future of the Commercial Court." In *Indonesia: Bankruptcy, Law Reform & the Commercial Court: Comparative Perspectives on Insolvency Law and Policy*, edited by Tim Lindsey. Sydney: Desert Pea Press, 2000.
- Simmons, RG. "The Use and Abuse of Dissenting Opinions." *Louisiana Law Review* 16 (1956): 497.
- Stephens, RB. "The Function of Concurring and Dissenting Opinions in Courts of Last Resort." *University of Florida Law Review* 5 (1952): 394.
- Stone Sweet, Alec. *Governing with Judges: Constitutional Politics in Europe*. Oxford: Oxford University Press, 2000.
- Wells, Michael. "French and American Judicial Opinions." *Yale Journal of International Law* 19, no. 1 (1994): 81-133.
- Wijayanta, Tata, and Hery Firmansyah. *Perbedaan Pendapat Dalam Putusan Pengadilan*. Yogyakarta: Pustaka Yustisia, 2011.