Dissenting Opinion of Corruption Court Judges as a Form of Freedom and Legal Reform in Indonesia

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Article’s Information

Abstract

The existence of dissenting opinions is a step in organizing law enforcement. This is also an important issue in organizing judicial power in relation to the 1945 Constitution and Law No. 48/2009 on Judicial Power. In Indonesia itself, judges are allowed to give dissenting opinions, although there has never been a clear definition of dissenting opinions. In Anglo-Saxon law, dissenting opinions have become commonplace, and these dissenting opinions often form new laws. This is in line with the term “judge made law”. Therefore, the existence of dissenting opinion is very important, because it can continue to update the existing law.

This research includes normative or doctrinal legal analysis because it wants an accurate and clear picture of the judge's dissenting opinion on the verdict of a corruption case. To explain and find answers to problems, theories are used as the basis for analysis, namely Legal Certainty Theory, Judicial Power Theory, Evidence Theory, Legal Construction Theory, and Sentencing Theory.

The impact of the application of dissenting opinions by judges is an instrument towards a better quality of law enforcement, not just a matter of majority and minority in the consideration of judges but a consideration of whether or not a criminal offense has been proven. Therefore, further regulation of the conception of dissenting opinions in Indonesia is important. Legal reform of the Criminal Procedure Code in Indonesia and dissenting
A. Introduction

In terms of carrying out law enforcement as part of law development in Indonesia, one of the important issues at the moment is how to carry out judicial power with the synchronization between the 1945 Constitution and Law no. 48 of 2009 concerning Judicial Power. Judges must have firm convictions of anything that can incite them to uphold justice, both in court and outside court.1

Judges are no longer just mouthpieces for laws but for others as well, namely as mouthpieces for law and justice that are beneficial to society that can be realized and not just wishful thinking.2 Indonesian judges are allowed to issue a dissenting opinion.3 However, neither judges nor academics have ever spelled out the purpose of a dissenting opinion in Indonesia.4

Looking at it from a comparative legal perspective, in countries that adhere to the Anglo Saxon Legal System, the Dissenting Opinion itself is often used, as in the United States and the United Kingdom because it is one part of a legal opinion. Meanwhile, in countries adhering to the continental European system, dissenting opinions are actually unknown.5 Dissenting Opinion in the Anglo Saxon Legal System is used if there is a difference of opinion between a Judge and another Judge whose decision is majority.

The debate of these judges has meaning for the creation of a new law because in principle each judge has firmness with the thought of "judge made law" in which judges have demands from society to be able to answer and guarantee legal certainty to problems that occur. The judge's opinion that differs from the decision will also be attached to the decision and will become a dissenting opinion.6

Since the enactment of the Judicial Powers Law, there has been a norm between members of a panel of judges where when a deliberative session the panel of judges has not reached a unanimous vote, the opinions of minority judges that differ from the results of the deliberative meeting of judges "must be included" in the decision and symbolize an integral part from this decision Law Number 48 of 2009 concerning Judicial Power, namely in Article 14 paragraph (3). It is about this situation that occurs in court practice known as a dissenting opinion. Dissenting opinion describes the real embodiment of individual judges who are free and independent, including fellow members of the panel or fellow judges in one trial. This is in line with the objective of an independent judicial power, which is none other than the freedom of

6 Ke Song and Xuechan Ma, “Individual Opinions as an Agent of International Legal Development?”, Journal of International Dispute Settlement 13, no. 1 (March 2022): 54-78.
judges in examining and deciding cases.

In contrast to Law Number 8 of 1981 concerning Criminal Procedure Code (KUHAP). In Article 182 paragraph (6) of the Criminal Procedure Code, it is explained that a court decision must be based on a unanimous agreement of the members of the panel of judges. If unanimous agreement cannot be reached, then the decision is taken based on the majority of votes while still taking into account the principle "which is most advantageous to the accused". Furthermore, when looking at Article 182 paragraph (6) of the Criminal Procedure Code, it also emphasizes that this is recorded in the minutes of the assembly meeting which are "secret in nature". So that when viewed from the presence of dissenting opinion contained in the Law on Judicial Powers it is contradictory to the provisions of the Criminal Procedure Code.

The contradiction that occurs in two different rules is also found in the implementation of dissenting opinions in cases of corruption, namely the procedural law that applies to trials of corruption, namely the procedural law regulated in the Criminal Procedure Code, as well as the affirmation of Article 25 of the Corruption Court Law, namely "examination at the Corruption Court hearings are carried out based on the applicable criminal procedural law, unless otherwise provided for in this law. When looking at the Criminal Procedure Code to be precise in Article 182 paragraph (6) and paragraph (7) it is not permissible to include a different judge's decision in a case that will be decided by the court.

The decision produced by the court is one of the indicators in showing the quality of a trial. A transparent, logical, independent and fair judicial process has and will contribute to the ideal of moral truth and enlightenment for people's thinking and behavior. On the other hand, a court decision that is irrational and contrary to society's sense of justice will lead to the dead of common sense or the death of common sense.7 Supreme Court Decision Number 1555K/Pid.Sus/2019 with Cassation Petitioner/Defendant Syafruddin Arsyad Temenggung is one of 1 case studies regarding the dissenting opinion conducted by the Judge. In the consideration of the judges of the Supreme Court at the cassation level, the panel of judges who passed the Decision Release of All Charges against the defendant Syafruddin Arsyad Temenggung had a dissenting opinion by one of the panels of judges who tried the case, the dissenting opinion put forward by one of the panel of judges in outline considered that did not agree with the other panel of judges who stated that the act was not a criminal act but a civil and administrative one. The panel of judges as chairman of the panel that has a different opinion still considers that the defendant has fulfilled the elements as charged in Article 2 and Article 3 of the PTPK Law and stipulates that the defendant has been legally and convincingly proven guilty of committing a criminal act of corruption jointly The same. The consideration of the Supreme Court judge by issuing a decision free from all lawsuits is to assess that the act committed does not constitute a criminal act.

Based on the description put forward in the background, it can be identified the problems of how the judge dissenting opinion in the decision of the Supreme Court Number 1555K/Pid.Sus/2019; and how is the effect of the application of dissenting opinion by the judge on the decision handed down by the judge in a corruption case and the prospect of setting a dissenting opinion on legal reform in Indonesia as a form of judge's freedom?

Based on the problems that have been raised, the purpose of this legal research is to analyze the dissenting opinion by judges in setting up the criminal justice system in Indonesia referring to the Criminal Procedure Code and Law No. 48 of 2009 concerning Judicial Power Act on the process of making decisions on corruption cases and identify the effect of applying dissenting opinions by judges regarding the decisions handed down in cases of criminal acts of corruption as well as the prospect of setting dissenting opinions on legal reforms in Indonesia as a form of judge's freedom.

This study uses normative or doctrinal legal research methods. It is called normative legal research because the main data source is secondary data which is legal material. Judging from the nature of this research, it is a descriptive research, namely research that aims to provide data as accurately as possible about humans or other phenomena. In this study the author wants to obtain a real and clear picture of the application of the judge’s dissenting opinion in the process of making decisions on corruption cases.

This research was conducted at the Mochtar Kusumaatmadja Library, Faculty of Law, Padjadjaran University, Jalan Dipatiukur No. 35 Bandung.

The sources of legal materials in this study are as follows:
1. Primary legal material, namely in the form of covering all statutory regulations that are binding on the problem and research objectives, including:
   a. Law Number 8 of 1981 concerning Criminal Procedure Code
   b. The Criminal Code (KUHP)
   c. Law Number 31 of 1999 concerning Eradication of Corruption Crimes.
   d. Law Number 20 of 2001 concerning Amendments to Law Number 31 of 1999 concerning Eradication of Corruption Crimes
   e. Law Number 30 of 2002 concerning the Corruption Eradication Commission.
   f. Law Number 48 of 2009 concerning Judicial Powers

2. Secondary Legal Materials, namely secondary data that provides explanations and understanding related to primary legal materials, including:
   a. Text books related to corruption and dissenting opinion.
   b. Legal journals and magazines that discuss corruption.

3. Tertiary Legal Materials, namely secondary data used to complement and fulfill other information needs that are relevant to the issues discussed, such as the Black’S Law Dictionary, the Big Indonesian Dictionary, the Internet.

The data analysis used in this study is a qualitative research approach. Qualitative research is research conducted by collecting data in the form of words, pictures, as well as verbal or normative information and not in the form of numbers. Based on the observations of researchers, so far no research has been conducted about Analysis of Investor Protection Fund (Securities Investor Protection Fund) as a Means of Investor Legal Protection in the Capital Market, but related to The problems in this research are some examples of research that can be used as comparison material:

Based on the observations of researchers, so far no research has been conducted regarding Dissenting Opinion by Judges in the Process of Making Decisions on Corruption Cases as a Form of Judge Freedom, but related to The problems in this research are some examples of research that can be used as comparison material:

1. Analysis Regarding the Application of Dissenting Opinion to Court Decisions in Cases of Corruption Crimes. The research was conducted by Reza Fikri Febriansyah, 2014, Thesis, University of Indonesia.
2. Dissenting Opinion in Court Decisions. The research was conducted by M Feybi Inndriani Maling, 2010, Thesis, Airlangga University.
3. "Dissenting Opinion as a Form of Freedom for Judges in Making Court Decisions to Find Material Truth ". The research was conducted by Henny Han Dayani Sirait (NIM: 100200174) in 2014.
B. Discussion

1. Dissenting Opinion By Judge in Supreme Court decision Number 1555K/Pid.Sus/2019

In a rule-of-law state, the judicial power that applies represents one of the serious institutions for determining the contents of positive legal rules while concluding them by judges in their decisions before the Court. So it can be said in another way that even though the regulations that have been made are very good for the purpose of guaranteeing public safety towards people's welfare, the regulations that are made have no meaning if there is no judicial power that can fill the power of these norms.

Article 24 paragraph (1) of the 1945 Constitution states that the judiciary has independent powers aimed at upholding law and justice. The position or existence of a dissenting opinion is simply a question in the corruption crime decision regarding the existence of a dissenting opinion which will cause legal uncertainty for the perpetrators of the crime because they are on two sides, for example being blamed because the majority judge while on one side the opinion of the minority judge says that a person is not guilty (not guilty). There are similarities which can be seen in the location of the philosophy of eradicating criminal acts of corruption and the philosophy of applying dissenting opinion in examining cases in court. In this case both of them carry the mission of justice together so that because of this a dissenting opinion against the perpetrators of corruption at the Tipikor Court can further prove that the essence of justice is in the decision.

The existence of a dissenting opinion in a court in every country can be recognized because the country adheres to the common law legal system but gives rise to progressive legal thinking as suggested by Satjipto Rahardjo that must continue to be carried out, even more obligatory for judges to always explore the laws that live in the midst of society (Article 5 paragraph 1 Law No. 48 of 2009). Dissenting opinion among judges simply lies in differences of opinion in implementing the law by exercising the authority given to the Supreme Court.8

Based on the view of Radbruch (1946), a judge's decision that can be said to be ideal is when the decision contains elements of Gerechtigkeit (justice), Zweckmässigkeit (benefits), and Rechtssicherheit (legal certainty) proportionately.9 In a judge's decision it should contain the concept of being fair and beneficial for those who are involved as well as for the community, and guarantee legal certainty for the litigants or the applicant (community). Legal certainty creates protection for people who get punished for arbitrary actions, with legal certainty and clear regulations the community will be more disciplined in obeying because there is clarity of rights and obligations according to law and the aim is to achieve public order.10

The implementation of justice in Indonesia at every environmental line and stage is carried out by a panel of judges composed of an odd number of members. Law Number 4 of 2004 Jo. Article 17 of Law Number 48 of 2009 concerning Judicial Power (Judicial Power Law) stipulates that "All courts examine, try and decide with at least 3 (three) judges, unless the law stipulates otherwise".

Since the enactment of the Judicial Powers Law, there has been a norm between members of a panel of judges where when a deliberative session the panel of judges has not reached a unanimous vote, the opinions of minority judges that differ from the results of the deliberative meeting of judges "must be included" in the decision and symbolize an integral part of the verdict. It is about this situation that occurs in court practice known as a dissenting opinion. Dissenting opinion describes the real embodiment of individual judges who are free and independent, including fellow members of the panel or fellow judges in one trial. This is in line

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8 Satjipto Rahardjo, Membedah Hukum Progresif (Jakarta: Kompas, 2000), p. 10.
with the objective of an independent judicial power, which is none other than the freedom of judges in examining and deciding cases.

In an application to be decided, the judge uses the method of interpreting the construction of the judge's law in order to find the meaning in the law so that in the end the decision to be made is fair for the applicant (the public). When judges carry out methods of interpretation of laws, judges do not have to follow the interpretation made by legislators. There are considerations that serve as a reference from various aspects (sociological, teleological and others), then law enforcement which aims to build stability in people's lives must be carried out quickly and not be constrained by the law itself. The view conveyed by Utrecht, even though a decision (decision) is contrary to a law, it is not certain that such a thing is said to be contrary to the goals or intentions of the legislators (automatisch).

Having a dissenting opinion when deciding a case makes this dissenting opinion an indicator of fellow judges in the absence of mutual intervention. The explanation on the independence of judges (Article 3 Paragraph (1), (2), and (3) of Law No. 48 of 2009) shows that the independence of judges in the implementation of dissenting opinions should have obtained legality in statutory regulations, especially in the judicial procedural law in Indonesia so that when deciding a case, the judge does not intervene and influence the decision. Judges in deciding cases are very likely to get the influence arising from any intervention, so it may influence the judge's considerations out of the elements of Gerechtigkeit (justice), Zweckmassigkeit (benefits), and Rechtssicherheit (legal certainty).

Decision Number 1555K/Pid.Sus/2019 there has been a dissenting opinion in the deliberations of the Panel of Judges and efforts have been made in earnest but no consensus was reached, then in accordance with the provisions of Article 30 Paragraph (3) of Law Number 5 of 2004 concerning the Supreme Court, the dissenting opinion of the Chairman of the Panel, namely Supreme Judge Salman Luthan, is Fulfillment of Shareholders' obligations to Sjamsul Nursalim which resulted in the state losing the right to collect receivables from Sjamsul Nursalim in the amount of Rp.4,800,000,000,000.00 (four trillion eight hundred billion rupiah) which indirectly caused losses to the state in the amount of these receivables was not an administrative matter but was problem of corruption. Furthermore, the Letter of Fulfillment of Shareholders' Obligations to Sjamsul Nursalim issued by the defendant was not an administrative legal act but an unlawful act which qualified as corruption which was legalized by a legal decree/decision made by the Cassation Appellant/Defendant but without the basis of legal morality and morality of office. For this reason, the qualification of the decision that should be given is as stated in Law Number 31 of 1999 concerning Corruption Crimes in conjunction with Law Number 20 of 2001 concerning Amendments to Law Number 31 of 1999 concerning Corruption Crimes, article 2 and article 3.

An analysis of the considerations of the Supreme Court Judges and the Panel of Judges in passing a decision acquitted of all lawsuits, referring to Article 191 paragraph (2) of the Criminal Procedure Code which reads "if the court is of the opinion that the act charged against the defendant is proven, but the act does not constitute a crime, then the accused was acquitted of all charges". Regarding the acquittal of all lawsuits, the judge's consideration in general was that what was charged against the defendant was proven but the defendant's actions did not constitute a crime. Another consideration of the judge is if there are special circumstances that cause the defendant not to be punished, namely the existence of justification and excuse reasons.

The decision to be released from all lawsuits was inappropriately given to the criminal act of corruption in the case mentioned above on the basis of the judge's consideration that the act was not a criminal act but a civil one. Referring to Article 191 paragraph (2) which states that

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"the act which has been charged has been proven, but the act is not a criminal act" in the statement "the act which has been charged has been proven" which means that an act is a criminal act and has been charged by the public prosecutor and in the examination of the criminal court trial the act has been proven, the actions which the prosecutor has charged are certainly a criminal act that violates the provisions of the criminal norm and if it is violated it will be subject to criminal sanctions. So it is not appropriate if the Abandonment of All Lawsuits is given with the consideration that the act is not a criminal act, because if you see that the elements in the articles charged are not proven, then the decision that should be given is an acquittal.

2. The Implications of the Application of Dissenting Opinions in Corruption Judge Decisions

The effect of applying the Dissenting Opinion by the Judge in this study was carried out on the research object which has been described in sub-chapter B in Chapter III of this study. Decision Away from All Lawsuits (onslag van alle rechtsvervolging) in the Supreme Court Decision Number 1555K/Pid.Sus/2019 with the defendant Syafruddin Arsyad Temenggung which has been analyzed can be seen that the effect of applying to the defendant does not have any meaning due to the minority and majority votes as well as profitable. The panel of judges will conduct deliberations when making decisions on criminal cases that are being examined and tried. The form of deliberation is negotiation, which is a means for the panel of judges to exchange ideas. Thus, material truth can be found, not on a personal basis, but on truth that represents the views of society.

The judge in submitting a dissenting opinion as a form of freedom given to judges regarding cases that have been examined and decided on in reality in court has not been used as well as possible. So if you want to do a dissenting opinion and have influence in its application, it must be part of the consideration. The part of the consideration referred to here is when there is a legal renewal in procedural law regulations made so that a dissenting opinion is not only based on unanimous and majority votes and is confidential in the Criminal Procedure Code and in a decision if there is a dissenting opinion it is required to be contained in the Law on Judicial Powers and Law Supreme Court.

Making a decision by a judge regulated in the Criminal Procedure Code with deliberation is still confidential to the public in knowing the opinions that arise in the deliberation, which means that opinions that contain high truth values may occur so that the influence on the litigants also fulfills a sense of justice. the community actually lost in the deliberations that were carried out. On the other hand, the publication of dissenting opinions basically does not change the nature of the independence of the judiciary and the confidentiality of the deliberations of judges in deciding cases because this is precisely in line with the spirit so that the public knows the considerations for creating a decision, transparency and accountability which aim to guard the upright by focusing on the checks and balances of judicial power.

A healthy judiciary can be realized if in deliberations, each judge has deep beliefs, strong feelings, and has the courage to express his views through a concrete philosophical process. The existence of this deep belief and strong feeling is a form of the judge's personal freedom. However, this belief is not only based on subjective beliefs but on the belief in a sense of justice that exists in society.

The theoretical study of this research contained in CHAPTER II, sub-chapter three of the thesis, discusses the theory of proof, which in Indonesian procedural law adheres to a limited negative statutory proof system (negatief wettelijk bewisjstheorie). In the view of legal expert Andi Hamza, proof is an effort to obtain information through evidence and evidence in order to obtain a conviction about whether the criminal act being charged is true or not and to find
out whether the defendant was guilty.\textsuperscript{12} Then, Adami Chazawi in his explanation regarding the three beliefs contained in judges which are absolute, multilevel and inseparable: The judge's belief in the event of a crime in accordance with the indictment of the Public Prosecutor (JPU); The judge's belief that the accused has committed a crime. The judge believes that the criminal act committed by the defendant can indeed be blamed on him.\textsuperscript{13}

Then the judges will be given the freedom to analyze these legal events based on the rules using interpretation methods that still refer to the policies that underlie the rules and facts so that in the end the judges will find and classify a legal event. Through the judge's authority which is also given, the judge contains various considerations as a form of accountability for all phases passed in finding the truth of a legal event. Dissenting opinion is a forum for personal freedom for judges to express their views and philosophies in obtaining material truth.

To achieve a meaning of "unity in diversity; differences in unity ", then an awareness of the duties and responsibilities in the task of fulfilling the sense of justice that exists in society is needed by the panel of judges. Sometimes, as some of the decisions analyzed by the deliberations carried out by the panel of judges did not reach a consensus. The cause of this is due to differences in beliefs, views, social, philosophical factors that are adhered to by judges who cannot be forced to think the same way in looking at a legal issue.

With the existence of a dissenting opinion, the panel of judges who have the majority opinion in case examinations will be more careful in utilizing various sources of law which are used as a basis for making a decision, including the use of jurisprudence as a source of law by conducting studies that are adapted to social conditions in society. The form of the process of evaluating legal considerations in making a decision is an evolution of legal principles from the past, present and future as a form of legal renewal. In addition, the existence of a dissenting opinion becomes a reference for judges examining similar cases and can be used as material in proving the losing party in a trial. The dissenting opinion in the deliberation of the judges is material for examination for the community in assessing a judge's decision made, whether the decision is the result of deliberation or vice versa where the dissenting opinion by the judge is actually closer to the sense of justice that exists in society.

With the existence of limitations in the application and implementation of dissenting opinions by judges in court decisions, it shows that the judiciary in Indonesia is still not transparent and accountable. On the one hand, the legal system in Indonesia guarantees the freedom of judges when deliberations make decisions. The concept of deliberation of judges basically must be maintained its independence so that it is free from intervention by any party. On the one hand, the publication of dissenting opinions by judges is an important material for academics, practitioners and policy makers in assessing whether a case has been correctly assessed and examined by a judge. The limitations on publication arrangements regarding dissenting opinions in the scope of general courts, specifically in resolving criminal cases, are far different in comparison when looking at the application to the commercial courts and the Constitutional Court.

Therefore, this dissenting opinion must be regulated in the Criminal Procedure Code to be precise in the decision letter article 197 so that it becomes part of the consideration of a decision so that it has an influence on its application, when analyzing this research the existence of a dissenting opinion in every case of corruption and making a decision does not eliminate elements of prosecution of criminal acts of corruption that must be overcome in an extraordinary manner. So that the influence of the application of dissenting opinion by judges in every decision on corruption cases is still guaranteed elements of legal certainty, justice and expediency by also prioritizing the freedom of judges and the judge's independence.

\textsuperscript{12} Andi Hamzah, \textit{Pengantar Hukum Acara Pidana Indonesia} (Jakarta: Ghalia, 1984), p. 77.
\textsuperscript{13} Adami Chazawi, \textit{Hukum Pembuktian Tindak Pidana Korupsi} (Bandung: Penerbit PT. Alumni, 2005), p. 31.
Dissenting opinion is also considered as a breakthrough in the paradigm of legal discovery which has the nature of political judicial restraint to become a paradigm of progressive judicial activism. In this regard, legal findings that describe the existential freedom of judges are political judicial activism in nature. In more detail, legal findings position judges as the main pillars who are active in obtaining material truth. In this paradigm, judges must be able to break through various streams of legal discovery that place law as the only source of law into a more progressive stream in finding various sources of law that prioritize aspects of justice.

C. Conclusion

The results of the analysis and discussion in this study obtained two conclusions that are in line with the objectives of this study, namely: The dissenting opinion by the Judge is the essence of the judge’s freedom and independence to find material truth. Because there is a dissenting opinion, the elements of Gerechtigkeit (justice), Zweckmässigkeit (benefits), and Rechtssicherheit (legal certainty) are guaranteed. Dissenting opinion is not a decision but the contents of the decision which each judge considers. However, it would not be appropriate if an acquittal of all lawsuits was given with the consideration that the act was not a criminal act, because if you see that the elements in the articles charged are not proven, then the decision that should be given is an acquittal; and The effect of applying a dissenting opinion by a judge is an instrument towards better quality law enforcement, not just a matter of majority and minority in the deliberation of judges but a consideration of whether or not a crime has been proven. Dissenting opinions too have several important meanings in the development and development of law in Indonesia, namely dissenting opinion is an important pillar in keeping the judiciary healthy, dissenting opinion is a reflection of the personal freedom of judges and the impartiality of judges, giving effect in making court decisions in the future, dissenting opinion as material for examination the public against court decisions, and dissenting opinions as instruments to restore public trust in court decisions, breaking into the paradigm of legal discovery in realizing rechtsidee.

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