

Dissenting opinion in Indonesian constitutional court decisions: An analysis of the theory of judicial independence and its implications for constitutional legitimacy

Naili Azizah^{1*}, Dian Rosita¹, Zuniarti¹

¹ Universitas Muhammadiyah Kudus, Kudus, Indonesia

*Corresponding author email: nailiazizah@umkudus.ac.id

Abstract

This study examines dissenting opinions in Decision of the Indonesian Constitutional Court Number 90/PUU-XX/2023 and 62/PUU-XXII/2024. These two decisions contain dissenting opinions from judges. The existence of dissenting opinions is often seen as a tangible manifestation of the independence of judicial power, but at the same time raises debates about its influence on the legitimacy of constitutional decisions. The research method used is normative legal research with a legislative approach, a conceptual approach, and a case approach. The data sources are Constitutional Court decisions containing dissenting opinions, academic literature on the theory of judicial independence, and doctrines related to the legitimacy of constitutional adjudication. The analysis was conducted qualitatively through legal interpretation and theoretical review. The research findings indicate that dissenting opinions are a manifestation of the independence of constitutional judges in interpreting the constitution, while also strengthening the transparency of the decision-making process. From the perspective of legitimacy, dissenting opinions serve as an internal check on majority dominance and act as a foundation for the future development of constitutional law. From a legal-political perspective, dissenting opinions show that Constitutional Court decisions are not entirely free from the pull of political interests and the legal ideologies of judges, but rather affirm the role of the Constitutional Court as an open arena for deliberation. In this way, dissenting opinions not only reflect the freedom of judges but also serve as an indicator of how Indonesian legal politics shapes, influences, and directs the direction of constitutionalism.

Keywords

Dissenting Opinion, Independence of Judicial Power, Constitutional Legitimacy, Constitutional Court

Published:
October 1, 2025

This work is licensed
under a [Creative
Commons Attribution-
NonCommercial 4.0
International License](#)

Selection and Peer-
review under the
responsibility of the
ASEAN Conference of
Law Schools 2025
Committee

Introduction

The Constitutional Court plays an important role in law enforcement in Indonesia. The Constitutional Court has been designed to be both a guardian and sole interpreter of the constitution, where judges are independent of political influence (non-political adjudicators) and are tasked with and empowered to assess the constitutionality of laws and regulations (the guardian and interpreter of the constitution) [1]. This is the basic idea behind the establishment of the Constitutional Court, which has the authority to review the constitutionality of laws and resolve disputes between institutions [2]. The Constitutional Court Law grants Constitutional Court judges the authority to freely interpret the constitutionality of norms, which means that decisions containing dissenting opinions still have a high probability of being issued. According to Simon Bott, dissenting opinions in constitutional court decisions have been a common practice since the establishment of the Constitutional Court [3].

Theoretically, dissenting opinions are a manifestation of the independence of judicial power. Judges are given the space to express their constitutional views without pressure or interference from other parties. On the one hand, this reaffirms that Constitutional Court judges possess independence that stands above the law and the constitution, and judges have the essence of personal freedom in seeking material truth. Meanwhile, the freedom to express differing views on a case is a manifestation of a judge's existential freedom, where such freedom is the highest form of freedom and encompasses the entire existence and unlimited persona of the judge [3]. However, dissenting opinions often raise questions about the extent to which differences of opinion within the Constitutional Court can affect the legitimacy of its decisions and public trust.

In theory, judicial independence requires judges to be free from interference by the executive or legislative branches. Independence is not merely the personal freedom of judges in decision-making, but also relates to the institutional freedom of the judiciary to carry out its constitutional functions impartially [4]. At this point, dissenting opinions are not bound by majority opinion, but rather by constitutional beliefs and arguments [5]. This freedom has implications for constitutional legitimacy. The final and binding decisions of the Constitutional Court must be accepted and trusted by the public as fair, objective, and based on the law. Dissenting opinions will indeed cause polarization and may affect public perception of the authority of Constitutional Court judges. On the other hand, dissenting opinions are also seen as an internal check and balance mechanism [6].

From 2023 to 2025, there were several important Constitutional Court decisions that attracted public attention and dissenting opinions, such as Decision of the Indonesian Constitutional Court Number 90/PUU-XXI/2023 regarding the age limit for presidential and vice-presidential candidates [7]. In this case, the judges disagreed, allowing the age requirement to be replaced with experience as a regional head. The difference in opinion in this case shows how much the independence of judges is tested when dealing

with issues that are fraught with political interests. This decision has drawn criticism from many quarters. Additionally, regarding the presidential threshold, some judges emphasized that the presidential nomination threshold has reduced the quality of democracy by obstructing the emergence of alternative national leaders. Furthermore, in 2024, there was a judicial review request regarding the abolition of the presidential threshold, which led to Decision of the Indonesian Constitutional Court Number 62/PUU-XXII/2024 [8].

These cases show that dissenting opinions cannot be viewed merely as technical differences, but reflect the extent to which the theory of judicial independence is actually implemented in practice, and open up space for assessing whether judges' decisions have legitimacy in the eyes of the public.

Method

This study uses a normative legal research method, which involves a literature review. The literature review in this study is based on legislation, books, scientific journals, and sources or materials from online news media. The research approaches used are the statute approach and the case approach [9]. The legislative approach is an approach that involves examining laws [10]. As well as analyzing Constitutional Court decisions that contain dissenting opinions in the process.

Results and Discussion

Dissenting opinion as a manifestation of judicial independence

Basically, a judge's decision in a case does not fully and unanimously agree with the verdict that has been handed down. There are times when a judge does not agree with the decision made by the panel of judges. In such cases, this is referred to as a dissenting opinion. In legal terms, a dissenting opinion is a substantive disagreement that results in a different ruling. For example, the majority of judges may reject a petition, while the minority judge may grant the petition in question, and vice versa [11]. The theory of judicial independence explains that judges must be free from political interference, whether from the executive, legislative, or interest groups [4]. The concept of dissenting opinions is one indicator that constitutional judges still have freedom of thought that is not always subject to the majority. According to Jimly Asshiddiqie in his book about the law (Regarding the Law), differences of opinion are a reflection of a healthy constitutional deliberation process, as they demonstrate a deep legal dialectic in every decision [12]. The following are several strategic decisions that show dissenting opinions:

1. Decision of the Indonesian Constitutional Court Number 90/PUU-XX/2023 regarding the age requirements for presidential and vice-presidential candidates. This ruling has sparked public debate regarding the role and authority of the Constitutional Court in establishing new norms related to general elections. The ruling confirms

that a presidential or vice-presidential candidate must be at least 40 years of age or have experience in a position elected through general elections, including regional heads [1]. In this ruling, there were judges who disagreed on the interpretation of Article 169(q) of the Election Law. Some judges argued that the age limit should be strictly 40 years old, while others believed an exception should be made for incumbent regional heads. This dissenting opinion highlights the dynamics of judicial independence in addressing political issues, as the Constitutional Court's ruling will significantly shape the national political landscape ahead of the 2024 elections [13].

2. Decision of the Indonesian Constitutional Court Number 62/PUU-XXII/2024 The abolition of the presidential threshold. In this case, a number of petitioners challenged the constitutionality of Article 222 of the Election Law, which regulates the presidential nomination threshold (20% of seats in the House of Representatives or 25% of valid national votes). The petitioners argued that this provision restricted the constitutional right of citizens to be elected and hindered the emergence of alternative national leadership. The Constitutional Court, through a majority decision, rejected the petition and declared the presidential threshold constitutional. However, there were dissenting opinions from several judges who argued that the presidential threshold actually contradicts the principles of popular sovereignty, electoral justice, and the principle of equality in democratic elections. The dissenting judges emphasized that Article 6A of the 1945 Constitution does not stipulate any percentage limit on political party support, so the threshold regulation should not restrict citizens' constitutional rights. According to them, the existence of the threshold only benefits large parties and narrows the space for democracy [14].

The Implications of Dissenting Opinions on Constitutional Legitimacy in the Perspective of Indonesian Legal Politics

Indonesia is a country based on the rule of law, and countries based on the rule of law have three main characteristics, namely the principle of legality, recognition and respect for human rights, and an independent judiciary. As stated by Mahfud MD, the principle of independence is one of the most important characteristics of all democratic countries based on the rule of law. No country can be called democratic without an independent judiciary [2]. The existence of dissenting opinions in Constitutional Court decisions not only has legal significance, but also has a direct impact on constitutional legitimacy and the direction of Indonesian legal policy. Normatively, dissenting opinions demonstrate the transparency and accountability of judges, as the public can see the various legal considerations that arise in the decision-making process. However, in the reality of legal politics, these differences of opinion are often interpreted ambiguously: on the one hand, they strengthen constitutional legitimacy because they reflect the independence of judges, but on the other hand, they have the potential to weaken legal certainty due to sharp differences in interpretation. In the context of legal politics, dissenting opinions

in strategic cases reveal the tug-of-war between the principle of popular sovereignty and the logic of political stability. Take, for example, Putusan Mahkamah Konstitusi No. 90/PUU-XXI/2023 on the age requirement for presidential or vice-presidential candidates. Dissenting opinions arise when some judges consider that the 40-year-old age requirement must be applied absolutely, while others allow exceptions for regional heads. From a legal-political perspective, this dissent reflects the Constitutional Court's uncertainty in balancing citizens' political rights and legal engineering for practical political needs. As a result, the public perceives the legitimacy of the decision as being more influenced by political constellations than by constitutional principles of justice. This decision has sparked significant controversy regarding conflicts of interest. This is because the Constitutional Court amended the norms related to the eligibility criteria for presidential and vice-presidential candidates by adding the phrase “has held or is currently holding an elected position, including regional head positions.” Naturally, this decision raises doubts about the independence of the Constitutional Court [1].

Meanwhile, in Decision of the Indonesian Constitutional Court Number 62/PUU-XXII/2024 on the presidential threshold, the dissenting judges argued that the presidential nomination threshold contradicts the principle of popular sovereignty because it limits political participation. On the other hand, the majority of judges supported the threshold on the grounds of government stability. This can be seen from the rule that was initially implemented to limit the number of presidential and vice-presidential candidates, but it has become a double-edged sword as it has instead created dominance by political party coalitions participating in the election [8]. From a legal-political perspective, this dissent reveals two faces of legitimacy: formal legitimacy (a constitutionally valid majority decision) and substantive legitimacy (a decision in line with democratic ideals). This tension creates a paradox, where the decision is legally valid but is seen as weak in terms of democratic justice.

From the two cases above, it is evident that dissenting opinions have two main implications. First, dissenting opinions strengthen constitutional legitimacy by demonstrating the independence of constitutional judges, thereby convincing the public that the Court is not entirely subservient to the political interests of the majority. In this case, dissent becomes an internal check and balance mechanism in line with the theory of judicial independence. Second, dissenting opinions can weaken constitutional legitimacy in the context of legal certainty. Sharp differences of opinion among judges have the potential to raise public doubts about the objectivity of the Court, especially if dissent occurs on issues laden with political interests. In Indonesian legal politics, this emphasizes that the constitution is not only understood as a legal document but also as a political instrument that is often interpreted according to the dynamics of power.

Thus, the implications of dissenting opinions for constitutional legitimacy in Indonesia are always ambivalent. They can be an instrument of legal democratization while also posing challenges to the consistency of national legal politics. In this framework, Indonesian legal politics faces a dilemma: whether to position the Constitutional Court

as a uniform “final” interpreter or as a deliberative forum that opens up space for constitutional pluralism.

Conclusion

Dissenting opinions in Constitutional Court decisions not only represent the individual freedom of judges to interpret the constitution, but also serve as a tangible manifestation of the principle of judicial independence. The existence of dissenting opinions affirms that constitutional judges possess intellectual and moral autonomy to voice differing views, even when they diverge from the majority opinion. This is in line with the theory of judicial independence, which emphasizes the importance of judges' freedom in upholding constitutional principles without interference from other powers. However, dissenting opinions are not limited to internal judicial aspects. In the context of Indonesian legal politics, differences of opinion among judges have significant implications for constitutional legitimacy. On the one hand, dissenting opinions can strengthen constitutional legitimacy by demonstrating openness, transparency, and democratic dynamics in decision-making. On the other hand, dissenting opinions also have the potential to raise public doubts about the consistency and objectivity of the Constitutional Court, especially if the resulting decisions are considered to be politically charged.

Case studies such as Constitutional Court Decision No. 90/PUU-XXI/2023 on the age limit for presidential and vice-presidential candidates and Decision of the Indonesian Constitutional Court Number 62/PUU-XXII/2024 on the abolition of the presidential threshold demonstrate that dissenting opinions not only have academic value but also have a tangible impact on the political and legal landscape in Indonesia. From this, it can be concluded that dissenting opinions are an important instrument in maintaining the balance between judicial independence and constitutional legitimacy. Therefore, in the future, strengthening the position of dissenting opinions within the framework of Indonesia's legal politics should be encouraged not only as part of judicial freedom but also as a means to expand public trust in the Constitutional Court as the guardian of the constitution.

References

- [1] E. I. Rohmah and Z. Ilmiyah, “Dinamika Putusan Mahkamah Konstitusi Nomor 90/PUU-XXI/2023 Tentang Persyaratan Usia Calon Presiden dan Wakil Presiden,” *Progresif J. Huk.*, vol. 18, no. 1, pp. 100–131, 2024.
- [2] R. Librayanto, M. Riza, M. Ashri, and K. Abdullah, “Penataan Kewenangan Mahkamah Konstitusi dalam Memperkuat Independensi Kekuasaan Kehakiman,” *Amanna Gappa*, vol. 27, no. 1, p. 45, 2019.
- [3] S. U. Firdaus, P. A. N. Panjaitan, and R. K. Widyasasmito, “Peran Dissenting Opinion Hakim Konstitusi dalam Pembaharuan Hukum Nasional,” *J. Penelit. Huk. Jure*, vol. 20, no. 1, p. 1, 2020, doi: 10.30641/dejure.2020.v20.1-10.
- [4] T. Tate, C.N;Vallinder, *The Global Expansion of Judicial Power*. New York: NYU Press, 1995.
- [5] C. R. Sunstein, *Legal Reasoning and Political Conflic*. Oxford: Oxford University Press, 1996.
- [6] M. Saphiro, *Courts: A Comparative and Political Analysis*. Chicago: University of Chicago Press, 1981.

- [7] U. U. Weruin, "Dissenting Opinion Para Hakim dalam Pengadilan: Fungsi dan Ancamannya," *JlIP - J. Ilm. Ilmu Pendidik.*, vol. 7, no. 10, pp. 12359–12367, 2024, doi: 10.54371/jiip.v7i10.6183.
- [8] D. Lusy Nurcahyani and M. Arsanti, "Mengkaji Putusan Penghapusan Presidential Therseshold Untuk Pemilu Mendatang," *J. Sos. dan sains*, vol. 5, no. 5, pp. 1350–1359, 2025, doi: 10.59188/jurnalsosains.v5i5.31985.
- [9] M. Rusdi, "Implikasi Dissenting Opinion Hakim Mahkamah Konstitusi Terhadap Kesadaran Hukum Masyarakat," *Widya Pranata Huk. J. Kaji. dan Penelit. Huk.*, vol. 1, no. 1, pp. 89–107, 2019, doi: 10.37631/widyapranata.v1i1.257.
- [10] Fabiana Meijon Fadul, "Ekologi Pendidikan," 2019.
- [11] Haidar Adam, "Dissenting Opinion Dan Concurring Opinion Dalam," *Univ. Airlangga*, vol. 3, no. 2, pp. 309–312, 2017.
- [12] J. Asshiddiqie, *Perihal Undang-Undang*. Jakarta: Rajawali Pers, 2006.
- [13] M. Konstitusi, "Putusa No. 90/PUU-XX/2023," *Accid. Anal. Prev.*, vol. 183, no. 2, pp. 153–164, 2023.
- [14] M. Konstitusi, "Putusan Nomor 62/PUU-XXII/2024," no. February, pp. 4–6, 2024.