

## Juridical Analysis of Dissenting Opinions of Constitutional Judges in Constitutional Court Decisions

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**Abstract**

This research will raise the issue that will be studied is, First, the regulation of dissenting opinion in the Constitutional Court's Event Law. Second, the legal power of dissenting opinion in the Constitutional Court Decision. Third, the legal implications of dissenting opinion in the Constitutional Court Decision. This resulted in the conclusion First, the arrangement of dissenting opinions in the constitutional court's guidelines in this case in the FMD cannot be found as a whole. The arrangement of dissenting opinion in the PMK independence of constitutional judges in conveying their opinions is still maintained. Second, explicitly, there is no setting on dissenting opinion. The phrase used in Law No. 24 of 2003 concerning the Constitutional Court is "the opinion of different members of the panel of judges". Third, the legal implications of dissenting opinion in the Constitutional Court's decision are legal uncertainty, violation of the hierarchy of laws and regulations, and the absence of legal order. The formulation of dissenting opinion is necessary to clarify its position in the law of events in the Constitutional Court. This can only be done if the legal instruments that govern it give full legitimacy to constitutional judges in dissenting. The author's advice in this study is to strengthen the legal power of dissenting opinion, as a preventive measure against future legal reforms to ensure certainty, justice. and the usefulness of the law for the whole society.

**Keywords:** Dissenting Opinion, Concurring Opinion, Independence of Judges

**Abstrak**

Penelitian ini akan mengangkat permasalahan yang akan dikaji yaitu, Pertama, pengaturan perbedaan pendapat (*dissenting opinion*) dalam UU Acara MK. Kedua, kekuatan hukum perbedaan pendapat dalam Putusan MK. Ketiga, implikasi hukum perbedaan pendapat dalam Putusan MK. Hal ini menghasilkan kesimpulan Pertama, pengaturan perbedaan pendapat dalam pedoman MK dalam hal ini PMK tidak dapat ditemukan secara keseluruhan. Pengaturan dissenting opinion dalam PMK independensi hakim konstitusi dalam menyampaikan pendapat tetap dipertahankan. Kedua, secara eksplisit,

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tidak ada pengaturan mengenai dissenting opinion. Ungkapan yang digunakan dalam Undang-Undang Nomor 24 Tahun 2003 tentang Mahkamah Konstitusi adalah “pendapat anggota majelis hakim yang berbeda”. Ketiga, implikasi hukum dari dissenting opinion dalam putusan MK adalah ketidakpastian hukum, pelanggaran hierarki peraturan perundang-undangan, dan tidak adanya ketertiban hukum. Perumusan dissenting opinion diperlukan untuk memperjelas posisinya dalam hukum acara di MK. Hal ini hanya dapat dilakukan jika perangkat hukum yang mengaturnya memberikan legitimasi penuh kepada hakim konstitusi dalam perbedaan pendapat. Saran penulis dalam penelitian ini adalah memperkuat kekuatan hukum dissenting opinion, sebagai tindakan preventif terhadap reformasi hukum di masa depan untuk menjamin kepastian, keadilan. dan kemanfaatan hukum bagi seluruh masyarakat.

**Kata Kunci:** Dissenting Opinion, Concurring Opinion, Independensi Hakim

## A. Introduction

The Constitution, however, it is defined and categorized, is a dynamic organ. All constitutions, for the most part their meaning and relevance, depend on the social framework of the surrounding society.<sup>1</sup> Therefore, one of the main functions of the constitution is to protect the fundamental rights and freedoms of human beings or individuals. A state that is an organization of power where it can be known that power tends to be abused, therefore the power of a country must have a constitution that can later limit power itself.<sup>2</sup>

This is the seed of the development of the doctrine of constitutionalism is a view whose main substance is the means of control over the power possessed by the state. By fully enforcing that the constitution is the highest source of law in a country<sup>3</sup>, and on the authority possessed by the constitution

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<sup>1</sup> Hilaire Barnett, *Constitutional and Administrative Law*, 14th ed. (Routledge, 2021), <https://www.routledge.com/Constitutional-and-Administrative-Law/Barnett/p/book/9780367566326>.

<sup>2</sup> Erwin Chemerinsky, *Constitutional Law, Principles and Policies* (Aspen Law & Business, 1997).

that the power possessed by the state is determined by its limits or legitimacy.<sup>3</sup> Bede Harris's assertion that the doctrine or teachings of constitutionalism is "at the heart of constitutional law" is not an exaggeration. Because Constitutionalism is a teaching that emphasizes the notion that state power must be defined and established by law, so that just like people, the government must be subject to the law.<sup>4</sup> Therefore, according to Bede Harris, the key factor that determines whether the doctrine of constitutionalism is followed or not, lies in the answer to the question of whether the government respects the court's decision or not.<sup>5</sup> Because the nature of the constitution itself because the constitution, according to history and facts, is history and facts about the statement of rights, so that constitutional rights are not only related to the constitution but are part of the constitution.

Departing from the brief description above on the meaning of the constitution and constitutionalism simply conveys to the constitution in Indonesia and especially to the Constitutional Court of the Republic of Indonesia (hereinafter stated as MKRI) as one of the institutions implementing power. The annoyance in the country. So many terminologies or terms are often given to the Constitutional Court, namely *the sole interpreter of the constitution* or *the guardian of the constitution*. The term describes the important role of the responsibility held by MKRI and gives an implicit message of the high expectations of citizens who seek the meaning of justice.

The establishment of a rule of law in a country that is the main indicator is the power of an independent judiciary exercising its authority. No one can intervene in the inertia of the judicial power in actualizing its judicial power which can be the meaning that the power of the judiciary has been well carried out. Where the spearhead of the judiciary is the judge himself. The reflection of the independence of judicial power is seen from the independence of each

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<sup>3</sup> Barnett, *Constitutional and Administrative Law*.

<sup>4</sup> Sholahuddin Al-Fatih, "Model Pengujian Peraturan Perundang-Undangan Satu Atap Melalui Mahkamah Konstitusi," *Jurnal Ilmiah Hukum LEGALITY* 25, no. 2 (2018): 247, doi:10.22219/jihl.v25i2.6005.

<sup>5</sup> Bede Harris, "Constitutional Implications of a Zombie Outbreak," *Canberra Law Review* 14, no. 1 (2016): 12–24, <http://classic.austlii.edu.au/au/journals/CanLawRw/2016/4.pdf>.

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judge in issuing a decision. A view that says that the crown of the judges lies in the decisions it issues. The decision is the identity for the judges to know how quality, integrity, and credibility. Therefore, the judge is given freedom in carrying out his judicial activities (*judicial activism*)."

In the context of the Constitutional Court, a decision taken by a judge must be a decision extracted from the principles held firmly as a statesman who rules the constitution. These principles are maintained in order to fulfill the elements of justice that are the goal of the judicial process itself. Therefore, in the process of deciding, the judge must consider all aspects that are juridical, philosophical and sociological, so that the justice that wants to be achieved, realized, and accounted for in a judge's decision is justice oriented. On legal justice, moral justice, and community justice (*social justice*).<sup>6</sup>

During the court issuing a decision often get a lot of public attention so that it can produce debate or opposition. The controversy of an MKRI decision becomes understandable because every judge has an unequal perspective and interpretation in presenting a case. The judge's understanding of looking at laws and regulations can also be different when using different interpretations.<sup>7</sup> The decision of the MK judges who do not always get a unanimous decision is a logical consequence of the occurrence of differences of opinion of judges whether it is *dissenting opinion* or *concurring opinion*. So it is like a "labyrinth" that is very confusing over (not) fairness for every citizen. Simply speaking, *dissenting opinion* is the opinion of judges that differs from most other judges in substance, while *concurring opinion* is the opinion of the judge submitted in the writing where the opinion agrees with the opinion of many other judges but the difference is the reason that underlies the opinion.

The spirit of openness is something that goes hand in hand with the enactment of *dissenting opinion*. Do not just read the decision that is open then

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<sup>6</sup> Firman Floranta Adonara, "Prinsip Kebebasan Hakim Dalam Memutus Perkara Sebagai Amanat Konstitusi Principles of Freedom of Justice in Decidene The Case as a Constitutional Mandate," *Jurnal Konstitusi* 12, no. 1 (2015): 1–20.

<sup>7</sup> Sholahudin Al Fatih, "Interpretation of Open Legal Policy By The Constitutional Judges in Judicial Review of Parliamentary Thresholds," *Diponegoro Law Review* 6, no. 2 (2021): 231–46, doi:10.14710/dilrev.6.2.2021.231-246.

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the process in forming the decision must also be open as well. Constitutional judges who give *dissenting opinions* are the essence of the personal freedom of judges in order to discover the material truth. Freedom to express different views on a case is the embodiment of the existential freedom of judges, which is one of the highest types of freedom and covers all. The existence and personality of judges is not limited to one aspect. This existential freedom encourages judges to realize the existence of judges creatively in realizing their opinions independently and independently and in the absence of interference by parties.

Juridically, Constitutional Law No. 24 of 2003 opens wide-ranging opportunities for mk judges in explaining constitutionality to a norm, so when it's time to decide on a case has the possibility or opportunity of a decision that Having dissenting opinions is huge. Based on the view of Simon Butt, that dissenting opinion contained in the MKRI decision is certain to happen since the first time the Constitutional Court was the concerns felt when the first-time dissenting opinion given its authority by the Constitutional Law that the decision issued by MKRI has no authority and the views issued. But in the end time can give another answer that dissenting opinions can even increase public confidence in the public.

*Dissenting opinion* for the first-time in Indonesia does not have a formal legal basis because in practice it has not developed in Indonesia. Dissenting opinion for the first time has legal force when regulated in Bankruptcy Law No. 4 of 1998. When viewed in a historical perspective on dissenting opinion in Indonesia for the first time in branding on commercial courts, but the current condition of *dissenting opinion* has its own space for other courts, in which MKRI also regards material testing of a law.

There are 115 MKRI decisions that show the existence of *dissenting opinions*, when viewed from the Constitution and Democracy (Code) in 2016 explaining that all decisions issued by MKRI between 2004-2016. Where the number of decisions containing *dissenting opinion* continues to grow so that it can be seen in several decisions that had become public attention on a national scale. *First*, around in 2018, the public spotlight was related to differences of

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opinion issued by 4 (four) Constitutional Judges in issuing *dissenting opinions* on KPK questionnaire rights by the DPR. Constitutional Court Decision No. 36/PUU-XV/2017 which tests the constitutionality of the object of DPR's voting rights to the KPK raises legal problems and debates, especially whether the use of dpr's voting rights against the KPK as an independent state institution. Article 79 paragraph (3) of Law Number 17 of 2014 concerning MPR, DPR, DPD and DPRD (MD3 Law).

*Second*, the Opinion of the Judge Disenter in the Testing of the Blasphemy Law. In 2009, the applicants consisted of individuals and private legal entities, including former President K.H. Abdurrahman Wahid, applied for testing law No. 1/PNPS/1965 on Prevention of Abuse and/or Blasphemy (Blasphemy Law). The application asks the Constitutional Court to test the core articles of the Blasphemy Law, namely Articles 1 to 4, because it is considered contrary to the principle of *equality before the law*, the right to freedom of religion, believe. beliefs, expressing thoughts and attitudes, and other human rights, are protected and sponsored by the state. Stated in PMK No. 97/PUU-XIV/2016.

*Third*, the Opinion of the Judge Disenter in the Case of "Independent Presidential Candidate." There are two similar decisions, namely Decision No. No. 56/PUU-VI/2008 concerning the testing of Law No. 42 of 2008 concerning Presidential Elections and Constitutional Court Decision No. 17/PUU-XI/2013 concerning Testing of Law No. 2 of 2011 on political parties. In 2008, the Constitutional Court accepted the application for testing article 1 paragraph (4), article 8, article 9, and article 9. 13 paragraph (1) of the Presidential Election Law, which is an arrangement regarding the terms of the presidential and vice-presidential nominations. In its decision, the Constitutional Court rejected all applications, stating that the requirements for the nomination of the President and Vice President must come from political party is the will of the constitution which refers to the original intent (initial will ) article 6A paragraph (2) of the 1945 Constitution.

*Fourth*, Judge Disenter's Opinion on Legal Standing for Foreigners. Applications submitted directly by 3 (three) Foreign Nationals (WNA) which can be seen in PMK No.2-3 / PUU-V / 2007 concerning Testing law Number 22

of 1997 concerning Narcotics. In its decision that is simply unacceptable (*niet ontvankelijk verklaard*) where the Constitutional Court decides it to the applicant who is a citizen. The decision has 4 (four) different-opinions of judges, which only one gives *concurring opinion* and 3 (three) other judges expressly give different opinions in the decision, namely Judge Constitution Harjono, Judge Laica Marzuki, and Judge Maruarar Siahaan.

Most *dissenting opinions* are likely very vulnerable when MKRI is faced with cases that are in 2 (two) ways, namely politics and law enforcement. It can be seen that there are often opinions of judges who are stung when deciding the Law on Elections that have *dissenting opinions*, then the law enforcement nature can be known when there is a Judicial Review of the KPK Law, the Criminal Code Bill and others, which are also included there. *dissenting opinion* against the testing of Perppu. The form of the MKRI decision that has *dissenting opinion* in it becomes a big question by the public about the authority.

The actuality of *dissenting opinion* itself which is quite a lot in the process of MKRI. In the perspective of legal comparison, it is mentioned that *dissenting opinion* is the terminology and substance of *Anglo Saxon* legal parts, such as America and the British Empire and become part of the *legal opinion*. To be a comparison, the nature of legal opinion (*legal opinion*) can consist of:

- a. Judicial opinion is in the case of the criminal field and the civil field on the opinion of the judge in giving consideration in the decision of a case.
- b. The majority of opinions is the majority of judges in one court agreeing on the opinion or views of one of the judges.
- c. Dissenting opinion is a judge's opinion that differs substantially from that of other judges contained in writing in the decision issued.
- d. Concurring opinion is the opinion of judges who are the same as the majority of other judges but have differences in terms of rationality or reason.
- e. Plurality opinion is an opinion that has the characteristics of more than one or plural where this oppressor is in a court and accepted by the majority of other courts.
- f. A memorandum of opinion is a note given by a court whose authority is



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higher to be granted to a lower court of its level.

By looking at a constitutional court decision that has a comparison (5:4) means that 5 (five) judges agree on a decision while the other 4 (four) judges have different views. Show the openness of the rationality space in making decisions in the Constitutional Court. The decision issued by the Constitutional Court shows the upheaval of the judge's analysis in interpreting a very deep law. On the other hand, when viewed from other glasses it can indeed be categorized that the comparison shows the quality of the decision that does not fully reflect the panel of judges. Although the decision issued has fulfilled the 5 (five) judges who agreed to it, but does the decision have the same logical power as the decision that was decided by acclamation?

The existence of a Constitutional Court decision that has *dissenting opinions* of up to four judges so that it is still an upheaval of thought from experts in constitutional law or constitutional law. Some experts assess that as long as the decision issued by the Constitutional Court has fulfilled the provisions of the legislation and the provisions of the Constitutional Court, the decision already has a binding determination basis. In contrast to other expert views, as other experts consider when the constitutional court's decision that shows *dissenting opinion* is enforced in a manner intact, does not fulfill one of the legal objectives, namely the usefulness of the law for everyone who is a party in it. Although the *dissenting opinion* of the constitutional judge is included in the decision but what can be used as an epistemological reference is the opinion of many of the judges themselves. Other expert views are getting sharper analysis that says that, when the constitutional court decision has a difference of 1 (one) judge, it should not be decided on behalf of the MK judges. But it was returned to the legislature as an open legal policy.<sup>8</sup>

The background of constitutional judges *issuing dissenting opinions* in decisions is the main basis for future legal reform. MK judge is a statesman who has competence science in the field of constitution and state governance, so the nature of his expertise in the field cannot be simply abolished, even though the

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<sup>8</sup> Mardian Wibowo, "Menakar Konstitusionalitas Sebuah Kebijakan Hukum Terbuka Dalam Pengujian Undang-Undang," *Jurnal Konstitusi* 12, no. 2 (2016): 196, doi:10.31078/jk1221.

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mk judges have a connection to his authority which is limited by the laws and regulations of his institution. His expertise is what gives birth to decisions that reflect justice on the basis of knowledge and experience of mk judges who have expertise in the field of constitution and state order. Departing from that view, the *dissenting opinion* of the Mk judges should not only be used as a display or "ornament" in the Constitutional Court's decision, but must be an important part of the decision and the law of the MK event itself.

Looking at the legal conditions above, therefore from the renewal of thought in the method of approach to the current Law of State Governance more specifically in terms of the law of the MKRI event, began to be realized and implemented, especially regarding coaching and education for renewal of the law. This unconsciousness began to be seen in its existence by dialectically debating social issues into the material substance of the Law of State and The Law of MKRI events, considering the interaction, interrelationship or relationship with each other. other, and interdependence or interdependence between law and social changes.

Based on the description stated above, the author sees it is very necessary to research more deeply and deeply rooted the grass about *dissenting opinions*. MK judges and how the arrangement, legal strength of *dissenting opinion* and legal implications this is to see the position of *dissenting opinion* can be a reference or reference for the judges of the Constitutional Court in the future if faced with something that has something in common. That is what makes *dissenting opinion* can be categorized as one of the preventive measures in the renewal of the law in the future, because the law must be able to follow developments. But when the court's decision cannot reflect the development of the times, then there is another alternative that can be used as a solution, namely by looking at the substance contained in *the dissenting opinion* given by the previous judge. According those condition, the author want to examine about what are the legal implications of *dissenting opinion* in the Constitutional Court Decision

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## B. Method

Legal research is research aimed specifically at the field of legal sciences.<sup>9</sup> Research design as a guideline for collecting data, its management to be analyzed and reconstructed.<sup>10</sup> To carry out legal research, of course, there are several approaches taken. Depart from that approach, the author will later get information from various perspectives about the problem being researched to find a way out. This research method will have an impact on the analysis of the issue that will be answered and sought a scientific solution by the author.

Methods or procedures of approach is a step to solve the problem or legal issue that is being researched with the orientation to complete the research that the author does. Departing as the formulation of the problem that was delivered in order to research and study holistically and comprehensively, which will use normative juridical research methods, namely legal research to be carried out by researching legal materials from laws and literature that supports to answer and solve the legal issues studied.

This legal research author uses several legal materials, including primary legal materials secondary legal materials and tertiary legal materials as follows:

a. Primary Legal Materials

Primary legal materials are the main legal materials or can be catalyzed as the basic guidelines of this research. Where the primary legal materials used for this research are as follows:

- 1) NRI Constitution of 1945.
- 2) Indonesian Law Number 7 of 2020 Third Amendment to Law No. 24 of 2003 concerning the Constitutional Court.
- 3) Indonesian Law Number 48 of 2009 concerning the Power of Justice.

b. Secondary Legal Materials

Secondary legal material is legal material used to support primary legal materials in analyzing several legal problems. Secondary legal materials are sourced from books, journals, documents related to the legal issues

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<sup>9</sup> Irwansyah, *Penelitian Hukum: Pilihan Metode & Praktik Penulisan Artikel*, ed. Ahsan Yunus (Yogyakarta: Mirra Buana Media, 2020).

<sup>10</sup> Soerjono Soekanto, *Pengantar Penelitian Hukum* (Jakarta: UI-Press, 2014).

raised, and also references from the internet related to legal issues that the author conducted research.

c. Tertiary Legal Materials

Tertiary law material is a material used to by pass and help describe and facilitate the understanding of primary legal materials and secondary legal materials. The legal materials he delivered were the Indonesian dictionary and the legal dictionary and encyclopedia.

The technique of collecting legal materials that the author does is by means of literature studies, namely by reviewing information that has been printed and/or online from various references used in normative research the author conducted, this research is sourced from laws and regulations that are used as material for authors to studied comprehensively and holistically. Related information and data are then constructed systematically and deeply which will be obtained ideas that are close to the truth.

The author begins the analysis using qualitative descriptive techniques, namely interpreting and deciphering existing data along with the situation that is happening. This research also reveals attitudes, disagreements, tendencies and views that occur in a scope of research. Describes the condition as it is, without giving treatment or manipulation to the variables studied.

## C. Result and Discussion

### 1. Legal Implications of Dissenting Opinion in Constitutional Court Decisions

In Article 24C paragraph (6) of the 1945 NRI Constitution mandates that matters related to the guidelines for the constitution, appointment and also the suspension of MK judges and other provisions are regulated more specifically in the Law. Departing from this that it is very clear and firm that matters concerning the law of the MK event are regulated in the Law. The substance of the phrase "regulated by" according to Law No. 12 of 2011 concerning the establishment of Laws and Regulations in the annex section explains that:

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*If the partially delegated content material has been regulated in the devolved laws and regulations but the content material must be regulated only in the delegated Laws and Regulations and should not be further delegated to the lower Laws and Regulations (subdelegates), use the sentence Further provisions regarding .... arranged with ...*

Departing from the decision of the Constitutional Court Number 012-016-019 / PUU-IV / 2006 which expressly confirms the meaning or meaning of the phrase "regulated by" which is part of the legal technique itself, and the phrase "regulated by law" must be regulated again in a law. This indicates that the phrase "regulated by law" should indeed be regulated in the form of the law itself not with other regulation.

If examined more deeply which is the source of problems regarding the implications that occur that in Law No. 24 of 2003 concerning the Constitutional Court in its explanation section explains that the Constitutional Court is given authority under the Law to complete the law of events or the basis for the smooth implementation of its duties and authorities, therefore this is what injures the mandate given by the constitution itself. Stipulated in Article 86 of the Constitutional Law which describes a norm that reads: "The Constitutional Court may further regulate the matters necessary for the smooth implementation of its duties and authorities according to this Law". In the perspective analysis of the author that it can be categorized as a "rubber article" because the substance of the meaning of the article is very broad in meaning. But in the article does not expressly mention the "Law of Events MK". Even the legal phrase of the event appears in the explanatory section of article 86, namely: "This provision is intended to fill the possibility of any deficiency or void in the law of events under this Law." That there are inconsistencies in the trunk of the article and the explanation of article 86 of the Constitutional Law where in the norms contained in the torso are different or there are inconsistencies in the norm with the explanation section of the article.

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In The Constitutional Law No. 24 of 2003 as amended in Law No. 8 of 2011 which is the next legal matter, that in the new constitutional law changes, there is not even a single provision regarding the existence of instructions or mandates from the Law to form the law of MK events in the form of FMD. Things found in the MK Law it is only about the provisions on the order of the trial stipulated in Article 40 paragraph (3) of the Constitutional Law: "The provisions regarding the order of the trial as intended in paragraph (2) shall be regulated by the Constitutional Court." Furthermore, article 4 paragraph (5) of Law 8 of 2011 concerning the procedures for the election of the Chairman and Deputy Chairman of the Constitutional Court is: "Further provisions regarding the procedures for the election of the Chairman and Deputy Chairman are regulated in the Constitutional Court Regulation." At the last point that in the Constitutional Law delegates in the form of FMD regarding the organizational structure, the Honorary Assembly of the Constitutional Court and the governance of the court which can be found in Article 27 A paragraph (7) of Law 8 of 2011.

If more closely observed in the context of grass in PMK No:06/PMK/2005 concerning guidelines for concoction in the case of testing the Law (*judicial review*) in its can be found that the basis for the establishment of the FMD is seen from Article 24 C paragraph (1) in the Constitution and also the "rubber article" contained in the Constitutional Law article 86. In the "rubber article" it is explained that the Constitutional Court has the authority to regulate more in the necessary matters for the smooth implementation of its duties and authority. In the name of building a constitutional democracy, the main prerequisite is the refinement of the legal system and the constitution itself.<sup>11</sup>

What becomes involved and linked to the consequences of the MK event law in the form of FMD is the meaning of the implications referred to by the author. The legal implications of FMD are as follows:

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<sup>11</sup> Pan Mohamad Faiz, "Dimensi Judicial Activism Dalam Putusan Mahkamah Konstitusi," *Jurnal Konstitusi* 13, no. 2 (2016): 406, doi:10.31078/jk1328.

## 1) Legal Uncertainty (*Lex Certa*)

Testing of Law No. 5 of 2004 on the amendment of Law No. 14 of 1985 concerning the Supreme Court in the constitutional court decision No. 067 / PUU-II / 2004 where the decision was pronounced on February 15, 2005, MK Give the opinion that:

*"But on the other hand, it has been clear to the Court that the shaper of the law is not careful in exercising its authority which results in inconsistencies between one law and another. Such inconsistencies have caused doubts in the implementation of the relevant law which boils down to the emergence of legal uncertainty, which circumstances have the potential to cause violations of constitutional rights as stipulated in Article 28D paragraph (1) of the 1945 Constitution which states, ..."*

On the basis of the decision, the Constitutional Court gave an opinion on the inaccuracy of the shaper of the Law in carrying out its authority which has implications for the birth of inconsistencies between fellow laws. Similarly, in the law of the Mk event in the form of PMK which is a regulation that is more authorized than the Law (without the consent of the law) where the Law is formed by the DPR, therefore it will create doubts for all parties will implement the implementation process which is anchored to the birth of legal uncertainty. Provisions in article 28D paragraph (1) of the 1945 NRI Constitution which regulates Constitutional rights are the final story of the potential to violate those rights.

Furthermore, there is a substantial conflict between the existing article in the PMK and a Law related to the constitutional law. Where the opposition will create doubts in its implementation and inconsistencies that create a double interpretation. Legal uncertainty in the framework of its practice will be possible when the system in the Law has doubts in it. The Court has also argued that it is in line with this in a decision on the testing of Law No. 32 of 2004 on Local Government in Constitutional Court Decision No. 005 /PUU-III/2005 which was spoken on March 22, 2005, namely:

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*"Considering that there is a conflict between the substance of the article of a law and its apparent explanation contains inconsistencies that give birth to a double interpretation, and cause doubt in its implementation. The existence of doubts in the implementation of a law will give rise to legal uncertainty in practice. Such circumstances may cause violations of constitutional rights as stipulated in Article 28D paragraph (1) of the 1945 Constitution ..."*

Another issue that arises in the PMK is related to the type of decision in the decision on disputed election results.<sup>12</sup> MK decision is categorized into 3 (three) namely: application cannot be accepted, granted, and rejected as stipulated in Article 77 of the Constitutional Law. The provisions are juxtaposed with PMK No. 5 of 2007 Article 48 and Article 49 on the guidelines for arguing in disputes with result. The election of governors, regents and mayors in which the PMK gives a new type of decision that the Decree says with the provision reads: "Declaring the Applicant's Application withdrawn"; and also "Declaring the Applicant's Application is dead".

Departing from the view described by Lon L. Fuller who said that there are 8 (eight) prerequisites that must be met in forming a law or law to be able to run well in order to achieve certainty and the emergence of order in society. The eight requirements are as follows:

- a) *Generality* (generality of the law);
- b) *Promulgation* (legislation must be announced);
- c) *Prospectivity* (the law does not apply retroactively);
- d) *Clarity* (the formulation of the law should be clear);
- e) *Consistency or avoiding contradiction* (consistency in the conception of the law);
- f) *Possibility of obedience* (the law made must be enforceable );
- g) *Constancy through time or avoidance of frequent change* (the law

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<sup>12</sup> Fitria Esfandiari and Sholahuddin Al Fatih, "Initiating a Permanent Electoral Body To Resolve Dignified Election Disputes: Assessing the Effectiveness of Gakkumdu," *Yustisia Jurnal Hukum* 9, no. 3 (2020): 333, doi:10.20961/yustisia.v9i3.44437.



should not be changed too often );

- h) *Congruence between official action and declared rules* (conformity between law and implementation);

Where the eight prerequisites apply cumulatively not alternatively, meaning that if one of the prerequisites is not fulfilled in the formation of laws or laws then the effectiveness of its implementation is questioned, which is where in the future. The end point will be anchored to legal uncertainty.

## 2) Violation of the Hierarchy of Laws and Regulations

The implication of the hierarchy of invitation-to-invitation regulations occurs when the Constitutional Law is formed in the FMD itself. In the perspective constitution stipulates that the appointment and dismissal of MK judges and the law of events that become guidelines for the Constitutional Court regulated in the Law it is regulated in the NRI Constitution of 1945 Article 24C paragraph (6). Departing from these provisions, it is very clear that the law of the Mk event is regulated in the Law not in the form of rules that are under the Law, namely PMK.

When viewed in Law No. 12 of 2011 concerning the Establishment of Laws and Regulations, the types and hierarchies of Laws and Regulations consist of:

- a) Constitution of the Republic of Indonesia of 1945;
- b) Decree of the People's Consultative Assembly;
- c) Government Laws/Regulations in Lieu of Laws;
- d) Government Regulations;
- e) Presidential Regulation;
- f) Provincial Regulations; and
- g) District/City Regulations.

Indonesia as a country of law, then the placement of the constitution as the highest part in terms of the hierarchy of laws and regulations. The legal system is described as a pyramid where the Constitution is at the very top of it departs from the context of its hierarchy, and the rules under the

constitution are the specifications of the constitution. Positioning the constitution at the highest top of the pyramid is a structural perspective. While Satjipto Rahadjo is working on a disengagement,<sup>13</sup> where (the maestro) quotes the view of Hans Kelsen who explains that, "*this regressus is terminated by a highest, the basic norm...*" (the basic norm that the highest is the end of a series of legal formations).<sup>14</sup> The analogy is seen with the position of the inverted pyramid in the hierarchy of the legal system, where the constitution is in the basic position of the pyramid to describe the highest position. Both views have functional or alternative properties, but have a common thread in both views.

Entering into the same thing that the norm is lower, where the provisions are regulated by higher norms, it also continues with the formation of the norm is regulated by a higher norm again, to the constitution which is the last stage in the establishment of a norm. Legal products in the form of laws and regulations are specifications or elaborations of the constitution that contain abstract norms in it (*concretisering process*).

Where the laws and regulations that are under the constitution are authorized and their substance must not harm the mandate contained in the constitution. To maintain the legal certainty of products that are under the constitution. Coherence, consistency as well as correspondence and also should not conflict either in terms of materiil as well as formilnya, where it is a condition that must be owned as rules for legal products that are under the mandate.

Comprehensively and thoroughly for every product of laws and regulations must be able to be harmonious in a series of one unit, and it can also be said that it becomes synchronous or interconnected both vertically and / or horizontally. The fulfillment of the principle of law that is neglected into the principle of good laws and regulations and the principle of content

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<sup>13</sup> Satjipto Rahardjo, *Penegakan Hukum Progresif* (Kompas Media Nusantara, 2010).

<sup>14</sup> Hans Kelsen, "General Theory of Law and State. [Teoría General Del Derecho y Del Estado]," 1949.

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material in its material aspects, and also has a conformity of the background/reason/logical consensus which is a legal principle in the formation of a legal product whether it is express/explicit or implied / implicit, up to the realm of terminology/explanation. And the thing that should not be ignored is in terms of formil that the legal products formed must be in accordance with how mandated by the legal products above which regulate the provisions in it.

On the basis that the law is a system, the law itself must be able to adapt itself to other things, including the systems in society. Legal certainty for the community is one of the things that must be able to be born in the law as a product created. Failure for the law to bring legal certainty to every society, which ultimately boils down to creating the legal indiscretions that exist in society.

### 3) Absence of Orderly Law

Departing on the basic view in the constitution that the law of events in the Constitutional Court institution must be formed in a product of the Law instead of regulated or delegated back in the rules below it is a mandate given by the constitution. When the law of mk events is regulated in the form of FMD. Making social consensus can be achieved when able to position the Law as an instrument that must be enforced.

In order to provide an understanding of the order of law, it departs from the view of A. Hamid S. Attamimi who gives a definitive legal order (*rechtsordnung*) is the birth of an objective legal unity that has a dependency with other laws, and contains all the provisions of the formation of legal products as the orderly circuit of the law itself. The frame of mind is a formula to find answers about the presence or absence of a juridical unity in terms of achieving the rule of law.<sup>78</sup> To strengthen this view, it must also be seen that Soehino's view gives the definition of a legal order is a series of laws and regulations formed a measurable and hierarchically neat manner, from products the law whose degree of authority is lowest to the products of law whose degree of authority is highest.

Collaborating the above opinion, J. H. A. Logemann says that just as the order of society, which is an interconnected whole, also a positive law, determined by abstracting from a whole, a relationship of norms, is an orderly law. Thus, in positive law there are no conflicting norms. The achievement of legal goals to bring justice, certainty, and also legal benefits and in the law enforcement process itself one of the indicators is when the realization of legal order (*rechtsorde*). Where to achieve a logical correlation strengthens the existence of Indonesia as a country of law. In order to strengthen the execution of the decision issued by the Constitutional Court to obtain its legal power by creating the law of the Mk event in the form of a law not into the regulations under which the PMK. The need to follow up for its implementation as well as institutions or institutions or institutions to follow up related to the decision issued by the Constitutional Court is a problem that often arises from the practice of mk institutions. Concretely (*non-excutiable*) and floating *execution* is a fact in the implementation of the decision issued by the Constitutional Court.

Although in Law No. 24 of 2003 concerning the Constitutional Court and in its derivative regulations, the Constitutional Court has regulated in such a way regarding the implementation of *dissenting opinions*, but the provision does not make *dissenting Opinion* has an important meaning in the law of events in the Constitutional Court. Law No. 24 of 2003 concerning the Constitutional Court only states that *dissenting opinions* can be contained in the decision, but it is not outlined whether he is part of the decision that can be used as a reference in the same decision making, or only as an attachment to fulfill the decision. accountability of the Constitutional Court. This uncertainty raises various questions about the position of *dissenting opinion* in the constitutional court's event law and its function for future legal developments.

As explained above, *dissenting opinion* is the product of judicial activities carried out by constitutional judges, who are independent, with all attribution of expertise inherent in him. Controlling the constitution and statehood is a characteristic for MK judges who are also statesmen, where it

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cannot be removed from the nature of expertise possessed by mk judges, even though the mandate of mk judges is bound and facilitated by the existing regulations in the institution. Where the decision issued by the mk judge is an incarnation of the nature of his expertise based on the knowledge and experience of mk judges in the field of science and constitution. The "ornament" of a court is not a *dissenting opinion* given by the MK judge, but *dissenting opinion* must be able to be the "spirit" and one of the most important parts in the law of the MK events.

## 2. Reformulation dissenting opinion of constitutional judges

Therefore, there is a need for reformulation in the law of the Mk event regarding the *dissenting opinion* of MK judges, which is directed at affirmation of several things, namely:

*First*, Law No. 24 of 2003 concerning the Constitutional Court expressly must make it clear that constitutional judges have the right to submit dissenting opinions. This right is to ensure that in carrying out its function to interpret the constitution, a constitutional judge has the independence to make arguments related to his reasoning of the case being requested. This independence will arise if the regulation gives real rights. The same is applied in some countries in Europe, which in law, indeed expressly explain what dissenting opinion is, when dissenting opinion is delivered, and how the mechanism of publication.

*Second*, there must be a provision that explains that dissenting opinion is an integral part of the decision. There must be a clear formulation of how to put this dissenting opinion in a decision. For example, when using a systematic interpretation of Article 33 pmk No. 6/PMK/2005, "*different opinions of constitutional judges*" should be placed after the "*amar decision*", and before "*the day and date of the decision, the name and signature of the Judge. Constitution, as well as Clerk*". But in practice, *dissenting opinion* is always placed as a separate part of the decision, which is placed after the signing of the constitutional judge, giving rise to the assumption that *dissenting opinion* is only an 'attachment' to the Constitutional Court's decision. aforementioned.

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*Third*, the Constitutional Law and its derivative regulations, must include that dissenting opinions must be published to the public. There is no longer a mechanism by which the publication of dissenting opinions depends heavily on the will of the judge, but rather a necessity to contain such dissenting opinions. This is to maintain the main *marwah* dissenting opinion as part of judicial accountability to the public. Especially with the juridical fact, that the constitutional court's decision is *erga omnes*, and always attracts public attention, then the publication of dissenting opinion is an inevitability. The public will have a hard time understanding how the dynamics of the judges' debates, whether dissenting opinions are not published.

*Fourth*, it is the main thing, that Law No. 24 of 2003 concerning the Constitutional Court and its derivative regulations, must include norms that state that dissenting opinion must be considered by the constitutional court judges. in adjudicating and deciding a case in its institution in the future where the case has a relatively similar nature or has a relationship. Judge MK in carrying out his mandate to provide a substantial product in the form of *dissenting opinion* can be categorized as *an expert opinion*, whose argument contains strength. *logos* and logical, which can be used as a reference by the Mk judges in adjudicating and deciding a case that has a relatively similar nature and has a relationship. Mk judges in issuing a *dissenting opinion* did little to spur a fundamental change in some aspects of the state that tend to be conservative. So that if the dissenting opinion is used as a reference to cases that are influenced by the development of the times as it is today, it will create a comprehensive decision because Looking at it from different points of view of constitutional judges. To realize a formulation above, it is impossible to avoid any changes to Law No. 24 of 2003 concerning the Constitutional Court or in other FMDs. Changes are intended to list norms expressly, straightforwardly, and concretely, on the things mentioned above. The changes are not only intended to add to the legitimize the fullness of dissenting opinions, but also harmonize the rules. These are interrelated. This is with the intention that the constitutional court's event law, can guarantee a condition that can give birth to an authoritative decision in the public eye, with the

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existence of certainty for the judge to decide fairly, including if the judge decides to make a dissenting opinion. Something that needs to be rethought given the extraordinary nature, status and position of constitutional judges is important for the development of law and constitution in the future.

## D. Conclusion

This study concluded that the arrangement of *dissenting opinions* in the constitutional court's guidelines in this case in the PMK cannot be found in its entirety. The arrangement of *dissenting* opinions in the PMK ensures that constitutional judges get their ability to give different opinions to be maintained, so that *the dissenting opinion* given gets the legal certainty contained in the Constitutional Court's decision, which has the opportunity to continue to be maintained. on each judge of the Constitutional Court to give and submit his opinion that is different from the majority of other judges. The quality of *dissenting opinion* is not seen from the number of mk judges who submit it, but the substance built in *dissenting opinion* must be able to seen in very broad glasses that it is able to be a preventive step in the development of the law in the future. Explicitly, there is no setting on *dissenting opinions*. The phrase used in Law No. 24 of 2003 of the Constitutional Court is "*the opinion of different members of the panel of judges*". *Dissenting opinion* or *concurring opinion* is a category in the opinions of different judges. If a decision has a *concurring opinion* is a different opinion of the judge but it does not have a direct impact on the decision given by the majority of other judges. Meanwhile, *dissenting opinion* is a judge's opinion that is different from the majority of other judges, which does not lie in how the stages of legal reasoning are given but also has an impact on the difference from the consideration of the majority of judges who affects the decision. Without juridical affirmation in the law, dissenting opinion seems to be the 'extreme' choice of a judge who 'deviates' from the majority of other judges, but does not find legitimacy that specifically gives authority to him. The legal implications of dissenting opinion in the constitutional court decision are with the violation of hierarchy, legislation, the existence of legal uncertainty, and also cause the absence of legal order. If these

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three things are expressly and convincingly proven, it can be categorized that the implementation of mk's authority can be said to be invalid. But when viewed in the perspective of expediency and also seen that the provision has not been submitted an application to be canceled then all the authority owned must be considered correct to the extent that there is no application for testing to be canceled. This can only be implemented if the legal instruments that govern it give full legitimacy to constitutional judges in dissenting, along with the mechanism and implications for future legal developments. But the substance of the applicable law is not able to compensate for the frequency of judges who dissent and the complexity of cases that require arguments from constitutional judges. So that the formulation in question must be directed to formulations related to the arrangement.

That the Constitutional Law shall expressly explain that constitutional judges have the right to submit *dissenting opinions*, with a view to ensuring that in carrying out its function to interpret the constitution, a constitutional judge has the independence to draft related arguments. his reasoning of the requested thing. That there must be a provision that makes it clear that dissenting opinion is an integral part of the decision, to correct the practice of 'removing' dissenting opinion from the main part of a decision manuscript. That publication of dissenting opinions should be a necessity, is no longer facultative based on the will of its constitutional judges. That the main thing is how regulations can list the norms that say that *dissenting opinion* Must be considered by the constitutional court judge in adjudicating a case that is relatively the same or interrelated. Dissenting opinion is the product of constitutional judges as expert opinions, whose arguments contain the power of logos and logic, which can be used as a reference by other constitutional judges in deciding the same case .

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