THE CONSTITUTIONAL COURT

REPUBLIC OF INDONESIA

SUMMARY OF DECISION

ON CASE NUMBER 36/PUU-XVIII/2020

Concerning

State Obligations to Give Reward and Provide Quarantine Facilities for Officers On Duties During Pandemic Situation

Petitioner	:	**The Indonesia Health Law Society (MHKI), Eva Sri Diana, et al.**
Case	:	Judicial Review Number 4 of 1984 on Pandemic (Law 4/1984) and Law 6 of 2018 on Health Quarantine (Law 6/2018) Against the 1945 Constitution of the Republic of Indonesia (UUD 1945)
Case of Lawsuit	:	Testing Article 9 paragraph (1) Law 4/1984 and Article 6 Law 6/2018 and Article 27 paragraph (2), Article 28D paragraph (1), and Article 34 paragraph (3) UUD 1945.
Injunction	:	**In the Provision** Announced that the Petitioners' provision is not admissible **In the Merits of the Case** 1. Announced that the Petitioner I case is not admissible; 2. Dismiss the Petitioners' case
Date of Decision	:	Wednesday, 25 November 2020
Decision Overview	:	

The Petitioner comprised of a legal entity and an Indonesian citizen where the legal entity is a society established for the purposes to compile, supervise, and advance Health Law in Indonesia through studies, researches, training, mediation, advocation, and discussion in Health Law for the benefits of humanity and human rights, whereas the Indonesian citizen is a doctor or health worker which experienced deficits of Personal Protective Equipment facilities during COVID-19 pandemic. According to the Petitioner the wording "may" under Article 9 paragraph (1) Law 4/1984 allowed the government to perform or not to perform the obligations to reward the officers on duties during pandemic, in addition the norm under Article 6 Law 6/2018 allowed nonperformance to provide quarantine facilities needed by the Petitioner during COVID-19 pandemic. According to the Petitioner this violated the Petitioners' rights in particular the rights to activities and the rights to freedom from discrimination. According to the Petitioner the norm violated Article 27 paragraph (2), Article 28D paragraph (1), and Article 34 paragraph (3) UUD 1945.

On authority, for the Petitioners' case is a challenge to the constitutionality of a law, in this case Law 4/1984 and Law 6/2018 with respect to UUD 1945, the Court is competent to decide the case;

That on the Petitioner's legal standing, after careful reviewed on the Petitioner I presentation on the legal standing and all evidence presented by the Petitioner I, no convincing statements or evidence to the Court that the Petitioner had actively engaged in the constitutionality issue as stated herein. Thereby the Petitioner I is not entitled to the legal standing to file the case. Whereas on the Petitioner II, the Petitioner III, the Petitioner IV and the Petitioner V according to the Court there is some mutual interests among them as health worker with respect to the norm challenged herein, because the laws on pandemic and health quarantine is related to the Petitioners' rights and obligations whose profession is doctor and health worker with health facilities. Thereby

notwithstanding to any damage caused by the constitutionality of the Article challenged herein, the Petitioner II, the Petitioner III, the Petitioner IV and the Petitioner V on their profession and duties a causality existed between the perceived constitutionally burdened such as poor supports to the Petitioners' duties and the norm challenged herein. To this matters, the Petitioner I does not entitled to the legal standing, whereas the other Petitioners does.

That for the provisional case, the Court adjudicated the Petitioners' case cannot be immediately granted pursuant to the Court Decision Number 133/PUU-VII/2009 because after the Court carefully reviewed the Petitioners' arguments (see page 9-11) and the petition in the provision did not supported with significant argument which compelled the Court to grant the provision. Moreover it is not under the Court authority to order the Central Government and the Local Government to promptly created regulation and implement policy as stated by the Petitioners in its case. Thereby, the Petitioners' provisional case is unfounded and therefore shall be announced as inadmissible.

That the existence of Law 4/1984 is not specifically made for particular disease, but as a term of reference in the management of various pandemic to the extent the condition meet the requirements under Article 1 point a. In relation to the scope of pandemic management, the Law challenged herein stated it under Article 5 paragraph (1) which is: a. epidemiological investigation, b. examination, medication, treatment, and isolation of the victims, including quarantine, c. preventive measures and vaccination; d. eradication, e. post-partum management, f. dead body management during pandemic, f. public awareness program, and g. other necessary measures. The wording "other necessary measures" as referred to in Article 5 paragraph (1) point g of the Law challenged herein shows that the pandemic management includes the most sectors and without limitation, and COVID-19 pandemic condition included.

Because pandemic management has significant impact to the officers in charge of it the Article 9 Law 4/1984 wished them to be rewarded for the risks they are facing. The officers defined as any person, both government workers or otherwise, appointed by the authority and/or party in charge to perform pandemic management, whereas the type of reward could be monetary or in kinds (see Interpretation of Article 9 paragraph (1) Law 4/1984). However, the Law challenged herein did not determined the technical subject matters on this reward because pursuant to the statute it is a subject to further provisions under Government Regulation thereby it become the term of reference for the government to create the implementing regulations on pandemic management.

As an implementation pursuant to the statute the Government Regulation Number 40 of 1991 on Pandemic Management (PP 40/1991) is issued. The substance of the PP only support the provisions under the Laws and subdelegate it to subordinate regulation which is minister decision. Such delegation is necessary because the scope of Law 4/1984 thereby the policy maker is granted independency or flexibility to create proper implementing regulation according to the characteristics and impacts of the pandemic.

Using Law 4/1984 as the term of reference, the Government issued many implementing regulations specific for COVID-19 pandemic impact which is sub delegation provisions of Law 4/1984. Furthermore, to provide clear management on incentives allocation for the health workers in charge of COVID-19 pandemic another regulation which followed is the Minister of Finance Decision Number 15/KM.7/2020 on Code of Conduct and Detailed Health Operational Assistance Reserves Fund Allocation (BOK) Additional Stage III for the Budget Year 2020. The budget allocation as referred to therein, one of which provided incentives for the health workers at local level as allocated for the period of March through May 2020. This incentives is given as reward from the state in consideration of the risk faced by the health workers which engaged in COVID-

19 pandemic, where COVID-19 constitute a pandemic. In relation to which health workers entitled to such incentives it had been determined under Article 9 Law 4/1984, in this matters, the Minister of Health as the minister in charge of the pandemic management had also determined the criteria of health workers entitled to such incentives they are specialist doctors, doctors, dentists, midwives, nurses, and other medical workers, including doctors assigned in residency, Indonesian Doctors Internship Program, Utilization of Specialist Doctors participants, health workers assigned in Health Workers Special Assignment which Support Healthy Nusantara Program, and volunteers designated by the Minister of Health in COVID-19 management and nominated by the head of health facilities to which they are assigned.

On the Petitioners' arguments which stated there is confusion on legal protection for the health workers in charge during COVID-19 pandemic because the norm of Article 19 Law 4/1984 did not formulated by the wording "shall" therefore "shall be rewarded in consideration of the risks pertaining to their duties", it is unfounded because it is expressly stated under Article 9 Law 4/1984 even though it is formulated by the wording "may" had been realized by various regulation to give reward such as incentives and death benefits, even Medal. Moreover, the doctrine of the wording "may" in a law is common because the norm operator is not necessarily formulated with the wording shall, in which the norm shall is related to designated obligation and failing of which subject to sanction. Whereas, the norm "may" having discretionary sense (see point 267 and point 268 Appendix II Law 12 of 2011 on Legislation). Because of such discretionary, the norm "may" in the implementation can become shall be realized because of compelling factors, in this case, the risks faced by the health workers in charge during pandemic. From careful consideration on vast scope of Law 4/1984, which is related to the pandemic, its impact, type of activities which might be included in pandemic management, the appointment of officer in charge during pandemic, and

the reward to be given, therefore it is proper if the diction used in the norm use the wording "may". The transformation of "may" interpreted as "shall" in the implementation relies on many factors, and for any act with vast scope, such as Law 4/1984, the implementing regulation such as specific government regulation on particular condition is sufficient to reason when and where the wording "may" implemented as "shall". However, to the extent this regulation binding the government and its workers to implement it thereby in practice it is automatically the reward for the officers affected by COVID-19 pandemic become prioritized pursuant to the implementing regulations under the Law challenged herein. Therefore, the Petitioners' case which argued on certainty of the reward entitled to the Petitioners as officers who faced the risks during COVID-19 pandemic management the substance is on norm implementation. Notwithstanding the foregoing, the legislator had included the revision to Law 4/1984 in the 2020-2024 National Legislation Program, thereby the revision need to be prioritized toward more comprehensive pandemic management act. Thereby the Petitioners' argument on the constitutionality of norm under Article 9 paragraph (1) Law 4/1984 is unfounded;

On the Petitioners' argument which challenged the constitutionality of Article 6 Law 6/2018, if carefully reviewed the existence of Article 6 Law 6/2018 is not independent because further interpretation on Article 6 of the Law challenged herein including the phrase which constitutionality is challenged by the Petitioners had been governed more comprehensively under the Chapter IX of the Law challenged herein which titled "HEALTH QUARANTINE RESOURCES" which provisions as referred to under Article 71 through Article 78. In relation to the Petitioners' case which request the Court to interpret the phrase "necessary resources" under Article 6 Law 6/2018 to read as "Personal Protective Equipment provided to the medical workers" it is found that it had been accommodated under Article 72 paragraph (3) Law 6/2018 because the

Personal Protective Equipment as referred to therein is a part of medical devices which constitute Health Quarantine Items, it is not a part of the health facilities as argued by the Petitioners. Thereby if the Petitioners' petition is granted by the interpretation of the phrase "necessary resources" under Article 6 Law 6/2018 to read as personal protective equipment provision, incentives for medical workers, benefits for the medical workers' dependents and resources for disease examination and/or the risk factors of public health, that interpretation will further limit and create improper law enforcement as guaranteed under Article 28D paragraph (1) UUD 1945 because of redundancy with the provisions under Article 71 through Article 78 in particular Article 72 paragraph (3) of the Law challenged herein. Furthermore, if the Petitioners petition is granted it will create damage to the larger public because it affect the potential to prevent and block to the maximum any exit or entry of disease and/or risk factor of public health because the government could waived its obligation to provide health quarantine facilities such as hospital, pharmaceuticals such as medicines, and other medical supplies, whereas it is the state responsibility pursuant to Article 34 paragraph (3) UUD 1945.

The argument which stated deficits of Personal Protective Equipment to the needs of medical workers, health worker, and health facilities worker in the midst of COVID-19 pandemic as argued by the Petitioner it is truly showing the care and concern of the Petitioner and anyone which shall be put as special notes by the Government. However, it is not correlated to the constitutionality of Article 6 Law 6/2018 which norm is challenged herein. Thereby the Petitioners' argument which challenged the constitutionality of Article 6 Law 6/2018 is unfounded.

Now therefore the Court decided to announce as follows:

In the Provision

Announce that the Petitioners' provisions is not admissible

In the Merits of the Case

1. Announced that the Petitioner I case is not admissible;

2. Dismiss the Petitioners' case

Dissenting Opinion

On the Court decision herein, three constitution justices expressed dissenting opinion on the wording "may" under Article 9 paragraph (1) Law 4/1984 which stated that as a duty posed with life threatening risk, any facultative or discretionary policy is without respect to humanity. With that in mind, the state policy with respect to those affected from having to carry out pandemic management, including Covid-19 Pandemic, it should not be positioned as an option and shall be imperative instead. This imperative nature is the consequence of state responsibility to fulfill its constitutional obligation to provide adequate health services for the citizens. In the norm challenged herein it is formulated with imperative construction, the officer in charge who felt being threatened by the impacts of Covid-19 pandemic will work more comfortably because of better protection. Thereby, the wording "may" in the norm of Article 9 paragraph (1) Law 4/1948 should be changed to read as "shall" thus the norm challenged herein is constitutional to the extent it is interpreted "The officers in charge during pandemic as referred to in Article 5 paragraph (1) shall be rewarded for the risks in their duties it is well founded.