



**THE CONSTITUTIONAL COURT
REPUBLIC OF INDONESIA**

SUMMARY OF DECISION

ON CASE NUMBER 83/PUU-XVII/2019

Concerning

Constitutional Rights of Migrant Workers

Under Indonesian Migrant Workers Protection Law

- Petitioner** : **Indonesian Workers Placement Agency Organization (ASPATAKI) in this matter represented by the Board of Head Office, viz Saiful Mashud (General Chair), Letsman Tendency (Deputy General Chair), Filius Yandono (Secretary General), Bony Wongso Suhardjo (Deputy Secretary General), Lay Mena Nelly (Treasury), Ahmad Mulyadi (Deputy Training Preparation), and Saroni (Deputy Placement).**
- Case** : **Testing Law 18 of 2017 on Indonesian Migrant Workers Protection (Law 18/2017) Against the 1945 Constitution of the Republic of Indonesia (UUD 1945)**
- Case of Lawsuit** : **Testing Article 54 paragraph (1) point and point b, Article 82 point a, and Article 85 point a Law 18/2017 and UUD 1945**
- Injunction** : **In the Provision**
Announced that the Petitioner's provisions is not admissible
In the Merits of the Case
Announced that the Petitioner's Case is not admissible
- Date of Decision** : **Wednesday, 25 November 2020**

Decision Overview :

The Petitioner is the Indonesian Workers Placement Agency Organization (ASPATAKI) of 142 members in this matter appointed Mr. Wilman Malau, SH, et al. as legal counsel for the case.

On the Court authority, for the Petitioner's case challenged the constitutionality of Law 18 of 2017 on Indonesian Migrant Workers, the Court is competent to decide the case;

In relation to the Petitioner's legal Standing, the Petitioner is a private legal entity namely the Indonesian Workers Placement Agency Organization (ASPATAKI) of 142 members in this matter represented by the Board of Head Office, viz Saiful Mashud (General Chair), Letsman Tendy (Deputy General Chair), Filius Yandono (Secretary General), Bony Wongso Suhardjo (Deputy Secretary General), Lay Mena Nelly (Treasury), Ahmad Mulyadi (Deputy Training Preparation), and Saroni (Deputy Placement). In its legal standing presentation, the Petitioner stated that the norm under Article 54 paragraph (1) point a and point b, Article 82 point a, Article 85 point a Law 18/2017 as challenged herein had burdened the Petitioner's constitutional rights in particular the provisions on criminal sanction and the security amount which shall be deposited with the Bank upon their establishment. In consideration, the Court considered the Petitioner's legal standing to submit the case is admissible.

That in relation to the merits of the case, the Court in its adjudication stated as follows:

- a. The constitutionality of Article 54 paragraph (1) point a and point b Law 18/2017 on minimum paid up capital requirements Rp.5,000,000,000 (five billion Rupiah) and make deposit with a state owned bank minimum Rp.1,500,000,000 (one billion and five hundred million Rupiah) according to the Petitioner in contradiction to Article 33 paragraph (4), Article 27 paragraph (1), Article 27 paragraph (2), and Article 28D paragraph (1) and paragraph (2) UUD 1945.

The Constitutional Court in its adjudication stated that the paid up capital and the deposit as referred to in the article challenged herein, on one side is understood as burdened for the P3MI to obtain SIP3MI, whereas if it is reviewed carefully the philosophy and spirit of Law 18/2017 is provide protection to Indonesian Migrant Workers. According to the Court, the regulation is made by the legislator to increase the paid up capital and security deposit with the state owned bank constitute an effort to guarantee the qualification and credibility of P3MI as Indonesian Migrant Workers placement agency. In view of the legal facts such as cases involving PMI all rooted from P3MI omission in their roles and responsibilities both from PMI recruitment to post-employment

process, thereby the increase to paid up capital and security deposit as referred to under the challenged article is absolutely necessary to improve the PMI dignity which in this matter is represented by P3MI as Government partner in Indonesian Migrant Workers placement.

According to the Court, P3MI which obtained SIP3MI shall be P3MI which is not only professional and bona fide but also shows full commitment to protect and guarantee the citizen's rights who works abroad to keep them protected at all times pursuant to Article 28D paragraph (2) UUD 1945. In addition, according to the Court, the requirements under Article 54 ensure P3MI as PMI placement agency could prepare thorough professional planning in accordance to the company's capabilities and facts that had been carefully and rationally estimated which could affect the realization of the plan. According to the Court such requirements is to prevent careless establishment. Moreover, in correlation to the object of PMI placement business is human altogether dignity and being, such requirements is another form of protection provided for PMI. Furthermore, according to the Court, the requirements as referred to under Article 54 Law 18/2017 not only intended to enforce the law, but to ensure business and legal protection both for the P3MI, P3MI partner, potential PMI and/or PMI, and the government which interrelated and jointly responsible in comprehensive PMI protection. Whereas in relation to, the causality between the paid up capital and the security deposit under "mutual principle" for the P3MI and PMI as argued by the Petitioner that Article 54 paragraph (1) point a and point b in contradiction to Article 33 paragraph (4) UUD 1945 because the provisions of the article challenged herein determine the requirements which shall be fulfilled by each P3MI which intend to place PMI abroad. According to the Court, the expression on mutual principle under Article 33 paragraph (4) shall at all times followed by "reasonable efficiency" because mutual principle and reasonable efficiency under Article 33 paragraph (4) clearly favor the harmony toward social welfare for Indonesian people instead of for an individual.

Any other matters in relation to the nomenclature "State Owned Bank" as referred to in the article challenged herein and included in its petition, according to the Court the provisions is not related to the constitutionality of the norm, moreover the Petitioner did not stated in specific the actual damage caused by the expression state owned bank. "State Owned Bank" as nomenclature in fact can be found under Law 39/2004, in which the Petitioner also had deposited the security with the State Owned Bank. According to the Court, the provisions under article challenged herein is a general provisions applies to all P3MI and the requirements is flexible as referred to in Article 54

paragraph (3) Law 18/2017 which stated “*condition precedence, the paid up capital as referred to in paragraph (1) point a and the security deposit as referred to in paragraph (1) point b, can be reviewed and changed by Minister Regulation*”. In addition, the provisions under the article challenged herein had also complied the Article 32 paragraph (2) Law 40 of 2007 on Limited Liability Company which stated, “*Any Law on specific business may determine higher minimum capital than as referred to in paragraph (1)*”. Furthermore, the provisions on paid up capital and security deposit for P3MI is an open legal policy of the legislator, according to the Court the course of policy to increase paid up capital and security deposit by certain amount did not violated the legislator’s authority, it is not a legal abuse, and nothing against UUD 1945, thereby it is not a subject to cancellation by the Court. Thereby the Petitioner’s argument is unfounded;

- b. The constitutionality of Article 82 point a and Article 85 point a Law 18/2017 in contradiction to Article 27 paragraph (1) and Article 28D paragraph (1) UUD 1945.

The Constitutional Court in its adjudication stated that the phrase “anyone” in the provisions on criminal sanction shall applies to anyone violated the provisions, either individual or a group of people or an entity. Thereby, according to the Court, the provisions on criminal sanction under Article 82 point a and Article 85 point a Law 18/2017, shall applies to anyone violated the article challenged herein. In addition, the wording of “anyone” also intended to impose anyone involved in PMI placement business which violated the provisions on criminal sanction. According to the Court the formulation of the phrase “anyone” had been proper because under the doctrine vicarious liability if an entity in a crime, it is not the entity imposed with criminal sanction but the person who run it. Moreover, the article challenged herein which govern the restriction as well as criminal sanction applies not only to people but also to entity which also a legal subject having part of responsibility in PMI placement and liable for any legal action which might created damage. This support the acknowledgement, guarantee, protection and proper law enforcement and equality before the law pursuant to Article 28D paragraph (1) UUD 1945.

Any other matters which also become important and necessary for the Petitioner to attend is even though the Petitioner’s argument on the article challenged herein is closely related to the any issue on the implementation of law in life, thereby it is not directly related to any matter on constitutionality, according to the Court the Petitioner’s believe which held that the enforceability of the article which stated criminal sanction under the chapter on criminal sanction that had been

perceived as unfair and it seems to be that only P3MI is threatened by the sanction is misleading. According to the Court following the change to licensing regulation which prioritize protection for PMI by online single submission such criminal sanction under the article challenged herein is not only emphasized the P3MI as the PMI placement agency abroad but also its stakeholders both person and corporation. According to the Court any stakeholder of PMI placement from government, local government, P3MI, business partner, employer, officials, shall have the same perception or view in providing full protection to PMI thereby all PMI shall be protected against trafficking, slavery and forced labor, violence, bullying, crime against humanity, and against any other inhumane treatment. Towards it requires supervision and excellent law enforcement and consistent. In this context, supervision including protection at pre-, during, and post-employment. Meanwhile, law enforcement including administrative sanction and criminal sanction. Thereby according to the Court it had complied with Article 27 paragraph (1) UUD 1945.

In addition, according to the Court, the purpose of protection as provided for PMI shall also shows in the changes to regulation on requirements for potential PMI which will be employed abroad. Under Law 18/2017 the requirements is detailed, layered and cumulative. At least there are two important document requirements abroad which is Indonesian Migrant Workers Placement Contract and Contract [see Article 13 Law 18/2017]. This also applies to requirements when obtaining SIP2MI for P3MI which shall also had entered Agreement on Employment, Indonesian Migrant Recruitment letter of commitment from the Employer, draft agreement on Recruitment and Contract [vide Article 59 Law 18/2017]. According to the Court, the provisions under Article 82 point a and Article 85 point a Law 18/2017 is inherent with the protection for PMI in the protection system (at pre-, during, and post-employment stage) in which all stakeholders in interrelated to each other which purpose is to provide maximum protection to PMI potentials and PMI. This indicated that nothing is really exist that can be deemed as discriminative before the law if there is any action which degraded the PMI humanity as argued by the Petitioner. The provisions on criminal sanction in the Law challenged here is applies for anyone both person and/or corporation. In addition, according to the Court with respect to guarantee by the Government hat in the PMI placement, the Government will be under an agreement with the foreign party and in coordination with the minister in charge of foreign affairs and under an agreement between the Government and the coutry of destination it is found that the concern which stated that the business partners or agency which placed the PMI in foreign country is not a subject to criminal sanction

therefore it did not secure the protection and proper law enforcement for PMI become deniable. Other matters expressed by the Court is that according to the Court adjudication in its past decisions on criminal [policy the Court held that it is under the legislator's authority. Because, in relation to the criminal which essence is related to the restriction over human rights shall involve or represent the will of the people. Thereby the Petitioner's argument is unfounded;

That the Court decided to announce

In the Provisions

Announced that the Petitioner's provisions is not admissible

In the Merits of the Case

Announced that the Petitioner's case is not admissible.

Dissenting Opinion

In response to the decision the four Constitutional Justices, viz Constitutional Justice Enny Nurbaningsih, Constitutional Justice Suhartoyo, Constitutional Justice Aswanto, and Constitutional Justice Saldi Isra has dissenting opinion on the merits of the case on the norm under Article 54 paragraph (1) point a Law 18/2017, as follows:

That the provisions on paid up capital as stated under the deed of establishment of Indonesian Migrants Placement Agency in principle constitute the provisions on limited liability company (PT) because the company is a business entity with legal entity established after it obtained business license from the Minister of Justice and Human Rights to provide Indonesian Migrant Workers placement services (vide Article 1 paragraph 9 Law 18/2017). From the provisions it is important to first explained the definition of paid up capital under Law 40 of 2007 on Limited Liability Company (hereinafter referred to as Law 40/2007). Paid up capital is a part of the company's capital structure comprised of authorized capital, issued capital, and paid up capital, whereas the amount of capital shall be stated under the company's articles of association submitted as a legal requirements to establish business entity as Limited Liability Company (PT) by the Decision of Minister of Justice and Human Rights according to the applicable procedure

(see Article 9 paragraph (1) Law 40/2007). To determine the amount of paid up capital it shall be based on the company's authorized capital which is the total value of the shares of the PT stated thereunder articles of association, which in principle is the total number of shares that can be issued by the PT. Such shares number determination which constitute such authorized capital shall be determined in articles of association. Whereas the definition of issued capital is the number of shares that had been taken by the founders or shareholders, and some of it had been paid up and the other is not. Thus, the issued capital is the capital under the commitment of founders or shareholders to paid it, and the shares had been delivered to them for ownership. Law 40/2007 determined minimum 25% of the authorized capital shall be issued and paid up in full as proved by the legal receipt of its payment. Whereas the paid up capital is the capital that had been entered by the shareholders as shares payment that had been taken by them as paid up capital from the company's authorized capital. Thereby, the paid up capital is the shares that had been paid in full by the holder or owner (see Article 33 paragraph (1) and paragraph (2) Law 40/2007). Thereby the existence of paid up capital constitute the authorized capital of a company. When a company will decrease its issued capital or its paid up capital the consequence is it shall be preceded by amendment to articles of association (Article 21 paragraph (2) point e Law 40/2007). In this context, Law 18/2017 determined the amount of paid up capital as stated under the deed of establishment minimum Rp.5,000,000,000 (five billion Rupiah). Before, the provisions in this matter had been stated under Law 39 of 2004 on Placement and Protection of Indonesian Workers Abroad (Law 39/2004) which determined the amount of paid up capital minimum Rp.3,000,000,000 (three billion Rupiah).

Furthermore Law 39/2004 determined the amount of paid up capital as a requirements to obtained Business License for Indonesian Workers Placement Agency (SIPPTKI) issued by the Minister to the company which will engage as private Indonesian Workers placement agency (see Article 1 paragraph 12 jo. Article 12 Law 39/2004). Means, the company shall be established first as a legal entity of limited liability company (PT) under Law 40/2007 and has paid up capital stated under the company's deed of establishment, minimum Rp.3,000,000,000 (three billion Rupiah), thereafter it could obtained SIPPTKI after any other requirements is fulfilled.

In this matters, the Petitioner in its qualification as private legal entity (company) established under Law 39/2004 and the implementing regulations had complied requirements as legal entity of limited liability company (PT) and had also complied all requirements to obtain

Business License for Private Indonesian Workers Placement Agency (**SIPPTKI**). Means, as a legal entity of PT, the Petitioner had complied the provisions on company establishment under Law 40/2007 provided that the authorized capital is pursuant to Law 39/2004. In practice, paid up capital of a PT may be amended to the extent it is agreed by the company owner and it shall be stated under articles of association because the amendment will be related to the company's authorized capital. In relation to the company's capital, the larger the capital the more bona fide the company. Furthermore Law 40/2007 allowed any act on particular sector to determine other amount of authorized capital as referred to under Law 40/2007. However, without prejudice to the state services to provide protection to the maximum for Indonesian Migrant Workers (PMI) as the state obligation to attend it, the provisions on paid up capital requirements of a company to obtain SIP3MI in the limit of logical reasoning should not applies to any company that had been established under Law 39/2004. Means, the provisions on amendment to such authorized capital shall be applied or intended for any establishments which engage in PMI placement business. For any company that had been established under Law 39/2004 that had fulfilled the requirements to obtain private SPPTKI thereby the requirement subject to appropriation is the deposit amount because it is a guarantee to perform the obligation on PMI protection and at any time can be forfeited as determined under Article 54 paragraph (1) point b Law 18/2007, that before the amount of such deposit also stated under Law 39/2004 as much as Rp.500,000,000 (five hundred million Rupiah). Whereas the paid up capital is not related to the performance on PMI protection obligation, however it is a part of requirement to establish a company.

Beside the foregoing consideration, the increase to the company's paid up capital that had been established prior to Law 18/2017 is violated "non-retroactive" principle, which constitute violation against human rights of each citizen from being charged on the ground of any retroactive law in any event (see Article 28L paragraph (1) UUD 1945). Even though in this matter it is not directly related to criminal sanction, however in broader perspective, "non-retroactive" principle may be imposed also on the implementation of general laws (see Appendix II Law 12 of 2001 on Legislation (Law 12/2011), point 155). Moreover we did not found any ground that the provisions under Article 54 paragraph (1) point a Law 18/2017 can be applied retroactive as referred to under Appendix II Law 12/2011 paragraph 156.

From the foregoing reasoning and adjudication, the norm which imposed additional charge to any company formerly obtained SIP3MI (was known SPPTKI) as referred to under Article 54

paragraph (1) which stated, any Indonesian Migrant Workers Placement Agency shall meet the requirements: a. has paid up capital as stated under the company's deed of establishment minimum Rp.5,000,000,000 (five billion Rupiah) Law 18/2017 is against the Article 27 paragraph (1) and paragraph (2) and Article 28D paragraph (1) and paragraph (2) UUD 1945. At least, such additional charge had made the Petitioner lost or receive lesser guarantee, protection, and proper law enforcement as guaranteed under the UUD 1945.

Thereby the Petitioner's case which challenged the constitutionality of Article 54 paragraph (1) point a Law 18/2017 is well founded and it is necessary for the Court to announce it as admissible to the extent it is related to the norm challenged herein.