

**CONSTITUTIONAL COURT OF**

**THE REPUBLIC OF INDONESIA**

**SUMMARY OF LAWSUIT VERDICT**

**NUMBER** **87/PUU-XVI/2018**

**REGARDING**

**CIVIL SERVANTS CAN BE HONORABLY DISMISSED AND DISHONORABLY DISMISSED**

**Petitioner** : Hendrik, B.Sc.

**Type of Lawsuit** : Judicial review of Law Number 5 of 2014 concerning State Civil Apparatuses against the 1945 Constitution of the Republic of Indonesia (1945 Constitution)

**Case of Lawsuit** : Article 87 paragraph (2) and paragraph (4) letter b and letter d of Law Number 5 of 2014 concerning State Civil Apparatus (ASN Law) is contrary to Article 1 paragraph (3), Article 27 paragraph (1), Article 28D paragraph (1), and Article 28I paragraph (2) of the 1945 Constitution

**Injunction** : Granting the Petitioner's petition in part

**Date of Verdict** : Thursday, April 25, 2019

**Verdict Summary** :

Related to the Authority of the Court, because of what was petitioned by the Petitioner is a judicial review of the law, in this case Article 87 paragraph (2) and paragraph (4) letter b and letter d of Law 5/2014 against the 1945 Constitution, so that the Court has the authority to adjudicate the Petitioner's petition.

Related to the legal standing of the Petitioner, the Petitioner, Hendrick, B.Sc., explained his qualifications in the said Petition as an Indonesian citizen and was a civil servant (PNS). The Petitioner feels uneasy because at any time or potentially accepts the dishonorable dismissal decision at the time the Petitioner has been actively working again in the Bintan Regency Government agencies.

Accordingly, the Court has the opinion that, apart from the confusion of the Petitioner's description regarding his assumption regarding impairment of his constitutional rights with the Petitioner's description regarding the unconstitutionality of Article 87 paragraph (2), paragraph (4) letter b and letter d of the State Civil Apparatus Law (ASN Law), and also regardless of whether the Petitioner's argument is proven or not regarding the unconstitutionality of the norms of the ASN Law petitioned for review in the said petition, The Court has the opinion that the Petitioner has specifically stated implicitly his constitutional rights that have the potential to be impaired by the enactment of the norms of Article 87 paragraph (2), paragraph (4) letter b and letter d of the ASN Law, in which the Petitioners' perceived causality regarding the potential loss of constitutional rights in question has also been seen by the norms of the law petitioned for review and if the petition was granted then such losses would not occur. Therefore, the Petitioner has the legal standing to act as the Petitioner.

The substance of constitutional issue of the Petitioner is that the Petitioner argues that the origin of the issuance of SKB/2018 which was then followed by SE MENPAN RB 20/2018 is Article 87 of the ASN Law.

Whereas Article 87 of the ASN Law, specifically paragraph (2) and paragraph (4) letter b and letter d, is considered by the Petitioner as the origin of the issuance of SKB/2018 and SE MENPAN RB 20/2018, it does not at all prove that Article 87 of the ASN Law, especially paragraph (2) and paragraph (4) letter b and letter d, contradict the 1945 Constitution. On the contrary, the issuance of SKB/2018 and SE MENPAN RB 20/2018 is precisely because of the existence of a strong legal basis because it is expressly stated in the norms of the law which contains orders [in this case Article 87 paragraph (4) letter b and letter d of the ASN Law] and permissibility [in this case Article 87 paragraph (2) of the ASN Law]. The constitutional or unconstitutional norms of a law are not judged based on the laws and regulations below which actually intend to enforce the norms of the relevant law but must be assessed separately based on the substance or soul or spirit contained in the Constitution (in this case the 1945 Constitution). Even when a norm of law has been interpreted differently by the laws and regulations below it does not necessarily make the norms of such laws contrary to the Constitution. Because, in such case, the laws and regulations under the law must be reviewed for their compatibility with the norms of the law on which they are based. In such circumstances, then it will apply the provision of Article 24A paragraph (1) of the 1945 Constitution which gives authority to the Supreme Court to review it. Such conditions must be distinguished from conditionally constitutional or conditionally unconstitutional decisions as often handed down by the Court. Verdict of the Court whose consideration includes a conditional constitutional statement or the injunction declares that conditional unconstitutional occurs when there is a situation wherein the formulation of the norms of the law petitioned for review itself attaches to the possibility of constitutional or unconstitutional because in the norm it is possible that more than one interpretation, one of which is the interpretation which according to the Court is unconstitutional. Such circumstances are not found in the said petition, especially within the limits of the Petitioner's arguments as stated above.

Whereas, with regard to Article 87 of the ASN Law, the Petitioner argues that the legislators have built legal norms that are ambiguous in nature so as to cause doubt, obscurity, ambiguity, vagueness, or multiple meanings.

Because the said Petitioner's argument is addressed to the norms of Article 87 of the ASN Law as a whole, not to certain parts of the norms contained in Article 87 of the ASN Law, with such construction the Court did not find any ambiguous meaning causing doubts, ambiguity, obscurity, confusion, or doubly meaningful, as argued by the Petitioner. The issue is whether in certain parts (for example paragraph) of Article 87 of the ASN Law there are issues that can lead to different interpretations, such matters must be assessed separately and do not cause all the norms contained in Article 87 of the ASN Law to be ambiguous.

Whereas, the Petitioner linked the existence of PP 11/2017 in which according to the Petitioner, Article 250 PP 11/2017 was considered to copy and paste Article 87 paragraph (4) letter d of the ASN Law and then, according to the Petitioner, the legislators of PP 11/2017 intentionally amended the provisions of the terms of imprisonment , as can be seen from Article 251 PP 11/2017 which stipulates criminal verdicts as a measure of "dishonorably dismissal" is stipulated "less than 2 (two) years", so that the situation was stated by the Petitioner as the legislators of the ASN Law and the legislators of PP 11/2017 has conducted a fallacy of equivocation which has disadvantaged the Petitioner.

With regard to the said Petitioner's argument, insofar as it concerns the issue of government regulation (PP), in this case PP 11/2017, it does not constitute the Court's authority to adjudicate it, so that the Petitioner's argument, insofar as it concerns the validity of PP 11/2017 must be ruled out. However, with regard to Article 87 paragraph (4) letter d in that connection, the Petitioner argues that the legislator has made (according to the Petitioner's terms) a fallacy of equivocation, the Court must first explore what is intended as the fallacy of equivocation by the Petitioner because the Petitioner did not provide an explanation of this terminology but immediately jumped to the conclusion that it was detrimental to the Applicant Lexically, equivocation means "a way of behaving or speaking that is not clear or definite and is intended to avoid or hide the truth" (Oxford Advanced Learner's Dictionary, 7th Edition, 2005, page 515). Meanwhile, fallacy lexically means "(1) a false idea that many people believe is true" "(2) a false way of thinking about something" (Oxford Advanced Learner's Dictionary, 7th Edition, 2005, page 551).

With such lexical meaning, if concluded and connected with the Petitioners' argument, the question then is whether the legislators have included the false ideas or used the false way of thinking with a view to avoiding or hiding the truth through the formulation contained in Article 87 paragraph (4) letter d of the ASN Law.

With regard to such questions, the Court must first examine carefully the formulation contained in Article 87 paragraph (4) letter d of the ASN Law in question. As cited in consideration of point 2 above, Article 87 paragraph (4) letter d of the ASN Law contains a formula which states, "Civil servants are dishonorably dismissal because: ... (d) is sentenced to prison based on a court verdict that has permanent legal force because a crime with a minimum imprisonment of 2 (two) years and a crime committed in a planned manner." With this formulation, the Court did not find any facts or symptoms that showed that the legislators had incorporated the false ideas or used the false way of thinking with a view to avoiding or hiding the truth through the formulation contained in Article 87 paragraph (4) letter d of the ASN Law.

Based on all these legal considerations, the Petitioners' argument related to the unconstitutionality of Article 87 paragraph (4) letter d of the ASN Law is no legal grounds.

Whereas the Petitioner argues that there is an inconsistent mindset in Article 87 of the ASN Law, because there are dishonorably dismissals due to court verdicts and there are dishonorably dismissals due to court verdicts. The Petitioner then connects the existence of Article 87 of the ASN Law with PP 32/1979 where, according to the Petitioner, PP 32/1979 stipulates that an official can judge himself by dismissing dishonorably if a civil servant turns out to be carrying out a business or activity aimed at amending Pancasila and the 1945 Constitution or is involved in movements or carrying out activities against the State and/or Government. However, according to the Petitioner, in another article (without mentioning which article) PP 32/1979 does not give officials the right to make their own judgments because their verdicts must be based on the verdicts of other parties from the competent authority. In addition, the Petitioner also stated that the ASN Law had made new legal norms that were not regulated in PP 32/1979, namely dismissing dishonorably civil servants who are members or management board of political parties.

With regard to the said Petitioners' argument, the Court considers that dismissal of civil servants, especially dishonorably dismissal, may not be carried out arbitrarily but must be based on the laws and regulations. In this case, Article 87 of the ASN Law is the legal norm that provides a legal basis for officials who are authorized to dismiss civil servants dishonorably by affirming any valid reasons to be used as a legal basis for dismissing dishonorably a civil servant. Whereas in the legal norms on the one hand, the reasons mentioned are not a court verdict and on the other hand also stated reasons in the form of court verdicts, this does not show an inconsistent mindset. If the Petitioner's mindset is followed, what is consistent according to the Petitioner is that if the dishonorably dismissal, it must be based solely on reasons that are not court verdicts or, on the contrary, must be solely based on reasons due to court verdicts. Such reasoning is unacceptable, especially if such an argument is used as an argument to declare a legal norm, in this case Article 87 of the ASN Law is unconstitutional.

Meanwhile, against the Petitioners' argument stating that the ASN Law has made new legal norms that are not regulated in PP 32/1979, namely to dismiss dishonorably civil servants who are members or management board of political parties, the Court has the opinion that such arguments are totally unacceptable because they oppose logic hierarchy of the laws and regulations. With such argument the same means that the Petitioner said that the law must be guided by the PP (Government Regulation) and should not conflict with the PP. In other words, the law must be subject to PP which also means that the PP is higher in hierarchy than the law. How can such reasoning be accepted where the law must "lose" from the implementing regulations.

Whereas the Petitioner argues, SKB/2018 has required and at the same time corrected the facultative norms contained in Article 87 paragraph (2) and paragraph (4) letter b and letter d of the ASN Law where the Advisor for Staff Development Officials must choose other legal norms, in this case Article 87 paragraph (4) letter b, namely dishonorably dismissal.

With regard to the said Petitioner's argument, the Court has the opinion that with such argumentation again and again shows that the Petitioner's actual objection is against the SKB/2018, as has been considered by the Court in the consideration in Point 1 above.

Whereas the Petitioner argues as described in Paragraph [3.7] point 7 to point 11 above, Article 87 paragraph (2) and paragraph (4) letter b of the ASN Law is an "additional law" [sic!] outside the court's verdict outside as provided for in Article 10 of the Criminal Code and then on this basis the Petitioner then argues it as a discriminatory legal act and is not in accordance with the correctional philosophy, so that the Petitioner comes to the conclusion that the legislator has exceeded his authority.

With regard to the said Petitioner's argument, the Court has the opinion that if what the Petitioner calls "additional law" is an additional crime as provided for in Article 10 of the Criminal Code, the Petitioner has confused the definition of sanctions in administrative law and sanctions in criminal law. Sanctions in administrative law are the application of governmental authority, both originating from written and unwritten laws, which are implemented by administrative officials without the need for third party mediation (in this case court). The shape or type varies. There are reparatory sanctions, i.e. sanctions that are applied as a reaction to violations of norms and aim to restore a state to its original state before violations occur (e.g. government coercion or bestuursdwang, imposition of forced money or dwangsom). There are punitive sanctions, i.e. imposed as a reaction to non-compliancea t giving a sentence to someone (for example an administrative fine). There are regressive sanctions, i.e. sanctions imposed as a reaction to non-compliance with the provisions contained in the provisions issued (for example termination from position or ontlading). Thus, in the context of the Petitioner, the imposition of administrative sanctions in the form of dismissal from office is not an additional crime in the sense of Article 10 of the Criminal Code, as argued by the Petitioner, but the exercise of governmental authority exercised by administrative or state administration officials which does not require court involvement. Therefore, there is no relevance in linking the imposition of administrative sanctions with the issue of discrimination or the purpose of correctional penalties for prisoners who have finished serving their criminal penalties in prison. Article 87 of the ASN Law, specifically paragraph (2), paragraph (3), and paragraph (4), is a written legal norm that provides a legal basis for administrative or state administration officials to exercise governmental authority imposing administrative sanctions of dishonorably dismissal. Does giving or formulating a legal basis for the exercise of governmental authority mean that the legislators have taken actions that exceed their authority, as argued by the Petitioner. Such reasoning is difficult to be accepted. Because, if accepted, by a contrario, it means that logic must be accepted that in order not to exceed its authority, the legislators may not draw up laws that contain norms that provide the legal basis for the implementation of governmental authority to impose administrative legal sanctions. The issue of the constitutionality of a law must be distinguished from the issue of the authority of the legislators to draw up laws. The constitution gives authority to the legislators to draw up laws. Therefore, the constitutional or unconstitutional of a law does not eliminate the constitutional authority of the legislators to draw up laws. That is, the issue of the constitutionality of a law, both the process of formation and material content, must be assessed separately based on the rules that apply in reviewing the constitutionality of the law.

Based on all these legal considerations, the Petitioner's argument related to the unconstitutionality of Article 87 paragraph (2) of the ASN Law is no legal grounds.

Whereas regarding the Petitioner's argument, as outlined in Paragraph [3.7] point 12 to point 14 above, which essentially concerns that Article 87 paragraph (4) letter b of the ASN Law does not specify the timeframe of the inkracht decision which is used as the basis for dismissing civil servants dishonorablely, so the Petitioner questioned whether the inkracht decision in question is the inkracht decision starting in 2000, 1900, or whether the inkracht decision since the enactment of PP 11/2017 or since the enactment of SKB/2018 and Circular Letters (without mentioning which Circular Letters were meant), the Court has the opinion that such questions are irrelevant. This is because the provisions contained in the norms of Article 87 paragraph (4) letter b of the ASN Law are enacted against civil servants who are still active, so that whenever a court verdict convicts a punishment as provided for in Article 87 paragraph (4) letter b of the ASN Law obtains permanent legal force or its inkracht, Article 87 paragraph (4) letter b of the ASN Law remains in effect as long as a civil servant who is convicted as such is still active. Therefore, the Petitioners' argument which states that Article 87 paragraph (4) letter b of the ASN Law does not provide legal certainty, as long as it is related to the absence of a period of time as intended by the Petitioner, it is no legal grounds.

Whereas, meanwhile, Article 87 paragraph (4) letter b declares that a civil servant is dishonorably dismissed because he is sentenced to prison or confinement based on a court verdict that has permanent legal force for committing a criminal offense or a criminal offense related to his position and/or general crime. If a civil servant is dismissed for committing a criminal offense or a crime related to the position, this is reasonable because by committing such crimes or criminal offenses a civil servant has abused or even betrayed the position entrusted to him to be carried out as a State Civil Apparatus (ASN). Because, a civil servant who commits such a crime or criminal offense actually, directly or indirectly, has betrayed the people because such actions have hampered efforts to realize the ideals or goals of the state which should be the main reference for a civil servant as an ASN in carrying out his duties, both public service tasks, government tasks, or certain development tasks.

However, what about the existence of the phrase "and/or general crime" which is made an inseparable part of the norm in Article 87 paragraph (4) letter b of the ASN Law. The problem lies not in the existence of the phrase "and/or general crime" itself but in relation to other norms in the same article, namely the norms in Article 87 paragraph (2) of the ASN Law.

If the norm contained in Article 87 paragraph (4) letter b is related to the norm contained in Article 87 paragraph (2), the issue that arises is what will be done by the Advisor for Staff Development Officials if a civil servant commits a general criminal offense and is sentenced to two years in prison based on court verdicts that have permanent legal force, whether to take action by enacting Article 87 paragraph (2) of the ASN Law, i.e. dismiss honorably or not dismiss the relevant civil servant, or will enact Article 87 paragraph (4) letter b of the ASN Law, i.e., dismiss dishonorably the relevant civil servant due to the phrase "and/or general criminal" in Article 87 paragraph (4) letter b of the ASN Law. This situation, in addition to creating legal uncertainty, also opens opportunities for the Advisor for Staff Development Officials to take different actions against two or more subordinates who commit the same violations.

Another problem, if to carry out actions that are discretionary only against a civil servant (i.e. whether to dismiss honorably or not to dismiss), the Advisor for Staff Development Officials are given a condition that is that as long as the civil servant concerned commits a criminal offense that was sentenced to imprisonment for a minimum of two years and commits non-planned criminal offenses, as provided for in Article 87 paragraph (2) of the ASN Law, cannot be accepted by reasonable legal reasoning when a civil servant is dishonorably dismissed because he is committing a "general criminal offense" without a minimum criminal limit. Because, if such reasoning is accepted it must be accepted the possibility of a situation or event where a civil servant who commits a criminal offense that is sentenced to a two-year prison sentence is not dismissed [with reference to Article 87 paragraph (2) of the ASN Law], while a civil servant who was sentenced to confinement or conditional criminal with probation for committing a general criminal offense is dishonorably dismissed [with reference to Article 87 paragraph (4) letter b of the ASN Law].

This means that civil servants are dishonorably dismissed based on Article 87 paragraph (4) letter b of the ASN Law is on the grounds that there has been a court verdict that has permanent legal force because the relevant civil servant committed a criminal offense or a crime related to the position. As for civil servants who commit general crimes can be dishonorably dismissed or not dismissed in accordance with Article 87 paragraph (2) of the ASN Law.

Thus it has turned out that the existence of the phrase "and/or general criminal" in Article 87 paragraph (4) letter b has created legal uncertainty and opened the opportunity for the birth of injustice to contradict Article 28D paragraph (1) of the 1945 Constitution. Therefore, although the Petitioner did not specifically postulate the contradiction of Article 87 paragraph (4) letter b of the ASN Law is associated with the phrase "and/or general criminal" but because the phrase in question is an integral part of the norms of Article 87 paragraph (4) letter b of the ASN Law and because it has been proven that the phrase "and/or general criminal" in question has caused legal uncertainty, the Petitioner's argument related to the said article norms are legal grounds, insofar as it concerns the phrase "and/or general criminal".

With regard to the said Petitioner's Petition, the Court has the opinion that in addition to the Petitioner having misunderstood Article 28H Paragraph (2) of the 1945 Constitution, the Petitioner has also made incoherent arguments. Article 28H paragraph (2) of the 1945 Constitution is a Constitutional norm which belongs to the group of economic, social and cultural rights which in this case regulates the need for affirmative action for those who have special needs, while the Petitioner is clearly not included in such criteria. Meanwhile, it is said to be incoherent because the Petitioner, on the one hand, uses Article 28H paragraph (2) of the 1945 Constitution (which belongs to the group of economic, social and cultural rights), but on the other hand it relates it to the Covenant on Civil and Political Rights and part of the provisions in the Human Rights Law which also regulates civil and political rights. Therefore, the Court has the opinion that the said Petitioner's argument is no legal grounds.

Whereas based on all the legal considerations above, the Court has the opinion that the Petitioner's argument is legal grounds in part.

Thus, the Court subsequently handed down the verdicts as follows:

1. Granting the Petitioner's petition in part;

2. Declaring the phrase "and/or general criminal" in Article 87 paragraph (4) letter b of Law Number 5 of 2014 concerning State Civil Apparatus (State Gazette of the Republic of Indonesia of 2014 Number 6, Supplement to the State Gazette of the Republic of Indonesia Number 5494) is contrary to the 1945 Constitution of the Republic of Indonesia and has no binding legal force, so Article 87 paragraph (4) letter b of Law Number 5 of 2014 concerning State Civil Apparatus reads, "sentenced to prison or confinement based on a court verdict that has had the permanent legal force because of a criminal offense of office or a criminal offense related to the position";

3. Rejecting the Petitioner's petition for the rest and remainder;

4. Ordering the promulgation of this Verdict in the Official Gazette of the Republic of Indonesia as appropriate.

This document is translated from Indonesian into English by me, **Drs. EMIL SUSANTO**,

the Authorized and Sworn Translator in Jakarta - Indonesia

JAKARTA, June 24, 2020