



DECISION

Case Number 069/PUU-II/2004

FOR THE SAKE OF JUSTICE UNDER THE ONE ALMIGHTY GOD

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA

Examining, hearing, and deciding upon constitutional cases at the first and final level, has passed a decision in a case of petition for judicial review of the Law of the Republic of Indonesia Number 30 Year 1991 regarding the Corruption Eradication Commission (hereinafter referred to as the KPK Law) against the 1945 Constitution of the State of the Republic of Indonesia (hereinafter referred to as the 1945 Constitution), filed by:

BRAM H.D. MANOPPO, MBA, President Director of P.T. Putra Pobiagan Mandiri, domiciled at Jl. Dukuh Patra II No 81 Rt. 010/002, Menteng Dalam, South Jakarta, in this matter granting power of attorney to: **MOHAMMAD ASSEGAF, S.H**, **ASFIFUDIN, S.H.**, **RACHMAWATI, S.H., M.H.**, respectively Advocates joining, collectively the **LEGAL TEAM OF BRAM MANOPPO**, domiciled at Jl.

H. Samali No. 29, South Jakarta, by virtue of a Special Power of Attorney dated November 25, 2004, hereinafter referred to as the PETITIONER;

Having read the petition of the Petitioner;

Having heard the statement of the Petitioner;

Having heard the statement of the Government and the People's Legislative Assembly of the Republic of Indonesia;

Having heard the statement of the Corruption Eradication Commission as the Related Party;

Having read the written statements of the Government, the People's Legislative Assembly of the Republic of Indonesia, and the KPK as the Related Party;

Having examined the evidence;

Having heard the statements of Experts presented by the Petitioner;

Having heard the statements of Experts presented by the Corruption Eradication Commission;

LEGAL CONSIDERATIONS

Considering whereas the purpose and objective of the petition of Petitioner are as mentioned above;

Considering whereas prior to examining the substance or the principal issue of the case, the Court must first take the following matters into account:

1. Does the Court have the authority to hear and decide upon the petition for judicial review of Article 68 of Law Number 30 Year 2002 (regarding the Commission for the Eradication of Criminal Acts of Corruption) against the 1945 Constitution of the State of the Republic of Indonesia?;
2. Does the Petitioner have the legal standing to act as Petitioner in the *a quo* petition, namely that the constitutional right and/or authority of the *a quo* Petitioner have been impaired with the coming into effect of Article 68 of Law Number 30 Year 2002 (regarding the Commission for the Eradication of Criminal Acts of Corruption) to such an extent that under the law, *in casu* Law Number 24 Year 2003 (regarding the Constitutional Court), the Petitioner is recognized to have the legal standing as the Petitioner in the petition *a quo*?

1. AUTHORITIES OF THE CONSTITUTIONAL COURT

Whereas, pursuant to Article 24C Paragraph (1) of the 1945 Constitution in conjunction with Article 10 of Law Number 24 Year 2003 regarding the

Constitutional Court, one of the authorities of the Court is to conduct judicial review of a law against the 1945 Constitution;

Whereas, notwithstanding the dissenting opinions among the Justices regarding the provision of Article 50 of Law Number 24 Year 2003, based on the date of enactment of the *a quo* law then the Court has the authority to examine, hear, and decide upon this petition;

2. LEGAL STANDING OF PETITIONER

Whereas, Article 51 Paragraph (1) of Law Number 24 Year 2003 regarding the Constitutional Court states that,

“Petitioner is a party who assumes that his/her constitutional right and/or authority have been impaired by the coming into effect of a law, namely:

- a. an Indonesian citizen individual person;
- b. a traditional law community unit so long as it is still existence and in accordance with the development of the community and the principle of the Unitary State of the Republic of Indonesia as regulated in law;
- c. a public or private legal entity;
- d. a state institution”.

Whereas, therefore, in order to be recognized to have the legal standing as a petitioner before the Court, an individual or a party should explain:

1. His capacity in relation to the petition being filed, namely whether as an Indonesian citizen, or representing a traditional law community unit (with due fulfillment of the requirements as set forth in Sub-Paragraph b of Article 51 Paragraph [1] above), or representing a legal entity (public or private), or representing a state institution;
2. The impairment he suffers in his capacity as mentioned in item 1 as a consequence of the coming into effect of a law.

Whereas the Petitioner, Bram H.D. Manoppo, argued that his constitutional right had been impaired since he had been examined as a corruption crime suspect by the KPK under Article 68 of the KPK Law, which according to the Petitioner contained a retroactive legal provisions, so that the issue of the legal standing of the Petitioner is closely related to the substance or principal issue of the case; therefore, the consideration of the legal standing of the Petitioner shall be given along with the consideration of the substance or the principal issue of the case.

3. PRINCIPAL ISSUE OF THE CASE

Considering whereas the principal issue which must be considered by the Court in the *a quo* petition is whether Article 68 of the KPK Law contains a retroactive legal provisions as argued by the Petitioner;

Considering whereas in order to review the *a quo* petition, the Court has heard the oral and written statements of the Petitioner, Government, DPR, KPK as the related parties, out of which the following matters have become evident:

- Whereas in the hearing dated January 11, 2005, while answering the question from DPR who asked whether the Petitioner, Bram H.D. Manoppo, had ever been examined by any other investigator prior to the examination by the KPK, the Petitioner stated that he never had been;
- Whereas in the hearing dated January 11, 2005, the Government had also had its statement heard, followed by the written statement of the Minister of Justice and Human Rights dated January 12, 2005, which was received at the Registry Office of the Constitutional Court on January 20, 2005, in which the Government stated that the Petitioner, Bram H.D. Manoppo, had never been subjected to any legal action whatsoever by any other agency besides KPK. The fact was that the KPK conducted a pre-investigation, investigation, and prosecution of the Petitioner as a first action, rather than taking over. Therefore, there is no linear correlation between the action of the KPK (pursuant to Article 6 Sub-Article c of the KPK Law) and the context of taking over (Article 68 of the KPK Law) as per the petition of Petitioner (*vide* Statement of the Government page 4-5);

- Whereas the People's Legislative Assembly (DPR), in its written statement read out in the hearing dated January 11, 2005, principally stated that the authority granted to KPK by Article 68 of the KPK Law is the authority to take over therefore it is not related to the application of the retroactive principle but rather to the takeover procedure for the pre-investigation, investigation, and prosecution process, the legal process of which was not completed as of the establishment of KPK. In the Petitioner's case, it was not a taking over since the Petitioner had never been subjected to any pre-investigation, investigation, or prosecution process by the police or public prosecutor's office (*vide* Written Statement of DPR page 5 items 3 and 4);
- Whereas the statement submitted by both the Government and DPR above is evidently in conformity with the record of Minutes of the Meeting of the Working Committee of the Corruption Crime Eradication Commission (KPTK) dated June 6, 2002 (*vide* the relevant Minutes page 13) and the notes contained in Report of Commission II of DPR-RI in the Framework of Second Level Discussion/Decision Making on the Draft Law regarding Eradication of Criminal Acts of Corruption at the Plenary Meeting Dated November 29, 2002, Item B, Sub-Item 3;
- Whereas in the hearing dated January 11, 2005, KPK as the Related Party had also had its statement heard, which essentially stated that the Petitioner, Bram H.D. Manoppo, prior to the examination in the

framework or investigation by KPK, had never been examined nor investigated by the police or the public prosecutor's office, therefore it is not true if KPK is deemed to have taken over an investigation or prosecution conducted by the police or the public prosecutor's office. At another part of its statement before the Court, KPK also stated that in conducting the corruption crime investigation on the Petitioner, Bram H.D. Manoppo, KPK did not refer to Article 68 but rather Article 6 Sub-Article c of the KPK Law;

- o Whereas the statement as given by KPK was in conformity with the document in the form of Summons Number Spgl-145/X/2004/KPK dated October 8, 2004 which was addressed to Bram H.D. Manoppo, namely the Petitioner in the *a quo* petition;

Considering whereas based on the facts revealed in the hearing as described above, it is very clear and evident to the Court that some of the arguments of the Petitioner, namely concerning the legal basis of the investigation on the Petitioner carried out by KPK, were not proven. In his petition the Petitioner argued that Article 68 of the *a quo* law contained a retroactive principle. According to the Petitioner, Article 68 of the *a quo* law has been used by KPK as a basis to pre-investigate and investigate the legal action of the Petitioner which occurred prior to the enactment of the *a quo* law and prior to the establishment of KPK, therefore impairing the constitutional rights of the Petitioner as guaranteed in Article 28 I Paragraph (1) of the 1945 Constitution,

which states among other things that “...*the right not to be prosecuted under retroactive law shall constitute human rights which ca not be diminished under any circumstances whatsoever...*”. The hearing revealed the statements of KPK as the Related Party and the Experts it presented, that the pre-investigation and investigation carried out by KPK on the petitioner were not based on Article 68 in conjunction with Article 9, but rather based on Article 6C of the *a quo* law. Furthermore, the hearing revealed the statement of the Petitioner which stated that prior to being examined by KPK, the Petitioner had never been examined either by the Police or the Attorney’s Office, while the examination by the Police or the public prosecutor’s Office is a requirement which must be fulfilled by KPK to be able to use Article 68 of the *a quo* law. Therefore, there is no constitutional impairment on the part of the Petitioner due to the coming into effect of Article 68 of the *a quo* law, therefore it must be declared that the petition of Petitioner can not be accepted. Therefore, in accordance with the provision of Article 51 of Law Number 24 Year 2003 regarding the Constitutional Court, there are two (2) Constitutional Court Justices who concluded that there was no impairment of constitutional right suffered by the Petitioner, therefore the Petitioner **has not been proven to have the legal standing** in order to act as the Petitioner in the *a quo* petition;

Considering whereas notwithstanding the opinion of the two (2) Constitutional Court Justices as expressed above, given the substance of the issue argued by the Petitioner, whether Article 68 of Law Number 30 Year 2002 regarding KPK contained an issue of retroactive principle, so as not to cause

ambiguity in its future implementation and for legal certainty, the Court still considers it necessary to review the substance of Article 68 of the KPK Law, which was argued by the Petitioner as containing a retroactive principle;

Considering whereas for such need, the Court has heard the statements of experts presented, both by the Petitioner and by the KPK as the Related Party, from whom the following information was obtained:

1. Expert Prof. Dr. Indriyanto Senoadji, SH, in the hearing dated December 16, 2004 in essence stated that Article 68 of the KPK Law contained a retroactive provision since the expert in question is of the opinion that the prohibition of the application of a retroactive law applies not only to material criminal legal provision but also includes formal criminal legal aspects. According to the expert concerned, this is contained in Article 68 of the KPK Law. However, given that the hearing on January 11, 2005 it was revealed that the expert concerned, according to KPK as the Related Party, had been a part of the Legal Counsel Team of the Petitioner in the corruption crime case of Abdullah Puteh, the investigation process of which was being conducted by KPK (enclosed with evidence in the form of power of attorney number 001/SK.AP.XII/2004 dated December 7, 2004), which was not the Legal Counsel Team of the Petitioner then in order to fulfill the sense of propriety and to prevent any doubt on the objectivity of

expert Prof. Dr. Indriyanto Senoadji, S.H., the Court is of the opinion that the statement of the expert concerned needs to be set aside;

2. Expert Prof. Dr. Andi Hamzah, S.H., in the hearing dated December 16, 2004 principally stated that the non-retroactivity principle applies not only in the material criminal law but also in formal criminal law. To corroborate his opinion, the expert quoted a provision in the Dutch Criminal Procedural Law which stated that, *strafvordering heeft alleen plaats op de wijzig bij de wet voor zijn*”, the criminal procedural law shall only be practiced based on the procedures set forth in a law. The expert is also of the opinion that the non-retroactivity principle applies universally; it has been set aside by the United Nations only for extraordinary crimes, while according to this Expert corruption does not constitute such a crime, since corruption has many forms from minor cases to extremely major cases. As for the act of taking over a pre-investigation, investigation and prosecution by KPK, according to this expert, it was an act of applying a legal provision retroactively and therefore he is of the opinion that it must not be done;
3. Expert Prof. Dr. Komariah Emong Sapardjaja, S.H., in his statement dated January 11, 2005, followed by a written statement the expert in question received at the Registry Office of the Constitutional Court on January 11, 2005, stated among other things that the legality principle (the prohibition against retroactive application of a law) is indeed a

generally applicable principle, but it does not mean that this could not be breached, as evident from the provision of Article 103 of the Criminal Procedural Code. At another part of her statement, the expert in question stated that the tasks and functions of criminal procedural law are to uphold the norms of substantive criminal law, or more specifically to seek material truth, therefore the substantive truth about to be applied by the criminal procedural law is a *feiten* violated by a person contained in the substantive criminal law. Therefore, from the expert statement Prof. Dr. Komariah Emong Sapardjaja, S.H. it can be concluded that the expert in question is of the opinion that the legality principle (the prohibition against retroactive application of applying a law) only concerns the substantive criminal law.

As for Article 68 of the KPK Law, the expert in question is of the opinion that the aforementioned article governs the granting of authority to KPK to take over the authority possessed by the police or public prosecutor's office under the Criminal Procedural Code (Law Number 8 Year 1981). Therefore, Article 68 of the KPK Law, according to this expert, has no relationship to the retroactive applicability of the substantive law (in this case the Law on Corruption Crime which had existed before the Petitioner was examined by KPK) or any formal law that has existed by the time the alleged corruption crime was accused against the Petitioner (in this case, Law Number 8 Year 1981 regarding the Criminal

Procedural Code). Therefore, Article 68 delivers the authority of KPK pursuant to the substantive criminal law and the criminal procedural law already in existence. Therefore, Article 68 of the *a quo* law has a nature of administrative law as a transitory provision. Moreover, a further research by Machteld Boot in his dissertation *Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court*, Katholieke Universiteit Brabant, February 15, 2002, stated that “*The Nullum crimen sine lege principle originates in the law of national jurisdiction*” (page 18), “.... *the nullum crimen sine lege is not a rule of law **but rather an ethical principle...***” (page 19).

4. Expert Prof. Dr. Romli Atmasasmita, S.H., LL.M. in the hearing dated January 11, 2005 stated that in essence he is of the same opinion as expert Prof. Dr. Komariah Emong Sapardjaja, S.H. as described above, with an additional opinion that corruption has become an extraordinary crime.

Considering whereas in considering different opinions of the experts as expressed above in relation to the issue of whether or not there is a retroactive nature contained in the definition of Article 68 of the KPK Law, and since the Petitioner in his argument linked Article 68 in question with Article 72 and Article 70 of the KPK Law, therefore the Court shall first systematically

consider the link between Article 68, Article 72, and Article 70 of the KPK Law as follows:

- Article 72 of the KPK Law, which was contained under the chapter heading CLOSING PROVISIONS, completely reads “*This law shall come into effect as from the date of its enactment*”. The enactment date of the law in question was December 27, 2002. With the definition of said Article 72 it is clear that the KPK Law applies prospectively, namely as of December 27, 2002. It means that the entire *a quo* law may only be applied to criminal events whose *tempus delicti* were after the law in question was enacted. By *argumentum a contrario*, this law does not apply to any criminal event whose *tempus delicti* were before the *a quo* law was enacted;
- Article 70 of the KPK Law states that, “*The Corruption Eradication Commission carries out its duties and authorities at the latest within one (1) year after the enactment of this law*”. This article governs the time when KPK began to carry out its duties and authorities, namely not later than one (1) year after the *a quo* law was enacted. The *a quo* law was enacted on December 27, 2002, and it was also means that it was the time KPK began performing its duties and authorities;
- Article 68 of the KPK Law, which was set forth under the chapter heading TRANSITORY PROVISIONS (CHAPTER XI) states that, “*Any pre-investigation, investigation, and prosecution action on corruption*

*crime whose legal process had not been completed **at the time of establishment of the Corruption Eradication Commission**, may be taken over by the Corruption Eradication Commission under the provision as referred to in Article 9". Article 9 in question reads, "The taking over of investigation and prosecution as referred to in Article 8 shall be carried out by the Corruption Eradication Commission for the following reasons:*

- a. no follow-up action is taken on a public report regarding a corruption crime;*
- b. the corruption crime is handled in a protracted or delayed manner for no accountable reason;*
- c. the handling of the corruption case is aimed to at protecting the real perpetrator of the corruption crime;*
- d. the handling of the corruption crime contains an element of corruption;*
- e. the handling of the corruption crime is hampered by intervention from the executive, judicative, or legislative body, or*
- f. other circumstances that according to the consideration of the police or public prosecutor's office render the corruption crime difficult to handle in a proper and accountable manner".*

The clause “...*pre-investigation, investigation, and prosecution action on corruption crime whose legal process had not been completed at the time of establishment of KPK...*” indicates that at the time when KPK was established and carrying out its authority under Article 70, pre-investigation, investigation, or prosecution carried out by other, non-KPK law enforcement agencies had taken place. Logically speaking, the investigation or prosecution should have been based on an allegation that a criminal act had occurred, in this case corruption which had been established as a prohibited act and subject to criminal penalty at the time the pre-investigation, investigation or prosecution was being conducted. The reason was that if there was no prohibition against such act at the time, then there would have been no grounds for conducting the pre-investigation, investigation, or prosecution of the act in question. Therefore, the authority processed by KPK under Article 68 of the *a quo* law refers to the authority to continue the process which had previously existed. This means that the authority of KPK in this connection is a prospective one, only applicable if one of the circumstances as mentioned in Article 9 of the *a quo* law indicates that KPK in this regard only acts to continue the pre-investigation, investigation, or prosecution process which had been going by handing over the suspects and case file along with the evidence and other documents from the police or public prosecutor’s office, as regulated in Article 8 Paragraph (3). Therefore, with the existence of Article 68 in conjunction with Article 9 and Article 8 of the *a quo* law, the handling of the corruption cases impeded due to the reasons mentioned in Article 9 shall have the same grounds for legal suit as the handling of other

corruption cases still being carried out by the police and the prosecutor's office, but with no impediment as mentioned in Article 9.

- Article 70 of the KPK Law states that, "*The Corruption Eradication Commission carries out its duties and authorities at the latest within one (1) year after the enactment of this law*". This article is found under the Transitional Provisions Chapter (Chapter XII), which sets a time period on when the duties and authorities of KPK are to be implemented, namely the duties and authorities as set forth in the preceding article or chapter. With this provision, the prospective time frame for the implementation of the duties and authorities of KPK, including when KPK will be able to use the authority vested by Article 68, can be determined. This means that the authority of KPK to take over the handling of corruption cases on the basis of Article 68 may only be done after Article 70 is in effect;
- Article 72 of the KPK Law, which is contained under the chapter heading CLOSING PROVISIONS, reads in full as "*This law shall come into effect as from the date of its enactment*". The enactment date of the law in question was December 27, 2002. With the definition of the said Article 72 it is clear that the KPK Law applies prospectively, namely as of December 27, 2002. The Petitioner linked this provision with Article 68 of the *a quo* law, and then argued that Article 68 contained a retroactive legal provision since the act alleged to have been committed by the Petitioner by KPK had occurred before December 27, 2002. It has been previously described

that Article 68 of the *a quo* law contains no retroactive legal provision whatsoever so as to violate the provision of Article 28I Paragraph (1) of the 1945 Constitution. Article 12 Paragraph (2) of the *Universal Declaration of Human Rights* states that, “No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence ... at the time when it was committed. Nor shall be a heavier penalty shall be imposed than the one that was applicable at the time the penal offence was committed”. Therefore, a provision contains a retroactive legal enforcement (*ex post facto law*) if the provision in question:

- a. pronounces an individual to be guilty of an act which was not a punishable offense at the time it was committed;
- b. imposes a more severe punishment or penalty than the punishment or penalty that applied at the time the act was committed.

Article 68 of the *a quo* law contains neither of the two elements in question at all. The reason is that the taking over undertaken based on Article 68 did not change the allegation or accusation or prosecution, which logically also means that it did not change or add to the penalty or punishment for the act whose handling was taken over by KPK;

Therefore, notwithstanding the difference of opinions among the Petitioner, the Government, the People’s Legislative Assembly, and the Experts

regarding the retroactivity principle whether covering the substantive or formal law, the Court is of the opinion that Article 68 of the *a quo* law does not contain any retroactivity principle, even though KPK may take over pre-investigation, investigation, and prosecution for the criminal act committed after the enactment of the KPK Law (*vide* Article 72) up to the establishment of KPK (*vide* Article 70), as described above;

Considering whereas even if the action taken by KPK with respect to the criminal act alleged to have been committed by the Petitioner (Bram H.D. Manoppo) as specified in Summons Number Spgl-145/X/2004/P.KPK dated October 8, 2004, can be judged to be a retroactive action, it has no relation to the issue of substantive constitutionality of the *a quo* law, but rather it is an issue of the application of a law, which does not constitute an authority of the Constitutional Court;

Considering, whereas based on the above description, the Court is of the opinion that the Petitioner has been unable to lawfully and convincingly prove his argument, and therefore the petition of Petitioner must be declared as **rejected**;

In view of Article 56 Paragraph (5) of Law Number 24 Year 2003 regarding the Constitutional Court;

PASSING THE DECISION:

To declare that the petition of the Petitioner is rejected;

Hence the decision was made in the Consultative Meeting attended by nine (9) Constitutional Court Justices on Monday, on February 14, 2005, and was pronounced in a Plenary Session of the Constitutional Court open for the public on Tuesday, February 15, 2005, by us: Prof. Dr. Jimly Asshiddiqie, S.H. as the Chairman and concurrent Member, accompanied by: Prof. Dr. H.M. Laica Marzuki, S.H., Prof. H.A.S. Natabaya, S.H., LL.M, H. Achmad Roestandi, S.H., Dr. Harjono, S.H., MCL, Prof. H. Abdul Mukhtie Fadjar, S.H., M.S., I. Dewa Gede Palguna, S.H., M.H., Maruarar Siahaan, S.H., and Soedarsono, S.H. respectively as Members and assisted by Cholidin Nasir, S.H. as Substitute Registrar, and in the presence of the Petitioner and Power of Attorney of the Petitioner, the Government, the People's Legislative Assembly, and KPK as the Related Party.

CHIEF JUSTICE,

signed

Prof. Dr. Jimly Asshiddiqie S.H.

JUSTICES

signed

Prof. Dr. H. M Laica Marzuki, S.H.

signed

Prof.. H.A.S Natabaya.S.H. LLM

Signed

Prof. H. Abdul Mukthie Fadjar, S.H. M.S.

Signed

H. Achmad Roestandi, S.H.

signed

Dr. H. Harjono, S.H., M.CL.,

signed

I Dewa Gede Palguna, S.H., M.H.

signed

Maruarar Siahaan, S.H.

signed

Soedarsono, S.H.

SUBSTITUTE REGISTRAR,

signed

Cholidin Nasir, S.H.