



DECISION

Number 27/PUU-V/2007

FOR THE SAKE OF JUSTICE UNDER THE ONE ALMIGHTY GOD

THE CONSTITUTIONAL COURT OF REPUBLIC OF INDONESIA

[1.1] Examining, hearing, and deciding upon constitutional cases at the first and final level, has passed a Decision in the case of petition for judicial review of Law Number 3 Year 2005 regarding the National Sports System against the 1945 Constitution of the State of the Republic of Indonesia, filed by:

[1.2] **Saleh Ismail Mukadar, SH.**, place/date of birth: Central Maluku, December 25, 1963, citizenship: Indonesia, religion: Islam, Position: Chairman of the Indonesia National Sports Committee (KONI) of Surabaya Municipality, domiciled at Jalan Pogot Gang 8 Nomor 15 Surabaya, Handphone Number: 08111304999, Facsimile (031) 5039754, based on a Special Power of Attorney dated November 3, 2007 represented by Muhammad Sholeh, SH., and Moh. Zakaria Anshori, SH., advocates associated in the Anti-Discrimination Advocacy Team having its office at Jalan Genteng Muhammadiyah Nomor 2b Surabaya. Hereinafter referred to as ----- **the Petitioner;**

[1.3] Having read the petition of the Petitioner;
Having heard the statement of the Petitioner;
Having heard and read the written statement of the Government;
Having heard and read the written statement of the People's
Legislative Assembly;
Having heard the statement of the witnesses and experts presented by
the Petitioner and Government ;
Having heard the statement of the Related Party namely the Indonesia
National Sports Committee;
Having examined the evidence;
Having read the written conclusion of the Petitioner and the
Government;

3. LEGAL CONSIDERATIONS

[3.1] Considering whereas prior to further considering Case Number 27/PUU-V/2007, the Constitutional Court (hereinafter referred to as the Court) deems it necessary to clarify that based on the Stipulation of the Court Number 46/TAP.MK/2007 dated December 10, 2007 the merging of review of case Number 27/PUU-V/2007 with case Number 30/PUU-V/2007 has stipulated since the substantive contents of the two petitions are similar, namely, being concerned with the review of Article 40 of Law Number 3 Year 2005 regarding the National Sports System (hereinafter referred to as the SKN Law) against the

1945 Constitution of the State of the Republic of Indonesia (hereinafter referred to as the 1945 Constitution);

[3.2] Considering whereas through a letter dated January 22, 2008, the Petitioner in Case Number 30/PUU-V/2007 filed a petition to revoke (withdraw) his petition. The Petition for the withdrawal was reaffirmed by the Petitioner in the court hearing dated January 31, 2008. With respect to the withdrawal of the said petition, the Court, by the Stipulation Number 15/TAP.MK/2008 dated January 31, 2008, granted the petition for the withdrawal of the *a quo* petition with all its legal consequences, since the withdrawal of the *a quo* petition was not contrary to the Law. Hence, this decision shall further consider only the arguments of the Petitioner in Case Number 27/PUU-V/2007;

[3.3] Considering whereas prior to further considering of the *a quo* Petition, the Court shall first take the following matters into account:

1. Whether the Court has the authority to examine, hear, and decide upon the *a quo* petition;
2. Whether the Petitioner has the *legal standing* to file the *a quo* petition before the Court;

With respect to the foregoing two issues, the Court is of the following opinion:

Authority of the Court

[3.4] Considering whereas regarding the authority of the Court, Article 24C Paragraph (1) of the 1945 Constitution of the State of the Republic of Indonesia states that the Court has the authorities, among other things, to hear at the first and final level, the decision of which shall be final, in conducting judicial review of laws against the Constitution. Such provision is reaffirmed in Article 10 Paragraph (1) Sub-Paragraph a of Law Number 24 Year 2003 regarding the Constitutional Court (hereinafter referred to as the Constitutional Court Law) *juncto* Article 12, Paragraph (1) of Law Number 4 Year 2004 regarding Judicial Power (State Gazette of the Republic of Indonesia Year 2004 Number 8, Supplement to the State Gazette of the Republic of Indonesia Number 4358);

[3.5] Considering whereas the object of the petition filed by the *a quo* Petitioner is the review of law, *in casu* Article 40 of the SKN Law that was enacted on September 23, 2005 against the 1945 Constitution. Therefore, the Court shall have the authority to examine, to hear and to decide upon the *a quo* petition;

Legal Standing of the Petitioner

[3.5] Considering whereas according to Article 51 Paragraph (1) of the Constitutional Court Law, the parties who can file a petition for examining law against the 1945 Constitution shall be the parties who consider that their constitutional rights and/or authorities are impaired by the coming into effect of a law, namely a) individual Indonesian citizens (including groups of people having

a common interest); b) customary law community units insofar as they are still in existence and in line with the development of the communities and the principle of the Unitary State of the Republic of Indonesia as regulated in law; c) public or private legal entities; or d) state institutions;

[3.6] Considering whereas until now the Court has had a stand that the said impairment of rights and/or constitutional shall meet five requirements, namely::

- a. The Petitioner must have constitutional rights and/or authority granted by the 1945 Constitution;
- b. The Petitioner considers that the said constitutional rights and/or authority have been impaired by the coming into effect of the Law petitioned for review;
- c. The impairment of such constitutional rights and/or authority shall be specific and actual or at least potential in nature which, pursuant to logical reasoning, will take place for sure;
- d. The existence of a causal relationship (*causal verband*) between the said impairment of rights and/or constitutional authority and the coming into effect of the law petitioned for review;
- e. If the petition is granted, it is expected that such argued impairment of constitutional rights and/or authority will not or does not occur any longer;

[3.7] Considering whereas therefore, for a person or a party to qualify as a Petitioner in a case of judicial review of Law against the 1945 Constitution, according to Article 51 Paragraph (1) of the Law of Constitutional Court, the intended person or party must explain the following:

- a. his/her/its qualification, namely, whether as an individual Indonesian citizen, a customary law community unit, a legal entity or a state institution;
- b. the impairment of his/her/its constitutional rights and/or authority in the qualification as intended in item a, as the consequence of the coming into effect of the law petitioned for review;

[3.8] Considering whereas based on the description of the provision of Article 51 Paragraph (1) of the Constitutional Court Law and the requirements of impairment of constitutional rights and/or authority as described above, the Court shall further consider the legal standing of the Petitioner in accordance with the Petitioner's description in his petition including the relevant evidence;

[3.9] Considering whereas in principle, the Petitioner argues that the provision of Article 40 of the SKN Law has impaired his constitutional right. According to the Petitioner, such impairments are as follows:

- a) whereas Article 40 of the SKN Law has suppressed public functionaries (the Petitioner) who wish to contribute their energy and idea for the progress of the sports world.

- b) whereas Article 40 of the SKN Law is very discriminatory and contrary to Article 28I Paragraph (2) of the 1945 Constitution, because the Article prohibits public functionaries from actively participating in promoting the sports world for fear of abusing their position.
- c) whereas the prohibition of public functionaries from becoming KONI administrators is regulated both in Article 40 of the *a quo* Law, and in Government Regulation Number 16 Year 2007 regarding the Implementation of Sports, Article 56 of which reads as follows:
- Paragraph (1), *"The administrators of the national sports committee, provincial sports committee, regency/municipality sports committee shall be independent and not bound by the activities of structural and public positions "*.
 - Paragraph (2), *"In performing the duty, responsibility and authority, the administrators referred to in paragraph (1) must be free from the intervention of any parties whatsoever to maintaining neutrality and to guarantee the sports management professionalism"*.
 - Paragraph (3), *"The administrators referred to paragraph (1) shall be prohibited from holding positions indicating the duty, responsibility, authority and right as civil servants or military personnel in the context of leading the State organization or administration, among other things, the echelon positions in ministries or non-departmental government institutions"*.

- Paragraph (4), *"The administrators referred to in paragraph (1) shall be prohibited from holding public functions obtained through the process of direct voting by the people or through the election at the People's Legislative Assembly of Indonesia, among others, the President/Vice President and members of the Cabinet, Governors/Deputy Governors, Regents/Deputy Regents, Mayors/Deputy Mayors, members of the People's Legislative Assembly (DPR) of the Republic of Indonesia, members of Regional DPR, Supreme Court Justices, members of the Judicial Commission, Chief of the Police Force of the Republic of Indonesia and the Commander- in- Chief of the Indonesian Armed Forces"*.
- d) Whereas Article 123 of Government Regulation Number 16 Year 2007 states:
- Paragraph (6), *"In the event there is a violation of Article 56 (Government Regulation Number 16 Year 2007 regarding Sports Management), the Minister can facilitate the implementation of an election of new administrators in accordance with the provisions of the sports organization and the laws and regulations "*.
 - Paragraph (7), *"In the event that the election of the administrators as intended in this article is not performed, the Minister can recommend to the parties in relation to the financing to postpone the transfer of fund to the national sports committee, provincial sports committee, regency/municipal sports committee"*.

- e) Whereas Article 40 of the *a quo* Law and Government Regulation Number 16 Year 2007 are extremely discriminatory, since the public functionaries are not prohibited from holding the position of administrators of the sports branches, such as PBSI (Indonesian Badminton Federation) that was occupied by Sutiyoso when he was the Governor of DKI Jakarta. The Indonesian *Pencak Silat* Association of East Java Branch (IPSI) was occupied by Soekarwo, the Regional Secretary of East Java Province and so on. The description shows that Article 40 of the *a quo* Law has been made without considering the philosophical principle of law-making which must reflect on the aspiration of the people.
- f) Whereas Article 40 of the *a quo* Law, if related to Human Rights, is contrary to Article 3 of Law Number 39 Year 1999 regarding Human Rights that declares:
- Paragraph 1, *"Every person is born free with the same and equal status and dignity and is granted with the intellect and conscience to live in the society, nation, and state in a spirit of brotherhood"*.
 - Paragraph 2, *"Every person shall have the right to the recognition, guarantee, protection and a just legal treatment as well as the right to a legal certainty and equal treatment before the Law"*.
 - Paragraph 3, *"Every person shall have the right to the protection of the human rights and the basic human freedom without any discrimination"*.

g) whereas the Petitioner, Saleh Ismail Mukadar, SH., is an individual Indonesian citizen who occupies the position of Chairman of the Indonesia National Sports Committee (KONI) of Surabaya and at the same time he is also a public functionary, namely, the Head of Commission E of Regional DPR of East Java. The Petitioner considers that his constitutional rights granted by Article 28C Paragraph (2), Article 28D Paragraph (1) and Article 28I Paragraph (2) of the 1945 Constitution have been impaired by the coming into effect of Article 40 of the SKN Law regarding the prohibition for a public functionary to become a KONI administrator;

[3.10] Considering whereas therefore, according to the Court, the Petitioner has the *legal standing* to file the *a quo* petition and therefore, the principal issue of the petition needs further consideration;

Principal Issue of the Petition

[3.11] Considering whereas the Principal Issue of the Petition of Petitioner is regarding the constitutionality of Article 40 of the SKN Law that according to the Petitioner is contrary to the constitutional rights of the Petitioner as guaranteed by Article 28C Paragraph (2), Article 28D Paragraph (1), and Article 28I Paragraph (2) of the 1945 Constitution.

Article 40 of the foregoing SKN Law reads as follows: *The administrators of the national sports committee, provincial sports committee, regency/municipality*

sports committee shall be independent and not bound by the activities of structural and public positions”.

According to the Petitioner, Article 40 of the said SKN Law is contrary to the 1945 Constitution, namely:

- Article 28C Paragraph (2), *“Every person shall have the right to improve him/herself in striving for his/her rights collectively for building his/her society, nation, and state”.*
- Article 28D Paragraph (1), *“Every person shall have the right to the recognition, the guarantee, the protection and the legal certainty of just laws as well as equal treatment before the law”.*
- Article 28I Paragraph (2), *“Every person shall have the right to be free from discriminatory treatment on any basis whatsoever and shall have the right to obtain protection against any such discriminatory treatment”.*

[3.12] Considering whereas based on the foregoing descriptions of the petition and the statement of the Petitioner, the legal issue that must be considered by the Court is whether or not Article 40 of the SKN Law is truly contrary to Article 28C Paragraph (2), Article 28D Paragraph (1), and Article 28I Paragraph (2) of the 1945 Constitution as argued by the Petitioner;

[3.13] Considering whereas in considering the principal issue of the petition, the Court, in addition to examining the written evidence/documents filed by the Petitioner, has also heard the statements of the witnesses and oral statement

and/or having read the written statement of the experts presented by the Petitioner, namely, the witnesses named Herrman Rifai, Denny Trisyanto, and Ismail, and the experts named Dr. John Pieris, S.H., M.H., Prof. Dr. Satya Arinanto, S.H., M.H., and Hesti Armiwulan, S.H., M.H., as completely included in the Facts of the Case part, that basically state as follows :

Herman Rifai, Witness of the Petitioner

Whereas the witness, as Vice Chairman of DPRD, was appointed in as the Chairman of IPSI Surabaya Municipality Branch in 2000, with 36 *perguruan pencak silat* (pencak silat schools) as its members. Upon his first appointment, Witness gathered his fellow administrators and found out that IPSI did not have *silat* equipment at all. Since the Witness was considered by the *pencak silat* people as a *public figure*, in this matter as a public functionary (Vice Chairman of DPRD), the people expected that witness could procure the equipment for the organization's interests. According to the experience of Wtness, the position as the Chairman of IPSI Branch, on the one hand did not disturb his duty as the Vice Chairman of DPRD Surabaya, and on the other hand his position enabled Witness to give support to IPSI organization, namely that he could ask several businessmen to participate in the procurement of silat equipment needed by IPSI.

Denny Trisyanto, Witness of the Petitioner

Whereas the Witness was involved in archery sports in 1980 and handled the National Team in the 1991 Manila SEA Games which became the general champion, and also become the champion in Malaysia in 2001. Whereas, the witness would like to convey that a “Father” figure is needed by us living in regions since the spearhead of sports development is at the regions. We are only athletes, and therefore, if talking about Law, system, only athletes will be able to reach the target of government. The point is that there should be a synergy between the central government and regional governments in a line of command, in which the Chairman of Regional KONIs shall be the Governors, the Mayors, as the extension of the Government, considering that the “Fathers” of regions are the Governors, the Mayors, and the Regents. While the Minister of Sports is the Father figure at the national level, when we become national athletes. For that reason, there should be no restriction for a Governor, Regent, Mayor to be the Chairman of Regional KONI.

Ismail, Witness of the Petitioner

- Whereas at the time when the Witness occupied the Echelon IV position as Head of Treasury Sub-Division, he had a duty to verify the disbursement of all the existing budgetary assets of the Government of Surabaya Municipality including the budget of KONI. The witness needs to explain that the budget of KONI listed in the budgeting system set forth as a Regional Regulation, and was followed up operationally and technically with the issuance of a Decision of Mayor on the periodic disbursement,

namely from quarter 1 to quarter 4. During the application of such regulation, the witness as the implementer disbursing all the aids for KONI never found any fact in which KONI asked to be facilitated, and that the witness just carried out his duty in accordance with the rules.

- Whereas the witness retired in 2007 and before that, the witness occupied the position as the treasurer of KONI. At beginning of his service in the position, the General Chariman had issued regulatory procedures as to the way to effectively use the budget of KONI and then the way to distribute the said budget of KONI for the sports-related needs , 75% being allocated for the needs of sports branches, 25% for the operational interests of KONI to support the activities uncovered in the sports branches, where all apparatus of KONI officials received reward or duty allowance. However, the Chairman refused to accept that and that means the Chairman would not accept the money obtained as facility funds for KONI.

Dr. John Pieris, S.H., MS, Expert of the Petitioner

- Whereas with respect to the text of Article 40 of the SKN Law and its Elucidation, it can be explained that that “independent” shall only apply to the administrators of National Sports Committee. Therefore, it can be concluded that the administrators of the National Sports Committee is independent. Article 40 of the SKN Law and its elucidation do not explain that the administrators of the National Sports Committee organization is

independent, in the context that it is free from the influence and intervention of any parties whatsoever. In this respect, Article 36 Paragraph (1) of the SKN Law reads, “*the parent organization of sports branches as intended in Article 35 shall form a national sports committee*”. In the foregoing Elucidation of Article 36 Paragraph (1), there is no explanation regarding the phrase of being independent. Then in Article 36 Paragraph (3) of the SKN Law the formulation is as follows, “*the parent organization of national sports and the national sports committee as intended in paragraph (1) shall be independent*”. According to expert, since in the elucidation does not give any explanation on the independence of the parent organization and the national sports committee, the legislators, in this matter DPR and the President, understand that the parent organization and national sports committee shall be independent organizations.

- Whereas the difference between Article 40 and Article 36 including their Elucidations is that Article 40 including its Elucidation confirms that the administrators of the national sports committee is independent, while Article 36 and its Elucidation does not explain that the administrators of the parent organization of national sports is independent. Therefore, it can not be denied that the existence of the formulation of Article 40 has rendered the meaning and understanding of the related legal principles obscure, while the content, substance, spirit and substance are similar.

- Whereas, the existence of Article 40 including its Elucidation cannot be justified from the aspect of legal and juridical theories. Therefore, the Article should be void by law and void for the sake of justice. In relation to the said matter, we can therefore explain that Article 40 including its Elucidation are not in conformity and even contrary to the substantive principles of the formulation of laws and regulations, as the fundamental principles in the context and perspective of a constitutional state. Article 40 including its Elucidation are also contrary to Human Rights as regulated in Article 28C Paragraph (2), Article 28D Paragraph (1), Article 28I Paragraph (2), Article 28I Paragraph (5), and Article 28J Paragraph (1) and Paragraph (2) and if viewed from the logic of law perspective, the *a quo* Article 40 is also contrary to Article 1 Paragraph (3) of the 1945 Constitution. In other words, Article 40 including its Elucidation are contrary to the constitutional state principle and to constitutionalism.

Prof. Dr. Satya Arinanto, S.H., M.H., Expert of the Petitioner

- Whereas historically, KONI was established by the *society* rather than the state. However, in further development based on Decision of President Soekarno Number 143a and 156a, KONI changed from being the *society's* to become the *state's*.
- Whereas the legal politics of the SKN Law is to draw everything into the hands of the state, as evident in Article 32 Paragraph (1) which reads, "*the management of the national sports system shall be the responsibility of*

the Minister". The issue in relation to the national sports system can be viewed in Article 1 Paragraph (3) of the SKN Law.

- Whereas regarding the argument over Article 40 and a number of other articles in the same chapter, there are several matters that can also be viewed in a historical context. The prohibition specified out in the petition for those holding structural positions and public functions from becoming the administrators of the sports committee either at the state or regional level, while on the other hand, there is no restriction in Article 36, even though it is not accurate, since Article 36 Paragraph (3) explains that actually the parent organization of sports branches and also the national sports committee shall be independent. .
- Whereas in the context of law development, if the Court is of the opinion that Article 40 of the SKN Law is not contrary to the 1945 Constitution, there should be a synchronization, while at this time only the organizers of KONI are prohibited and the others are not, namely it is not prohibited to become the organizers of sports branches parent organizations. If logically it may disturb or there is a potential to disturb in terms of concentration and time, then such regulation shall apply to all people holding structural positions or public functions. Therefore, the expert observed that there is a partial interest in the national legal system. Sports organization is only a part of the interests of the national law. Therefore, the expert expects the Court to participate in straightening the context of the national law

development.

Hesti Armiwulan, S.H., M.H., Expert of the Petitioner

- Whereas the substance of Article 40 of the SKN Law, if observed, basically has the intention to prohibit public functionaries from becoming the administrators of KONI. Substantially, based on the constitutional rights granted in Article 28I Paragraph (2) of the 1945 Constitution, that every person shall have the right to be free from discriminatory treatment on any basis whatsoever and shall have the right to obtain protection which is the right of all citizens of the Republic of Indonesia. Therefore, if observed, the substance of the aforementioned Article 40 of the SKN Law gives an impression of discrimination. This matter can be viewed in the perspective of Article 28I Paragraph (5) of the 1945 Constitution which clearly explains that To enforce and protect human rights in accordance with the principle of a democratic constitutional state, the exercise of human rights shall be guaranteed, regulated and set forth in laws and regulations. It is perceived that based on the two provisions of Article 28I Paragraph (2) and Article 28I Paragraph (5) of the 1945 Constitution, the SKN Law substantially fails to guarantee justice and is discriminatory.
- Whereas the substance of Article 40 of the SKN Law implies that as long as it is not prohibited by the law, it shall be allowed. If observed, Article 40 of the SKN Law prohibits public functionaries from becoming the administrators of KONI, but there are several other laws allowing a public

functionary to become an administrator. This gives an evidence that the SKN Law fails to guarantee the sense of justice and it is discriminatory from the aspect in relation to the functionaries. There is also discrimination in the field of sports because there is no attention from the functionary where therefore for that kind of sports a functionary is not allowed to become an administrator while he is allowed to become an administrator for other kinds of sports.

- Whereas in the terminology of Human Rights there is a negative right recognized, namely, the right which indicates that the authority of the state, government apparatus, if possible, should be reduced and considered relative to meet the civil and political rights and Indonesia has ratified the covenant on civil and political rights with Law Number 11 Year 2005. The civil and political rights can be fulfilled if there is no intervention of the state or government for that fulfillment. That means that it is appropriate if related to the fulfillment of civil and political rights. However, the right recognized in the terminology of social, cultural, economic rights as *positive rights* namely that the fulfillment of the economic, social, and cultural rights shall be guaranteed if the intervention or role of the state or government becomes greater. The greater the intervention of the state (government) is the bigger possibility for the fulfillment of the economic and socio-cultural rights will be.
- Whereas the issue of sports is included in the capacity or domain of the

economic, social and cultural rights. That means that in this matter the state (Government) should make the greatest and most extensive possible intervention for the fulfilment of the economic, social and cultural rights including the development of the field of sports. This matter is in line with the the provision of Article 28I Paragraph (4) of the 1945 Constitution that the government shall have the responsibilities and obligations not only to protect, uphold but also to fulfill the Human Rights. This means that the SKN Law regulating sports for fulfilling the sense of justice in the world of sports in Indonesia requires the state or the government to have maximum intervension which involves public functionaries in regions. They must also be responsible for the execution of development and fulfillment in relation to this sports issue. Therefore, it is quite clear Article 40 of the SKN Law, in the perspective of Human Rights, reflects discriminatory treatment, not only in relation to the functionaries but also in relation to the world of sports.

[3.14] Considering whereas the Government has presented both oral and written statements, as completely set out in the Facts of the Case part, which are principally as folllows:

- Whereas if the Head of Region, Deputy Head of Region or Chairman/Vice Chairman of DPRD (structural functionaries or public functionaries) become the Chairman or the administrators of the National Sports Committee, a *conflict of interest* is likely to happen especially in the

planning, discussion, and operational implementation of the sports budget support. In other words, it is impossible for a structural or public functionary to participate in the discussion and to determine the allocation amount of sports budget while he is also the user of the said budget in his capacity as the Chairman or Administrator of the National Sports Committee;

- Whereas to guarantee the transparency and accountability in the arrangement and utilization of sports budget, the regulation needed shall not be one in relation to public/structural functionary's holding the position as the Chairman of the National Sports Committee as well as the Provincial and Regency/Municipal Sports Committees but the explicit regulation on the responsibility segregation between budget arranger and budget user.
- Whereas every person (including the Petitioner) may dedicate, participate and contribute his thought and energy for the progress of sports through several ways and channels available. For example, in his capacity as a public/structural functionary (as it is the case with the Petitioner) a person can still participate in the procurement of facilities and infrastructure of sports, assist and strive for the allocation of sports budget in the APBD (Regional Revenues and Expenditures Budget) discussions, become a regular donor for one of sport branches and so forth. In other words, the participation of every person to promote sports shall not necessarily take

the form of becoming a Chairman or the Executive Board of the National Sports Committee, the Provincial Sports Committee or the Regency/Municipal Sports Committee.

- Whereas the *a quo* provision of Article 40 has exactly guaranteed the establishment of legal certainty (*rechtszekerheid*), and the sense of justice in the community especially in providing the same opportunity for the community (each person) who is not a public functionary or a structural functionary. Therefore, the *a quo* provision is not contrary to Article 27 Paragraph (1), Article 28D Paragraph (1), and Article 28I Paragraph (2) of the 1945 Constitution, and do not impair the constitutional rights and/or authority of the Petitioner.

[3.15] Considering whereas in addition to that, the Government has also presented witnesses and experts, namely, the witnesses named Drs. Aristo Munandar, H. Mahfudz, S.H., and Gus Irawan, S.E., including the experts named Prof. Dr. Harzuki, S.H., M.H., Prof. Dr. Toho Cholik Muttahir, M.A., Ph.D., Prof. A. Mansyur Effendi, Drs. Ramli Naibaho, M.Si., Prof. Dr. Rusli Lutan, whose statements have been heard by the Court and completely set out in the Facts of the Case part, which basically describes as follows :

Drs. Aristo Munandar, Witness of Government

- Whereas, the witness once occupied the position as a District Head and was given the position as the District KONI Manager. Since 2000 he had

been the Regent of Agam Regency of West Sumatra Province and based on KONI District Consultation he was appointed as the General Manager of KONI for Agam Regency and the most recently was confirmed on December 11 and 12, 2007 at the Regional Consultation of KONI of Agam Regency. The administrators' position is no longer occupied by public and structural functionaries in accordance with the provision of Article 40 of the SKN Law.

- Whereas before the existence of the SKN Law was enacted, there was an expectation and the desire of the people as sports lovers that the main positions of the said organization were to be occupied by public functionaries or structural functionaries as it was related to the procurement of facilities and supports. However, the said matter was already replied by the SKN Law especially Article 12 Paragraph (1), Article 13, Article 16, regarding the form of Government's roles.
- Whereas as the policy maker, the Government shall not give up but must still take the responsibility for the progress of sports development. Furthermore, the implementation of the policy shall rest on KONI. Therefore, the implementation of the SKN Law has been correct.

H. Mahfudz, S.H., Witness of the Government

- Whereas as the consequence of the implementation of the SKN Law and PP (Government Regulation) Number 16 Year 2007, the witness

submitted a letter of resignation from the position of KONI administrator in response to the provision of Article 40 and PP (Government Regulation) Number 16 Year 2007 Article 56 explicitly confirms that a public functionary or structural functionary is not allowed to become an administrator of KONI, and also in relation to his oath of office and responsibilities as the District Head and Deputy Head of District he should obey and implement the provisions of laws and regulations and therefore there is no other words except that the witness should implement the said provisions;

- Whereas in relation to the Membership in the DPRD, Article 54 Paragraph (1) of Law Number 32 Year 2004 regarding Regional Government states that, "*members of DPRD are prohibited from holding double position as a. State Officials, b. Justices of the Court, c. Civil Servants, TNI members, employees of State-Owned Enterprises, regional-state-owned enterprises and or other agencies whose budget is derived from the APBN (State Revenues and Expenditures Budget) and APBD (Regional Revenues and Expenditures Budget)*". The problem is that the circle of the administrator position itself sometimes requires a public functionary or a structural functionary to still hold the position as a Chairman;
- Whereas the budget of KONI no longer creates any problem following the prohibition of double function of the position occupied by a public functionary or a structural functionary and that as the position is now

occupied by the private individuals, the budget of KONI has become 5 billion from the previous 2,6 billion only. Therefore, there is no relation whether the administrators of KONI is held by a public functionary or not. The SKN Law and Government Regulation Number 16 Year 2007 really give such a blessing to us (especially for the Witness) since therefore, the Witness as a public functionary can focus more on a number of responsibilities that must be implemented by the Regional Government together with DPRD.

Gus Irawan, S.E., Witness of the Government

- Whereas to reach the best result, the SKN Law wishes the administrators and the management of KONI to be professionally independent and therefore they can be focused and independent. Furthermore, being independent implies that there is a segregation of functions, in order to simultaneously avoid conflicts of interest. There are at least 3 functions in the SKN Law: firstly, planning and budgeting; Secondly, organization and; thirdly supervision. The Government, governor, mayor and regent shall continue to be in the position with great function and concern, namely, the responsibility of the government in the context of developing sports achievement, facilities and infrastructures with the financing from the government, and the appreciation upon the achievement of sports by the government. Therefore, the government is responsible for the function of planning and budgeting. Whereas the organization matters are left to

KONI and must not be implemented by the government. Accordingly, the supervision shall be carried out by the government and also by DPR and DPRD.

- Whereas a segregation of functions is considered necessary and the organization will not become independent if all functions are in the hands of one body or person.

Prof. Dr. Harzuki, S.H., M.H., Expert of the Government

- Whereas KONI is a committee that manages sports in Indonesia. Since there is a regulation from *Olympic Charter* then the involvement of the government is limited. Such limitation shall be implemented not only by the government or Law but also through special restriction of IOC on government officials, which, among other things, are described in Article 29 of the *Olympic Charter* to the effect that the government or other public authorities shall not be appointed as members of *National Olympic Committee* (KOI) except if there is a request or a policy of the Leadership of KOI itself.
- Whereas after the late Sri Sultan Hamengkubuwono IX became the Chairman of KONI, KONI and KOI were like two sides of a coin, which means that KONI was directly responsible to the parent organization that implements national activities and KOI only dealt with IOC or the *International Olympic Committee*, having a charter called the *Olympic*

Charter. Therefore, in course of its development we still depend on those two bodies, namely KOI and KONI, with KONI dealing with domestic activities and acting to activate the parent organization in relation to the government, while KOI is not allowed to or cannot directly deal with the government. It may cooperate but must not associate itself with the government

Prof. Dr. Toho Cholikh Muttahir, M.A.,Ph.D., Expert of the Government

- Whereas the intention of formulating the SKN Law is aspirational, adaptive and reformative. The SKN Law lays the foundation and starting point for the development and planning of national sports to be more improved by observing the principles of decentralization, autonomy, public participation, professionalism, partnership, transparency and accountability. The management system of fostering and development of the national sports is regulated in the spirit of regional autonomy policy, for materializing regional capacity and competent people and with the ability to develop independently through sports activities. The development of sports cannot just be handled sufficiently but it should be handled professionally.
- Whereas following the enactment of Article 40 of the SKN Law, the national sports shall optimistically develop as the management of sports is implemented professionally in accordance with the demand of sports development that requires the existence of a management system which is more productive, effective, efficient and transparent as well as

accountable. Sports in the future shall be predicted to be more complex and complicated and therefore shall require a systematic and professional management which is supported by the technology through a comprehensive management.

- Whereas Article 40 of the SKN Law is in line with the sports management demand with orientation towards the future and development of sports. This matter is based on the consideration that the management of sports in the future must be handled independently and in a sense of being free from any influence or intervention from any parties whatsoever, including educators in order to maintain neutrality and to guarantee professionalism in the management. Article 40 must continue to be carried out since no parties are impaired, since this Article principally is not restricting the right of public functionary or structural functionary and yet, it gives the chance or a great opportunity for everybody who wishes to develop sports by becoming the administrators of the national sports committee, provincial sports committee and the reGENCY/municipality sports committee. Article 40 of the SKN Law has considered the workload of dealing with lots of works and duties of services to the people that have to be implemented by a structural functionary or a public functionary who requires bigger concern at present as well as in the future. In the event that a structural functionary and a public functionary holds double positions by becoming the Chairman of the National Sports Committee, a conflict of interest and confusion shall occur in the accountability system of the state financial

administration that should be carried out in accordance with the financial accountability mechanism.

- Whereas the intended restriction with the respect to positions of Chairman and Administrators of the National Sports Committee, Provincial Sports Committee, as well as Regency/Municipal Sports Committee not to be occupied by a public functionary or a structural functionary cannot be considered as a discriminatory treatment.
- Whereas the duty of the National Sports Committee basically is to assist the government, and the Provincial Sports Committee shall assist the provincial government and the Regency/Municipal Sports Committee shall assist the regency/municipality government in the field of management, fostering and in creating sports organizers with achievements as well as in coordinating the parent organizations of sports branches. Whereas the duty of sports branches organizations is to foster and develop of the sports with achievements in certain types of sports either at the regional, national or international stages. Whereas the existence of a Chairman of sports branch organization shall focus more on the development of the sports branch and minimizing corruption, collusion and nepotism (KKN), abuse of authority and position as well as shall be capable in implementing good governance. KONI has a wide scope of duties since KONI coordinates main sports and has the main duties of fostering and developing the achievement of a sports branch.

Prof. A. Masyhur Effendi, SH.MS., Expert of the Government

- Whereas the SKN Law has no element of discrimination. It is only a regulation of a certain specification to make people more intensive, serious in their performance on several fields they engage in. Therefore, if this matter is related to Article 29 Paragraph (2) of the Declaration of Human Rights which states *"In the exercise of his rights and freedoms, every individual shall be subject only to such restriction that is determined by law solely for the purpose of securing due recognition and respect for the rights and freedom of others and of meeting the just requirements of morality, public order, and the general welfare in democratic society"*, then this Article 29 Paragraph (2) of the Declaration of Human Rights shall enable such limitations to be applied, even internationally
- Whereas Human Rights shall be subject to such limitation and therefore, in Article 73 of Law Number 39 Year 1999 regarding Human Rights there are also some limitations and restrictions. Therefore, Article 40 of the SKN Law must be related to Article 3 of the SKN Law where it is explicitly explained that discrimination is not desired. Then, since Human Rights are universal, possessed by everybody, we have to be capable to place it proportionally and finally, it should not be too easy for us to simplify or to broaden the very meaning of Human Rights

Drs. Ramli El Naibaho, M.Si, Expert of the Government

- Whereas according to the 1945 Constitution, one of our objectives in its Preamble is "*to develop the intellectual life of the nation and to advance general welfare*", a state administration has been formed. Our elected state administration is a democratic state system. The aim of a democratic state system is to advance the state and to create *clean government and good governance*. One of the programs of the government in advancing *good governance* is through a synergy among the government, private parties and the community. These kinds of roles are tried to be expressed in the SKN Law, namely with a segregation between the government's authority as the regulator and evaluation by the people as the regulator through NGO (KONI) as an implementation, so as to create *check and balances*, as noticeable in Article 40 of the SKN Law.
- Whereas a double position has been gradually reduced on several occasions of government programs, as regulated in Law Number 43 Year 1999 as the improvement of Law Number 8 Year 1974, which we started with the bureaucratic reform. Activities of state officials including structural functionaries have started to be reduced in terms of double roles, and also functional activities have also started to be abolished. The aim of all actions as described above is that each person can focus on the work with our target being to provide the best service to the society proportionally.
- Whereas Article 40 of the SKN Law does not contain any intention of discrimination because, *firstly*, it does not close the opportunity to other

persons, while the background is the idea that the structural functionary or public functionary may work professionally and will not be disturbed with other activities which may cause him/her to leave his/her duty by arranging, inaugurating the administrators of the branches, for example. *Secondly*, there is no intervention in the implementation and evaluation, except for check and balances. *Thirdly*, the awareness of the society of a partnership, being one of *good governance* requirements that is being developed by giving a chance to other persons to have a role in their affairs.

Prof. Dr. Rusli Lutan, Expert of the Government

- Whereas the SKN Law is in the context of responding to which model of sports development is suitable for Indonesia. Article 40 of the SKN Law is remarkable in arranging the said system. Chapters V, VI, VII have regulated that regional governments shall be responsible for formulating public policies up to the interpretation and evaluation. In fact, KONI is expected to return to the original spirit as an NGO.
- In conclusion, since the expert himself participated in preparing the academic draft of the said SKN law, nobody is injured by the application of the said SKN Law especially Article 40 of the SKN Law that regulates a more solid management as to who manages what in a solid synergy

[3.14] Considering whereas the People's Legislative Assembly (DPR) has presented its oral and written statements as completely stated in the Facts of the Case part which are basically as follows:

- Whereas it is necessary to make a regulation for the administrators of the National Sports Committee, Provincial Sports Committee, and Regency/Municipal Sports Committee to be independent (*vide* Article 36 Paragraph (3), Article 37 Paragraph (2), Article 38 Paragraph (2) of the SKN Law, namely, being free from any influence whatsoever, with the aim to maintain the neutrality and professionalism of sports management. Based on the elucidation of Article 40 of the SKN Law which reads, ***“being independent shall mean being free from any influence or intervention of any parties whatsoever in order to maintain the neutrality and to guarantee a professional management of sports”*** The independence of the National/Provincial/Regency/Municipal Sports Committees is required in the context of upholding the principles of transparency and accountability that basically provide the chance for controlling the mechanism to eliminate the weakness and deviation in order to reach the objective and target of the national sports.
- Whereas to maintain neutrality and professionalism of sports management, it is necessary to regulate the administrators of the sports committee so that it shall not be bound by the activities of structural functionary and public functionary as regulated in Article 40 of the SKN

Law, whereas the reason/basis of the said provision can be viewed in the Minutes of the discussion of Draft Law regarding Sports during the 4th Session of the Working Committee (Panja) dated August 4, 2005 as stated by the Session Chairman Prof. DR. H. Anwar Arifin regarding the approval/agreement of the session who stated that “...**neither public functionaries nor structural functionaries shall be allowed to become the administrators of KONI or the administrators of the parent organization so that the sports can be arranged full time without allowing corruption, collusion and nepotism to be committed by KONI or parent organization officials who concurrently have double positions in the government**”.

- Whereas the provision of Article 40 of the SKN Law is also in line with Article 104 Paragraph (1) of Law Number 22 Year 2003 regarding the Structure and Position of the Consultative Assembly (MPR), the People’s Legislative Assembly (DPR), the Regional Representative Council (DPD) and the Regional People’s Representative Assembly (DPRD) that reads as follows:

“Members of DPR, DPD, Provincial DPRD, and Regency/Municipal DPRD are not allowed to have a double position as:

- Other state officials;**
- Judges at judicial institutions;**

- c. **Civil servants, members of TNI/Polri, employees of state-owned enterprises, regional-owned enterprises and/or other agencies whose budget is derived from APBN/APBD“.**

The aforementioned provisions regarding **the prohibition of double position**, among others for **the members of Provincial DPRD** in other positions such as **the position in other agencies whose budget is derived from APBN/APBD.**

- Whereas the provision regarding the position of DPRD members who are prohibited to have a double the position with that in other agencies whose budget is derived from APBN/APBD and the prohibition of DPRD members from carrying out other works that are related to their duties and authorities as Members of DPRD, namely the Members of DPRD as the Executive element of Regional Government having the budgetary and supervisory functions of in order to conduct control mechanism. Therefore, the provision of Article 40 of the SKN Law is not contrary to Article 28C Paragraph (2), Article 28D Paragraph (1) and Article 28I Paragrph (2) of the 1945 Constitution, and is still in line with the provision of Article 28J Paragrph (2) of the 1945 Constitution that reads, ***“In exercising his/her right and freedom, every person must submit to the restrictions stipulated in laws and regulations with the sole purpose to guarantee the recognition of and the respect for other persons’ rights and freedom and fulfill fair demand in accordance with the***

considerations of morality, religious values, security, and public order in a democratic society”.

[3.15] Considering whereas the Related Party namely the Indonesia National Sports Committee (KONI) has presented its statement before the Court, as completely described in the Facts of the Case part,. which basically state as follows:

- Whereas the sports society coordinated by KONI surely should be proud of the birth of the SKN Law, and it is acknowledged that the existence of the SKN Law really supports the development of sports in Indonesia since it serves as legal protection.
- Whereas it is necessary to know that in accordance with the Law, the society formed parent organizations of sports branches and this parent organizations of sports branches formed KONI. Therefore, KONI shall be the coordinator of the parent organizations of sports branches. With the enactment of the SKN Law, at the 10th National Conference in 2005 as the holder of the supreme authority in KONI, decided several issues, with the basic point being that the participants, including other Provincial KONIs recommended among other things that the existence of Article 40 of the SKN Law be reviewed more comprehensively.
- Whereas in that mandate there are two important things, *firstly*, to adjust the articles of association and rules of association of KONI to the SKN

Law; *Secondly*, to review Article 40 of the SKN Law, since there is an amusing thing in a sense that there is a limitation for a public functionary to occupy the position as the Chairman of KONI while before, since the birth of KONI there was no such restriction. The reason for this matter is that in Article 36 of the SKN Law, the parent organization of sports branch and KONI shall be independent. Therefore, the parent organizations of sports branches and KONI are independent. However, Article 40 then appeared and controlled KONI, while such regulation does not apply to the parent organizations of sports branches, isn't this discriminatory?

- Upon the recommendation of the said 10th National Consultation, KONI formed an Assessment Team. This Assessment Team consists of the elements of sports society and recommends that Article 40, when related to other Laws contains discriminatory element and therefore the recommendation has been passed on further to the society who believe to have been injured by this article to apply for further examination through available mechanism.

The Court's Opinion

[3.16] Considering whereas after carefully examining the description of the petition and arguments filed by the Petitioner, the presented evidence, the statements both oral and written from DPR and the Government, the statements of the witnesses and experts, the Court is of the following opinion:

[3.16.1] Whereas the rights provided for in Article 28C Paragraph (2), Article 28D Paragraph (1) and Article 28I Paragraph (2) of the 1945 Constitution, which have been made as the basis of the arguments of the *a quo* petition are constitutional rights in the form of human rights inherent in a person (*naturlijke persoon*). Whereas, Article 40 of the SKN Law does not regulate the limitation of human rights but regulates the prohibition from having a double position for a structural functionary and a public functionary. As the prohibition of such double position only applies to the structural functionary and public functionary, none of the Petitioner's Rights as an individual (*naturlijke persoon*) has been violated. There is no right of the Petitioner which is suppressed be it the right to develop himself collectively, the rights of the recognition, security, protection and just legal certainty as well as the right to be free from discriminatory treatment with the coming into effect of Article 40 of the SKN Law;

[3.16.2] Whereas the provision of Article 40 of the SKN Law is not contrary to the rights of every person to develop themselves collectively in developing the society, nation and the state.

With the coming into effect of Article 40 of the SKN Law, the human rights of the Petitioner as an individual are not restricted or violated. The limitation or restriction of Human Rights will occur only if the Petitioner is prohibited from becoming a structural functionary or a public functionary. Article 40 of the SKN Law does not give any discriminatory treatment since the limitation stated in the *a quo* article applies to every person. Different treatment is based on the distinction between the people who occupy the position as structural

functionaries and public functionaries and those who do not. Discrimination occurs when different treatment is given with respect to upon the same things. On the other hand, it is not a discrimination if different treatment is given with respect to different things. Treating of a human being (every person) differently from treating a structural functionary or a public functionary shall not be considered as a discriminatory treatment;

[3.16.3] Whereas even if such kind of treatment is considered different, the matter would not be contrary to the rights of every person to the treatment, guarantee, protection and a just legal certainty. Therefore, justice itself has two meanings, namely, a commutative justice, which means giving the same quantity to every person regardless of one's service/performance, and distributive justice, which means giving every person in accordance with his service/performance. The type of justice which is applied by Article 40 of the SKN Law is the distributive justice. Justice in this sense can be used in determining the requirements that must be fulfilled to occupy a certain position. The said requirements can be in the form of the determination of limits in terms of age, education, experience, health, double position and so forth;

[3.16.4] Whereas we have to distinguish between the limitation of constitutional rights and the requirements made in the context of *legal policy*. The limitation of a structural functionary and the right of the official for not having a double position as the administrator of KON (formerly KONI) as stated in Article 40 of the *a quo* Law is not a limitation of the constitutional rights of Petitioners. Such limitation is

an open legal policy for the legislators with the sole purpose of establishing *good governance* which is more effective. For the legislators, the limitation of the position as stated in the *a quo* article refers to permit (*permittere*), and not obligation (*obligatere*), or prohibition (*prohibere*). Such permit surely has its *cost and benefit*. If a public or structural functionary occupies a position in KON, then his authority can facilitate the fund raising and to awaken people's concern to support the activities of KON. On the other hand, the involvement of a public or structural functionary may cause a complication with respect to the independence of KON as well as the disturbance to the effectiveness of the said functionary in implementing his main duty. In addition to that, it is likely that the function KON function may be misused for the private interest of the functionary concerned. The aforementioned two legal policies are equally constitutional and not contradictory to the Human Rights. The pragmatic cost and benefit consideration of both legal policies as described above is basically the choice among alternatives which is the authority of the legislators to decide, and excluding the issue of constitutionality of norms. Likewise, different regulation regarding double position between the administrators of KON and the administrators of Parent Organizations of Sports Branches is a legal policy. In other words, it is left to the legislators to regulate whether it shall be treated equally or differently, since there are similarities and dissimilarities between KON and Parent organizations of Sports Branches.

[3.16.5] Whereas on the one hand, despite its establishment by the parent organizations of sports branches, from the point of view of the duty, KON is a

committee that implements a part of the government's obligations in sports sector as regulated in Article 36 Paragraph (4) of the SKN Law, namely: a. assisting the Government in drafting national policy in the field of processing, guidance and developing sports with achievements at the national level; b. Coordinating parent organizations of sports branches, functional sports organization, as well as provincial sports committee and reGENCY/municipal sports committee; c. Implementing the process, guidance and development of sports with achievements based on the authority; and d. Implementing and coordinating the activities of multi-championship of sports at the national level. Therefore, the status of KON which is fully an organization of the people and whose budget is derived from the government and whose function is to implement sports development, is indeed different from the status of Parent organizations of Sports Branches. Meanwhile, the government serves the function to plan and supervise the policies. Therefore, there will be confusion if a public functionary who is also the planner of policy and supervision is also involved in the activities of KON that he should supervise. This will disturb the accountability principle. While the Parent Organizations of Sports Branches are non-government organizations and therefore no accountability problem shall occur if a public functionary or a structural functionary occupies the position as the administrator of a Parent Organization of Sports Branch. However, if the article requires that a public or a structural functionary is not allowed to have a double position as the administrator of a Parent Organization of Sports Branch, such requirement shall be a legal policy, and its regulation shall depend on the legislator, and shall not

relate to the issue of constitutionality of norms. In the statement presented by the former Chairman of the Working Committee (Panja) for the *a quo* Draft Law it is disclosed that such issue arose in the discussion of the Working Committee because the administrator of sports branch is also *ex-officio* administrator of KON;

4. CONCLUSION

Considering whereas based on all the foregoing considerations, the Court has come to the following conclusion:

[4.1] whereas the petition of the Petitioner is groundless ;

[4.2] whereas the provision of Article 40 of the SKN Law is not contrary to Article 28C Paragraph (2), Article 28D Paragraph (1) and Article 28I Paragraph (2) of the 1945 Constitution. Therefore, the petition of the Petitioner must be declared rejected ;

5. RULINGS

In view of Article 56 Paragraph (5) of Law Number 24 Year 2003 regarding the Constitutional Court (State Gazette of the Republic of Indonesia Year 2003 Number 98, Supplement to the State Gazette of the Republic of Indonesia Number 4316);

Passing the Decision :

To declare that the petition of the Petitioner is rejected .

Hence the decision was made in the Consultative Meeting of Justices, attended by nine Constitutional Court Justices on Wednesday, February 20, 2008, and was pronounced in the Plenary Session of the Constitutional Court open for public on this day, Friday, February 22, 2008, by us, seven Constitutional Court Justices, namely, Jimly Asshiddiqie as the Chairperson and concurrent Member, H. Achmad Roestandi, H. Abdul Mukthie Fadjar, Maruarar Siahaan, H.A.S. Natabaya, I Dewa Gede Palguna, and Soedarsono, respectively as Members, assisted by Cholidin Nasir as the Substitute Registrar and in the presence of the Petitioner/his attorneys, the Government or its representative, and the People's Legislative Assembly or its representative, as well as the Related Party namely the National Sports Committee;

CHIEF JUSTICE ,

signed

Jimly Asshiddiqie

JUSTICES

sgd.

H. Achmad Roestandi

sgd.

Maruarar Siahaan

sgd.

H. Abdul Mukthie Fadjar

sgd.

H.A.S. Natabaya

sgd.

Soedarsono

I Dewa Gede Palguna

SUBSTITUTE REGISTRAR ,

sgd.

Cholidin Nasir