



CONSTITUTIONAL COURT  
OF THE REPUBLIC OF INDONESIA

SUMMARY OF DECISION  
FOR CASE NUMBER 91/PUU-XX/2022

Concerning

**Periodization of Advocate Organization Leadership Positions**

<b>Petitioner</b>	: <b>Zico Leonard Djagardo Simanjuntak</b>
<b>Type of Case</b>	: Material judicial review of Law Number 18 of 2003 concerning Advocates (Law 18/2003) against the 1945 Constitution of the Republic of Indonesia (1945 Constitution)
<b>Subject Matter</b>	: Material judicial review of Article 28 paragraph (3) of Law 18/2003, which is in contrary to Article 1 paragraph (3), Article 27 paragraph (1), Article 28D paragraph (1), and Article 28E paragraph (3) of the 1945 Constitution
<b>Verdict</b>	: <ol style="list-style-type: none"><li>1. To partially grant the Petitioner's petition;</li><li>2. To declare that Article 28 paragraph (3) of Law Number 18 of 2003 concerning Advocates (State Gazette of the Republic of Indonesia of 2003 Number 49, Supplement to State Gazette Number 4288) which states that "Leadership positions of Advocate Organization cannot be hold concurrently with leadership positions of political parties, both at the Central and the regional level" is in contrary to the 1945 Constitution of the Republic of Indonesia and does not have binding legal force as long as it is not interpreted as "The leaders of advocate organization shall hold a term of office of 5 (five) years and can only be re-elected 1 (one) time for the same positions, either consecutively or not consecutively, and such positions cannot be hold concurrently with the leadership positions of political parties, both at the central and the regional levels";</li><li>3. To order the publication of this decision in the State Gazette of the Republic of Indonesia as appropriate</li></ol>
<b>Date of Decision</b>	: Monday, October 31, 2022
<b>Overview of Decision</b>	:

The Petitioner is an individual Indonesian citizen who has the qualification as Advocate. Furthermore, the Petitioner believes that his constitutional rights have been harmed both actually and potentially by the enactment of the provisions of Article 28 paragraph (3) of Law 18/2003. According to the petitioner the *a quo* norm has caused ambiguity and legal uncertainty regarding the term of office and periodization of the Advocate organization leadership positions, because so far, the limitation on the term of office for the Advocate organization leadership positions has only been set out in the Articles of Association which is

part of the organizational structure as stipulated in Article 28 paragraph (2) of Law 18/2003 . In addition, the enactment of the *a quo* norms has deprived the Petitioner of his rights as an Advocate to become the leader of an Advocate organization. Moreover, without any limitation on the term of office and periodization of the advocate organization leadership positions in Law 18/2003, it has the potential to cause abuse of power;

In relation to the authority of the Court, because the Petitioner petitioned for the review of the constitutionality of the norms of Article 28 paragraph (3) of Law 18/2003 against the 1945 Constitution, the Court has the authority to adjudicate the *a quo* petition;

Regarding the legal standing of the Petitioner, the Court is of the opinion that the Petitioner has explained his constitutional rights which according to his opinion have been harmed by the enactment of the norms of the law being petitioned for review, namely Article 28 paragraph (3) of Law 18/2003. In addition, the presumption that his constitutional rights are impaired as explained by the Petitioners has a causal relationship (*causal verband*) with the enactment of the norms of the law being petitioned for review. Therefore, based on such consideration, the Court believes that the Petitioner has the legal standing to act as the Petitioner in the *a quo* petition;

Whereas because the *a quo* petition is sufficiently clear therefore based on Article 54 of the Constitutional Court Law, the Court is of the opinion that there is no urgency or need to hear the statements of the parties as referred to in Article 54 of the Constitutional Court Law.

Whereas before considering the arguments of the *a quo* Petitioner's petition any further, the Court shall first consider the Petitioner's petition in relation to the provisions of Article 60 paragraph (2) of the Constitutional Court Law and Article 78 of the Constitutional Court Regulation Number 2 of 2021 concerning Procedures in Judicial Review Cases (PMK 2/2021), which in principal states that the provisions of the norms of Article 28 paragraph (3) of Law 18/2003 has been submitted before and already decided in the Decision of the Constitutional Court Number 014/PUU-IV/2006 which was declared in a hearing session open to the public on November 30, 2006, which verdict states "to Declare that the petition of the Petitioners is entirely dismissed"; and Decision of the Constitutional Court Number 35/PUU-XVI/2018 which was declared in a hearing session open to the public on November 28, 2019, which verdict states "To dismiss the petition of the Petitioners entirely". After the Court studied it carefully, it was found that the Case Number 014/PUU-IV/2006 uses the following laws as the legal basis for the review: Article 28D paragraph (1), Article 28D paragraph (3), Article 28E paragraph (3), Article 28J paragraph (1) and Article 28J paragraph (2) of the 1945 Constitution, and the Case Number 35/PUU-XVI/2018 uses the following laws as the legal basis for the review: Article 28, Article 28D paragraph (1), and Article 28J paragraph (2) of the 1945 Constitution. Meanwhile, the constitutional reason used in the Case Number 014/PUU-IV/2006 in principal contains the prohibition of concurrent positions as the leader of an advocate organization as a political party administrator, while the Case Number 35/PUU-XVI/2018 uses the reasoning which in principal describing the formation of an advocate organization;

Furthermore, it has been evident that there are differences in the legal basis for the review of the petition for Case Number 014/PUU-IV/2006, the petition for Case Number 35/PUU-XVI/2018 and the legal basis for review of the *a quo* petition. In addition, there are also differences in the constitutional reasons in the petition for the Case Number 014/PUU-IV/2006, the petition for Case Number 35/PUU-XVI/2018 and the constitutional reasons in the *a quo* petition. Therefore, regardless of whether the Petitioners' petition is legally reasonable or not, based on the provisions of Article 60 paragraph (2) of the Constitutional Court Law and Article 78 paragraph (2) of PMK 2/2021, the *a quo* petition may be resubmitted;

Regarding the review of the constitutionality of Article 28 paragraph (3) of Law 18/2003 as argued by the Petitioner, the Court is of the following opinion:

- Whereas in principle Advocates are law enforcers, this is as contained in the provisions of Article 5 paragraph (1) of Law 18/2003. Furthermore, with regard to this matter, the Court has considered and decided how the position of advocates as an element of law enforcement is in the Decision of the Constitutional Court Number 014/PUU-IV/2006. The Court is of the opinion that advocates have an equal position with other law enforcers, they are still closely related to other law enforcers, including the judges, police and prosecutors, in the context of maintaining and guaranteeing the legal certainty for all justice seekers in realizing the rule of law and justice;
- Whereas as a profession, the advocates are also members of advocate organization which carries out the function of establishing a code of ethics, enforcing a code of ethics and conducting other functions such as resolving professional issues, defending the rights of members and also as a means of sharing information needed in carrying out professional duties. If it is related to the substance regulated in Law 18/2003, it can be understood that advocate organization as professional organization shall also refer to the framework of such professional organization. In this case, advocate organization shall be given the task and function of compiling a code of ethics and at the same time, professional organization shall also carry out the oversight function in the implementation of the professional code of ethics. The function of such professional organization must be carried out in a professional manner. This is because professional organization shall demand all aspects related to the profession, including professional management of the organization. In accordance with that, professional organization must be kept away from all management practices that can undermine the authority of the organization in the perspectives of its members;
- Whereas in order for professional organization to remain professional, authoritative and to maintain its solidity, it is imperative to apply the principles of good professional organization governance. Among such principles of organizational governance is the participation of members, namely professional organization shall provide equal space for all of its members to be involved in managing and playing a role in the professional organization. Participation of members in the management of the organization shall require the prevention of the practice of domination within the organization. In such position, the participation of members without domination shall require professional organization to regulate the restrictions on the power of the holders of professional organization. In this case, advocates as law enforcers should have organizational governance that can prevent individual domination which shall lead to abuse of power as is commonly understood: *power tends to corrupt, absolute power corrupt absolutely*;
- Whereas the norms of Article 28 paragraph (3) of Law 18/2003 do not regulate the limitation on the term of office for the advocate organization leadership positions because the provisions regarding the term of office for the advocate organization leadership positions are outlined in the section on the composition of the advocate organization which is regulated in the Articles of Association of the advocate organization as stipulated in the provisions of Article 28 paragraph (2) of Law 18/2003. Therefore, each advocate organization can freely manage it in such a way as to enable a person to serve as the leader of the advocate organization consecutively because there is no regulation regarding the limitation on the term of office at the statutory level. Within the limits of reasonable reasoning, such a model of management may eliminate equal opportunities for the members in managing the organization as well as diminishing the regeneration of leadership in the advocate organization. This can lead to fair legal uncertainty and unequal treatment before the law;
- Whereas within the limits of reasonable reasoning, when it comes to advocates as law enforcers who have equal position with other law enforcers, the limitation on the term of office for the advocate organization leadership positions should be clearly regulated in the statutory norms like other law enforcers, or at least periodic rotation (tour of duty) should be carried out to prevent any abuse of authority. In addition, the formulation that limits the term of office and periodization of the advocate organization leadership positions is one of the ways to guarantee legal certainty and equality before the law for

all members of advocate organizations who meet the requirements, so that it can open up opportunities to fulfil the provisions in Article 28D paragraph (1) of the 1945 Constitution. In addition, limitation on the term of office and periodization of office can fulfil one of the principles of a rule of law as stipulated in Article 1 paragraph (3) of the 1945 Constitution;

- Whereas when compared to other law enforcement organizations, the limitation on the term of office for the leadership of such law enforcement organization has been clearly limited by the norms at the statutory level or periodic rotation has been carried out. In that context, as an organization that has equal position as other law enforcement organization, it shall also be necessary to clearly stipulate limitation on the term of office including the limitation on the periodization of office of the advocate organization leadership positions. This is done in order to guarantee the creation of legal certainty and equal opportunity before the law for every member who is a member of an advocate organization. Such limitation is in accordance with the spirit of limiting the power in administering the state;
- Whereas regarding the limitation on the term of office and periodization of office, the Court is of the opinion that the term of office for the advocate organization leadership position shall be 5 (five) years and after that they can be re-elected only for 1 (one) term of office. The 5 (five) year option is based on the practice of limiting the term of office generally used by advocate organization or any organizations in general. Meanwhile, regarding the total term of office of 2 (two) period, it may be conducted consecutively or non-consecutively. By being put in this framework, it will eliminate or prevent the potential for abuse of power within the advocate organization;
- Whereas Article 28 paragraph (3) of Law 18/2003 has been declared as conditionally unconstitutional, where in fact it is very likely that there are any leaders of any advocate organization currently holding the same position for more than 2 (two) periods prior to the *a quo* decision, then for ensuring the legal certainty and to not cause any problems in the advocate organization, the relevant head of the advocate organization shall continue to carry out their duties until the end of their term of office and subsequently the term of office for the advocate organization leadership positions shall be adjusted to the new interpretation of the norms of Article 28 paragraph (3) of Law 18/2003 as the *a quo* verdict.

Whereas based on all of the aforementioned considerations, the Court is of the opinion that the subject matter of the Petitioner's petition is legally unreasonable. Accordingly, the Court subsequently passed down a decision which verdict states as follows:

1. To partially grant the Petitioner's petition;
2. To declare that Article 28 paragraph (3) of Law Number 18 of 2003 concerning Advocates (State Gazette of the Republic of Indonesia of 2003 Number 49, Supplement to State Gazette Number 4288) which states that "Leadership positions of Advocate Organization cannot be hold concurrently with leadership positions of political parties, both at the Central and the regional level" is in contrary to the 1945 Constitution of the Republic of Indonesia and does not have binding legal force as long as it is not interpreted as "The leaders of advocate organization shall hold a term of office of 5 (five) years and can only be re-elected 1 (one) time for the same positions, either consecutively or not consecutively, and such positions cannot be hold concurrently with the leadership positions of political parties, both at the central and the regional levels";
3. To order the publication of this decision in the State Gazette of the Republic of Indonesia as appropriate.

### **Dissenting Opinion**

Whereas regarding the *a quo* Decision of the Constitutional Court, there are dissenting opinions from Constitutional Justice Anwar Usman and Constitutional Justice Daniel Yusmic P. Foekh, as follows:

1. Whereas doctrinally, a country's political system can be distinguished between political superstructure and political infrastructure. The political superstructure is the atmosphere of life in relation to the state apparatus, which shall be needed to support the running of the government, which shall include the compositions, positions, duties and authorities, as well as the relationships between the formal state apparatus. Meanwhile, the political infrastructure is the atmosphere of life outside the state apparatus, but it shall impact any policies taken by the political superstructure. In other words, the political superstructure is related to the phenomenon of political life in the government level, while political infrastructure is related to the phenomenon of political life at the societal level. Furthermore, what is meant by the political superstructure includes, among others, the MPR, DPR, DPD, MK, MA, BPK and KY. While the political infrastructure includes, among others, political parties, interest groups, pressure groups, political communication media and political figures. Judging from the political infrastructure, the Advocate Organization is part of an interest group.
2. Whereas in the political system, political infrastructure shall play a role in providing inputs to the political superstructure, so that the policies to be taken by the political superstructure become democratic and of good quality in nature. Therefore, the Court should hold a follow-up session with the agenda of hearing the statements from the DPR, the President, and/or any related parties so that the Court can obtain more comprehensive enrichment, for example to find out the philosophical and sociological reasons and why the Law 18/2003 does not regulate the limitation on the term of office of Advocate Organization leadership positions. Moreover, the norms being submitted for review do not regulate the term of office, thus leading the Court to become a positive legislature. In its capacity as a political superstructure, the Court should have held hearings/requested for inputs from the Advocate Organizations (as political infrastructure). Moreover, the characteristics of the Court's decision are final and binding as well *erga omnes* which will have an impact on Advocate Organizations and its members whose numbers tend to increase along with the needs and the variety of legal issues that occur in society.
3. Whereas the Petitioner's concern regarding the occurrence of any abuse of power in any advocate organization, when being compared to the police, prosecutors and judges, such comparison is not appropriate. This comparison cannot be made directly apple to apple because advocates are informal in nature and are part of the political infrastructure, while the police, prosecutors and judges are formal law enforcers and part of the political superstructure.
4. Whereas in terms of funding, Advocate organization is not funded by the state. The main source of funding/finance for advocate organization comes from mandatory and/or voluntary contributions from its members, so that the state is not involved in the funding/finances of any advocate organization. Furthermore, the Petitioner's petition for the Law 18/2003 to stipulate that the term of office for the general chairman of the Advocate Organization is only 2 (two) terms of office is very redundant. The Petitioner did not realize that his good intention to limit the term of office to 2 (two) times actually led the Court to go beyond the limits of demarcation, by breaking through the sovereignty of the members of the Advocate Organization. Therefore, it is only natural that the members of the Advocate Organization are given the flexibility and freedom freely and independently to regulate their own organizational matters in the Articles of Association or any other internal regulations. Moreover, the substance of the norms of Article 28 paragraph (3) of Law 18/2003 stipulates a prohibition on concurrent positions for the advocate organization leaders and political party leaders, both at the central and regional levels, it is not a limitation on the term of office of the general chairman. This should be the main concern of the Court. By not limiting the term of office for the chairman, to find out the philosophical, sociological and juridical aspects, the Court should have held a follow-up hearing session to hear the parties as referred to in Article 54 of the Constitutional Court Law, including the related parties *in casu* Advocate Organization.

5. Whereas there are restrictions on the role of the state in relation to the composition of the Advocate Organization, especially regarding the limitation of the term of office of the organization management, such matter should be left to its members to have full sovereignty. This is in accordance with the spirit of democracy that the holder of sovereignty shall be the members of the Advocate Organization themselves, so it is appropriate that the term of office should be left to be regulated in the Articles of Association by the members. In addition, there is also the independence of the advocate organization in order to maintain the independence of the advocate profession and to ensure that its functions can be carried out properly, then the election of the Advocate Organization leadership, including its term of office, and the number of times a person can occupy the leadership position of the organization, shall all be determined from and by the members. Because it is the members of the organization who know their needs better, not people from the outside of the organization and not the state either. Therefore, the Court should not be trapped into being a positive legislature.
6. Whereas based on the entire aforementioned description of the legal considerations, even though the majority of justices granted the *a quo* petition, the Court should have first heard the statements from the House of Representatives and the President as well as the statements of other related parties directly or indirectly.