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Dismissal of KPK Employees from Legal Positivism and Alternative Solutions

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Abstract

Studying the philosophy of law means studying various schools of law. Amongst the variety of legal theories, there are adherents of legal positivism or the positive legal theory postulated by John Austin (a philosopher whose thoughts on law are outlined in a work entitled *The Province of Jurisprudence Determined* 1832). Are Austin's thoughts still relevant for the practice of law in the modern era, considering that law is made for the public interest? Is it appropriate for the law to be made by authorities (superior) to bind subordinates (inferior), whereas the people are only in a position to obey the law?

In a functioning democracy public participation is important in decision-making by the elected legislators. Presumably, law is not made arbitrarily or unilaterally, but it is supposed to take into account the interest of the public or the interest of the groups it is designed to address. A prominent example currently in the public spotlight is the dismissal of 57 Corruption Eradication Commission (KPK) employees due to their stated ineligibility following their failure to pass the National Insight Test Assessment. For this matter, a judicial review (JR) has been requested from the Constitutional Court and the Supreme Court who in the meantime have published their decisions. In addition, there have been recommendations from the National Human Rights Commission (Komnas HAM) and the Indonesian Ombudsman regarding the occurrence of human rights violations and maladministration in the transfer of KPK employees to ASN. Where JR's decision by the two judicial institutions is different from what is recommended by Human Right Commission and the Indonesian Ombudsman. Here it can be seen that there are differences in the application of the law with the positive law that applies and is detrimental to the rights of KPK employees.

Keywords:

positive laws; violated human rights; maladministration

Introduction

The human resource factor in an institution becomes a very important main asset. Therefore, in the modern era, even though any technological sophistication cannot replace the

position of the human resources. Included in government organizations, the main assets are required to play a major role in running the wheels of government organizations with the support of adequate infrastructure, so that government goals can be achieved. In Indonesia, one of the government's independent organizations that is expected to play a major role in eradicating and preventing corruption is KPK or Komisi Pemberantasan Tindak Pidana Korupsi.

Based on the results of the international transparency survey, Indonesia is ranked 37 out of 100 and is ranked 102 out of 180 countries surveyed. This score dropped 3 points from 2019 which was ranked 40 out of a scale of 100 as stated by Indonesia's international transparency.¹ This fact raises questions and challenges about how the Indonesian government's efforts to enforce anti-corruption performance through various law enforcement and corruption eradication agencies and all relevant stakeholders.

The problem of corruption has become a national problem which has not been completed since the New Order era and has hampered the progress of the country's development. The problem is, at this time the KPK leadership dismissed 57 KPK employees starting September 30, 2021 because the employees not eligible in the National Insight Test (TWK) assessment which was held in the context of transferring the status of KPK employees to State Civil Apparatus (ASN).

As we know, the process of transferring KPK employees to ASN is a mandate from the KPK Law Number 19 of 2019 concerning the Second Amendment to the Corruption Eradication Commission Law, Government Regulation Number 41 of 2020 concerning the Transfer of KPK Employees to ASN Employees and KPK Regulation Number 1 of 2021 concerning Procedures for Transferring KPK Employees to ASN Employees. Thus, the failure of KPK employees in the TWK assessment raises public questions, at least from the employees themselves, anti-corruption activists and academics professors.

The employees who were declared non-eligible were 75 out of 1349 employees who took part in the TWK. This has received the attention of President Jokowi in his remarks on

¹ <https://ti.or.id/indeks-persepsi-korupsi-2020-korupsi-respons-covid-19-dan-kemunduran-demokrasi/> (accessed on September 28, 2021)

May 17, 2021 at the Merdeka Palace.² He stated that the transfer of KPK employees to ASN should not reduce the rights of employees. Therefore, KPK and related institutions reviewed their decision and stated that 24 of the 75 people who did not pass were given another opportunity to take part in state defense training and national insight to become ASN.

On the other hand, there are parties who apply for a judicial review to the Constitutional Court and the Supreme Court for the assessment failure. The Constitutional Court and the Supreme Court of the Republic of Indonesia have delivered their decisions as stated in the decision of the Constitutional Court Number 34/PUU-XIX/X/2021 dated August 31, 2021. Furthermore, the Supreme Court of the Republic of Indonesia in its decision No.26P/HUM/2021 dated September 9, 2021 stated that it rejected the petition for judicial review from the applicants and stated that the position of the provisions being tested (i.e. the KPK Law, PP and KPK Regulations) was in accordance with the 1945 Constitution and the examination of the KPK Regulations with norms on it are rejected. The Supreme Court of the Republic of Indonesia also stated that KPK Regulation Number 1 of 2021 was valid in accordance with the KPK Law.

Meanwhile, to ensure their rights, employees through their legal representatives have also submitted reports/complaints to Komnasham and the Ombudsman of the Republic of Indonesia. The results of the examination by the Ombudsman stated that there had been maladministration in the process of transferring KPK employees to ASN, especially those who did not pass the TWK. Komnasham also given their recommendation to the President of the Republic of Indonesia that there have been violations of human rights for employees who have not passed the TWK.

Looking at the pro and con problems, the issuance of the decisions of the two judicial institutions, and the recommendations of the National Human Rights Commission and the Ombudsman Republic of Indonesia, a descriptive study of the problems and comparisons can be made on the basis of the positivism law school which was initiated by John Austin. regarding laws made by rulers and described as superior and decisive human beings.³ Likewise, John Austin is also the initiator or figure of analytical jurisprudence, so that it can be written for analysis and opinions on the problem by juxtaposing the opinions of several

²news.detik.com/berita/d-5572186/pernyataan-lengkap-jokowi-tolak-pemberhentian-75-pegawai-kpk-tak-lulus-twk (accessed on September 28, 2021)

³Prof Dr. H. Zainal Asikin,SH,SU, Mengenal Filsafat Hukum, Penerbit Andi, 2020, hlm 62

experts. This is done to obtain conclusions and suggestions on problems in the study of laws and regulations as well as general principles of good governance which should serve as guidelines for public officials in making decisions.

A public policy that is made and its implications for the fate or rights of individuals must be carefully considered. Whereas, there are at least three elements of the policy system that become a series of processes to be involved in order to arrive at a decision on a policy that can be accounted for. William Dunn describes it as an interrelated triangle, namely between policy actors, the environment in which the policy is made and policies that have implications for the public.⁴ If these three elements are involved according to their respective portions in an accountable and transparent manner, a policy will be well received and the decisions taken will not become controversial in society, because no one is harmed.

In addition, the application of the law on the transfer of KPK employees has been tested by a judicial institution, namely that the legal provisions for the transfer of employees are in accordance with the constitution and laws, as well as the hierarchy of laws and regulations in Indonesia. However, no matter how good the positive legal provisions are, it really depends on their implementation by law enforcement in the field. In this case, what is meant is the decision to dismiss employees or at least 57 employees whose dismissals have been announced on September 30, 2021 on the grounds that they have not passed the TWK assessment exam.

Based on the decisions of the Constitutional Court and the Supreme Court of the Republic of Indonesia in their consideration, stating that the transfer of KPK employees to ASN must not harm the rights of employees and the decision is left to the government. With the same provisions, namely "The Transfer Of Employees to Other Institutions to Become Civil Servants or ASN" which took effect at Komnasham in 2005 and village secretaries Indonesia, as a mandate from the implementation of the Law on Regional Government and Government Regulation Number 45 of 2007 stating that there is no there was one requirement that dismissed the village officials or secretaries simply because they did not pass the national insight test.

⁴ William Dunn, *Tiga Elemen Sistem Kebijakan Dalam Analisa Kebijakan Publik*, Yogyakarta: UGM Press, 2020, hlm. 110

Reflecting on the experience, the authors feel the need to discuss John Austin's opinion about the importance of positive law in its application so that there is no abuse of power that harms society. That the dismissal of employees at an institution, especially at an institution such as the KPK, whose employees have proven themselves to work with high dedication and loyalty, can be considered as a step backwards in eradicating corruption. Therefore, it is very important to dissect the issue of the dismissal of 57 KPK employees in the context of anti-corruption law enforcement in Indonesia.

That the decisions of the two judicial institutions should not be contradicted by the authority of two independent institutions that have different functions, duties and authorities from the judiciary, namely Komnasham and the Ombudsman of the Republic of Indonesia. Therefore, it is important for the government to seriously seek solutions to problems, in order to avoid violations of human rights and acts of maladministration that harm the rights of employees who are also citizens who must be protected. The resolution of problems is also a manifestation of good governance because it provides legal certainty and justice for dismissed KPK employees.

Methods

In this research paper, the authors use normative juridical research methods (applicable positive law). This normative juridical research is a research focused on examining the application of the rules or norms in positive law. This research method is in the form of legal research on legal principles based on statutory regulations, theories, especially John Austin's theory in legal positivism and concepts related to the writing of this research. Where the authors use library materials or secondary data as a reference for writing. Secondary data in the form of applicable laws and regulations, judicial decisions and recommendations of institutions related to the problems studied, including articles from the internet and other materials that are scientific works related to the problems discussed in this paper.

Results

a. John Austin's Opinion on Legal Positivism Regarding Arrangements for Transferring KPK Employees to ASN

As we know, the transfer of KPK employees consisting of investigators. Other KPK employees to become ASN is a mandate from the implementation of Law 19 of 2019 concerning the Second Amendment to the KPK Law. Regarding this, the arrangements can be found in Government Regulation Number 41 of 2020 concerning Transfer of KPK Employees to ASN and KPK Commission Regulation Number 1 of 2021 concerning Procedures for Transfer of KPK Employees to ASN. This is in accordance with John Austin's opinion regarding the nature of law which lies in the element of command. These elements are divided into 4 elements, namely 1) orders, 2) sanctions, 3) obligations, and 4) sovereignty.⁵ In addition, there are provisions of Law Number 5 of 2014 concerning State Civil Apparatus which regulates ASN which is a reference in the implementation of post-transfer of employee status.

In the context of the transfer of KPK employees, there are a number of regulations that can be used as a legal basis. This is stated in:

a. Law Number 19 of 2019, namely in articles:

i. Article 69B

- (1) At the time this Law comes into force, investigators or investigators from the Corruption Eradication Commission who have not had status as employees of the state civil apparatus within a maximum period of 2 (two) years after this Law comes into force may be appointed as employees of the state apparatus. state civil servants as long as they comply with the provisions of the legislation.
- (2) The appointment as referred to in paragraph (1) shall apply to investigators or investigators of the Corruption Eradication Commission who have attended and passed education in the field of investigation and investigation in accordance with the provisions of the legislation. Article 69C At the time this Law comes into force, Employees of the Corruption Eradication Commission who have not had the status of a state civil servant within a maximum period of 2 (two) years since this Law comes

⁵ Prof. Dr. H. Zainal Asikin,SH,SU. (2020). *Mengenal Filsafat Hukum*. penerbit Andi. 63

into force may be appointed as employees of the state civil apparatus in accordance with the provisions of the legislation.

ii. Article 69 C

"When this Law comes into force, KPK employees who have not been ASN employees within a maximum period of 2 (two) years from the time this Law comes into force may be appointed as ASN employees in accordance with the provisions of the legislation."

Provisions regarding sanctions for KPK employees who do not participate in the transfer of KPK employees to ASN in stipulates in Article 70A of Law 19 of 2019 that the appointment, guidance, and dismissal of the Corruption Eradication Commission Employees are carried out in accordance with the provisions of the legislation. Article 4 government regulation No. 41 of 2020

(1) Transfer of Corruption Eradication Commission Employees to ASN Employees, through the following stages:

- a. positions at the Adjusting the currentCorruption Pambansa Commission into ASN positions in accordance with the provisions of the legislation;
- b. Identify the type and number of current employees of the Corruption Eradication Commission;
- c. Mapping the suitability of the qualifications and competencies as well as the experience of the Corruption Eradication Commission Employees with the ASN positions to be occupied;
- d. Carry out the transfer of the Corruption Eradication Commission Employees as referred to in Article 2 to become PNS or PPPK in accordance with the provisions of the legislation; and
- e. Determine the class of office in accordance with the provisions of the legislation.

(2) The transfer of the Corruption Eradication Commission Employees to ASN Employees is carried out by taking into account the organizational structure and procedures working of the Corruption Eradication Commission.

b. Article 5 KPK Commission Regulation Number 1 of 2021

- (1) Employees of the Corruption Eradication Commission as referred to in Article 2 who are still carrying out their duties may turn into civil servants.
 - (2) The transfer of employees of the Corruption Eradication Commission to become civil servants as referred to in paragraph (1) is carried out with the following conditions:
 - a. willing to become civil servants;
 - b. loyal and obedient to Pancasila, the 1945 Constitution of the Republic of Indonesia, the State Unitary of the Republic of Indonesia, and the legitimate government;
 - c. not involved in organizational activities prohibited by the government and/or court decisions;
 - d. have good integrity and morality;
 - e. have qualifications in accordance with the requirements of the position; and
 - f. have competence in accordance with the requirements of the position.
 - (3) The requirements as referred to in paragraph (2) letter a to letter d are stated in a statement letter as contained in Attachment I which is an integral part of this Commission Regulation.
 - (4) In addition to signing the statement as referred to in paragraph (3), to fulfill the requirements of paragraph (2) letter b, an assessment of the national insight test is carried out by the Corruption Eradication Commission in collaboration with the State Civil Service Agency.
 - (5) The fulfillment of the requirements as referred to in paragraph (2) letter e and letter f shall be stipulated by a decision of the Secretary General.
 - (6) Corruption Eradication Commission employees who are not willing to become civil servants as referred to in paragraph
- c. Article 23 paragraph (1) Perkom KPK Number 1 of 2021 it is regulated that;
- “An employee of the Corruption Eradication Commission is dismissed as an ASN because:
- a. has died;
 - b. no longer meets the requirements as ASN as referred to in Article 5; and

- c. own request in writing. Paragraph (2) The procedure for dismissing an employee of the Corruption Eradication Commission is in accordance with the provisions of the laws and regulations."

Whereas the various provisions referred to in positive law have regulated the mechanism for the transfer of KPK employees. Furthermore, in the implementation of the transfer of KPK employees, there are requirements, among others regulated in Article 5 of the KPK Perkom Number 1 of 2021, where one of the requirements must be declared to have passed the national insight assessment. However, considering that BKN does not have the intended instrument, it eventually uses a third party, this is also justified by the provisions of the legislation as Law Number 30 of 2014 stipulates that if an institution lacks or does not have the resources, official assistance can be provided. Then the Regulation of the Head of BKN Number 26 of 2019, it is very possible for BKN to involve other agencies, even independent parties.

b. Efforts by KPK Employees Who Did Not Pass TWK to Fight for Rights

Based on the results of the TWK assessment, it was found that 75 out of 1349 employees who took part in the TWK were declared to have failed or did not meet the requirements in the TWK assessment. Due to this failure, the Chairperson of the Corruption Eradication Commission made the decision of the Chairperson of the Corruption Eradication Commission Number 652 of 2021 concerning the Results of the National Insight Test for Employees who do not meet the requirements in the context of transferring employees of the Corruption Eradication Commission to become State Civil Apparatus Employees. Furthermore, those who are declared to have obtained the results of the National Insight Test (TWK) assessment in the Unqualified category (TMS) through the said 652 decisions are ordered to submit the tasks and responsibilities that are being carried out to their Direct Supervisor, pending further decisions.

As citizens whose rights need to be fought for, 75 KPK employees who felt they were being treated unfairly for TMS' statement in the TWK submitted their reports to Komnas HAM and the Ombudsman Republic of Indonesia, which were then followed up by submitting a request for judicial review to the Supreme Court of the Republic of Indonesia. The material for the complaint to Komnasham is related to allegations of human rights violations regarding their fate as KPK, which there is no certainty after being declared by TMS.

Komnasham has the authority to deal with issues of human rights violations as regulated in Law Number 39 of 1999 concerning Human Rights. Meanwhile, the authority of the Ombudsman is regulated in Law Number 37 of 2008 concerning the Ombudsman of the Republic of Indonesia and Law Number 25 of 2009 concerning Public Services. In addition, the Supreme Court of the Republic of Indonesia is related to the authority of the Judicial Review Rights between lower statutory regulations and the Law regulated in the 1945 Constitution, namely Article 24 paragraph (1) "The Supreme Court has the authority to judge at the level of cassation, examine the legislation under law and has other powers granted by law."

On the other hand, there are members of the public who have also submitted a request for judicial review to the Constitutional Court regarding the examination of the transfer of KPK employees to ASN in Law 19 of 2019, Government Regulation No. 41 of 2020 and Perkom KPK 1 of 2021 whether it is contrary to the constitution. The authority of the Court to conduct a judicial review of Law on the Constitution or the constitution set out in Article 24C paragraph 1 of the 1945 "Constitution that The Constitutional Court has the authority to test laws against the Constitution the Republic of Indonesia Year 1945"

That being the right of employees of the Commission to fight for justice and the rule of law as well as services through a variety of existing state institutions, both judicial institutions and through supporting state institutions or auxiliary state's institutions, namely Komnasham and Ombudsman. As for the position of the applicant, or the reporting party/complainant, then the substance being tested, or allegations of reported human rights violations and maladministration, legal considerations or opinions from the Constitutional Court, Supreme Court and KomnasHAM and the Ombudsman as shown in the matrix below.

**Matrix of Decisions of the Constitutional Court and Decisions of the Supreme Court of the Republic of Indonesia and
Recommendations of Komnas HAM and the Ombudsman of the Republic of Indonesia
Regarding the problem of transferring the status of KPK employees to ASN**

No	Constitutional Court ⁶	Supreme Court ⁷	Komnas HAM	Ombudsman RI
1.	The Petitioner for Judicial Review on behalf of Muh Yusuf Sahide, S.H.	The Petitioner for Judicial Review on behalf of Yudi Purnomo as Applicant I and Farid Andhika as Applicant II	Reporting Party on behalf of Yudi Purnomo and partner accompanied by his power.	Reporting Party on behalf of Sdr. Yudi Purnomo and partner accompanied by his power.
2.	Case Decision Constitutional Court No: 34/PUU-XIX/2021 dated 31 August 2021 and has been recorded in the registration book constitution.	Case Decision Supreme Court No: 26 P/HUM/2021 dated 9 September 2021 and has been accepted by the Registrar of the Supreme Court of the Republic of Indonesia.	Recommendations regarding Human Rights Violations by the KPK in the implementation of the KPK TWK that violate human rights dated August 23, 2021 through letter Number 132/PM.00/0.1.0/VIII/2021 submitted to the President of the Republic of Indonesia as the head of state and head of government.	Recommendation of the Ombudsman of the Republic of Indonesia Number: 0001/RM.03.01/0593.2021/IX/2021 Dated 15 September 2021 regarding Maladministration in the Implementation of the KPK TWK which did not graduate 75 KPK employees has been submitted to the Reported Party and related parties to be carried out, according to applicable regulations

⁶ Mahkamah Konstitusi Republik Indonesia. Retrieved from <https://www.mkri.id/index.php?page=web.Putusan&id=1&kat=1&cari=34>

⁷ Mahkamah Agung Republik Indonesia. Retrieved from <https://putusan3.mahkamahagung.go.id/direktori/putusan/zaec1127b9a45486a67e313133383035.html>

3.	<p>That based on the authority and the applicable law, the Constitutional Court of the Republic of Indonesia has the right to conduct legal examinations and in accordance with the constitutionality of the provisions of Article 68B paragraph (1) and Article 69C of the Law of the Republic of Indonesia Number 19 of 2019 concerning the Second Amendment to the Law Number 30 of 2002 concerning the Corruption Eradication Commission which on October 17, 2019 was promulgated in the State Gazette of the Republic of Indonesia of 2019 Number 197 and Supplement to the State Gazette of the Republic of Indonesia Number 6409 against Article 1 paragraph (3), Article 28D paragraph (2) and Article 28D paragraph (3) of the 1945 Constitution. The Petitioner explained the use of the results of the TWK as a basis for determining whether a person was appointed or not appointed as ASN by the BKN and the KPK, where the TWK had absolutely no legal basis at the technical level and there was no single rule in the legislation either in Law 19/2019 as well as PP 41/2020 which requires a TWK. And</p>	<p>Whereas based on the foregoing, Petitioners I and II then request to the Chief Justice of the Supreme Court to examine and submit the petition for objection and decide as follows:</p> <ol style="list-style-type: none"> Accept this Application for Material Test in its entirety Stating Article 5 paragraph (4) of the Regulation of the Corruption Eradication Commission Number 1 of 2021 concerning Procedures for the Transfer of Employees of the Corruption Eradication Commission to become State Civil Apparatus Employees is contrary to Law Number 19 of 2019 concerning the Second Amendment to Law Number 30 of 2002 concerning the Commission Corruption Eradication and Constitutional Court Decision Number 70/PUU-XVII/2019, dated May 4, 2021; To state that Article 5 paragraph (4) of the Corruption Eradication Commission Regulation Number 1 of 2021 concerning 	<p>Whereas based on Law Number 39 of 1999 concerning Human Rights, Komnas HAM has completed monitoring and investigation into allegations of human rights violations in the process of transferring the status of employees of the Corruption Eradication Commission (KPK). In the report, which is more than 300 pages thick, Komnas HAM concluded that there were human rights violations in the case of the transfer of status of 75 KPK employees.</p>	<p>Based on the verification of the report requirements in a formal and material manner, the Indonesian Ombudsman is authorized to follow up on the report. In addition to the Reporting Party having legal standing to submit reports, the authority of the Indonesian Ombudsman to follow up on the report is based on several provisions of laws and regulations. Among other things, Article (1) number 1, number 3 of Law Number 37 of 2008 concerning the Ombudsman of the Republic of Indonesia. As for the provisions of Article 9 of Law Number 37/2008 which stipulates that in carrying out its authority, the Indonesian Ombudsman is prohibited from interfering with the freedom of judges in making decisions, and Article 36 of Law Number 37/2008 which states that the Indonesian Ombudsman rejects reports in terms of the substance of the report being and in the object of examination. court, is not fulfilled in this report, namely the application for Judicial Review to the Supreme Court and the Constitutional Court. Bearing in mind that the Ombudsman did not examine the norms of KPK Regulation Number 1 of 2021 concerning</p>
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<p>the conditions that must be met in the transfer of ASN status because Committee Regulation can be said to be part of the "statutory regulations" as stated in Article 69B paragraph (1) and Article 69C of Law 19/2019.</p> <p>In accordance with the rules for the TWK assessment requirements for the transfer of ASN status as regulated in KPK Regulation 1/2021 and which was made later after the issuance of Law 19/2021, it was made due to the uncertainty of the content of the content in Article 69B paragraph (1) and Article 69C of Law 19/2019. The Petitioner explained that Committee Regulation 1/2021 as a new regulation based on Article 69B paragraph (1) and Article 69C of Law 19/2019 does not reflect the principles of transparency and accountability because for KPK employees, loyalty to Pancasila and the 1945 Constitution is sufficient with a statement letter. stamped considering that TWK can be a "double-edged knife" that can be used subjectively to dismiss KPK employees. According to the Petitioner, the action of the KPK leadership which decided that</p>	<p>Procedures for the Transfer of Corruption Eradication Commission Employees to State Civil Apparatus Employees does not have binding legal force;</p> <p>d. Ordering the publication of the Supreme Court's Decision on the a quo Petition to be published in the State Gazette;</p>		<p>Procedures for Transferring Corruption Eradication Commission Employees to State Civil Apparatus Employees, Government Regulation Number 41 of 2020 concerning Transfer of KPK Employees to ASN Employees or against Law Number 19 of 2019 and did not test Law Number 19 of 2019 with the Constitution. The scope of examination of the Indonesian Ombudsman is to prove whether or not there has been maladministration in the transfer of KPK employees to ASN employees. So that the substance and object of the examination are different from the judicial review in the Constitutional Court and the Supreme Court, the Ombudsman has the authority to examine and issue the Recommendation of the Indonesian Ombudsman in the event that maladministration is found.</p>
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	<p>employees who did not pass the TWK were obliged to hand over their duties and responsibilities to their superiors while waiting for further decisions, was not justified, because the action was classified as against the law because it was not based on any statutory regulations that became the basis for take such action, however, it is also because it is contrary to Article 24 of Committe Regulation 1/2021.</p> <p>The Petitioner also explained that the nature of the TWK is a real effort to eliminate a person's right to work without a fair process in the employment relationship and by using/using the results of the TWK as the basis for determining whether a person is appointed or not appointed as ASN is contrary to the provisions of Article 28D paragraph (3) 1945 Constitution.</p>			
4.	<p>Considering that according to the Court's opinion, the current ASN management regulations have put forward the existence of ASN management to produce ASN employees who are not only professional, but also have basic values, have professional ethics, are free from political intervention, and are free from corrupt practices,</p>	<p>Whereas based on Article 24A of the 1945 Constitution, the Supreme Court has the authority to judge at the level of cassation, examine statutory regulations under the law against the law, and has other powers granted by law;</p> <p>Whereas based on Article 20 paragraph (2) letter b of Law</p>	<p>Whereas based on the findings of Komnas HAM, it can conclude that there were 11 human rights violations in the process of changing the status of KPK employees to ASN through the TWK assessment method.</p> <p>The human rights violations referred to are:</p>	<p>Whereas based on the results of the examination and resolution and listening to expert input, the Ombudsman provides the following opinion:</p> <p>a. The mechanism for transferring KPK employees to ASN employees is not a mechanism for the procurement of new employees, so the transfer of KPK employees must be seen as a status</p>

<p>collusion , and nepotism. Transparent and accountable ASN selection processes and mechanisms are also an integral part in the effort to create quality ASN human resources. In addition, the education and training process for ASN has also been carried out in an integrated manner with the aim of building moral integrity, honesty, nationalism and nationalism spirit and motivation, building superior and responsible personality characters, and strengthening professionalism and field competence. According to the opinion of the Constitutional Court, efforts to realize ASN that are professional, have integrity and have morality, are not only the responsibility of the Government and related stakeholders but are also the responsibility of all levels of society by continuing to prioritize principles, principles, basic values, as well as codes of ethics and codes of behavior. as regulated in Law 5/2014. Considering whereas based on all of the above legal considerations, the Court is of the opinion that the Petitioners' arguments regarding the</p>	<p>Number 48 of 2009 concerning Judicial Powers, it is stated that the Supreme Court has the authority to examine statutory regulations under the law against the law; That Committe Regulation 1/2021 is a regulation issued by the Corruption Eradication Commission which regulates the procedure for transferring the status of an Employee of the Corruption Eradication Commission (hereinafter referred to as "KPK") to become a State Civil Apparatus Employee (hereinafter referred to as "ASN") within the hierarchy of laws and regulations. invitation is under the Act Whereas therefore, pursuant to Article 1 paragraph (1) and paragraph (2) of the Regulation of the Supreme Court Number 01 of 2011 concerning the Right of Material Testing, Committe Regulation 1/2021 by law becomes the object of the application for the right of material testing. Considering whereas with respect to the subject matter, it can be concluded that the opinion</p>	<ol style="list-style-type: none">1. Right to Justice and Legal Assurance.2. Women's Rights.3. Right not to be discriminated against.4. Right to Freedom of Religion and Belief.5. Right to Work.6. Right to Security.7. Right to Information.8. Right to Privacy.9. Right to Freedom of Association and Association.10. Right to Participate in Government. Right to Freedom of Expression.	<p>transfer process.</p> <ol style="list-style-type: none">b. The transfer of KPK employees to ASN employees can be done through the mechanism of signing a statement letter regarding loyalty to Pancasila which has been made by KPK employees as a condition of loyalty to Pancasila.c. The Reported Party did not pay attention to the aspirations of employees regarding the consequences of the results of the TWK assessment, so that the results of the TWK assessment should not be used as a parameter to abort the rights of KPK employees to become ASN employees, especially using discretion as a consideration in making decisions.d. The implementation of TWK is a form of test that has just been applied to KPK employees, thus the instrument/parameter is not perfect, so it should not be used as the only mechanism to determine which employees are appointed as ASN.e. Whereas to the objections of the KPK and the response of BKN to the RI Ombudsman's LAHP, the Ombudsman conveyed that in essence the objections and responses had been explained in the Resolution and Monitoring Efforts Chapter which can be seen in full in
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<p>unconstitutional norms of Article 69B paragraph (1) and Article 69C of Law 19/2019 are unreasonable according to law and the arguments of the Petitioners' petition other than and the rest are not considered further and by therefore considered irrelevant and must be declared unreasonable according to law. Meanwhile, there are different reasons (concurring opinion), this was conveyed by 4 judges of the 9 existing Constitutional Court judges,</p> <p>In essence, it is of the opinion that the transfer of KPK employees to ASN is carried out in such a way as to not harm the employees as stated in the Constitutional Court's decision No. 70.PUU-XVII/2019 dated May 4, 2021, that for KPK employees expressly (expresis verbis) declare employees to be ASN because of the Law's orders. 19/2019, the transition does not harm the rights of employees for any reason outside the predetermined design. Because the employees have dedicated themselves to the KPK and their dedication in eradicating corruption is no longer in doubt. Whereas regarding the transitional</p>	<p>of the Supreme Court is as follows:</p> <p>a. That substantially the design of the transfer of KPK employees to ASN follows the provisions of Law Number 5 of 2014 concerning State Civil Apparatus and its implementing regulations, and one that has been accepted as an objective measure to fulfill the requirements for filling the position is TWK which is also a requirement during selection ASN and during career development of civil servants.</p> <p>b. ThatCommitte Regulation 1/2021 is an implementing regulation of PP 41/2020 and Law 19/2019. The TWK assessment in Committee Regulation 1/2021 is a tool in the form of general norms that apply to KPK employees as a formal requirement as outlined in institutional regulations in order to obtain material outputs, namely KPK employees who are loyal and obedient to Pancasila. The substance of the Petitioners cannot be appointed as ASN</p>		<p>the Ombudsman Recommendations as a whole.</p> <p>f. The Ombudsman of the Republic of Indonesia found the occurrence of maladministration in the form of Abuse of Authority and Improper Actions. Abuse of Authority related to TWK assessment requirements which should not necessarily be a reason for eliminating an employee's right to continue working, especially in the process of transferring to become an ASN employee. In this case, the KPK leadership has used its authority for purposes other than the intended authority by not considering the principles of the benefit of law and justice as a manifestation of the implementation of good governance.</p>
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<p>status for investigators, or KPK investigators and for KPK employees, it is not a selection process for new prospective employees or new ASN selection, which requires various forms of selection to be carried out so that some of them can be declared 'qualified' and some are declared 'not eligible', so that the provisions Article 69B and Article 69C of UU19/2019 must be viewed and interpreted and positioned as a transition from the status of KPK employees to ASN so that the new KPK design still provides legal certainty for KPK employees. That the transition of employee status to ASN should be done first because it is a right, after the fulfillment of these rights will be followed by the resolution of other problems, including the possibility of promotion, demotion as ASN employees at the KPK So that the norms of Article 69 B and 69 C of Law 19/2019 should be enthusiastic about fulfilling the constitutional rights of KPK employees to be transferred to ASN status in accordance with Article 27 paragraph (2), Article 28 C paragraph (2),</p>	<p>not because of the enactment of Committe Regulation 1/2021 for which a review is requested, but because the results of the TWK assessment of the Petitioners themselves are TMS, while the follow-up to the results of the TWK assessment is under the authority of the government.</p> <p>c. Whereas the consideration of the age issue of KPK employees who have reached 35 years and it is feared that they will lose the opportunity to become an ASN is not at all related to the TWK assessment.</p> <p>d. In accordance with the decision and description above, that based on the description above, the Supreme Court is of the opinion that the object of the application for the right to a judicial review, Article 5 paragraph (4) Committe Regulation 1/2021 does not conflict with the higher laws and regulations, namely Law 19/2019, PP 41/ 2020, and the Constitutional Court Decision Number 70/PUU-XVII/2019,</p>		
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	<p>Article 28 D paragraph (1), and Article 28 D paragraph (3) of the 1945 Constitution. Thus, even though the a quo application is rejected, the legal considerations can be used as a momentum to confirm the Court's stance regarding the transition of the status of KPK employees as rights in accordance with the Constitutional Court's decision Number 70/PUU-XVII/2019.</p>	<p>as well as the Constitutional Court Decision Number 34/PUU-XIX/2021 and also Considering, based on all the considerations above, the arguments of the Petitioners' petition have no legal basis</p>		
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5	<p>Based on the explanation given by the Petitioner and it has been carefully considered. So verdict tried to reject the Petitioner's application in its entirety.</p>	<p>Based on the explanation given by the Petitioner and it has been carefully considered. So Amar Judgment tried for</p> <ol style="list-style-type: none"> Rejecting the petition for objection to the right of judicial review of Petitioners I: YUDI PURNOMO and Petitioners II: FARID ANDHIKA; Sentencing Petitioner I and Petitioner II to pay court fees of IDR 1,000,000.00 (one million Rupiah) 	<p>Based on the contents of the Komnas HAM recommendation to President Jokowi regarding the polemic of the TWK assessment, the chairman of the National Human Rights Commission has explained. That the President is asked to restore the status of KPK employees who are declared ineligible (TMS) to be appointed as KPK ASNs. This can be interpreted as part of an effort to follow up on the directives of the President of the Republic of Indonesia which had previously been conveyed to the public.</p> <p>_____</p> <p><i>Source: Komnasham</i></p>	<p>Based on the results of the examination, resolution efforts, opinions and findings, the Ombudsman Republik of Indonesia provides the following recommendations to the Chair and/or Chairperson of the KPK to immediately carry out the transfer of KPK employees to become ASN employees, for at least 75 KPK employees for whom there is no certainty about the transfer of their employment status and who have not entered retirement age or who have not obtained the certainty of becoming an ASN employee. And to the Head of the State Civil Service Agency to make improvements and refinement of the parameters for determining the TWK assessment as a form of assessment for ASN and or improving the provisions used in the process of transferring employees to ASN.</p> <p>_____</p> <p><i>Source: The Ombudsman Of Republic Indonesia</i></p>
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Discussion

a. Decisions of Two Judicial Institutions Regarding the Transfer of KPK Employees to ASN

In the fact, there are employees who have not passed the TWK, the KPK has been declared the dismissed by the KPK Chairman's decision Number 1327 of 2021 as of September 30, 2021. The Constitutional Court of the Republic of Indonesia in its decision Number 34/PUU-XIX/2021 dated August 31, 2021, rejected the request for a judicial review of the KPK Law Number 19 of 2019 and its derivative regulations on the constitution, namely related to the implementation of the provisions of Articles 69B and 69 C which are considered contradictory with the provisions of Article 27 paragraph (2) and Article 28 D paragraph (2) of the 1945 Constitution. This is related to the right to decent work and to receive fair and proper remuneration and treatment in an employment relationship, which is a human right that must be guaranteed and protected by the state.

Regarding the issue of the transfer of KPK employees, there was previous a decision of the Constitutional Court Number 70/PUU-XVII/2019 which stated that the transfer of employees must not harm the rights of employees who are over 35 years old. However, 5 of 9 judges of the Constitutional Court stated that they rejected the applicant's application because the meaning of "not harming the rights of employees" does not mean that there has been discrimination for employees who are declared ineligible in the TWK.⁸ Law 5 of 2014 is used as a reference in the transfer of KPK employees so that it is hoped that the transfer process, including the conditions, is an employee who is professional, has integrity and has morality. This is not only the the government's responsibility, but also all levels of society by continuing to prioritize principles, basic values, as well as a code of ethics and code of conduct as regulated in Law 5 of 2014.

On the other hand, there are concurring opinions from the other 4 judges of the Constitutional Court. They stated that the provisions of Articles 69B and 69C of Law 19 of 2019 were declared unconstitutional as long as it was not interpreted that the transfer of KPK employees to ASN was not the employee's will. Therefore, the transfer of the parties should

⁸ <https://mkri.id> Constitutional Court Decision Number 70/PUU- XVII/2019

not harm the rights of employees⁹ because they have been serving themselves at KPK all this time. Thus, there is a need for legal certainty so that the employment rights of KPK employees are fulfilled first

Furthermore, KPK conducted a test for their placement according to the new KPK design. But, the 4 judges of the Constitutional Court stated that the transfer of employees was the right of the employee. The transition is carried out first and followed by solving other problems after the transition is fulfilled, including the possibility of promotion and demotion as ASN employees at the KPK. Therefore, the fulfillment of the norms in the provisions of Articles 69B and 69C of the a quo Law should be carried out seriously and interpreted as the fulfillment of the constitutional rights of citizens. Even if the a quo request is rejected, the legal considerations can be used as a momentum to uphold the rights of KPK employees to become ASN as stated in the Constitutional Court's decision Number 70/PUU- XVII/2019.

As we know, the decision of the Constitutional Court of the Republic of Indonesia is a mandate of formation whose authority is final and binding. Therefore, as a form of compliance the law, the decision is always respected and obeyed. However, there are more basic values related to the law that also acts as a moral, namely the law that is considered as God's wisdom. For example, it is the nature of reason and mind given by God so that humans are rational beings and must live according to the ratios given by God.¹⁰ The decision from the 4 judges of the Constitutional Court can also be an illustration related to the constitutional rights of KPK employees where these employees are not new recruited candidates but have served the KPK all this time. That, with the provisions stating that they can be appointed as ASN does not mean that they can be dismissed from KPK employees. This should be a guide to not eliminate the rights of employees

Regarding the application for judicial review at the Constitutional Court carried out by non- victims parties, it is necessary to pay attention to whether the direct interests of the applicant so it wont harm the rights of the victim directly from an implementation of legislation.

⁹ CNN Indonesia. (2021, May 28). Pakar: Pemecatan 51 Pegawai KPK Tak Bisa Pakai UU ASN. CNN Indonesia. Retrieved from <https://www.cnnindonesia.com/nasional/20210527200916-12-647648/pakar-pemecatan-51-pegawai-kpk-tak-bisa-pakai-uu-asn>.

¹⁰ Shidarta. (1997). Aktualisasi Pemikiran Hukum Kodrat, ERA HUKUM No.13/Th. IV. 96

The Supreme Court of the Republic of Indonesia in its decision Number 26P/HUM/2021 dated September 9, 2021 regarding Judicial Review application on the provisions of Article 5 of the KPK Perkom Number 1 of 2021 stated in its decision that it rejected the applicant's application.¹¹ Whereas in substance, the design of the transfer of KPK employees to ASN follows the provisions of the ASN Law and its implementing regulations. One that is accepted as an objective measure for filling the position is TWK which also a requirement for ASN selection and career development. In its consideration, the Supreme Court stated that Perkom KPK Number 1 of 2021 was an implementing regulation and stated that the TWK assessment was a general norms that apply to KPK employees who will become ASN. These applicants cannot be appointed as ASN not because of the enactment of Perkom KPK 1 of 2021, but the results of the TWK assessment of applicants who are declared ineligible. However, on the other hand, Perkom KPK Number 1 of 2001 does not regulate the dismissal of KPK employees due to transfers, but only regulates the dismissed ASN.

Judicial review decisions with their considerations must be respected, but the Supreme Court in its decision is considered inaccurate¹² because the KPK employees are not new employees who will be recruited to work at the KPK. BKN as the authorized agency to conduct testing has also stated that they do not have an instrument to conduct TWK assessments for the transfer of employee status, so they use a third party. Moreover, the ASN Law cannot be applied in the transfer of KPK employees because personnel matters have more specific rules (*lex specialis*).¹³

b. Recommendations by KomnasHAM and the Indonesian Ombudsman

Komnasham, in accordance with its authority, has submitted its Recommendation to the President of the Republic of Indonesia on August 23, 2021, has stated that 11 (eleven) human rights violations occurred in the process of transferring KPK employees to ASN, namely to KPK employees who were declared ineligible in the TWK. These human rights violations need to be remedied immediately by fulfilling the rights of KPK employees who

¹¹ M Rosseno Aji. (2021, September 9). Ini Pertimbangan MA Tolak Uji Materiil Pegawai KPK Soal TWK. National Tempo. Retrieved from Ini Pertimbangan MA Tolak Uji Materiil Pegawai KPK Soal TWK - Nasional Tempo.co

¹² CNN Indonesia. (2021, May 28). Pakar: Pemecatan 51 Pegawai KPK Tak Bisa Pakai UU ASN. CNN Indonesia. Retrieved from <https://www.cnnindonesia.com/nasional/20210527200916-12-647648/pakar-pemecatan-51-pegawai-kpk-tak-bisa-pakai-uu-asn>.

¹³ CNN Indonesia. (2021, May 28). Pakar: Pemecatan 51 Pegawai KPK Tak Bisa Pakai UU ASN. CNN Indonesia. Retrieved from <https://www.cnnindonesia.com/nasional/20210527200916-12-647648/pakar-pemecatan-51-pegawai-kpk-tak-bisa-pakai-uu-asn>.

report to Komnas HAM so that they have the right to be appointed as ASN. Komnas HAM asked the president as head of government and head of state to provide protection to KPK employees whose human rights were violated.

According to the Universal Declaration, all people are born free and have the same dignity and rights. They are endowed with reason and conscience and should associate with one another in brotherhood. Hak rights itself is a fundamental right that should not be violated, and therefore as a form of state employees present then the Commission should immediately gain attention meant the country through the president to obtain a settlement.

The Ombusman RI has also issued Recommendation Number: 0001/RM.03.01/0593.2021/IX/2021 dated September 15, 2021 to be submitted to the Reported Party (KPK and BKN) and related parties for implementation. As stipulated in Article 38 Paragraph (1) of Law Number 37/2008, the recommendations of the Ombudsman of the Republic of Indonesia must be implemented by the Reported Party and the Reported Party's superiors. This Ombudsman recommendation was issued because of the Maladministration Act by the Reported Party in the process of transferring KPK employees to ASN. In his findings, the Ombudsman stated that the application of the law was wrong, among others, by the KPK leadership where there was an abuse of authority and deviated from the purpose of the said authority. Therefore, employees who have not been appointed as ASN because they did not pass the TWK should be immediately appointed as ASN. The Ombudsman's recommendation is also submitted to the President as the head of government to supervise and ensure that the KPK implements the RI Ombudsman's Recommendation.

Discretion in government is a common thing, but the exercise of discretion is also limited by regulations (see the Law on Government Administration and expert opinion on discretion), thus the use of discretion that goes beyond the limit is an act that is not in line with the principles of good governance.

The decision of the judicial institution, namely to examine the implementation of the law on the constitution and to examine the implementation of the rules under the law with the related law. Therefore, the scope of its authority is different from that of KomnasHAM and the Ombudsman of the Republic of Indonesia, which are more concerned with applying the law to a problem. Thus there is a clear separation of functions, duties and authorities

between the judicial institution and other institutions such as the National Human Rights Commission and the Indonesian Ombudsman.

The current condition is that 56 of the 75 employees who have not passed the TWK have been dismissed for failing to pass the TWK. At the direction of President Jokowi in May 2021, the TWK test must not harm the rights of KPK employees. The KPK and related agencies have evaluated the results of the TWK and provided opportunities for 24 employees to take part in state defense education and national insight. Then, 6 of the 24 people resigned and one entered retirement age. Furthermore, on September 15, 2021, the KPK leadership dismissed the said 56 employees.

That the president's directive or statement can be said to be a policy that must be followed because it shows the input and objectives of the government and what must be done to achieve that goal. As James Anderson argues (in his book *Public Policymaking an Introduction*, fifth edition 2003), that policy statements include official statements, namely laws, presidential decrees, administrative regulations, but speeches by government officials that show the aims and objectives of the government and what will be done to achieve these goals. The leadership of the KPK and related agencies seemed inconsistent with the policy of not graduating 75 employees, as evidenced later by the president's statement revising the results of the TWK. According to the president's statement, 75 employees should be included in education and training for state defense and national insight.

The latest condition, the National Police Chief has asked the president to make 56 dismissed KPK employees become ASN employees within the Police (detiknews.28/09/2021), the government has at least given the green light for this, but back to 56 KPK employees who were dismissed, they are KPK employees not in other agencies. The solution is still far from the public's expectations, at least anti-corruption activists and universities who have been voicing their aspirations.

Conclusion

a. Summary

1. Whereas the transfer of KPK employees to ASN has been regulated in the provisions of the legislation, namely Law 19 of 2019 concerning the Second Amendment to the KPK Law, Government Regulation Number 41 of 2020

concerning Transfer of KPK Employees to ASN, and KPK Commission Regulation Number 1 of 2021 concerning Procedures Transfer of KPK Employees to ASN.

2. Whereas the transfer of KPK employees to ASN has also been subject to judicial review at the Constitutional Court and the Supreme Court of the Republic of Indonesia related to the transfer process as stipulated in Article 69B and 69C of Law Number 19 of 2019 and the application of the norms in Article 5 of KPK Regulation Number 1 of 2021, where the two institutions in question reject the petition for judicial review of the petitioners and declare the constitutionality of the laws and regulations related to the transfer of KPK employees to ASN.
3. The Constitutional Court of the Republic of Indonesia in principle states that regarding the transfer of KPK employees there is the authority of the KPK leadership to determine graduation requirements, although there are different reasons from the 4 Constitutional Court judges who stated that the transfer of KPK employees to ASN was the right of the employees so that the staffing test for HR management was carried out after the employee becomes ASN.
4. The transfer of KPK employees is a process of transferring employees, not new recruits, considering that the employees in question have worked and served at the KPK so far, so the assessment instrument is not applied like the ASN recruitment process in general, as the Supreme Court in its decision also handed over the transfer process to the government, with thus, it is the authority of the government to determine the continuation of the process of transferring the said employee.
5. There is not a single provision in the process of transferring KPK employees which states that employees who do not meet the TWK requirements are then dismissed from the KPK. If this is done with discretion then it violates the applicable provisions, namely the use of discretion without any limitations and is detrimental to the dismissal of the employees.
6. Until now there has been no permanent solution regarding the dismissal of

employees, although it is also possible for the employees in question to file a lawsuit to the Administrative Court over the decision regarding their dismissal.

7. The President as head of state and head of government has not yet taken a stand on the recommendations of Komnasham and the Ombudsman Republic of Indonesia which are also addressed to the president.
8. According to the provisions of the law, the Ombudsman Recommendation is obligatory to be implemented. It can therefore be concluded that since the Ombudsman Recommendation is not implemented, the Reported Party violated the Law.
9. The dismissal of KPK employees is also seen as a form of weakening the commitment to eradicate corruption, considering that when the KPK was having limited human resources, employees with experience and dedication were arbitrarily dismissed.
10. The TWK assessment process for KPK employees uses an instrument that has never been used before in the process of transferring employees to ASN so that the accountability of the process is doubtful, especially for employees who are not given TWK results and thus do not know where their weaknesses or shortcomings are in the selection process, as a form of good governance is accountability and transparency.
11. There has not been a constructive dialogue effort between employees and the leadership of the KPK in an effort to solve problems properly, showing the KPK staffing problem, which is an internal problem of the institution and then became a public problem. It does not provide a good lesson for the public about the mitigation mechanism of the problem, instead abuse of power or arbitrariness.
12. No matter how good the applicable positive law will provide justice and order, if its implementation is carried out properly, the law can provide legal certainty, justice and benefits can be achieved.

b. Suggestion

1. The provisions of laws and regulations should be made comprehensively, that

is, they are regulated in full regarding orders and prohibitions, rights, obligations and sanctions as follows the flow of legal positivism so that in its implementation it does not cause problems or avoid mistakes in the application of the law.

2. It is necessary to apply the principle of discretion in making decisions or policies in a measurable manner by public officials so as not to harm the rights of others.
3. The president as head of state and government needs to be involved to facilitate problem solving so that there is certainty for dismissed KPK employees.
4. All public officials in the government shall implement the principles of good governance in making decisions so as not to harm related parties.

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