

Verdict Examination of Dishonorable Discharge as PNS Due to Criminal Act of the Office in State Administrative Court

Fauzi Syam*, Helmi Helmi, Fitria Fitria

Fakultas Hukum
Universitas Jambi
Jambi, Indonesia

*fauzisyam@unja.ac.id, helmi@unja.ac.id, fitria@unja.ac.id

Abstract—Dishonorable discharge as Pegawai Negeri Sipil (PNS) who perform criminal act of the office according to court with permanent legal force's decision, had once again become a national issue of law during the entire year of 2018. The resolution of aforementioned issue has involved many relevant institutions such as BKN (National Civil Service Agency), Kemenpan RB (Ministry of Administrative and Bureaucratic Reform), Kemendagri (Ministry of Home Affairs), and KPK (Corruption Eradication Commission). After the publication of joint decision between Mendagri, Menpan RB, and chief of BKN (SKB Tiga Lembaga) which ordered Pejabat Pembina Kepegawaian (PPK) to hand down PTDH PNS (Dishonorable Discharge as Civil Servant) towards any PNS (Civil Servant) who performed criminal act of the office based on the decision by PBHT (Court with Permanent Legal Force), in 1st of August 2019, which had been handed down to 1.906 PNS (88%) out of 2.357 PNS in active duty. The publication of SKB Tiga Lembaga (joint decision of three institutions), have caused controversy among scholars, practitioners, and law experts concerning the interpretation of article 87 clause (4) letter b UU No. 5/2014 about Aparatur Sipil Negara (UU ASN). There are debates concerning the interpretation of law article 87 clauses (4) letter b, implication of PTDH as PNS, and the status of PNS who had been reactivated by PPK (Staff Development Officer) before UU ASN (civil servant acts) was implemented. A variety of parties that felt like their rights were aggrieved had filed constitutional examination of article 87 of UU ASN to the Constitutional Court. Most civil servants that had been dishonorably discharged had also filed a lawsuit to Pengadilan Tata Usaha (PTUN) to receive legal certainty and justice. And yet unlike the controversy of SKB Tiga Lembaga's publication, PTDH PNS in PTUN (State Administrative Court) was rarely investigated thoroughly. Even though the legal issues that appear in PTUN's examination and verdict towards PTDH PNS verdict is far more fundamental and strategic in deciding the progress of Indonesian administrative law, which already found its basis in UU No. 30/2014 about government administration.

Keywords: *verdict examination of dishonorable discharge as PNS (PTDH PNS), State Administrative Court*

I. INTRODUCTION

The mechanism of dishonorable discharge as Civil Servant that is claimed committing a function crime based on PBHT, actually has been regulated in Article 23 clause (5) letter C Law Number 41/1999 about Official Basis (UU PPK). At the time the effectuation of Law Number 5/2014 about Civil Servant (UU ASN), this mechanism takes variation, such as dishonorobale discharge, honorable discharge upon own proposing, and Civil Servant discharge with or without dicipline punishment. From 2.357 Civil Servant who is still serving at work as released by, most of them are claimed guilty before the effectuation of UU ASN. That condition happens in almost National and Local Government Institution [1].

The solution from that law issue has been involving many institutions and related ministry; such as National Civil Service Agency, Ministry of State Apparatus Utilization and Bureaucratic Reform, Ministry of Home Affairs, including Corruption Eradication Commission. Last solution, publishing Joint Decision among Ministry of Home Affairs, Ministry of State Apparatus Utilization and Bureaucratic Reform, and the Chief of National Civil Service Agency in 13th of September 2018 [2]. The publication of that regulation causes issues among academicians, practicing, and justice that is related to dishonorable discharge Civil Servant, or law interpretation Article 87 clause (4) letter b [3]. First group states that Article 87 clause (4) letter b UU ASN has the clear norm already. Civil Servant that is claimed guilty by court decision which has permanent law because committing function crime, how long its punishment verdict, must considered as dishonorable discharging. There is no other interpretation upon that regulation. This overview, clearly stated by National Civil Service Agency, Corruption Eradication Commission [4]. Nurmilita Ayuningtyas [5], Wirza Fahmi [6], Roy Marthen and Irwan Polidu [7]. However, the second group stated the regulation Article 87 clause (4) letter b must not be dishonorable discharging. This overview refers to jurisprudence Supreme Court Decision Number 01/K/TUN/2012 in 21th September 2011 in Sisminardi's case against Surabaya Mayor. In that case, Supreme Court Decision

of Surabaya Mayor who discharge dishonorably 11 Civil Servants who commit functional crime based on PBHT Decision [8].

As further action SKB Three Institutions, Ministry of State Apparatus Utilization and Bureaucratic Reform published SE Number B/50/M.SM.00.00/2019 in 28th February 2019 about Guideline Verdict PTDH Implementation. The result is 1st August 2019, there are 1.906 cases of PTDH Civil Servant (88%) from 2.357 Civil Servant who is still serving at work in Local and National institutions [9].

Some Civil Servants who dishonorably discharged, has proposed constitutionality test of Article 87 Law about Civil Servant to Constitutional Court [3], and most of them also proposing accusation to Administrative Court to get the law and justice convenience. But it is different with the issue of publishing SKB Three Institutions also theory arguing and constitutional upon the norms Article 87 clause (2) and clause (4) letter b and d in Constitutional Court, summarizing validity of Decision PTDH Civil Servant in Administrative Court is least to happen. However, the law issues that exist in jury validation in Administrative Court, is also fundamental and strategic in deciding the dynamic of law administration in Indonesia that its fundamental has been regulated in Law Number 30/2014 about Governance Administrative. There is indication, the verdict of Administrative Court is far from social justice, declining of basic principles of the characteristic punishment administration law, and basic principle decision validity that refers to law regulation and AUPB.

The focus of this writing is going to answer 2 (two) law issues, first, how the law interpretation upon the mechanism discharged dishonorably for those who commit crimes at the time the effectuation Law PPK? Second, how far the jury validation upon accusation Decision PTDH Civil Servant who commit crimes before the effectuation of Law about Civil Servant already suitable to law regulation and AUPB?

This study is normative law study, within using conceptual approach, statute approach, historical approach, and case

approach using law sources, such as primary, tertiary, and secondary ones. In the beginning part, there will be early overview about character and concept administrative juridical law.

II. YURIDICAL CONCEPT AND CHARACTER OF ADMINISTRATIVE

Punishment The term of law administrative punishment in law administrative review is well-known as “administrative punishment”. The doctrine in law administrative has shown many different definitions in this term. The general characteristic that is emphasized by some of authors is the condition that administrative punishment is negative consequence from violation the legal administrative duty. The administrative punishment is one of law punishments that is decided to make sure respecting to all law regulation [10].

Public Administration Act Europe Union summarized administrative punishment as this: “By administrative sanction is meant a negative reaction that may be applied by an administrative agency in response to an actual breach of a statute, regulation or individual decision, and which is deemed [11]. AP Law defines that Administrative Punishment as the one that is aimed for governance official who commit administrative violation [12].

Yucel Ogurlu states that: *Administrative sanctions, as a sort of administrative acts, are a dimension of the unilateral decision-making power of the Administration. This is the power to decide, to apply and enforce sanctions against individuals who violates laws of public order* [10]. According to P. de Haan, administrative punishment is a tool to implement public power as reaction of violation the norm of law administration [13].

Administration punishment in official is well-known as “discipline punishment”. Different with PP Number 53/2010, AP Law using the term “administrative punishment”. The mechanism of the form discipline law in those regulations are provided on the table below:

TABLE I. THE REGULATION OF ADMINISTRATIVE PUNISHMENT PP NUMBER. 53/2010 AND PP NUMBER

Description	PP No.53/2010	PP No.48/2016
Term	Dicipline Punishment	Administrative Punishment
Definition	Dicipline punishment as a punishment to Civil Servant because violating dicipline regulation of Civil Servant	Administrative punishment is a punishment for official government who commit administrative violation, it is a violating to implementation of governance administrative as regulated in AP Law
Object	Civil Servant	Official government who commit violation
Type	Three types (low, medium, hard)	Three Types (low, medium, hard)
Type of low punishment	1. Verbal Warning 2. Written Warning 3. Inconvenience Written Statement	Verbal Warning Written Warning Postponing of functional promotion, level and rights of functional
Type of medium punishment	1. Postponing regular salary increasing for a year; 2. Postponing of functional promotion for a year;	1. Paying for compensation money 2. Temporary discharging with the functional rights;
Type of hard punishment	1. Decreasing of functional in one lower level for 3 years; 2. Moving in order to level decreasing in one lower level; 3. Releasing of functional; 4. honorable discharge upon own proposing; 5. Dishonorable discharge	1. Permanent discharging within the right of finansial and other facillities; 2. Permanent discharging without the right of finansial and other facillities; 3. Permanent discharging within the right of finansial and other facillities also published in mass media; or 4. Permanent discharging without right of finansial and other facillities also published in mass media 5. -

This definition is contained in Article 1 number 5 PP No. 48/2016 concerning Procedures for Imposing Administrative Sanctions to Government Officials as implementing regulations of UU AP.

Administrative punishment has particular juridical characteristic. Refers to Riawan Tjandra, the character of administrative punishment is not a mandatory (*plicht*), but an independence right, not depending to other parts [14]. The government official is given a right exclusively to implement administrative law norm without depend on other institution like court [10]. Philippus M Hadjon explains further about the characteristic of administrative juridical punishment and the difference criminal punishment, as shown in the table:

TABLE II. THE DIFFERENCE BETWEEN ADMINISTRATIVE PUNISHMENT AND CRIMINAL PUNISHMENT [13]

Difference Factor	Administrative Punishment	Criminal Punishment
Goals	Action	Suspector
Characteristic	Reparatoir/Comdemnatoir	Comdemnatoir
Procedure	Without court procedure	Using court procedure
The Verdict Law	There is independency in the official (discretion)	Based on proofs in the court and the belief of jury

III. SESSION

A. Arrangement and interpretation of law Dishonorable discharge as Pegawai Negeri Sipil (PNS) who Commits Crimes in Criminal Act of the Office During the Validity of the Legal Staff Development Officer

1) Regulation of PTDH PNS

a) *UU No. 43/1999*: One of the changes made by UU No. 43/1999 about Amendment to Law No. 8/1974 concerning Personnel Principles (hereinafter referred to as constitutional of the republic of indonesia about the main point of staffing/UU PPK) is to reorganize the dismissal of civil servants by changing the provisions of Article 23 of Law No. 8/1974 so it reads:

- (1) The civil servant was honorably dismissed because he died.
- (2) Civil servants can be dismissed with respect because:
 1. at his own request;
 2. reach the retirement age limit;
 3. streamlining Government organizations;
 4. not physically or spiritually capable so that they cannot carry out their obligations as civil servants.

(3) Civil servants can be dismissed with respect or not because of:

1. breaking Oaths / Promises of Civil Servants and Oaths / Promises of Positions other than violating Oaths / Promises of Civil Servants and Oaths / Promises of Civil Servants and Oaths / Promises of Position for being unfaithful to Pancasila, the 1945 Constitution, State and Government;
2. sentenced to prison, based on a court decision that already has permanent legal force because of a criminal offense that carries a penalty of fewer than 4 years.

(4) Civil servants can be dismissed with respect not at their own request or not with respect, because:

1. sentenced to prison or confinement, based on a court decision that has permanent legal force for committing a criminal law of crime that has been sentenced to 4 years or more;
2. committing severe level discipline violations.

(5) Civil servants are dismissed with no respect, because:

1. breaking Oaths / Promises of Civil Servants and Oaths / Promises of Position in addition to breaches of oaths/promises of PNS and Oaths / Promises of PNS because they are not loyal to Pancasila, the 1945 Constitution, State and Government;
2. deviating from the ideology of the State, Pancasila, the 1945 Constitution or involved in activities that oppose the State and the Government; or
3. sentenced to prison or confinement based on a court decision that has permanent legal force because committing a criminal of office or a criminal offense that has to do with a court decision.

b) *PP No. 32/1979*: PP No. 32/1979 about Dismissal of civil servants are not issued as statutory regulations of PPK(staff development officer), but regulation executor UU No. 8/1974. In terms of substance, the norm is no longer appropriate or contrary to the norms stipulated in statutory regulations of PPK(staff development officer). This is often ignored by judges in case trials of Dishonorable Discharge as Civil servant (PNS) at A state administrative court, where Judges often assume that the norms in Government regulations No. 32/1979 is the same as the norm in the constitutional of the republic of Indonesia about the main points of staffing (UU PPK).

TABLE III. COMPARISON OF PP 32/1979 WITH ARTICLE 23 UU 43

No	Norm Formulation of PP 32/1979	Norm Formulation of UU 43/199	Information
1	Civil Servants (PNS) can be dismissed with no respect for violating the Oath / Promises of Civil Servants, Oaths / Promises of Civil Servants position or Disciplinary Regulations of Civil Servants; (Article 8a)	Civil servants (PNS) are dismissed with no respect because they violate Oaths / Promises of PNS and Oaths / Promises of Position in addition to violations of oaths / Oaths / Promises of PNS because they are not loyal to Pancasila, 1945 Constitution, State and Government (Article 23 paragraph 5a)	Norms and sanctions are not appropriate
2	Civil Servant (PNS) can dishonorably discharged because of being sentenced to prison, based on a court decision that already has permanent legal force, because it deliberately commits a crime that is threatened with a maximum imprisonment of 4 years, or is threatened with a heavier sentence. (Article 8b)	Civil Servants (PNS) can be honorably dismissed or not dismissed because of imprisonment, based on a court decision that has permanent legal force for committing a criminal offense for which the penalty is less than 4 years (Article 23 paragraph 3b).	Norms and Sanctions are not appropriate
3	Civil Servants are dishonorably discharged as civil servants if they are sentenced to prison or confinement based on a court decision that has permanent legal force, because they have committed a criminal offense or a crime related to that position; or (Article 9a)	Civil servants are dishonorably discharged, because they are sentenced to prison or confinement based on a court decision that has permanent legal force because they committed a criminal offense or a criminal offense regarding their post (Article 23 paragraph 5c).	Norms and Sanctions are not appropriate
	commits violations as referred to in Article 104 to Article 161 of the Criminal Code (Article 9 b).	Nothing	Norms and Sanctions are not appropriate
4	Civil Servants are dishonorably discharged as civil servants if they are found to be carrying out effort or activities aimed at changing the Pancasila and/or the 1945 Constitution or engaging in movements or carrying out activities that oppose the State and/or the Government (Article 10).	Civil servants are dishonorably discharged for misusing the State ideology, the Pancasila, the 1945 Constitution or engaging in activities that oppose the State and the Government; (Article 23 paragraph 5b)	Norms and Sanctions are not appropriate
5	Unregulated	Civil servants can be dismissed with respect not at their own request or not with respect, because they are sentenced to prison or confinement, based on a court decision that already has a permanent legal force because committing a criminal law crime that threatens a sentence around 4 years or more (article 23 paragraph 4a)	

2) Interpretation of PTDH PNS during the period of UU PPK's validity

a) *Kemenpan's interpretation:* In order to carry out the presidential instruction No. 4/2004 regarding corruption eradication acceleration, the government published SE Menpan (ministry of administrative and bureaucratic reform's handbill) No. SE/03/M.PAN/ 4/2007 about treatment of officials involved in KKN (corruption, collusion, and nepotism). In number point 1, 2, and 3 of the handbill, it is clearly mandated that:

1. To immediately authorize inspection towards officials, whether as a witness or suspect, whenever the authorization is required based on the established law;
2. To temporarily discharge of their position every official which are involved in corruption, considered a suspect, and currently being held by law enforcement officers, until a decision that has permanent legal force (incracht) from a court is officially declared or their case is terminated by a law enforcement officer.
3. To hand down administrative penalty according to PP No. 32/1979 regarding civil servant's discipline, to the officials who have received a guilty verdict from the court or if there is evidence of civil servant's discipline violation, even though the official has been acquitted in court.

Based on the aforementioned SE Menpan, the interpretations of government's law during that time were:

- To hand down administrative penalty according to PP No. 32/1979 towards officials which have been declared guilty from the court. As such, administrative penalty is handed down according to the discretion of PPK, in accordance with the juridical characteristic of administrative penalty. PPK is the one that assess and consider whether to hand down a light, moderate, or heavy discipline penalty by observing the factors which drive the civil servant to perform the crime. It can be considered illogical contradictory if 'dishonorably discharged' in article 23 clause (5) UU PPK be interpreted as "mandatory," then in the third point of SE Menpan it should be firmly declared that; "to dishonorably discharge the officials which had been given a guilty verdict by the court." this is because the context in which this handbill was published includes the treatment of officials involved in crime cases such as corruption, collusion, and nepotism.
- Civil servants which conducted the crime of corruption does not require PTDH PNS treatment; this became a general understanding among government officials. This is because the handbill is aimed towards the head of ministry/institution. Therefore, it is understandable when many civil servants escaped PTHD PNS when they committed criminal acts.

b) *Kemendagri's interpretation*: In 29th of October 2012, Mendagri published a handbill No. 800/4329/SJ regarding reassignment of civil servants in structural positions. In point 3 of aforementioned handbill, it was stated that:

As such, in accordance with the spirit of bureaucratic reform and corruption and other crime's eradication, it is mandated that every civil servant who had gone through criminal punishment due to the act of corruption or other kinds of crime of office should not be included in structural position. This is done to encourage the growth of bureaucratic reform and the eradication of corruption. We are sure that there are still many excellent Civil Servants in the area who are honest and clean.

The government's interpretation of law further emphasize that a civil servant who committed a criminal act according to article 23 clause (5) letter c UU PPK, are not necessary be dishonorably discharged. Even so, PPK forbid those civil servants from becoming a structural official. This interpretation is consistent with the aforementioned Menpan's handbill No. SE/03/M.PAN/4/2007.

Before the handbill was published, Mendagri argued that civil servants involved in the act of corruption can still apply to become a structural official. Mendagri stated that civil servants who was convicted can apply as an official since there is no law that clearly states otherwise [15]. Menpan RB Azwar Abubakar was on the same age with mendagri, stating that the appointment of Azirwan as Kepala Dinas could not be overruled, since it was the district head's authority and require no further assessment from the central government, cannot be changed. Because, it must be the authority of regional heads and do not need to be considered to the Center. Furthermore, the book of law does not regulate such matter [16].

The publication of SE Mendagri No. 800/4329/SJ on 29th of October 2012, finally received a warm welcome from the scholars and practitioners at the time. It was also regarded as a remedy for the previous policy which allows ex-convict to sit in structural office [17].

c) *BKN's interpretation*: Not long after SE Mendagri was published, BKN published a handbill No. K.26-30/V.3262/94 on 20th November 2012 regarding convicted civil servants. In number 2 of said handbill, it was affirmed that:

Civil Servants who commit a criminal offense of the office or a criminal offense related to the office and have been sentenced based on a court decision that has permanent legal force, will be dishonorably discharged.

d) *Interpretation of legal norms*: The basic problem that must be answered is, whether the PNS who committed the violation as referred to in Article 23 paragraph (5) of the PPK Laws must be dismissed with no respect as a PNS? To answer this question, the formula of Article 23 paragraph (5) cited again:

TABLE IV. FORMULATION OF ARTICLE 23 PARAGRAPH (5) AND EXPLANATION BASED ON UU No. 43/1999

Article 23 paragraph (5)	Explanation
Civil servants are dismissed with no respect, because :	
a. Breaking Oaths / Promises of Civil Servants and Oaths / Promises of Position in addition to challenging the oaths / Oaths / Promises of PNS because they are not loyal to Pancasila, the 1945 Constitution, the State and Government	Civil Servants who are dishonorably discharged are not entitled to receive a pension.
b. deviating from the ideology of the State, Pancasila, the 1945 Constitution or involved in activities that oppose the State and the Government; or	
c. sentenced to prison or confinement based on a court decision that has permanent legal force for committing a criminal offense or an offense related to the post.	

Normative analysis of the formulation of Article 23 paragraph (5) as follows:

1. In Article 23 paragraph (5) and Explanation, no phrase must be dismissed with no respect. Not using the word "must" in Article 23 paragraph (5) can be understood. First, violation of the norms letters is a violation of administrative legal norms. Before to hand down Dishonorable Discharge as Civil servant (PNS) which is declared "violate Oaths / Promises of Civil Servants and Oaths / Promises of Position", must an in-depth examination must be carried out. Likewise, violation of letter norms b. When a civil servant is said to have clearly committed a misappropriation of the state ideology, Pancasila, the 1945 Constitution, in-depth examination is also needed. The results of the examination of violations in paragraphs (5) letters an and b which can conclude whether the said PNS was sentenced to (a) PTDH PNS; (b) PDH PNS Not on Their Own Request; or (c) A mild, moderate or severe disciplinary sentence according to PP No. 30 of 1980 (has been replaced with PP No. 53/2010). Third, thus, the norm letter c may not be interpreted partially so that it becomes a mandatory norm. Because, the formulation of the letter c "Civil Servants who commit crimes in office crimes or those related to the position" is included in Article 23 paragraph (5) family. From the technical aspect of the formation of laws and regulations, if indeed the legislators want the norms of Article 23 paragraph (5) letter c to be mandatory / must, then it must be made a separate Article. May not be combined with the formulation of paragraph (5) letter an and letter b.
2. Original intend the forming of the PPK Law on violations of the norms of Article 23 paragraph (5) especially the letter c is not a norm is mandatory / must, increasingly clear with the abolition of the explanation of Article 23 paragraph (4) letter an of Law No. 8/1974, as presented in the following table:

TABLE V. COMPARISON OF THE FORMULATION OF ARTICLE 23 PARAGRAPH (4) AND THE EXPLANATION BASED ON UU No. 8/1974 AND No. 43/1999

Article 23 paragraph (4) letter a	Article 23 paragraph (5) letter c
Civil servants are dishonorably discharged because they are sentenced to prison or confinement, based on a court decision that has permanent legal force for committing a criminal offense or a position of crime related to the position.	Civil servants are dishonorably discharged because they are sentenced to prison or confinement, based on a court decision that has permanent legal force for committing a criminal offense or a crime related to the position.
Explanation: Basically, the position given to a Civil Servant is a trust of the State that must be carried out as well as possible. If a Civil Servant is sentenced to prison or confinement based on a court decision that has permanent legal force for committing a criminal offense of office or a criminal offense related to his position or occupation, then the relevant Civil Servant must be dismissed no respect for having abused the trust given to him.	Explanation: Civil Servants who are dishonorably discharged are not entitled to receive a pension.

The legal implications of the issuance of the explanation of Article 23 paragraph (4) letter a special phrase must be dishonorably discharged, causing the Explanation to become invalid. and then the explanation of Article 9 letter a PP No. 32/1979 which took over the formulation of Article 23 paragraph (4) letter a becomes **invalid** [18].

3. Whereas the provisions of Article 23 paragraph (5) letter c, which are not mandatory norms, have been confirmed through Supreme Court Decree No. 01/K/TUN/2012 dated 21 September 2012 in the case of Sisminardi Against the Mayor of Surabaya. Although Sisminardi Proven legally and convincingly committing a criminal offense based on court decision with permanent legal force. (PBTH) decision, but the Supreme court (MA) canceled the dishonorable discharge PNS Decree by the Mayor of Surabaya. The Supreme court's verdict in the sisminardi case later became **permanent jurisprudence**. The Supreme Court considers three things before making a decision, viz:
 - a. The Plaintiffs have devoted themselves long enough as civil servants;
 - b. The Plaintiffs are only a poor victim system in the Surabaya City Transportation Department bureaucracy, and
 - c. The Plaintiffs were sentenced to prison terms which were fairly mild for 10 months.

*Based on the permanent jurisprudence of the Supreme Court, Civil servants who were found guilty of committing a criminal offense of positions, **must not be dismissed not with respect as a civil servant.***

4. PPK's legal conviction that original intend Formers of the staff development officer (PPK) Law indeed provide discretion to hand down sanctions against civil servants, evident from not all civil servants who criminal act of the office be given dishonorable discharge (PTDH). Based on data published by the National civil service agency (BKN), 2,357 civil servants were not conducted dishonorable discharge (PTDH) as civil servant. (PNS), scattered in Central and Regional offices, including within the Supreme Court [19].

B. Judge Testing of Dishonorable Discharge PTDH Civil Servants' Lawsuit From the Perspective of Legislation and Good Governance (AUPB)

1) *Implementation of PTDH PNS After the issuance of the Three Institution SKB*: SKB Tiga Lembaga was actually issued at the insistence of the Corruption Eradication Commission (KPK) [4]. Not a pure agreement from the Government. In the Joint Decree (SKB) Three Institutions are mandated:

- a. The imposition of sanctions in the form of dismissal with respect to civil servants by the PPK and officials who are authorized to civil servants who have been sentenced based on a court decision that has permanent legal force because committing a criminal offense or a crime related to the position, no later than December 2018;
- b. Imposition of sanctions on PPK and authorized officials who do not implement sanctions as referred to in letter a.

The issuance of the Three Institution Decree raises questions for PPK. There is a kind of doubt and hesitant. Do civil servants who have finished serving prison sentences and have been reactivated by PPK as civil servants prior to the enactment of the ASN Law (January 15, 2014) including those dismissed disrespectfully as civil servants? What is meant in the Three Institution Decree is since the enactment of the ASN Law or since the enactment of PP No. 11/2017 about Civil Servants Management (March 30, 2017)? What about civil servants who have retired or applied for early retirement before there was a PBHT decision? Does the entry into force of PTDH PNS begin from the date of issuance of the Decree or take effect backwards from the end of the month of the incraht decision? Because of these doubts and doubts, until 29 January 2019, out of a total of 2,357 civil servants who were still actively working, only 478 civil servants (20.3%) were dismissed to follow up on the Three Institution SKB [20].

PPK's doubts and hesitant were finally answered by Menpan by issuing SE No. B / 50 / M.SM.00.00 / 2019 dated February 28, 2019, Regarding Instructions for the Implementation of PTDH PNS, which reads:

2. as the implementation of the Fourth Dictum, the letter Joint Decree and to make it easy implementation, be appointed the following implementation guidelines:

a. Civil servants sentenced to imprisonment or confinement based on court decisions that have permanent legal force for committing a criminal offense or a crime related to the position are sanctioned with Dishonorable discharge (PTDH) as PNS

b. Dismissal as referred to in letter a starting from the date of stipulation of PTDH PNS Decree.

c. In case there are Civil servants that should be dismissed as referred to in letter a but PNS that have been subjected to other sanctions in the form of discipline sanctions, then the decision of punishment must be revoked and soon be dishonorably discharge as PNS.

d. In the event that there are civil servants who are supposed to be dismissed as referred to in letter a, but the relevant civil servant has stipulated a Honorable Dismissal Decree due to reaching the retirement age limit (BUP) with pension rights or a Honorable Dismissal Decision on Own Request with pension rights, the following provisions apply:

1) If a decision is made before a court decision that has permanent legal ownership, the Dismissal Decree with respect and retirement rights remains in effect;

2) If the decision is made after a court decision that has permanent legal force, then the decision must be revoked and the PTDH Decree as a civil servant is immediately appointed.

3. As for civil servants who should be dismissed as referred to in letter an and have been sentenced based on a court decision that has permanent legal force after the Joint Decree of the Minister of Home Affairs, Men pan RB and the Head of BKN dated September 13, 2018, so the implementation is in accordance with statutory provisions.

4. In the context of the issuance of a PTDH Decree, you can download a copy of the Court's Decision via the website of the Supreme Court Directory or Case Tracking Information System (SPIP) at the Local District Court.

5. Against PPK and PyB who did not carry out the demanding PTDH, administrative sanctions in the form of temporary dismissal without obtaining office rights in accordance with Article 81 paragraph (2) letter c of Law Number 30 Year 2014 concerning Government Administration.

6. Implementation of this Circular Letter is carried out no later than 30 April 2019 and the results are reported to the Head of the State Personnel Agency with a copy to the Minister of the Interior and the Minister of Administrative and Bureaucracy Reform.

In practice, the application of PTDH PNS has started since the issuance of the Three Institution Decree. for the examples of PTDH as civil servants in the Jambi Provincial Government and Tanjung Jabung Timur District Government, there are 35 civil servants have conducted by PTDH, in the following figure 1 and 2 below:

No	Name/NIP/Gol	Court ruling <i>Incracht</i>		Decision of PPK PTDH PNS		
		Decision number	Date	Decision number	Date	TMT
Category I (Before the coming into force of the ASN Law)						
1.	Drs. Ramlan, KS 195903251986031006 (IV/a)	MA, No. 610/K/ Pid.sus/2009	14-12-2010	1360/KEP.GUB/ BKD-4.2/2019	27-12-2018	31-12-2010
2.	Rd. Hasan Basri, SH, M.Si 196303141984031001 (IV/a)	PT Jambi, No. 06/ Pid.sus/2013	30-05-2013	673/KEP.GUB/ BKD-4.2/2019	28-05-2019	28-05-2019
3.	Ir. Zaimuddin, M.Si 196803201994031005 (IV/b)	PT Jambi, No. 17/ Pid.sus/2013	27-06-2013	670/KEP.GUB/ BKD-4.2/2019	28-05-2019	28-05-2019
4.	Tuti Gantini, SE 196609051985122001 (III/d)	PT Jambi, No. 11/ Pid.sus/2013	26-06-2013	676/KEP.GUB/ BKD-4.2/2019	28-05-2019	28-05-2019
Category II (After the coming into force of the ASN Law, Before the entry into force of PP No. 11/2017)						
5.	Suhaimi, S.Sos, MM 196209011985031006 (IV/a)	PN Jambi, No. 25/ Pid.sus-TPK 2015	11-01-2015	671/KEP.GUB/ BKD-4.2/2019	28-05-2019	28-05-2019
6.	Sukardi, S.Pdi 196105101988031006 (IV/a)	MA, No. 1497K/ Pid.sus/2016	16-01-2016	672/KEP.GUB/ BKD-4.2/2019	28-05-2019	28-05-2019
7.	Azwan, S.Sos, ME 196701071988101002 (IV/a)	PN Jambi, No. 56/ Pid.sus-TPK 2015	02-05-2016	675/KEP.GUB/ BKD-4.2/2019	28-05-2019	28-05-2019
Category III (After the coming into force of the ASN Law and PP No. 11/2017)						
8.	Zulfahmi 197512042003121002 (III/a)	PN Jambi, No. 40/ Pid.sus-TPK 2017	06-03-2017	1363/KEP.GUB/ BKD-4.2/2019	27-12-2018	31-03-2017
9.	Drs. Asvan Deswan, M.Si 196212241982031003 (IV/c)	PN Jambi, No. 9/ Pid.sus-TPK 2017	07-06-2017	1358/KEP.GUB/ BKD-4.2/2019	27-12-2018	30-06-2017
10.	Wenzirman, M.Pd 196708011991031008 (IV/a)	PN Jambi, No. 12/ Pid.sus-TPK 2017	04-09-2017	674/KEP.GUB/ BKD-4.2/2019	28-05-2019	28-05-2019
11.	Novri Hasan, SH.MP 197411242000121001 (IV/a)	PN Jambi, No. 27/ Pid.sus-TPK 2015	04-12-2017	1359/KEP.GUB/ BKD-4.2/2019	27-12-2018	31-12-2017
12.	Wahyudi, AS, SH 19740212005011005 (III/a)	PN Jambi, No. 28/ Pid.sus-TPK 2017	04-12-2017	1361/KEP.GUB/ BKD-4.2/2019	27-12-2018	31-12-2017
13.	Mulyadi 197606031998031001 (III/a)	PN Jambi, No. 31/ Pid.sus-TPK 2017	10-12-2017	1362/KEP.GUB/ BKD-4.2/2019	27-12-2018	31-01-2018
14.	Ir. Akhdjady 196008261986031005 (IV/d)	PN Jambi, No. 39/ Pid.sus-TPK 2017	02-04-2018	303/KEP.GUB/ BKD-4.2/2019	21-03-2019	30-04-2018
15.	Naksabandi, S.Pi 197010091998031004 (IV/a)	PN Jambi, No. 42/ Pid.sus-TPK 2017	02-04-2018	304/KEP.GUB/ BKD-4.2/2019	21-03-2019	30-04-2018
16.	DS Tarigan Tua, S.Pi 198009172010011005 (III/b)	PN Jambi, No. 41/ Pid.sus-TPK 2017	02-04-2018	305/KEP.GUB/ BKD-4.2/2019	21-03-2019	30-04-2018
17.	Drs. Erwan Malik, MM 196203091983031001 (IV/d)	PT Jambi, No. 3/ Pid.sus-TPK/2018	10-07-2018	1355/KEP.GUB/ BKD-4.2/2019	27-12-2018	31-07-2018
18.	Saipudin, A.Mk, SE, MH 196408121985011001 (IV/c)	PT Jambi, No. 2/ Pid.sus-TPK/2018	10-07-2018	1356/KEP.GUB/ BKD-4.2/2019	27-12-2018	31-07-2018
19.	Arlan, ST, MM 196307291985031004 (IV/a)	PT Jambi, No. 1/ Pid.sus-TPK/2018	10-07-2018	1357/KEP.GUB/ BKD-4.2/2019	27-12-2018	31-07-2018

Source: Jambi's Provincial Secretariat Legal Bureau

Fig. 1. Number of PTDH civil servants of Jambi Provincial Government after the issuance of three institution SKB

No	Name/NIP/Gol	Court ruling <i>Incracht</i>		Decision of PPK PTDH PNS		
		Decision number	Date	Decision number	Date	TMT
Category I (Before the coming into force of the ASN Law)						
1.	Rizon Willadi, SE 196503201986031006 (III/d)	PN TJT, No. 24/ Pid. sus/ 2011/PN.TJT	12-09-2011	580 Th 2018	28-08-2018	28-08-2018
2.	Parno, S.H 196007071986031010 (III/d)	PN TJT, No. 23/ Pid.sus/PN.TJT/2011	15-09-2011	568 Th 2018	28-08-2018	28-08-2018
3.	Haviz 196308181989011002 (III/b)	MA, No. 2475/K/ Pid.Sus/2011	21-02-2012	569 Th 2018	28-08-2018	28-08-2018
4.	Azhar Asari, SE 197810032008011002 (III/a)	MA, No. 2475/K/ Pid.Sus/2011	21-02-2012	570 Th 2018	28-08-2018	28-08-2018
5.	Abd. Manan, S.Pd 196501081986021003 (III/d)	PT Jambi, No. 2477 K/Pid.sus/ 2011	18-04-2012	579 Th 2018	28-08-2018	28-08-2018
Category II (After the coming into force of the ASN Law, Before the entry into force of PP No. 11/2017)						
6.	M. Nur Yusuf, A.Pi 196410091991031004 (IV/a)	PN TJT, No. 29K/ Pid.sus/TPK/2013	21-02-2014	571 Th 2018	28-08-2018	28-08-2018
7.	Satrio, S.Pi 198704102009031002 (III/a)	PN TJT, No. 31K/ Pid.sus/TPK/2013	21-02-2014	572 Th 2018	28-08-2018	28-08-2018
8.	Ir. Sabri, MMP 196404011992031009 (IV/c)	PN TJT, No. 30K/ Pid.sus/TPK/2013	21-02-2014	573 Th 2018	28-08-2018	28-08-2018
9.	Ramalfi Abadi, S.Pi 196805260202121004 (III/d)	PN TJT, No. 42/ Pid.sus/TPK/2013	06-05-2014	574 Th 2018	28-08-2018	28-08-2018
10.	M. Bana, SE 196112311986031117 (III/d)	PN TJT, No. 7/ Pid.sus-TPK/2014	18-07-2014	575 Th 2018	28-08-2018	28-08-2018
11.	Muh. Asyad 198107022007011006 (II/b)	PN TJT, No. 31/ Pid. sus-TPK/ 2014	02-02-2015	576 Th 2018	28-08-2018	28-08-2018
12.	Hasuni, SE 196505192000031002 (IV/a)	PN TJT, No. 36/ Pid. sus-TPK/ 2015	03-02-2015	577 Th 2018	28-08-2018	28-08-2018
13.	Heri Yusnaldo, ST 198306232010011014 (III/b)	PN TJT, No. 37/ Pid. sus-TPK/ 2015	03-02-2016	578 Th 2018	28-08-2018	28-08-2018
Category III (After the coming into force of the ASN Law and PP No. 11/2017)						
14.	Heri Widodo, S.Pd 196909291988031007 (IV/b)	PN Jambi, No. 2/Pid. Ssus/ TPK/2018	23-04-2018	590 Th 2018	28-08-2018	30-08-2018

Source: BKPSDM Tanjung Jabung Timur Regency

Fig. 2. Number of PTDH as PNS East Tanjung Jabung Regency Government after the issuance of three SKB agencies.

Based on the data in the table above, there are 3 categories of PTDH as PNS,

1. Category I: namely civil servants who were dismissed with no respect based on PBHT decisions that occurred before the enactment of the ASN Law, as many as 9 PNS.
2. Category II: namely civil servants who commit crimes of positions after the enactment of the ASN Law, but

before the enactment of PP No. 11/2017 about Management of PNS, as many as 11 PNS.

3. Category III: Civil Servants who commit crimes of positions after the enactment of the ASN Law and PP No. 11/2017, as many as 13 civil servants.

2) *PPK's decision to reactivate category I civil servants:*

Observing the case of Category I civil servants, several legal actions have been taken by the PPK against the relevant civil servants. For example in the Haviz case against the Regent of Tanjung Jabung Timur (Tanjung Timur). The plaintiff in his lawsuit explained the following matters:

1. On February 21st 2011, the plaintiff was found guilty of committing a criminal act of corruption based on the PBHT ruling, namely the verdict of the Supreme Court No. 2475K/Pid.sus/2011 and sentenced to one year in prison and a fine of Rp. 50,000,000.
2. During the detention period, the PPK issued a Temporary Termination Order against the plaintiff through the decision of Tanjung Timur's Regent No.229/2013 about Temporary Termination from occupation of civil servant.
3. After serving his detention term, on October 25th 2013 the PPK issued a decree on the activation of civil servants through the decree of Tanjung Timur's Regent No. 434/2013 regarding revocation of decree No. 229/2013 about temporary dismissal of civil servants' position and activation of civil servants.
4. On August 28th 2018, PPK issued decree of Tanjung Timur's Regent No. 569/2018 regarding dishonorable discharge as civil servants in the district of Tanjung Timur regency on behalf of Haviz [21].

Based on the facts and legal events above, the legal questions are: First, whether PPK Decree No. 434/2013 which reactivates these civil servants can be categorized as a valid decision? Second, whether the implementation of PTDH PNS can be justified based on statutory regulations and AUPB?

a) *The validity of PPK's decision to reactivate category I civil servants:* It has been stated that PPK's decision to reactivate civil servants who have finished serving prison sentences for committing criminal offenses prior to the enactment of the ASN Law, departs from the interpretation and legal conviction at that time where honorably discharged, or dishonorably discharged at their own request, or not discharged with or without being subjected to disciplinary action, is highly dependent on the assessment and consideration of the factors that encourage the civil servants concerned to commit the crime, as well as the severity of the court's decision which were handed down (see the description above). Based on these legal beliefs, the PPK's decree to reactivate civil servants who have finished serving their sentences for committing criminal offenses is legally valid. Accordingly, in accordance with the presumption of *rechtmatige* or *presumptio justea causa*, the decree shall remain in effect until it is over or revoked by the authorized Government Official [22]. In the construction of Article 33

paragraph (3) of UU AP, the revocation of the decree can be made by the Officer who issued the decree or the Official Superior. The existence of principle of *rechtmatige* presumption in the procedural law of the Peratun is also recognized, in the sense that the decree of the Government Official must always be considered true and valid before a court with permanent legal force state that the decree is invalid.

The legal problem is, in the Decree of Tanjung Timur's Regent No. 569/2018 about PTDH PNS on behalf of Haviz there is no dictum that revokes Decree of Tanjung Timur's Regent No. 434/2013 concerning activation of plaintiff's civil servants. The same thing happened to all PTDH PNS of Category I civil servants in other regions. The non-repeal of the PPK's decree which reactivates civil servants has created legal uncertainty and is contrary to the presumption of *rechtmatige*. On the one hand, there is the issuance of PTDH PNS, but on the other hand, the Decree on the re-relocation of PNS has never been revoked, so both of the Decrees are equally valid. These conditions indicate that PPK, in issuing PTDH PNS has violated the principle of accuracy [23] and is in conflict with Article 33 paragraph (2) of UU AP.

What about the case with judicial review in Peratun? Based on the results of a review of PTUN Jambi's Decision which tried the PTDH Category I lawsuit, there was not a Panel of Judges who examined or questioned this [24]. The same thing generally happens at the appeal level and the cassation level. This initial error caused judicial legal considerations to occur jumping conclusions and conclusions that were too forced [25], so that the decision no longer found substantive justice and was not in accordance with the values and sense of justice of the community.

3) *Retroactive AP and PP Law No. 11/2017 in the case of PTDH as civil servants category I:* In general, the main objections raised by Category I Plaintiffs are the retroactive application of the ASN Law (Article 87 paragraph (4) letter d) and PP No. 11/2017 (Article 250 letter b) which is used as a legal basis by the Defendant to dismiss not with respect for the Plaintiff. The Plaintiff's objections among others:

1. That, the legal basis used by the defendant for Dishonorable discharge of defendant The Plaintiff is based on the provisions of Article 87 paragraph (4) letter d of the ASN Law and Article 250 letter b PP No. 11/2017 about Civil Servants Management. The new ASN Law came into force on January 15, 2014, and PP No. 11/2017 was only promulgated on March 30, 2017. Meanwhile, fourth discussions about the law that occurred to you Plaintiff (see the description above) occurred before the enactment of the ASN Law and PP No. 11/2017, while at that time about the law regulated by the PPK Law.

2. Related to the retroactivity of the provisions of the ASN Law and the provisions of PP No. 11/2017 has been violated the principle of retroactive (the law may not apply retroactively), which is very contrary to the provisions of Article 28I paragraph (1) of the 1945 Constitution which states that retroactive laws are "*The right not to be*

prosecuted based on retroactive laws is a human right that cannot be reduced under any circumstances".

3. The retroactivity of the provisions of the ASN Law and PP No. 11/2017 also contradicts the principle of legal certainty [21].

Against the Plaintiff's object above, the Judge's Assembly rejected the Plaintiff's argument with the following considerations:

1. That Law No. 43/1999 concerning Personnel Principles based on Article 139 of the ASN Law has been revoked and declared invalid. Thus, it is appropriate to use the provisions of the ASN Law and PP No. 11/2017 in a quo case

2. That in the State Administrative Law the principle of legality is not enforced absolutely. Article 58 paragraph (6) of the AP Law which states: *"Decisions cannot be applied retroactively, except to avoid greater losses and / or neglect of the rights of citizens."*

3. Whereas the stipulation of PTDH for the Plaintiff, according to the Panel of Judges was appropriate because the issuance of the Decree of the object of the dispute was based on the legislation in force while the criminal decision with a permanent legal force in 2012 was used as a basis for consideration of the object of the dispute of the object of the dismissal not respectfully by the Plaintiff.

4. That the Plaintiff has never been imposed with an administrative employee affair sanction regarding the existence of a criminal decision that has permanent legal force, even though it has finished implementing the criminal law [27].

Judge's consideration to reject the Plaintiff on the grounds that the PPK Law was repealed by the ASN Law and approved using the ASN Law and PP No. 11/2017, and the Plaintiff has never been subjected to a personnel administration policy, which is a serious policy in violation of the State Administrative Court program, such as the principle of extunc question. The principle of extinct testing requires that the Panel of Judges only pay attention to the facts, policy framework, and legal conditions at the time. The fact that was not considered by the Panel of Judges was that although the Plaintiff had committed a crime of office based on the PBHT Decision, it was in accordance with the interpretation and legal conviction of the meaning of Article 23 paragraph (5) in Law No. 43/1999, PPK has issued the Plaintiff's Reactivation Decree as a civil servant. This is what should be examined by the Panel of Judges, whether the Plaintiff's Reactivation Decision is in accordance with or not in accordance with Article 23 paragraph (5) of Law No. 43/1999, not test it with the provisions in the ASN Law and PP No. 11/2017. Moreover, the Plaintiff's Reactivation Decree was never revoked by the Defendant. Judges, they should act fairly, and don't act to deny the reality of differences in interpretation of PTDH PNS in Law No. 43/1999 with UU ASN and PP No. 11/2017.

Not only does the ex post facto law of Indonesia's Civil Servant Law and Indonesia's Government Regulation number 11/2017 towards the law that is proposed in Indonesia's Legislation number 43/1999 contradict with The 1945 State

Constitution of Indonesia in article 28I chapter one, it is also against The General Principle of Good Governances (Asas-asas Umum Pemerintahan yang Baik) in Indonesia, namely:

a) It contradicts the principle of legal certainty: The Principle of Legal Certainty is one of the most fundamental principle in The General Principle of Good Governances that needs to be used by governments as a guideline before making the decision. This principle is used in state law that is prioritising in the provisions of law regulation, the appropriateness, the regularity, and the justice in every regulation of government administration [26]. In Administrative Law Doctrine, the principle of legal certainty can be divided into two terms, which are in terms of material and in terms of formal. As for terms of material, this principle wants legal certainty in terms of: *First*, respecting the rights that are acquired by someone based on government decision, and that decision cannot be revoked even if there is a small deficiency in that decision. In first category dishonorable discharge of civil servants case, the rights that they receive will be activated again, thus, they will be inaugurated as civil servants once again by Commitment-Making Official or CMO (Pejabat Pembuat Komitmen). *Second*, a decision that has been made by the government cannot be applied towards specific things, primarily towards things that can harm the receiving party [27]. While in terms of formal, this principle wants the decision of State Administrative should be based on strong, straightforward laws and regulations in Indonesia, which means that every State Administrative decision should be made clearly without any ambiguous words [28].

The Legal Certainty principle in Administrative Law is relatable with The Legal Principle of Criminal Law. According to Indonesian Criminal Code (article 1, chapter 2), if a convicted has done something and there is a change in laws and regulations, The Supreme Court should use the law that alleviate the most the convicted' penalty. While van Genus (as cited in Indonesian Criminal Code article 1, chapter 2) stated that "there is a change in law belief of the policymakers." [29].

As it is mentioned above, the law belief of CMO that reinstating a civil servant who has served his/her sentence is appropriate with Indonesia's legislation number 43/1999, which gives discretion towards CMO. This law belief is also supported by government's policy which is firmly accommodated this occurrence, that also has never been discussed by the government or even the law enforcement. Thus, the dishonorable discharge to civil servants who have committed crime before the validation of Indonesia's legislation of civil servants that has been validated by CMO, is contrary to the principle of legal certainty.

b) It contradicts with the principle of trust and hope: The Principle of Trust and Hope, as a part of The General Principle of Good Governances that forbid officials (specifically governments) to validate retroactive law or ex post facto law towards certain objects, particularly will be detrimental to the receiving party. The CMO's decision regarding the inauguration of the convicted civil servants with

the law belief in the past has created a trust and hope from the civil servants who have been inaugurated. This trust and hope that has been given to the convicted civil servants cannot be revoked anymore, even if there is a mistake on it [27].

If the principle of legal certainty and the principle of trust and hope are not held closely, then the government has changed into authoritarian figure in a country. There will be no more achievements that can be proud of if the government implements first category dishonorable discharge of civil servants. As Eddy O.J Hairier said, "do not utilize the legislation of corruption as *lex talionis*, or as a revenge law, because it is not applicable with the paradigm of modern criminal law as it mentioned in United Nation convention regarding anti-corruption that is implicitly adhered corrective, rehabilitative, and restorative justice [29]. The implementation of corruption legislation as *lex talionis* is conducted by creating stigma where the reinstated civil servants have caused financial loss to the state, or they are not working but getting paid by the state [30]. In fact, they have done well accordingly to their responsibilities as civil servants. Due to this perspective, the principle of benefit that is conducted by Romli towards criminal laws that are based on *Pancasila* (the principle where there is no sentence without a crime, and there is no crime without benefit), needs to be considered. The criminal laws that are based on *Pancasila* are the appropriate laws that can create a peaceful life and less conflict [31].

c) *It contradicts with the principle of equality:* The Principle of Equality seeks a condition where an officer needs to take an equal decision while facing equal cases and facts. If the decision of reinstating the convicted civil servants is considered contrary with Indonesia's legislation number 43/1999 article 23 chapter 5, there will be administrative penalty in forms of dishonorable discharge of civil servants, not only for first category civil servants, but also for: First, the CMO who reinstates the first category civil servants. According to The Legislation of State Administration, the CMO commits violation to The Legislation of State Administration article 8 chapter 2, where the CMO is not using authority based on Indonesia's legislation and The General Principle of Good Governance, which can be given minor administrative penalty. Second, high-rank CMO officers, who do not revoke or cancel the CMO decision in reinstating first category civil servants. Based on The Legislation of State Administration article 64 chapter 1 and article 66 chapter 1, the high-rank CMO officers have rights to revoke or to cancel the CMO decision in reinstating civil servants if there is authority flaw, procedural flaw, and/or substantial flaw in that decision. Ignoring this phenomenon can be categorised as a violation to The Legislation of State Administration article 8 chapter 2, which is not using authority based on the Indonesia's Legislation and The General Principle of Good Governance, which can be given minor administrative penalty. Third, giving administrative penalty to Indonesian Ministry of Administrative and Bureaucratic Reform that publishes Circular Letters number SE/03/M.PAN/4/2007 and to Indonesian Ministry of Home Affairs that publishes Circular Letters number 800/4329/SJ.

4) *The retroactive validation of dishonorable discharge decision of civil servants:* Based on the data, from 35 civil servants who have been discharged dishonorably, there are 6 civil servants that commencing from their discharge that are given retroactive to their discharged decision. The discharge of these 6 civil servants happens in Jambi Provincial Government, while in East Tanjung Jabung regency, all of the discharges are valid based on the commencing date, as it is informed in the figure below:

No	Name	Date of decision	Date of discharge	Commencing date	Retroactive	Category
1	Drs. Ramlan, KS	14-12-2010	27-12-2018	31-12-2010	96 mo	I
2	Zulfahmi	06-03-2017	27-12-2018	31-03-2017	21 mo	II
3	Drs. Asvan Deswan, M.Si	07-06-2017	27-12-2018	30-06-2017	18 mo	III
4	Novri Hasan, SH.MP	04-12-2017	27-12-2018	31-12-2017	12 mo	III
5	Wahyudi, AS, SH	04-12-2017	27-12-2018	31-12-2017	12 mo	III
6	Mulyadi	10-12-2017	27-12-2018	31-12-2017	12 mo	III

Source: Processed data

Fig. 3. The retroactive of dishonorable discharge decision based on the commencing.

The implication of this retroactive validation results that there will be an obligation for the discharged civil servants to give back their income since the commencing date of the validation of this dishonorable discharge decision. As an illustration, if Raman receives an income of 8 million rupiahs, with the period of employment of 30 years, he needs to return the money multiply with his work period, which is 96 months, worth of 768 million rupiahs. So how does Indonesian Judge's Council react to this occurrence?

In Raman's case (plaintiff) against Jambi Governor (defendant), Jambi's State Administrative refused the lawsuit given by the plaintiff. However, the decision released by the Judge's Council is inconsistent or controversial, so to speak. On one of Judge's consideration, the Judge's Council stated boldly that the plaintiff's decision where he delayed the commencing date of the dishonorable discharge towards the plaintiff himself (31st December 2010) was contrary to The Legislation of State Administration article 57 and 58 chapter 6. Judge's Council also stated that validating a retroactive of State Administration Decision can trigger a risk in violating law, which is related with the actions and/or decisions made by the plaintiff [32]. Yet on the other consideration, the Judge stated differently:

Considering that because of the dispute of a quo by the plaintiff is not against the valid Legislation and also applicable to The General Principle of Good Governance, thus The Judge's Council is convinced that the lawsuit has no sufficient reason and basis in law and **the lawsuit should be dismissed** [32].

Contradicted with Jambi State Administrative Court decision number 11/2019/PTU-JBI, in general the retroactive validation of the commencing date towards dishonorable discharge of civil servants can be dismissed by the Judge (judges fact), with some considerations of:

1. The retroactive validation is against The 1945 State Constitution of Indonesia article 28I chapter 1 that says, "*right to live, right to not be tortured, right of independence mind and conscience, right to choose religion, right to not be enslaved, right to be accepted as a person by the law, and right to not be accused*

based on the valid constitution that is retroactive are human rights which cannot be reduced in any circumstances."

2. Based on the legislation article 57 and 58 chapter 6, it can be inferred that the decision is valid in the commencing date, and there is no retroactive.
3. Based on the legislation article 252 number 11/2017 that said, *"The discharge, as it mentioned in article 250-chapter b and d and also article 251, is determined by the commencing at the end of the month since the judge's decision toward the case which has a permanent legal force"* is sidelined by The Legislation of State Administration article 57 and 58 chapter 2 [33].

All of the considerations utilized by the Judge's Council work accordingly with the Indonesian Legislations.

5) *Purification of dualism in decision on case of testing verdict, dishonorable discharge as PNS:* Based on the decision data published by the Supreme Court, a lawsuit on PTDH PNS Decree has not yet been found after the enactment of the ASN Law which was won by the Plaintiff. Even if at the judex facti level the lawsuit was granted, at the judex juris level the MA jurist still had trump card to rescind the case using the provisions of Article 2 letter e of the PTUN Law which states: Not included in the KTUN definition under this Law: e. KTUN issued on the basis of the results of judicial review on the basis of the applicable provisions.

The Supreme Court quite often uses the reason PTDH PNS does not include the competence of PTUN to try it because it is included in Article 2 letter e of the PTUN Law. For example, MA Decision No. 175 K / TUN / 2018 in the Syamsuddin Fei case against the Governor of South Sumatra. At the first level, the Plaintiff's claim was granted by the Palembang Administrative Court with approval of the retroactive application of the PND PTDH Decree which came into force against the applicable laws and regulations and the AUPB (see discussion of letter c). At the Appeal level, PT TUN Medan upheld the Decision of the Palembang PTUN. Although in this case the Defendant did not submit an exception to Article 2 letter e, the Supreme Court still returned the Decision of PT TUN Medan with consideration:

Consider that based on the reasons for the cassation, the Supreme Court is of the opinion:

Consider, that based on the reasons that can be justified, because the *Jude Facti* Medan State Administrative Court has erroneous and wrong in using the law with the following considerations:

That the Administrative Decree of the object of dispute is issued as a follow-up to the Decision of the Corruption Crime Court, namely the Decision of the Palembang District Court Number 44/Pid.Sus-TPK/015/PN which have a permanent legal force so that according to article 2 letter e of UU Number 9 year 2004, the claims in the State Administrative Court must be declared unaccepted [34].

On the other hand, in cases where a lawsuit is rejected or not accepted at the judex facti level, the MA does not use the "trump card" Article 2 letter e, even though the Defendant uses Article 2 letter e as an exception. As an example is Supreme Court's Decision No.40K/TUN/2019 in the case of Drs. H. Zulfikar against the Regent of Berau. At the judex facti level, the Plaintiff's claim was rejected by the PTUN Samarinda and PT TUN Jakarta. At the cassation level, the Supreme Court still requests the Plaintiff's appeal, but the Supreme Court does not question the defendant's exception about article 2 letter e. In its consideration, the Supreme Court stated:

Consider that based on the reasons for the cassation, the Supreme Court is of the opinion:

Consider, that these reasons cannot be justified, the Jude Facts verdict is correct and there are no errors in the application of the law, with the following considerations:

That the issuance of the disputed object is correct, based on the provisions of Article 87 paragraph (4) letter b of Law Number 5 of 2014 concerning State Civil Apparatus in conjunction with Article 250 letter b of Government Regulation Number 11 of 2017 concerning Management of Civil Servants, Plaintiffs are sentenced to criminal imprisonment for 1 (one) year is appropriate if terminated not respectfully as a Civil Servants. Therefore, the Plaintiff's claim has been declared to be completely rejected [35].

Dualism of Case Decisions on Testing PTDH PNS Decisions at the judge Juris level has a negative impact. First, the development of administrative law whose foundation has been laid in the AP Law has become undeveloped and even tends to be ignored. Debate and argument at the judex fact level regarding PTDH decisions of civil servants that are considered to be disorderly administration (delays in issuance of PTDH PNS at the end of the month since the decision of PBHT), do not create legal certainty (PTDH PNS Decision Category I), stimulating arbitrary actions (SKB Tiga Institution), becomes meaningless when the Supreme Court uses the "trump card" provisions of Article 2 letter e of the PTUN Law. Second, ignoring AUPB in issuing Decrees. Third, there is a strong tendency to grant PTDH PNS claims at the judex Juris level to something "taboo" done. In fact, one of the main objectives of the issuance of the AP Law is to provide legal protection to government officials (Article 3 letter c of the AP Law). This goal should be the goal that must be realized by the Supreme Court considering that in the past there was often a "criminalization of position or policy" to the government apparatus. In fact, according to Dian Puji in her dissertation, 72.7% of the cases which were supposed to be administered were all criminalized (Corruption). That is because everything is wrongly related to someone's right or wrongly regarding the laws and regulations and then wrongly applies the law, it turns out that it is also criminalized [36].

IV. CONCLUSION

Based on the description above it can be concluded:

Based on the original intend legislators UU No. 43/1999, interpretation of the Government, and interpretation of the legal norms of PTDH PNS who commit criminal act of crime under Article 23 of Law No. 43/1999, the enforcement of administrative sanctions unnecessary be dismissed with no respect as a civil servant, but rather being a PPK discretion. PPK which assesses and considers whether to be dismissed with no respect, dismissal with respect not at its own request, or not to be dismissed with or without a discipline action by taking into account the factors that encourage civil servants to do so and pay attention to the severity or floaty of criminal penalties imposed.

Based on the result of a study of the judge's decision on the lawsuit of PTDH PNS that to commit the criminal act of office crime offense before the enactment of the ASN Law, there is an inconsistency and dualism of the judge's decision. The inconsistencies were reflected in the judges' decision in the case of PTDH Category I civil servants, among others: (a) none of the Panel of Judges tested the PPK Decision which reactivated the PNS which was a valid decision under Law No. 43/1999; (b) misunderstanding in interpreting the norms of PTDH PNS based on Article 23 of Law no. 43/1999 and put the principle of legality in accordance with its essence, namely in the event that there is a change in legal confidence in the legislators, the most beneficial rules for civil servants are used. The dualism of judges' decisions is reflected in the Supreme Court's Decisions. Some think that PTDH PNS decisions are based on PBHT decisions, not PTUN's competence to adjudicate them and some others think PTUN has the authority to adjudicate the object of PTDH PNS Decisions.

REFERENCES

- [1] Medan Tribun, "Jumlah PNS terpidana korupsi di Indonesia," [Online] Retrieved from: <http://medan.tribunnews.com/2018/09/15/sumut-jawarajumlah-pns-terpidana-korupsi-di-indo-nesiadipecat-paling-lambat-desember-2018?page=all>, accessed 09-02-2019.
- [2] Republik Indonesia, Surat Keputusan Bersama Mendagri, Menpan RB, dan Kepala BKN Nomor 182/6597/SJ, Nomor 15 Tahun 2018, dan Nomor 153/KEP/2018 tentang Penegakan Hukum Terhadap PNS yang Telah Dijatuhi Hukuman Berdasarkan Putusan Pengadilan yang Telah Berkekuatan Hukum Tetap Karena Melakukan Tindak Pidana Kejahatan Jabatan atau Tindak Pidana yang Ada Hubungannya Dengan Jabatan.
- [3] MKRI, Putusan Mahkamah Konstitusi Nomor 87/PUU-XVI/2018.
- [4] Republik Indonesia, Surat Deputi Bidang Pencegahan KPK melalui Surat Nomor: B-1213/KSP.00/10-16/03/2018 perih Koordinasi Bersama terkait Pengawasan dan Pengendalian Kepegawaian
- [5] Nurmalita Ayuningtyas Harahap, "Revitalisasi Manajemen Aparatur Sipil Negara Melalui Pemberhentian Tidak Dengan Hormat Bagi Pegawai Negeri Sipil Yang Terlibat Tindak Pidana Korupsi", *Jurnal Panorama*, Vol. 3 No. 2nd of December 2018, pg. 155-170.
- [6] Wirza Fahmi, "Kedudukan Pegawai Negeri Sipil Yang Diberhentikan Secara Tidak Hormat Karena Melakukan Tindak Pidana Kejahatan Jabatan," *Syiah Kuala Law Journal*, Vol. 1 No. 1st of April 2017, pg. 246-265.
- [7] I.K. Munthe, "Analisis Yuridis Tindak Pidana Korupsi Yang Dilakukan Oleh Aparatur Sipil Negara Ditinjau Dalam UUNomor 5 Tahun 2014 Tentang Aparatur Sipil Negara," *Jurnal Hukum Kaidah*, Vol. 17 No. 2, pg. 14-20, 2018.
- [8] MARI, Putusan MA Nomor 01/K/TUN/2012.
- [9] CNB Indonesia, "Pemerintah pecat 1906 PNS korup dengan tidak hormat," [Online] Retrieved from: <https://www.cnbcindonesia.com/news/20190813152746-4-91692/pemerintah-pecat-1906-pns-korup-dengan-tidak-hormat>, accessed on 10th of September 2019.
- [10] S.N.H. Susanto, "Karakter Yuridis Sanksi Hukum Administrasi: Suatu Pendekatan Komparasi," in *Administrative Law & Governance Journal*, Vol.1 2 Issue 1, March 2019, 126-142.
- [11] Public Administration Act Europe Union, Chapter IX : Administrative sanctions, (Section) 43 (Scope), Act Relating to Procedure in Cases Concerning the Public Administration
- [12] Republik Indonesia, Peraturan Pemerintah Nomor 48 Tahun 2016 tentang Sanksi Administratif Kepada Pejabat Pemerintahan.
- [13] Philipus M. Hadjon, "Penegakan Hukum Administrasi Dalam Pengelolaan Lingkungan Hidup," *Jurnal Yuridika*, No. 1, 1996, pp. 136.
- [14] W. Riawan Tjandra, *Hukum Administrasi Negara*, Sinar Grafika, Yogyakarta, 2018, pg. 218.
- [15] Kompas, Mantan Koruptor Jadi Pejabat, Menpan Buat Surat Edaran, published 16th October 2012.
- [16] Kompas, Mantan Koruptor Jadi Pejabat, Menpan Buat Surat Edaran, 16th October 2012.
- [17] Republik Indonesia, Surat Edaran Mendagri Nomor 800/4329/SJ tanggal 29 Oktober Perihal Pengangkatan PNS Kembali Dalam Jabatan Struktural.
- [18] Article 23 paragraph (4).
- [19] Anti Korupsi, "lampiran siaran pers komitmen pemberantasan korupsi," [Online] Retrieved from: https://antikorupsi.org/sites/default/files/lampiran-siaran-pers-icw-komitmen_pemberantasan_korupsi.pdf, diakses tanggal 12 September 2019.
- [20] Kabupaten Bangka Barat, [Online] Retrieved from: <http://portal.bangkabaratkab.go.id/aggregator/sources/6>, diakses tanggal 12 September 2019.
- [21] MARI, Putusan PTUN Jambi Nomor 25/G/2018/PTUN.JBI.
- [22] Article 33 paragraph (2) UU AP.
- [23] Elucidation of Article 10 letter d of the AP Law.
- [24] Mahkamah Agung, [Online] Retrived from: <https://putusan.mahkamahagung.go.id>.
- [25] Jonaedi Efendi, *Rekonstruksi Dasar Pertimbangan Hukum Hakim*, Prenamedia Group, Jakarta, 2018, pg. 250-251.
- [26] Pasal 10 UU AP.
- [27] S.F. Marbun, *Pemerintahan Berdasarkan Kekuasaan dan Otoritas*. *Jurnal Hukum IUS QUIA IUSTUM*, vol. 3, no. 6, pp. 28-43, 1996.
- [28] C.S. Pratiwi, *Penjelasan Hukum Asas-Asas Hukum Pemerintahan Yang Baik*, Judicial Sector Support Program, Jakarta, 2016, pg. 115.
- [29] O.S. Eddy, Hiariej, *Prinsip-Prinsip Hukum Pidana*, Edisi Revisi, Cahaya Atma Pustaka, 5th edition, 2016, pg. 85.
- [30] BBC, "gaji PNS Rp10 juta setiap bulan," [Online] retrieved from: <https://www.bbc.com/Indonesia/indonesia-47027532>, diakses tanggal 15 September 2019.
- [31] Romli Atmasesmita, *Rekonstruksi Asas Tiada Pidana Tanpa Kesalahan*, Jakarta: Gramedia, 2017, pg. 213-216.
- [32] MARI, Putusan PTUN Jambi No.11/2019/PTU-JBI, pg. 48-49. Retrieved from: [https:// putusan.mahkamahagung.go.id](https://putusan.mahkamahagung.go.id).
- [33] See MARI: (1) Putusan PTUN Padang, No.6/G/ 2018/PTUN.PDG, pg. 59-67; (2) Putusan PTUN Palembang, No.43/G/ 2017/PTUN.PLG, pg. 40-42; Retrieved from: <https:// putusan.mahkamahagung.go.id>
- [34] See MARI, Putusan MA No.510 K/TUN/2015, pg.4-5. Retrieved from: <https://putusan.mahkamahagung.go.id>.
- [35] See MARI, Putusan MA Nomor 560 K/TUN/2018, pg. 4. Downloaded from <https:// putusan.mahkamahagung.go.id>.
- [36] Putusan MK No. 25/PUU-XIV/2016 pg. 51.