

## The Neutrality of Civil Servants in The 2024 Elections: A Proportionality Test of Administrative Sanctions Against Civil Servants Political Rights

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### ABSTRACT

The neutrality of civil servants (Aparatur Sipil Negara/ASN) is a fundamental principle in ensuring fair and democratic elections in Indonesia. Despite clear regulations under the 1945 Constitution, the Civil Service Law, and the Election Law, violations of neutrality among ASN have persisted, raising concerns over the balance between bureaucratic impartiality and the political rights of civil servants. This study aims to analyze whether the administrative sanctions imposed on ASN for political involvement during the 2024 elections are proportionate to constitutional guarantees of political rights. Employing a normative legal research method with a statute, conceptual, and case approach, this paper examines relevant laws, constitutional provisions, and judicial decisions, including rulings from the Constitutional Court and Administrative Courts. The findings reveal that, while sanctions are necessary to preserve electoral integrity, their application often lacks proportionality, with dismissals for minor infractions highlighting inconsistencies and potential overreaching in the restriction of fundamental rights. The proportionality test, widely recognized in constitutional law, provides a valuable framework for assessing whether restrictions on ASN's political rights serve legitimate aims, are necessary, and remain proportionate. The study concludes that the proportional application of administrative sanctions, combined with more straightforward regulatory guidelines and stronger appeal mechanisms, is essential to uphold democratic values and protect civil servants' constitutional rights.

## 1. Introduction

General elections (elections) are the main instrument in realizing the principle of popular sovereignty as affirmed in Pasal one ayat (2) of the 1945 Constitution of the Republic of Indonesia (**UUD NRI 1945**). Elections are not only a procedure for selecting leaders but also a mechanism for political legitimacy in a constitutional democratic system, with electoral integrity

determining the social acceptance and legality of the results. (**Miriam Budiardjo, 2008**). The successful organization of elections depends heavily on the bureaucracy's neutrality. The State Civil Apparatus (ASN), as the backbone of state administration, must be neutral to ensure a fair and professional government. This principle is clearly regulated in Pasal 2 huruf f dan Pasal 9 ayat (2) Undang-Undang Nomor 5 Tahun 2014 tentang ASN, serta diperkuat oleh Pasal 280 ayat (2) Undang-Undang Nomor 7 Tahun 2017 tentang Pemilu.. (**Undang-Undang Nomor 5 Tahun 2014 tentang Aparatur Sipil Negara; Undang-Undang Nomor 7 Tahun 2017 tentang Pemilu**).

However, reality shows that ASN's neutrality is vulnerable to violation. Bawaslu's report recorded more than 1,500 violations of ASN neutrality in the 2019 elections. (**Badan Pengawas Pemilu Republik Indonesia, 2019**). The types of breaches varied, ranging from open support for candidate pairs to the use of state facilities to the dissemination of political content on social media. A similar phenomenon emerged again in the 2024 elections. (**Badan Kepegawaian Negara, 2024**). On the other hand, ASN also has political rights as a citizen, guaranteed by Pasal 28E ayat (3) UUD NRI 1945, including freedom of association, assembly, and expression, as well as the right to elect and be elected. (**UUD NRI 1945, Pasal 28E ayat 3**). This creates a normative dilemma between the obligation of bureaucratic neutrality and ASN's individual political rights. The question then arises: can restrictions on ASN's political rights through administrative sanctions be considered proportional to the goal of maintaining democracy? (**Jimly Asshiddiqie, 2005**).

Administrative sanctions for violations of ASN neutrality are regulated in various regulations, ranging from Government Regulation Peraturan Pemerintah Nomor 42 Tahun 2004 tentang Pembinaan Jiwa Korps dan Kode Etik PNS to Surat Keputusan Bersama (SKB) between KASN, BKN, KemenPAN-RB, and Bawaslu (2020). The forms of sanctions include reprimand, postponement of promotion, dismissal with honor or dishonor. This issue has become an object of dispute in the judiciary. For example, in the Makassar State Administrative Court Decision No. 38/G/2019/PTUN.Mks, an ASN, was returned to his position after being sanctioned for allegedly violating neutrality by attending a candidate pair declaration. However, the judge emphasized that the sanction was still valid as long as the procedure was upheld. (**Putusan PTUN Makassar Nomor 38/G/2019/PTUN.Mks**). In addition, Supreme Court Decision No. 41 P/HUM/2018 rejected a judicial review of the regulation prohibiting ASN from engaging in politics, because protecting election integrity is a greater public interest. (**Putusan Mahkamah Agung Nomor 41 P/HUM/2018**).

Furthermore, Constitutional Court Decision No. 41/PUU-XII/2014 emphasized that ASN may run for regional head but must resign from their position. (**Putusan Mahkamah Konstitusi Nomor 41/PUU-XII/2014**). The latest decision, Constitutional Court Decision No. 136/PUU-XXII/2024, states that state officials, regional officials, ASN, TNI/Polri, and village heads who are not neutral in regional head elections may be subject to criminal sanctions, including imprisonment or fines. (**Putusan Mahkamah Konstitusi Nomor 136/PUU-XXII/2024**). Support for this decision came from the House of Representatives and civil society, as a step toward improving the quality of democracy by ensuring direct, general, free, secret, honest, and fair elections (Luber-Jurdil). (**Antara, 2024**).

In the theoretical framework, the concept of proportionality is essential for assessing the extent to which restrictions on ASN's political rights can be justified. The proportionality test, which originated in German judicial practice and is now also adopted in Indonesian constitutional practice, requires four stages (**Christoph B. Graber, 2008**).

- a. legitimate aim,
- b. suitability,
- c. necessity or the need to choose the least restrictive alternative, and
- d. proportionality in strict sense, namely the balance between public benefit and individual harm.

The study of ASN neutrality in the 2024 elections is relevant both theoretically and practically. Theoretically, this issue highlights the tension between citizens' constitutional rights and the principle of bureaucratic professionalism in a democratic state of law. In practice, the results of this study are expected to provide input for policymakers so they can formulate regulations that are balanced, fair, and proportional between protecting democracy and fulfilling ASN's political rights.

## 2. Method

This research uses a normative legal research method that emphasises literature review, examining primary, secondary, and tertiary legal materials. (**Soerjono Soekanto & Sri Mamudji, 2015**). This method was chosen because the problems studied relate to applicable legal norms, both in the constitution, laws, and court decisions, as well as doctrines that have developed in the fields of constitutional law and state administrative law. Thus, this research focuses primarily on analysing legal texts rather than conducting empirical research.

The research design is descriptive-analytical. (**Peter Mahmud Marzuki, 2017**). The descriptive-analytical nature means that this research seeks to

provide a systematic and comprehensive description of the regulation of ASN neutrality in elections and an analysis of the proportionality of administrative sanctions imposed. This research not only stops at description but also provides legal analysis to assess the compatibility between applicable rules and the principles of political rights and democracy.

The approaches used in this research include the statute approach, the conceptual approach, and the case approach. The statutory approach is carried out by examining the provisions in UUD NRI 1945, Undang-Undang Nomor 5 Tahun 2014 tentang Aparatur Sipil Negara, Undang-Undang Nomor 7 Tahun 2017 tentang Pemilu, serta peraturan pelaksana terkait netralitas ASN. The conceptual approach is carried out by examining legal doctrines and theories that have developed regarding political rights, bureaucratic neutrality, and proportionality tests in modern constitutional law. (**Jimly Asshiddiqie, 2005**). Meanwhile, the case approach is carried out by reviewing relevant court decisions, including Constitutional Court Decision Number 41/PUU-XII/2014, Supreme Court Decision Number 41 P/HUM/2018, Constitutional Court Decision Number 136/PUU-XXII/2024, as well as several PTUN decisions related to sanctions against ASN that are deemed not neutral.

The sources of legal materials used include primary, secondary, and tertiary materials. Primary legal materials include applicable laws and regulations, as well as court decisions directly relevant to the research issue. Secondary legal materials include books, legal journals, scientific articles, and expert opinions in constitutional and administrative law. (**Miriam Budiardjo, 2008**). Meanwhile, tertiary legal materials are used to strengthen understanding of concepts, such as legal dictionaries and legal encyclopedias.

The collection of legal materials was conducted through library research, including tracing relevant literature in both print and electronic formats. Once collected, the legal material is analyzed using a qualitative, deductive method, namely by identifying general norms that apply in the Indonesian legal system to address specific issues regarding the proportionality of administrative sanctions against ASN in the 2024 Election. (**Peter Mahmud Marzuki, 2010**).

### 3. ASN Neutrality in the 2024 Election: Test of Proportionality of Administrative Sanctions against ASN Political Rights.

#### 3.1. ASN Neutrality Arrangements in the Indonesian Legal System

Neutrality of the State Civil Apparatus (ASN) is one of the fundamental principles in the modern bureaucratic system, especially in the context of

a democratic country like Indonesia. ASN neutrality means that every civil servant is obliged to maintain an impartial attitude, free from political intervention, and focus on the interests of public services. (**Agus Dwiyanto, 2002**). This principle is very important because a partisan bureaucracy will potentially become a tool of political power, thus disrupting the principles of fairness, equality, and integrity of elections.

Historically, the idea of bureaucratic neutrality in Indonesia began to strengthen since the reform era. During the New Order era, the bureaucracy tended to be co-opted by the political forces in power, where civil servants (PNS) were required to support Golongan Karya (Golkar) as the *government party*. (**Dwiyanto Indiahono, 2009**). This practice created unfairness in political contestation and weakened the bureaucracy's function as a public servant. Therefore, after the 1998 reform, there was a realization that bureaucratic neutrality is an absolute requirement for the implementation of a healthy democracy.

The main legal framework governing ASN neutrality is Law Number 5 of 2014 concerning the State Civil Apparatus (the "ASN Law"). Pasal 2 UU ASN Law states that the implementation of ASN policy and management is based on the principle of neutrality. (**Undang-Undang Nomor 5 Tahun 2014 tentang Aparatur Sipil Negara, Pasal 2**). Furthermore, Pasal nine ayat (2) emphasizes that ASN is prohibited from becoming a member and/or administrator of a political party. (**Undang-Undang Nomor 5 Tahun 2014 tentang Aparatur Sipil Negara, Pasal 9 ayat 2**). This norm imposes an explicit restriction on ASN's political rights, particularly the right to associate with political parties. In addition, Undang-Undang Nomor 7 Tahun 2017 tentang Pemilihan Umum strengthens the provisions on ASN neutrality. Pasal 280 ayat (2) huruf f of the Election Law prohibits state officials, structural officials, functional officials, and ASN from participating in campaign activities. This is emphasized by Article 494 of the Election Law, which provides that ASNs who violate campaign provisions may face criminal sanctions. Thus, election regulations place ASN neutrality as an integral part of an honest and fair election system.

To strengthen field implementation, various technical regulations were also issued. For example, Peraturan Pemerintah Nomor 42 Tahun 2004 tentang Pembinaan Jiwa Korps dan Kode Etik Pegawai Negeri Sipil stipulates that civil servants must uphold professionalism and must not abuse their positions for political interests. In addition, Peraturan Bawaslu Nomor 6 Tahun 2018 tentang Pengawasan Netralitas ASN provides guidelines for election supervisors in handling allegations of neutrality



violations. In practice, the supervision of ASN neutrality is also coordinated through a Joint Decree (SKB) between the State Personnel Agency (BKN), the State Civil Apparatus Commission (KASN), and Bawaslu, which outlines the types of neutrality violations and the corresponding administrative sanctions.

For example, ASN involvement in political declarations, attending campaigns, using social media to support specific candidates, and becoming a successful team. (**Surat Keputusan Bersama BKN, KASN, dan Bawaslu tentang Netralitas ASN dalam Pemilu, 2018**). The SKB is an essential legal instrument in filling the implementation void, although its legal status is often debated because it is not equivalent to a law or government regulation. Although the ASN neutrality regulation appears comprehensive, it raises normative issues that should be noted. First, restrictions on ASN's political rights are often seen as too broad, potentially reducing ASN's constitutional rights as citizens. Pasal 28D ayat (3) UUD NRI 1945 Constitution guarantees equal opportunities for every citizen in government, while Pasal 28E ayat (3) provides freedom of association, assembly, and expression.

Therefore, the question arises whether the total prohibition on ASN from participating in politics (including simply attending campaign activities) remains in line with the principle of proportionality in the limitation of human rights. Second, there are inconsistencies in the application of administrative sanctions. For example, some ASNs received only a light punishment, such as a reprimand, while others were dishonorably dismissed, even though the forms of violation were relatively similar. (**Nur Rachman Setiawan, 2019**). This creates an impression of injustice and opens the door to subjectivity in rule enforcement. Third, in the context of local politics, ASN neutrality is often problematic. ASN in the regions tends to be tied to the political dynamics of the regional head, making it difficult to distance themselves from practical political interests. (**Siti Zuhro, 2010**). This creates a dilemma between loyalty to political leaders and the obligation of neutrality as ASN.

Thus, although the legal framework in Indonesia is quite complete in regulating the neutrality of ASN, there are still serious challenges in the aspect of implementation and protection of ASN's constitutional rights. This is where the proportionality test is essential to assess whether the restrictions are legitimate, necessary, and balanced within the framework of a democratic state of law.

## 3.2. ASN Political Rights in the Perspective of Human Rights and the Constitution

Political rights are among the categories of human rights universally and constitutionally guaranteed. In the international framework, Article 21 of the 1948 Universal Declaration of Human Rights (UDHR) emphasizes that everyone has the right to participate in government, either directly or through freely elected representatives. **(United Nations, Universal Declaration of Human Rights, Article 21, 1948)**. This provision is reaffirmed in Article 25 of the 1966 International Covenant on Civil and Political Rights (ICCPR), which states that every citizen has the right and opportunity to take part in government, to vote and be elected, and to have equal access to public services. **(United Nations, International Covenant on Civil and Political Rights, Article 25, 1966)**.

Indonesia, as a state party to the ICCPR, has ratified the instrument through Undang-Undang Nomor 12 Tahun 2005 tentang Pengesahan ICCPR, thereby granting political rights binding recognition in national law. Thus, as a citizen, ASN also, in principle, has political rights guaranteed under international and national law. In the context of national law, the 1945 Constitution provides explicit guarantees regarding political rights. Pasal 28D ayat (3) states that "Setiap warga negara berhak memperoleh kesempatan yang sama dalam pemerintahan." In addition, Pasal 28E ayat (3) states that everyone has the right to freedom of association, assembly, and expression. **(UD NRI 1945, Pasal 28D ayat 3)** Furthermore, Pasal 28E ayat (3) affirms that everyone has the right to be free from discriminatory treatment on any grounds. These norms entail that, as a citizen, ASN has equal access to political rights with other citizens. However, in practice, ASN's political rights in Indonesia are significantly restricted. ASN is prohibited from becoming a member of a political party (Pasal 9 ayat (2) UU ASN), banned from participating in campaigns (Article 280 paragraph (2) letter f of the Election Law), and in some cases even subject to administrative sanctions up to dismissal if proven to show political favoritism. This restriction raises a juridical debate: to what extent can the state restrict ASN's political rights without violating constitutional and human rights principles?

In theory, restrictions on ASN's political rights can be justified on the grounds of maintaining bureaucratic neutrality, administrative efficiency, and preventing the politicization of public services. **(Jimly Asshiddiqie, 2005)**. This restriction is in line with the principle of *legitimate aim* in human rights law, where certain rights can be limited in the public interest. **(Manfred Nowak, 2005)**. However, problems arise when

restrictions are absolute, so that ASN's political rights are almost completely eliminated, except for the right to vote in the voting booth.

Some legal experts consider the restriction model in Indonesia to be too harsh compared to international standards. For example, in Germany, civil servants are still allowed to join political parties, as long as they do not abuse their public positions. (**Hans-Ulrich Derlien, 2003**). Similarly, in the United States, federal civil servants are subject to the 1939 *Hatch Act*, which prohibits them from using their positions for political purposes, but still allows them to join political parties or express personal views. (**John C. Fortier, 2006**). This means that Indonesia has opted for a more restrictive model, even approaching the partial elimination of ASN's political rights. From a *constitutional* perspective, this debate can be analyzed through *constitutional balancing* theory. On the other hand, ASN neutrality is a constitutional requirement to maintain electoral justice. In this case, the instrument of Pasal 28J ayat (2) UUD 1945 can be used as a basis for justifying restrictions, which states that in exercising their rights and freedoms, everyone must be subject to regulations stipulated by law to guarantee recognition and respect for the rights and freedoms of others, and to fulfill fair demands in accordance with moral considerations, religious values, security, and public order. However, the principle of proportionality is an important benchmark. Restrictions must fulfill three conditions: (**Aharon Barak, 2012**).

- a. legitimate aim, namely maintaining bureaucratic neutrality,
- b. necessity (restrictions are really necessary, not just rhetoric), and
- c. proportionality *stricto sensu* (restrictions are not excessive to the detriment of the essence of the right).

The question that arises is: does the total prohibition on ASN becoming a member of a political party, attending campaigns, or simply showing political support still fulfill the proportionality requirement?

Several studies confirm that restrictions that are too strict have the potential to harm the democratic system itself. ASN can become "second-class" citizens who lose most of their political rights, even though they still have obligations as taxpayers and part of the sovereign people. (**Nur Rohim Yunus, 2020**). In fact, according to the progressive view, ASN's political rights should only be limited to aspects that are directly related to the duties of their position, not removed entirely. (**Satya Arinanto, 2018**).

Thus, it can be concluded that the regulation of ASN's political rights in Indonesia reflects the tension between the principle of bureaucratic



neutrality and the constitutional guarantee of citizens' political rights. To be in line with the principles of human rights and the constitution, these restrictions need to be continuously tested through the proportionality test instrument, so that ASN can still enjoy its political rights reasonably without sacrificing the interests of bureaucratic neutrality.

### 3.3. Proportionality Test for ASN Administrative Sanctions in the 2024 Election

The application of the principle of proportionality to ASN administrative sanctions is important because it concerns the balance between the interests of maintaining bureaucratic neutrality and protecting ASN's political rights as citizens. In the doctrine of constitutional law, the principle of *proportionality* tests whether a limitation of rights is truly necessary (*necessity*), feasible (*suitability*), and balanced between the public benefits obtained and the harm caused (*proportionality stricto sensu*). (David M. Beatty, 2004).

In the context of the 2024 elections, several cases demonstrate the problematic application of the principle of proportionality. For example, an ASN in Kolaka Regency was honorably discharged, not at his own request, in 2019 because he was considered not neutral after uploading campaign content for one of the Presidential candidate pairs on social media. (State Civil Apparatus Commission, 2020). In fact, these actions are passive and have little impact on the election's course. However, the sanctions imposed in the form of dismissal indicate an imbalance between the violations committed and the legal consequences ASN has faced.

Another case occurred in Pamekasan Regency in 2020, when a civil servant teacher was dismissed for taking a photo with one of the regional head candidates and uploading it to social media. (East Java Bawaslu, 2021). The ASN argued that his presence was only due to attending a family event, but Panwaslih and BKD still interpreted it as a form of political support. This shows that the enforcement of ASN neutrality tends to use rigid standards without considering the social context, thus leading to a form of *over-restriction* of political rights.

If tested with the principle of proportionality, both cases pose serious problems. First, in terms of *necessity*, violations in the form of social media posts or presence in a photo with a candidate should be handled with light sanctions, such as a reprimand or written warning. Dismissal does not fulfill the element of necessity because there are alternative sanctions that are lighter and still effective. (Jimly Asshiddiqie, 2007). Second, in terms

of *proportionality stricto sensu*, dismissal results in losses that are far greater than the benefits obtained by the community, because the right to ASN employment and political rights are cut off only because of relatively minor political expression. This is contrary to the principle in Pasal 28D ayat (2) UUD NRI 1945, which affirms everyone's right to fair legal certainty, including in the field of employment.

The perspective of international human rights law also corroborates this analysis. Manfred Nowak states that restrictions on political rights must be transparent, proportional, and subject to judicial review. (Manfred Nowak, 2005). However, the current legal framework in Indonesia does not fully enable ASNs to challenge sanctions effectively. Administrative appeals are limited to the internal level of the bureaucracy, while the PTUN route is often not utilized due to procedural barriers and the ASN's weak position before the sanctioning institution.

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#### 4. Conclusion

ASN neutrality is an essential foundation for democratic, honest, and fair elections. As part of the bureaucracy, ASN must not take sides in elections, as this can undermine public trust and erode democracy's legitimacy. This principle has been affirmed in various national legal instruments, ranging from the 1945 Constitution of the Republic of Indonesia, the ASN Law, the Election Law, and the implementing regulations governing civil servant discipline. However, the facts on the ground show that violations of ASN neutrality are still high, which indicates a gap in the implementation of regulations and a bureaucratic culture that is vulnerable to politicization.

The existing legal framework is quite comprehensive in regulating prohibitions and sanctions against non-neutral ASNs. However, law enforcement mechanisms still cause problems, mainly because administrative sanctions are often imposed disproportionately. The punishment of dismissal for passive actions, such as social media posts or informal meetings with

regional head candidates, creates an imbalance between maintaining neutrality and protecting ASN's rights as citizens

Therefore, it is essential to apply the proportionality test in every administrative sanction. This test is a control instrument so that restrictions on ASN's political rights do not exceed the necessary limits. In addition, the appeal mechanism should be more independent, and broader access to the state administrative court should be strengthened, so that ASNs sanctioned have guarantees of their constitutional rights. Thus, the principle of ASN neutrality can be upheld without sacrificing substantive justice and protection of human rights.

Based on the conclusions of this paper, several suggestions can be made to improve this problem. First, the government, together with the DPR, needs to make limited revisions to the ASN Law and the Election Law by including a proportionality test clause as a standard in imposing administrative sanctions. This is to ensure normative clarity regarding the limits of KASN's and Bawaslu's authority when assessing violations of ASN neutrality. Second, KASN and Bawaslu need to strengthen coordination and create more detailed technical guidelines regarding the categories of violations, levels of seriousness, and proportional forms of sanctions.

These guidelines must take into account the principles of human rights and court jurisprudence, so that there are no more disparities in sanctions. Third, the appeal mechanism for ASNs sanctioned should be expanded through the state administrative court, with fast, simple procedures. This will increase the likelihood of protecting ASN rights without reducing the effectiveness of neutrality enforcement. Fourth, it is necessary to conduct coaching and political ethics education for ASN on an ongoing basis, so that understanding of neutrality is not only normative, but also becomes part of the bureaucratic culture. This effort must involve the PAN-RB Ministry, BKN, KASN, and ASN education institutions.

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