



## DECISION

Number 11/PUU-VI/2008

FOR THE SAKE OF JUSTICE UNDER THE ONE ALMIGHTY GOD

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA

[1.1] Examining, hearing and deciding upon constitutional cases at the first and final level, passing a Decision in the case of Petition for Judicial Review of Law Number 32 Year 2004 regarding the Regional Government and Law Number 29 Year 2007 regarding the Provincial Government of the Special Capital Region of Jakarta as the Capital of the Unitary State of the Republic of Indonesia against the 1945 Constitution of the Republic of Indonesia, filed by:

[1.2] **H. BIEM BENJAMIN, B.Sc., MM.** Indonesian citizen, occupation: Member of the Regional Representative Council of the Republic of Indonesia/the People's Consultative Assembly of the Republic of Indonesia/B-43, having his address at Jalan Jagakarsa Number 39, South Jakarta. Telephone number: 0811809774, 08170902211.

Hereinafter referred to as **the Petitioner**;

[1.3] Having read the petition of the Petitioner;  
Having heard the statement of the Petitioner;

Having heard and read the written statement of the Government;

Having heard and read the written statement from the People's  
Legislative Assembly;

Having examined the evidence;

Having heard and read the written statement of the expert and  
witness of the Petitioner;

Having heard and read the written statement of the expert and  
witness of the Government;

Having read the written conclusion of the Petitioner;

### **3. LEGAL CONSIDERATIONS**

**[3.1]** Considering whereas the purpose and objective of the Petitioner's petition is for substantive review of Article 227 paragraph (2) of Law Number 32 Year 2004 regarding Regional Government (State Gazette of the Republic of Indonesia Year 2004 Number 125, Supplement to the State Gazette of the Republic of Indonesia Number 4437, hereinafter referred to as Law 32/2004), Article 19 paragraphs (2), (3), (4), (6), (7) and (8), as well as Article 24 paragraphs (1), (2), (3) and (4) of Law Number 29 Year 2007 regarding the Provincial Government of the Special Capital Region of Jakarta as the Capital of the Unitary State of the Republic of Indonesia (State Gazette of the Republic of Indonesia Year 2007 Number 93, Supplement to the State Gazette of the Republic of Indonesia Number 4744, hereinafter referred to as Law 29/2007).

**[3.2]** Considering whereas prior to examining the principal issue of the petition, the Constitutional Court (hereinafter referred to as the Court) shall first take the following matters into account:

- a. Whether the Court has the authority to examine, hear, and decide upon the *a quo* petition;
- b. Whether the Petitioners have the legal standing to file the *a quo* petition.

### **Authority of the Court**

**[3.3]** Considering whereas pursuant to Article 24C paragraph (1) of the 1945 Constitution as reaffirmed in Article 10 paragraph (1) sub-paragraph a (Law Number 24 Year 2003 regarding the Constitutional Court, hereinafter referred to as the Constitutional Court Law), one of the constitutional authorities of the Court is to hear at the first and final level, the decision of which shall be final in conducting judicial review of a law against the 1945 Constitution;

**[3.4]** Considering that the *a quo* petition is regarding the judicial review of a law against the Constitution, *in casu* Law 32/2004 and Law 29/2007 against the 1945 Constitution, the Court shall therefore have the authority to examine, hear, and decide upon the petition concerned;

### **Legal Standing of the Petitioner**

**[3.5]** Considering whereas pursuant to Article 51 paragraph (1) of the Constitutional Court Law along with the Elucidation thereof, parties qualified for filing for judicial review of a law against the 1945 Constitution shall be parties

claiming that their constitutional rights and/or authorities granted by the 1945 Constitution are impaired by the coming into effect of a law, namely:

- a. individual Indonesian citizens (including a group of individuals having a common interest);
- b. customary law community units insofar as they are still in existence and in line with the development of the communities and the principle of the Unitary State of the Republic of Indonesia regulated in law;
- c. public or private legal entities; or
- d. state institutions;

Therefore, in judicial review of a law against the 1945 Constitution, the Petitioner must first explain and prove:

- a. his legal standing as a Petitioner as referred to in Article 51 paragraph (1) of the Constitutional Court Law;
- b. the existence of impairment of constitutional rights and/or authorities granted by the 1945 Constitution due to the coming into effect of the law petitioned for review;

**[3.6]** Considering also whereas, following Decision Number 006/PUU-III/2005 and Decision Number 11/PUU-V/2007, as well as subsequent decisions, the Court is of the opinion that the impairment of constitutional rights and/or authorities as referred to in Article 51 paragraph (1) of the Constitutional Court Law must fulfill 5 (five) requirements, namely:

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

**[3.7]** Considering whereas the Petitioner is an individual Indonesian citizen assuming the position as a Member of the Regional Representative Council (DPD) of the Republic of Indonesia, and therefore the Petitioner qualifies as a legal subject in judicial review of Law 32/2004 and Law 29/2007 against the 1945 Constitution.

**[3.8]** Considering whereas the Petitioner argues that he has constitutional rights and/or authorities granted by the 1945 Constitution, which among others provided in:

- a. Article 1 paragraph (2), *"Sovereignty shall be in the hands of the people, and shall be exercised in accordance with the 1945 Constitution"*.
- b. Article 18 paragraph (1), *"The Unitary State of the Republic of Indonesia shall be divided into provincial regions and these provincial regions shall be divided into regencies and municipalities, whereby each province, regency and municipality shall have a regional government set forth in law"*.
- c. Article 18 paragraph (2), *"The provincial, regency, and municipal governments shall regulate and administer their own governmental affairs in accordance with the principle of autonomy and duty of assistance"*.
- d. Article 18 paragraph (3), *"The provincial, regency, and municipal governments shall have their respective Regional People's Legislative Assembly the members of which shall be elected through general elections"*.
- e. Article 18 paragraph (4), *"Governors, Regents and Mayors as the respective heads of provincial, regency, and municipal governments shall be elected democratically"*.
- f. Article 27 paragraph (1), *"All citizens shall have an equal status before the law and government and shall be obligated to uphold such law and government, without exception."*
- g. Article 28D paragraph (3), *"Every citizen shall have the right to obtain equal opportunities in government"*.

- h. Article 28I paragraph (2), *“Every person shall have the right to be free from discriminatory treatment on any basis whatsoever and shall have the right to obtain protection against any such discriminatory treatment”*.

**[3.9]** According to the Petitioner, the coming into effect of Article 227 paragraph (2) of Law 32/2004 and Article 19 paragraphs (2), (3), (4), (6), (7), and (8) as well as Article 24 paragraphs (1), (2), (3), and (4) of Law 29/2007 have impaired his constitutional right and/or authority, since as a resident of the Province of Special Capital Region of Jakarta, he is only entitled to elect and be elected as (i) the member of the People’s Legislative Assembly, (ii) the member of the Regional Representative Council, (iii) the President and the Vice President, (iv) a member of Regional People’s Legislative Assembly of Province, and (v) a Governor.

**[3.10]** Considering whereas although there are dissenting opinions from several Justices in relation to the impairment of the Petitioner’s constitutional right for the reason that the law petitioned for review by the Petitioner does not hinder the Petitioner’s right to become a candidate mayor, the majority of Justices are of the opinion that the Petitioner’s argument on his legal standing is sufficiently grounded. If considered from the perspective of Article 18 of the 1945 Constitution, the existence of Article 227 paragraph (2) of Law 32/2004 and Article 19 paragraphs (2), (3), (4),(6) ,(7), and (8) as well as Article 24 paragraphs (1), (2), (3) and (4) of Law 29/2007, which stipulate that the Province of the Special Capital Region of Jakarta as the State Capital has the status of an

autonomous region, and in the administrative area, no autonomous region is established, and the regent/mayor is appointed from among qualified civil servants, can be deemed to have impaired the argued constitutional right and authority. The constitutional right derived from Article 18 of the 1945 Constitution, ordering for the Unitary State of the Republic of Indonesia to be divided into provinces, and provinces to be divided into regencies and municipalities, with the authority to regulate and manage their own governmental affairs pursuant to the principle of autonomy and duty of assistance, with the respective regional heads who are elected democratically, which the Petitioner deems to have impaired his constitutional right because it eliminates his right to equal opportunity for participating in the government, either in the form of the right to be elected as or to elect a regent/mayor and a member of the Regional People's Legislative Assembly of regency/municipality in the Province of the Special Capital Region of Jakarta. Such impairment of constitutional right arises from a causal relationship as a result of the coming into effect of Article 227 of Law 32/2004 and Article 19, as well as Article 24 of Law 29/2007, which, although still potential in nature, will take place for sure pursuant to logical reasoning, and if the petition is granted, the result will be that the argued impairment does not occur any longer.

**[3.11]** Considering whereas based on such considerations, the Petitioner has the legal standing to file for the *a quo* petition, and therefore the principal issue of the petition must be further considered.

### **Principal Issue of the Petition**



**[3.12]** Considering whereas in the principal issue of the petition, the Petitioner has requested that:

1. Article 227 paragraph (2) of Law 32/2004;
2. Article 19 paragraphs (2), (3), (4), (6), (7), and (8) of Law 29/2007;
3. Article 24 paragraphs (1), (2), (3), (4) of Law 29/2007 which in principle, places the regional autonomy of the Special Capital Region of Jakarta Region only at the provincial level, be declared as unconstitutional and also as having no binding legal effect for reason that they are contradictory to the 1945 Constitution, namely:

- a. Article 18

*paragraph (1) "The Unitary State of the Republic of Indonesia shall be divided into provincial regions and these provincial regions shall be divided into regencies and municipalities, whereby each province, regency and municipality shall have a regional government regulated by law".*

*paragraph (2) "The provincial, regency, and municipal governments shall regulate and administer their own governmental affairs in accordance with the principle of autonomy and duty of assistance".*

*paragraph (3) "The provincial, regency, and municipal governments shall have their respective Regional People's Legislative Assemblies the members of which shall be elected through general elections".*

*paragraph (4) "Governors, Regents and Mayors as the respective heads of provincial, regency, and municipal governments shall be elected democratically".*

b. Article 27 paragraph (1)

*paragraph (1) " All citizens shall have an equal status before the law and government and shall be obligated to uphold such law and government, without exception".*

c. Article 28D paragraph (3)

*"Every citizen shall have the right to obtain equal opportunities in government".*

d. Article 28I Paragraph (2)

*paragraph (2) "Every person shall have the right to be free from discriminatory treatment on any basis whatsoever and shall have the right to obtain*

*protection against any such discriminatory treatment.”*

**[3.13]** Considering whereas in order to support his arguments, the Petitioner has presented written evidence (Exhibits P-1 through P-10). In addition, the Petitioner also presents an expert and a witness the statements of which are being heard under oath in the Plenary Session on June 26, 2008, completed with written statement of the expert and witness concerned, which has been completely included in the description of the Principal Issue of the Case, which are principally as follows:

**[3.13.1] Statement of Expert of the Petitioner, Prof. Dr. Bhenyamin Hoessein**

- Pursuant to *Desentralisatie Wet 1903*, the structure of autonomous regions in East Indies consists of a *gewest*, subsequently referred to as a *residentie*, and constitutes a part of a *gewest*. The part of a *gewest* with the characteristics of a city is referred to as a *gemeente*. Based on such legal framework, Jakarta which was then referred to by the Dutch as Batavia was established as a *gewest* and under it, *gemeente* Batavia and *gemeente Meester Cornelis* (Jatinegara) were established. Before becoming an autonomous region, *Gewest Batavia* was merely an administrative region in the context of de-concentration.
- During the 1922 *Bestuurhervormingswet*, the structure of an autonomous region comprised a province the territory of which covered several *gewest*

- or residencies governing *stadsgemeente* as a development of *gemeente* and *regentschaap* (regency). In such structure, the autonomy of *gewest* was removed and its status was returned to the status prior to the coming into effect of the coming into effect of the 1903 decentralization law as an administrative region. Based on such legal framework, *Gewest Batavia* was governed under West Java Province subordinating *Stadsgemeente Batavia*, *Stadsgemeente Meester Cornelis*, *Regentschaap Batavia* and *Regentschaap Meester Cornelis*. In 1926, *Stadsgemeente Meester Cornelis* was amalgamated with *Stadsgemeente Batavia*.
- Following the stipulation of the 1945 Constitution, the administration of decentralization is regulated in Article 18 of Chapter VI under the title of Regional Governments, i.e. Regional Governments, and not Regional Governance. A question arises upon reading the Article, namely whether the term “region” before the word “Indonesia” and the terms major region and minor region have the same understanding, which refers to regional government (*local bestuur, local government*) as mentioned in the title of Chapter VI, and whether the term is used in the context of decentralization or de-concentration, and whether the relationship between major regions and minor regions is hierarchical or equal in nature.
  - After Indonesia returned to the form of a Unitary State, under the provision of Article 131 paragraph (1) of the 1950 Provisional Constitution, the term “*major and minor regions*” in Article 18 of the 1945 Constitution was added with the phrase, “which shall be entitled to manage their own households

- (*autonom*), but as provided for in Article 18 of the 1945 Constitution, the relationship can be interpreted as non-hierarchical. Article 2 paragraph (1) of Law Number 1 Year 1957 stipulates that there shall be three levels of autonomous regions at the maximum, namely (a) first level regions, including the Municipality of Great Jakarta, (b) second level regions, including municipalities, and (c) third level regions. However, it is mandated that under municipalities, except for the Municipality of Great Jakarta, no autonomous region is established. Therefore, the law orders the establishment of autonomous regions under the region of the Municipality of Great Jakarta, for specific reasons, namely its history of establishment and development, its area coverage and rapid development as well as substantial financial source;
- Regulation on the Governance of Jakarta in Law Number 5 Year 1974 regarding Principles of Governance in Regions, is similar to Law Number 18 Year 1965, but its regulation contains an idea which is logically inconsistent. Law Number 5 Year 1974 adopts a distinctive difference between the administration of decentralization and that of de-concentration. Regulation on the two principles is provided for in different chapters under Law Number 5 Year 1974. Decentralization is set forth in Chapter III, while De-concentration is set forth in Chapter IV.
  - In the amendment, Article 18 was further described in detail in Articles 18A and 18B. The content of Article 18A is clearly influenced by Law Number 22 Year 1999, as evident in the existence of such terms as province,

- regency, and municipality. With the elucidation of Article 18 of the 1945 Constitution and the Assembly Decree Number IV/MPR/2000 requiring for regional autonomy to be established in levels, namely from province to village levels as the background, Article 18 paragraph (1) reads, "*The Unitary State of the Republic of Indonesia shall be divided into provincial regions and these provincial regions shall be divided into regencies and municipalities, whereby each province, regency and municipality shall have a regional government regulated by law*".
- Both Law Number 22 Year 1999 and Law Number 32 Year 2004 adopt the local democracy model, which prioritizes the value of democracy and community diversity. Meanwhile, the number of Jakarta population which ranked at the 6<sup>th</sup> place out of 33 provinces, demands a more democratic administration of government. Even more, the level of Jakarta residents is relatively higher than other regions, while the demand for faster services in the framework of good local governance cannot be ignored. Therefore, it needs to be accommodated with the existence of an autonomous city in the region of Jakarta. The specificity in governance should only be implemented at the level of province, governance relationship, services, and the financial aspect between provinces and autonomous regions there under.

**[3.13.2] Statement of the Witness of the Petitioner, Drs. H. Andi Effendi  
Nur, MM**

- It is true that the witness provides a supporting statement to become a witness for the judicial review of a law filed by H. Biem Benyamin.
- It is true that the witness provides such support in the context of manifesting harmonious legislations in accordance with the 1945 Constitution.
- City Council/Regency/Province of the Special Capital Region of Jakarta established based on the aspect of legality/legal umbrella as set forth in Article 24 of the Special Capital Region Law, which evidently, after compared to Article 18 paragraph (3) of the 1945 Constitution has the potential to be interpreted as being not in conformity with the mandate of the 1945 Constitution as the highest law in the system of state administration of the Republic of Indonesia.
- If viewed from the aspect of its electing institution and its number of members, the City Council of Province of the Special Capital Region of Jakarta was established as a substitute for the Regional People's Legislative Assembly of Municipality/Regency is, in fact not in line with and even not recognized in the 1945 Constitution. As elaborated in Law Number 10 Year 2008 regarding the General Elections of Members of the People's Legislative Assembly, the Regional Representative Council, and the Regional People's Legislative Assembly which certainly are impartial and constitute a constitutional authority as applicable to the Regional People's Legislative Assembly throughout Indonesia.

**[3.14]** Considering whereas the People's Legislative Assembly (DPR)

represented by its attorney, Nursyamsi Nurlan S.H., provides oral and written statements at the Plenary Session on June 26, 2008 completely set out in the description of the Principal Issue of the Case of this decision, which are principally as follows:

- The specificity of the form of Government of the Special Capital Region of Jakarta, has judicially commenced since the early independence era. In the coming into effect of Law Number 22 Year 1948 regarding Regional Government, the Special Capital Region of Jakarta which was then the Municipality of Great Jakarta, was led by a Mayor, but he was granted with the same level of capacity as a Governor leading a province. Other specificity was that in the Municipality of Great Jakarta, separate laws and regulations regulating the specificity of the Municipality of Great Jakarta applied,, namely:
  1. Emergency Law Number 20 Year 1950 regarding the Governance of Great Jakarta.
  2. *Stadsgemeente ordonantie* (*Staatsblad* 1926 Number 365) as amended and supplemented, most recently with the ordinance in *Staatsblad* 1940 Number 226.
  3. *Ordonantie tijdelijke voorzieningen bestuur stadsgemeenten Java* (*staatsblad* 1948 Number 195);
  4. Decree of the President of the United States of Indonesia Number 114 regulating the Governmental Organs of the Municipality of Great Jakarta;



5. Decree of the President of the United States of Indonesia Number 125 Year 1950 stating the position of Jakarta as an Autonomous Region under the name of the Municipality of Great Jakarta.
- In 1957, Law Number 22 Year 1948 was revoked and replaced with Law Number 1 Year 1957, and at the time such law was applicable, the status of the Municipality of Great Jakarta which should have been included in the category of second level region, was equalized with a first level region. It was implemented due to the capacity of the Municipality of Great Jakarta as the State Capital.
  - With the coming into effect of Law Number 5 Year 1974 regarding the Principles of Regional Government, which provides in Article 6 that the Special Capital Region of Jakarta as the Capital of the State of the Republic of Indonesia was granted the right to specifically regulate its governmental structure in different manner with other first level regions, the specificity of which was granted considering the growth and development of Jakarta as the State Capital, with more complex burdens, duties, responsibilities, and challenges.
  - Whereas the absence of an autonomous region at the regency/municipality level in Jakarta and the absence of direct Regional Head Elections for Mayors/Regents are a consequence of the absence of Regional People's Legislative Assembly at the regency/municipality level in Jakarta. Therefore, under Article 12 paragraph (4) Law Number 29 Year 2007, it is stipulated that the number of members of the Regional People's

- Legislative Assembly of the Province of Special Capital Region of Jakarta shall be added by 125% of the total number set forth in compliance with the General Election Law (based on the total population). It implies that the Regional People's Legislative Assembly of the Province of Special Capital Region of Jakarta has a high level of representativeness since it also represents people of the entire regency/municipality in the Special Capital Region of Jakarta. Moreover, with the stipulation that in the election of the Governor and Deputy Governor of the Special Capital Region of Jakarta, the candidates are required to obtain votes support from the voters of more than 50% of the valid vote acquisition to be elected as the Governor/Deputy Governor, which is intended so that the candidates have exceptionally strong legitimacy from the public because as the State Capital, Jakarta must be able to overcome all problems under one control (namely in the hands of the Governor and Deputy Governor);
- Whereas in fact, the aforementioned provision of Article 18B of the 1945 Constitution supports the existence of various government units which are specific or special in nature (at provincial, regency, municipal, or village levels). An example of a special government unit is the Special Capital Region (DKI) Jakarta, and an example of a special government unit is the Special Region (DI) of Yogyakarta and the Special Region of Nanggroe Aceh Darussalam (NAD);
  - Whereas in the normative domain, special regulations may set aside general regulations (*lex specialis derogat legi generalis*) insofar as they

are not contradictory to the superior legal norms. Therefore, managing Jakarta is different than managing other regions at the same level. Likewise, from the normative point of view, the organization of Jakarta municipality is also different than that of other regions because it requires an indicator to solve the complexity of problems encountered by DKI Jakarta.

**[3.15]** Considering whereas the Government, represented by the Minister of Law and Human Rights and the Minister of Home Affairs providing oral and written statements in the Plenary Session on June 26, 2008, which are completely set out in the description on the Principal Issue of the Case herein, which principally states as follows:

- The Government disagrees with the Petitioner's arguments stating that the form of administration (of similar structure) with regard to the specificity of the Government of the Province of Special Capital Region of Jakarta must matched to the specificity and/or exclusivity of other regions in Indonesia because, in the Government's opinion, in addition to having based on sociological and historical aspects, Jakarta also has different characteristics compared to other specific and/or special regions existing in Indonesia.
- Whereas the specificity of the Government of the Province of Special Capital Region of Jakarta is also based on the following matters:  
*First*, Jakarta's capacity as the State Capital assumes greater and more

complex burdens, challenges, and responsibilities to perform the functions attached to the Government of the Province of Special Capital Region of Jakarta. An organization in a unified and integrated unit of planning, implementation, and control becomes a necessity so that the administration of government functions is more effective and efficient. The form of specific autonomy and authority in provincial governments is required to guarantee flexibility in determining priorities and stipulating policies so as to avoid the narrow and sectional regional perspective (municipality region), as well as to prevent regional inequality in public services. Autonomy in municipal regions will create an inefficient and uneconomical situation as well as political fragmentation leading to a disorderly city development.

*Second*, in the perspective of decentralization, it is indeed considered as a necessity in relation to the distribution of authority reflected through the geographical hierarchy of the state. Geography is a significant reason for granting decentralization. Decentralization becomes useful in regions which are geographically different than Jakarta region which is not divided by geographical differences and in fact, there are no significant demographic partitions. On the other hand, since the beginning, municipal regions are administrative in nature. Therefore, geographically, historically, and politically, there are no reasons to grant autonomy to municipalities and the government should maintain the existing form of autonomy; If the Petitioner's assumption is correct and the petition for judicial review

is granted, the following issues may arise:

1. The specific nature of the Government of Province of Special Capital Region of Jakarta as the Capital of the Unitary State of Indonesia with relatively long historical journey will disappear.
2. Instability in the government administrative system may arise, both for the Government of the Province of Special Capital Region of Jakarta and the Central Government.
3. Legal disorder and uncertainty (*rechtsonzekerheid*) in the government system, economic system, and public services may arise.

**[3.16]** Considering whereas the Government has presented three experts who have provided statements in the Plenary Session on June 26, 2008, which have been completely set out in the Principal Issue of the Case herein, which principally states as follows:

**[3.16.1] Statement of the Expert of the Government, Prof. Dr. Ryas Rasyid**

- Throughout history, the Special Capital Region of Jakarta never had any autonomous region under what we refer to as Governor. The granting of provincial status to the Special Capital Region consequently grants the Governor a special position that is related to the President, since the center of the government is in the capital city. Substantially, the Special Capital Region is merely a city which cannot be separated into two

- different entities. It is only a city managed according to city management. Due to this reason, the city was granted a special treatment in Law Number 1 Year 1965. There used to be only Jakarta Mayor. The Governor of the Special Capital Region is actually more of a granted political status, and the Jakarta region is only represented by one institution, namely the Regional People's Legislative Assembly. Since it is granted with the status of a province, there has to be a Regional People's Legislative Assembly of Province.
- If the cities within Jakarta had their own autonomy, their own Regional People's Legislative Assemblies, their own Regional Regulations, which may not necessarily be synchronous with one another, there could have been a different treatment between one city and the other, although they exist within the same scope of Jakarta municipality. Based on the viewpoint of political decentralization, it is inappropriate to create autonomous regions under the great Jakarta region.
  - The granting of status of a province is indeed administratively different from other provinces because when compared to other provinces, the total area, the culture, the socio-economic condition, the socio-cultural condition, and other characteristics are greatly varied. It is impossible for special autonomous regions in Aceh and Papua to be treated in the same way as Jakarta, for their cultural and socio-economic conditions are indeed, very different. The people of Jakarta are included in an integrated unity, and the region does not even have any clear geographical

- boundaries, but from administrative aspect, such boundaries exist. This is not the same as the conditions in other provinces.
- There is not one analysis agreed by the people that there is something lacking from the services of Jakarta only because the cities are not autonomous, and there is not one political movement whatsoever which considers that there is something disrupting the government administration and public services in Jakarta only because the cities are not autonomous and do not have any Regional People's Representative Assembly.

**[3.16.2] Drs. Andi Ramses Marpaung, M.Si**

- Asymmetrical decentralization accommodates the local identity to a local government system and the local community may identify itself to a locally characterized system. The dimension of administration, asymmetric decentralization is encouraged more by the need to establish a service region which is ideal with the implementing organization in certain working region, or due to a position granted to a territory or region having the special position (special territory) such as the position granted to Jakarta because Jakarta serves as the State Capital and the Administrative Capital.
- Special status will be able to improve administrative and public services because a special status may provide an opportunity for administrative and service adjustment to the characteristics of Jakarta region as the

- State Capital of the Republic of Indonesia serving as the center of administration, in such position, hence, Jakarta is given the status as a special territory. The consequence of the special position pursuant to Law Number 32 Year 2004 is that Jakarta has a special autonomy different than other provinces. Jakarta is given a special autonomy or asymmetric decentralization whereby there are no administrative regional that also serve as autonomous regional, and there are no other administrative regions or forms of autonomy, under provincial autonomy.
- Asymmetric decentralization may be divided into three different forms, namely different *authority*, different *form*, and different *financial sources*. Pursuant to Law Number 34 Year 1999, the Structure of the Government of the Province of Special Capital Region of Jakarta consists of the following:
    - a. Provincial government comprises the Governor and provincial organs. Provincial organs comprise the provincial secretariat, provincial service offices, and technical institutions.
    - b. Municipality/regency organs comprise the municipal/regency secretariat, sub-service offices, districts, and sub-districts.

**[3.16.3] Prof. Dr. Zuhdan Arif Faturullah, S.H., M.H**

- The construction in the administration of regional government, from Article 1 paragraph (1). Article 1 paragraph (1) sets out a final statement that “*the State of Indonesia shall constitute a Unitary State, having the form of*



- Republic*'. In Article 1 paragraph (1), further regulated in Article 18. Article 18 was then amended to become Article 18A and Article 18B. We will particularly consider Article 18A. Article 18 contains two elements; as a **structure** and **content**. If we compare Article 18 with other articles in the Constitution, Article 18 has the most paragraphs and also significant substantive material. If we examine thoroughly, its seven paragraphs contain such aspects as the government organization, the government structure, the government institution, and the contents of government. One part which we should coherently observe in Article 18 is Paragraph (7) which states that the structure and procedure for implementing regional government are to be regulated by law.
- Article 18 of the 1945 Constitution has a different substantive material, its delegation will be restricted when formulated. The structure and procedure for implementing regional government as referred to in paragraphs (1), (2), (3), (4), (5), and (6) shall be regulated by law, are referred to as by the expert as a coherent unity. This becomes significant because the substantive materials regulated are varied.
  - The expert opines that by concluding from various literature, that the limitation of the regulation of the Regional Government Law providing for the specificity of a region is not contradictory to the Constitution. The expert is of the opinion that there are at least five matters which should exist in the regulation. *First*, the regulation of specificity must remain within the scope of the Unitary State of the Republic of Indonesia. *Second*,

- regulations which are specific in nature must be in line with the aim of the state, namely to actualize the prosperity of the local people and the prosperity of the general public. *Third*, these regulations should accelerate the actualization, equal distribution, and social equality for the entire Indonesian people. *Fourth*, the regulations should strengthen democratization at the local level, and *fifth*, these regulations should be able to realize the objectives of regional autonomy.
- Article 227 paragraph (2) of Law Number 32 Year 2004 and Law Number 29 Year 2007 have adopted all of the five points. Furthermore, based on the dynamics of regulations, basically Jakarta has been merely a city since the independence of Indonesia. It can be seen in the stipulation dated September 29, 1945, when Suwiryo was appointed as the Mayor of Jakarta. Jakarta only had a capacity as a city. Up to 1948, Jakarta was designated as the Capital of pre-federal Administration and in 1948, pursuant to Law Number 22, the Mayor of Great Jakarta was granted a capacity similar to that of Governor at provincial level. Substantially, the position of the mayor was still a mayor and until the issuance of Presidential Decree Number 125 Year 1950, Jakarta was named the Municipality of Great Jakarta. A major political change in laws occurred in 1990 which clearly states that autonomy shall be at the provincial level. Autonomy remained at the provincial level in 1999, and until the most recent law is issued, namely Law Number 29 Year 2007, it is that the status of autonomy shall be at the provincial level.

- If autonomy has already existed at the provincial level, it is not necessary to grant autonomy at the regency and vice versa. The expert's observation indicates that, for example, in the autonomy of West Java, almost all of its policies are ineffective at the regency/municipality level. Provincial regulations cannot be implemented at the regency/municipality because the enforcement units of the regional regulations are already different in nature and they prefer to obey their respective regional heads. In the provincial perspective, a province actually has a region, but it does not have any working area, and this is what we should observe. It is true that Article 18 leads to complications when incorporated into the principle of regional autonomy implementation.
- Legislation of law is a process to give form to various demands existing in the community. These diverse demands are then formulated from language to the form of norms and rules.
- A constitution is always considered final or clear. Actually, in principle, when a constitutional product is agreed, it has carried an inherent flaw due to linguistic limitation and inability of norms to accommodate all behaviors and demands. Therefore, if one wishes to place the government administration, society, and human resources as the objective of regulation, he/she must be prepared to provide a vast interpretation on the Constitution, so as to increase the aspect of social utilization, rather than only the aspect of legal certainty.

**[3.17]** Considering whereas the Petitioner has presented a written conclusion which, in principle, states that he shall remain in his stance;

### **Opinion of the Court**

**[3.18]** Considering whereas upon carefully considering the statements of the Petitioner along with the evidence, statements of the People's Legislative Assembly and the Government, as well as statements of the experts, both the expert presented by the Petitioner and by the Government, the Court is of the opinion that the substantive material of Article 227 paragraph (2) of Law 32/2004 and Article 19 paragraphs (2), (3), (4), (6), (7), and (8), as well as Article 24 paragraphs (1), (2), (3), and (4) of Law 29/200 petitioned for review, basically relates to the regulation which places the regional autonomy of the Special Capital Region of Jakarta only at the provincial level. It is argued by the Petitioner as contradictory to Article 18 paragraphs (1) and (2), Article 28I paragraph (2) and Article 27 paragraph (1) of the 1945 Constitution. Whereas prior to considering and providing an opinion with respect to the aforementioned arguments of the Petitioner, it is necessary for the Court to reaffirm several matters as follows;

- Prior to the amendment to the 1945 Constitution, regional autonomy in the context of decentralization of the Unitary State of the Republic of Indonesia, is only regulated in one article, namely Article 18 under Chapter VI. The division of Indonesian regions into major and minor regions, with structures of government provided for by laws, which take

into account the principle of democracy and the right to origins in special regions. Elucidation to Article 18 of the 1945 Constitution prior to amendment states that Indonesian regions are to be divided into provincial regions and provincial regions are to be divided into smaller regions, either autonomous or merely administrative regions. Both regions will be regulated by law. In addition, the 1945 Constitution acknowledges the existence of special regions based on the right to origins of such regions, which then constituted *zelfbesturende landschappen* and *volksgemeenschappen*;

- With respect to the economic growth and development since independence, it appears that differences in regional potential and capability are supported with cultural diversity and regions having certain specificity and/or exclusivity, resulting in differences in their roles and contribution to the Unitary State of the Republic of Indonesia, so these regions also require an exclusive acknowledgement. In addition, there are certain regions having an original structure acknowledged and respected as special regions for their origins. The direction of the Second Amendment in Chapter VI, particularly Article 18, Article 18A, and Article 18B supports and clarifies the concept of regional autonomy. Article 18 paragraphs (1) and (2) sets out general regulations on the structure of regional division of the Unitary State of the Republic of Indonesia into provincial regions and regency/municipality regions in regulating and

- managing their own government affairs pursuant to the principle of autonomy and duty of assistance;
- Based on considerations on the differences in regional potentials, capabilities, as well as specificity in the economy, culture, and territory, and also the existence of regions with special origins, which respectively have different roles and contributions to the Unitary State of the Republic of Indonesia, Article 18B of the 1945 Constitution provides the possibility to make a separate regulation from the provision of Article 18 of the 1945 Constitution. Pursuant to Article 18 of the 1945 Constitution, in the context of regional government administration regulating and managing its own government affairs pursuant to the principle of autonomy and duty of assistance, Law 32/2004 has been established. The structure of regional government stipulated consists of (a) Regional Government of Province, comprising regional government of province and the Regional People's Legislative Assembly of Province, (b) regional government of regency/municipality, comprising regional government of regency/municipality and the Regional People's Legislative Assembly of Regency/Municipality [Article 3 paragraph (1) of Law 32/2004]. However, regions having special status and granted a special autonomy are not only being regulated by this law, but also subject to a special provision regulated in another law. With respect to the Special Capital Region of Jakarta, due to its capacity as the State Capital of the Republic of Indonesia, it is regulated with separate laws with the status of an

autonomous region, and within such administrative region, no autonomous region is established [Article 227 paragraphs (1) and (2) of Law 32/2004].

Therefore, the Special Capital Region of Jakarta as the State Capital of the Republic of Indonesia does not only comply with Law 32/2004 as a general provision on Regional Government, it is also specifically regulated in a separate law, namely Law 29/2007, having a constitutional basis provided for in Article 18B paragraph (1) of the 1945 Constitution;

- Whereas in addition to that, it is also important for the Court to reaffirm the relationship between Article 18 paragraph (1) and Article 18B paragraph (1) of the 1945 Constitution, whether it is a relationship between principal norms and supplementary norms or a relationship between *lex generalis* and *lex specialis* or a relationship among two equal constitutional norms. The first alternative is that Article 18 paragraph (1) contains principal norms which apply generally, while Article 18B paragraph (1) contains supplementary norms which may not deviate from or set aside the principal norms. It implies that the implementation of Article 18B paragraph (1) as reflected in Law 32/2004 and Law 29/2007 may not deviate from and ignore the coming into effect of Article 18 paragraph (1) of the 1945 Constitution in the governmental structure of the Special Capital Region of Jakarta as a province. The second alternative is that Article 18B Paragraph (1) of the 1945 Constitution is considered as *lex specialis*, so that the implementation of the aforementioned Article 18B paragraph (1) may, in certain matters, deviate from and ignore Article 18

Paragraph (1). It implies that the regulation of the Special Capital Region of Jakarta may differ from the regional autonomy of other provinces. Meanwhile, the third alternative is for the two to be considered equal, in the sense that both of them apply independently, so the implementation of Article 18B paragraph (1) and Article 18 paragraph (1) respectively may apply independently and are not in a potentially contradictory position. It means that regulation regarding the Special Capital Region of Jakarta may be fully based on Article 18B paragraph (1) without prejudice to the applicability of Article 18 paragraph (1) to other provinces without any specific or special status. Based on the three alternative relationships between the constitutional norms set forth in Article 18 and the constitutional norms provided for Article 18B of the 1945 Constitution, the Court opines that both are in an equal position and one does not stand under the other.

The Court is of the opinion that the choice among the three alternatives is considered more appropriate for at least two reasons. *First*, based on the perspective of original intent in the sense that when the formulation of Article 18B of the 1945 Constitution was debated in the sessions of Ad Hoc I Committee of the Working Unit of the People's Consultative Assembly, the specificity referred to in Article 18B paragraph (1) was indeed referred to the status of Jakarta as a special region due to its position as the state capital, so that it may be given the status of a province. *Second*, the granting of the status of a province by a law to the



Special Capital Region of Jakarta which makes it seem like it must be subject to the provision of Article 18 paragraph (1) of the 1945 Constitution, as expressed in the opinion of expert Prof. Dr. Bhenyamin Hoessein as reflected in the second alternative above, although it is historically true based on the practice of regional term (*gewest*) in the past, the specificity contained in the article is also intended to accommodate the dynamic development of needs in the future which requires the stipulation of specific status for certain regions. In addition, the capacity of the two articles [Article 18 paragraph (1) and Article 18B paragraph (1) of the 1945 Constitution] from the perspective of Carl Schmitt's *Verfassungsbegriff* in the absolute sense of the constitution (*absoluut begriff der verfassung*), a constitution is a closed system of higher and ultimate norms, so every article of the constitution is autonomous as the norm of norms (*norma-normarum*) [*vide* Carl Schmitt, *Verfassungslehre, 1928/Constitutional Theory, 2008:62*].

**[3.19]** Considering whereas based on the starting points described above, the Court will further take into account the Petitioner's petition as follows:

- a. the Petitioner argues that the specificity of Jakarta as the state capital resulting in the justification of autonomy only for the Province of Special Capital Region of Jakarta which is not in conformity with the principle of special law (*lex specialis*) may be different than general laws (*lex generalis*). The Petitioner considers it as contradictory to the 1945

- Constitution, particularly Article 18 paragraphs (1) and (2). The Petitioner's arguments is that Article 18 paragraphs (1) and (2) of the 1945 Constitution is a general regulation setting forth decentralization and division of autonomous regions in general, dividing the State of the Republic of Indonesia into provincial regions and the provincial regions are further divided into regency/municipality regions, which respectively have regional administration with the authority to organize and manage their own regional affairs in accordance with the principle of autonomy and duty of assistance. The Court is of the opinion that based on the statements of the experts, both presented by the Petitioner and the Government, it is evident that whereas in fact, in the history of state administration and governance during the colonialism era and after the independence, specific and special regions were also recognized. Pursuant to *Decentralisatie Wet 1903*, the structure of autonomous region in East Indies consisted of *gewest* (subsequently referred to as *residentie*) and a part of *gewest* with urban characteristics referred to as *gemeente*. Based on such legal framework, as explained by expert Bhenyamin Hoessein, Jakarta (*Batavia*) was established as a *gewest* and under it, *gemeente Batavia* and *gemeente Meester Cornelis* (Jatinegara) are established. Prior to being established as an autonomous region, *Gewest Batavia* was only an administrative region in the context of de-concentration.
- b. Jakarta as the state capital is specific nature. Its specificity contains regulations on (i) the specificity of duties, rights, obligations, and

responsibilities as the state capital; (ii) the domicile of representatives of fellow countries; (iii) integrity of general plan on the spatial layout of Jakarta with a general plan on the spatial layout of its surrounding areas; (iv) specific are to perform certain government functions directly managed by the Government. As a result of such specificity Jakarta has been referred to with various names during its course of history, namely the First Level Region of the Municipality of Great Jakarta (*vide* Law 1/1957), the Special Capital Region of Great Jakarta (*vide* Law 2 Pnps/1961), the Special Capital Region of Jakarta (*vide* Law 10/1964), the Great Jakarta Municipality (*vide* Law 18/1965), with the status of a First Level Region up to 1999. By virtue of Law 34/1999 and Law 29/2007, Jakarta was granted the status of the Province of Special Capital Region of Jakarta as the state capital. Regulation on the granting of such special status is acknowledged and respected pursuant to Article 18B paragraph (1) of the 1945 Constitution (*vide* the Second Amendment to the 1945 Constitution year 2000) and Article 2 paragraph (8) of Law 32/2004. The Province of Special Capital Region of Jakarta, in accordance with Law 29/2007, is divided into administrative municipality and administrative regency regions of Seribu Islands, the mayor and regent of which are to be appointed. Such structure is based on the need for regulation for a region which is integrated with a large number of population and financial resources, but with vague administrative boundaries. The specificity of Jakarta as the state capital requires regulation which is also specific in nature. The Court

is of the opinion that such regulation is not contradictory to Article 18 paragraphs (1) and (2) of the 1945 Constitution due to the equal position of constitutional norms between Article 18 paragraphs (1) and (2) and Article 18B of the 1945 Constitution.

With respect to the historical perspective presented by the Petitioner's expert (Bhenyamin Hoessein) regarding the implementation of autonomy in Jakarta region who is of the opinion that Article 18 paragraph (1) of the 1945 Constitution demands for the existence of a hierarchy of autonomous regions which cannot be derogated by special regions and autonomous regions which are specific in nature, the Court is of the opinion that such specific regulation is not based on Article 18 paragraphs (1) and (2) of the 1945 Constitution, but instead on Article 18B paragraph (1) of the 1945 Constitution. The Court is of the opinion that the capacity of Article 18 paragraphs (1) and (2) and Article 18B of the 1945 Constitution is on an equal position and has the same independent binding legal force, making it irrelevant to challenge the placement of autonomy of the Special Capital Region of Jakarta only at the provincial level by virtue of Article 18 paragraphs (1) and (2) of the 1945 Constitution. In addition to that, the capacity of Jakarta, which at first was only a major city, will not give rise to any constitutional issues whatsoever, if it was only granted the capacity as the Great City of Special Capital Region. Only because of its specificity and capacity as the state capital, and in its relation with the Central Government, it is considered necessary

- to grant a status or capacity to the regional heads and their regions at the provincial level led by a Governor. Hence, the specificity of Jakarta need not to be considered from Article 18 paragraphs (1) and (2) of the 1945 Constitution obligating the provincial regions to be divided into autonomous regencies/municipalities, but it must be seen as the implementation of Article 18B paragraph (1) of the 1945 Constitution. Therefore, preparing the government of the Special Capital Region of Jakarta, which has subordinate regions there under, does not necessarily have to be in the form of leveled autonomous regions, but instead it must be adjusted to Jakarta's own needs as a specific region.
- c. The Petitioner argues that the regulation which places the autonomy of the Special Capital Region of Jakarta only at the provincial level as provided for in Article 227 paragraph (2) of Law 32/2004, is a discriminatory treatment towards the people of Jakarta. According to the Petitioner, the people's right to elect and be elected has been impaired, since the option is limited to only members of the People's Legislative Assembly, the Regional Representative Council, the President and the Vice President, members of the Regional People's Legislative Assembly and the Governor, and therefore it is considered as contradictory to Article 28I paragraph (2) of the 1945 Constitution. The Court disagrees with such argument. Article 28I paragraph (2) of the 1945 Constitution reads, "*Every person shall have the right to be free from discriminatory treatment on any basis whatsoever and shall have the right to obtain protection against any*

- such discriminatory treatment*". The absence of the Petitioner's right to be elected as the mayor of the Special Capital Region of Jakarta, and the absence of the right of Jakarta people to elect the members of Regional People's Legislative Assembly of municipality/regency in the Special Capital Region of Jakarta, cannot be regarded as discrimination because it is equally applicable to all citizens without exception or discrimination. Even more, the granting of limited autonomy at the level of the Special Capital Region of Jakarta Province is irrelevant either to be considered as an unequal treatment which may cause constitutional impairment to the citizens due to the fact that they cannot elect and be elected as a regent/mayor and members of the Regional People's Legislative Assembly of regency/municipality in Jakarta. Such impairment may possibly arise when the position of regent/mayor and members of the Regional People's Legislative Assembly of regency/municipality directly elected by the people is indeed existed in Jakarta, but there are certain people whose right to elect and/or be elected has been hindered. With the special regulation of the Special Capital Region of Jakarta in Law regarding Regional Government and Law regarding the Government of the Province of Special Capital Region of Jakarta, the autonomy has been placed at the provincial level, so there will be no citizen losing the right to elect and/or be elected;
- d. Likewise, the Petitioner's argument that Article 227 paragraph (2) of Law 32/2004 and Articles 19 and 24 of Law 29/2007 are contradictory to Article

27 paragraph (1) of the 1945 Constitution is considered inappropriate. Article 27 paragraph (1) of the 1945 Constitution reads, "*All citizens shall have an equal position before the law and government and shall be obligated to uphold such law and government, without exception*". The regulation which places the autonomy of the Special Capital Region of Jakarta only at the provincial level causes the direct election of regent/mayor and members of the Regional People's Legislative Assembly of regency/municipality by the people within Jakarta's territory becomes unnecessary. It has no implication whatsoever on the equal position of citizens before the law and government. All citizens shall be entitled to elect and/or be elected to assume the existing governmental positions in the government system of Indonesia without exception, insofar the requirements pertaining thereto are met. The Court is of the opinion that such regulation is not contradictory to the 1945 Constitution.

#### **4. CONCLUSION**

Based on the factual and legal considerations described above, it can be concluded, as follows:

- [4.1]** Whereas the regulation placing the autonomy of the Special Capital Region of Jakarta only at the provincial level, which is different than the regional autonomy in general in Indonesia pursuant to Article 18 paragraphs (1), (2), (3), (4), (5), (6), and (7) of the 1945

Constitution, is constitutional pursuant to Article 18B Paragraph (1) of the 1945 Constitution;

**[4.2]** Whereas Article 227 paragraph (2) of Law Number 32 Year 2004 regarding Regional Government and Article 19 paragraphs (2), (3), (4), (6), (7), and (8), as well as Article 24 paragraphs (1), (2), (3), and (4) of Law Number 29 Year 2007 regarding the Government of the Province of Special Capital Region of Jakarta as the State Capital of the Unitary State of the Republic of Indonesia are not contradictory to Article 18 paragraphs (1) and (2), Article 27 paragraph (1), Article 28D paragraph (3), and Article 28I paragraph (2) of the 1945 Constitution as argued by the Petitioner;

**[4.3]** Whereas the Petitioner's petition is groundless, and therefore the petition must be rejected.

## **5. DECISION**

In view of Article 56 paragraph (5) of Law Number 24 Year 2003 regarding the Constitutional Court (State Gazette of the Republic of Indonesia Year 2003 Number 98, Supplement to the State Gazette of the Republic of Indonesia Number 4316), pursuant to the 1945 Constitution of the State of the Republic of Indonesia,

### **Passing the decision**



To declare that the Petitioner's petition is rejected in its entirety.

Hence the decision was passed in the Consultative Meeting of Constitutional Court Justices on Friday, the first of August two thousand and eight, attended by nine Constitutional Court Justices, which was pronounced in the Plenary Meeting of the Constitutional Court open for public on this day, Tuesday, the fifth of August two thousand and eight, by Jimly Asshiddiqie, as Chairperson and concurrent Member, Maruarar Siahaan, Moh. Mahfud MD, H. Harjono, H. Abdul Mukthie Fadjar, H.A.S. Natabaya, HM. Arsyad Sanusi, I Dewa Gede Palguna, and Muhammad Alim, respectively as Members, assisted by Alfius Ngatrin as the Substitute Registrar, and attended by the Petitioner, the Government or its representative, and the People's Legislative Assembly or its representative.

**CHIEF JUSTICE,**

**sgd.**

**Jimly Asshiddiqie**

**JUSTICES**

**sgd.**

**Maruarar Siahaan**

**sgd.**

**sgd.**

**Moh. Mahfud MD**

**sgd.**

**H. Harjono**

**sgd.**

**H.A.S. Natabaya**

**sgd.**

**I Dewa Gede Palguna**

**H. Abdul Mukthie Fadjar**

**sgd.**

**HM. Arsyad Sanusi**

**sgd.**

**Muhammad Alim**

**SUBSTITUTE REGISTRAR,**

**sgd.**

**Alfius Ngatrin**