



DECISION

NUMBER 19/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, has passed a decision on the petition for Judicial Review on Law Number 7 Year 1989 regarding Religious Judicature which has been amended with Law Number 3 Year 2006 regarding the Amendment to Law Number 7 Year 1989 regarding Religious Judicature against the 1945 Constitution of the Republic of Indonesia, filed by:

[1.2] **Suryani**, moslem; laborer; Indonesian citizen; residing at Kp. Tubui Number 35 RT. 13/05 Waringinkurung Village/District, Serang Regency, Banten Province;

Hereinafter referred to as **the Petitioner**;

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

3. LEGAL CONSIDERATIONS

[3.1] Considering whereas the purpose and objective of the *a quo* petition are to review Article 49 paragraph (1) of the Law Number 7 Year 1989 regarding Religious Judicature and the Elucidation of the Article (State Gazette of the Republic of Indonesia Year 1989 Number 49, Supplement to the State Gazette of the Republic of Indonesia Number 3400) as amended with the Law Number 3 Year 2006 regarding the Amendment to the Law Number 7 Year 1989 regarding Religious Judicature (State Gazette of the Republic of Indonesia Year 2006, Number 22, Supplement to the State Gazette of the Republic of Indonesia 4611, hereinafter referred to as the Religious Judicature Law) against the 1945 Constitution of the Republic of Indonesia 1945 (hereinafter referred to as the 1945 Constitution);

[3.2] Considering whereas before further considering the substance or the principal issue of the *a quo* petition, the Constitutional Court (hereinafter referred to as the Court) shall first consider the following matters:

1. Whether or not the Court has the authority to examine, hear, and decide upon the *a quo* petition;
2. Whether or not the Petitioner has legal standing to be accepted as a Petitioner before the Court in the *a quo* petition;

With regard to the aforementioned two matters the Court is of the following opinion:

Authority of the Court

[3.3] Considering whereas Article 24C paragraph (1) of the 1945 Constitution states, among others, that the Court has the authority to hear at the first and final level whose decision is final to review a law against the Constitution. The provision is reaffirmed in Article 12 paragraph (1) of law Number 4 Year 2004 regarding Judicial Power (State Gazette of the Republic of Indonesia Year 2004 Number 8, Supplement to the State Gazette of the Republic of Indonesia Number 4358) and Article 10 paragraph (1) subparagraph a 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, hereinafter referred to as the Constitutional Court Law).

[3.4] Considering whereas the object of the petition filed by the Petitioner is judicial review of Article 49 paragraph (1) of the Religious Judicature Law and the Elucidation of the Article against the 1945 Constitution, and accordingly based on the aforementioned considerations, the Court declares to have the authority to examine, hear, and decide upon the *a quo* petition.

Legal Standing of the Petitioner

[3.5] Considering whereas in the petition for the judicial review of a law against the 1945 Constitution, in order for the legal standing as the

Petitioner of a person or a party before the Court to be accepted, Article 51 paragraph (1) of the Constitutional Court Law specifies that the Petitioner shall be the party who deems that his/her constitutional right/authority has been impaired by the coming into effect of the law, namely:

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

[3.6] Considering whereas therefore in order for a person or a party to be accepted as the Petitioner in the case for judicial review of a law against the 1945 Constitution, according to the provision of Article 51 paragraph (1) of the Constitutional Court Law, the intended person or the party must:

- a. clarify his/her qualification, namely whether or not he/she/it is an Individual Indonesian citizen, a unit of customary law community, a legal entity, or a state institution;
- b. the impairment of constitutional right and/or authority, in the qualification as intended in item a, as the result of the coming into effect of the law petitioned for judicial review;

[3.7] Considering whereas, following Decision Number 006/PUU-III/2005 dated May 31, 2005 and Decision Number 11/PUU-V/2007 dated September 20, 2007, and subsequent decisions, it has become the opinion of the Court that the impairment of constitutional right and/or authority can be established upon the fulfillment of the following conditions:

- a. the existence of constitutional right and/or authority of the Petitioner granted by the 1945 Constitution;
- b. the constitutional right and/or authority shall be deemed by the Petitioner to have been harmed by the coming into effect of law petitioned for judicial review;
- c. the constitutional impairment must be specific and actual in nature or at least potential which pursuant to a logical reasoning will surely take place;
- d. there is a causal relationship (*causal verband*) between the intended impairment and the coming into effect of the law petitioned for judicial review;
- e. It is expected that upon the granting of a petition the constitutional impairment argued will not occur or no longer occurs;

[3.8] Considering whereas the petition filed by the Petitioner is concerned with a judicial review of a general legal norm, not a right which is private in nature (*subjektief-recht*), even though the Petitioner is an individual. Therefore, in every judicial review, what is defined as the constitutional

impairment which will not occur or does not occur any longer as intended in item e above, must be understood in the following sense:

- a. if only there had not been the norm of the law petitioned for the review, the Petitioner would have never encountered the constitutional right impairment;
- b. if only the norm of the law petitioned for review had been eliminated, the possibility of the impairment to other parties would not have occurred.

[3.9] Considering whereas based on the aforementioned Petitioner's description, in evaluating whether or not the Petitioner has the legal standing according to Article 51 paragraph (1) of the Constitutional Court Law, the Court shall therefore consider two matters, namely:

- a. Whether or not the Petitioner as an individual Indonesian citizen can be qualified as an Indonesian citizen individual Petitioner as regulated in Article 51 paragraph (1) of the Constitutional Court Law;
- b. Whether or not the constitutional right of the Petitioner as the individual Indonesian citizen is impaired by the coming into effect of Article 49 paragraph (1) of the Religious Judicature Law;

[3.10] Considering whereas based on the description of the provision of Article 51 paragraph (1) of the Constitutional Court Law and the aforementioned conditions of constitutional right and/or authority impairment, furthermore the Court shall consider the Petitioner's legal standing in

accordance with the Petitioner's description in her petition and the submitted evidence;

[3.11] Considering whereas the Petitioner principally argues to have been harmed as the result of the coming into effect the Article 49 paragraph (1) of the Religious Judicature Law which reads, *"Religious Judicature has the duty and authority to examine, decide upon, and settle cases at the first level among the moslems in the fields of: a. marriage; b. inheritance; c. will; d. grant; e. bequest; f. Charity (zakat); g.donation (infaq); h. Alms (shadaqah); and i. Sharia economy"* because the Petitioner as the Indonesian citizen individual is of the opinion that the coming into effect of Article 49 paragraph (1) of the Religious Judicature Law and its Elucidation is contradictory to the constitutional mandate as intended in the 1945 Constitution namely:

- Article 28E paragraph (1) which reads, *"Every person shall be free to adhere to a religion and to worship in accordance with his/her religion, to choose education and teaching, to choose occupation, to choose citizenship, to choose residence in the State territory and to leave it, and shall the right to return"*;
- Article 28I paragraph (1) which reads, *" The right to life, the right not to be tortured, the right of freedom of thought and conscience, the right to have a religion, the right not to be enslaved, the right to be recognized as person before the law, and the right not to be prosecuted under retroactive law shall constitute human rights which cannot be reduced under any*

circumstances whatsoever". Paragraph (2) which 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";

- Article 29 paragraph (1) which reads, "*The state shall be based upon Belief in The One and Only God.*" Paragraph (2) reads, "*The State shall guarantee freedom to every resident to adhere to his/her religion and to worship in accordance with such religion and belief*".

It is said to be contradictory to the constitution because the Petitioner's constitutional right and/or authority to "be free to adhere to a religion and to worship in accordance with the religion" in order to become a perfect faithful religious person and to reach the level of devoutness in accordance with the Petitioner's religious doctrine, has been "*limited*" by the state through the Religious Judicature Law.

[3.12] Considering whereas in the court hearing on July 31, 2008 the Court offered the opportunity to the Petitioner to present expert and/or witness but the Petitioner stated not to use the opportunity to present the expert and/or witness in this case.

[3.13] Considering whereas after carefully examining the description of the Petitioner and the arguments conveyed by the Petitioner, the submitted

evidence, with regard to the Petitioner's legal standing, the Court is of the following opinion:

1. whereas the Petitioner has fulfilled the subject condition as regulated in Article 51 paragraph (1) sub-paragraph a of the Constitutional Court Law namely as the individual citizen;
2. whereas the Petitioner has *prima facie* fulfilled the constitutional impairment conditions as referred to in Decision of the Court Number 006/PUU-III/2005 dated May 31, 2005 and Decision of the Court Number 11/PUU-V/2007 dated September 20, 2007, and subsequent decisions, namely:
 - a. whereas the Petitioner has constitutional right as granted by Article 28E paragraph (1), Article 28I paragraph (1) and (2), Article 29 paragraph (2) of the 1945 Constitution;
 - b. whereas the Petitioner as a citizen who is a moslem feels that her constitutional right has been impaired by the coming into effect of Article 49 paragraph (1) of the Religious Judicature Law because she feels that her freedom is limited to apply the Islamic doctrine entirely and completely (*kaffah*);
 - c. whereas even though it is not specific and actual in nature, the intended constitutional impairment is at least it potential to occur;

- d. whereas the intended constitutional impairment is actually caused by the coming into effect of the Article 49 paragraph (1) of the Religious Judicature Law and the Elucidation of the article;
- e. whereas upon the granting of the Petitioner's petition, the constitutional impairment potential as argued by the Petitioner shall not occur or no longer occurs.

[3.14] Considering, furthermore, to the extent as it is related to the Petitioner's constitutional right impairment and unconstitutionality of Article 49 paragraph (1) of the Religious Judicature Law, the Court shall consider and give evaluation together with the consideration on the principal issue of the petition based on the description of the Petitioner as well as the Petitioner's evidence submitted in the hearing.

Principle Issue of the Petition

[3.15] Considering whereas the Petitioner basically argues to have been harmed as the result of the coming into effect of the Article 49 paragraph (1) of the Religious Judicature Law and the Elucidation of the Article. Article 49 paragraph (1) of the Religious Judicature Law reads, *"The Religious Judicature has the duty and authority to examine, decide upon, and settle cases at the first level among the moslems in the fields of : a. marriage; b. inheritance; c. will; d. grant; e. bequest; f. Charity (zakat); g. donation (infaq); h. Alms (shadaqah); and i. Sharia economy"* because the Petitioner's constitutional right to "be free to adhere to a religion and to worship in accordance with her religion" in order to

become a perfect faithful religious person and to reach the level of devoutness in accordance with the Petitioner's religious doctrine, namely Islam, has been "limited" by the state through the Religious Judicature Law. With respect to the Petitioner's argument the Court is of the opinion that the Religious Judicature Law has been made by the legislators based on the legal constitutional authority as regulated in Article 24 paragraph (2) and Article 24A paragraph (5) of the 1945 Constitution.

- Article 24 paragraph (2) of the 1945 Constitution reads, "*Judicial power shall be exercised by a Supreme Court and its inferior courts, in the jurisdictions of general courts, the religious affairs courts, the military tribunal, the state administration courts, and by Constitutional Court*";
- Article 24A paragraph (5) of the 1945 Constitution reads, "*The composition, position, membership, and proceedings of the Supreme Court as well as judicial bodies under it shall be regulated by law*".

The provisions of the aforementioned Articles obviously specify that the judicial power below the Supreme Court consists of four jurisdictions which have their own absolute competency [Article 24 paragraph (2) of the 1945 Constitution] in accordance with the historical background and the philosophy of the Unitary State of the Republic of Indonesia, *Pancasila*. The composition, position, membership, and procedural law including absolute competency for each jurisdiction under the Supreme Court, are granted to the legislators by Article 24A paragraph (5) of the 1945 Constitution to regulate them by law.

[3.16] Considering whereas the *posita* and *petitum* of the Petitioner reflect an inconsistency. The Petitioner in her *petitum* requests for the revocation of Article 49 paragraph (1) of the Religious Judicature Law concerning absolute competency of Religious Judicature, while in her *posita* the Petitioner requests for the addition of authority in order to extend the coverage and the scope of its competency covering the other Islamic laws including criminal law (*jinayah*). With respect to such petition, the Court is of the opinion that the Court does not have any authority to extend the absolute competency of the Religious Judicature as specified in Article 49 paragraph (1) of the Religious Judicature Law, because based on the provisions of Article 24C of the 1945 Constitution and Article 10 of the Constitutional Court Law the Court has an authority to review the constitutionality of a law and declares that it does not have any binding legal effect if the law is proven contradictory to the 1945 Constitution, either in substantive or in formal reviews. The Court can only act as a *negative legislator* and does not have any authority at all to add the content of the regulation or to become a *positive legislator*.

[3.17] Considering whereas the Petitioner also argues that Article 49 paragraph (1) of the Religious Judicature Law is contradictory to the 1945 Constitution so that according to the Petitioner it harms her constitutional right as guaranteed by the constitution particularly by Article 28E paragraph (1), Article 28I paragraph (1) and (2), as well as Article 29 paragraphs (1) and (2) of the 1945 Constitution. With respect to the Petitioner's argument, the Court is of the

opinion that the provisions of Article 24 paragraph (2) and Article 24A paragraph (5) of the 1945 Constitution as quoted above obviously show that the Religious Judicature is one of the four jurisdictions which have authority to enforce law and justice with their scope and limit of competency being determined by law. Therefore, the regulation of Article 49 paragraph (1) of the Religious Judicature Law is not at all contradictory to the 1945 Constitution;

[3.18] Considering, the Petitioner also argues that the Islamic law with all of its branches including the criminal law (*jinayah*) must be put into effect in Indonesia because Indonesia is a state based on the Belief in One Almighty God. The Petitioner even argues that every adherent of any legal religion in Indonesia may request the state to put into effect his/her own religion. In relation to that matter, the Petitioner also argues that Article 49 paragraph (1) of the Religious Judicature Law is contradictory to Article 28I paragraph (1) of the 1945 Constitution which reads, "*The right to have a religion shall constitute human rights which cannot be reduced under any circumstances whatsoever*". Paragraph (2) 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*". With respect to the Petitioner's argument, the Court is of the opinion that the Petitioner's argument is not in accordance with the statesmanship view of Indonesia concerning the relationship between state and religion. Indonesia is not a religion-based state which is only based on one certain religion; neither is Indonesia a secular state which does not pay any attention to the religions and leaves the religious affairs

totally to the individual and the people. Indonesia is a state believing in the One Almighty God which protects every adherent of religions to worship in accordance with his/her religion. In connection with the *Pancasila* philosophy, the national law must guarantee the ideological unity and the integrity of state territory, as well as develop just and civilized tolerance among religions. Accordingly, the national law can serve as an integrating factor which becomes the cement and unifying tools. The service of the state to the citizens is not based on the majority and the minority of the religious adherents, ethnic groups or races. If the problem of the imposition of Islamic law is related to the source of law, accordingly it can be said that Islamic law actually becomes the source of the national law, but the Islamic law is not the only source of national law, because beside the Islamic law, customary law, and western law, as well as other sources of law traditions have also become the sources of the national law. Therefore, the Islamic law can become one of the material sources as the material of formal laws and regulations. The Islamic law as a source of law can be used together with other sources of law, so that it becomes the material for the formulation of laws and regulations to be applied as the national law.

[3.19] Considering whereas the Petitioner also argues that Article 49 paragraph (1) of the Religious Judicature Law is contradictory to Article 28E paragraph (1), Article 28I paragraphs (1) and (2), and Article 29 paragraph (2) of the 1945 Constitution. With respect to the Petitioner's argument, the Court is of the opinion that the provision of Article 49 paragraph (1) of the Religious Judicature Law does not at all reduce the Petitioner's right and the freedom to

adhere to a religion and to worship in accordance with her religion as guaranteed by Article 28E paragraph (1), Article 28I paragraph (1) and (2), and Article 29 paragraph (2) of the 1945 Constitution, so that the Petitioner's argument is not relevant to be further considered.

4. CONCLUSIONS

Considering whereas based on all the foregoing factual and legal considerations , the Court concludes:

[4.1] whereas Article 49 paragraph (1) of the Religious Judicature Law is not contradictory to Article 28E paragraph (1), Article 28I paragraph (1) and (2), and Article 29 paragraph (1) and (2) of the 1945;

[4.2] whereas because the Petitioner's arguments are groundless, accordingly the Petitioner's petition must be declared rejected.

5. DECISION

In view of Article 56 paragraph (5) of the 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), accordingly based on the Constitution of the Republic of Indonesia Year 1945,

Passing the Decision,

To declare that the Petitioner's petition is rejected.

In witness thereof this decision was made in the Consultative Meeting of (nine) Constitutional Court Justices on Friday, August 8, 2008, and was pronounced in the Plenary Season of the Constitutional Court open for public on this day, Tuesday, August 12, 2008, by us, Jimly Asshiddiqie as the Chairperson and concurrent Member, Moh. Mahfud MD, HM. Arsyad Sanusi, Muhammad Alim, H. Harjono, Maruarar Siahaan, H.A.S. Natabaya, I Dewa Gede Palguna, and H. Abdul Mukhtie Fadjar, respectively as Members, assisted by Fadzlun Budi SN as Substitute Registrar and in the presence of the Petitioner and the Government or its representatives and the People's Legislative Assembly or its representative.

CHIEF JUSTICE,

sgd.

Jimly Asshiddiqie

MEMBERS,

sgd.

Moh. Mahfud MD

sgd.

Muhammad Alim

sgd.

sgd.

HM. Arsyad Sanusi

sgd.

H. Harjono

sgd.

H. Abdul Mukthie Fadjar

H.A.S. Natabaya

sgd.

sgd.

I Dewa Gede Palguna

Maruarar Siahaan

SUBSTITUTE REGISTRAR,

sgd.

Fadzlun Budi SN