



DECISION

Number 26/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 in the first and final level, has passed a decision in the case of petition for Judicial Review of Law Number 2 Year 2003 concerning the Establishment of Tanah Bumbu Regency and Balangan Regency in South Kalimantan against the 1945 Constitution of the State of the Republic of Indonesia, filed by:

[1.2] **H.G. KHAIRUL SALEH**; place/date of birth: Tabalong, January 5 1964, Moslem, occupation as the Head of Banjar Regency, Indonesian citizen, having his address at Jalan Jend. A. Yani Number 2 Martapura South Kalimantan;

In this case having authorized 1) Safrin Noor, S.H; 2) Hanafi, S.H; 3) Hj. Siti Mahmudah, S.H., M.H; 4) Rr. Dian Parwatisari, S.H; all of them are the Civil Servants of the Law Section of Banjar Regional Secretariat, having their office at Jalan Jend. A. Yani Number 2 Martapura 70611 South Kalimantan, based on the Special Power of Attorney dated August 5, 2008, either jointly or severally, hereinafter referred to as the ----- **Petitioner**;

[1.3] Having read the Petitioner's petition;

Having heard and read the Petitioner's statement;

Having examined the evidence;

2. FACTS OF THE CASE

[2.1] Considering whereas the Petitioner has filed the petition without being dated in August, 2008 which was received and registered in the Registrar's Office of Constitutional Court (hereinafter referred to as the Registrar's Office of the Constitutional Court) on September 19, 2008 with Case Registration Number 26/PUU-VI/2008, that has been corrected and received in Registrar's Office of the Constitutional Court on October 21, which describes the following matters:

1. Constitutional Court's Authority

Based on Article 24C paragraph (1) of the 1945 Constitution of the Republic of Indonesia and as further affirmed in Article 10 paragraph (1) of Law Number 24 Year 2003 concerning 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) *juncto* Article 12 paragraph (1) of Law Number 4 Year 2004 concerning 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), the Constitutional Court has authority to hear cases in the first and final level whose decision is final to:

- a. review laws against the 1945 Constitution of the Republic of Indonesia;
- b. decide upon disputes on the authority of state institutions whose authorities are granted by the Constitution of the State of the Republic of Indonesia Year 1945;
- c. decide upon dissolution of political parties; and
- d. decide upon disputes over the results of general elections.

Accordingly, the Petitioner's petition for the review of Law Number 2 Year 2003 concerning the Establishment of Tanah Bumbu and Balangan Regencies in South Kalimantan Province particularly Article 6 paragraph (4) against the 1945 Constitution constitutes the Constitutional Court's authority.

2. Petitioner's legal standing

Article 51 paragraph (1) of Law Number 24 Year 2003 determines that the Petitioners in judicial review of laws against the 1945 Constitution shall be the persons who deem that their constitutional rights and/or authorities have been harmed by the coming into effect of a law, namely a) individual Indonesian citizens, including groups of people having a common interest; b) units of customary law communities to the extent as they still exist and in accordance with the development of the community 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.

The Petitioner in this matter shall be included in the category of public legal entity namely the Government of Banjar Regency and based on Article 25 sub-article F of Law Number 32 Year 2004, a regional head has duties and authorities to represent his/her region in and out of the court, and may authorize the attorney to represent him/her in accordance with the laws and regulations;

The Petitioner in the judicial review of Law Number 2 Year 2003 against the 1945 Constitution is the party whose constitutional rights and/or authorities have been harmed by the coming into effect of Law Number 2 Year 2003 because based on Article 18 paragraph (4), paragraph (5), paragraph (6) and paragraph (7) of the 1945 Constitution, stating that the regional governments (either province, regency or municipality) shall administrate and manage their own governmental affairs under the autonomy and the principle of duty of assistance. This statement has become the legal basis for the all regional governments to be able to administer the government (including stipulating the regional regulations and other regulations) more freely and independently as well as in accordance with the needs, condition, and the characteristics of their respective regions, except for governmental affairs stated by the laws to

be the central government's affairs (General Secretariat of MPRRI:2006:81).

Furthermore, the law intended in Article 18 paragraph (7) of the 1945 Constitution namely Law Number 32 Year 2004 concerning 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) in Article 13 paragraph (1) sub-paragraphs c and m and Article 198 paragraph (1) states that the organization of the public order and people's security as well as public administration service of the government become the authorities of the provincial governments which constitute the affairs at a provincial scale, including the settlement of disputes over government functions among regencies/municipalities in a province shall be settled by the Governor.

With the existence of Article 6 paragraph (4) of Law Number 2 Year 2003 granting authorities to the Minister of Home Affairs the Petitioner's constitutional rights and/or authorities are obviously impaired.

The Petitioner's constitutional impairment has been caused by the fact that based on the formulation of Article 6 paragraph (4) of the Law Number 2 Year 2003, the authority of the Governor issuing the Decision of Border Stipulation between Banjar Regency and Tanah Bumbu Regency of South Kalimantan Province was annulled by the Supreme Court, with the consequence that a part of the territory of Banjar Regency is lost.

More extensive constitutional loss has been due to the coming into effect of Article 6 paragraph (4) of Law Number 2 Year 2003 which interrupts government administration by Banjar Regency Government and public services that have lasted for 40 years.

Accordingly, the Petitioner has legal standing in the petition for judicial review of Law Number 2 Year 2003.

3. Principal Issues of Review :

The reasons for the petition for judicial review of Law Number 2 Year 2003 against the 1945 Constitution are described as follows:

Law Number 2 Year 2003 concerning the Establishment of Tanah Bumbu and Balangan Regencies (State Gazette of the Republic of Indonesia Number 22 Year 2003, Supplement to the State Gazette of the Republic of Indonesia Number 4265) is the law of division of region. The petition is concerned with the Establishment of Tanah Bumbu Regency which used to be part of Kota Baru Regency based on Law Number 27 Year 1959 concerning the Stipulation of the Emergency Law Number 03 Year 1953 concerning the Establishment of Second Level Regions in Kalimantan as law (State Gazette of the Republic of Indonesia Year 1959 Number 72, Supplement to the State Gazette of the Republic of Indonesia Number 1820);

Law Number 2 Year 2003 is the instruction of Article 6 paragraph (2) and paragraph (4) of Law Number 22 Year 1999:

- (2) A region may be divided into more than one regions;
- (4) The elimination, merger, and division of regions as intended in paragraph (1) and paragraph (2) shall be stipulated by law.

Accordingly, based on Article 6 of Law Number 22 Year 1999, Law Number 2 Year 2003 was stipulated to regulate the division of Kotabaru with the new regency namely Tanah Bumbu Regency.

Under Law Number 2 Year 2003 concerning the Establishment of Tanah Bumbu Regency, the region has a direct border with Banjar Regency which constitutes an autonomous region under Law Number 27 Year 1959 concerning the Stipulation of Emergency Law Number 03 Year 1953 concerning the Establishment of Second Level Regions in Kalimantan as Law (State Gazette of the Republic of Indonesia Year 1959 Number 72, Supplement to the State Gazette of the Republic of Indonesia Number 1820).

When Banjar Regency bordered Kotabaru Regency in the border area there was Paramasan Village of Sungai Pinang District, Banjar Regency (in 1992, based on the Decision of Governor Number 0543 Year 1991, Paramasan Village was merged with Baringan Village to be Paramasan

Bawah Village and in 2006 the two villages and several other villages were upgraded to become Paramasan District based on the Regional Regulation Number 12 Year 2006, Regional Gazette Number 2 Series D Serial Number 03 Year 2006) for around 40 years the government organization and public service was conducted by the Government of Banjar Regency.

With the Law Number 2 Year 2003 concerning the Establishment of Tanah Bumbu and Balangan Regencies the border area becomes the conflict area because it is claimed by Tanah Bumbu Regency to be within its territory, so that it brings about the disturbance to the community of the area and conflicts in the government administration between Tanah Bumbu Regency and Banjar Regency.

Law No. 2 Year 2003 does not include the territory of Sungai Pinang District and Paramasan District of Banjar Regency in the administrative territory of Tanah Bumbu Regency. However, the Government of Tanah Bumbu Regency claims that its territory includes a part of Sungai Pinang District and Paramasan District of Banjar Regency.

It is argued by them based on the Indonesian Topographic Map (*Peta Rupa Bumi Indonesia /RBI*) First edition Year 1991 published by the National Land Survey Coordinating Agency/*Badan Koordinasi Survei Tanah Nasional (Bakorsurtanal)*. In the RBI Map the administrative borders of every regency/municipality are drawn as imaginary/virtual

borders. Furthermore, at the bottom part of the RBI map there is a description “***The administrative borders in this map are temporary and may not be used as the official reference to administrative borders***”

If we relate it to Article 6 paragraph (1) sub-article b concerning the territorial borders of Tanah Bumbu Regency, it borders Aranio District and Sungai Pinang District of Banjar Regency to the west, so that the claim for Tanah Bumbu territory includes a part of administrative territory of Sungai Pinang District and Paramasan District of Banjar Regency. Paramasan District constitutes the New District resulting from the Division of Sungai Pinang District.

It is known that the determination of administrative territorial border of every regency/municipality used to refer to the Circular Letter of the Minister of Home Affairs Number 126/2742/SJ. Dated November 27, 2002 concerning the Stipulation and Confirmation of Regional Borders, and furthermore the Minister of Home Affairs issued the Regulation of the Minister of Home Affairs Number 1 Year 2006 concerning the similar matter.

Based on the authority under Article 198 paragraph (1) of Law Number 32 Year 2004, the Governor of South Kalimantan has settled the conflict by issuing the Decision of South Kalimantan Governor Number 03 Year 2006 concerning the Determination of Territorial Borders Between Banjar Regency and Tanah Bumbu Regency.

The Decision of South Kalimantan Governor Number 03 Year 2006 concerning the Determination of Territorial Borders Between Banjar Regency and Tanah Bumbu Regency was petitioned for substantive review to the Supreme Court by the Government of Tanah Bumbu Regency.

Decision of the Supreme Court Number Reg. 26 P/HUM/2006 in the case of the rights to substantive review between the Regent of Tanah Bumbu Regency and South Kalimantan Governor dated May 30, 2007 granted the petition for substantive review and declared that the Decision of South Kalimantan Governor Number 03 Year 2006 concerning the Determination of Territorial Borders Between Banjar Regency And Tanah Bumbu Regency was not valid.

Decision of the Supreme Court in point 3.7. above was based on Article 6 paragraph (4) of Law Number 2 Year 2003 which reads:

“The determination of definite territorial borders between Tanah Bumbu Regency and Balangan Regency in the field as intended in paragraphs (1) and (2) shall be stipulated by the Minister of Home Affairs”. Therefore, the Decision of South Kalimantan Governor Number 03 Year 2006 was declared invalid because it was not in his authority.

With the existence of the provision of Article 6 paragraph (4) of Law Number 2 Year 2003, the Decision of South Kalimantan Governor Number 03 Year 2006 has become invalid, so that the territory of Paramasan

Bawah Village shall become the territory of Tanah Bumbu Regency with the consequence that Banjar Regency suffers loss namely among other things as follows:

1. Government Sector

In the context of public service, community development and guidance in the areas bordering Tanah Bumbu Regency namely RT (*Neighborhood Association*) IV, RT. V, and RT. VI Dadap in Belimbing Lama Village, RT. V Sungai Pinang Kusan in Angkipih Village, RT. II Emil and RT. V Andau Huling of Paramasan Bawah Village in Sungai Pinang District, various activities have been conducted as follows:

- a. Guidance and counseling in the government sector either in District Office or directly in the Village/RT;
- b. Services for Family and Residential Identity Cards and other licenses;
- c. Organizing General Election since 1971;
- d. Facilitation for the establishment of Dadap Farmers' Group;
- e. Developing *musholla* (prayer house for Moslems) in Muara Alat Dadap, Musholla Emil and Musholla Andau Huling;

- f. Guidance for customary communities in RT. III Emil, RT. VI Belimbing Lama and helping build *Adat* (Customary) Hall in Sungai Pinang Kusan RT.V of Angkipih Village;
- g. Organizing the election of the Head of Belimbing Lama Village in 2001 and Head of Paramasan Bawah Village in 2005;
- h. Organizing Guidance, Directing and Counseling for the smallest customary community as well as submitting proposal for the establishment of Dayak Meratus Settlement in Dadap, Belimbing Lama Village and Angkipih Village;
- i. Establishing mutual cooperation with the people of Dadap and RT. III Emil to repair the damaged roads/landslide and proposing for its repair to Banjar Regional Government;
- j. Proposing the appointment and placement of *Da'i* (Islamic Guide) in Remo, Angkipih, Paramasan Atas and Paramasan Bawah villages to educate and guide the people converting to Islam.

2. Forestry Sector

- a. Working Area of Annual Work Plan (RKT) of HPH UPT Emil Timber since the First Five-Year Work Plan (RKL I Year

1978/1979 up to RKL IV Year 1998/1999 was within the territory of Banjar Regency so that all of public services related to forestry sector of PT. Emil Timber were provided by the Forestry Service Office of Banjar Regency (i.e. Sub-Service Office/KPH Kayu Tangi Territory) among other things the service for forest exploitation administration, timber management, in field supervision, reporting etc.

- b. Some of the people of Paramasan bawah Village were involved in community skill improvement training in the context of *Social Forestry (Socfor)* organized by BP. Das Barito in cooperation with Banjar Regency Forestry Service Office and Directorate General of RLPS of the Ministry of Forestry from November 21-23, 2005.
- c. The proposal for rubber tree seeds submitted by “Suka Maju” Farmers’ Group of Paramasan Bawah Village contains the name list of group members from RT. I, RT. II, RT. III, RT. IV, RT. V and RT. VI. who would be involved as participants in *Social Forestry (Socfor)* activities.
- d. Currently, the technical arrangement is being prepared for the implementation of the aforementioned activities.

3. Education Sector

- a. The Submission of Approval Recommendation by the Head of Education Sub-Service Office of Pengaron District and Sungai Pinang District on March 17, 2003 concerning the Establishment of Mekar Sari Elementary School (SD) Emil Hamlet of which the implementation of administration of activities still follows SDN (Government Elementary School) Paramasan Bawah (*SD Filial*).
- b. The appointment of “Contract-based Teaching Personnel/*Tenaga Bhakti Guru*” in SDN Paramasan Bawah in the names of Baiq Kartini and Karmila through the Decision of Regent of Banjar Regency Number 245 Year 2004 dated April 28 Year 2004 where their period of service was extended until now under the Decision of Regent of Banjar Regency Number 30 Year 2005 and Number 15 Year 2006.

4. Social Welfare Sector

- a. Documentation of isolated communities in Kahelaan Village up to Dadap, Belimbing Village in 1984;
- b. Construction of 100 houses and the aid for living cost for the isolated community in Kahelaan in 1985;

- c. Proposal submission for the isolated communities settlement (PKMT) in Paramasan Bawah Village in 1993;
- d. Cooperation with Kodeco Timber for house renovation in Paramasan Bawah Village in 1994/1995;
- e. In 1997, 195 homes were built along with hall, *langgar* (a place serves as a Muslim elementary school) SD, Community Health Center (*Puskesmas*);
- f. Aid of clean water in 1998;
- g. The repair of road in housing locations, the provision of young goats and goat cattle, coconut seeds, the extension of agricultural lands in 1999;
- h. Provision of Diesel Power Generator Set through P2LTD Project in 1999;
- i. Aid of rubber tree seeds and young buffaloes in 2000;
- j. Aid from the World Bank for settlement road repair in 2001;
- k. Aid of teak, rambutan, mango seeds from the Regional Government of Banjar Regency in 2003;
- l. Guidance for Isolated Customary Communities of Paramasan Bawah and Paramasan Atas, Remo, Angkipih, Belimbing Villages in the forms of empowerment and improvement of facility and infrastructure in 2004;
- m. Aid for Customary (*Adat*) Hall rehabilitation in the amount of Rp.40,000,000,- in 2006;

- n. *TNI Manunggal Masuk Desa* (TMMD-Military Social Activities in rural areas) in 2006;
- o. Implementation of *PMPD/CERD* and *PPD* activities from 2002-2006.

5. Health Sector

The provision of health service has been conducted since 1983 (since the establishment of the Supporting Community Health Centers (*Puskesmas Pembantu*) in Belimbing Lama and Parasaman Bawah until now), with the services provided being among other things:

- a. Basic health services (*mobile Puskesmas/pusling*);
- b. Basic health guidance;
- c. Eradication of contagious diseases (malaria and rabies);
- d. Childbirth aid;
- e. Family Planning (KB) guidance and service;
- f. National Immunization Program (PIN) and vitamin A provision;
- g. *Posyandu* (Integrated Service Post) Activities;
- h. Handling of Incidental activities (emergency), taking patients to *Puskesmas/Hospital*.

The provision of Article 6 paragraph (4) of Law Number 2 Year 2003 granting authority to the Minister of Home Affairs is contradictory to Article 18 of the 1945 Constitution because the determination of territorial borders of Regencies/Municipalities shall be the affairs of autonomous Regional Governments as formulated in Article 18 paragraph (5) of the 1945 Constitution namely that the Regional Governments shall exercise autonomy to the greatest extent, except if it is stipulated by the law to be the affairs of the Central Government.

Accordingly, the Normative provision of Article 6 paragraph (4) of Law Number 2 Year 2003 is contradictory to Article 18 of the 1945 Constitution.

Based on the aforementioned reasons, the Petitioner in his petition for judicial review of Law Number 2 Year 2003 against the 1945 has requested for the following decisions:

- To grant the Petitioner's petition;
- To declare that Article 6 paragraph (4) of Law Number 2 Year 2003 is contradictory to Article 18 paragraph (5) of the 1945 Constitution;
- To declare that Article 6 paragraph (4) of Law Number 2 Year 2003 does not have binding legal force;
- To publish this decision in the Official Gazette.

[2.2] Considering whereas to confirm the arguments of his petition, the Petitioner has submitted written evidence duly stamped and marked as Exhibit P - 1 up to P - 8, as follows:

Exhibit P - 1 : Photocopy of Law Number 2 Year 2003 concerning the Establishment of Tanah Bumbu Regency And Balangan Regency in South Kalimantan Province (State Gazette of the Republic of Indonesia Year 2003 Number 22, Supplement to the State Gazette of the Republic of Indonesia Number 4265);

Exhibit P - 2 : Photocopy of Law Number 27 Year 1959 concerning the Stipulation of Emergency Law Number 3 Year 1953 concerning the Establishment of Second Level Regions in Kalimantan (State Gazette of the Republic of Indonesia Year 1959 Number 72, Supplement to the State Gazette of the Republic of Indonesia Number 1820);

Exhibit P - 3 : Photocopy of Law Number 22 Year 1999 concerning Regional Government;

Exhibit P - 4 : Photocopy of Law Number 32 Year 2004 concerning 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);

- Exhibit P - 5 : Photocopy of Circular Letter of the Minister of Home Affairs Number 126/2742/SJ dated November 27, 2002 concerning the Guidelines for the Stipulation and Confirmation of Territorial Borders;
- Exhibit P - 6 : Photocopy of Governor's Decision Number 03 Year 2006 concerning the Determination of Territorial Borders between Banjar Regency and Tanah Bumbu Regency in South Kalimantan province dated January 6, 2006;
- Exhibit P - 7 : Photocopy of Decision of Supreme Court under Registration Number 26 P/HUM/2006, in the case of substantive review right between the Regent of Tanah Bumbu Regency and Governor of South Kalimantan Province;
- Exhibit P - 8 : Photocopy of Decree of the Minister of Home Affairs Number 131.43-556 Year 2005 concerning the Dismissal of Acting Regent of Regency And the Legalization of Appointment of the Regent of Banjar

Regency, South Kalimantan Province dated July 21,
2005;

[2.3] Considering whereas to shorten the description of this decision, everything occurring in the hearing is described in the Minutes of Hearing, and constitutes an inseparable part of the Decision;

3. LEGAL CONSIDERATIONS

[3.1] Considering whereas the purpose and objective of the Petitioner's petition are as described above;

[3.2] Considering whereas prior to 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. Authority of the Court to examine, hear, and decide upon the *a quo* petition;
2. The Petitioner's Legal Standing to qualify as the Petitioner before the Court in the *a quo* petition;

With respect to the above-mentioned two matters the Court id of the following opinion:

COURT'S AUTHORITY

[3.3] Considering whereas one of the constitutional authorities of the Court based on Article 24C paragraph (1) of the Constitution of the State of the Republic of Indonesia Year 1945 (hereinafter referred to as the 1945 Constitution) is to hear cases in the first and final levels whose decision shall be final to review laws against the 1945 Constitution. Such provision is reaffirmed in Article 10 paragraph (1) sub-paragraph a of Law Number 24 Year 2003 concerning the Constitutional Court (hereinafter referred to as the Constitutional Court Law) *juncto* Article 12 paragraph (1) of Law Number 4 Year 2004 concerning Judicial Power;

[3.4] Considering whereas the object of the Petitioner's petition is judicial review, *in casu* of Article 6 paragraph (4) of Law Number 2 Year 2003 concerning the Establishment of Tanah Bumbu Regency and Balangan Regency in South Kalimantan Province (State Gazette of the Republic of Indonesia Year 2003 Number 22, Supplement to the State Gazette of the Republic of Indonesia Number 4265, hereinafter referred to as Law 2/2003), against the 1945 Constitution;

Considering whereas accordingly, the Court has authority to examine, hear, and decide upon the *a quo* petition;

THE PETITIONER'S LEGAL STANDING

[3.5] Considering whereas based on Article 51 paragraph (1) of the Constitutional Court Law, the Petitioner in the judicial review against the 1945

Constitution shall be the party who deems that his constitutional rights and/or authorities have been harmed by the coming into effect of a law, namely:

- a. Individual Indonesian citizens;
- b. units of customary law community to the extent that they still exist and in accordance with development of the community and the principle of the Unitary State of the Republic of Indonesia as regulated by law;
- c. public or private legal entities; or
- d. state institutions;

[3.6] Considering whereas to qualify as Petitioner in the case of judicial review against the 1945 Constitution, according to the provision of Article 51 paragraph (1) of the Constitutional Court Law, the intended party shall clarify the following:

- a. legal standing in his/her petition, namely whether or not as an Individual Indonesian citizen, unit of customary law community, legal entity, or state institution;
- b. impairment of his/her constitutional rights and/or authorities in his/her legal capacity as intended in point a, as a result of the coming into effect of the law petitioned for review;

[3.7] Also considering whereas, following Decision Number 006/PUU-III/2005 dated May 31, 2005 and Decision Number 11/PUU-V/2007 dated September 20, 2007, as well as further decisions, the Court is of the opinion that

that for the impairment of constitutional rights and/or authorities to be established, the following requirements must be fulfilled:

- a. The Petitioner has constitutional rights and/or authority granted by the 1945 Constitution;
- b. The Petitioner deems that his/her constitutional rights and/or authority are harmed by the coming into effect of the law petitioned for review;
- c. such constitutional impairment must be specific and actual in nature or at least potential in nature which, according to logical reasoning, will surely occur;
- d. there shall be a causal relationship (*causal verband*) between the intended impairment and the coming into effect of the law petitioned for review;
- e. It is expected that by granting the petition, the constitutional impairment argued shall not or shall no longer occur.

[3.8] Considering whereas the Petitioner, in the *a quo* petition, declares himself as public legal entity, namely the Government of Banjar Regency in this case represented by H.G. Kahirul Saleh, the Regent of Banjar Regency, based on Article 25 of Law Number 32 Year 2004 concerning 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) which reads, "*The Regional Head shall have the duties and authorities:*

f. to represent his/her region in and out of the court, and may authorize attorney (s) to represent him/her in accordance with the laws and regulations”.

Meanwhile, Elucidation of Article 51 paragraph (1) of the Constitutional Court Law states that “constitutional rights“ shall the rights regulated in the 1945 Constitution. Accordingly, to be able to determine whether or not the Petitioner has constitutional rights and/or authorities being impaired, shall be evaluated according to the definition as included in the Elucidation of Article 51 paragraph (1) of the intended Constitutional Court Law;

[3.9] Considering whereas the Petitioner claims to have constitutional rights granted by the 1945 Constitution as follows:

- Article 18 paragraph (4): “ *Governors, Regents and Mayors as the respective heads of provincial, regency, and municipal governments shall be elected democratically*”;
- Article 18 paragraph (5): “ *The regional governments shall exercise autonomy to the broadest possible extent, with the exception of governmental affairs determined by law as affairs of the Central Government* ”;
- Article 18 paragraph (6): “ *The regional governments shall have the right to stipulate regional regulations and other regulations to implement autonomy and duty of assistance* ”;

- Article 18 paragraph (7): *“The structure of and procedures for the administration of regional government shall be regulated in law”*.

[3.10] Considering whereas with respect to the Petitioner’s arguments concerning his constitutional rights granted by the 1945 Constitution, the Court is of the opinion that the intended articles are concerned with the granting of authorities to regional governments to regulate and manage their own government affairs based of the principles of autonomy and duty of assistance. Therefore, the Petitioner’s argument stating that the Petitioner has the constitutional rights as a public legal entity is sufficiently grounded;

[3.11] Considering whereas even though the Petitioner in his legal capacity as a public legal entity has constitutional rights granted by the 1945 Constitution, it must still be proved whether or not the Petitioner’s constitutional rights have been impaired by the coming into effect of Law 2/2003 petitioned for the review, namely:

- Article 6 paragraph (4) which reads, *“The determination of territorial borders of Tanah Bumbu Regency and Balangan Regency exactly in the field, as intended in paragraph (1) and paragraph (2) shall be determined by the Minister of Home Affairs”*. Whereas according to the Petitioner, the coming into effect of the *a quo* Article has impaired his constitutional rights on the following reasons:

- the authority of the Governor issuing the Decision concerning the Determination of Borders between Banjar Regency and Tanah Bumbu Regency, of South Kalimantan Province has been annulled by the Supreme Court, resulting in loss on the part of Banjar Regency's territory;
- the interruption of the government administration by Banjar Regency government and public services that have been lasting for 40 years;
- According to the Petitioner, Article 13 paragraph (1) sub-paragraphs c and m, as well as Article 198 paragraph (1) of Law 32/2004 state that the implementation of public order and public security as well as general government administration become the authority of provincial governments which constitute the affairs in provincial scale, including the settlement of disputes over governmental functions among regencies/municipalities in a province which shall be settled by the Governor;

[3.12] Considering, in view of the foregoing arguments of the Petitioner, the Petitioner questions the authority of South Kalimantan Governor, with respect to which, according to the Petitioner, after the coming into effect of Article 6 paragraph (4) of Law 2/2003, South Kalimantan Governor no longer have authority to issue the Decision concerning the determination of territorial borders. Such authority was also conveyed by the Petitioner in the preliminary court

hearing on October 13, 2008 and the revised petition on October 28, 2008, in which the Petitioner basically explains that the determination of territorial borders after division in every regency/municipality shall be the authority of Governor as regulated in Government Regulation Number 38 Year 2007 concerning the Division of Government Affairs among Central Government, Provincial Governments, and Regency/Municipal Governments (hereinafter referred to as PP 38/2007).

[3.13] Considering whereas Article 10 paragraph (5) of Law 32/2004 states *"In government affairs which become the authority of the Government **beyond the government affairs** as intended in paragraph (3), the Government may:*

- a. *Organize a part of the government affairs by itself;*
- b. *delegate a part of the government affairs to Governors as the representatives of the Government; or*
- c. *assign a part of the affairs to regional governments and/or village governments based on the principle of duty of assistance";*

The *a quo* Article shows that the Government has other authorities in addition to the 5 (five) government affairs determined by law. The five government affairs which become the authority of the Government include: **foreign policy; defense; security; administration of justice; monetary and fiscal; and religion** [*vide* Article 10 paragraph (3) of Law 32/2004]. Meanwhile, the other Government authorities, beyond such government affairs, are further regulated in

PP 38/2007 including 31 (thirty one) government affairs, among other things: **regional autonomy, general government, regional finance administration, regional instruments, personnel affairs, and coding....** [*vide* Article 2 paragraph (4) PP 38/2007];

[3.14] Considering whereas in executing the government affairs beyond the 5 (five) government affairs which become its affairs, the Government may choose 3 (three) alternatives, namely to a part of the government affairs by itself; to delegate a part of the government affairs to Governors as the Government's representatives; or to assign a part of the affairs to regional governments and/or village governments based on the principle of duty of assistance. Whereas for the government affairs concerning *regional autonomy, general government, regional finance administration, regional instruments, personnel affairs, and coding*, which include *the stipulation of changes of borders, name, and separation of regional capital city*, the Government shall administer such Government affairs by itself. Such provision is regulated in the attachment item T of PP 38/2007 concerning the division of sectors of Regional Autonomy, General Government, Regional Finance Administration, Regional Instruments, Personnel Affairs, and Coding in Sub-Sectors of Region Establishment Sector that the Stipulation of changes of borders, name, and the transfer of regional capital city constitute the authorities of the Government. Provincial governments have authority to propose the change of provincial borders, name and the transfer of regional capital city, while Regional/Municipal Governments have authority to propose the change of regional/municipal borders, name and the transfer of

regional capital city (*vide* Attachment of Government Regulation 38/2007 in Sub-Sectors in point 2 letter b, Regional Establishment);

Accordingly, the Petitioner's argument stating that Government Regulation 38/2007 has granted authority to Governors to determine division territorial borders is incorrect, because Government Regulation 38/2007 does not have any provision granting authority to Governors to determine division territorial borders;

[3.15] Considering whereas in his petition the Petitioner argues that he has been harmed by the coming into effect of Article 6 paragraph (4) of Law 2/2003 causing the Petitioner to lose Paramasan Village, Sungai Pinang District. Article 6 paragraph (1) of Law 2/2003 concerning territorial borders of Tanah Bumbu Regency states, "*Tanah Bumbu Regency has the following territorial borders:*

- a. *to the north bordering Hampang District, Kelumpang Hulu District, and Kelumpang Selatan District, Kotabaru Regency;*
- b. *to the east bordering Selat Laut;*
- c. *to the south bordering Java Sea; and*
- d. ***to the west bordering Kintab of Tanah Laut Regency, Aranio and Sungai Pinang Districts, Banjar Regency".***

Whereas with the inclusion of Sungai Pinang District into Banjar Regency as specified in Article 6 paragraph (1) sub-paragraph d of Law 2/2003, accordingly

the Petitioner is not harmed by the coming into effect of the *a quo* Article. No loss of the Petitioner by the coming into effect of the *a quo* Article has been also conveyed by the Petitioner in the revised petition on page 5 in point 3.4 which basically states that Law 2/2003 does not mention Paramasan District and Sungai Pinang District to be included into the administrative territory of the government of Tanah Bumbu Regency, however the two districts are claimed by Tanah Bumbu to be its territory. Therefore, the Petitioner's loss has not been caused by the coming into effect of Article 6 paragraph (4) of Law 2/2003 as argued by the Petitioner, but by territorial border dispute causing the Petitioner to lose a part of his territory. The settlement of such territorial border dispute shall not be the authority of the Court;

[3.16] Considering whereas apart from whether the substance of the Petitioner's petition as described above is right or wrong, even though the Petitioners' rights as argued truly constitute constitutional rights, the Petitioner's constitutional rights are not impaired by the coming into effect of Law 2/2003, even Article 6 paragraph (4) of Law 2/2003 petitioned for review is not relevant to the Petitioner's legal standing as a public legal entity, namely the Government of Banjar Regency. Because the Article petitioned for review constitutes the Article concerning the determination of territorial borders of Tanah Bumbu Regency and Balangan Regency of South Kalimantan Province stipulated by the Minister of Home Affairs, according to the Court, the provision of the *a quo* Article does not have any relation to the legal interest or constitutional rights of the Petitioner *in casu* the Government of Banjar Regency;

[3.17] Considering whereas Article 6 paragraph (4) of Law 2/2003 which is argued by the Petitioner to have impaired his constitutional rights, both from the argumentation and evidence presented, according to the Court:

- a. No constitutional right of the Petitioner has been impaired by the coming into effect of Law 2/2003, *in casu* Article 6 paragraph (4) petitioned for review, either in actual or potential manner which according to logical reasoning shall not surely occur;
- b. there is no casual relationship (*causal verband*) between the Petitioner's constitutional rights and Article 6 paragraph (4) of Law 2/2003 petitioned for review;
- c. if the Petitioner's petition were granted, it would not influence the Petitioner's constitutional rights;

[3.18] Considering whereas from all of the Petitioner's arguments, it is evident that:

- the Petitioner's constitutional rights have not been impaired by the coming into effect of Article 6 paragraph (4) of Law 2/2003 petitioned for review;
- in essence, the party harmed is the Governor of South, while the Petitioner is not the Governor of South Kalimantan and not his attorney, either.

Therefore, the Petitioner does not have legal standing to file the *a quo* petition, so that the principal issue of the petition does not need to be further considered.

Considering whereas even though on November 14, 2008 the Petitioner withdrew his petition by the letter Number 180/306/KUM sent via facsimile which was received by the Registrar's Office of the Court on that very date, because on November 10, 2008 the Court had made a decision in the Consultative Meeting of Justices, and on November 12, 2008 the Court sent notice of hearing by letter Number 427.26/MK/XI/2008 for Plenary Hearing of decision pronouncement, the court shall accordingly set aside such withdrawal.

4. CONCLUSION

Based on the foregoing evaluation of the facts the laws Court concludes that the Petitioner does not have legal standing in the petition for review of the *a quo* law, it must be declared that the Petitioner's petition can not be accepted;

5. DECISION

In view of Article 56 paragraph (1) of Law Number 24 Year 2003 concerning 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 State of the Republic of Indonesia Year 1945,

Passing the Decision,

To declare that the Petitioner's petition cannot be accepted.

Hence the decision was made in the Consultative Meeting of Constitutional Court Justices attended by eight Constitutional Court Justices on Monday, November the tenth two thousand eight, and was pronounced in the Plenary Meeting of the Constitutional Court open publicly on this day, Tuesday, November the eighteenth Year two thousand eight by us, Moh. Mahfud MD, as the Chairperson and concurrent Member, H.M. Akil Mochtar, Achmad Sodiki, Maria Farida Indrati, H. Abdul Mukthie Fadjar, Maruarar Siahaan, H.M. Arsyad Sanusi, and Muhammad Alim, respectively as Members, assisted by Eddy Purwanto as the Substitute Registrar, and in the presence of the Petitioner and/or his Attorneys, the People's Legislative Assembly or its representative, and the Government or its representative, and the Related Party.

CHIEF JUSTICE ,

sgd.

MOH. MAHFUD MD

JUSTICES

sgd.

H.M. AKIL MOCHTAR

sgd.

ACHMAD SODIKI

sgd.

MARIA FARIDA INDRATI

sgd.

H. ABDUL MUKTHIE FADJAR

sgd.

H.M. ARSYAD SANUSI

sgd.

MARUARAR SIAHAAN

sgd.

MUHAMMAD ALIM

SUBSTITUTE REGISTRAR

sgd.

EDDY PURWANTO