



DECISION

Number 31/PUU-V/2007

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 in a case of petition for Review of Law Number 31 of 2007 concerning the Establishment of Tual City in Maluku Province against the 1945 Constitution of the State of the Republic of Indonesia, filed by:

- [1.2] 1. **Abdul Hamid Rahayaan**, acting in this matter in his position and capacity as the Chief of the Traditional Law Community Unit of and thus for and on behalf of and representing the *Lor Lim (Lim Itel)* Traditional Law Community Unit, domiciled at Feer Village, South Kei Besar Subdistrict, Southeast Maluku Regency, as -----
----- **Petitioner I;**
2. **Gasim Renuat**, acting in this matter in his position and capacity as the Chief of the Traditional Law Community Unit of and thus for and on behalf of and representing the *Ratschap Dullah* Traditional Law

Community Unit, domiciled at Dullah Village, North Dullah Subdistrict, Southeast Maluku Regency, as ----- **Petitioner II;**

3. **Abdul Gani Refra**, acting in this matter in his position and capacity as the Chief of the Traditional Law Community Unit of and thus for and on behalf of and representing the *Ratschap Lo Ohoitel* Traditional Law Community Unit, domiciled at Nerong Village, South Kei Besar Subdistrict, Southeast Maluku Regency, as -----
----- **Petitioner III;**

In this matter pursuant to Proxy Deed Number 13 dated December 22, 2007 made before Notary and Land Title Official Hengki Tengko, S.H., granting a power of attorney to:

1. **Johan Fredrik Let Let**; place/date of birth Ohoiseb, January 13, 1975; Christian; entrepreneur; Indonesian citizen; address Tual, Kompleks Lorong Yana, Lodar E1 *Kelurahan*, South Dullah Island Subdistrict, Southeast Maluku Regency;
2. **Mohammad Tayeb Matdoan**; place/date of birth Tual, October 16, 1978; Islam; entrepreneur; Indonesian citizen; address Tual, Jalan Pattimura, Ketsoblak *Kelurahan*, South Dullah Island Subdistrict, Southeast Maluku Regency;
3. **Fredrik Julius Renel**; place/date of birth Saumlaki, May 09, 1979; Christian; entrepreneur; Indonesian citizen; address Tual, Jalan Taar Baru

Un, Ketsoblak *Kelurahan*, South Dullah Island Subdistrict, Southeast Maluku Regency.

Who subsequently granted a power of attorney to H. Sapriyanto Refa, S.H., M.H., M. Nahwan Matdoan, S.H., Budi Prasetyo, S.H., Roby Samuel, S.H., and M. Nazaruddin Salam, S.H., all of them Attorneys-Legal Consultants, having their office at Jalan Terogong Raya Number 12, West Cilandak, South Jakarta, under Substitute Special Proxy dated December 26, 2007;

Hereinafter referred to as ----- **Petitioners;**

[1.3] Having read the petition of Petitioners;

Having heard the testimony of Petitioners;

Having heard the verbal testimony and having read the affidavit of the Related Party i.e. the Governor of Maluku Province;

Having heard the verbal testimony and having read the affidavit of the Related Party i.e. the Regional People's Representative Council of Maluku Province;

Having heard the verbal testimony and having read the affidavit of the Related Party i.e. the Regent of Southeast Maluku;

Having heard the verbal testimony and having read the affidavit of the Related Party i.e. the Regional People's Representative Council of Southeast Maluku Regency;

Having heard and read the affidavit of the Regional Representative Council;

Having heard and read the affidavit of the Government;

Having heard and read the affidavit of the People's Representative Council;

Having heard and read the affidavit of the experts/witnesses of the Petitioner and Related Parties;

Having read the written conclusion of Petitioners;

Having examined the evidence;

3. LEGAL CONSIDERATIONS

[3.1] Considering whereas, in principle, the purpose and objective of the Petitioners namely Petitioner I, Petitioner II, and Petitioner III are for the Constitutional Court (hereinafter referred to as the Court) to declare Law Number 31 of 2007 concerning the Establishment of Tual City in Maluku Province (State Gazette of the Republic of Indonesia Year 2007 Number 97, Supplement to State Gazette of the Republic of Indonesia Number 4747, hereinafter referred to as Tual City Law) are in formal and material contradiction with the 1945 Constitution of the State of the Republic of Indonesia (hereinafter referred to as the 1945 Constitution) and therefore has no binding legal power.

The arguments presented by the Petitioners are as follows:

- (1) The establishment of the Tual City Law did not conform to Article 20 of the 1945 Constitution since it was established by a non-lawmaking institution under the 1945 Constitution;
- (2) The establishment of the Tual City Law did not conform to the provision of Article 18 paragraph (1) of the 1945 Constitution which should refer to Law Number 32 of 2004 concerning Local Governance (State Gazette of the Republic of Indonesia Year 2004 Number 125, Supplement to State Gazette of the Republic of Indonesia Number 4437);
- (3) The establishment of the Tual City Law did not conform to Article 22A of the 1945 Constitution which must be read as a cohesive whole with Law

Number 10 of 2004 concerning Establishment of Legislation (State Gazette of the Republic of Indonesia Year 2004 Number 53, Supplement to State Gazette of the Republic of Indonesia Number 4389);

- (4) The Tual City Law impairs the constitutional right of the traditional law community unit, represented by the Petitioners, as guaranteed by Article 18B of the 1945 Constitution.

[3.2] Considering whereas that prior to examining the substance or the principal issue of the case, the Constitutional Court first needed to determine two things related to the petition of Petitioners:

- (1) The authority of the Court to examine, hear, and decide upon the petition *a quo*;
- (2) The legal standing of the Petitioners to act as a Petitioner in the petition *a quo*;

Authorities of the Court

[3.3] Considering whereas Article 24C of the 1945 Constitution states that, *“The Constitutional Court has the authority to adjudicate at the first and final level, the decision of whom shall be final to review laws against the 1945 Constitution, decide upon disputes over the authority of a state institution whose authority was granted by the Constitution, decide upon the dissolution of a political party, and decide upon disputes over general election results.”* Article 24C of the 1945 Constitution is further reiterated in Article 10 paragraph (1) sub-

paragraph a of Law Number 24 Year 2003 regarding the Constitutional court (State Gazette of the Republic of Indonesia Year 2003 Number 98, Supplement to State Gazette of the Republic of Indonesia Number 4316, hereinafter referred to as CC Law);

[3.4] Considering whereas the petition *a quo* is a petition for the review of a law *in casu* the Tual City Law against the 1945 Constitution, the petition *a quo* falls under the scope of authority of the Court to examine, hear, and decide upon.

Legal Standing of the Petitioners

[3.5] Considering, under Article 51 paragraph (1) of the CC Law, the requirement for a Petitioner to file a petition for the review of a law against the 1945 Constitution is that the Petitioner must be one of the legal subjects who believe that his constitutional right and/or authority has been impaired by the enactment of the law for which the review was petitioned for, namely:

- a. Indonesian citizen individual;
- b. a traditional law community unit so long as it lives and adheres to the developments of society and the principles of the Unitarian State of the Republic of Indonesia provided for in a law;
- c. a public or private legal entity; or
- d. a state institution.

[3.6] Considering whereas in addition to belonging to any one of the legal subject groups as referred to in Article 51 paragraph (1) of the CC Law above, the Petitioner must also clearly describe his assumption that with the enactment of the law for which the review was petitioned for, the Petitioner has had or will have his constitutional right and/or authority impaired.

[3.7] Considering whereas the Court in Decision Number 06/PUU-III/2005 and Decision Number 11/PUU-V/2007 and subsequent decisions has stipulated five (5) requirements for constitutional impairment and/or authority as referred to in Article 51 paragraph (1) of the CC Law namely:

- (a) there is a constitutional right and/or authority of the Petitioner which was granted by the 1945 Constitution;
- (b) the constitutional right and/or authority is deemed to have been impaired by the enactment of a law;
- (c) the impairment of said constitutional right and/or authority is specific and actual or at least potential in nature which based on reasonable logic is certain to occur;
- (d) there is a causal relationship (*causal verband*) between the constitutional impairment of the Petitioner and the law for which the review was petitioned;
- (e) there is a possibility that with the granting of the petitioner, the constitutional right and/or authority impairment as argued will not or will no longer occur;

[3.8] Considering whereas in the petition *a quo*, Petitioner I, Petitioner II, and Petitioner III identified themselves respectively as acting in their capacity and position as Chiefs of Traditional Law Community Units. Petitioner I, Abdul Hamid Rahayaan, as a Chief of Traditional Law Community Unit, represented and acted on behalf of the *Lor Lim (Lim Ite)* Traditional Law Community Unit at Feer Village, South Kei Besar Subdistrict, Southeast Maluku Regency. Petitioner I, Gasim Renuat, as a Chief of Traditional Law Community Unit, represented and acted on behalf of the *Ratschap Dullah* Traditional Law Community Unit, domiciled at Dullah Village, North Dullah Subdistrict, Southeast Maluku Regency. Petitioner III, Abdul Gani Refra, represented and acted on behalf of the *Ratschap Lo Ohoitel* Traditional Law Community Unit domiciled at Nerong Village, Kei Besar Subdistrict, Southeast Maluku Regency. Therefore, the Petitioners in the petition *a quo* based their legal standing as “a traditional law community unit so long as it lives and adheres to the developments of society and the principles of the Unitarian State of the Republic of Indonesia provided for in a law” as determined in Article 51 paragraph (1) letter b of the CC Law, who considered their constitutional right and/or authority to have been impaired by the enactment of the Tual City Law;

[3.9] Considering whereas upon taking into account the elaboration in paragraphs [3.5] to [3.8] above, then for evidentiary purposes the qualification of the Petitioner as a traditional law community unit – as referred to in Article 51 paragraph (1) of the CC Law – or to prove the impairment of the constitutional

right of Petitioner as a consequence of the enactment of the Tual City Law, the Court deems it necessary to hear the testimony of a number of parties. The parties in question were the Governor of Maluku, the Regional People's Representative Council (DPRD) of Maluku Province, the Regent of Southeast Maluku, the Regional People's Representative Council of Southeast Maluku Regency, the President (Government), the People's Representative Council (DPR), and Regional Representative Council (DPD).

[3.10] Considering whereas, at the hearing on January 30, 2008, the Court has heard the testimony of the Governor of Maluku, the Regional People's Representative Council of Maluku Province, the Regent of Southeast Maluku, and the Regional People's Representative Council of Southeast Maluku Regency, as contained in full in the Principal Issue of the Case part of this Decision, which in essence clarified the following:

[3.10.1] **Testimony of the Governor of Maluku**

a. Whereas the principle for the establishment of the Tual City Law is guided by five of the seven principles required in the law, namely:

- Principle of Establishment;
- Principle of appropriate Institution or Establishment Organ;
- Principle of Practicability;
- Principle of Efficiency and Effectiveness;
- Principle of Openness.

- b. Whereas the establishment of Tual City was also supported by traditional leaders, namely the support of the Kings (*Raf*) of Southeast Maluku Regency. This was in line with Article 16 paragraph (1) letter a of Government Regulation Number 129 of 2000 which named the political will of the community as one of the procedures in the establishment of a region. It was affirmed in the Elucidation to Government Regulation Number 129 of 2000 that political will from the community meant statements from the community through NGOs, political organizations, and so forth;
- c. Whereas the entire requirements, mechanism, and procedure for the establishment of Tual City is in line with the mandate of Law Number 22 of 1999, Government Regulation Number 129 of 2000, and Law Number 32 of 2004, and the 1945 Constitution;
- d. Whereas the Tual City Law does not contradict Article 18B paragraph (2) of the Second Amendment to the 1945 Constitution.

[3.10.2] Testimony of the Maluku Province DPRD

- a. Whereas the Maluku Province DPRD gave full support to the policies taken by the Governor;
- b. Whereas the blueprint for the splitting of Maluku Province was stipulated by the DPRD in 1997 through Decision Number 1 of 1997. The spirit of the

stipulation of the blueprint for the creation of Southeast Maluku was based on Law Number 5 of 1974 which in principle differed from the spirit of new region creation under Law Number 32 of 2004. There are eight regions planned to be created, but after the modification in the spirit of governance and state administration, Maluku Province was split in two, i.e. Maluku Province and North Maluku Province;

- c. Whereas for the planned created new region, seven of the eight created regions have been realized, Tual City being the latest;

[3.10.3] Testimony of the Regent of Southeast Maluku

Whereas the Tual City creation process was not consistently implemented, since:

- a. It was not carried out with the endorsement of the Regent of Southeast Maluku, as mandated by Law Number 32 of 2004 concerning Local Governance and Government Regulation Number 129 of 2000;
- b. The feasibility study was rushed and could not be defended academically;
- c. None of the letters from the community in support of the creation had been officially received by the Regent of Southeast Maluku, whether concerning the requirements of physical, geographic, administrative, political condition, or other requirements of economic conditions;
- d. The capital move should have been based on Law Number 32 of 2004 concerning Local Governance rather than the Government Regulation.

Only the name change of the capital of an autonomous region should be executed with a Government Regulation;

- e. The Regional Representative Council team who visited Tual, Southeast Maluku Region, only went so far as the airport and was requested to presented their expose at the airport, then left;
- f. Conceptually speaking, the creation was crucial as a bridge for public welfare. But as an official in the region, the Regent would like to implement national regulations in a consistent manner and not disregard them;
- g. Whereas the communal rights in Southeast Maluku Regency on sea and land management have a very close context to the consequences of an autonomous region against the right to manage a marine or terrestrial area in the event of separation or division of an area.

[3.10.4] Testimony from the Southeast Maluku Regency DPRD

- a. Whereas the issue of capital move, pursuant to Law Number 32 of 2004, is clearly provided for with a Government Regulation;
- b. Whereas with the incoming letters to the DPRD on the wish for created new regions having been executed, such as in West Southeast Maluku where it had been successfully implemented in 1999, Aru Regency in 2003, and Tual City by aspirations, did not arise automatically;
- c. Whereas the creation of Tual City did not change the traditional customs;

- the 15 kings even gave it their full support;
- d. Whereas with the creation, the Southeast Maluku Regency DPRD in fact felt that it benefited since the city development would have a positive impact. That is to say, land prices rose because the area was to be upgraded into a city, which meant that supporting facilities and infrastructure were going to be built.

[3.11] Considering whereas subsequently at the hearing on February 20, 2008, the Court has heard the testimony of the Government, People's Representative Council, and Regional Representative Council, which is fully contained in the Principal Issue of the Case part, in principle clarifying the following:

[3.11.1] Testimony of the Government

- a. Regarding the formal review (*formele toetsingsrecht*).
- (i) Whereas the criterion for reviewing the constitutionality of a law in a formal review (*formele toetsingsrecht*) is the extent to which the law *a quo* was stipulated in the appropriate form, by the appropriate institution, and according to the appropriate procedure. Article 4 paragraph (3) of Regulation of the Constitutional Court Number 06/PMK/2005 states that, "*formal review is the review of a law with regard to the law creation process and matters not included under material review*". In other words, according to the Government, it

will be included under formal review if the discussion for the law *a quo* may be suspected to have been conducted with collusive and corrupt elements that may have a direct or indirect effect from the discussion to the ratification and enactment of the law;

- (ii) Whereas the creation of Tual City in Maluku Province, in terms of its form, institution, and procedure has conformed to the prevailing laws and regulations, such as the existence of public aspiration, the existence of a proposal and recommendation from the Local Government of Southeast Maluku Regency or the Local Government of Maluku Province, discussed together between the Government (President) and the People's Representative Council (DPR), enacted in the State Gazette, and socialized in the interest of preparing for the establishment (declaration) of Tual City in Maluku Province;
- (iii) Whereas the discussion process up to the ratification of the Tual City Law did not contain any element of corruption and collusion, as evidence by the absence of reports from the public or any other party to the authorities (Police and the Corruption Eradication Commission);
- (iv) Whereas the establishment of Tual City in Maluku Province has met the administrative requirements for the establishment and/or creation of a region (in this case a district/city), as governed in Article 5

paragraph (3) of Law Number 32 of 2004 concerning Local Governance, namely the endorsement of the District/City DPRD and the Regent/Mayor concerned, the endorsement of the Provincial DPRD and the Governor, and recommendation from the Minister of Home Affairs, all of which have been given and met.

- b. Regarding the material review (*materiele toetsingsrecht*).
- (i) Whereas the establishment of a region is essentially intended to improve public service in order to accelerate the creation of public welfare in addition to serving as a means of political education at the local level. To that end, the establishment of a region should take various factors into account such as economic capacity, regional potential, area size, demography, and considerations on the socio-political aspects, socio-cultural aspects, defense, security, and other considerations and requirements that would enable the region to run and realize the purpose of establishing the region and granting regional autonomy;
 - (ii) Whereas the procedure in the creation of a region whether by fusion or splitting including the requirements including the administrative, technical, and physical geographic requirements has been governed by Law Number 32 of 2004 concerning Local Governance and Government Regulation Number 129 of 2000 regarding Establishment Requirements and Criteria for the

Creation, Elimination, and Fusion of a Region;

- (iii) Whereas the provisions of Articles 2, 3, 4, 5, and 6 of the Tual City Law do not contravene with the provisions of Article 18 paragraph (1), Article 18B paragraph (2), Article 20 paragraph (1), and Article 22A of the 1945 Constitution, and do not impair the constitutional rights and/or obligations of the Petitioners.

[3.11.2] Testimony from the People's Representative Council

- a. Whereas the establishment of a region is essentially, as mandated by Article 18 paragraph (1) of the 1945 Constitution, intended to improve public service in order to accelerate the creation of public welfare in addition to serving as a means of political education. To that end, the establishment of a region should take various factors into account such as economic capacity, regional potential, area size, demography, and considerations on the socio-political aspects, socio-cultural aspects, defense and security, and other considerations and requirements that would enable the region to run, and realize the purpose of establishing the region and granting regional autonomy;
- b. Whereas the establishment of Tual City in Maluku Province with the law is in adherence with Article 18 paragraph (1) and Article 18B of the 1945 Constitution, as well as with the regulation as set forth in Law Number 32 of 2004 concerning Local Governance and Government Regulation

Number 129 of 2000 regarding Establishment Requirements and Criteria for the Creation, Elimination, and Fusion of a Region;

- c. Whereas therefore, the principle of prudence and principles related to technicalities and administration so long as they are based on legislative provisions, according to the People's Representative Council, are in adherence with the procedure, thus the Tual Law City does not contravene with the 1945 Constitution.

[3.11.3] Testimony of the Regional Representative Council

- a. Whereas according to the DPD, the Petitioners have no legal standing to act as a Petitioner in filing the petition for the review of the Tual City Law, due to lack of direct interest;
- b. Whereas with relation to the formal review, according to the DPD, the establishment of Tual City has met the procedure set forth by the prevailing laws and regulations;
- c. Whereas according to the DPD, the petition of Petitioners is in essence a review of Law Number 31 of 2007 against Law Number 32 of 2004 and Law Number 10 of 2004, and not a review of Law Number 31 of 2007 against the 1945 Constitution;
- d. Whereas according to the DPD, the establishment of Tual City did not neglect the constitutional rights of traditional law community units, since in

essence the power of customary law/customary (*ulayat*) rights is not necessarily the same and identical as the authority of a local government, thus the establishment of Tual City as a new autonomous region would not split/divide the traditional law community unit.

[3.12] Considering also whereas to prove their qualification or the impairment of their constitutional rights and/or authorities, the Petitioners have brought forth an expert by the name of Prof. Dr. Ronald Zelfianus Titahelu, S.H., M.S and witnesses by the name of Nasir Leisubun and Laurentius Rahatoknam respectively, each of whom has been heard before the Court at the hearing on February 20, 2008, the full substance of which is included in the Principle Issue of the Case part of this Decision, in principle elaborating the following:

[3.12.1] **Testimony of the Petitioner expert**

Prof. Dr. Ronald Zelfianus Titahelu, S.H., M.S.

- a. Whereas with the division of Southeast Maluku Regency into Southeast Maluku Regency and Tual City, there is a concern that the principal of the traditional law community units would lose its customary law jurisdiction and traditional law community. Their traditional rights would be disrupted in ranges: geography which would have an effect on the reduced authority or competence with regard to the prescriptive jurisdiction, adjudicative jurisdiction, or enforcement jurisdiction of the traditional sovereign;
- b. Whereas the establishment of Tual City from an administrative city into an

- autonomous city has a potential to create social conflict among the traditional law communities, namely in determining the borders of their territory;
- c. Whereas a disregard of the social, economic, or cultural aspects and – at a certain degree – the “political system” within a traditional law community unit on Kei Islands will cause a loss of the constitutional rights of the traditional law community;
 - d. Whereas the existence of the Tual City Law is in fact *contra legem* against the text of Article 18B and 28I of the 1945 Constitution.

[3.12.2] **Testimony of Petitioner Witnesses**

1. Nasir Leisubun

- a. Whereas the witness is the King and Village Chief of Wain;
- b. Whereas according to the witness, Key is not familiar with *Pata Siwa* or *Pata Lima*, only with *Ur Siw* and *Lor Lim*;
- c. Whereas according to the witness, Key has two major community groups, namely *Ur Siw* and *Lor Lim*. The leadership of these two groups are organized and each has a leader;
- d. Whereas in terms of the physical geography, the issue has not been agreed on since the beginning and would create confusion;

2. Laurentius Rahatoknam

- a. Whereas according to the witness, the entire *Lim Itel* know that their village is known as the village of the warlords;
- b. Whereas the first king was Boma while Ibes is the second king in Kei Besar;
- c. Whereas with the splitting of Tual City into two administrations, there will be a major conflict and a great impact on the customs in Maluku;

[3.13] Considering whereas to corroborate its testimony, the Related Party Government of Maluku Province has presented witness by the names of Prof. Dr. John E. Lokollo, S.H., Hendrik Hattu, S.H., M.H., A.G. Wokanubun, S.Pd., and Matheus Gerath Laillosa, S.H, who have been heard before the Court at the hearing on February 20, 2008, the full substance of which is included in the Principle Issue of the Case part of this Decision, in principle elaborating the following:

[3.13.1] **Testimony of the Expert from the Related Party Government of Maluku Province**

1. Prof. Dr. John. E. Lokollo, S.H.

- a. Whereas according to the expert, the Petitioners based their petition on an interpretation of the 1945 Constitution that was (i) unsystematic, (ii) non-holistic, (iii) incomprehensive, (iv) with no single text, and (v) not as an addendum. This manner would certainly have its advantages and disadvantages;

- b. Whereas according to the expert, the Petitioners' version of constitutional norms is very weak, and therefore cannot be accepted as an argument that has a binding legal power.

2. Hendrik Hattu, S.H., M.H.

- a. Whereas according to the expert, when the creation of an administrative area occurs, such as between the Southeast Maluku Regency and Tual City, the government will have no constitutional authority to divide or split a traditional law community area or traditional law community unit along with their traditional rights or rights of origin. Since the autonomous authority is not included in the competence area of village autonomy or traditional law community unit that constitutes an inherent autonomy or authentic autonomy;
- b. Whereas the concern of the Petitioners, that the creation of Tual City would lead to the establishment of a new traditional law community unit, is unfounded, since the matter has been defined constitutionally and does not contravene with Article 18B paragraph (2) of the 1945 Constitution.

3. A.G. Wokanubun, S.Pd.,

- a. Whereas according to the expert, Southeast Maluku has no "King of Kings" traditional governance system;

- b. Whereas prior to being ratified as an acting village chief appointed by the Regent, the individual in question would not automatically assume the title of *Rat* (King);
- c. Whereas each *Rat* (King) has the authority to manage and resolve any internal problems within his *Ratschap*. Interference with the internal authority of a *Rat* (King) in the territory of another king, would potentially cause an inter-*Ratschap* and even inter-*Lor* (*Lor Lim* and *Ur Siu*) horizontal conflict;
- d. Whereas the three Petitioners, by traditional customs have yet served as *Rat* (Kings). Therefore, they do not meet the legal formal requirement according to the prevailing laws and regulations.

4. Matheus Gerath Laillosa, S.H.

- a. Whereas according to the expert, analysis of the socio-cultural aspects for the creation of a region shall maintain due regard to the socio-cultural life and customs of the community in question;
- b. Whereas from a customary law standpoint, the creation of Tual City will not extinguish or break up the traditions.

[3.14] Considering whereas the Court at the hearing on February 20, 2008 has heard the testimony of the expert and witnesses of the Related Party

DPRD of Southern Maluku Regency who testified under oath to have the names of Sayuti Rahawarin (expert), H.N. Renuat (witness), and Drs. H. M. Tamher (witness), the full substance of which is included in the Principle Issue of the Case part, in principle:

Testimony of the Expert from the Related Party DPRD of Southern Maluku Regency

[3.14.1] Sayuti Rahawarin

- a. Whereas according to the expert, the creation of Tual City is seen in terms of the service control span and the effort to accelerate development and promote the economic level of the community. The reason is that the creation of Tual City will mean that there are two regional administrations that will develop at a balanced and quick rate, to such an extent that the benefits of development will be perceptible to the community;
- b. Whereas the Tual City Draft Law became a initiative proposal of the 1999-2004 term DPR, with reference to Law Number 22 of 1999 on Regional Autonomy and Government Regulation Number 129 of 2000 regarding Establishment Requirements and Criteria for the Creation, Elimination, and Fusion of a Region is deemed to have fulfilled the administrative, technical and physical requirements;
- c. Whereas the Petitioners have no right to claim to act on behalf of the Southeast Maluku traditional law community especially the traditional

territories that are included in the Tual City region. The reason is that none of the *Rat/Orang Kay* objected or refused the incorporation of their region into the Tual City region. This is evident from the statement of the *Rat/Orang Kay* who declared full support for the creation of Tual City;

- d. Whereas the argument of the Petitioners which claims that the effectiveness of Articles 2, 3, 4, 5, and 6 of the Tual Law City means that the state does not recognize and respect traditional law community units and their traditional rights, and that the state does not grant recognition and legal protection on customary land and the resources possessed by traditional law communities, has no reason.

Testimony of the Expert from the Related Party DPRD of Southern Maluku Regency

[3.14.2] H. N. Renuat

- a. Whereas the witness is the King of Dullah/Chief of *Ratschap Dullah*;
- b. Whereas the witness's territory consists of nine villages;
- c. Whereas Petitioner II is not a king, but rather an acting village chief.

[3.14.3] H. Muhammad Tamher

- a. Whereas the witness fully supports the Tual City Law;
- b. Whereas the creation of Tual City will have a very positive impact on the community, especially with the approaches of delegating

governance to the community and promoting public welfare in the *Ratschap*/Tual City Village area;

- c. Whereas the creation of the autonomous region will uphold and respect the prevailing customary values, in line with Law Number 32 of 2004 concerning Local Governance, and other laws and regulations;
- d. Whereas the witnesses are kings, all of whom are within the Tual City region;
- e. Whereas the witness rejects certain parties who claimed to be acting on behalf of traditional leaders who were in the village/*Ratschap* outside the Tual city region.

Opinion of the Court

[3.15] Considering, upon hearing the testimony of the parties as elaborated in paragraphs [3.10] to [3.14] above, prior to considering the legal standing of the Petitioners, the Court deems it necessary to describe the typology and benchmark for the existence of traditional law community units and their traditional rights as intended by Article 18B paragraph (2) of the 1945 Constitution in conjunction with Article 51 paragraph (1) letter b of the CC Law.

[3.15.1] Considering that in reality, traditional law community units in Indonesia can be classified into traditional law community units that are (i) territorial, (ii) genealogical, and (iii) functional. The ties of genealogically based traditional law community units are determined based on the bloodline criterion,

while functionally based traditional law community units are based on certain functions that involve the common interest that unites the traditional law community in question and does not depend on bloodlines or areas, such as the Subak in Bali. Meanwhile, territorially based traditional law community units rest on a certain area in which the members of the traditional law community unit in question live for generations and give rise to customary rights that include right of use on the land, water, the forest, etc.

[3.15.2] Considering whereas since Article 18B paragraph (2) of the 1945 Constitution reads, “*The State recognizes and respects traditional law community units and their traditional rights so long as they live and adhere to the developments of society and the principles of the Unitarian State of the Republic of Indonesia, as provided for in a law*”, the Court deems it necessary to determine the criteria or benchmark for the fulfillment of the Constitutional provision in question, namely that the traditional law community unit:

1. still lives;
2. adheres to the developments of society;
3. adheres to the principles of the Unitarian State of the Republic of Indonesia; and
4. has a provision based on law.

[3.15.3] According to the Court, for a traditional law community unit to be declared *de facto* as alive (having actual existence), be it a territorial, genealogical, or functional one, it should at least contain the following elements:

(i) a community whose members share an in-group feeling; (ii) a traditional governing institution; (iii) traditional assets and/or artifacts; and (iv) a set of traditional legal norms. For territorially based traditional law community units in particular, there should also be an element of (v) a specific area.

[3.15.4] The Court is of the opinion that a traditional law community unit and its traditional rights are regarded as adhering to the developments in society if the traditional law community unit:

1. Has its existence acknowledged under the effective law as reflecting the development of the values that are regarded as ideal in today's society, whether under general law or sectoral law, such as in agriculture, forestry, fishery, etc. or in local regulations;
2. The substance of the traditional rights is recognized and respected by the members of the community unit in question and the general public, and does not contravene with basic human rights.

[3.15.5] Considering whereas the Court is of the opinion that a traditional law community unit along with its traditional rights is in adherence with the principles of the Unitarian State of the Republic of Indonesia if the traditional law community unit does not disrupt the existence of the Unitarian State of the Republic of Indonesia as a political and legal unit, that is to say:

1. Its existence does not threaten the sovereignty and integrity of the Unitarian State of the Republic of Indonesia;

2. The substance of its traditional legal norms is in adherence with and does not contravene with the laws and regulations.

[3.15.6] Considering whereas based on the above description, then with regard to the petition *a quo*, the Court shall first need to verify that the Petitioner has fulfilled the requirements as referred to in paragraph [3.15.5] above. Based on the examination at the hearing, the testimony of the Petitioner, testimony of related parties, affidavits, witness testimonies, expert testimonies, so long as they are not related to territorial boundaries including the maritime boundaries of the Petitioner as a traditional law community unit, and the substance or material of the constitutional rights of the Petitioner, then in *prima facie* the Petitioner has fulfilled the requirements to be Petitioner in the petition *a quo*.

[3.16] Considering whereas the hearing revealed the following:

- Petitioner I, Abdul Hamid Rahayaan, claimed in his petition to be acting in his capacity as the Chief of the **Lor Lim** or **Lim Itel** Traditional Law Community Unit subordinating seven (7) *Ratschap*, each of them led by a *Ratschap* chief called a King;
- Petitioner II, Gasim Renuat, claimed in his petition to be the Chief of the *Ratschap* Dullah Traditional Law Community Unit, consisting of seven villages, domiciled at Dullah Village, Dullah Subdistrict, a *Ratschap* under the **Ur Siw** atau **Siw Ifaak** Traditional Law Community Unit;

- Petitioner I, Abdul Hamid Rahayaan, claimed in his petition to be acting in his capacity as the Chief of the **Lo Ohoitel Ratschap** Traditional Law Community Unit, a *Ratschap* under the **Lor Lim** atau **Lim Itel** Traditional Law Community Unit that consists of five villages;

[3.17] Considering whereas the capacities of Petitioners I, II and III who argued themselves to be the Chiefs of Traditional Law Community Units, as described in paragraph [3.16] above, were based on the admission of the Petitioners alone. However, it later transpired at the hearing on February 20, 2008 that there was a rebuttal on the capacity of Petitioner II by the witness H.N. Renuat. In a testimony under oath, witness H.N. Renuat claimed that he, not Gasim Renuat, was the King of Dullah – who was none other than his brother. Gasim Renuat was merely the Acting Village Chief. The same witness also claimed that Abdul Hamid Rahayaan was not the Leader of **Pata Siwa** in Southeast Maluku **Key**. Further at the same hearing, the Speaker of the DPRD of Southeast Maluku Regency, H. Mahmud Muhamad Tamher, also claimed that the two traditional leaders on behalf of the nine traditional leaders were not representative. Gasim Renuat was the Acting Village Chief of Dullah and not the King.

[3.18] Considering whereas at the hearing a Related Party, in this case the Governor of Maluku, also claimed that the establishment of Tual City was supported by traditional leaders, namely support from the Kings (**Rat**) of Southeast

Maluku Regency in Letter Number 05/Prov/IV/2005 dated March 11, 2005. Furthermore, in his testimony to respond to the legal standing of the Petitioners, the Governor of Maluku stated that each traditional law community unit was **assembled** under several *ratschap* (traditional jurisdiction) and not **subordinated** (hierarchical) as mentioned by the Petitioners;

[3.19] Considering whereas the Petitioner made no counter-rebuttal to neither the rebuttal of witness H.N. Renuat nor the testimony given by the Governor of Maluku as the Related Party. Therefore, the Court is of the opinion that the testimony given by witness H.N Renuat and the Governor of Maluku as the truthful testimony, thus the Petitioners do not have the capacity to act for and on behalf of the traditional law community unit as Petitioners in the petition *a quo*;

[3.20] Considering also whereas based on the testimony of the parties as mentioned in paragraphs [3.10] to [3.14], according to the Court, the hearing did not clearly reveal the structure of the traditional law community units in which the Petitioners were involved. The traditional law community units that were assemblies in nature are not the same as traditional law community units that have a hierarchical structure. The difference will certainly have a major effect on the distribution of or relationship in authority between the chief of one traditional law community unit and another. The expression that “there is no king over kings” made by witness H.N. Renuat at the hearing, and the statement that the Petitioners subordinating a number of villages, indicates that there is still a lack of clarity in the structure of the traditional law community units. Each of the structure

will certainly have an implication on who will have the right to represent a given traditional law community unit and who will likewise have the right to represent another traditional law community unit, and in what matter the representative may act on behalf of the traditional law community unit he is representing;

[3.21] Considering whereas the hearing also revealed that a chief of the traditional law community unit called King often would also hold the position of village chief. The village as an administrative institution is in essence different from a traditional law community unit. However, the hearing did not reveal when an authority would be based on traditional authority and when it would be based on authority in the position of village chief. Such an issue is in fact crucial for the Court in order to determine whether a constitutional right of the traditional law community unit that filed the petition exists;

[3.22] Considering also whereas the substance and boundaries of the traditional rights of a traditional law community unit in the context of maritime territory should be clearly verifiable, given that many legislative provisions are enforced on the maritime territory. Therefore, the Petitioners must be able to prove the traditional right in a specific and defined manner. The Petitioners must also prove whether the traditional right was a right to control a maritime territory or a right to benefit from resources in the sea. If it is a right to collect resources that are in the sea, the right will certainly be possessed by the members of the traditional law community; and also how the relationship between the members of the traditional law community and the traditional law community unit will be.

The traditional rights must also be proven as to their existence, nature, particular scope, in a specific and defined manner as a right of the Petitioners rather than the right of another traditional law community unit, the right of the local governance, or the right of the central government in the maritime territory.

[3.23] Considering whereas based on the matters revealed at the hearing as described above, the Court judges that the Petitioners have been unable to prove that they have the legitimate capacity to represent the traditional law community units on whose behalf they claimed to be acting. Furthermore, the Petitioners have also been unable to prove in a specific and defined manner any impairment of constitutional rights resulting from the enactment of the Tual City Law.

4. CONCLUSION

Based on the entire elaboration above, the Court concludes:

[4.1] That the Petitioners are unable to prove their capacity to legitimately represent the traditional law community units in the petition *a quo*;

[4.2] That the Petitioners are also unable to prove in a specific and defined manner any impairment of constitutional rights resulting from the enactment of Law Number 31 of 2007 concerning the Establishment of Tual City in Maluku Province (State Gazette of the Republic of Indonesia Year 2007

Number 97, Supplement to State Gazette of the Republic of Indonesia Number 4747);

[4.3] That therefore the Petitioners in the petition *a quo* did not fulfill the provision of Article 51 paragraph (1) letter b of the CC law, thus the petition of Petitioners must be declared unacceptable.

5. JUDICIAL VERDICT

In view of Article 56 paragraph (1) of Law Number 24 of 2003 concerning the Constitutional Court (State Gazette of the Republic of Indonesia Year 2003 Number 98, Supplement to State Gazette of the Republic of Indonesia Number 4316),

Has adjudicated:

To declare the petition of Petitioners as unacceptable (*niet ontvankelijk verklaard*).

Hence the decision was made in the Plenary Consultative Meeting of nine Constitutional Court Justices on Thursday, June 12, 2008 and was read out in a Plenary Session open for the public on this Wednesday, June 18, 2008, by eight Constitutional Court Justices, namely Jimly Asshiddiqie as the Chairman and concurrent member, I Dewa Gede Palguna, H. Harjono, H. Abdul Mukthie Fadjar, Maruarar Siahaan, Soedarsono, H. Moh. Mahfud MD, and H. M. Arsyad Sanusi respectively as Members and assisted by Eddy Purwanto as Substitute

Registrar and attended by the Petitioners/their Power of Attorney, the Government or its representative, the People's Representative Council or its representative, the Directly Related Parties i.e. the Governor of Maluku or his representative, the Regional People's Representative Council of Maluku Province or its representative.

CHIEF JUSTICE,

Sgd.

Jimly Asshiddiqie

MEMBERS,

Sgd.

I Dewa Gede Palguna

Sgd.

H. Harjono

Sgd.

H. Abdul Mukthie Fadjar

Sgd.

Maruarar Siahaan

Sgd.

Soedarsono

Sgd.

H. Moh. Mahfud MD.

Sgd.

H. M. Arsyad Sanusi

SUBSTITUTE REGISTRAR,

Sgd.

Eddy Purwanto