DECISION

Number 004/SKLN-IV/2006

FOR THE SAKE OF JUSTICE UNDER THE ONE ALMIGHTY GOD

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA,

Examining, hearing, and deciding upon constitutional cases at the first and final level, has passed a decision on the case of petition for a decision on authority dispute of state institutions whose authorities are granted by the Constitution of the State of the Republic of Indonesia Year 1945, filed by:

1. **Drs. H. M. Saleh Manaf,** Resident Identity Card Number 10.1210.180950.1001, Place and date of birth: Meulaboh, September 18, 1950, Religion: Islam, Occupation: Regent of Bekasi, West Java Province, with his address at Jl. Senayan III Number 2, Lippo Cikarang, Taman Olympia, Cibatu Village, South Cikarang District, Bekasi Regency;

2. **Drs. Solihin Sari,** Resident Identity Card Number 10.1210.301069.1002, Place and date of birth: Bekasi, October 30, 1969, Religion: Islam, Occupation: Vice Regent of Bekasi, West Java Province, with his address at Perum Taman Beverly, Jl. Palem Kenari I Number 23, Lippo Cikarang, Cibatu Village, South Cikarang District, Bekasi;

Based on a special power of attorney dated 3 March 2006, the foregoing Petitioners have granted power of attorney to Dr. Iur Adnan Buyung Nasution and associates, choosing legal domicile at the office of **Adnan Buyung Nasution & Partners Law Firm**, with its address at Sampoerna Strategic Square Building, Tower B, 18th Floor Jl. Jenderal Sudirman Kav. 45-46 Jakarta, 12930;

Hereinafter referred to as **Petitioners**;

Against

1. **The President of the Republic of Indonesia**, based on a special power of attorney dated March 20, 2006, granting power of attorney to the Minister of Law and Human Rights of the Republic of Indonesia, and

2. The State Secretary of the Republic of Indonesia, and choosing legal domicile at State Secretary Office at Jl. Veteran Number 16, Jakarta, hereinafter referred to as **Respondent I**;

3. **The Minister of Home Affairs of the Republic of Indonesia**, based on a special power of attorney Number 183/546/S.J., dated March 20, 2006, granting power of attorney to Progo Nurjaman, H.R. and associates, and choosing legal domicile at the Office of the **Minister of Home Affairs of the Republic of Indonesia** with its address at Jl. Medan Merdeka Utara Number 7, Jakarta, hereinafter referred to as **Respondent II**;

4. **The Regional People's Legislative Assembly of Bekasi Regency,** with its address at Government Office Complex of Bekasi Regency, Sukamahi Village, Central Cikarang District, Bekasi, West Java, as **Respondent III**.

Having read the petition of the Petitioners;

Having heard the statement of the Petitioners;

Having heard the statement of Respondent I;

Having heard the statement of Respondent II;

Having heard the statement of Respondent III;

Having heard the statements of Witnesses and Experts presented by the Petitioners;

Having heard the statement of Expert presented of Respondent I;

Having read the written statement of Respondent I;

Having read the written statement of Respondent II;

Having read the written statement of Respondent III;

Having read the written statements of Experts presented by the Petitioners;

Having examined the evidence of the Petitioners;

Having read the final conclusion of the Petitioners;

LEGAL CONSIDERATIONS

AUTHORITY OF THE COURT AND LEGAL STANDING

Considering whereas the purpose and objective of the *a quo* petition are as described above;

Considering whereas in their petition, the Petitioners argued that there has been an authority dispute of state institutions between the Petitioners and Respondent I, Respondent II, and Respondent III. The Petitioners argued that the Petitioners or Respondent I, Respondent II, and Respondent III are state institutions whose positions are regulated by the Constitution of the State of the Republic of Indonesia Year 1945 (hereinafter referred to as the 1945 Constitution). The authority dispute of state institutions was caused by the action of Respondent II in issuing Decision of the Minister of Home Affairs Number 131.32-11 Year 2006 dated January 4, 2006 concerning Revocation of Decision of the Minister of Home Affairs Number 131.32-36 Year 2004 dated January 8, 2004 concerning Legalization of Termination and Legalization of Appointment of Regent of Bekasi, West Java Province and Decision of the Minister of Home Affairs Number 132.32-35 Year 2006 dated January 19, 2006 concerning Revocation of Decision of the Minister of Home Affairs Number 132.32-37 Year 2004 concerning Legalization of Termination and Legalization of Appointment of Vice Regent of Bekasi West Java, and the action of Respondent III in stipulating

Decision of the Regional People's Legislative Assembly (DPRD) of Bekasi Regency Number 06/KEP/172.2-DPR/2006 dated February 28, 2006 concerning Approval of the Regional People's Legislative Assembly of Bekasi Regency on the stipulation of Regional Government Draft Regulation concerning Regional Revenues and Expenditures Budget of Bekasi Regency Year 2006. In addition, according to the Petitioners, Respondent I should have corrected the action of Respondent II because Respondent II is the assistant of Respondent I. The action of Respondent II shall be the responsibility of Respondent I who appoints and terminates Respondent II as regulated in Article 17 Paragraphs (1) and (2) of the 1945 Constitution;

Considering whereas, in addition to arguing that there has been an authority dispute between the Petitioners and Respondents as described above, the Petitioners also filed provisional petition. To such petition, the Court is of the opinion that the provisional petition is related to the principal petition, hence the provisional petition will be considered together with the principal petition;

Considering, to support their arguments that there has been an authority dispute between the Petitioners and Respondent I, Respondent II, and Respondent III, the Petitioners, in addition to giving the reason that both Petitioners and Respondents are state institutions, also presented the following experts:

(1) Prof. Dr. Muhammad Ryaas Rasyid, M.A.;

(2) Topo Santoso, S.H., M.H.;

(3) Denny Indrayana, S.H., LL.M., Ph.D.

In the statements as described in the foregoing principal case, the three experts basically stated that Respondents are state institutions or stated that in the dispute between Petitioners and Respondents, the Constitutional Court has the authority to examine, hear, and decide upon the *a quo* case;

Considering whereas upon the petition of the Petitioners the statements of the Respondents have been heard in the hearing and basically they argued that Petitioners and Respondent II are not state institutions and the petition filed by Petitioners is purely about the dispute of state administration and not an authority dispute of state institutions as intended in Article 24C of the 1945 Constitution. Meanwhile, Respondent II argued that the action of Respondent II in issuing Decision of the Minister of Home Affairs Number 131.32-11 Year 2006 dated January 4, 2006 concerning Revocation of Decision of the Minister of Home Affairs Number 131.32-36 Year 2004 dated January 8, 2004 concerning Legalization of Termination and Legalization of Appointment of Regent of Bekasi, West Java Province and Decision of the Minister of Home Affairs Number 132.32-35 Year 2006 dated January 19, 2006 concerning Revocation of Decision of the Minister of Home Affairs Number 132.32-37 Year 2004 concerning Legalization of Termination and Legalization of Appointment of Vice Regent of Bekasi, West Java is intended for implementing Decision of the Supreme Court of the Republic of Indonesia Number 436 K/TUN/2004 dated July 6, 2005 pursuant to Article 116 Paragraph (2) of Law Number 9 Year 2004 concerning

Amendment to Law Number 5 Year 1986 concerning State Administrative Court. In addition to giving his own arguments, Respondent I also presented experts in the hearing to hear their expert statements, namely:

(1) Harun Kamil S.H.;

(2) Hamdan Zoelva, S.H., M.H.;

(3) Drs. Slamet Effendy Yusuf, M.Si.;

Complete statements of the three experts have been described in the foregoing principal case. Basically, the experts stated that a Regent is not a state institution as intended by Article 24C of the 1945 Constitution. As to the position of the three experts the Petitioners had objection because they are Members of the 1999-2004 Ad Hoc Committee of People's Consultative Assembly who were involved in the amendments to the 1945 Constitution, hence their position should have been as witnesses and not experts. With respect to the Petitioners' objection, the Court was determined that what is intended by "expert statement" shall be "statement given by a person who, due to his education and/or experience, has the skill or in-depth knowledge in relation to the petition, in the form of scientific and technical opinions or other specific opinions concerning an evidence or fact required in examining the petition", as regulated in Article 1 Sub-Article 13 of Regulation of the Constitutional Court Number 06/PMK/2005;

Considering whereas in accordance with Article 24C of the 1945 Constitution, the Constitutional Court shall have the authorities, among other things, to hear at the first and final level the decision of which shall be final to

decide upon authority disputes of state institutions whose authorities are granted by the Constitution;

Considering whereas with the petition of the Petitioners, the Court deems it necessary to first consider what is intended by authority dispute of state institutions whose authorities are granted by the Constitution, as intended by Article 24C of the 1945 Constitution. Only then can the Court can stipulate whether or not the petition of the Petitioners is included in the meaning of authority dispute of state institutions, hence the Constitutional Court has the authority to examine, hear, and decide upon the petition filed by the Petitioners;

Considering whereas to determine the definition of authority dispute of state institutions whose authorities are granted by the Constitution, the Court must first consider the basis for the need of a hearing process in settling authority disputes of state institutions as indicated in Article 24C Paragraph (1) of the 1945 Constitution. The need to provide settlement procedures for authority disputes of state institutions whose authorities are granted by the Constitution arises because state power is distributed functionally, the implementation of which is conducted by institutions stipulated by the Constitution. The power granted to state institutions has limiting nature to each other (*checks and balances*). Upon the amendments, the 1945 Constitution no longer recognizes the highest state institution as the full executor of people’s sovereignty. Thus, there are no more state institutions having a higher position, the decision of which can be made as reference in settling authority disputes among state institutions;

Considering whereas in addition to being the highest source of law, the Constitution contains fundamental law norms for state governance, and also regulates the relationship mechanism among state institutions. Regulations concerning working mechanism in the Constitution must operate as regulated by the Constitution. If any component in the mechanism does not function properly, one of the causes being state institutions' acting beyond their authorities, it must be restored to the required mechanism. Legal correction of the unconstitutionality of such mechanism shall be conducted by a separate judicial institution namely the Constitutional Court through its decisions in order to avoid settlements that are merely political in nature based on power. In addition, since the mechanism contained in the constitution is formed by law norms in the constitution, the function of the Constitutional Court to correct the use of authorities granted by the Constitution to state institutions to be exercised in accordance with the constitution, is included in the duties of Constitutional Court in guarding and enforcing the constitution. In determining whether the Constitutional Court has the authority to examine, hear, and decide upon the *a quo* petition and to stipulate whether the Petitioners have the legal standing in the *a quo* petition, the Court has based its the opinion concerning the definition of "authority disputes of state institutions whose authorities are granted by the Constitution" on the above mentioned considerations;

Considering whereas in every Constitution, the main issue to be regulated is state authorities granted to certain state organs or institutions. The aspect of

state institutions becomes relevant only after the state institutions are granted with the authorities. For example, in America, the legislative power is implemented by the Congress, in England the legislative power is implemented by the Queen in the Parliament consisting of the House of Commons and the House of Lords, while in Indonesia the legislative power is granted to the People's Legislative Assembly. Such authorities certainly need implementing organs so that the connection between authorities and the implementing organs is very close and they can even be said to be inseparable from each other. With the foregoing perspective, the formulation of "authority disputes of state institutions whose authorities are granted by the Constitution" must be understood in such a way that the core of such formulation is a matter of "authority". Thus, according to such formulation, *the objectum litis* of the authority dispute concerned shall be "authority concerning what", while concerning "who holds the authority" or who is given the authority will be observed in the provisions of the Constitution. The phrase "state institutions" in Article 24C Paragraph (1) of the 1945 Constitution, must be interpreted as being inseparable from "authorities granted by the Constitution". In examining, hearing, and deciding upon a petition on authority dispute of state institutions, the Court must consider the close relationship between authorities and the implementing institutions. Hence, in stipulating whether the Court has the authority to examine the petition of authority dispute of state institutions, the Court must relate directly the disputed principal case (*objectum litis*) to the position of state institutions filing the petition, namely whether the authorities are given to such state institutions.

Therefore, the matter of authority concerned is closely related to the legal standing of the Petitioners and determines whether or not the Court has the authority to examine, hear, and decide upon the *a quo* petition;

The placement of “authority dispute“ before “state institutions“ has a very important meaning, because basically what is intended by Article 24C Paragraph (1) of the 1945 Constitution is indeed “authority dispute” or concerning “what is disputed” and not “who disputes”. The definition will be different if the formulation of Article 24C Paragraph (1) of the 1945 Constitution reads, “…dispute of state institutions whose authorities are granted by the Constitution”. In the latter formulation, the main problem is the disputing parties, namely state institutions and the object of dispute becomes unimportant. Hence, in such formulation, the Constitutional Court will consequently become a forum for dispute settlement of state institutions without considering the subject matter disputed by the state institutions, and such matter according to the Court is not the purpose of Article 24C Paragraph (1) of the 1945 Constitution. Because, if the formulation is “… dispute state institutions whose authorities are granted by the Constitution”, the Constitutional Court will have the authority to decide upon any disputes that are not relevant at all to the matter of constitutionality of authorities of state institutions, insofar as the disputing parties are state institutions;

Considering whereas the phrase “state institutions” in Article 24C Paragraph (1) of the 1945 Constitution must be closely related to and must not be separated from the phrase “whose authorities are granted by the

Constitution". With the formulation of clause "state institutions whose authorities are granted by the Constitution", there is an implicit recognition that there are "state institutions whose authorities are not granted by the Constitution". Therefore, the definition of state institutions must be understood as a general *genus* that can distinguish "state institutions whose authorities are granted by the Constitution" from "state institutions whose authorities are not from the Constitution". In Decision of Case Number 005/PUU-I/2003 concerning Judicial Review of Law Number 32 Year 2002 concerning Broadcasting, the Constitutional Court acknowledged the existence of state institutions whose authorities are not granted by the Constitution but by other legislations, in this matter the Indonesian Broadcasting Commission (KPI);

Considering whereas the phrase "state institutions" is found in Article 24C Paragraph (1) of the 1945 Constitution, and hence the Court must stipulate which institutions are intended by Article 24C Paragraph (1). In deciding what are referred to as state institutions by Article 24C Paragraph (1) of the 1945 Constitution, the Court refers to the aforementioned description that the authority of the Court is to decide upon disputes on authority granted by 1945 Constitution, so that to decide whether an institution is a state institution as intended by Article 24C Paragraph (1) of the 1945 Constitution, the first thing to consider is the existence of certain authorities in the Constitution and then to which institutions those authorities are given. Since authority is limited in nature and is for a certain purpose, the nature of state institution cannot be decided in general, but is related to the authorities given or in other words an institution referred to by any

name shall have the status as a state institution according to the definition of Article 24C Paragraph (1) of the 1945 Constitution if such institution questions, or is questioned about, its authorities granted by the 1945 Constitution;

Considering whereas the formulation of “authority disputes of state institutions whose authorities are granted by the Constitution,” has a purpose that only the authorities granted by the Constitution shall become *the objectum litis* of the dispute and the Court has the authority to decide upon such dispute. The provision that becomes the basis for such authority of the Court also limits the authority of the Court, which means that if there is an authority dispute without *the objectum litis* “being the authorities granted by the Constitution”, the Court shall not have the authority to examine, hear, and decide. The Court is of the opinion that it is what is intended by the 1945 Constitution. Authority dispute, with the authority being granted by Law, is not under the authority of the Court;

Considering whereas Article 61 Paragraph (1) and Paragraph (2) of the Constitutional Court Law states:

Paragraph (1) : *“Petitioners shall be state institutions whose authorities are granted by the Constitution of the State of the Republic of Indonesia Year 1945 having direct interest in the disputed authorities”;*

Paragraph (2) : *“Petitioners must clearly describe in the petition the direct interest of the petitioners and describe the disputed*

authorities as well as clearly mention the state institutions that become respondents".

This provision is intended as the procedural law that enables the commencement or opening of examination on an authority dispute in the Constitutional Court because accordingly there is in the first place a party that files the petition first. The Court cannot on its own initiative examines a case of authority dispute of state institutions and such provision does not change the nature of authorities owned by the Court only to examine authority dispute of state institutions based on what is disputed (*objectum litis*) and not the authority to decide upon the dispute because of the disputing parties (*subjectum litis*). It has been described in the earlier opinion of the Court;

Considering whereas based on the aforementioned considerations, the Court can decide whether the petition of the Petitioners is included in the definition of authority dispute of state institutions as intended by Article 24C of the 1945 Constitution, and hence the Court has the authority to decide upon the *a quo* petition;

PRINCIPAL ISSUE OF THE CASE

Considering whereas the *objectum litis* of the petition of the Petitioners is as follows:

(1) "the authority of Respondent II in issuing Decision of the Minister of Home Affairs Number 131.32-11 Year 2006 dated January 4, 2006 concerning

Revocation of Decision of the Minister of Home Affairs Number 131.32-36 Year 2004 dated January 8, 2004 concerning Legalization of Termination and Legalization of Appointment of Regent of Bekasi, West Java Province and the authority of Respondent II in issuing Decision of the Minister of Home Affairs Number 132.32-35 Year 2006 dated January 19, 2006 concerning Revocation of Decision of the Minister of Home Affairs Number 132.32-37 Year 2004 concerning Legalization of Termination and Legalization of Appointment of Vice Regent of Bekasi, West Java";

(2) "the authority of Respondent III in stipulating Decision of the Regional People's Legislative Assembly (DPRD) of Bekasi Regency Number 06/KEP/172.2-DPR/2006 dated February 28, 2006 concerning Approval of the Regional People's Legislative Assembly (DPRD) of Bekasi Regency of the stipulation of Regional Government Draft Regulation concerning Regional Revenues and Expenditures Budget of Bekasi Regency Year 2006";

Considering whereas the Petitioners argued that in issuing the 2 (two) Decisions concerned, Respondent II have exceeded his authority (*ultra vires*) as provided for in the constitution because such action was clearly taken for no reason and without passing through the legal mechanism for termination as regulated in Article 18 Paragraph (4) and Article 18A of the 1945 Constitution *juncto* Article 29 through Article 31 of Law Number 32 Year 2004;

Considering whereas the Petitioners have based the authority for terminating Regent and Vice Regent on Article 18 Paragraph (4) and Article 18A of the 1945 Constitution, but the Court is of the opinion that the substance of both Articles is not directly related to the authority for terminating the Petitioners. In deciding the contents and limits of authority as the *objectum litis* of an authority dispute of state institutions, the Court does not only interpret textually the provisions of the Constitution granting authorities to certain state institutions, but also sees the possibility of implicit authorities in a principal authority and necessary and proper authorities to perform the certain principal authority. Those authorities may be contained in a law. In interpreting the authorities granted by the Constitution, expert Prof. Dr. Muhammad Ryaas Rasyid, M.A. stated in the hearing that constitutional authorities are not only limited to those referred to in writing in the Constitution, but also all Laws derived from the Constitution. Meanwhile, expert Denny Indrayana, S.H., LL.M., Ph.D. stated that constitutional authorities shall be authorities directly obtained from the Constitution or derived from the Constitution. With respect to the opinions of both experts stating that authorities derived from the Constitution or from laws derived from the Constitution shall be included in the definition of authorities granted by the Constitution, the Court is of the opinion that the definition of authorities granted by the Constitution can be interpreted not only textually but also in such a way that it includes implicit authorities contained in a principal authority and authority needed to perform the principal authority. However, not all authorities existing in Law derived from the Constitution are automatically included in the definition of

authorities granted by Constitution as intended by Article 24C Paragraph (1) of the 1945 Constitution. Legislators, based on the Constitution, are given the authority to establish state institutions and to give authorities to the established state institutions. However, if the establishment of state institutions and the granting of authorities to such state institutions as stipulated in Law are contradictory to the Constitution, the Court can conduct substantive review of the Law against the 1945 Constitution. In addition, Legislators can also establish state institutions and give authorities to such state institutions, although it is not instructed by the 1945 Constitution. Therefore, not every authority granted by Law must be understood as an authority granted by the Constitution;

Considering whereas the Petitioners' argument stating that Respondent II has exceeded his authorities (*ultra vires*), according to the Court, cannot be directly reviewed against Article 18 Paragraph (4) and Article 18A of the 1945 Constitution, but shall be based on Article 29 through Article 31 of Law Number 32 Year 2004. The provisions of Article 18 Paragraph (4) and Article 18A of the 1945 Constitution do not grant authorities to Governors, Regents, and Mayors, but provide for Constitutional norms that bind the legislators in regulating the election of Governors, Regents, and Mayors so that the election of heads of regions is not conducted through appointment, but through a democratic way namely a direct election or election through representative institutions. Legislators granted full authority by the Constitution shall choose one of the aforementioned ways. Therefore, the Court is of the opinion that Article 18 Paragraph (4) and Article 18A of the 1945 Constitution are not the bases or

sources of authorities of a head of region, either principal authority, implicit authority, or necessary and proper authority to perform the principal authority of the Heads of Provinces, Regencies, and Municipal Governments;

Considering, with respect to the Petitioners' argument stating that the termination executed by the Minister of Home Affairs is contradictory to the principle of *a contrario actus*, the Court is of the opinion that such principle must be applied in a limited way, namely when interpreting provisions that do not clearly regulate the procedures for the termination of heads of region. Besides, Article 18 Paragraph (4) is obviously intended as a norm concerning procedures of election only and does not regulate the termination of Governors, Regents, and Mayors. The provisions regulating the reasons and procedures for terminating Heads of Regional Governments are given to Law. Article 18 Paragraph (4) of the 1945 Constitution becomes one of the legal bases for the establishment of Law Number 32 Year 2004 which is particularly related to the procedures for the election of Heads of Regional Governments, but it is not the only legal basis to determine the reasons for the termination of Heads of Regional Governments. In addition to democratic termination involving the Regional People's Legislative Assembly (DPRD), Law can democratically add other methods based on rational and constitutional reasons, namely Article 18 Paragraph (7) of the 1945 Constitution, to terminate Heads of Regional Governments as described in Article 30 Paragraph (2) of Law Number 32 Year 2004, which reads as follows:

"*Heads of regions and/or vice heads of regions shall be terminated by the President without the proposal from the Regional People's Legislative Assembly if they are proved to have committed criminal acts as intended in Paragraph (1) based on court decisions having permanent legal effect*". Also Article 31 Paragraph (2) of Law Number 32 Year 2004 which reads, *"Heads of regions and/or vice heads of regions shall be terminated by the President without any proposal from the Regional People's Legislative Assembly because they are proved to have committed subversion and/or other acts that can break up the Unitary State of the Republic of Indonesia based on a court decision having permanent legal effect*". Accordingly, the principle of *a contrario actus* is not relevant to the termination, because the reason for the termination is a legal matter. Hence, the mechanism for the termination must also follow the legal process regulated in Article 29 through Article 33 of Law Number 32 Year 2004. Thus, the Court is of the opinion that the action of Respondent I is irrelevant to the principle of *a contrario actus*;

Considering whereas the Petitioners stated that the action of Respondent II has exceeded his authority (*ultra vires*) because the termination of Petitioners was not based on Article 29 through Article 33 of Law Number 32 Year 2004 concerning the reasons or bases for terminating heads of regions. In line with the foregoing opinion of the Court, the authorities of state institutions shall not sufficiently be viewed textually but shall be viewed in such a way that it includes implicit authorities contained in a principal authority and necessary and proper authority (to perform the principal authority the regulation of which may be

mentioned in Law. Hence, the Court concluded that the provisions of Article 29 through 33 of Law Number 32 Year 2004 are not the authorities of head of region either textually, implicitly, or as necessary and proper authority to perform the principal authority granted by the Constitution. Therefore, the provisions in Article 29 through Article 33 of Law Number 32 Year 2004 cannot be made as the basis for the *objectum litis* by heads of regions in an authority dispute of state institutions as intended in Article 24C Paragraph (1) of the 1945 Constitution. The provisions of Article 29 through Article 32 of Law Number 32 Year 2004 regulate the involvement of the Regional People's Legislative Assembly in terminating heads of regions by providing certain authorities. If the termination of a head of region is not in accordance with such provisions, the interested party in such termination issue should have been the Regional People's Legislative Assembly, and not the Petitioners. Therefore, such authority is not included in the definition of authorities of the head of region granted by the 1945 Constitution. Hence, it shall not be the authority of the Court to examine, hear, and decide upon disputes with respect to the implementation of Article 29 through Article 32 of Law Number 32 Year 2004;

Considering whereas based on the above description, the Court is of the opinion that the dispute between the Petitioners and Respondent II is not an authority dispute as intended by Article 24C Paragraph (1) of the 1945 Constitution so that the petition of the Petitioners does not meet the criteria as intended by Article 61 of the Constitutional Court Law. Therefore, the petition of the Petitioners is groundless.

Considering whereas the Petitioners argued that the action of Respondent III in issuing Decision of the Regional People's Legislative Assembly of Bekasi Regency Number 06/KEP/172.2-DPR/2006 dated February 28, 2006 has exceeded its authority and has directly impaired the interest of the Petitioners, because it ignored the Petitioners' authorities referred to in Article 18 Paragraph (6) of the 1945 Constitution *juncto* Article 25 Sub-Article c and Sub-Article d of Law Number 32 Year 2004;

Considering whereas based on the foregoing Petitioners' argument, the *objectum litis* between the Petitioners and Respondent III is the authority of Regional Government to stipulate regional regulations and other regulations to implement the principle of autonomy and duty assistance as stated in Article 18 Paragraph (6) of the 1945 Constitution. The Court is of the opinion that Regional Government is a state institution as intended by Article 24C of the 1945 Constitution because it is granted with authorities by Article 18 Paragraph (2), Paragraph (5), and Paragraph (6), Article 18A Paragraph (1) and Paragraph (2), and Article 18B Paragraph (1) of the 1945 Constitution. The Petitioner who argued in his capacity as a state institution to file the petition on authority dispute of state institutions as intended by Article 24C of the 1945 Constitution is the Regent of Bekasi. With regard to the argued capacity as Regent, the 1945 Constitution regulates in Article 18 Paragraph (4) that Governors, Regents, and Mayors as the respective Heads of Provincial, Regency, and Municipal Governments shall be elected democratically. In addition to such provision,

Article 18 Paragraph (3) of the 1945 Constitution states that Provincial, Regency, and Municipal Governments shall have their respective Regional People's Legislative Assemblies the members of which shall be elected through general elections. From the aforementioned provisions the authorities clearly referred to are the authorities of Regional Government, granted in connection with the regulating authority owned by the central government. Although Article 18 Paragraph (4) of the 1945 Constitution provides that Governors, Regents, and Mayors are Heads of Regional Governments, this Article does not specify the authorities of Heads of Regional Governments and this is normal because the scope of such authorities can be stipulated only upon the implementation of the mandates of Article 18, Article 18A, and Article 18B of the 1945 Constitution by the stipulation in Law. The authorities of heads of regions are closely related to the authorities of regional governments, because a head of region is the Head of Regional Government. Certainly it is inappropriate if the authorities of heads of regions are not in the context of implementing the authorities owned by the regional governments. The whole authorities are regulated in laws, namely laws that implement Article 18, Article 18A, and Article 18B of the 1945 Constitution. Article 18 Paragraph (6) provides for an authority granted by the Constitution to regional governments as well as instruction to Legislators that the authority is not ignored in implementing the provisions of Article 18, Article 18A, and Article 18B of the 1945 Constitution. With regard to the making of regional regulations, the authorities of the heads of regional governments and the Regional People's Legislative Assembly are determined and regulated by law. Meanwhile, the

Constitution prohibits complete erasure of the authority to make regional regulations. The implementation of such authorities will certainly be adjusted to the implementation of autonomy principles and duty of assistance regulated by law. The legislators can regulate differently the procedures for making regional regulations applicable for provinces, regencies, cities, and even regions included in specific or special units of regional governments as intended by Article 18B of the 1945 Constitution;

Considering whereas based on the foregoing, the Court is of the opinion that a Regent is a government organ as well as state institution in the process of formulating regional regulations as regulated in Law Number 32 Year 2004. The authorities of a Regent is granted by law, and in such law there is no implicit authority or necessary and proper authority to exercise the principal authority of the Regent granted by the Constitution. Therefore, the Court is of the opinion that the dispute between the Petitioners and Respondent III is not an authority dispute of state institutions whose authorities are granted by the Constitution as intended by Article 24C of the 1945 Constitution so that the petition of the Petitioners is groundless;

Considering whereas the Petitioners also reminded Respondent I to correct the action of Respondent II issuing such Decisions questioned by the Petitioners. However, the Petitioners did not clearly describe the action petitioned to the Court against Respondent I, thus rendering the petition obscure (*obscuur libel*). In addition, the Court is of the opinion that Respondent's not correcting the

action of Respondent II is not included in the definition of authority dispute of state institutions as intended by Article 24C of the 1945 Constitution. Thus, the petition of the Petitioners is groundless;

Considering whereas in their petition the Petitioners requested for a provisional injunction to instruct Respondent I, Respondent II, and Respondent III to temporarily stop the implementation of:

(i) Decision of the Minister of Home Affairs Number 131.32-11 Year 2006 dated January 4, 2006;

(ii) Decision of the Minister of Home Affairs Number 132.32-35 Year 2006 dated January 19, 2006;

(iii) Decision of the Regional People's Legislative Assembly of Bekasi Regency Number 06/KEP/172.2-DPR/2006 dated February 18, 2006.

With respect to the petition for a provisional injunction, the Court is of the opinion that upon considering the substance of petition above, the petition for a provisional injunction is no longer relevant to be considered;

Considering whereas in their petition the Petitioners considered that in examining Decision of the Minister of Home Affairs concerning Appointment of Regent Number 131.32-36 Year 2004 dated January 8, 2004 and Decision of the Minister of Home Affairs concerning Appointment of Vice Regent Number 132.32-37 Year 2004 dated January 8, 2004 the Supreme Court of the Republic

of Indonesia has exceeded its authority and such action is contradictory to the provision in Article 2 Sub-Article g of Law Number 5 Year 1986 concerning State Administrative Court as amended by Law Number 9 Year 2004. The Court is of the opinion that such argument is not relevant to be considered in this decision, because the Petitioners did not make the assessment regarding such decisions as *objectum litis* of the authorities of the *a quo* state institutions.

Considering whereas since the *objectum litis* in the *a quo* petition is not an authority dispute as intended in Article 24C Paragraph (1) of the 1945 Constitution *juncto* Article 61 Paragraph (1) of the Constitutional Court Law, it must be declared that the petition of the Petitioners can not be accepted.

In view of Article 64 Paragraph (1) of the Law of Republic of Indonesia Number 24 Year 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).

PASSING THE DECISION:

To declare that the petition of the Petitioners can not accepted (*niet ontvankelijk verklaard*).

Hence this Decision was made in the Consultative Meeting of 9 (nine) Constitutional Court Justices with one Constitutional Court Justice having concurring opinion and two Constitutional Court Justices having dissenting opinion on **Tuesday, July 11, 2006**, and was pronounced in the Plenary Session

of Constitutional Court open for public on this day **Wednesday**, **July 12, 2006**, by us **Prof. Dr. H. Jimly Asshiddiqie, S.H.,** as the Chairperson and concurrent Member, **Dr. Harjono, S.H., M.C.L., Prof. H.A.S. Natabaya, S.H., LL.M., Maruarar Siahaan, S.H., Prof. Dr. H.M. Laica Marzuki, S.H., Prof. H.A. Mukthie Fadjar, S.H., M.S., H. Achmad Roestandi, S.H., I Dewa Gede Palguna, S.H., M.H., and Soedarsono, S.H.,** respectively as Members, assisted by **Wiryanto, S.H., M.Hum.** as Substitute Registrar, in the presence of the Petitioners/their Attorney-in-Fact, Respondent I/his Attorney-in-Fact, Respondent II/his Attorney-in-Fact, and Respondent III.

CHIEF JUSTICE,

signed.

Prof. Dr. H. Jimly Asshiddiqie, S.H.

Justices,

signed.	**signed.**
Dr. Harjono, S.H., M.C.L.	**Prof. H.A.S Natabaya. S.H. LL.M.**
signed.	**signed.**
Maruarar Siahaan, S.H.	**Prof. Dr. H. M Laica Marzuki, S.H.**
signed.	**signed.**
Prof. H. Abdul Mukthie Fadjar, S.H. M.S.	**H. Achmad Roestandi, S.H.**

signed. **signed.**

I Dewa Gede Palguna, S.H., M.H. **Soedarsono, S.H.**

Concurring Opinion

Constitutional Court Justice Prof. Dr. H.M. Laica Marzuki, S.H.

I. Authorities of the Court

Whereas pursuant to Article 24C Paragraph (1) of the 1945 Constitution, as reaffirmed in Article 10 Paragraph (1) of the Constitutional Court Law, the Constitutional Court shall have the authority to hear at the first and final level the decision of which shall be final *in casu* to decide upon authority disputes of state institutions whose authorities are granted by the Constitution.

Whereas the petition of the Petitioners filed in this case is argued as pertaining to an authority dispute of state institutions whose authorities are granted by the Constitution, with regard to the termination of Petitioner Drs. H.M. Saleh Manaf as the Regent of Bekasi, pursuant to Decision of the Minister of Home Affairs Number 131.32-11 dated January 4, 2006 concerning Revocation of Decision of the Minister of Home Affairs Number 131.32-36 Year 2004 concerning Legalization of Termination and Legalization of Appointment of Regent of Bekasi, West Java Province and Petitioner Drs. Solihin Sari as the Vice Regent of Bekasi, pursuant to

Decision of the Minister of Home Affairs Number 132.32-35 Year 2006 dated January 19, 2006 concerning Revocation of Decision of the Minister of Home Affairs Number 132.32-37 Year 2004 concerning Legalization of Termination and Legalization of Appointment of Vice Regent of Bekasi, West Java Province and Decision of the Regional People's Legislative Assembly of Bekasi Regency Number 06/KEP/172.2-DPR/2006 dated February 28, 2006 concerning Approval of the Regional People's Legislative Assembly of Bekasi Regency of the stipulation of Regional Government Draft Regulation concerning Regional Revenues and Expenditures Budget of Bekasi Regency Year 2006 into Regional Government Regulation concerning Regional Revenues and Expenditures Budget of Bekasi Regency Year 2006.

Accordingly, the *constitutioneele vraagstuk* is as follows: shall Regent and Vice Regent be categorized as state institutions whose authorities are granted by the Constitution? Can Regent and Vice Regent act as parties (*een partij zijnde*) in the authority dispute of state institutions, pursuant to Article 24C Paragraph (1) of the 1945 Constitution?

Article 18 Paragraph (4) of the 1945 Constitution stipulates that Governors, Regents and Mayors respectively as the respective heads of provincial, regency, and municipal governments shall be elected democratically. Regents as the head of regency governments are the

administrators of regency governments, together with the Regional People's Legislative Assembly (DPRD).

Article 18 Paragraph (5) of the 1945 Constitution stipulates that the regional governments shall exercise autonomy to the broadest possible extent, with the exception of governmental affairs determined by law as the affairs of the central government.

Vice Regents or vice heads of regency shall be elected and inaugurated together with the Regents or heads of regency (Article 107 Paragraph (1) of Law Number 32 concerning Regional Government). Both constitute a unified public title. The Regional People's Legislative Assembly (DPRD) of Bekasi Regency is included as a party (Respondent III) in this case. The Regent, Vice Regent and the Regional People's Legislative Assembly *in casu* are state institutions in a region.

The President (Respondent I), as the holder of state executive power, shall be the Central Government, *in casu* the Minister of Home Affairs (Respondent II) as state minister [Article 4 Paragraph (1) of the 1945 Constitution *juncto* Article 17 Paragraph (1), (3) of the 1945 Constitution, as described in Article 1 Sub-Article 1 of Law Number 32 Year 2004 concerning Regional Government] shall be state institutions in the central level.

Pursuant to the aforementioned articles of the constitution, the case filed by the Petitioners can be considered as the case of authority dispute of state institutions whose authorities are granted by the Constitution. Thus, the Court has the authority to examine and decide upon this case.

II. Legal standing

Whereas apart from the fact that the Petitioners have been removed from the position of Regent/Vice Regent of Bekasi Regency/Head of Regional Government of Bekasi Regency by Respondent II, the Minister of Home Affairs, their removal from office is related to the direct interest of the Petitioners in the disputed authorities of state institutions. The Petitioners can be deemed as having the legal standing in this case.

III. Principal issue of the Case

The petition of the Petitioners questioned the authority of *in casu* Respondent Minister of Home Affairs who removed the Petitioner Drs. H.M. Saleh Manaf as the Regent of Bekasi, pursuant to Decision of the Minister of Home Affairs Number 131.32-11 Year 2006 dated January 4, 2006 concerning Revocation of Decision of the Minister of Home Affairs Number 131.32-36 Year 2004 concerning Legalization of Termination and Legalization of Appointment of Regent of Bekasi, West Java Province, and Petitioner Drs. Solihin Sari as the Vice Regent of Bekasi, pursuant to

Decision of the Minister of Home Affairs Number 132.32-35 Year 2006 dated January 19, 2006 concerning Revocation of Decision of the Minister of Home Affairs Number 132.32-37 Year 2004 concerning Legalization of Termination and Legalization of Appointment of Vice Regent of Bekasi, West Java Province.

Whereas the two Removal Decisions issued by Respondent II (Minister of Home Affairs) were based on a court decision having permanent legal force (*in kracht van gewijsde*), namely Decision of the Supreme Court Number 436 K/TUN/2004 dated July 6, 2005 in the Cassation case of Petitioner H. Wikanda Darmawijaya against 1. Minister of Home Affairs (Cassation Respondent I). 2. Drs. H.M. Saleh Manaf (Cassation Respondent II, formerly Intervention Defendant), the decision of which principally declared the cancellation or nullification of Decision of the Minister of Home Affairs Number 131.32-36 Year 2004 concerning Legalization of Termination and Legalization of Appointment of Regent of Bekasi, West Java and declared the cancellation or nullification of Decision of the Minister of Home Affairs Number 132.32-37 Year 2004 concerning Legalization of Termination and Legalization of Vice Regent of Bekasi, West Java, and instructed the Defendant Minister of Home Affairs to revoke the two Decisions of the Minister of Home Affairs concerned.

Whereas public titles of Regent of Bekasi and Vice Regent of Bekasi are categorized state institutions (*een gedeelte van staatsorgaan*)

representing the title of Head of Bekasi Regency and Vice Head of Bekasi Regency. However, since the Decision of the Minister of Home Affairs Number 131.32-11 dated January 4, 2006 and Decision of the Minister of Home Affairs Number 132.32-35 Year 2006 dated January 19, 2006 questioned by the Petitioners as *fundamentum petendi* were issued by the Minister of Home Affairs as a State Administrative Official, the minister's action in issuing the two Decisions (SK) was taken in the context of making a state administrative decision, as commonly called *beschikkingsdaad van de administratie*. Thus, the removal of the two Petitioners was conducted by the minister in relation to the minister's position as *een gedeelte van administratie orgaan*, not representing state institutions (*het is geen vertegenwoordiger van staatsorgaan*).

Whereas pursuant to Article 2 Sub-Article e of Law Number 9 Year 2004 concerning Amendment to Law Number 5 Year 1986 concerning State Administrative Court, State Administration Decision (K.TUN) shall not include K.TUN which is issued based on the results of examination of judicial bodies pursuant to the prevailing laws and regulations. Decision of the Minister of Home Affairs Number 131.32-11 dated January 4, 2006 and Decision of the Minister of Home Affairs Number 132.32-35 dated January 19, 2006 made as *fundamentum petendi* by the Petitioners, belong to the category of K.TUN issued based on the results of examination of judicial bodies, hence they cannot be sued again, just like the final destination of a night train. *Het is een eindpunt van deze trein*.

Whereas in this respect, pursuant to Article 116 Paragraphs (3), (4) and (5) of Law Number 9 Year 2004, in the event that the defendant (state administrative agency or official) is determined to perform the obligation *in casu* to revoke a K.TUN cancelled by the Court and after 3 (three) months the obligation is not executed, the plaintiff shall file a petition to the Chief of the Court to execute the court decision. In the event that the defendant is not willing to execute the Court decision having a permanent legal force, the related official shall be subject to punishment in the form of fine and/or administrative sanction. An Official who does not execute Court decision shall be announced in the local mass media by the Registrar as from the decision is not executed.

Whereas based to the foregoing, in issuing a K.TUN *in litis,* Respondent Minister of Home Affairs has complied with the Court decision having permanent legal force.

Whereas accordingly, it is reasonable to declare that the petition of the Petitioners can not be accepted (*niet ontvankelijk verklaard*).

Dissenting Opinion*:*

1. Constitutional Court Justice Prof. H.A. Mukthie Fadjar, S.H.,M.S.

"The existence of the Constitutional Court shall be to maintain the stable state governance"

(General Elucidation of Law Number 24 Year 2003 concerning the Constitutional Court)

1. Article 61 of Law Number 24 Year 2003 concerning the Constitutional Court (referred to as the Constitutional Court Law) provides that in “Authority Dispute of State Institutions whose Authorities Are Granted by the Constitution” it is required that:

   (1) *Petitioners shall be state institutions whose authorities are granted by the Constitution of the State of the Republic of Indonesia Year 1945 having direct interest in the disputed authorities.*

   (2) *Petitioners must clearly describe in the petition the direct interest of the petitioners and describe the disputed authorities as well as clearly mention the state institutions as respondents.*

From the provisions of Article 61 of the Constitutional Court Law, Court, in the legal considerations, of Case Number 002/SKLN-IV/2006 concluded that:

a. both petitioners and respondents must be state institutions whose authorities are granted by the 1945 Constitution;

b. there must be constitutional authorities disputed by the petitioners and respondents, in which the constitutional authorities of the petitioners are taken over and/or disturbed by the respondent’s action;

c. the petitioners must have direct interest in the disputed constitutional authorities.

The issues in the *a quo* case (Case Number 004/SKLN-IV/2006) are:

a. Can the Petitioners, namely Regent/Vice Regent of Bekasi Regency and Respondents, namely Respondent I (President of the Republic of Indonesia), Respondent II (Minister of Home Affairs), and Respondent III (Regional People's Legislative Assembly of Bekasi Regency) be qualified as state institutions having authorities granted by the 1945 Constitution (constitutional authorities)?

b. Are there any constitutional authorities disputed by the Petitioners and Respondents?

c. Do the Petitioners have direct interest in the disputed constitutional authorities?

2. My opinion regarding the foregoing three issues is as follows:

    a. Petitioners, namely Regent/Vice Regent of Bekasi Regency are categorized as state institutions as referred to in Article 18 Paragraph (4) of the 1945 Constitution as **head of regional government** and have constitutional authorities regulated by Article 18 Paragraph (2), Paragraph (5), and Paragraph (6) of the 1945 Constitution, together with the Regional People's Legislative Assembly of Bekasi:

1) To regulate and administrator their own governmental affairs in accordance with the autonomy principle and duty of assistance (Paragraph 2);

2) To exercise autonomy to the broadest possible extent, with the exception of governmental affairs determined by law as the affairs of the Central Government (Paragraph 5);

3) To stipulate regional regulations and other regulations to implement autonomy and duty of assistance (Paragraph 6).

Petitioners have been right in claiming themselves as Regent/Vice Regent having constitutional authorities, therefore they are state institutions, because although the Legalization of Appointment was revoked by Respondent I (including therein the Minister of Home Affairs), such revocation is in fact a taking over of authority, which is the object of constitutional authority dispute as the core of this case. Acknowledgement of Regent/Vice Regent or Mayor/Vice Mayor as state institutions having constitutional authorities implicitly and *a contrario* can also be concluded from the legal considerations of the Court in Decision Number 002/SKLN-IV/2006.

Meanwhile, Respondent I, namely the President of the Republic of Indonesia is categorized as a state institution having constitutional authorities intended in Article 4 Paragraph (1), Article 5, Article 10,

Article 11, Article 12, Article 13, Article 14, Article 15, Article 16, Article 20 Paragraph (4), Article 22 Paragraph (1), Article 23F Paragraph (1), Article 24A Paragraph (3), Article 24B Paragraph (3), and Article 24C Paragraph (3) of the 1945 Constitution. Respondent II, namely the Minister of Home Affairs, is not included in the a state institution category having constitutional authorities, because as assistant to the President, the authorities of the minister are attached to the President, and hence the Minister of Home Affairs cannot become respondent, as his action is taken on behalf of, or considered as the action of, the President (Respondent I). Respondent III, the Regional People's Legislative Assembly of Bekasi Regency is a state institution having constitutional authorities together with the Regent/Vice Regent of Bekasi as the elements of regional government.

b. Constitutional authorities disputed by Petitioners and Respondents as follows:

1) Whereas the constitutional authorities of the Petitioners as the Head of Regional Government of Bekasi Regency together with the Regional People's Legislative Assembly of Bekasi Regency as referred to in Article 18 Paragraph (2), Paragraph (5), and Paragraph (6) of the 1945 Constitution, have been taken over, disturbed, and even revoked by Respondent I (Minister of Home

Affairs, referred to as Respondent II) through the revocation of Legalization of Appointment of the Petitioners on the basis which is contradictory to Article 18 Paragraph (4) of the 1945 Constitution *juncto* Law Number 22 Year 1999 *juncto* Law Number 32 Year 2004, namely, that the Regent/Vice Regent were elected democratically by the Regional People's Legislative Assembly of Bekasi Regency, but their removal from office was not democratic, for it did not involve the Regional People's Legislative Assembly of Bekasi Regency and was not based on the reasons provided for by the Regional Government Law. The excuse of implementing Decision of the Supreme Court (Supreme Court) in the State Administration (TUN) dispute case is inappropriate, because the matter of appointment and termination of heads of regions who must be elected democratically, either through indirect election (by Regional People's Legislative Assembly) or direct election, however, is categorized as decision of election committee/regional elections commission that must also be understood by Respondent I (including the Minister of Home Affairs) as not being included in the absolute competence of the State Administrative Court (PTUN) with the Supreme Court at the top (*vide* Law Number 5 Year 1986 as amended by Law Number 9 Year 2004 Concerning State Administrative Court).

Furthermore, in its legal considerations, the Supreme Court has also indirectly admitted that there had been elected Regent/Vice Regent, so that Respondent I including the Minister of Home Affairs should not have the authority to take over/revoke the constitutional authorities of Petitioners without the Approval of the Regional People's Legislative Assembly (DPRD) that has elected and stipulated their appointment as Regent/Vice Regent democratically.

2) Whereas the authorities of the Petitioners as the Head of Regional Government of Bekasi Regency are, among other things, to stipulate regional regulations, including regional regulation on Regional Revenues and Expenditures Budget (APBD), have been ignored by Respondent III, namely the Regional People's Legislative Assembly of Bekasi Regency which is an element of Regional Government of Bekasi Regency. Moreover, the Regional Draft Regulation on the Regional Revenues and Expenditures Budget Plan is always an initiative proposal of the head of regional government.

c. Concerning direct interest of the Petitioners, it is obvious that the Petitioners have direct interest that their constitutional authorities taken over by the Respondents are returned to the Petitioners so that they can exercise their constitutional authorities properly. Furthermore, the

Petitioners had performed their constitutional authorities for 2 (two) years before they were terminated by the action of the Respondents.

3. Based on the above description, it can concluded that such case constitutes a constitutional authority dispute of state institutions as intended in Article 24C Paragraph (1) of the 1945 Constitution *juncto* the Constitutional Court Law, in which the Petitioners are categorized as state institutions having constitutional authorities (the Petitioners have the *legal* standing) that have been unlawfully taken over, disturbed, and even revoked by the Respondents. Therefore, the petition of the Petitioners is sufficiently grounded and it is reasonable for the Court to grant the petition. It is necessary to notice that the existence of the Constitutional Court, as reaffirmed in the General Elucidation of the Constitutional Court Law, is intended **"to maintain stable governance"**, while the actions of the Respondents have disturbed the stability of governance of Bekasi Regency which had been properly administered by the Petitioners for the previous two years.

1. Constitutional Court Justice Maruarar Siahaan, S.H.

In this case, the Regent/Vice Regent of Bekasi who were elected and stipulated as the elected Regent in year 2003 by the People's Legislative Council of Bekasi Regency, and legalized with Decision of the Minister of Home Affairs as Regent/Vice Regent of Bekasi and had their oath taken on January 8, 2004, were removed from office by the Minister of Home Affairs with a decision dated January 4, 2006, exactly after 2 (two) years of their term of office. The Decision

of the Minister of Home Affairs was issued following Decision of the Supreme Court Number 436 K/TUN/2004 declaring to cancel the previous Decision of the Minister of Home Affairs concerning appointment of Regent and Vice Regent and instructing the Minister of Home Affairs to revoke the decision. As a result, in the Decision of the Minister of Home Affairs concerning cancellation of the previous Decision on Appointment, the Regent and Vice Regent were removed from office. Unlike the majority of Constitutional Court Justices, we are of the opinion that this case is under the authority of the Constitutional Court that must be decided by the Constitutional Court.

I

Such dispute can happen due to the exercise of authorities of state institutions obtained from the 1945 Constitution, and then the exercise of such authorities causes impairment of constitutional authorities of other state institutions.

In this sense, state institutions with lower position, which are in *stricto sensu* not referred to as state institutions, but also state institutions having constitutional duties pursuant to the Constitution, are included in this category. Whatever interpretation is made of Article 18 Paragraph (4) of the Constitution, it is clear that the authorities as the head of region, who lead some duties of Regional Government in organizing Regional Government, are granted by the 1945 Constitution through ”**Democratic election”. The authorities to run Regional Government, given to the Regent, and the Regional People’s Legislative**

Assembly, clearly originate from the 1945 Constitution. It is pointless to make any other interpretation, because the authorities to run the Government in exercising autonomy to the broadest possible extent, stipulating regional regulations and other regulations in exercising such autonomy and duty of assistance, are not different from the authorities obtained from and granted by the 1945 Constitution to the President and the People's Legislative Assembly. In fact, it will be a failure in enforcing the Constitution as the highest law which becomes the basis for governance based on law and Constitution, if the interpretation is made restrictively and without sufficient grounds. The *Original intent* of the legislators is important to notice, but it has been a universal fact that the legislators must also give freedom to the Court to make adjustments in meeting the demands of the dynamic progress of the era and of practical needs *(The Court needs to adapt to meet the demands of the unknown future)*, and in our opinion the legislators never intended to hamper the Court's freedom to make adjustments to the demands of needs in the context of implementing its purpose in guarding the Constitution. Democracy and its whole institutional system is a growing work, as also shown by the developed countries, which cannot be controlled by the legislators so perfectly that they no longer need interpretation in political reality.

The main question to answer first is whether the decision on appointment and removal of Regent, as the continuation of election of head of region, is subject to and becomes the object of dispute of State Administration. Prior to the provisions of the Regional Government Law, if the rules in the Law give a role to

the President and the Minister of Home Affairs to issue the Decision on appointment of Regent concerned, while such State Administration Officials have no full discretion to assess the capacity and qualification of a person prior to appointing/terminating him from the position of Regent/Vice Regent or if it is then conducted by the Minister of Home Affairs only based on a Decision of the Supreme Court having the legal force, the standard or parameter used in deciding whether this shall be an authority dispute intended in Article 24C of the 1945 Constitution shall be whether the decision of the Minister of Home Affairs is based on freedom of discretion. Such matter also becomes relevant in the event of negligence of Judge in applying the rules of Laws and Constitution, as argued by the Petitioners, and hence this dispute is under the jurisdiction of the Constitutional Court, and the Constitutional Court has the authority to hear this case, because the improper use of authority of the Minister of Home Affairs by removing the authorities of the Regent who has served as the Head of Regional Government in the governance of Bekasi Regency.

This issue of authority must be viewed from the boundaries between state structure law and State Administration Law, both of which are included in the domain of public law. In a broad sense, State Structure Law encompasses State Administration Law, which regulates state organization, vertical and horizontal relationship among state organs, and the position of citizens and their human rights. Thus, in a broad sense it includes not only the relationship among state institutions, but also the relationship between state institutions and citizens. With such definition, certainly there will be possible point of contact between the

authorities of the State Administrative Court and the authorities of the Constitutional Court, resulting in possible *overlap* of authorities between the two institutions. However, one clear standard can be viewed from the boundaries stipulated as being outside of the authorities of the State Administrative Court namely the result of election as a democratic institution. Legalization or stipulation of results of regional elections in the form of Presidential Decree or Decision of the Minister of Home Affairs, although formal, is a decision of State Administration which is final, individual and concrete. However, the Minister of Home Affairs as a State Administration Official with regard to the legalization of elected Regent/Head of region, has the authority to make Decision not by a discretionary authority which makes assessment using the standards determined by Law, while it is merely a legalization/stipulation. Disputes concerning whether or not the requirements of election are fulfilled shall be under the authority of the election committee (now the KPUD), and the Minister of Home Affairs as a State Administration Official has no discretionary authority to determine that an elected Regent does not meet the requirements, as the authority of State Administration in appointing State Administration Officials or other personnel. In Regional Government Law, it is the task of the Regional People's Legislative Assembly to stipulate the Head of region based on voting, and the Minister of Home Affairs has the task to affirm or legalize it. This must be viewed and assessed not from the viewpoint of state administration law, but from the viewpoint of state structure law, namely as a mechanism of relationship among state institutions whose officials are elected democratically. Decision of appointment or legalization

cannot be viewed as a pure decision of State Administration, because actually it is merely an action of state structure law as an authority regulated and hence assessed constitutionally, concerning the relationship between the central government and regional governments in the principle of unitary state. Such affirmation by Decision of the Minister of Home Affairs is an administrative settlement of state structure and not the Decision of State Administration, because it pertains to the filling of public official positions through a democratic mechanism as determined by the 1945 Constitution. If such Decision of the Minister of Home Affairs has constitutive function in deciding the position of heads of regions, heads of region then it is not democratic election which stipulates a head of region but the appointment by the Minister of Home Affairs or the President. This issue, if correct, is clearly contradictory to the 1945 Constitution, because it shall be a democratic election that determines and stipulates a head of region.

The jurisdiction of the Constitutional Court is to prevent violations of the provisions of the Constitution in the exercise of authorities of state institutions, by applying constitutionality test also in the event of dispute in which it is argued that certain state institutions exercise their authorities while removing the authorities of other state institutions or violating their constitutional authorities. Based on the above description and reasons, we are of the opinion that the Constitutional Court has the authority to examine and decide upon this dispute.

II

Petitioners are state institutions, as described above, obtain their authorities from the 1945 Constitution although their detailed authorities are derivatively regulated later in a Law. Petitioners as the office holders *(ambtsdrager)* cannot be separated from the office of regent *(ambt)*, especially in a dynamic condition, the authorities of the institutions *(ambts)* obtaining their authorities from the 1945 Constitution can only be implemented through the officials *(ambtsdrager)*. The Petitioner as the elected Regent in the regional head election by the Regional People's Legislative Assembly democratically, pursuant to Article 18 Paragraph (4) of the 1945 Constitution, and as subsequently legalized through the appointment of the related party by the Decision of the Minister of Home Affairs and had his oath taken before the Governor of West Java, shall be the Head of Regency Government, who together with the Regional People's Legislative Assembly, exercise the autonomy to the broadest possible extent, and shall have the right to stipulate regional regulations and other regulations in exercising the autonomy and duty of assistance [Article 18 Paragraphs (4) and (5) of the 1945 Constitution]. Therefore, his authorities as a Regent are based on a democratic election to organize governance in the region with autonomy to the broadest possible extent, granted with the authority to stipulate regional regulations and other regulations. With such standards, apart from the statement of Respondent I (President) dated April 19, 2006, and the statement of the expert presented by Respondent I showing that it is not the original intent of the drafters of the amendments to the 1945 Constitution, it is pointless to declare that Regent is not a state institution, whose authorities are

granted by the 1945 Constitution, although such authorities are later detailed in Regional Government Law as mandated by the 1945 Constitution, since actually the *casu quo* case could not be imagined earlier by the drafters of the amendments to the Constitution. Legal events (state structure) which are not in accordance with the Constitution must not be ignored just because they are not expressly specified whether the dispute filed to the Constitutional Court belongs to the category of constitutional complaint which has not become the authority of the Constitutional Court in guarding the constitution. Apart from the *original intent* of the drafters of the amendments to the 1945 Constitution and absence of clear regulations granting such authority to the Constitutional Court, in our opinion, the Constitutional Court Justices are indeed obliged to find the law, either through interpretation or construction or refinement of law. This becomes extremely important, because in our opinion we must not allow any situation in which (regional) government becomes unstable, ineffective and inefficient because the Constitutional Court ***does not find the law as the basis for its authority in settling the a quo case.*** The main principle placed in constitutionalism, which places the 1945 Constitution as the highest law, must become the source of legitimacy and the basis for the existence of lower regulations or government acts. Based on the principle, Judges can formulate a constitutional norm (*Judge-made constitutional law*) that all state institutions obtaining their authorities from the 1945 Constitution, are not allowed to issue regulations or to make decisions which are contradictory to the Constitution. The Constitutional Court as a forum for the settlement of state structure disputes must not allow itself not to take

active and substantive decisions if it is faced with such problems, because allowing such matter to happen will not contribute anything to its duty in the management of a stable state living based on the Constitution.

The establishment of the Constitutional Court as State Structure Judicature through major amendments to the 1945 Constitution, with its main authorities being to examine and decide upon authority dispute of state institutions, will have a point of contact with the authorities of the State Administrative Court. It will happen if authority disputes of state institutions are also viewed from the aspect of the exercise of authorities of state institutions by issuing decisions, especially in the legalization of regional head election through the mechanism determined in the 1945 Constitution, namely democratic election. The mechanism of settling the point of contact between two equal judicial institutions is not available in the way that the Supreme Court has the authority to decide upon the authority to adjudicate disputes among courts of lower level. Thus, before the *meeting of mind* between the Supreme Court and Constitutional Court has been achieved in this way, the Constitutional Court shall be forced to make its own judgment based on evidence and its belief in considering and deciding whether it is true that there is absolute authority of the State Administrative Court being violated if the Constitutional Court examines and decides upon such cases. The revolutionary amendments to the 1945 Constitution should have forced judicative institutions to have a common understanding on the implication of amendments to the 1945 Constitution to their respective authorities. If it does not happen, the Constitutional Court must

consider by itself the authorities of the Constitutional Court or of the Supreme Court (*The Italian Constitutional Court*, *Corte Coztitutionale*, 2004, page 37-38).

III

An authority dispute of state institutions that obtain the authorities from the 1945 Constitution can be defined as ***"a dispute which occurs in state structure when the exercise of a state institution's authorities granted by the 1945 Constitution removes, impairs or interferes with the authorities of other state institutions".*** With such definition, one authority dispute of state institutions can happen because one state institution exercises its authorities contradictorily to the 1945 Constitution, which can be called **Action against Constitutional Law (PMHK).** A Regent/Vice Regent who elected democratically and stipulated by the Regional People's Legislative Assembly – now by the KPUD – shall remain considered as the Regent/Vice Regent, until the termination of their office due to expiration of their term of office or due to commission of a criminal act, resulting in termination by the President without any proposal from the Regional People's Legislative Assembly, or upon the proposal from the Regional People's Legislative Assembly (*vide* Articles 29, 30, 31, and 32 of Law Number 32 Year 2004 concerning Regional Government). The problem of point of contact between the Constitutional Court and the State Administrative Court must be viewed from the boundaries between the state structure law and the state administrative law, both of which are included in the domain of public law. In a broad sense, State Structure Law also encompasses State Administration

Law, which regulates state organization, vertical and horizontal relationship between state organs, and position of citizens and their human rights. Since the definition of state structure dispute and the boundaries between state structure law and state administrative law are in the same domain of public law, certainly there is a possible point of contact between the authorities of the State Administrative Court and the authorities of the Constitutional Court, resulting in possible *overlap* of authorities, because state institutions can issue decisions which are ***"individual, concrete and final", but issued not based on the discretionary freedom of state officials.*** It is true that Decision of the Minister of Home Affairs in the appointment and termination of a head/vice head of region is an action of a State Administration Official, which is based on the Regional Government Law (Law Number 22 Year 1999 as amended with Law Number 32 Year 2004 concerning Regional Government). Article 1 Paragraph (3) of Law Number 5 Year 1986 *juncto* Number 9 Year 2004 mentions that: "*Decision of State Administration shall be a written stipulation issued by a State Administration Agency or Official containing legal action of the State Administration based on prevailing laws and regulations, which is concrete, individual and final in nature, and which creates legal effect to a person or a civil legal entity".*

Pursuant to Article 47 *juncto* Article 53 of Law Number 5 Year 1986 *juncto* Number 9 Year 2004, a decision that meets such criteria is an object of dispute that is under the authority of the State Administrative Court to examine and decide. The problem is whether every written stipulation of a State Administration

Official that meets the criteria of being concrete, individual and final must always become the object of dispute under the authority of the State Administrative Court. In our opinion it is not. A provision concerning the definition of a written stipulation which is concrete, individual and final in nature issued by the State Administration agency or title, to be referred to as the object of State Administration dispute, shall remain subject to other requirements and certain exceptions. Decision of State Administration which can become the object of State Administration dispute shall be a decision in which the official who is authorized to issue the said decision has freedom (discretion) to issue the decision or not, and freedom to decide when and how the decision is issued. A declaratory stipulation is always deemed to be bound, and it is said so if the existence of the stipulation is just dictated *(letterlijk)* by the underlying regulation (Indroharto S.H., *Perbuatan Pemerintah Menurut Hukum Publik (Government's Actions Under Public Law), Lembaga Penelitian Dan Pengembangan Hukum Administrasi Negara*, Bogor Jakarta, 1999, page 153). Another exception which is expressly mentioned is the Decision of Election Committee concerning the results of general elections, both in central and regional levels (Article 2 Sub-Article g of Law Number 5 Year 1986 as renewed with Law Number 9 Year 2004 concerning State Administrative Court). Decision of the Minister of Home Affairs in the appointment of elected Heads of regions is not a stipulation of State Administration Official based on the discretion of the State Administration Official, but is merely a declaratory stipulation which is bound, as instructed by Article 40 of Law Number 22 Year 1999 as renewed with Law Number 32 Year 2004 Article

109 Paragraph (2) in which the elected Head of region is **legalized by the President.** What elects, stipulates and appoints a person to become head of region is actually the democratic mechanism itself, and there is no discretionary freedom for the President or Minister of Home Affairs to issue other stipulations for a person who is not elected by the Regional People's Legislative Assembly or by the people.

The main issue to address is whether the decision of State Administration concerning the appointment and termination of Regent, which is a continuation of election of Head of region shall be subject to, complies with and shall become the object of State Administration dispute. In our opinion, with the definition and exception as to what becomes the decision of State Administration as the object of State Administration dispute as described above, the answer is clearly **no.**

One important matter as a standard to determine the boundaries between the authorities of the State Administrative Court and the authorities of state structure court is made by considering the constitutional authorities of the Regent/Head of region. Pursuant to Article 18 Paragraphs (2), (3), (4), (5), and (6), the Regent/Head of region together with the Regional People's Legislative Assembly shall exercise autonomy to the broadest possible extent, and therefore has the authority to stipulate regional regulations and other regulations. The executive official of Regent appointed by the Minister of Home Affairs and not elected democratically, shall not have such constitutional authorities to participate in formulating Regional Regulations and/or the legalization of Regional Regulations, and the legalization of Regional Draft Regulation on

Regional Revenues and Expenditures Budget into Regional Regulation on Regional Revenues and Expenditures Budget. Such constitutional authorities are only granted by the 1945 Constitution to the Regent who is elected democratically. Therefore, the Regional People's Legislative Assembly (DPRD) of Bekasi Regency that participate with the executive official of Regent of Bekasi, who was not elected democratically in stipulating the regional regulations, has also participated in committing an act which violates the constitution (Action Against Constitutional Law), the issue of which is under the constitutional authority of the Regent elected democratically. This dispute is certainly a state structure dispute, which is under the authority of the Constitutional Court.

There are still two arguments given in assessing the authorities of the Constitutional Court and not the authorities of the State Administrative Court of the Supreme Court which will become the forum to hear this dispute, because it is said that (i) the dispute is concerning administrative procedures followed by the Minister of Home Affairs in following up and taking the legal actions of state structure immediately after the election process, namely the problem of superior official's permission that must be obtained by a Regent candidate to participate in the elections and procedures for sending the legalization documents of elected Regent candidate pair; (ii) the issue of Decision of the Minister of Home Affairs that cancels the legalization of elected Regent/Vice Regent, as an implementation of Decision of the Supreme Court having permanent force which is the legal obligation of the Minister of Home Affairs. With respect to the problem of administrative procedures considered flawed, it is actually under the authority

of the Election Committee to decide, because the permission requirement is a matter of *eligibility* of a candidate, who prior to the election must have accommodated every objection concerning the matter, and will accept or reject such objection, which becomes the administrative authority of the Election Committee and which does not constitute a state structure dispute which is under the authority of the State Administrative Court. This is analogous with the whole settlement of administrative dispute in the general election, not a law dispute which is under the authority of the judicial institution but the administrative authority of the General Election Commission/Regional General Election Commission (KPU/KPUD). If this problem is handled as a State Administration dispute, there will be extensive legal uncertainty regarding the results of regional elections that also creates instability in the government. The imperfect administrative procedures in sending documents of elected candidate pair stipulation by the Regional People's Legislative Assembly, do not always result in the cancellation of a decision made based on ***documents of elected candidate pair stipulation,*** because the **principle of proportionality** must also be applied in assessing this matter, namely whether such flaw cannot be repaired in such a way that it must be cancelled, especially by using the standard of whether or not it affects the voting result obtained by the elected Regent and the implication of cancellation in the term of office that has been going on for a significant period. The principle of proportionality is actually just a principle based on common sense which is a basic principle of good governance. The principle can be interpreted in such a way that the cancellation can be applied: (a) if the

rearrangement purpose cannot be achieved through other actions; (b) if the purpose can be achieved better or more effectively through cancellation action, based on efficiency criteria with better results, and (c) if the problem encountered can be settled more effectively through cancellation authority (formulated from the principle of subsidiarity or proportionality as regulated in Article 5 of the European Community Treaty) as interpreted in the implementation; Hilaire Barnett in ***Constitutional & Administrative Law***, Fourth Edition, Cavendish Publishing Limited, London-Sidney, 2003 page 244-245.

In addition to the reason that the dispute like the *a quo* case of Regent of Bekasi which is not a state structure dispute under the absolute competence of the State Administrative Court of Supreme Court, but a state structure dispute as the absolute competence of the Constitutional Court, the argument stating that the issuance of Decision of the Minister of Home Affairs that cancelled the Legalization of Appointment as the implementation of legal obligation due to the Decision of the Supreme Court having permanent legal force, the President and Minister of Home Affairs still have the obligation to assess whether the implementation of such legal obligation is not contradictory to the higher constitutional obligation. If there is a contradiction between the two legal obligations, the President must choose to implement the higher legal obligation regulated in the 1945 Constitution, and set aside the lower legal obligation. Such constitutional obligation is derived from Article 18 Paragraph (4) and Paragraphs (5) and (6) that provide for the constitutional obligation of the President to respect the term of office of Governors, Regents, and Mayors elected democratically.

They will keep performing the Regional Government with autonomy to the broadest possible extent through constitutional authorities in stipulating regional regulations and other regulations, except for the reason of death, or commission of criminal acts or due to impeachment process by the Regional People's Legislative Assembly. It can be ascertained that the legal obligation to respect and implement such Decision of the Supreme Court must be in a lower position in the hierarchy of laws and regulations that create legal obligations set forth in the 1945 Constitution. Consolidation in this authority is urgently needed, to prevent the impact on the stability of Regional Government that has been held for a significant period, but which has been disturbed due to the disproportionate application of authorities.

Decision of the Supreme Court having permanent force, is not relevant to be presented to legalize the action of Respondent II because the decision has no binding effect at all *(buiten effect)* because it is contradictory to the obligation of Respondents I and II pursuant to the 1945 Constitution and Law Number 22 Year 1999 *juncto* Law Number 32 Year 2004. Although it is not the authority of the Constitutional Court to assess the decision of the Supreme Court, the consequence of Constitution as the highest law that becomes the basis of legitimacy of all subordinate regulations, including decisions of the Supreme Court, makes it unavoidable. Especially, Law Number 5 Year 86 *juncto* Law Number 9 Year 2004 concerning State Administrative Court, excludes election dispute from the object of State Administration dispute. If it is true that there is a neglected administrative process prior to the issuance of Decision of the Minister

of Home Affairs that legalized the appointment of elected Regent, the standard of relevance and significance placed on the effect of administrative negligence depends on whether or not the administrative negligence influence the results of democratic elections in the number of votes obtained, as a form of people's sovereignty. If not, such reason is not significant enough and not proportional to cancel the results of democratic elections; the correct step in this respect is giving a chance to correct the administrative flaw. Government stability must become a factor to consider prior to making a decision on the cancellation of appointment of Regent/Vice Regent, especially after they have administered the Regional Government for a period of 2 (two) years, and with a limited term of office, the lengthy decision making process must also be a factor to consider. In performing their authorities the Constitutional Court Justices will always participate in maintaining the government stability concerned.

IV

The source of authority of the Petitioners is the 1945 Constitution, which cannot be measured or assessed by a lower regulation which is incompatible with the Constitution. If it is conducted, every organ that makes an assessment and implements the assessment results will violate its constitutional obligation to implement and uphold the 1945 Constitution as basic rule. Respondents I, II, and III who exercised their authority pursuant to the State Administration Decision of the Supreme Court, referred to a lower law as the basis therefor which is contradictory to 1945 Constitution, as the basic rule or the highest law, and

implemented it in contradiction to their constitutional obligation. The decision of judicial body with such effect should be treated as a decision having no binding legal effect *(buiten effect)* and which is non-executable, because in the event of contradiction between 2 (two) obligations based on two different levels of rule of law, both state institutions having the authority or the Constitutional Court deciding upon authority dispute of state institutions must prioritize the Constitution. This particularly can be concluded from the oath of office of President to fulfill his obligations to the maximum extent by firmly holding on to the Constitution and to implement the Constitutional System as faithfully as possible, which inherently contains a Constitutional test, and in the event of contradiction between constitutional rules and lower regulations, state officials must be bound to respect the Constitution and set aside the lower regulations. This originates from the principle that every action and regulation of all authorities granted with power by the constitution must not be contradictory to the *basic rights* and the Constitution itself as the highest law, with a consequence that such rule or action may become "**null and void**" and has no binding legal effect. To deny this would be to deny the position of the Constitution as the highest Basic Law and the source of authorities of state institutions. It will illegally establish a situation that **the deputy or executor is higher than the principal or the servant is greater than the master*. "****To deny this would be to affirm that the deputy is greater than his principal; that the servant is above his master; that the representatives…are superior to the people themselves"* (Alexander Hamilton, ***The Federalist Papers***, Mentor Book, The New American Library,1961, page

467).

Based on all the above description, we are of the opinion that Respondent II on behalf of Respondent I and Respondent III has no authority to exercise the disputed authority, with all legal consequences concerning the cancellation (*ultra vires*) to the decision taken based on such unconstitutional authority. Therefore, the petition should be granted in its entirely.

SUBSTITUTE REGISTRAR

Signed

Wiryanto, S.H., M.Hum.