



## **DECISION**

**Case Number 005/PUU-III2005**

**FOR THE SAKE OF JUSTICE UNDER THE ONE ALMIGHTY GOD**

### **The Constitutional Court of Republic of Indonesia**

Examining, hearing, and deciding upon constitutional cases at the first and final level, has passed decision on a case of petition for Judicial Review of the Law of Republic of Indonesia Number 32 Year 2004 regarding Regional Government (hereinafter referred as the Regional Government Law) against the 1945 Constitution of the State of the Republic of Indonesia (hereinafter referred to as the 1945 Constitution) filled by :

- 1. Major General (Retired) Ferry Tinggogoy**, Chairperson of the Regional Executive Board of the National Awakening Party (PKB) of North Sulawesi Province, having his address at Jalan Rano Paso Tataaran Patar Area III Sub-District, South Tondano District, Minahasa Regency;
- 2. Jack C. Parera, SE, MBA** Chairperson of the Regional Executive Board of the New Indonesian Assembly Party (PPIB) of North Sulawesi Province, having his address at Jalan Tikala Ares Number 66, Tikala Ares Area 1 Sub-District, Tikala Kota District, Manado City;

3. **Brigadier General (Retired) Anthon.T. Dotulong**, Chairperson of the Regional Executive Board of the National Democratic Union Party (PPDK) of North Sulawesi Province, having his address at Jalan Sam Ratulangi Number 509 B Karombasan Manado;
4. **Drs. E. Bulahari**, Chairperson of the Regional Executive Board of the Indonesian Association Party (PSI) of North Sulawesi Province, having his address at Jalan Garuda Number 31, Mahakeret Area III Sub-District, Wenang District, Manado City;
5. **Sonny Lela**, Chairperson of the Regional Executive Board of the Freedom Party (PM) of North Sulawesi Province, having his address at Jalan Sungai Maruasei Number 456, Karame Area V Sub-District, Singkil District, Manado City;
6. **Liang Gun Wa, SE**, as Chairperson of the Regional Executive Board of the Democratic Social Labour Party (PBSD) of North Sulawesi Province, having his address at Pineleng Graha Indah Block P Number 1, Manado;
7. **H. Achmad Buchari, SH**, in spite of the fact as Chairperson of Regional Executive Board of the Reformation Star Party (PBR) of North Sulawesi Province, having his address at Jalan TVRI Number 61 A, Banjer Area V Sub-District, Tikala District, Manado City;

8. **Wilson H. Buyung, BSc**, Chairperson of the Regional Executive Board of the Indonesian Democratic Enforcement Party (PPDI) of North Sulawesi Province, having his address at Jalan Temboan Number 3, North Karombasan Area I Sub-District, Wanea District, Manado City;
9. **Abdullah Satjawidjaja**, Chairperson of the Regional Executive Board of the Indonesian Renaissance of Muslims National Party (PPNUI) of North Sulawesi Province, having his address at Jalan Dan Mogot Number 6, Banjer Sub-District, Tikala District, Manado City;
10. **Drs. Danny Wattti**, Chairperson of the Regional Executive Board of the Regional Union Party (PPD) of North Sulawesi Province, having his address at Jalan Pramuka VII Number 48, North Sario Area I Sub-District, Manado City;
11. **Firasat Mokodompit, SE**, Chairperson of the Regional Executive Board the Work of Nation Care Party (PKPB) of North Sulawesi Province, having his address at Jalan A. Yani XIII Sario, Sario District, Manado City;
12. **Brigadier General (Retired) Ferdinand D. Lengkey**, Chairperson of the Regional Executive Board of the National Indonesian Marhaenism Party (PNI-M) of North Sulawesi Province, having his address at Jalan Sarapung Number 29, Mahakeret Sub-District, Wenang District, Manado City;

All of whom acting in their capacity either as Indonesian citizens or as Chairpersons of the abovementioned Political Parties, in this case authorizing

and thereafter selecting the legal domicile at the office of **Louis Nangoy, SH**, and **H. Achmad Buchari, SH**, Advocates and Lawyers, having their office at Jalan Agus Salim Number 22, Wawonsa Area 1 Sub-District, Singkil District, Manado City, hereinafter referred to as the **PETITIONERS**;

Having read the petition of the Petitioners;

Having heard the statement of the Petitioners in the court hearings;

Having heard the statement of the Government and the People's Legislative Assembly of the Republic of Indonesia both as presented orally in the hearings and submitted in writing through the Registrar's Office of the Constitutional Court of the Republic of Indonesia;

Having examined the evidence;

### **LEGAL CONSIDERATIONS**

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

Considering whereas prior to examining the principal issue of the case, the Court will first take the following matters into account:

1. Whether the Court has the authority to examine, hear, and decide upon the petition for judicial review of Elucidation of Article 59 Paragraph 1 of the Regional Government Law against the 1945 Constitution;

2. Whether the *a quo* Petitioners have the legal standing to file the petition for judicial review of Elucidation of Article 59 Paragraph 1 against the 1945 Constituion;

Considering whereas in respect of the abovementioned two issues, the Court is of the following opinion:

1. **Authority of the Court**

Considering whereas based on the provision of Article 24C Paragraph 1 of the 1045 Constitution *juncto* Article 10 Paragraph 1 Sub-Paragraph a of Law Number 24 Year 2003 regarding the Constitutional Court (hereinafter referred to as the Constitutional Court Law), one of the authorities of the Court is to conduct judicial review of laws against the 1945 Constitution. *In casu* in the *a quo* petition, the petition was actually filed for judicial review of the Elucidation of Article 51 Paragraph 1 Law Number 32 Year 2004 regarding Regional Government, but because the Elucidation is an inseparable part from and a unity with the related law, the *a quo* petition is therefore pertaining to judicial review of the Regional Government Law against the 1945 Contitution:

In addition, apart from the difference of opinion among the Justices regarding the existence of Article 50 of the Constitutional Court Law which states that laws which can be petitioned for judicial review are laws enacted following the first amendment to the 1945 Constitution namely after October 19, 2004, the Regional Government Law petitioned for judicial review was enacted on October

15, 2004 with the State Gazette Year 2004 Number 125, Supplement to the State Gazette of Republic of Indonesia Number 4437;

Considering whereas based on the foregoing description, the Court has the authority to examine, hear, and decide upon the *a quo* petition.

## **2. Legal Standing of the Petitioners**

Considering whereas Article 51 Paragraph 1 of the Constitutional Court Law states that parties which may file a petition for judicial review against the 1945 Constitution shall be individual Indonesian citizens (including groups of people having a common interest), or units of customary law community insofar as they are still in existence and in accordance with the development of the community and the principle of the Unitary State of the Republic of Indonesia as regulated in law, public or private legal entities, or state institutions, claiming that their constitutional rights and/or authority have been impaired.

Considering whereas the Petitioners filed the petition in their qualification as a group of individuals or as the Chairpersons of the Regional Executive Boards of 12 political parties in North Sulawesi who did not obtain seats in the last general election but gained votes support in the total of 34.4 %, and as a coalition of political parties they will nominate a pair of candidates in the next Governor/Deputy Governor's election in North Sulawesi Province. Whether as individuals or as a group of individuals or as privat legal entities, they claim to have been harmed by the Elucidation of Article 59 Paragraph 1 of the Regional

Government Law which has impeded the Petitioners in nominating candidates for Governor/Deputy Governor because of the requirement set forth in the Article 59 Paragraphs 1 and 2 of the *a quo* law that to nominate the candidate pair, the parties have to acquire 15% of the total seats of the Regional People's Representative Assembly (DPRD) or 15% of the accumulated valid votes in the last general election of DPRD members in the related region. The Elucidation of Article 59 Paragraphs 1 and 2 have impaired the petitioner's constitutional rights to participate in the equal opportunity in government as the constitutional rights to elect and to be elected;

Considering that based on the abovementioned reasons, both in the capacity as individual Indonesian citizens or as groups of individuals having a common interest, the Petitioners are considered to have the legal standing, whereas in their capacity as legal entities or political parties, they evidently do not have powers of attorney or approvals from the central executive boards of their respective political parties, so that in their capacity as legal entities, their legal standing shall not be considered;

### **Principal Issue of the Case**

Considering whereas the *a quo* Petitioners argue that the Elucidation Article 59 Paragraph 1 of the Regional Government Law that reads as follows "A *Political party or a coalition of political parties in this provision is a political party or a colaition of joint parties which has seats in the Regional People's Legislative Assembly*" has negated or eliminated the normative substance (corpus of law) of

Article 59 Paragraphs 1 and 2 of the Regional Government Law. However, according to the Petitioners, the substance in Article 50 Paragraph 1 which reads as follows "*Candidates for regional head and vice head are candidate pairs who had been nominated in a pair by a party or a coalition of political parties.*" and Parapgraph 2 which reads as follows "*A Political party or a coalition of Political parties as meant in Paragraph 1 can nominate candidate pairs if they can fullfill the minimum vote requirement of 15% (fifteen percent) of the total seats in the Regional People's Legislative Assembly or 15% (fifteen percent) of accumulated valid votes in general election of DPRD members in the relevant district*", is already clear. The existence of Elucidation of Article 59 Parapgraph 1 of the Regional Government Law has impeded the contitutional rights of the Petitioners to nominate or to be nominated in the election of regional heads, such that according to the petitioner this is contradictory to Article 18 Paragraph 4, Article 27 Paragraph 1, Article 28D Parapgraphs 1 and 3, Article 28 Paragraphs 2, 4, and 5 of the 1945 Constitution, and also contradictory to Article 43 Paragraphs 1, 2, and 3 of Law Number 39 Year 1999 regarding Human Rights. Therefore, the Petitioners have requested that the Elucidation of Article 59 Paragraph 1 be declared as not having any binding legal effect.

Considering whereas the Government has given both oral and written statements as fully described in the principal case, which basically state as follows:



1. The Elucidation of Article 59 Paragraph 1 of the Regional Government Law which limits political parties or coalition of political parties having seats in DPRD which have the right to nominate candidate pairs of regional head and vice head has been in line with the capacity of DPRD. People's representatives who sit in DPRD are those who have gained the trust from the people through a democratic process of general election in a particular political district who have managed to gain seats in the representative institution (DPRD). This indicates the significance of people's support for the political parties concerned.
2. To realize the goals of the society and the state with a national orientation, a sound and mature party system namely a simple multi-party system is needed. Law Number 31 Year 2002 regarding Political Parties has directed the "simple multi-party system" for the purpose of realizing a sound and mature party system and improving the quality of the people's representative institution through the general election process. Political parties eligible to participate in general elections shall have equal opportunities to strive for the interest of the people at large.
3. Political Parties as a facility to strive the will of the people and a constitutional channel for people's political aspiration shall also become a means of cadre formation and political recruitment to fill political positions through a democratic mechanism. Therefore, in the simple multi-party system as provided for in Law Number 31 Year 2002 regarding Political Parties and the

requirement for political parties to be entitled to participate in the next election, political parties shall have to fulfill certain seats acquisition both for DPR or DPRD, as provided for in Law Number 12 Year 2002;

4. Article 59 Paragraph 1 of the Regional Government Law and its Elucidation constitute an inseparable part and the elucidation sets the limit for political parties or coalitions of political parties having seats in DPRD to be entitled to nominate candidate pairs for regional head/vice head. Those who successfully gain seats support in the representative institution, in this case DPRD, indicate that the people's support for the political party concerned is significant. Therefore, based on that election, they shall become people's representatives and the extension of the political party, who are politically legitimate to represent the people in performing the leadership recruitment process.
5. The limitation for the nomination of regional head/vice head candidates as provided for in the Elucidation of Article 59 Paragraph 1 of the Regional Government Law constitutes a political consensus of political parties at the time when the aforementioned law is formulated.

Considering whereas the Court also received a written statement from DPR which principally concludes that:

1. The spirit in formulating Article 59 Paragraph 1 of Law Number 32 Year 2004 regarding Regional Government is to develop a democratic mechanism in

Indonesia namely a party – based democratic mechanism rather than an individual - based democratic mechanism.

2. The party - based democratic mechanism must be implemented with due observance of and by accommodating developing aspirations in society and must keep avoiding discriminatory treatment by carrying out every recruitment of head and vice head candidate pairs through a democratic and transparent mechanism.
3. Therefore, based on the foregoing, the substance of the Elucidation of Article 59 Paragraph 1 of Law Number 32 Year 2004 regarding Regional Government is not contradictory to the 1945 Constitution of the State of Republic of Indonesia.

Considering whereas to support their arguments, the Petitioners presented 3 (three) experts, namely **Prof. Dr. Ryaas Rasyid, Dr. H. Alfitra Salamm, APU, Jogjo Endi Rukmo, M.A.** who have given their statements as fully described in the principal case but the relevant parts will be repeatedly summarized for legal consideration which principally state as follows:

1. The Elucidation of Article 59 Paragraph 1 of the Regional Government Law is not necessary because Paragraph 2 of the Article has served as the elucidation for the provision of its Paragraph 1. The matter that should have been elucidated by the legislators is Paragraph 2 because it mentions two group categories which can nominate candidates namely a

- political party and a coalition of political parties that in fact needs elucidation.
2. The true fact is that 15% seats in DPRD is smaller than 15% votes because only less than ten DPR/DPRD members in Indonesia reached the Election Denominator Number (BPP); so that in fact, most of DPRD members elected have insufficient votes. However the allocation of the seats has been arranged in such a way that the parties with less votes could gain a seat in DPRD. This means that nominating candidates with 15% votes requirement is harder than 15% seats requirement in DPRD because 15% seats requirement in DPRD is smaller than 15% votes requirement.
  3. From the theoretical perspective of democracy, Paragraph 2 of Article 59 of the Regional Government Law actually reflects the magnanimous gesture and democratic commitment of the legislators because it appreciates the valid votes although the votes do not have any representative in DPRD. However, the existence of the Elucidation of Article 59 Paragraph 1 has reduced the democratic meaning intended by Paragraph 2. The Elucidation of Article 59 Paragraph 1 of the Regional Government Law is contradictory to the spirit of Article 59 Paragraph 1, and also in the Presidential Election, the requirement to nominate a President is 5% of the acquired votes. Therefore, the Regional Government Law has caused democratic deficit and is discriminatory.

4. The word “or” in Article 59 Paragraph 1 principally opens the opportunity for party candidates who do not have seats in DPRD but have earned accumulated votes of 15% or independent candidates as long as nominated by a party or a coalition of political parties. However, due to the existence of the Elucidation of Paragraph 1, the opportunities for the two candidate categories are precluded again. Therefore, the chance for independent candidates to be candidate pairs is available because the ego of a party not having a representative in DPRD is usually not as big as the ego of a party which has a representative in DPRD so that independent candidates could be accommodated more openly. Based on logically accepted general interpretation, that 15% is an accumulated vote acquisition because the legality and existence of those political parties remain acknowledged as political parties according to the Political Party Law or the General Election Law up to the next General Election. The right which they do not have is the right to participate in the next General Election because the threshold has not been reached.
  
5. The Elucidation of Paragraph 1 is extremely contradictory to Paragraph 2, and hence, by using only simple logic the Elucidation of Paragraph 1 should not exist and should be eliminated from the Law.

Considering whereas based on the Petitioners’ arguments and the statements of the experts after being compared with the statement of the Government and DPR as well as other documents, it is clear to the Court that the

Elucidation of Article 59 Paragraph 1 is indeed contradictory to and has even negated the norm contained in Article 59 Paragraphs 1 and 2. Article 59 Paragraphs 1 and 2 has clearly regulated that candidate pairs could be nominated for regional head/vice head by a political party or a coalition of political parties gaining 15% seats in DPRD **or** acquiring 15% of accumulated votes in the election of DPRD members in the relevant district. The word “**or**” in Article 59 Paragraph 2 refers to the alternatives between two choices provided, according to the statement of the experts, on which the Court has the same opinion as an accommodative gesture to the spirit of democracy that enables candidates from parties which did not gain seats in DPRD but obtained the accumulated votes of 15% or independent candidates nominated by a party or a coalition of political parties to participate in the direct Regional Head Election.

Considering whereas this also constitutes an appreciation of those who have voted for the political party but did not have representatives in DPRD, that because of the requirement of the Election Denominator Number, occasionally the number of votes are larger than the number of parties which gained their seats in DPRD. The Court is of the opinion that such regulation has been considered in accordance with the democratic vision adhered to by the 1945 Constitution, because the political parties which did not gain *electoral threshold* in the 2004 General election are still legitimate as political parties according to Law Number 12 Year 2003 and The Political Party Law (Law Number 31 Year 2002), even though they are not allowed to participate in the next General Election because they did not reach the aforementioned *electoral threshold*;

Considering whereas however, the statement of the government that the Elucidation of Article 59 Paragraph 1 has to be read along with Article 59 Paragraph 1 which provides that only political parties that have seats in DPRD are entitled to nominate Regional Head/Vice Head candidate pairs because they have successfully obtained a significant people's support, and therefore they are people's representatives and also an extension of the political parties which legally represent the people to perform the leadership recruitment process. Apart from differences in the democratic interpretation as to which is more consistent with the 1945 Constitution as being the opinion of the Court mentioned above, the Government's opinion regarding the substance of the Elucidation of Article 59 Paragraph 1 of the *a quo* Law, has created a new norm which negates the substance of the explicitly stated Paragraphs 1 and 2, so as to raise the question as to the meaning of the Elucidation of Article 59 Paragraph 1 and as to the position of Elucidation in a law;

Considering whereas in accordance with the common practice in legislation, which is also considered legally binding, an Elucidation serves to elucidate the substances of norms existing in the article and not to add any new norm, let alone to include substance which completely contradicts the elucidated norm. Besides, this practice has in fact been clearly embodied in the Attachment [*vide* Article 44 Paragraph 2] of Law Number 2004 which is an inseparable part of Law Number 10 Year 2004 regarding Formulation of Laws and Regulation which among others provides as follows:

1. An Elucidation functions as the official interpretation of the formulators of laws and regulations on a certain norm in the corpus of law. Therefore, the elucidation shall only contain further explanation or description of the norm regulated in the corpus of law. In this way, the elucidation as a means of clarifying the norm of the corpus of law must not cause any ambiguity with respect to the norm being elucidated.
2. The elucidation cannot be used as the legal ground to formulate further regulation. Therefore, formulating a norm in the Elucidation part must be avoided;
3. In the Elucidation, any formulation containing implicit changes to the relevant law and regulation provisions must be avoided.

Considering whereas the intended practice has in fact been ignored by the legislators in formulating the Elucidation of Article 59 Paragraph 1 of Law Number 32 Year 2004 regarding Regional Government. This is noticeable from the fact that the aforementioned Elucidation of Article 59 Paragraph 1 has obviously contained a new norm having a different meaning from the clearly stated norm contained in Article 59 Paragraphs 1 and 2;

Considering whereas any contradiction between the substance of an article in a certain law and its elucidation containing inconsistency will create double interpretations and raise doubt in its implementation. Such doubt in law implementation will create legal uncertainty in its practise. This circumstance may



cause violations of constitutional rights as regulated in the Article 28 Paragraph 1 of the 1945 Constitution which reads as follows: "Every person shall have the right to the recognition, the guarantee, the protection, and just legal certainty as well as equal treatment before law." This legal uncertainty is not in accordance with the spirit to uphold the principles of a constitutional state as mandated by Article 1 Paragraph 3 of the 1945 Constitution which expressly states that Indonesia is a state based on law where legal certainty is an indispensable prerequisite;

Considering whereas in addition, the Elucidation of Article 59 Paragraph 1 of the *a quo* Law has in fact eliminated the rights of the Petitioners to be elected as regional heads as explicitly guaranteed in the formulation of Article 28 Paragraph D of the 1945 Constitution and as described in Article 59 Paragraphs 1 and 2 of the *a quo* Law ;

Considering whereas in addition, the implementation of Article 59 Paragraph 1 has been explicitly formulated in its Paragraph 2 which sufficiently guarantees the democratic meaning in a regional head election as intended in Article 18 Paragraph 4 of the 1945 Constitution. However, the democratic meaning is reduced with the existence of the Elucidation of Article 59 Paragraph 1. Therefore, the Elucidation of Article 59 Paragraph 1 of Law Number 32 Year 2004 regarding Regional Government (Supplement to State Gazette Number 4437) is contradictory to Article 1 Paragraph 3, Article 18 Paragraph 4, Article

28D Paragraphs 1 and 3 of the 1945 Constitution of the state of the Republic of Indonesia.

Considering whereas based on the above considerations, the Court is of the opinion that the petition of the *a quo* Petitioners is sufficiently grounded, and hence the petition of the Petitioners must be granted;

In view of Article 56 Paragraphs 2 and 3 of Law Number 24 Year 2003 regarding the Constitutional Court;

### **PASSING THE DECISION**

To grant the petition of the Petitioner;

To declare that the Elucidation of Article 59 Paragraph 1 of Law Number 32 Year 2004 regarding Regional Government is contradictory to the 1945 Constitution of the State of the Republic of Indonesia;

To declare that the Elucidation of Article 59 Paragraph 1 of Law Number 32 Year 2004 regarding Regional Government does not have any binding legal effect;

To order that this decision be placed in the State Gazzette for a period of time not later than 30 (thirty) days;

Hence this decision was made in the Consultative Meeting of Justices attended by 9 (nine) Constitutional Court Justices on : **Monday, March 21, 2005,**

and was pronounced in the Plenary Session of Constitutional Court open for public on this day **Tuesday, March 22, 2005**, by us **Prof. Dr. Jimly Asshiddiqie, SH.** as the Chaiperson and concurrent Member and **Prof. Dr. H.M. Laica Marzuki, SH, Prof. H.A.S. Natabaya, SH, LL.M, H. Achmad Roestandi, SH, Dr. Harjono, S.H., MCL., Prof. H. Abdul Mukthie Fadjar, SH, M.S., I Dewa Gede Palguna, S.H., M.H., Maruarar Siahaan, S.H., and Soedarsono, S.H.** respectively as Members, assisted by **Teuku Umar, S.H., M.H.** as Substitute Registrar and in the presence of the Petitioners and their Attorneys, the Government, and the People's Representative Assembly, and the Relevant Parties.

**CHIEF JUSTICE,**

**signed**

**PROF. DR. JIMLY ASSHIDDIQIE, S.H.**

**JUSTICES**

**signed**

**PROF. DR. H.M. LAICA MARZUKI, S.H.**

**signed**

**PROF. H.A.S. NATABAYA, S.H., LL.M.**

**signed**

**H. AHMAD ROESTANDI, SH**

**signed**

**PROF. H. A. MUKTHIE FADJAR, S.H., MS.**

**signed**

**Dr. HARJONO, SH, MCL**

**signed**

**I DEWA GEDE PALGUNA, S.H., M.H.**

**signed**

**MARUARAR SIAHAAN, S.H.**

**signed**

**SOEDARSONO, S.H.**

**SUBSTITUTE REGISTRAR,**

**TEUKU UMAR, SH, MH**