



## **DECISION**

Case Number 006/PUU-III/2005

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 in a case of petition for Judicial Review of the Law of the Republic of Indonesia Number 32 Year 2004 regarding Regional Government against the 1945 Constitution of the State of the Republic of Indonesia, filed by Biem Benjamin, having his address at Jalan Jagakarsa Number 39 South Jakarta, hereinafter referred to as PETITIONER;

Having read the petition of the Petitioner;

Having heard the statement of the Petitioner;

Having heard the statements of Witnesses and Experts;

Having read the written statements of the Government and the People's Legislative Assembly of the Republic of Indonesia which were conveyed in court hearings of Constitutional Cases Number 071/PUU-II/2004, 073/PUU-II/2004, 073/PUU-II/2004 and 005/PUU-III/2005 concerning the

judicial review of the same law, namely: Law Number 31 Year 2004 regarding the Regional Government;

Having examined the evidence as well as documents relating to the Petitioner's petition;

### **PRINCIPAL ISSUE OF THE CASE**

Whereas the Petitioner has filed a petition with his petition dated February 18, 2005 which was received at the Registrar's Office of the Constitutional Court of the Republic of Indonesia on Friday, February 18, 2005 and registered with the Number 006/PUU-III/2005, along with the Petitioner's revised petition dated March 14, 2005 which was received at the Registrar's Office of the Constitutional Court on Monday, March 14, 2005 principally filed for Judicial Review of the Law of the Republic of Indonesia Number 32 Year 2004 regarding the Regional Government, against the 1945 Constitution of the State of the Republic of Indonesia, with the arguments as follows:

#### **I. AUTHORITY OF THE CONSTITUTIONAL COURT**

Article 24C Paragraph (1) of the Third Amendment to the 1945 Constitution of the State of the Republic of Indonesia (hereinafter referred to as the 1945 Constitution) *juncto* Article 10 of Law Number 24 Year 2004 regarding the Constitutional Court (hereinafter referred to as the Constitutional Court Law) states that the Constitutional Court shall have the authority to hear cases at the first and final level the decisions of which

shall be final, in conducting judicial review of laws against the Constitution, to decide disputes related to the authorities of state institutions vested in them by the Constitution, to make decisions on the dissolution of political parties, and to decide disputes concerning the results of general elections;

### **LEGAL CONSIDERATIONS**

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

Considering whereas prior to examining the substance or principal issue of the case, the Constitutional Court (hereinafter referred to as the Court) needs to first take the following matters into account:

1. Whether the Court is authorized to examine, hear, and decide upon the petition for Judicial Review of Law Number 32 Year 2004 regarding Regional Government (hereinafter referred to as the Regional Government Law), specifically Article 25 Paragraph (5), Article 59 Paragraph (1), Paragraph (2), Paragraph (3), Article 56 through Article 67, Article 70, Article 75 through Article 80, Article 82 through Article 86, Article 88, Article 91, Article 92, Article 95 through Article 103, Article 106 through Article 112 and the sixth Paragraph of Article 115 through Article 119;
2. Whether the Petitioner has the legal standing to file the petition for Judicial Review of the *a quo* Law Number 32 Year 2004 against the 1945 Constitution;

With respect to the abovementioned two issues, the Court is of the following opinion:

**1. Authorities of the Constitutional Court**

Considering whereas based on Article 24C Paragraph (1) of the 1945 Constitution as subsequently reaffirmed in Article 10 Paragraph (1) Sub-Paragraph (1) of Law Number 24 Year 2003 on the Constitutional Court (hereinafter referred to as the Constitutional Court Law), one of the authorities of the Constitutional Court is to conduct judicial review of laws, against the 1945 constitution, and thus the Court is authorized to examine, hear and decide upon the petition of the Petitioner;

**2. Legal Standing of the Petitioner**

Considering whereas Article 51 Paragraph (1) of the Constitutional Court Law has determined two criteria which must be fulfilled so that the Petitioner has legal standing, namely:

- a. The qualification of the Petitioner whether as an individual Indonesian citizen (including a group of people with a common interest), a unit of customary law communities insofar as 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, a public or private legal entity, or a state institutions;

- b. The assumption that in such qualification, there are constitutional rights and/or authorities of the Petitioner having been impaired by the coming into effect of a law;

Considering whereas the Petitioner is an Indonesian citizen, who deems that his constitutional rights have been impaired by the coming into effect of Law Number 32 Year 2004 (the Regional Government Law), specifically the Articles of the *a quo* law which as described above, which will be respectively explained as follows:

- Whereas the articles of Law Number 32 Year 2004 petitioned for judicial review, namely the Regional Government Law, are articles regarding the head of region candidates that must be nominated by a political party, and that political parties that may nominate pairs of head/deputy head of region candidates must have 15% of the seats in the People's Legislative Assembly or 15% of the valid votes in the 2004 General Elections, which are deemed to be discriminatory with the requirements of smaller number of votes acquired for nominating a pair of Presidential/Vice-Presidential candidates, the stipulation of the Regional General Election Commission (KPUD) as the organizer of the Regional Head Elections (Pilkada) being contradictory to Article 22E Paragraphs (2) and 55) of the 1945 Constitution, since Regional Head Elections are not General Elections, as well as the existence of the regional deputy head position in Article 24 Paragraph (5) of Law

Number 32 Year 2004, which is deemed to be contradictory to the 1945 constitution since it is not mentioned in Article 18 Paragraph (4), being argued to have impaired the constitutional rights of the Petitioner;

- Whereas the Constitutional Rights of the Petitioner namely the Petitioner's rights equal and in-discriminatory treatment with the pair of Presidential/Vice-Presidential candidates, as well as the Petitioner's rights be nominated as a regional head candidate, as guaranteed by the 1945 Constitution are deemed to have been impaired by the coming into effect of the *a quo* law;

Considering whereas the constitutional right impairment caused by the coming into effect of a particular law pursuant to Article 51 Paragraph (1) of the Constitutional Court Law must meet the following 5 (five) requirements, namely:

- a. The Petitioner must have constitutional rights of the Petitioner granted by the 1945 Constitution;
- b. said the Petitioner believes that his constitutional rights have been impaired by the law being reviewed;
- c. Whereas such impairment of constitutional right of the Petitioner shall be specific and actual or at the very least potential in nature which pursuant to logical reasoning, can be ascertained to occur;

- d. There is a causal relationship (*causal verband*) between the impairment and the coming of effect of the law petitioned for judicial review;
- e. If the petition is granted, it is expected that the constitutional impairment argued will not or does not occur any longer;

Considering whereas the constitutional impairment argued by the Petitioner to have occurred with the coming into effect of Law Number 32 Year 2004 specifically the articles pointed out above, primarily Article 24 Paragraph (5) regarding the existence of a regional head deputy position in the *a quo* law as deemed contradictory to Article 18 Paragraph (4) of the 1945 Constitution, as well as the different requirements of votes acquisition by political parties in the previous general elections, being 3% of the seats in the People's Legislative Assembly or 5% of the valid cotes for the nomination of President/Vice President, whereas for the regional head candidates 15% of the seats in the People's Legislative Assembly or 15% of the valid votes is required, could not be proven by the Petitioner in terms of either its specific or potential nature, let alone its actual nature;

Considering whereas besides, there is no rational causal relationship (*causal verband*) between the intended Law with the impairment of the Petitioner's constitutional right, because even if Article 24 Paragraph (5) is contradictory to Article 18 Paragraph (4) of the 1945

Constitution, the existence of a Regional deputy head, does not have any connection, either directly or indirectly, with the possible election of the Petitioner as an individual in the regional head election, since the Petitioner did not provide evidence that his quality whether politically, socially, economically and intellectually, both in his capacity and capability as a regional head candidate, will be absolutely impaired by the vote acquisition in the aforementioned regional head election. The contrary is still possible to occur since a regional head deputy may promote the image of a particular regional head candidate who, because of certain matters, has certain limitations;

Considering whereas the difference in the percentage requirements for the number of votes acquired by political parties to nominate a President/Vice-President from the requirement for the nomination of a regional head/regional deputy head, does not have any correlation whatsoever with the constitutional rights of the Petitioner as an individual, since even it such a difference, being deemed as discrimination, did truly occur – *quod non* – it would not concern the impairment of the Petitioner's constitutional right, but rather the impairment of solely the political party's constitutional right. Even it such an issue have indirectly impaired the Petitioner's constitutional right, the legal standing (*persona standi in judicio*) in such a case would remain with the political party which claimed to have been impaired by such statutory provisions. Similarly, if the Regional Head Elections is not the general



election, which according to the Petitioner should not be organized by the Regional General Elections Commission, while the Petitioner did not point out his specific or potential impairments threatening his constitutional interests or rights, because as an individual regional head candidate the provisions in the aforementioned law do not have a direct causal relation with the possible election of the petitioner as a regional head;

Considering whereas with such considerations, with the exception of the judicial review of Article 59 Paragraph (1) and (3) of the regional Government Law, the Petitioner cannot ascertain his legal standing to file a petition for judicial review of Article 24 Paragraph (5) along with the related articles namely Articles 56 through 67, Article 70, Article 75 through Article 80, Article 82 through Article 86, Article 88, Article 91, Article 92, Article 95 through Article 103, Article 106 through Article 112, the sixth Paragraph of Article 115 through Article 119, and therefore without entering the principal issue of the case insofar as it relates to the articles described above, it must be declared that the petition of the Petitioner can not be accepted;

Considering whereas even though the Petitioner's impairments caused by the coming into effect of Article 59 Paragraphs (1) and (3) of the Regional Government Law as an individual candidate who which did not go through a political party and who could not register himself as a regional head candidate, has not been an actual issue as a

member of the Regional Representative Council (DPD) elected to represent the Special Capital City Region of Jakarta, pursuant to logical reasoning, it can be ascertained that he will be rejected by the Regional Head Election organizers, and hence, the criteria of legal standing as described above have been fulfilled. Therefore, insofar as it relates to the petition for judicial review of Article 59 Paragraphs (1) and (3) of the *a quo* law, the petitioner has the legal standing;

Considering since the Court is authorized to examine the *a quo* petition, and the Petitioner has the legal standing, the Court will further consider the principal issue of the case insofar as it relates to Article 59 Paragraphs (1) and (3) of the Regional Government Law;

### **3. Principal Issue of the Case**

Considering whereas the Petitioner has argued that Article 59 Paragraphs (1) and (3), which stipulates that only political parties or coalition of political parties can propose a pair of regional head/regional deputy head candidates, which has eliminated the opportunity for an individual propose him/herself directly and independently as a regional head candidate, is deemed to be contradictory to Article 22E Paragraphs (3) and (4), Article 27 Paragraph (1) and Article 28D Paragraph (3) of the 1945 Constitution;

Considering whereas in case Number 005/Puu-III/2005 which has been passed and has a binding legal effect which also relates to Article 59 of the Regional Government Law, in its legal consideration there is a relevant logical decision (*ratio decidendi*) with the *a quo* petition;

Considering whereas the Court has paid attention to the statement and written statement of the Government on the Regional Government Law in case Number 005/PUU-III/2005 as mentioned above, which principally has stated as follows:

1. The spirit of the formulation of Article 59 of the Regional Government Law is to build a mechanism of democracy in Indonesia, where the mechanism develops in the regional head election is a mechanism for the democracy of the parties;
2. In implementing the mechanism of democracy, a party must still pay attention or accommodate the aspiration developing in society and must avoid a discriminatory attitude by way of recruiting a pair of regional head and regional head deputy candidates through a democratic and transparent mechanism;
3. Political parties are tools to strive for the people's will and to constitutionally channel the political aspiration of society, as well as a tool for cadre formation and political recruitment in to assume the political positions through a democratic mechanism;

Considering whereas the current necessary consideration is whether the regulation of political position recruitment conducted based on Article 59 Paragraph (1) which must be conducted through the proposal of a political party is contradictory to Article 27 Paragraph (2) and Article 28D paragraph (3) of the 1945 Constitution with respect to which the Court will present the following considerations:

Article 27 Paragraph (1) of the 1945 Constitution reads:

“Without exception, all citizens shall have an equal position before the law and government and shall be obligated to uphold such law and government”;

Article 28D Paragraph (3) reads:

“Every citizen shall have the right to obtain equal opportunities in government”;

Equal status and opportunities in the government which could also mean without discrimination is a different issue than the democratic mechanism of recruitment for government positions. It is true that the rights of every citizen to obtain equal opportunities in government is protected by the Constitution insofar as the aforementioned citizen meets the requirements determined in law related with it, among others, the requirements of age, education, physical and mental health as well as other requirements. Such requirements will apply to every citizen, without distinguishing people, in

terms of, tribe, race, ethnicity, group, classification, social status, economy status, gender, language and political beliefs. Meanwhile, the definition of discrimination which is prohibited in said Article 27 Paragraph (1) and Article 28D Paragraph (3) of the 1945 Constitution has been elaborated further in Article 1 Paragraph (3) of Law Number 39 Year 1999 regarding Human Rights;

Considering whereas the requirements for the nomination of a pair of regional head/regional deputy head to be nominated by a political party, is the mechanism or procedure on how the election of the intended regional head is to be implemented, and does not eliminate the individual right to participate in the government, insofar as the conditions of nomination through a political party is conducted, so that with the formulation of discrimination as elaborated in Article 1 Paragraph (3) of Law Number 39 Year 1999 and Article 2 of the International Covenant on Civil and Political Rights, which is insofar as the distinction carried out is not based on religion, tribe, race, ethnicity, group, classification, social status, economic status, gender, language and political beliefs, then the nomination through a political party cannot be deemed contradictory to the 1945 Constitution because the choice of such system is a legal policy which cannot be tested unless conducted haphazardly (*willekeur*) and exceeding the legislators' authority (*detournement de pouvoir*);

Considering whereas the restrictions on political rights are validated by Article 28J Paragraph (2) of the 1945 Constitution, insofar as the intended restrictions are set forth in law;

Considering whereas moreover, the granting of the constitutional rights to nominate for a candidate pair of regional head/regional deputy head to political parties, shall not be construed that it will eliminate the citizen's constitutional right, *in casu* the Petitioner to become a regional head, insofar as the Petitioner meets the requirements of Article 58 and to be conducted through the procedures mentioned in Article 59 Paragraph (1) and Paragraph (3) of the Regional Government Law, and that such requirements shall constitute a binding mechanism or procedure to every citizen who will become a candidate for regional head/regional deputy head;

Considering whereas based on the above considerations, the Court is of the opinion that the petition of the Petitioner, insofar as it relates to judicial review on Article 24 Paragraph (5), Article 59 Paragraph (2), Article 56, Article 58 through Article 65, Article 70, Article 75, Article 76, Article 77, article 79, Articles 82 through 86, Article 88, Article 91, Article 92, Articles 95 through 103, Article 106 through article 112, Sixth Paragraph of Article 115 through Article 119 of Law Number 32 Year 2004 regarding the Regional Government, can not be accepted; whereas the petition of the Petitioner in relation to Article 59 Paragraph (1) and

Paragraph (3) are not substantiated, is not sufficiently grounded, which must therefore be rejected;

In view of Article 56 Paragraph (1) and Paragraph (5) of law Number 24 Year 2003 regarding the Constitutional Court;

### **PASSING THE DECISION**

To declare that the Petition of the Petitioner, insofar as it relates to the judicial review of Article 24 Paragraph (5), Article 59 Paragraph (2), Article 56, Article 58 through Article 65, Article 70, Article 75, article 76, Article 77, article 79, Articles 82 through 86, Article 88, Article 91, Article 92, Articles 95 through 103, Article 106 through Article 112, Sixth Paragraph of Article 115 through Article 119 of Law Number 32 Year 2004 regarding the Regional Government (State Gazette of the Republic of Indonesia Number 125 Year 2004, Supplement to State Gazette Number 4437), can not be accepted (*niet ontvankelijke verklaard*);

To reject the petition of the Petitioner concerning the judicial review of Article 59 Paragraph (1) and Paragraph (3) of Law Number 32 Year 2004 regarding the Regional Government (State Gazette of the Republic of Indonesia Number 125 Year 2004, Supplement to the State Gazette Number 4437);

Hence the decision was made in the Consultative Meeting of Constitutional Court Justices on Thursday, May 19, 2005 which was

attended by 9 (nine) Constitutional Court Justices **Prof. Dr. Jimly Asshiddiqie, S.H.** as the Chief Justice and concurrent Member and **Prof. Dr. H.M. Laica Marzuki, S.H., Prof. H.A.S. Natabaya, S.H., LL.M., H. Achmad Roestandi, S.H., Dr. Harjono, S.H., M.C.L., Prof. H. A. Mukthie Fadjar, S.H., M.S., I Dewa Gede Palguna, S.H.,M.H., Maruarar Siahaan, S.H.,** along with **Soedarsono, S.H.,** and was pronounced in a plenary session of the Constitutional Court open for public on this day, **Tuesday, May 31, 2005,** by us, **Prof. Dr. H.M. Laica Marzuki, S.H.,** Vice-Chief Justice acting as Chairperson and concurrent Member, accompanied by **Soedarsono, S.H., Prof. H.A.S. Natabaya, S.H., LL.M, H. Achmad Roestandi, SH, Dr. Harjono, S.H., M.C.L, Prof. H. A. Mukthie Fadjar, S.H., M.S., I Dewa Gede Palguna, S.H., M.H., and Maruarar Siahaan, S.H.,** respectively as members, assisted by **Wiryanto S.H., M.Hum.** as Substitute Registrar and in the presence of the Petitioner, the Government, and the People’s Legislative Assembly of the Republic of Indonesia;

#### **CHAIRPERSON OF SESSION**

**signed**

**Prof.Dr.H.M.Laica Marzuki, S.H.**

**JUSTICES,**

**signed**

**signed**



**Soedarsono, S.H.**

**Prof.H.A.S.Natabaya,S.H.,LL.M.**

**signed**

**signed**

**H.Achmad Roestandi, S.H.**

**Prof.H.A.Mukthie Fadjar,S.H.,M.S.**

**signed**

**signed**

**Dr. Harjono, S.H., M.C.L.**

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

**signed**

**Maruarar Siahaan, S.H.**

**SUBSTITUTE REGISTRAR,**

**signed**

**Wiryanto, S.H., M.Hum.**