



DECISION

Case Number 010/PUU-III/2005

FOR THE SAKE OF JUSTICE UNDER THE ONE ALMIGHTY GOD

Constitutional Court Republic of Indonesia

Examining, hearing, and deciding upon constitutional cases at the first and final level, has passed a decision on 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 the **Central Executive Board of the Freedom Bull National Party**, based on Letter Number 267/DPN-PNBK/EKS/IV/ 2005 dated April 11, 2005, giving the mandate to:

1. Febuar Rahman, S.H. Chairperson of Regional Executive Board of the Freedom Bull National Party (DPD PNBK) of South Sumatra, having his address at Jalan Letnan Hadin, Number 1865 Rt.030 Rw.011 Palembang, 30129;
2. H. Endaryadi, S.H., Chairperson of Branch Executive Board of *Partai Nasional Banteng Kemerdekaan* (DPD PNBK), Palembang City, having his

address at Jalan Mayor Zen Rt.022 Rw.006 Sungai Selayur, Kalidoni, Palembang 30118;

Subsequently In this case authorizing **Chairil Syam, S.H., A. Patra M. Zen, S.H., LL.M., Dhab K Gumayra, S.H., Munarman, S.H., Syamsul Bahri, S.H., and Adri Fadly, S.H.** all of whom are advocates and Public Lawyers from the offices of the Indonesian Legal Aid Institute Foundation (YLBHI) and the National Legal Aid Institute (LBHN), choosing their domicile address at Jalan Diponegoro 74, Central Jakarta, respectively by virtue of a special power of attorney dated March 12, 2005, hereinafter referred to as the **PETITIONER**;

Having read the petition of the Petitioner;

Having heard the statement of the Petitioner;

Having heard the statement of Witnesses;

Having read the statement of Experts;

Having read the written statements of the Government and the People's Legislative Assembly of the Republic of Indonesia (DPR-RI) filed in the examination hearing for Constitutional Cases Number 072/PUU-II/2004, 073/PUU-II/2004 and 005/PUU-III/2005 regarding the judicial review of the same law, namely; Law Number 32 Year 2004 regarding Regional Government;

Having examined the evidence;

LEGAL CONSIDERATIONS

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

Considering whereas prior to examining the principal issue of the case, the Constitutional Court (hereinafter the Court) needs to 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 Law Number 32 Year 2004 regarding Regional Government (hereinafter referred to as the Regional Government Law), particularly Article 59 Paragraph (2) thereof;
2. Whether the Petitioner has the legal standing to file the *a quo* petition for judicial review of the Regional Government Law against the 1945 Constitution;

With regard to the aforementioned two issues the Court is of the following opinion:

1. The Authority of the Court.

Considering whereas based on Article 24C Paragraph (1) of the 1945 Constitution as reaffirmed in 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, so that the Court has the authority to examine, hear, and decide upon the Petitioner's petition;

2. Legal standing of the Petitioner

Considering whereas Article 51 Paragraph (1) of the Constitutional Court Law stipulates 2 (two) criteria that must be fulfilled by the Petitioner in order to have the required legal standing, namely:

- a. The qualification of the Petitioner whether as an individual Indonesian citizen (including a group of people having a common interest), a unit of customary law community insofar as it is 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 institution;
- a. The claim that in such qualification, there are constitutional rights and/or authorities of the Petitioner which are impaired by the coming into effect of a law;

Considering whereas the Petitioner is a legal entity in the form of a political party legally registered both as a legal entity and as a participant in the 2004 general elections, claiming that its constitutional rights have been impaired

by the coming into effect of Article 59 Paragraph (2) of the Regional Government Law with the following description:

Whereas Article 59 Paragraph (2) provides that Candidates for Head/Vice Head of Region must be nominated by a political party or a coalition of political parties that gains 15% of the total seats in the Regional People's Legislative Assembly (DPRD) or 15% of the accumulated valid votes in the general election of DPRD members in the related region. The provision is deemed to have impaired the constitutional rights of the Petitioner because, according to the Petitioner, political participation should be a part of the human rights and that the underlying idea of the political participation concept is that sovereignty is in the people's hand, executed through common activities constituting the exercise of legitimate political power by the people. Meanwhile, Article 59 Paragraph (2) forces political parties to establish a coalition while every political party has its own characteristics, goals, aspiration and work programs to participate in the administration of regional government;

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

- a. the petitioners must have constitutional rights granted by the 1945 Constitution;
- b. the petitioners believe that such constitutional rights have been impaired by the coming into effect of the being reviewed law;

- c. that the impairment of the Petitioner's constitutional rights is specific and actual in nature or at least potential in nature, which, according to logical reasoning, will take place for sure;
- d. there is a causal relationship (*causal verband*) between the impairment and the law petitioned for review;
- e. if the petition is granted, it is expected that such impairment of the constitutional rights argued will not or does not occur any longer;

Considering whereas the impairment to the constitutional rights argued by the Petitioner occurs because of the provision limiting vote acquisition percentage of a political party or a coalition of political parties to a minimum of 15% of the total seats of the Regional People's Legislative Assembly (DPRD) or 15% of the accumulated valid votes in the general election of DPRD members in the relevant electorate district, under which the Petitioner was unable to nominate candidate pairs for regional heads, such as, among others, in Kutai Kertanegara Regency, East Kalimantan, because the Petitioner only gained 2½ (two and a half) percent of valid votes in the 2004 general elections;

Considering whereas the Petitioner was unable to nominate its candidate pair for regional head /vice head due to the existence of Article 59 Paragraph (2) of the *a quo* law, which indicates a direct causal relationship, and the Petitioner claims that this provision has impaired its constitutional rights as guaranteed by the 1945 Constitution. The Petitioner's claim has qualified for the legal standing

as described above, so that the Court is of the opinion that the Petitioner has the legal standing;

Considering whereas because the Court has the authority to examine the *a quo* petition and the Petitioner has the legal standing, the Court will further consider the principal issue of the petition insofar as it is related to Article 59 Paragraph (2) of the Regional Government Law;

3. Principal Issue of the Petition

Considering whereas the issue that must be considered with respect to the *a quo* petition is whether the provision of Article 59 Paragraph (2) which requires a minimum acquisition of votes of 15% of the total seats of the Regional People's Legislative Assembly (DPRD) or 15% of the accumulated valid votes in the general election of DPRD members in the related region by a political party or a coalition of political parties is contradictory to the 1945 Constitution, particularly Article 27 Paragraph (1), Article 28C Paragraph (2), Article 28D Paragraph (1) and Article 28D Paragraph (3);

Considering whereas the Petitioner's petition is based on the argument that political participation is a legal personal activity of citizens, which is aimed at influencing the selection of state officials and/or their actions, which is an important aspect in general elections, including direct elections of heads and vice heads of Region. The opportunity for such political participation must be open to the widest extent, because political participation is a protected Human Right,

while the provision of Article 59 Paragraph (2) is a form of majority dictatorship (*meerderheids dictatuur*) that limits the political participation of the minorities;

Considering whereas based on such arguments, the Petitioner asserted that political parties should have the right to nominate candidate pairs for regional heads/vice heads in regional elections without any requirement of minimum vote acquisition in the previous general election as set forth in Article 59 Paragraph (2) of the *a quo* law, because it is contradictory to the purpose and nature of democracy, whereby sovereignty is in the people's hands;

Considering whereas to support the arguments in its petition, the Petitioner presented witness and expert's written statement as attached to the conclusion, which principally state the following matters:

Witness H. Syahrani.

Whereas the witness was one of the candidates for Regent of Kutai Kertanegara nominated by the Indonesian Democratic Party of Struggle (PDIP) and the Freedom Bull National Party (PNBK), who had initially met the requirements pursuant to Article 59 Paragraph (2), but at the end of the process, PDIP withdrew its support;

Whereas following the withdrawal of support, the Regional General Election Commission (KPUD) disqualified the witness because the witness did not reach the quorum as required by Article 59 Paragraph (2). This truly disfavored the witness because the registration period ended on March 27, 2005,

while the witness' nomination was annulled on April 23, 2005, in which case the KPUD committed a fatal mistake as it did not comply with its own schedule;

Expert Written Statement of Arbi Sanit

- Whereas there are two controversial thoughts in terms of efficiency improvement. The Limitation of the number of parties and the number participants in the regional head election to a very small quantity is justifiable, but the problem is that it is not a principle of democracy. The principles of democracy are right and freedom;
- Whereas right and freedom should not be sacrificed merely for the sake of efficiency and limited number of candidates, and that efficiency is not an appropriate reason for sacrificing freedom because efficiency can still be achieved in freedom; The idea to sacrifice justice and freedom for the sake of efficiency should not be accepted in the effort to develop the State of the Republic of Indonesia;
- Whereas the provision is a formal procedure which outstrips the substance of democracy which, if accepted by the people, constitutes a coercive action by immature and unwise legislators;

Considering whereas the Court is of the opinion that the statement of witness presented by the Petitioner regarding the annulment of nomination conducted by the KPUD being not in compliance with the schedule made by the KPUD due to the withdrawal of support by a party that initially gave its support is irrelevant to this judicial review, because if it were true that such withdrawal

disfavored the witness and the Petitioner, the issue would be the authority of a court of general jurisdiction. Meanwhile, the expert Prof. Dr. Harun Alrasid, S.H. when inquired by the Petitioner regarding Article 59 Paragraph (2) of the Regional Government Law, expressed his disagreement to Article 59 Paragraph (1) of the *a quo* law and therefore according to the expert this would mean that Article 59 Paragraph (2) should be automatically disqualified. The expert was actually not presented by the Petitioner as stated by the expert himself, and since the opinion given was not supported by adequate arguments, the Court will not take it into further consideration;

Considering whereas the choice of policy made by legislators in relation to the provision of Article 59 Paragraph (2), according to the written statement of the Government, is a sound and mature mechanism in a simple multiparty system to ensure that political parties would have the capacity to serve as the main pillars in promoting public political awareness and participation, consolidating the unity of various groups and social classes, supporting national integration and national unity, realizing justice, enforcing the law, respecting human rights and ensuring the creation of security stability, and therefore, political parties also serve as the means of regeneration and political recruitment in the process of filling political positions through a democratic mechanism, and in accordance with the established political system. If there is any aspiration of the people which does not meet the vote acquisition requirement for nominating candidate pairs in the election of regional heads/vice heads, the issue will be

addressed by applying the appropriate political process through eligible political parties;

Considering whereas whether or not such choice of legal policy is contradictory to the 1945 Constitution, particularly Article 27 Paragraph (1), Article 28C Paragraph (2), Article 28D Paragraph (1) and Article 28D Paragraph (3), will be consecutively taken into account as follows:

1. Article 27 Paragraph (1) reads as follows:

“All Citizens have equal status before the law and in the government and shall be obligated to uphold the law and government without exception“.

The aforementioned Article 27 is under Chapter X regarding Citizens and Residents, which gives equal right as citizens before the law and government, commonly referred to as *equality before the law*, and which disallows different treatment from one citizen to another, both with respect to the opportunity in the government and the treatment before the law. Since the Petitioner is a political party arguing that the threshold limitation in Article 59 Paragraph (2) constitutes a limitation of political participation for parties that do not achieve the 15% threshold of the total seats of the Regional People’s Legislative Assembly (DPRD) or 15% of the accumulated of valid votes acquired in the previous general election, the Petitioner’s argument concerning this Article 27 Paragraph (1) is, therefore, irrelevant, so that it must be disregarded, because this

requirement is not only applicable to the Petitioner, but to all citizens and political parties;

2. Article 28C Paragraph (2) reads as follows:

“Every person shall have the right to improve himself/herself by striving for his/her collective rights in developing his/her community, nation and state”.

Whereas based on the facts and arguments presented, it is not proved that the Petitioner’s right to improve itself and to strive for its collective rights in developing the community, nation and state, is impaired, and if the intended manifestation of such right is to nominate candidate pair for regional head/vice head, the procedures and mechanism to regulate such right is the choice of policy on the system to be applied and which is applicable for every person or legal entity without exception;

3. Article 28D Paragraph (3) reads as follows:

“Every person shall have the right to obtain equal opportunity in Government.”

Equal opportunity to participate in the government in the form of the right to elect and to be elected is guaranteed, with respect to such opportunity, however, certain conditions as well as procedures or mechanism must also be provided and they must be complied with by every person and legal entity as considered above;

Considering whereas it is necessary to further consider the expert written statement attached by the Petitioner that recognizes the need for limiting the number of candidates for regional head/vice head, but which also states that justice and freedom as the principles of democracy can not be sacrificed by unwise and immature limitation for the sake efficiency, and therefore the question is whether such choice of policy deemed unwise and immature is a matter of constitutionality of a law;

Considering whereas insofar as the choice of policy is not exceeding the authority of legislators and does not constitute an abuse of authority, and is not obviously contradictory to the provisions of the 1945 Constitution, such choice of policy can not be petitioned for judicial review by the Court. Furthermore, limitations in the form of mechanism and procedures for the exercise of such rights can be made as provided for in Article 28J Paragraph (2) which reads as follows:

“In exercising his/her rights and freedom, every person shall be subject to the limitations stipulated by law for the sole purpose of guaranteeing the recognition of and respect for the rights and freedom of other people and to fulfill fair demands in accordance with the considerations of morality, religious values, public security and order in a democratic society”;

Considering whereas with the considerations as described above, the Court is of the opinion that the Petitioner’s petition for judicial review of Article 59 Paragraph (2) of the Regional Government Law against the 1945 Constitution, is

not sufficiently grounded to be granted, and therefore the Petitioner's petition must be rejected;

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

PASSING THE DECISION

To reject the petition of the Petitioner;

Hence the decision was made in the Consultative Meeting of Justices on Thursday, May 19, 2005 attended by 9 (nine) Constitutional Court Justices namely **Prof. Dr. Jimly Asshiddiqie, S.H.** as the Chairperson 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., and Soedarsono, S.H.**, and was pronounced in the Plenary Session of the Constitutional Court open for the public on this day **Tuesday, May 31, 2005**, by us, **Prof. Dr. H.M. Laica Marzuki, S.H.**, the Vice Chairperson as the Chairperson of the Session and concurrent Member, accompanied by **Soedarsono, 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., 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/Petitioner's Attorneys-In-Fact, the Government and the People's Legislative Assembly of the Republic of Indonesia;

CHAIRPERSON OF THE SESSION

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

JUSTICES,

Soedarsono, S.H.

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

H.Achmad Roestandi, S.H.

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

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

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

Maruarar Siahaan, S.H.

SUBSTITUTE REGISTRAR,

Wiryanto S.H., M.Hum.