

## DECISION

Number 012/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 on the case of petition of Judicial Review of the Law of the Republic of Indonesia Number 36 Year 2004 regarding State Revenues and Expenditures Budget of Budget Year 2005 against the 1945 Constitution of the State of the Republic of Indonesia, filed by:

1. Name : Fathul Hadie Utsman.  
Place/Date of Birth : Banyuwangi, September 15, 1959  
Address : Tegal Pare RT 001/Rw 002 Muncar  
Banyuwangi East Java, Mobile: 0815  
595 378 54  
Status : Individual Indonesian Citizen, Students'  
Guardian, Director of NGO:  
*ACC/SERGAP (Abnormal Constitutiona  
IControl/People's Ethical Voice to Sue  
Ambivalence and Abnormalization of  
Laws and Regulations),;*

Acting for and on behalf of himself and as attorney of:

2. Name : Drs. Abd Halim Soebahar, M.A.  
Place/Date of Birth : Banyuwangi, October 7, 1962  
Address : JL. KartaNegara IV/88 Jember, East  
Java  
Mobile: 0815 595 04151  
Status : Individual Indonesian Citizen,  
Students' Guardian, Lecturer;
3. Name : Dr. M. Hadi Purnomo, M.Pd.  
Place/Date of Birth : Banyuwangi, December 1, 1965  
Address : Kacap iring 23 gebang Jember, East  
Java  
Mobile: 0815 595 92453  
Status : Individual Indonesian Citizen.  
Headmaster of Senior High School;
4. Name : Drs. Zainal Fanani.  
Place/Date of Birth : Banyuwangi, December 17, 1956  
Address : JL. M. Yamin No. 25 Tegal Besar  
Jember, East Java, Mobile: 0812 346  
0268

- Status : Individual Indonesian Citizen,  
Headmaster of Junior High School;
5. Name : Sanusi Afandi, S.H., M.M.
- Place/Date of Birth : Banyuwangi, August 5, 1955
- Address : Krajan RT 004/Rw001 Kalibaru wetan  
Banyuwangi, East Java Tel: 0333  
897136
- Status : Individual Indonesian Citizen  
Teacher/Lecturer;
6. Name : Dra. Hamdana, M.hum.
- Place/Date of Birth : Banyuwangi, October 7, 1966
- Address : JL. KartaNegara IV/88 Jember, East  
Java  
Mobile: 0812 495 2797
- Status : Individual Indonesian Citizen,  
Lecturer;
7. Name : Dra. Sumilatum
- Place/Date of Birth : Banyuwangi, May 23, 1962
- Address : Tegal Pare Rt 001/Rw002 Muncar  
Banyuwangi–East Java, Mobile: 0815  
595 378 54
- Status : Individual Indonesian Citizen

Teacher;

8. Name : Darimia Hidayati, S.P.  
Place/Date of Birth : Jember April 8, 1984  
Address : JL. Mastrip 1A/16 Jember, East Java  
Mobile: 0815 787 58972  
Status : Individual Indonesian Citizen,  
Postgraduate Student;
9. Name : JN. Raisal Haq  
Place/Date of Birth : Banyuwangi, March 6, 1992  
Address : Tegal Pare Rt 001/Rw 002 Muncar  
Banyuwangi–East Java, Mobile: 0815  
595 378 54  
Status : Individual Indonesian Citizen  
Junior High School/MTS Student.

Based on a Special Power of Attorney dated April 15, 2005.

Hereinafter referred to as Petitioners;

Having read the petition of the Petitioners;

Having heard the statements of the Petitioners;

Having heard the statements of experts and witnesses of the Petitioners;

Having heard and read the written statements of the Related Parties;

Having heard and read the written statement of the Government;

Having read the written statement of the People's Legislative Assembly of the Republic of Indonesia;

Having examined the evidence of the Petitioners;

### **LEGAL CONSIDERATIONS**

Considering whereas the purpose and objective of the Petitioners' petition are as described above;

Considering whereas before entering the main issue of the case, the Constitutional Court (hereinafter referred to as the Court) needs to first take the following matters:

1. The authority of the Court to examine, hear, and decide upon the petition of the Petitioners;
2. Legal Standing of the Petitioners for filling the *a quo* petition;

With regard to the aforementioned two matters, 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 1945 Constitution of the state of the Republic of Indonesia Year 1945

(hereinafter referred to as the 1945 Constitution) in conjunction with Article 10 Paragraph (1) of the Law of the Republic of Indonesia 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.

Considering whereas the petition of the Petitioners is concerning judicial review of the Law of the Republic of Indonesia Number 36 Year 2004 regarding State Revenues and Expenditures Budget of Budget Year 2005 (hereinafter referred to as the APBN Law).

Considering whereas in accordance with the provision of Article 24C Paragraph (1) of the 1945 Constitution, Article 10 Paragraph (1) and Article 51 Paragraph (3) of the Constitutional Court Law, the Court has the authority to hear the *a quo* petition of the Petitioners, at the first and final level the decision of which shall be final in nature.

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

Considering whereas pursuant to Article 51 Paragraph (1) of the Constitutional Court Law, the Petitioners for judicial review of Law against the 1945 Constitution are the parties who deem that their constitutional rights and/or authorities are harmed by the coming into effect of a Law, namely a) individual Indonesian citizens (including groups of people having a common interest); b) units of customary law communities 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; c) public or private legal entities; or d) state institutions.

Considering whereas in Decision on Case Number 006/PUU-III/2005 and Case Number 010/PUU-III/2005, the Court is of the opinion that the impairment of constitutional rights due to the coming into effect of a law pursuant to Article 51 Paragraph (1) of the Constitutional Court Law, shall meet the following criteria:

- a. The Petitioners must have constitutional rights granted by the 1945 Constitution;
- b. The Petitioners believe that their constitutional rights have been impaired by the coming into effect of a law;
- c. the constitutional right impairment shall be specific and actual in nature or at least potential in nature which pursuant to logical reasoning will take place for sure;
- d. there is a causal relationship (*causal verband*) between the constitutional right impairment and the law petitioned for review;
- e. If the petition is granted, it is expected that, the impairment of such constitutional rights argued will not or does not occur any longer;

Considering whereas Petitioner Number 9 by the name of JN Raisal Haq, who was born on March 6, 1992, is underage, so that the *a quo* Petitioner is not

eligible to take any legal action on his own. In the petition and statement in the hearing the Petitioners/their Attorney did not explain who the guardian of Petitioner Number 9 was, that would represent Petitioner Number 9 in the hearings. Based on such consideration, the Court is of the opinion that Petitioner Number 9 has no *legal standing*.

Considering whereas with respect to other Petitioners the Court deem that the Petitioners' arguments are sufficiently grounded, so that Court is of the opinion that the Petitioners have the legal standing.

Considering whereas since the Court have the authority to examine, hear, and decide upon the *a quo* petition, and that some of the Petitioners have the *legal standing*, the Court will give further consideration on the Principal Issue of the case.

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

Considering whereas the Petitioners argued that the APBN Law Year 2005 which stipulates the allocation of 7% of the State Revenues and Expenditures Budget for education is contradictory to Article 27 Paragraph (2), Article 28D Paragraph (2), Article 28H Paragraph (1) and Paragraph (3), and Article 31 Paragraph (2) of the 1945 Constitution as intended in the principal issue of the case, and Article 31 Paragraph (4) of the 1945 Constitution which reads, "The State shall prioritize the educational budget by allocating at least twenty percent of the State Revenues and Expenditures Budget and of the



Regional Revenues and Expenditures Budget in order to meet the needs for organizing national education”;

Considering whereas to support their arguments, besides submitting written evidence in the forms of letters/documents (Exhibit P-1 through Exhibit P-5) the Petitioners also presented witnesses and experts whose statements are completely described in the principal issue of the case, which principally support the Petitioners’ arguments;

Considering whereas the Government has given its oral and written statements as completely described in the Principal Issue of the Case, that principally reject the Petitioners’ arguments;

Considering whereas the People’s Legislative Assembly of the Republic of Indonesia has given its written statement as completely described in the Principal Issue, principally arguing that the APBN Law Year 2005 is not contradictory to the 1945 Constitution;

Considering whereas the Court has summoned the Related Parties namely the Chairperson of Indonesian Private University Association, the Central Executive Board of the Indonesian Teachers’ Association, the Chairperson of Indonesian Education Scholars’ Association (ISPI), Chairperson I of the Council of *Taman Siswa* Education Institutions’ Association Foundation, Representative of the PBNU, whose statements are completely described in the Principal Issue of the Case;

Considering whereas based on the foregoing, the Court is of the following opinion;

Considering whereas the Petitioners argued that Law No. 36 Year 2004 namely the APBN Law is contradictory to Article 31 Paragraph (4) of the 1945 Constitution which reads, “The State shall prioritize the educational budget by allocating at least twenty percent of the State Revenues and Expenditures Budget and of the regional revenues and expenditures budget in order to meet the needs for organizing national education”. The formulation of Article 31 Paragraph (4) of the 1945 Constitution refers to the “state” in preparing the State Revenues and Expenditure (APBN) and the Regional revenues and Expenditure Budget (APBD) to fulfill the needs for organizing national education. Since Article 31 Paragraph (4) of the 1945 Constitution is related to the fulfillment of needs for organizing national education, the Court needs to first review the issue of education matters in the 1945 Constitution.

Considering whereas the provisions of the 1945 Constitution concerning education are set forth in:

1. Article 28C Paragraph (1) which reads, “Every person shall have the right to develop him/herself through the fulfillment of their basic needs, shall have the right to obtain education and to enjoy the benefits of science and technology, arts and culture, for the enhancement of the quality of their life and for the welfare of humankind”.

2. Article 28E Paragraph (1) which reads, “Every person shall be free to adhere to a religion and to worship in accordance with his/her religion, to choose education and teaching, to choose occupation, to choose citizenship, to choose residence in the state territory and to leave it, and shall have the right to return”.
3. Article 31 Paragraph (1) which reads, “Every citizen shall have the right to obtain education”.
4. Article 31 Paragraph (2) which reads, “Every citizen shall be obligated to follow basic education and the government shall be obligated to finance it”.

The provisions in Article 28C Paragraph (2) and Article 28E Paragraph (1) are included in the Chapter concerning human rights, so that the formulation uses the term “every person“. The State recognizes the rights to education as referred to in Article 28C Paragraph (1) and Article 28E Paragraph (1) of the 1945 Constitution for every person without discrimination. In the recognition of human rights in general, the state can perform it by respecting, protecting, and fulfilling efforts. The State’s recognition of the right to education in Article 28C Paragraph (1) and Article 28E Paragraph (1) which is intended to every person will certainly be different from the state’s position with respect to citizens’ right to education, because citizens have a direct connection to their state. The state’s respect for the right to obtain education for non citizens is conducted by refraining from exercising the state’s authority to hamper someone who is not a

citizen to obtain education in Indonesia. In addition, the state also protects non citizens to use their educational right not to be disturbed merely because of their citizenship.

The recognition of on the right to obtain education for non citizens does not cause an obligation on the part of the state to provide special education, and the state does not have the obligation to guarantee someone who is not a citizen to obtain education, it means that the state has no obligation to fulfill the right to obtain education for non citizens.

The state's obligation which occurs from the citizen's right to obtain education which is guaranteed by the 1945 Constitution is broader than the right to obtain education of non citizens, as legally based on Article 28C Paragraph (1) and Article 28E Paragraph (1) and particularly Article 31 Paragraph (1) of the 1945 Constitution.

The state's obligation to citizens in educational sector has a more fundamental basis, because one of the objectives of the establishment of the Unitary State of the Republic of Indonesia (*het doel van de staat*) is to improve the nation's intellectual life as expressed in the Preamble to the 1945 Constitution in the fourth Paragraph which reads, "Furthermore, in order to form a Government of the State of Indonesia which shall protect the entire Indonesian nation and the entire Indonesian native land, and in order to advance general welfare, to develop the intellectual life of the nation ..."

Therefore, one of the obligations is attached to the existence of the state namely that it is in fact for the purpose of improving the nation's intellectual life that Indonesian country has been established. The citizens' right to obtain education is not just limited to the state's obligation to respect and protect but that the state is obligated to fulfill the citizens' right. Education is so important to Indonesia, that it is not only stipulated as the citizens' right, but the 1945 Constitution deems it necessary to make basic education as the citizens' obligation. To fulfill the citizens' right properly the 1945 Constitution, Article 31 Paragraph (2) requires the government to finance it.

From human rights point of view, the right to obtain education is included in human rights outside civil and political rights, and is included in the social, economic, and cultural rights. The state's obligation to respect, and to fulfill the social economic political rights is an obligation to result and not an obligation to conduct as that with respect to civil and political rights. The state's obligation in terms of "*obligation to result*" has been fulfilled if the state with goodwill has utilized the maximum available resources and has conducted progressive realization.

Considering whereas Article 31 Paragraph (4) of the 1945 Constitution, besides being connected to the right to obtain education, is also related to the State Revenues and Expenditures Budget (APBN), so that the Court deems it necessary to discuss the constitutional aspect of the APBN. In the 1945 Constitution it is regulated that the APBN shall be stipulated every year by Law. It

means, the APBN is drafted based on a joint approval between the President and the People's Legislative Assembly. However, the drafting of the APBN Law is different from the drafting of other Laws, as the APBN Draft Law always comes from the President which is then discussed together with the People's Legislative Assembly by taking the advice of Regional Representative Council into account, while in respect of other Laws, the proposal of a Draft Law is the authority of the People's Legislative Assembly although it may be proposed by the President. The APBN Law is only effective for one Budget Year, different from other Laws having unlimited effective period. The APBN Law is needed every year, and if the APBN Law cannot be stipulated because the People's Legislative Assembly does not approve of the APBN Draft Law proposed by the President, the Government shall apply the State Revenues and Expenditures Budget (APBN) of the previous Budget Year. The coming into effect of the previous APBN is conducted to avoid a legal vacuum (*rechtsvacuum*), considering that the APBN is highly important to assure governance arrangement.

Considering whereas from the substantive point view, the APBN Law is a financial plan which reflects policy choice for one Budget Year. The policy choice is related to the estimated revenues and expenditures expected to occur in a period in the future. As a Law with a binding force, the APBN Law particularly binds the Government in collecting revenues either from the aspect of amount or revenue sources and the expenditures as well. As a plan, the APBN Law is open to revision or amendments if the assumptions underlying the drafting encounter

changes, so that it should be adjusted, but still within the effective period of the APBN, namely in one Budget Year.

Considering whereas with respect to citizens' right to education as described above, the state's obligation is an "obligation to result" and by utilizing resources to the greatest possible extent, with good intention, and with progressive realization. However, with the existence of Article 31 Paragraph (4) of the 1945 Constitution which provides for the priority for the minimum educational budget of 20 percent of the APBN, the nature of *obligation to result* in fulfilling the citizens' right to education becomes stronger as an *obligation to conduct*. Therefore, if in an APBN Law the minimum allocation of 20 percent for educational arrangement is not fulfilled, the APBN Law is contradictory to Article 31 Paragraph (4) of the 1945 Constitution.

Considering whereas to the Petitioners' arguments stating that the APBN Law is contradictory to Article 27 Paragraph (2), Article 28D Paragraph (2) and Article 28H Paragraph (1) and Paragraph (3) of the 1945 Constitution, the Court is of the opinion that the Petitioners' arguments are groundless, because if it is true that the Petitioners are harmed by the APBN Law, it is not a constitutional impairment;

Considering whereas to judge the *a quo* petition, the Court also needs to consider the following matters:

- whereas Article 31 Paragraph (4) of the 1945 Constitution does not give any limitations being included in the “educational budget”. In the efforts to determine the components of educational budget, under the joint approval of the President and the People’s Legislative Assembly, it has been stipulated that the educational budget shall include education directly enjoyed by the people as stipulated in Article 49 Paragraph (1) of Law Number 20 Year 2003 regarding the National Education System (hereinafter referred to as the Sisdiknas Law), namely the funds for education other than educators’ salary and official service education cost. The existence of Article 49 Paragraph (1) of the Sisdiknas Law will indirectly increase the nominal amount of educational budget compared to the amount if the calculation of educational budget includes the component of educators’ salary and official service education. The joint decision between the Government and the People’s Legislative Assembly was based on the intention to properly perform constitutional provisions, because if the interpretation of 20 percent referred to in Article 31 Paragraph (4) of the 1945 Constitution includes the components of educators’ salary and official service education, the nominal amount of educational budget will become smaller. Therefore, in the Court’s opinion, the goodwill of the Government and the People’s Legislative Assembly to perform Article 31 Paragraph (4) of the 1945 Constitution has been reflected. This is added by an agreement between People’s Legislative Assembly and the Government to always increase the percentage of



educational budget from year to year so that within the next five years the provisions in the 1945 Constitution can be fulfilled.

- whereas the Court has decided upon Case Number 011/PUU-III/2005 the decision of which rules that the Elucidation of Article 49 Paragraph (1) of the Sisdiknas Law has no binding legal effect on the grounds that the elucidation of Article 49 Paragraph (1) of the Sisdiknas Law contains a norm which is different from the elucidated article. Therefore the fulfillment of Article 31 Paragraph (4) of the 1945 Constitution regarding budget allocation of 20 percent is not conducted in stages and as described above, pursuant to Article 31 Paragraph (4) of the 1945 Constitution the state has an obligation that it must fulfill. The allocation of education budget in the APBN Law which is less than 20 percent is contradictory to the instruction of Article 31 Paragraph (4) of the 1945 Constitution, which states that the budget shall be prioritized to be 20 percent at the minimum, although the People's Legislative Assembly and the President have in good faith utilized maximum resources and are determined to perform progressive realization in the drafting the next APBN.

Considering whereas although Law Number 36 Year 2004 namely the APBN Law is contradictory to Article 31 Paragraph (4) of the 1945 Constitution, to declare it as not having a binding legal effect, the Court takes the following matters into account:

- If the Court declares that the APBN Law has no binding legal effect, the legal consequence is that the whole state revenues and expenditures plan set out in the APBN shall no longer have any binding effect to the President who in accordance with Law Number 17 Year 2003 regarding State Finance namely Article 6 Paragraph (1), is the holder of state finance management authority. The whole realization of state revenues and expenditures which is based on the APBN Law will no longer have any legal ground.
- If on the Court's decision stating that the APBN Law no longer has any binding legal effect, then the President with the approval from the People's Legislative Assembly must reformulate the allocation from revenues and expenditures that have been realized so that 20 percent for education sector is fulfilled by reducing the budget for other sectors, it will certainly cause legal uncertainty in the expenditures realization that has been incurred by other sectors whose budget must be reduced. From administrative point of view, financial management is very difficult to conduct because it will change the whole financial administration in Indonesia which thereby requires adjustment. It requires costs, energy and time that are very difficult to calculate.
- Moreover, if the value or nominal amount of educational budget in the previous year is evidently smaller than the current budget, and that if the petition is granted, the Petitioners and all citizens who share a common interest with the Petitioners will be even more harmed.

Considering whereas pursuant to the Constitutional Court Law with respect to judicial review of a Law, if the Court declares that the petition is grounded, the decision will declare that the petition is granted. Based on the above description, the Court is of the opinion that the petition of the Petitioners is grounded, but if the Court declares to grant the petition, based on Article 23 Paragraph (3) of the 1945 Constitution, the APBN of previous year will be applied. It is impossible to apply this on the *a quo* petition, because it will cause *governmental disaster* in the state finance administration, which can cause legal uncertainty (*rechtsonzekerheid*) and the impact will be even worse if the amount of the educational budget of the previous APBN is smaller.

Considering whereas based on all the above considerations, the Court is of the opinion that although the APBN Law is contradictory to the 1945 Constitution, there are sufficiently objective reasons for the *a quo* Law not to be declared as having no binding legal effect, for which it must be declared that the petition of the Petitioners can not be accepted.

In view of Article 56 Paragraph (1) of the Law of the Republic of Indonesia Number 24 Year 2003 regarding the Constitutional Court;

### **PASSING THE DECISION**

To declare that the petition of the Petitioners cannot be accepted (*niet ontvankelijk verklaard*).

With respect to such Decision of the Court, two Constitutional Court Justices have concurring opinion although both their decisions declare that the petition cannot be accepted (*niet ontvankelijk verklaard*). Besides, two other judges have dissenting opinions as follows:

### **Concurring Opinion**

#### **1. Constitutional Court Justice Prof. H.A.S. Natabaya, S.H., LL.M.;**

Whereas in their petition the Petitioners argued that the existence of Law Number 36 Year 2004 must be reviewed because it is contradictory to Article 31 Paragraph (4) of the 1945 Constitution of the Republic of Indonesia and contradictory to Article 46 Paragraph (2) of Law Number 20 Year 2003 because the allocation of educational fund has not reached the minimum of 20% of the APBN from which, pursuant to Law Number 36 Year 2004, the educational sector shall receive the allocation of funds as follows:

- |    |  |                          |
|----|--|--------------------------|
| 1. | Early age education program                          | Rp 375,220.00 million    |
| 2. | 9-year basic compulsory education program            | Rp.8,547,940.00 million  |
| 3. | Secondary education program                          | Rp. 3,320,024.90 million |
| 4. | High education program                               | Rp .7,707,159.60 million |
| 5. | Non formal education program                         | Rp 334,396.40 million    |
| 6. | Education and educators' quality improvement program | Rp 2,883,325.00 million  |
| 7. | Reading culture development                          |                          |

	and library guidance program	Rp	67,775.20 million
8.	Education research and development program	Rp	86,390.00 million
9.	Education management and service program	Rp	360,345.00 million
10.	Official service education	<u>Rp</u>	<u>646,967.00 million</u>
	Total		Rp24,225,543.00 million

Whereas the Petitioners are individual Indonesian Citizens comprised of students, college students, Students' Guardians, Teachers, Lecturers, Headmasters and other parties that have interest and are related to and responsible for educational arrangement who deem that their constitutional rights are harmed by the coming into effect of Law Number 36 Year 2004 regarding the State Revenues and Expenditures Budget (APBN) Year 2005 because the coming into effect of the *a quo* Law has caused the fulfillment of educational funds to be delayed and constitutional rights of the Petitioners are impaired because compulsory education still requires fee, the salary of education officers and educators is still small and inadequate, the subsidy of educational funds is not equal and unfair and far from the criteria of sufficiency, educational facilities and infrastructures are still minimum so that the quality of most educational output is still low. Besides, the Petitioners also argued that the compulsory education program determined in Article 31 Paragraph (2) of the 1945 Constitution of the State of the Republic of Indonesia which must be financed by the state still requires costs as operational funds, so that it harms the constitutional rights of the Petitioners;

Whereas to prove whether Law Number 36 Year 2004 regarding the State Revenues and Expenditures Budget (APBN) is contradictory to Article 31 Paragraph (4) of the 1945 Constitution of the State of the Republic of Indonesia Year 1945, it is necessary to conduct prior discussion concerning Article 23 of the 1945 Constitution of the State of the Republic of Indonesia Year 1945 which regulates State Finance;

#### Article 23

- (1) The state revenues and expenditures budget as the realization of state financial management shall be stipulated annually by law and shall be implemented in an open and accountable manner for the greatest prosperity of the people.
- (2) Draft law on the state revenues and expenditures budget shall be proposed by the President for further discussion with the People's Legislative Assembly by taking into account the considerations of the Regional Representative Council.
- (3) Should the People's Legislative Assembly does not approve the draft of the state revenues and expenditures budget proposed by the President, the Government shall implement the State Revenues and Expenditures Budget of the previous year.

If the formulation of Article 23 Paragraph (1) of the 1945 Constitution of the State of the Republic of Indonesia, which states that state financial management shall be stipulated annually by Law and shall be implemented in an open and accountable manner for the greatest prosperity of the people is observed carefully and seriously, the Government in preparing the State Revenues and Expenditures Budget (APBN), which is only effective for one Budget Year, will certainly consider the state economic and financial condition that will affect the level of Government's freedom to run governance administration.

Whereas if the statement of the Government in the hearing before the Court is considered, the Government in preparing the State Revenues and Expenditures Budget (APBN) of Budget Year 2005 has evidently been bound to determine the allocation of such budget for DAU, DAK of 35% and banking 20% which are all the instruction of Law and if it is added by another 20% for education, it will be difficult for the Government to conduct governance and national development with the remaining budget of 25% of the APBN. It can be imagined that stagnation in governance and national development will certainly occur. If the figure of 20% is forced, it will bring a big impact to the state economy because the APBN is related to other micro economic businesses.

Whereas, the issue is whether the APBN Year 2005 which determines the allocation of educational budget less than 20% has violated Article 31 Paragraph (4) of the 1945 Constitution of the State of the Republic of Indonesia. This is let

up to the definition of "educational budget". If we define "educational budget" to include educators' salaries and official service education costs, our educational budget has exceeded 20%, but if the definition of "educational budget" is made equal to "educational fund" (Article 49 Paragraph (1) of Law Number 20 Year 2003) it has not reached 20%.

Whereas with respect to the above description, the Government encounters a situation (fact) in which it is not possible to do other things in preparing the State Revenues and Expenditures Budget, either in the form of situation where the Government is bound to Law on Balanced Finance or the Government's commitment to settle problems related to banking, which have been certainly discussed with and approved by the People's Legislative Assembly by taking the advice from the Regional Representative Council into account as instructed by Article 23 Paragraph (2) of the 1945 Constitution of the State of the Republic of Indonesia. Moreover, if the definition of "educational budget" referred to in Article 31 Paragraph (4) means the educational fund of 20% of the APBN and APBD, the consequence is the decreasing portion of budget allocation for the development of other sectors outside the educational sector. If the APBN Law is cancelled, the APBN of the previous year will be applied, which means that the amount of the APBN will decrease and harm the Petitioner.

With respect to the above description we are of the opinion that Law Number 36 Year 2004 is not contradictory to Article 31 Paragraph (4) of the 1945



Constitution of the State of the Republic of Indonesia. Another issue to address is whether the constitutional right of the Petitioner is impaired by the coming into effect of Law Number 36 Year 2004.

If we refer to Decision of the Constitutional Court Number 006/PUU-III/2005 dated May 31, 2005, there are 5 (five) requirements for the existence of impairment of constitutional right due to the coming into effect of a Law pursuant to Article 51 Paragraph (1) of Law Number 24 Year 2003 on the Constitutional Court namely: the impairment of constitutional rights of the Petitioner shall be specific and actual in nature and or at least potential in nature which pursuant to logical reasoning will take place for sure and there is a causal relationship (*causal verband*) between the impairment of constitutional rights and the coming into effect of the Law petitioned for review.

With respect to the petition of the Petitioners, we are of the opinion that the Petitioners do not encounter losses because there is no right of the Petitioner either actual or potential in nature being impaired by the coming into effect of Law Number 36 Year 2004 and there is no causal relationship (*causal verband*) even if the Petitioner deemed to encounter losses because of the coming into effect of Law Number 36 Year 2004.

Accordingly, we are of the opinion that in accordance with Article 56 Paragraph (1) of Law Number 24 Year 2003 on the Constitutional Court it must be declared that the petition of the Petitioners can not be accepted (*niet ontvankelijk verklaard*).

## 2. Constitutional Court Justice I Dewa Gede Palguna, S.H., M.H.;

Considering whereas with respect to the judicial review of Law against the 1945 Constitution Article 51 Paragraph (1) of the Constitutional Court Law states, *“Petitioners shall be parties who deem that their constitutional rights and/or authorities are impaired by the coming into effect of a Law, namely:*

- a. *Individual Indonesian citizens;*
- b. *units of customary law communities 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;*
- c. *public or private legal entities; or*
- d. *state institutions”;*

Considering whereas accordingly, to be qualified as having the legal standing as Petitioner in judicial review of Law before the Constitutional Court (hereinafter the **Court**), a person or a party must explain:

- (1) his qualification in the *a quo* petition, whether as an individual Indonesian citizen, a unit of customary law community (under the aforementioned requirements), a legal entity (public or private); or as a state institution;
- (2) his constitutional rights and/or authorities in the aforementioned qualification deemed to have been impaired by the coming into effect of a Law;

Considering whereas it has become the Court's determination, as declared in a number of its decisions, in describing the aforementioned two principles contained in Article 51 Paragraph (1) of the Constitutional Court Law, for a person or a party filing a petition to be judged as encountering constitutional impairment, the Petitioner must explain as follows:

- a. The Petitioner must have constitutional rights granted by the 1945 Constitution;
- b. such constitutional rights of the Petitioner shall be deemed to have been impaired by the coming into effect of a law petitioned for review;
- c. the impairment of constitutional rights shall be specific and actual in nature or at least potential in nature which pursuant to a logical reasoning will take place for sure;
- d. there is a causal relationship (*causal verband*) between the impairment of such constitutional rights and the law petitioned for review;
- e. IF the petition is granted, it is expected that the impairment of such constitutional rights argued will not or does not occur any longer;

Considering whereas in their qualification as individual Indonesian citizens the Petitioners have described their petition regarding constitutional rights as regulated in the 1945 Constitution which, according to the Petitioners, have been impaired by the coming into effect of the APBN Law namely: the right

to a proper living and work [Article 27 Paragraph (2)], the right to work and to receive fair remuneration and treatment in work relationship [Article 28D Paragraph (2)], the right to live a physically and mentally prosperous life, to have residence, and to obtain healthy and proper living environment as well as to obtain health services [Article 28H Paragraph (1) and Paragraph (3)], and the right of every citizen to obtain education and the government's obligation to finance basic education, and the State's obligation to prioritize the educational budget by allocating at least twenty percent of the State Revenues and Expenditures Budget and of the Regional Revenues and Expenditures Budget, and the Government's obligation to advance science and technology by upholding religious values and national unity for the progress of civilization as well as the welfare of humankind [Article 31 Paragraph (1), Paragraph (2), Paragraph (3), Paragraph (4), and Paragraph (5)];

Considering whereas, since the main problem filed by the Petitioners is the failure to fulfill the minimum of 20% for educational budget in the APBN Law which, according to the Petitioners, result in the violation or impairment of constitutional rights of the Petitioners as described above, and with respect to the criteria of impairment of constitutional rights that must be fulfilled to decide whether or not the Petitioners have the legal standing, prior to entering the substance of petition the following must be taken into account:

- a. whereas, except Petitioner Number 9 (JN Raisal Haq) – who was born on March 6, 1992, meaning that he is underage to take legal action (*minderjarig*)

so that the related party is incapable to give authorization to act on his behalf, while his parents/guardian who pursuant to law should have acted for and on his behalf do not give authorization to any party (*vide* Petition) – other Petitioners *prima facie* can be considered eligible to act as Petitioners in the *a quo* petition;

- b. whereas, except for constitutional rights related to or derived from Article 31 Paragraph (1), Paragraph (2), and Paragraph (3) of the 1945 Constitution, other constitutional rights argued by the Petitioners in their petition have no direct causal relationship (*causal verband*) as a result of non-fulfillment of the provision of Article 31 Paragraph (4) of the 1945 Constitution, so that they must be declared irrelevant for consideration;
- c. whereas, based on the examination results in the hearing, it is evident that if the petition of the Petitioners is granted, the impairment of constitutional rights of the Petitioners will not disappear or no longer occurs but in fact the Petitioners will encounter more losses based on the following explanations:

based on the statement of the government and written evidence presented in the hearing, it was found that educational budget for Year 2005 was 7 % of the APBN. This is *prima facie* contradictory to Article 31 Paragraph (4) of the 1945 Constitution. However, if the petition of the Petitioners is granted, in accordance with Article 57 Paragraph (1) of the Constitutional Court Law, the provisions in the APBN Law must therefore be declared as not having any binding legal effect. Consequently, the

Government must implement the APBN of the previous year, namely the APBN Year 2004, while the educational budget in the APBN Year 2004 was only 6.6 %.

Considering, based on the above considerations, without any intention to state that the legislators do not violate the Constitution, it is evident that the Petitioners do not meet the criteria of impairment of constitutional rights as intended in Article 51 Paragraph (1) of the Constitutional Court Law so that the Petitioners must be declared as not having the *legal standing*. Accordingly, in accordance with Article 56 Paragraph (1) of the Constitutional Court Law, it must be declared that the petition can not be accepted (*niet ontvankelijk verklaard*).

**Dissenting Opinion;**

**Constitutional Court Justices H. Achmad Roestand, S.H., and Soedarsono, S.H.,**

With respect to this Decision of the Court, we are of the opinion that, although fund allocation for organizing national education in the APBN Year 2005 has literally not reached 20%, it does not have to be considered absolutely as contradictory to Article 31 Paragraph (4) of the 1945 Constitution. *Contradiction* must be differentiated from *delay*. A contradiction happens if two things in the same line moving from the opposing direction collide, while a delay occurs when two things moving in the same line and direction, one of them has

not managed keep up with the other. What happens in the State Revenues and Expenditures Budget Year 2005 related to educational arrangement budget item compared to the message of Article 31 Paragraph (4) of the 1945 Constitution is a delay, not a contradiction. The Government and the People's Legislative Assembly are aware of this, and a joint agreement has been made between the People's Legislative Assembly and the Government regarding the achievement of educational budget allocation of 20% (twenty percent) of State Revenues and Expenditures Budget (APBN), namely:

- a. The achievement of educational budget target of 20% (twenty percent) of the State Revenues and Expenditures Budget (APBN) outside educators' salaries and official service education cost, in accordance with Article 49 Paragraph (1) of Law Number 20 Year 2003 regarding National Education System and its Elucidation uses the scenario: "Educational fund ratio (after educators' salaries and official service education cost deduction) towards state expenditures (after regional funds deduction) is projected to achieve the minimum 20 percent in year 2009".
- b. The achievement of educational budget of 20 % (twenty percent) of State Revenues and Expenditures Budget (APBN) is based on the following assumption:
  - 1.) Educational fund will increase from 6,6% (Rp16,8 trillion) in 2004 to 8.2% (Rp22.0 trillion) in 2005, 10.3% (Rp 29.0 trillion ) in 2006, 12.9% (38.1 trillion ) in 2007, 16.1% (Rp 50 trillion ) in 2008, and 20.2% (Rp

65.8 trillion) in 2009. The average progressive increase (adjusted) is 2.72% from the previous budget year so that by 2009 it will reach 20.2 percent of the APBN outside teachers' salaries and non official service education budget. The increase from year 2004 to year 2005 is 1.6%, year 2005 to year 2006 2.1%, year 2006 to year 2007 2.6%, year 2007 to year 2008 3.2%, and year 2008 to year 2009 4,1%. Based on these figures, by year 2009 the increase of educational budget of 20.2% will be achieved.

- 2.) Educational fund will increase from 6.6% (Rp16.8%) year 2004 to 9.3% (Rp 24.9 trillion) in 2005, 12% (Rp33.8 trillion) in 2006, 14.7% (Rp 43.4 trillion) in 2007, 17.4% (Rp 54.0 trillion) in 2008, and 20.1% (Rp 65.5 trillion) in 2009. Average linier increase occurs at 2.7% from the previous budget year so that by year 2009 it will reach 20.1% of the APBN outside teachers' salaries and non official service education budget. Based on these figures, by year 2009 the increase of educational budget of 20.1% will be achieved.

The reason for such delay and commitment of the Government and the People's Legislative Assembly is our main reason for declaring that the budget item for educational arrangement that has not achieved 20% in the APBN Year 2005 is not contradictory to Article 31 Paragraph (4) of the 1945 Constitution. Meanwhile, the APBN Law has a different character from a Law in general, that the APBN Law is more an implementation of budgetary function rather than



legislative function of the People's Legislative Assembly [*vide* Article 20A Paragraph (1) of the 1945 Constitution], *eenmalig* in nature [*vide* Article 23 Paragraph (1) of the 1945 Constitution], its draft law can only be proposed by the President [*vide* Article 23 Paragraph (2) of the 1945 Constitution], and its amendment will greatly affect the budget of other sectors, even causing stagnation in the governance, are the supporting reasons why Law Number 36 Year 2004 regarding the APBN Year 2005 is not contradictory to the 1945 Constitution.

Moreover, in accordance with the statement of the government revealed in the hearing, if the budget for educational arrangement also counts the component of educators' (teachers') salaries and official service education cost, the budget percentage for educational arrangement has achieved more than 20 percent of the APBN and APBD 2005. Based on the reason, we are of the opinion the petition of the Petitioners should have been declared rejected.

\*\*\*\*\*

Hence, this decision was made in the Consultative Meeting of 9 (nine) Constitutional Court Justices on: Thursday, October 13, 2005 and was pronounced in the Plenary Session of the Constitutional Court open for public on

this day Wednesday, October 19, 2005 by 9 (nine) Constitutional Court Justices, namely Prof. Dr. Jimly Asshiddiqie, S.H., as the Chairperson and concurrent Member, accompanied by H. Achmad Roestand, S.H., Prof. Dr. H.M.Laica Marzuki, S.H., Dr. Harjono, S.H., Prof.H.A.S. Natabaya, S.H., LL.M., Prof.H.A. Mukthie Fadjar, S.H., M.S., Maruarar Siahaan, S.H., Soedarsono, S.H., I Dewa Gede Palguna, S.H., M.H; respectively as Members, assisted by Eddy Purwanto, S.H. as Substitute Registrar and in the presence of the Petitioners/their Attorney, the Government, the People's Legislative Assembly of the Republic of Indonesia, and the Related Parties.

**CHIEF JUSTICE,**

**Signed**

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

**JUSTICES,**

**Signed**

**H. ACHMAD ROESTANDI, S.H.**

**Signed**

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

**Signed**

**DR. HARJONO, S.H., MCL.**

**Signed**

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

**Signed**

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

**Signed**

**SOEDARSONO, S.H.**

**Signed**

**Signed**

**MARUARAR SIAHAAN,S.H**

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

**SUBSTITUTE REGISTRAR,**

**Signed**

**EDDY PURWANTO, S.H.**