



DECISION

Number 021/PUU-IV/2006

FOR THE SAKE OF JUSTICE UNDER THE ONE ALMIGHTY GOD

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA

Examining, hearing, and deciding upon constitutional cases at the first and final level, has passed a Decision on the case of petition for Judicial Review of the Law of the Republic of Indonesia Number 20 Year 2003 regarding National Education System, against the 1945 Constitution of the State of the Republic of Indonesia, filed by:

1. **Association of Indonesian Private University Organizing Agencies (ABPPTSI)**, having its address at Jalan Jenderal Ahmad Yani Kav. 85, By Pass, East Jakarta, hereinafter referred to as ----- **Petitioner I;**
2. **Islamic Hospital of Indonesia Foundation (Yayasan Yarsi)**, having its address at Jalan Letjen Suprpto Cempaka Putih Tengah Number 13 , Central Jakarta, hereinafter referred to as -----
Petitioner II;

3. ***Al-Azhar Islamic Boarding School Foundation***, having its address at Jalan Sisingamangaraja, Kebayoran Baru, Jakarta 12210, hereinafter referred to as ----- **Petitioner III;**

4. ***As-Syafi'iyah University Foundation***, having its address at Jalan Raya Jati Waringin Number 12 Pondok Gede, Bekasi 17411, hereinafter referred to as ----- **Petitioner IV;**

5. ***Makassar's Wakaf UMI Foundation***, having its address at Jalan Kakatua Number 27 Makassar, hereinafter referred to as ----- **Petitioner V;**

6. ***Trisakti Foundation***, having its address at Jalan Jenderal Ahmad Yani Kav.85, By Pass, East Jakarta, hereinafter referred to as ----- **Petitioner VI;**

7. ***Prof. Dr. Moestopo University Foundation***, having its address at Jalan Hang Lekir I Number 8 Kebayoran Baru South Jakarta, hereinafter referred to as ----- **Petitioner VII;**

8. **Education Institute Facilitator Foundation of the Teachers' Association of the Republic of Indonesia (YPLP-PGRI)**, having its address at Jalan Tanah Abang III Number 24, Central Jakarta, hereinafter referred to as ----- **Petitioner VIII;**

9. **University Education Institute Facilitator Foundation of the Teachers' Association of the Republic of Indonesia Foundation (YPLT-PT-PGRI)** the Province of South Sumatera, having its address at Jalan Jenderal Ahmad Yani, Lorong Gotong Royong 9/10 Ulu Palembang, hereinafter referred to as ----- **Petitioner IX;**
10. **Teachers' Training Institute (IKIP) Education Institute Facilitator Foundation of the Teachers' Association of the Republic of Indonesia (YPLT-IKIP-PGRI) of the Province of Bali**, having its address at Jalan Seroja, North Denpasar, Bali, hereinafter referred to as ----- **Petitioner X;**
11. **University Education Institute Facilitator Foundation of the Teachers' Association of the Republic of Indonesia (YPLT-PT-PGRI) of the South Kalimantan Region**, having its address at Jalan Sultan Adam Complex H. lyus Number 18 Banjarmasin, hereinafter referred to as ----- **Petitioner XI;**
12. **Dikdasmen PGRI Education Institute Facilitator Foundation of the Province of Bali**, having its address at Jalan Meduri Number 20 Denpasar Bali, hereinafter referred to as ----- **Petitioner XII;**
13. **Education Commission of the Indonesian Bishop Council (KWI Education Commission or Komdik KWI)**, having its address at Jalan Cut Mutiah Number 10, Jakarta, hereinafter referred to as ----- **Petitioner XIII;**

14. **Tarakanita Foundation**, having its address at Jalan Salemba Tengah Number 23, Central Jakarta, hereinafter referred to as ----- **Petitioner XIV**;

15. **Karya Sang Timur Foundation**, having its address at Jalan Barata Pahala Number 37, Karang Tengah, Tangerang, Banten, hereinafter referred to as ----- **Petitioner XV**;

16. **Mardi Yuana Foundation**, having its address at Jalan Laksamana R. E. Martadinata Number 52, Sukabumi, hereinafter referred to as ----- **Petitioner XVI**;

In this matter represented by the following attorneys –in-fact:

1. Luhut M. P. Pangaribuan, S.H., LL.M
2. Dr. A. Muhammad Asrun, S.H., M.H
3. Leonard P. Simorangkir, S.H
4. Bakhtiar Sitanggang, S.H

All of them are advocates who are members of the “Team of Advocates of the Association of Indonesian Private University Organizing Agencies” or abbreviated as “Team of Advocates of ABPPTSI” having its address at the office of Luhut Marihot Parulian Pangaribuan (LMPP) Advocates and Counselors at Law, at Menara Kuningan 15th Floor, Jalan HR. Rasuna Said Block X-7 Kav.5, Jakarta 12940 based on Special Powers of Attorney dated August 16, 23, 29, 2006, and dated October 21, 23, 25, 26, 30, as well as

31, 2006. Hereinafter referred to as -----

Petitioners;

Having read the petition of the Petitioners;

Having heard the statements of the Petitioners;

Having heard the verbal statement and read the written statement of the Government;

Having heard the verbal statement and read the written statements of the People's Legislative Assembly of the Republic of Indonesia;

Having heard the verbal statements and read the written statements of experts and witnesses of the Petitioners;

Having heard the verbal statements and read the written statements of experts of the Government;

Having heard the verbal statements of the witnesses of Government;

Having read the conclusion of the Petitioners;

Having read the conclusion of the Government.

Having examined the evidence;

LEGAL CONSIDERATIONS

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

Considering whereas the following matters will be considered in this case:

- I. The authority of the Constitutional Court (hereinafter referred to as the Court) to examine, hear, and decide upon the petition of the Petitioners;
- II. The legal standing of the Petitioners;
- III. The Principal Issue of the Petition, namely concerning the constitutionality of the paragraphs, articles, and/or sections of the law petitioned for judicial review.

I. Authority of the Court

Considering whereas Article 24C Paragraph (1) of the Constitution of the Republic of Indonesia Year 1945 (hereinafter referred to as the 1945 Constitution) has granted constitutional authority to the Court to hear at the first and final level, the decision of which shall be final, among other things, to conduct judicial review of laws against the 1945 Constitution. Such authority is reaffirmed in Article 10 Paragraph (1) of the Law of the Republic of Indonesia Number 24 Year 2003 concerning the Constitutional Court (State Gazette of the Republic of Indonesia Year 2003 Number 98, Supplement to the State Gazette of the Republic of Indonesia Number 4316, hereinafter referred to as the Constitutional Court Law);

Considering whereas the Petitioners' petition is concerning judicial review of the Law of the Republic of Indonesia Number 20 Year 2003 regarding National Education System (State Gazette of the Republic of Indonesia Year 2003 Number 78, Supplement to the State Gazette of the Republic of Indonesia Number 4301, hereinafter referred to as the National Education System Law) against the 1945 Constitution. Therefore, the Court has the authority to examine, hear and decide upon the *a quo* petition;

II. Legal Standing of the Petitioners

Considering whereas pursuant to Article 51 Paragraph (1) of the Constitutional Court Law and its Elucidation, Petitioners for judicial review of a law against the 1945 Constitution 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 (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 as regulated in law;
- c. public or private legal entities; or
- d. state institutions;

Considering whereas therefore, in order for a party to qualify as a Petitioner in a judicial review against the 1945 Constitution, that party must explain:

1. the party's qualification in the petition, whether as an individual Indonesian citizen, a unit of customary law community, public or private legal entity, or a state institution;
2. the impairment of the party's constitutional rights and/or authorities due to the coming into effect of the law petitioned for judicial review;

Considering whereas the Court, as from the Decision Number 006/PUU-III/2005 and its subsequent decisions, has determined five requirements for the existence of impairment of constitutional rights and/or authorities as intended in Article 51 Paragraph (1) of the Constitutional Court Law, as follows:

- a. the Petitioner must have constitutional rights granted by the 1945 Constitution;
- b. the Petitioner believes that such constitutional rights have been impaired by the coming into effect of a law;
- c. the impairment of such constitutional rights and/or authorities 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 impairment of such constitutional rights and/or authorities with the law petitioned for review;
- e. if the petition is granted, it is expected that, the impairment of constitutional rights and/or authorities argued will not or does not occur any longer;

Considering whereas based on the submitted written evidences (Exhibits P-7, P-8, P-9, P-10, P-11, P-12, P-13a, P-13b, P-15, P-16a, P-16b, P-17a, P-18, P-21) the Petitioners can qualify as a private legal entities arguing that the coming into effect of Article 53 Paragraph (1) of the National Education System Law which reads, "*Formal education Organizers/Units established by the Government or the community shall be in the form of education legal entity*" has been deemed to have impaired the Petitioners' constitutional rights granted by the 1945 Constitution, namely:

- Article 27 Paragraph (1), "*All citizens shall have equal status before the law and government administration and shall be obligated to uphold such law and government administration, without exception*";
- Article 28A, "*Every person shall have the right to live and to maintain their life and livelihood*";
- Article 28C Paragraph (2), "*Every person shall have the right to promote themselves in striving for their rights collectively for building their society, nation, and state*";

- Article 28D Paragraph (1), *"Every person shall have the right to fair recognition, guarantee, protection and legal certainty as well as equal treatment before the law"*;
- Article 28G Paragraph (1), *"Every person shall have the right to protect themselves, their family, their honor, dignity and property under their control, and shall have the right to the feeling of security and protection against the threat of fear to do, or not to do something that constitutes a human right"*;
- Article 28I Paragraph (2), *"Every person shall have the right to be free from discriminatory treatment on any basis whatsoever and shall have the right to obtain protection against any such discriminatory treatment"*;

Considering whereas according to the Petitioners, Article 53 Paragraph (1) of the National Education System Law has denied and eliminated the existence of foundations and their role in participating in the advancement and development of education in Indonesia, which existence and role have been proven by history all this time. Such denial and elimination were caused by the provision that required the establishment of education legal entity, although they have already possessed a legal entity status. According to the Petitioners, their constitutional rights impairment has a specific (connected to education provisions) and potential nature which, pursuant to logical reasoning, will take place for sure and has a causal relationship with the coming into effect of Article 53 Paragraph (1) of the National Education System Law, and will never take place for sure if the petition is granted;

Considering whereas based on the foregoing matters, according to the Court, the Petitioners *prima facie* have the legal standing to file a petition for judicial review of Article 53 Paragraph (1) of the National Education System Law against the 1945 Constitution. However, due to the close connection between the impaired constitutional rights of the Petitioners and the principal issue of the petition, then the existence or non-existence of the constitutional rights impairment of the Petitioners as a result of the coming into effect of the *a quo* article will be considered simultaneously with the Principal Issue of the Petition, namely concerning the constitutionality of Article 53 Paragraph (1) of the National Education System Law;

III. Principal Issue of the Petition

Considering that in the Principal Issue of the Petition, the Petitioners have argued that Article 53 Paragraph (1) of the National Education System is contrary to the 1945 Constitution so that it must be declared as having no binding legal effect, principally based on the following reasons:

1. Article 53 Paragraph (1) of the National Education System Law is contrary to Article 27 Paragraph (1) of the 1945 Constitution, because the existence and role of foundations which have been based on Law Number 16 Year 2001 on Foundation as amended by the Law Number 28 Year 2004 that *nota bene* is an implementation of Article 27 Paragraph (1) of the 1945 Constitution, especially in their position and role in participating in the advancement and

development of education, have been hampered or even eliminated by the *a quo* article;

2. Article 53 Paragraph (1) of the National Education System Law is contrary to Article 28A of the 1945 Constitution, because according to the Petitioners, the Petitioners' right to live and to maintain their life and livelihood has directly or indirectly been destroyed by the *a quo* article;
3. Article 53 Paragraph (1) of the National Education System Law is contrary to Article 28C Paragraph 2) of the 1945 Constitution, because that article has arbitrarily revoked the Petitioners' right to participate in the development of the community, the nation and their country by providing education;
4. Article 53 Paragraph (1) of the National Education System Law is contrary to Article 28D Paragraph (1) of the 1945, because that article has caused unfair treatment and does not give legal certainty to the Petitioners as education providers;
5. Article 53 Paragraph (1) of the National Education System Law is contrary to Article 28G Paragraph (1) of the 1945 Constitution, because that article has violated the Petitioners' human rights to do something as intended by Article 28G Paragraph (1) of the 1945 Constitution;
6. Article 53 Paragraph (1) of the National Education System Law is contrary to Article 28I Paragraph (2) of the 1945 Constitution, because that article is

discriminatory by no longer allowing and slowly eliminating foundations as formal education providers;

Considering whereas to support their arguments, the Petitioners have presented written evidence (Exhibits P-1 through P-21) as well as witnesses and experts who have given verbal and written statements under oath, the complete version of which has been set forth in the description of the Principal Issue of the Petition, which basically has explained the following matters:

1. Harry Tjan Silalahi, S.H, an expert presented by the Petitioners, states that Article 53 Paragraph (1) of the National Education System Law will eliminate private entities' role in the form of established foundations which have properly provided education. It can be seen from the dissemination by the Government of the Draft Law on Education Legal Entity. Therefore, should the Draft Law become a law in the future, then it means that the Government with its idea is trying to eliminate historical right (*historische recht*) of the community who have provided private education all this time through legal entities such as foundations, *wakaf*, and associations which have done the adjustment upon the coming into effect of the Law on Foundations. In addition, politically, private parties who have fought to participate in the nation building of Indonesia have been eliminated all at once;
2. Prof. Dr. H. Sudijarto, M.A., an expert presented by the Petitioners is of the opinion that the basic problem of the quality of the national education that has

not yet increased and hence has not had a meaning yet in the development of the intellectual life of the nation and the national culture has been caused not by the fact that not all of the providers have possessed the education legal entity status as intended by Article 53 Paragraph (1) of the National Education System Law, but by the lack of willingness and ability of the Government and the community to fund the national education provision. Besides, the granting of full authority to Universities to manage their finance in a country with a corruption culture which has not yet vanished, will have a negative impact that the education managers will be busy making money by selling education services to those who are academically unqualified. The statement of Prof. Dr. H. Sudijarto, M.A conforms to the result of Drs. Richardus Djokopranoto's research in some countries which concludes that the increase in education quality has nothing to do with the legal entity status of the education units, but has been due to the flexibility to manage themselves, the increase in financial aid, and tax relief granted to the education units;

3. Milly Karmila Sareal, S.H., Notary and Land Deed Official, an expert presented by the Petitioners, states that apart from the constitutional right impairment suffered by the Petitioners by the coming into effect of Article 53 Paragraph (1) of the National Education System Law, the Petitioners also suffer factual damage because they have to pay fees for deeds of amendment of change of legal entity status and asset transfer. According to this expert, it is better to find a more beneficial way than to face more complex problems which are exhausting, costly and time-consuming;

4. Witnesses presented by the Petitioners, namely Dr. Ma'mun Hasanuddin, S.H., M.H., (Chairman of the *SARI Makassar* Foundation), Dr. Ir. Edi Noersasongko, S.E., (Head of a private university in Semarang), and Dr. Ir. Siswono Yudo Husodo (Chairman of Pancasila University Foundation) all state that there is no problem concerning the relationship between foundation and education institute/unit and that there is no constraint for the universities to cooperate with other institutions, both domestic and foreign;

Considering whereas the Government has presented verbal and written statements as completely described in the Principal Issue of the Petition, which basically have stated the following matters;

- a. Whereas from the legal standing point of view, the Petitioners do not have legal standing to file a petition for review of Article 53 Paragraph (1) of the National Education System Law, because 1) the impaired constitutional rights are not clearly specified; 2) there is a causal relationship between Article 53 Paragraph (1) of the National Education System Law and the existence of foundations which are thousands in numbers, because in fact the existence of foundations up to now is not affected by the coming into effect of the *a quo* article; 3) the petition for review is premature in nature, because the implementation of Article 53 Paragraph (1) of the National Education System Law still greatly depends on the law concerning education legal entity as mandated by Article 53 Paragraph (4) of the National Education System Law which until now has not yet existed;

- b. Whereas substantially, the provision of Article 53 Paragraph (1) of the National Education System Law has been based on the philosophical considerations in relation to the education system management and non-discriminatory nature, sociological considerations in relation to the fact that the existing higher education units other than those having State Owned Legal Entity status are not legal subjects, and the substantive consideration namely that various terminologies referred to in Article 53 Paragraph (1) of the National Education System Law have in fact not yet provided by the National Education System Law. Such terminologies will instead be left to the law on education legal entity that will be made by the legislators;
- c. Whereas there are four possibilities from the substantive aspect concerning education legal entity (hereinafter referred to as "*bhp*") as intended by Article 53 Paragraph (1) of the National Education System Law, namely:
- 1) One of them, in this case, the provider shall turn into a "*bhp*", while the education units shall continue to serve as implementing units of the "*bhp*";
 - 2) One of them, in this case, the education unit shall turn into a "*bhp*", while the provider (such as the foundation) shall remain in its former status;
 - 3) The provider together with the education unit shall turn into a "*bhp*";
 - 4) Each of the provider and the education unit shall turn into a "*bhp*";

- d. Whereas from the four possibilities as mentioned in item c, the foundations that wish to retain their former status must change their education units into "*bhp*";

Considering whereas to support its statements, the Government presented two experts, namely Prof. Dr. Arifin P. Soeria Atmadja, S.H., and Prof. Dr. Johannes Gunawan, S.H., LL.M., and two witnesses, namely Dr. Ir. Suharyadi (Head of Mercu Buana University) and Djoko Soemardijo, S.H. (Head of Narotama University) who have given statements under oath as completely described in the Principal Issue of the Petition which basically have stated the following matters:

1. Expert Prof. Dr. Arifin P. Soeria Atmadja, S.H., states that: "*bhp*" is a must, because the only way to promote the position of universities before the law in order to do best in enhancing faith and devoutness as well as good character in developing the intellectual life of the nation within a democratic environment is by turning universities into legal subjects and *mutatis mutandis* as legal entities. Therefore, Article 53 Paragraph (1) of the National Education System Law has given the appropriate solution by stipulating that the providers and/or the formal education units established by the Government or the community shall be in the form of education legal entities with a non-profit orientation, rather than mere profit as practiced by foundations in general nowadays;
2. Expert Prof. Dr. Johannes Gunawan, S.H., LL.M., states as follows:

- a. Whereas the National Education System Law does not define the meaning of the terminology and formulation of the *a quo* Article 53 Paragraph (1) of the *a quo* Law, namely regarding 1) who or what is meant by 'provider', 2) what is the purpose of utilizing the words "and/or", and 3) what is meant by 'education legal entity'. Accordingly in order to understand the meaning of Article 53 Paragraph (1) of the National Education System Law, it is necessary to use the law finding (*rechtsvinding*) method which consists of two groups, namely a) legal interpretation which consists of six methods of legal interpretation: grammatical, historical, systematic, authentic, sociological, and anticipatory; b) legal construction which consists of three kinds of legal construction, namely analogy, *argumentum a contrario*, and legal refinement (*rechtsverfijning*);
- b. Whereas based on the systematic interpretation, by referring to the Government Regulation Number 60 Year 1999 that remains in effect up to now, provider shall mean a foundation or entity which has a social nature and the government;
- c. Whereas by utilizing the grammatical interpretation, the words "and/or", the word "and" shall mean jointly or both, while the word "or" shall mean either one. Therefore, there are four possibilities, namely 1) the provider shall become a *bhp*, the education unit shall become a *bhp* implementing unit; 2) the provider shall remain as it is, the education

unit shall become *bhp*; 3) both the education unit and the provider shall collectively become a *bhp*; 4) each of the provider and the education unit shall become a *bhp*;

- d. Whereas education legal entity shall mean legal subject created by law that can possess and exercise rights and carry out obligations as a human being, and hence it shall have independency. Therefore, "*bhp*" is a proper organization for the autonomy of universities, because the one that possesses the autonomy is the education unit, not the provider;
 - e. Whereas if the Petitioners (foundations) wish to retain their existing status, then their education unit shall turn into "*bhp*" (the second possibility);
3. Witness Dr. Ir. Suharyadi, M.S and Djoko Soemadijo, S.H., basically tell their experiences as university rectors who have often faced difficulties in maintaining cooperation with various institutions both domestic and foreign, because universities as education units are not legal entities;

Considering whereas the People's Legislative Assembly (*DPR*) has presented verbal and written statements, as completely described in the Principal Issue of the Petition, principally stating the following matters:

1. The state is in fact deeply indebted to community's education foundations which are very helpful in developing the intellectual life of the nation, but the

foundation legal entity has been misused by non-education community by commercialization of foundations. Meanwhile the reform in foundation regulation through Law Number 16 Year 2001 in conjunction with the Law Number 28 Year 2004 has negative impact on education foundations. Therefore, the education legal entity (*bhp*) with non-profit orientation is expected to become a solution for education unit under the foundation. Commission X of the People's Legislative Assembly of the Republic of Indonesia expects that the law which will regulate *bhp* shall consider existing realities and shall not be very detailed. Various "BHP" Draft Laws developed by the Government and subsequently circulated within the community have become public concern especially among education provider foundations;

2. Whereas Article 53 Paragraph (1) of the National Education System Law is a provision that will be set forth in a separate law, so that the petition for review for declaring that Article 53 Paragraph (1) of the National Education System Law contrary to the 1945 Constitution is superfluous, because the contrasted two subjects are different in their existence, one of them is concrete in nature (the 1945 Constitution) while the other one remains abstract (imaginary). It is also improper to contrast the National Education System Law with Law Number 10 Year 2004, because when the National Education System Law was enacted (Year 2003) Law Number 10 Year 2004 had not existed yet;
3. The opinion that Article 53 Paragraph (1) of the National Education System Law has caused discrimination against foundations is improper, because until

now the People's Legislative Assembly of the Republic of Indonesia has not yet discussed the "BHP Draft Law", moreover, there has not been any manuscript of "BHP Draft Law" being submitted to the People's Legislative Assembly yet, so that the terminology of education legal entity as a separate legal entity has not been final and is implicit (the terminology of education legal entity is written in lower case). In fact in the Hearing Session (*RDP* between Commission X of the People's Legislative Assembly of the Republic of Indonesia and the Ministry of Law and Human Rights, there are some inputs among other things are:

- a. The "*bhp*" law to be established based on Article 53 of the National Education System Law shall not be in contradiction with the laws on other legal entities which engage in education activities and have non-profit orientation, such as foundations or association legal entity;
- b. The "*bhp*" that has non-profit orientation shall not become a burden to the community, instead such non-profit *bhp* must become a solution in increasing the education service quality for education participants;
- c. The "*bhp*" law as intended by Article 53 of the National Education System Law differs in its basic principle with Limited Liability Companies and Cooperatives;
- d. With regard to the existing legal entities which have thus far been the legal umbrella for education units during all this time, such as

foundations or associations, they are greatly dependent on the transitional provision which must be formulated to the greatest possible extent. The legislators concerning education legal entity (the Government with the People's Legislative Assembly) must carefully consider emerging pros and cons regarding "bhp" and shall view them as valuable inputs;

Considering whereas the Petitioners and the Government have presented their written conclusions as completely described in the Principal Issue of the Petition, which basically have stated that they are consistent with their position.

The Court's Opinion

Considering whereas in the *a quo* case, the legal issue is the authority of the legislators to regulate national education. Because the petition is a petition for judicial review against the 1945 Constitution, there are two issues to be reviewed, namely:

- 1) Whether the legislators have the authority to regulate national education which has been based on the provisions of the 1945 Constitution and to what extent such authority is granted. In addition to the authority of the legislators, the issue is whether there is a state duty to be carried out in the field of national education;

- 2) Whether the 1945 Constitution also grants specific rights in relation to education to the citizens so that the legislators must respect such rights, and even protect them. Should the legislator be forced to reduce or to obstruct the citizen's rights, the issue is whether there is a *compelling rationale* needed for such reduction or obstruction toward the citizens' rights.

Considering whereas the legal bases for regulating the national education by the legislators are set forth in:

- 1) The Preamble to the 1945 Constitution 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 motherland, and in order to promote general welfare, to develop the intellectual life of the nation, and to partake in implementing world order... (and so on) "*
- 2) Article 31 Paragraph (2) of the 1945 Constitution, "*Every citizen shall be obligated to follow basic education and the government shall be obligated to finance it*". Article 31 Paragraph (3) of the 1945 Constitution, "*The government shall make endeavors for and shall organize a national educational system that enhances faith and devoutness as well as noble morals in the context of improving the way of thinking in the life of the nation, and it shall be provided for in law*".

- 3) Article 31 Paragraph (4) of the 1945 Constitution, "*The state shall prioritize 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 the national education*".
- 4) Article 31 Paragraph (5) of the 1945 Constitution, "*The government shall promote science and technology by highly upholding religious values and national unity for the progress of civilization as well as the welfare of humanity*".

Considering whereas in addition to the foregoing provisions, the 1945 Constitution also mentions the citizens' rights in the field of education, which can be found in the following provisions:

- 1) Article 28C paragraph (1), "*Every person shall have the right to develop themselves 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 human beings*";
- 2) Article 28C paragraph (2), "*Every person shall have the right to promote themselves in striving for their rights collectively for building their society, nation, and state*";
- 3) Article 28E paragraph (1), "*Every person shall be free to embrace a religion and to worship in accordance with their 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 “

4) Article 31 paragraph (1), “*Every citizen shall be entitled to obtain education*”;

Considering whereas by the existence of the two groups of provisions in the 1945 Constitution, then the national education regulations which are set forth in the laws must be based on and with due regard to such provisions. It is not sufficient for the regulators to make law merely based on their authorities; they must take into consideration the rights of the citizens in regulating the substance of the law. Although the 1945 Constitution provides the possibility to limit the rights of the citizens, such limitation must have a *compelling rationale* as stated in Article 28J Paragraph (2) of the 1945 Constitution;

Considering whereas the National Education System Law has relied on the aforementioned provisions. The National Education System Law must first define what is meant by “shall make endeavors for and organize a national education system “, as intended by Article 31 Paragraph (3) of the 1945 Constitution, because the National Education System Law has been an implementation of this article. Prior to providing a definition of what is intended by an education system, it is important to first give a definition of “national” in this context. A national education system may have a meaning of a system that comprises of existing education within the whole territory of the state. By taking into account the vast territory and the fact that education exists in rural regions as

well, either as an implementation of the decentralization or de-concentration principles, then it becomes very important to organize them into one national education system. In addition to being related to territorial element, the meaning of national shall also be linked to nationality, namely an education system which includes the character and individuality of the nation of Indonesia which is different from other nation in relation to the education substance being linked to the national education objectives;

Considering whereas the meaning of “national” also relates to the existence of the nation’s potentials which have proven to have significant role in developing the nation’s education both at the present time and in the future, through various methods in accordance with the capability and situation. The nation’s potentials to develop the education have constitutional basis namely as a vehicle for actualization of freedom of association [Article 28E Paragraph (3)], freedom to promote themselves in striving for their rights collectively for building their society, nation, and state [Article 28C Paragraph (2)], and freedom to choose education and teaching [Article 28E Paragraph (1)]. It is necessary to develop such potentials because in fact the state has very limited source of funds and energy to organize the duty to develop the intellectual life of the nation, so that the state must open more space for such potentials;

Considering whereas the methods and types chosen by the citizens in striving for their rights collectively for building their society and nation including to promote themselves both individually and collectively in the field of education

constitute a national potential asset which may result in certain weaknesses. However, due to such weaknesses, there must be a sufficient *compelling rationale*, if the state thereafter unifies the methods of the nation in striving for their rights. In fact, unification may result in greater risks because if things happen in the future, then the whole national education organization system will be affected;

Considering whereas nevertheless, the aforementioned matters are clearly the elements which need to be protected in the law that implements Article 31 Paragraph (3) of the 1945 Constitution, because they also involve the rights of the citizens guaranteed by the 1945 Constitution in addition to the state which can certainly make the regulation;

Considering whereas Article 53 Paragraph (1) of the National Education System Law, the constitutionality of which is disputed by the Petitioners, reads that, "*The provider and/or the formal education unit established by the Government or the community shall be in the form of education legal entity*", meanwhile in Article 53 Paragraph (4) of the National Education System Law stipulates that, "*The provisions on the education legal entity shall be provided by law*";

Considering whereas the law as intended by Article 53 Paragraph (1) in conjunction with Article 53 Paragraph (4) of the National Education System Law has not been made yet, even according to the People's Legislative Assembly, there has not been a "Draft Law on Education Legal Entity" being

submitted to it. However, things explicitly mentioned in the 1945 Constitution shall become the basis to form such law. Therefore, the Draft Law on the Education Legal Entity as prepared and disseminated by the Government, and which has become the main point of the Government's statement supported by experts presented by the Government, and moreover which has become one of the evidence in this case (Exhibit P-11) which in the statement of the People's Legislative Assembly is considered to have become a public concern especially in the education provider foundations society, must be reconsidered carefully by the Government;

Considering whereas the law on the education legal entity intended to implement Article 53 Paragraph (1) of the National Education System has not existed, and hence the Petitioners' constitutional rights are not impaired by the coming into effect of the Article 53 Paragraph (1) of the National Education System Law. This is due to the fact that Article 53 Paragraph (1) of the National Education System Law remains a directive that the provider and/or education unit shall be in the form of an education legal entity with the functions and principles as stipulated in Article 53 Paragraph (2) and Paragraph (3) of the National Education System Law, so that it has not contained any regulation substance on the education legal entity disputed by the Petitioners;

Considering whereas nevertheless, in order for the law concerning education legal entity as mandated by Article 53 Paragraph (4) of the National

Education System Law is in accordance with the 1945 Constitution, it is necessary to take the following matters into account:

1. The aspect of the state's function in developing the intellectual life of the nation (Fourth Paragraph of the Preamble), the obligation of the state and the government in the field of education as stipulated in Article 31 Paragraph (2), Paragraph (3), Paragraph (4), and Paragraph (5), and also the rights and obligations of citizens in the field of education as stipulated in Article 31 Paragraph (1) and Paragraph (2), Article 28C Paragraph (1) and Paragraph (2), and also Article 28 Paragraph (1) of the 1945 Constitution;
2. The philosophical aspect namely concerning the vision to build a national education system that have quality and meaning for the life of the nation, the sociological aspect namely the reality concerning the existing provision of education including those organized by foundations, associations, etc, and also the juridical aspect namely absence of conflict with other regulations related to legal entities;
3. The regulatory aspect concerning education legal entity in the aforementioned law must be an implementation of the state's responsibility and shall not be intended to reduce or to avoid the state's constitutional obligations in the field of education, so that it shall not become a burden to the community and/or education participants;

4. The aspect of the community's aspiration must be properly considered in the form of the law on education legal entity, so that it shall not cause confusion and new problems in the field of education in Indonesia.

Considering whereas based on the foregoing matters, although in the description of the legal standing the Constitutional Court has declared that the Petitioners *prima facie* have legal standing, but because Article 53 Paragraph (1) of the National education System Law is not proven to have impaired the Petitioners' constitutional rights, the Petitioners do not fulfill the constitutional rights impairment requirements as stipulated in Article 51 Paragraph (1) of the Constitutional Court Law, so that it must be declared that the Petitioners' petition cannot be accepted (*niet ontvankelijk verklaard*);

In view of Article 56 Paragraph (1) of the Law of the Republic of Indonesia Number 24 Year 2003 on the Constitutional Court (State Gazette of the Republic of Indonesia Year 2003 Number 98, Supplement to the State Gazette of the Republic of Indonesia Number 4316).

PASSING THE DECISION

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

Hence the decision was made in the Consultative Meeting of 9 (nine) Constitutional Court Justices on Wednesday, February 21, 2007 and was pronounced in the Plenary Session of the Constitutional Court open for public on

this day, Thursday, February 22, 2007 by us, Jimly Asshiddiqie as the Chairperson and concurrent Member, H.M. Laica Marzuki, H.A.S. Natabaya, H. Abdul Mukthie Fadjar, H. Achmad Roestandi, Harjono, I Dewa Gede Palguna, Maruarar Siahaan, and Soedarsono, respectively as Members, assisted by Ida Ria Tambunan as Substitute Registrar and in the presence of the Petitioners/their attorneys-in-fact, the Government or its representative, and the People's Legislative Assembly or its representative.

CHIEF JUSTICE,

SIGNED.

**Jimly Asshiddiqie
JUSTICES**

**SIGNED.
H.M. Laica Marzuki**

**SIGNED.
H.A.S. Natabaya**

**SIGNED.
H. Abdul Mukthie Fadjar**

**SIGNED.
H. Achmad Roestandi**

**SIGNED.
Harjono**

**SIGNED.
I Dewa Gede Palguna**

**SIGNED.
Maruarar Siahaan**

**SIGNED.
Soedarsono**

Substitute Registrar,

**SIGNED.
Ida Ria Tambunan**

