

DECISION

Case Number: 070/PUU-II/2004

FOR THE SAKE OF JUSTICE UNDER THE ONE ALMIGHTY GOD

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA

Examining, hearing, and deciding upon constitutional cases at the first and final level, has passed a decision in a case of petition for judicial review of the Law of the Republic of Indonesia Number 26 Year 2004 (hereinafter referred to as Law Number 26 Year 2004) regarding Establishment of West Sulawesi Province against the 1945 Constitution of the State of the Republic of Indonesia (hereinafter referred to as the 1945 Constitution) filed by:

HM. AMIN SYAM, Governor of the South Sulawesi Province, in this matter represented by Dr. H. SUKARNO ABURERA, SH. 2. MAS BAKAR, SH. MH.3. Hj. ROSDA MASRICH, SH. MSi. 4. M. YUSRAN, SH. MH. 5. M. ABDI TAUFAN HUSNI, SH, all of whom are domiciled at Jalan Urip Sumoharjo No. 269 Makassar (Office of the Governor of South Sulawesi Province), under a Special Power of Attorney dated December 10, 2004, Number 180/5317/SET, hereinafter referred to as **Petitioner**;

Having read the petition of the Petitioner;

Having heard the statement of the Petitioner;

Having heard the oral statement and having read the written statement of the People's Legislative Assembly, the Government, and the Relevant Parties;

Having examined the evidence;

Having heard the statement of witnesses and experts;

LEGAL CONSIDERATIONS

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

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

1. Whether the Court has the authority to examine, hear and decide upon the petition for the review of Law Number 26 Year 2004 regarding Establishment of the West Sulawesi Province (hereinafter referred to as Law Number 26 Year 2004) against the 1945 Constitution of the State of the Republic of Indonesia (hereinafter referred to as the 1945 Constitution).
2. Whether the *a quo* Petitioner has the legal standing to file a petition for the review of Law Number 26 Year 2004 against the 1945 Constitution.

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

1. AUTHORITIES OF THE COURT

Considering whereas in accordance with the provisions of Article 24C paragraph (1) of the 1945 Constitution as later 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 a review of laws against the 1945 Constitution. Furthermore, under the provisions of Article 50 of the Constitutional Court Law, and its Elucidation, laws which can be petitioned for review are laws enacted following the First Amendment to the 1945 Constitution namely on October 19, 1999;

Considering whereas Law Number 26 Year 2004 was enacted on October 5, 2004 (State Gazette Year 2004 Number 105, Supplement to the State Gazette Number 44222), therefore notwithstanding any dissenting opinion among the Constitutional Court Justices concerning Article 50 of the Constitutional Court Law, the *a quo* petition has met the requirements stipulated by Article 24C Paragraph (1) of the 1945 Constitution and Article 10 Paragraph (1) Sub-Paragraph a of the Constitutional Court Law. Based on the foregoing, the Court is authorized 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 has stipulated two criteria that must be fulfilled for a Petitioner to have the legal standing, namely:

- a. The Petitioner's status whether as an individual Indonesian citizen, a customary law community unit so long 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 provided for in law, a public or private legal entity, or a state institution;
- b. The assumption that the Petitioner's constitutional right and/or authority has been impaired by the coming into effect a law;

Considering whereas the Petitioner argues that the Province of South Sulawesi is a public legal entity established by law, which carries rights and obligations, has assets, and may sue and be sued before the Court. The Petitioner also argues that as the Governor/Head of Region, pursuant to Article 24 Paragraph (1) and Article 25 Sub-Article f of Law Number 32 Year 2004 regarding Regional Government, has the right to represent his region in and outside the court and may appoint an attorney to represent him;

Considering whereas the Petitioner deems that his constitutional right and/or authority as guaranteed by Article 18 Paragraph (2), Paragraph (5), Paragraph (6) and Paragraph (7) of the 1945 Constitution, as elaborated in Law Number 32 Year 2004 and Law Number 22 Year 1999, becomes lost or

diminished due to the application of Article 15 Paragraphs (7) and (9) of Law Number 26 Year 2004. The Court is of the opinion that the Petitioner's assumption as mentioned above has sufficient grounds, therefore the Petitioner is deemed to have the legal standing;

Considering whereas due to the fact that the Court has the authority and the Petitioner has the legal standing, the Court shall further consider the Petitioner's arguments in the principal issue of the case;

3. PRINCIPAL ISSUE OF THE CASE

Considering whereas the Petitioner argues that Article 15 Paragraphs (7) and (9) of Law Number 26 Year 2004 is contradictory to Article 18 Paragraphs (2), (5), (6) and (7), Article 18A Paragraph (2), Article 27, and Article 22A of the 1945 Constitution.

Article 16 Paragraph (7) of Law Number 26 Year 2004 reads in full as follows,

“The Province of South Sulawesi shall provide fund assistance to the Province of West Sulawesi for two (2) consecutive years since the enactment of this law in the minimum amount of eight billion rupiah (Rp 8,000,000,000.-) for every budget year”.

Article 15 Paragraph (9) of Law Number 26 Year 2004 reads in full as follows,

“The Government shall impose a sanction in the form of postponement of the distribution of balancing fund to the Regional Treasury of the Province of South Sulawesi if the Government of the Province of South Sulawesi fails to execute

the provisions of Paragraph (7) and Paragraph (9)”.

According to the Petitioner the provision of Article 15 Paragraph (7) is contradictory to Article 18 Paragraphs (2), (5), (6) and (7) of the 1945 Constitution, the fundamental principle of which reflects a freedom of Regional Governments to manage and organize their own region, including determining their own Regional Revenues and Expenditures Budget. With regard to the argument presented by the Petitioner, the Court is of the opinion that a region that has been given the broadest possible autonomy remains a part of the Unitary State of the Republic of Indonesia, and therefore shall continue to abide by the provisions and limitations stipulated by the Central Government, as provided for in Article 18 Paragraph (5) of the 1945 Constitution which reads, *“The regional governments shall exercise autonomy to the broadest possible extent with the exception of governmental affairs determined by law as affairs of the Central Government”*;

Article 15 Paragraphs (7) and (9) of Law Number 26 Year 2004 constitute one of the forms of limitation by the Central Government under Article 18 Paragraph (5) of the 1945 Constitution. The Court agrees with the Petitioner that the Regional Government has the right to stipulate Regional Regulations including to stipulate the Regional Revenues and Expenditures Budget to exercise autonomy to the broadest possible extent; however, the Regional Regulations are not independent from and must not contradict any hierarchically superior legislation. Therefore, the imposition of obligations as set out in Article

15 Paragraph (7) of Law Number 26 Year 2004 as set out with a Regional Regulation does not contradict the constitution;

Considering whereas the Petitioner argues that Article 15 paragraphs (7) and (9) of Law Number 26 Year 2004 are contradictory to the principle of equal justice before the law as contained in Article 27 of the 1945 Constitution, since compared to the laws regarding the establishment of other provinces such as the establishment of the Province of Gorontalo (Law Number 38 Year 2000), the Province of Riau Islands (Law Number 13 Year 2000), the Province of Banten (Law Number 23 Year 2000), and the Province of Bangka Belitung Islands (Law Number 27 Year 2000), it is evident that the substance set out in Article 15 Paragraphs (7) and (9) of Law Number 26 Year 2004 is not contained in the laws regarding the establishment of the other provinces. This, according to the Petitioner, indicates that the legislators have acted in an unfair and discriminatory manner, by burdening with an enormous fund assistance that has to be provided to the newly created province compared to the mandatory fund assistance which must be distributed by the other principal provinces;

Considering whereas with regard to the Petition of Petitioner, the Court is of the opinion that justice does not mean that all legal subjects are treated in the same manner regardless the circumstances of each party; In fact, justice should apply the principle of proportionality, which means treating similar things the same way and treating different things differently. The circumstances of each principal province and newly created province are not always the same,

therefore it is appropriate not to treat them in the same way either. Discrimination can only be said to exist if there is a different treatment with no reasonable ground for creating the difference, as formulated in Black's Law Dictionary, 2004, pg. 500, "*differential treatment; ... a failure to treat all persons equally, when no reasonable distinction can't be found between those favored and those not favored*". In fact, uniform treatment of inherently different things will cause injustice. Explored even further, the imposition of obligations to the other provinces is not precisely identical. For example, the obligation of the Government of the Province of North Sulawesi to fund the Province of Gorontalo is determined to last for three (3) consecutive years, while a shorter period has been determined for the other principal provinces;

Considering whereas the obligation of the principal province to assist the newly created province for a certain period as occurred in the *a quo* petition is a generally and proportionally applicable matter, as a logical consequence of the approval and proposal of the principal province to divide the province. The fund required to fund the development and to perform governance in the newly created that originated from the people in the existing region being split will be raised and managed by the principal province for a certain period of time until the newly created province manages its local revenue sources independently. Based on the data revealed during the hearing, the revenues from tax and non-tax income plus the general allocated fund (DAU) and special allocated fund (DAK) for the newly created province which have been received by the principal province (the Province of South Sulawesi) can be said to be

sufficiently proportional to the obligations imposed to the Province of South Sulawesi as set forth in Article 15 Paragraph (7) of the *a quo* law. moreover, in the spirit of the Unitary State of the Republic of Indonesia based on Pancasila, it is appropriate for all local governments to feel bound by a sense of commonality to assist one another. It is not appropriate to consider the different treatment as mentioned above to be a discrimination as per the definition contained in Article 27 of the 1945 Constitution as argued by the Petitioner. Furthermore, the principle of equality before the law set out in Chapter X regarding Citizens and Residents, Article 27 Paragraph (1) of the 1945 Constitution explicitly regulates the matter of the Indonesian citizen, not other legal subjects, such as a Local Government. Therefore the Petitioner's assumption that Article 15 Paragraphs (7) and (9) of the *a quo* law contains an element of discrimination and is contradictory to Article 27 paragraph (1) of the 1945 Constitution has no sufficient ground;

Considering whereas based on the statement of from the Government in the hearing, it is evident that the legislators did intentionally specify a nominal amount of eight billion rupiah (Rp 8,000,000,000.00) in Article 15 Paragraph (7) and stipulate a sanction in Article 15 Paragraph (9) if the Province of South Sulawesi fails to fulfill its obligation as set out in Article 15 Paragraph (7), and Paragraph (8). The specification of the nominal amount and stipulation of the sanction were based on existing experiences thus far in which the principal province is generally negligent or less serious in fulfilling its obligation, due to the absence of a set nominal amount and any express sanction

which may be imposed on any principal province that has neglected its obligation. The nominal amount of eight billion rupiah (Rp 8,000,000,000.00) imposed on the Province of South Sulawesi as the principal province has been considered in a careful and thorough manner by the legislators based on the economic condition of the Province of South Sulawesi, so that the assistance may facilitate the formation of government instruments and governance administration in the Province of West Sulawesi on the one hand, without disrupting the smooth governance administration in the Province of South Sulawesi on the other hand;

Considering whereas the sanction specified in Article 15 Paragraph (9) is in actuality a mere assertion of the inherent power possessed by the Central Government and a reiteration of the provisions contained in previous legislations, such as Article 14 Paragraph (3) of Government Regulation Number 107 Year 2000 regarding Regional Loans, Article 7 of Government Regulation Number 11 Year 2001 regarding Regional Financial Information. Furthermore, the provisions are also set forth in Article 220 paragraph (1) of Law Number 32 Year 2004 regarding Regional Government, and Article 102 Paragraph (5) of Law Number 33 Year 2004 regarding Financial Balance between the Central Government and Local Government. Therefore, whether or not an administrative sanction as mentioned in Article 15 Paragraph (9) of the *a quo* law is specified, such authority remains with the Central Government as an inherent power in its possession, to any principal province that has neglected its obligation. Therefore, the provision in Article 15 Paragraph (9) is not evidently discriminatory, and

therefore does not contravene the 1945 Constitution;

Considering whereas the Petitioner argues that Article 15 Paragraphs (7) and (9) contravene Article 22A of the 1945 Constitution, because the substance does not contain among other things justice, equality before the law and in the government and balance, synchronicity, and harmony as set forth in Law Number 10 Year 2004 regarding the Formulation of Laws and Regulations. In the previous consideration, the Court has explained that Article 15 Paragraphs (7) and (9) have in fact taken into account and contained the elements of justice, equality before the law and in the government and balance, synchronicity, and harmony, in accordance with the circumstances of the respective region. Therefore, Article 15 Paragraphs (7) and (9) of the *a quo* law is already in line with and does not contravene the 1945 Constitution;

Considering whereas that based on the above considerations, the Court is of the opinion that the argument presented by the Petitioner has no sufficient grounds, and therefore the Petition of Petitioner cannot be granted;

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 in its entirety;

With respect to the above Court Decision, there was one (1) Constitutional

Court Justice who expressed a Dissenting Opinion as follows:

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

1. The Province of South Sulawesi as a public legal entity has the right to receive equal and fair treatment as other provinces assigned to act as the principal province for a newly created province, as guaranteed by the constitution on grounds of Article 27 Paragraph (1) of the 1945 Constitution of the State of the Republic of Indonesia. When Article 27 paragraph (1) of the 1945 Constitution of the State of the Republic of Indonesia stipulates that “Every citizen shall have equal position standing before the law and government...” then the phrase of the article of the constitution in question should be viewed to have covered its enforcement on legal subjects having the status of Indonesian public legal entity. The constitutional article forbids discriminatory treatment against any legal subject in law and government;

Article 15 Paragraphs (7) and (9) of Law Number 26 Year 2004 regarding Establishment of the Province of West Sulawesi which burdens the Province of South Sulawesi (Petitioner) as the principal province in order to impose the provision of fund assistance to the Province of West Sulawesi for two (2) consecutive years in the minimum amount of eight billion rupiah (Rp 8,000,000,000.00) for every budget year accompanied by a sanction in the form of deferred distribution of balancing fund to the Regional treasury of the Province of South Sulawesi if the Government of South Sulawesi (Petitioner) fails to implement it, in essence constitutes a discriminatory treatment when the other

principal provinces turn out not to have been imposed with similar obligation and sanction in relation to the division of the provinces in their respective regions, such as in the establishment of the Province of Banten in the region of the principal province, West Java (Law Number 22 Year 2000) the establishment of the Province of Bangka Belitung Islands in the Region of the Province of South Sumatra (Law Number 27 Year 2000), the establishment of the Province of Gorontalo in the region of the Province of North Sulawesi (Law Number 38 Year 2000) and the establishment of the Province of Riau Islands in the region of the Province of Riau (Law Number 2 Year 2002);

Whereas the Central Government is of the opinion that the imposition of the obligation and sanction, as set out in Article 15 Paragraphs (7) and (9) of Law Number 26 Year 2004, is enforced on the Petitioner since the other provinces provide no fund assistance in full according to the needs of the newly created province and due to the absence of any sanction for it, a generally binding law should be enforced in the *een algemene wet voorschrift* sense, rather than treating the Petitioner in a discriminatory and unfair manner from other principal provinces. *Discrimination happens when someone is treated worse ('less favourably' in legal terms) than another person in the same situation. (Community Legal Service, London, June 2001).* This shall certainly apply to every legal person as well;

Article 15 Paragraphs (7) and (9) of Law Number 26 Year 2004 regarding Establishment of West Sulawesi Province clearly contravenes Article 27 Paragraph (1) of the 1945 Constitution of the State of the Republic of Indonesia;

2. In that regard, Article 15 Paragraphs (7) and (9) of Law Number 26 Year 2004 regarding Establishment of West Sulawesi Province which imposes the Province of South Sulawesi (Petitioner) as the principal province with obligatory provision of fund assistance to the Province of West Sulawesi for two (2) consecutive years in the minimum amount of eight billion rupiah (Rp 8,000,000,000.00) for every budget year accompanied by a sanction in the form of deferred distribution of balancing fund to the local treasury of the Province of South Sulawesi in the event of failure to implement it, essentially causes the Central Government to have acted in an unfair and unharmonious manner, with regard to the financial relationship with a local government, as guaranteed by the constitution, pursuant to Article 18A Paragraph (2) of the 1945 Constitution of the State of the Republic of Indonesia which emphasizes that the financial relationship between the central government and local governments shall be carried out in a just and harmonious manner, while the other principal provinces are not imposed with similar funding obligations or sanctions in relation to the division of the provinces in their respective regions. Article 15 Paragraphs (7) and (9) of Law Number 26 Year 2004 regarding Establishment of West Sulawesi Province is also clearly contradictory to Article 18A Paragraph (2) of the 1945 Constitution of the State of the Republic of Indonesia. Therefore, the Court should have granted the Petition of the Petitioner;

Hence the decision was made in the Plenary Consultative Meeting of nine

(9) Constitutional Court Justices on Monday, on **April 11, 2005** and was pronounced in a Plenary Session of the Constitutional Court open for the public on **Tuesday, April 12, 2005**, by us: Prof. Dr. Jimly Asshiddiqie, S.H., as the Chairman and concurrent Member, accompanied by: Prof. Dr. H.M. Laica Marzuki, S.H., Prof. H.A.S. Natabaya, S.H., LL.M, Dr. Harjono, S.H., MCL., Prof. H.A. Mukthie Fadjar, S.H., MS., Maruarar Siahaan, S.H., Soedarsono, S.H., H. Achmad Roestandi, S.H., and I Dewa Gede Palguna, S.H. MH, respectively as Members and assisted by Rustiani, S.H. MH, as Substitute Registrar, and in the presence of the Petitioner, the Government, the People's Legislative Assembly of the Republic of Indonesia and the Relevant Parties.

CHIEF JUSTICE,

Prof. Dr. Jimly Asshiddiqie, S.H.

JUSTICES,

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

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

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

Dr. Harjono, S.H., MCL.

Maruarar Siahaan, S.H.

Soedarsono, S.H.

H. Achmad Roestandi, S.H.

I Dewa Gede Palguna, S.H. MH.

SUBSTITUTE REGISTRAR,

Rustiani, S.H.MH.