D E C I S I O N

Number 23/PUU-V/2007

FOR THE SAKE OF JUSTICE UNDER THE ONE ALMIGHTY GOD

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA

[1.1] Examining, hearing and deciding upon constitutional cases at the first and final level, has passed a Decision in the case of Petition for Judicial Review of Law Number 5 Year 2004 regarding Amendment to Law Number 14 Year 1985 regarding the Supreme Court against the 1945 Constitution of the State of the Republic of Indonesia, filed by:

[1.2] **HENDRIANSYAH**, Director of CV. Sungai Bendera Jaya, Place/Date of Birth: Tepian Langsat Village, March 3, 1965, Religion: Islam, Nationality: Indonesian, Address: Sumber Makmur Neighborhood Unit 09 Neighborhood Ward III, Sepaso Barat Sub-District, Bengalon District, East Kutai Regency;

Based on a Special Power of Attorney Number 88/AD-P/TOS/VII/2007 dated August 4, 2007 having authorized Tumbur Ompu Sunggu, S.H., M.Hum.; Kasmawati, S.H.; and Dicky

Juniawan, S.H.; respectively as Advocates/Lawyers with their office at the Office for Advocacy and Legal Assistance of Tumbur Ompu Sunggu, S.H., M.Hum & Associates, domiciled at Jalan Pangeran Antasari Neighborhood Unit 1 Number 34 Samarinda, East Kalimantan, acting collectively and individually;

Hereinafter referred to as -- **THE PETITIONER**;

[1.3] Having read the petition of the Petitioner;

Having heard the statement of the Petitioner;

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

Having heard and read the written statement of the Government;

Having heard and read the written statement of the expert presented by the Petitioner;

Having examined the evidence presented by the Petitioner;

Having read the conclusion opinion of the Petitioner;

3. LEGAL CONSIDERATIONS

[3.1] Considering whereas the purpose and objective of the *a quo* petition are to review the constitutionality of Article 45A Paragraph (2) Sub-Paragraph c of Law Number 5 Year 2004 regarding Amendment to Law Number 14 Year 1985 regarding the Supreme Court (State Gazette of the Republic of Indonesia Year 2004 Number 9, Supplement to the State Gazette of the Republic of Indonesia Number 4359, hereinafter referred to as the Supreme Court Law) against the 1945 Constitution of the State of the Republic of Indonesia (hereinafter referred to as the 1945 Constitution);

[3.2] Considering whereas prior to further considering the substance of the *a quo* petition, the Constitutional Court (hereinafter referred to as the Court) shall first take the following matters into account:

1. Whether the Court has the authority to examine, hear, and decide upon the *a quo* petition;

2. Whether the Petitioner has the legal standing to qualify as a Petitioner before the Court in the *a quo* petition;

AUTHORITY OF THE COURT

[3.3] Considering whereas based on the provision of Article 24C Paragraph (1) of the 1945 Constitution, one of the authorities of the Court is to

hear at the first and final level, the decision of which shall be final, to review laws against the Constitution;

[3.4] Considering whereas since the Petitioner's petition is concerned with the judicial review of the Supreme Court Law against the 1945 Constitution, the Court therefore declares that it has the authority to examine, hear, and decide upon the *a quo* decision*;*

LEGAL STANDING OF THE PETITIONER

[3.5] Considering whereas based on the provision of Article 51 Paragraph (1) of Law Number 24 Year 2003 regarding the Constitutional Court (hereinafter referred to as the Constitutional Court Law), parties qualified as Petitioners in a judicial review of a law against 1945 Constitution shall be the parties that deem that their constitutional rights and/or authority have been impaired by the coming into effect of a law, namely: a) individual Indonesian citizens, b) customary law community units insofar as they are still in existence and in line with the development of the communities 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. Therefore, in order for a person or a party to be accepted as having the legal standing as a Petitioner in a petition for judicial review of a law against the 1945 Constitution, the person or the party must first:

a. explain his/her qualification whether as individual Indonesian citizen, customary law community unit, legal entity, or state institution;

b. explain the impairment of his/her constitutional rights and/or authority, in the qualification as intended in Sub-Paragraph a, as a result of the coming into effect of the law petitioned for review.

[3.6] Considering, meanwhile, following its Decision Number 006/PUU-III/2005 and its subsequent decisions, the Court has declared its stance that the impairment of the aforementioned constitutional rights and/or authority must fulfill five requirements, namely that:

a. the Petitioner must have constitutional rights and/or authority granted by the 1945 Constitution;

b. the Petitioner's constitutional rights and/or authority have been impaired by the coming into effect of the law petitioned for review;

c the impairment of such constitutional rights and/or authority must be specific and actual or at least potential in nature which, pursuant to logical reasoning, will take place for sure;

d. the existence of a causal relationship (*causal verband*) between the impairment of rights and/or constitutional authority and the coming into effect of the law petitioned for review;

e. if the petition is granted, it is expected that such impairment of constitutional rights and/or authority will not or does not occur any longer;

[3.7] Considering whereas the Petitioner has explained his qualification as an individual Indonesian citizen as mentioned in his Resident Identification Card Number 09.2001/2919/9733/2007 (Exhibit P-1); in this matter, however, the

Petitioner declares himself as acting for and on behalf of C.V. Sungai Bendera Jaya. It is possible because, based on the provision of Article 6 of the Articles of Associations of C.V. Sungai Bendera Jaya, the Petitioner as the Director of C.V. Sungai Bendera Jaya shall have the right to represent C.V. Sungai Bendera Jaya both before and outside the Court of Law (Exhibit P-2). Furthermore, with such qualification, the Petitioner argues in his petition that he has the constitutional rights and/or authority granted by the 1945 Constitution set forth in Article 27 Paragraph (1), Article 28D Paragraph (1), Article 24 Paragraph (1), Paragraph (2), Paragraph (3) and Article 24C Paragraph (1) of the 1945 Constitution, which respectively read as follows:

- Article 27 Paragraph (1): "*Without exception, all citizens shall have an equal position before the law and government and shall be obligated to uphold such law and government*";

- Article 28D Paragraph (1): "*Every person shall have the right to the recognition, the guarantee, the protection and the legal certainty of just laws as well as equal treatment before the law*";

- Article 24 Paragraph (1): *"Judicial power shall be an independent power to organize judicial administration to uphold law and justice";*

- Article 24 Paragraph (2): *"Judicial power shall be exercised by a Supreme Court and its inferior courts, in the courts of general jurisdiction, the*

religious affair courts, the military tribunal, the state administration courts, and by a Constitutional Court";

- Article 24 Paragraph (3): *"Other agencies with functions related to judicial power shall be regulated in law ";*

- Article 24C Paragraph (1): *"The Constitutional Court shall have the authority to hear cases at the first and final level the decisions of which shall be final, in conducting judicial review of laws against the Constitution, to decide disputes concerning the authorities of state institutions whose authorities are granted by the Constitution, to make decisions on the dissolution of political parties, and to decide disputes concerning the results of general elections";*

[3.8] Considering whereas the Petitioner deems that his constitutional rights and/or authority as intended above have been impaired by the coming into effect of Article 45A Paragraph (2) Sub-Paragraph c of the Supreme Court Law, since the Petitioner cannot file an appeal to the Supreme Court against the Decisions of the Jakarta State Administrative High Court Number 60/B/2007/PT.TUN.JKT, dated June 28, 2007 and Number 59/B/2007/PT.TUN.JKT, dated June 28, 2007. Article 45A Paragraph (2) Sub-Paragraph c of the Supreme Court Law reads, *"Cases that are excluded as intended in Paragraph (1) shall consist of:*

a. . . .

b. . . .

c. State Administrative Cases with the object of complaint being decisions of regional government officials with such decisions being applicable in the territory of the region concerned";

[3.9] Considering whereas based on the foregoing description, it has been evident that the factual impairment suffered by the Petitioner as a result of the coming into effect of Article 45A Paragraph (2) Paragraph c of the Supreme Court Law above is that the Petitioner cannot file for an appeal to the Decision of the Jakarta State Administrative High Court Number 60/B/2007/PT.TUN.JKT (Exhibit P-8) and the Decision of the Jakarta State Administrative High Court Number 59/B/2007/PT.TUN.JKT. (Exhibit P-9). This matter, in the Petitioner's opinion, has impaired his constitutional rights as described above;

[3.10] Considering whereas based on the foregoing description, apart from the issue of whether or not the impairment as described in paragraph [3.9] constitutes an impairment of constitutional rights, the matter of which shall be evaluated further in the considerations of the Principal Issue of the Petition, the Court is of the opinion that *prima facie* the Petitioner has sufficiently fulfilled the requirements for legal standing to file a petition for judicial review of Article 45A Paragraph (2) Sub-Paragraph c of the Supreme Court Law against the 1945 Constitution. Therefore the Court will proceed with the consideration of the Principal Issue of the Petition;

PRINCIPAL ISSUE OF THE PETITION

[3.11] Considering whereas in explaining the impairment of his constitutional rights as a result of the coming into effect of Article 45A Paragraph (2) Sub-Paragraph c of the Supreme Court Law, the Petitioner presented the following arguments:

a. whereas the Petitioner has been injured by the coming into effect of Article 45A Paragraph (2) Sub-Paragraph c of the Supreme Court Law, as it has limited his constitutional right to file an appeal to the Supreme Court. In the Petitioner's opinion, all state administrative disputes the object of claims of which is a decision of a regional government official and a decision of a central government official may be appealed to the Supreme Court based on the provisions of Article 131 Paragraph (1) and Paragraph (2) of Law Number 5 Year 1986 regarding the State Administrative Court, which read as follows:

Paragraph (1) : *"Any Court decision at the final level may be filed to the Supreme Court for cassation level examination";*

Paragraph (2) : *"The procedure of cassation examination as intended in Paragraph (1) shall be conducted in accordance with the provisions as intended in Article 55 Paragraph (1) of Law Number 14 Year 1985 regarding the Supreme Court";*

Although Law Number 5 Year 1986 regarding the State Administrative Court has been amended with Law Number 9 Year 2004, the provisions of Article 131 Paragraph (1) and Paragraph (2) of Law Number 5 Year 1986

regarding the State Administrative Court have never been revoked until the present time;

b. whereas Article 45A Paragraph (2) Sub-Paragraph c of the Supreme Court Law is contradictory to Article 27 Paragraph (1) and Article 28D Paragraph (1) of the 1945 Constitution, because it has revoked, limited, and eliminated the Petitioner's right to file an appeal to the Supreme Court against the Decisions of the Jakarta State Administrative High Court Number 60/B/2007/PT.TUN.JKT., dated June 28, 2007 and Number 59/B/2007/PT.TUN. JKT., dated June 28, 2007. In the Petitioner's opinion, the *a quo* provision has violated his constitutional rights to obtain just legal recognition, guarantee, protection and certainty as well as equal treatment before the law. Therefore, the limitation of appeal as regulated in Article 45A Paragraph (2) Sub-Paragraph c of the Supreme Court Law has caused discrimination, since the *a quo* article only limits petitions for an appeal against state administrative cases with the object of complaint being the decision of a regional government official, while in respect of state administrative cases with the object of complaint being the decision of a central official, the petition for appeal is not limited;

c. whereas Article 45A Paragraph (2) Sub-Paragraph c of the Supreme Court Law is contradictory to Article 24 Paragraph (1), Paragraph (2), Paragraph (3), and Article 24C Paragraph (1) of the 1945 Constitution because it has revoked, limited, and eliminated the Petitioner's right to

obtain justice through judicial institutions (access to justice) which is the principle of judicial power to uphold law and justice exercised by the Supreme Court and its subordinate judicial bodies as well as the Constitutional Court;

[3.12] Considering whereas in order to support his arguments, the Petitioner has presented written evidence (Exhibit P-1 through Exhibit P-17) and has also presented an expert named Prof. Soehino, S.H., who has presented his statement under oath as follows:

- the provision of Article 45A Paragraph (2) Sub-Paragraph c of the Supreme Court Law which distinguishes between the decisions of regional government officials which cannot be appealed against to the Supreme Court and the decisions of central government officials which may appealed against to the Supreme Court is a form of a discriminatory treatment against the Petitioner, particularly in order to obtain equal position before the law;
- the provision of Article 45A Paragraph (2) Sub-Paragraph c of the Supreme Court Law which establishes a regulation to exclude appeals to the Supreme Court with the object of dispute being the decision of regional government officials can weaken the supervision over decisions of regional government officials which may lead to arbitrary acts by regional government officials;

- all the legislators' reasons for limiting petitions for appeals to the Supreme Court are to reduce caseload at the Supreme Court; the small number of supreme court justices; and in order to reach quick and inexpensive court decisions, do not fulfill the lawmaking principles because such reasons are not set forth in the consideration section and the elucidation of the *a quo* law, so that such reasons cannot be justified in accordance with the principle of good governance in legal drafting;

[3.13] Considering whereas the Court has requested information from the legislators (the People's Legislative Assembly and the Government), as completely described in the Facts of the Case part of this Decision.

Statement of the People's Legislative Assembly (DPR).

In principle, the People's Legislative Assembly explains as follows:

- whereas Article 45A Paragraph (2) Sub-Paragraph c of the Supreme Court Law is already in accordance with Article 24A Paragraph (5) of the 1945 Constitution, which states, *"The composition, position, membership and proceedings of the Supreme Court as well as of judicial bodies under it shall be regulated by law"*. One of the Laws intended in Article 24A Paragraph (5) of the 1945 Constitution is Law Number 5 Year 2004 regarding Amendment to Law Number 14 Year 1985 regarding the Supreme Court;

- whereas the limitation of legal remedy in Article 45A Paragraph (2) Sub-Paragraph c of the Supreme Court Law is intended to avoid excessive caseload at the Supreme Court and in order to promote the improvement of the quality of decisions of first-level courts and appellate courts in accordance with the values of justice and public equity as regulated in the General Elucidation of the Supreme Court Law. Such limitation is also intended to encourage a quick, simple, and inexpensive judicial process with the ultimate aim of obtaining legal certainty;

- whereas the limitation in the *a quo* article does not necessarily eliminate the Petitioner's rights to law enforcement and sense of justice since the Petitioner has gone through the judicial process from the court of first instance to the appellate level. If the Petitioner still considers that the Decision of the Jakarta State Administrative High Court has not fulfilled the sense of justice, the issue is not concerned with constitutionality, but rather the law enforcement or the implementation of laws and regulations;

- whereas the limitation in the *a quo* article does not have any connection with the constitutionality issue of the freedom of the judiciary in examining, hearing and deciding a case as regulated in Article 24 Paragraph (1) of the 1945 Constitution;

Based on the foregoing description, the People's Legislative Assembly is of the opinion that Article 45A Paragraph (2) Sub-Paragraph c of the Supreme Court Law is not contradictory to Article 24 Paragraph (1), Paragraph

(2), Paragraph (3), Article 27 Paragraph (1) and Article 28D Paragraph (1) of the 1945 Constitution;

Statement of the Government.

The Government principally explains as follows:

- whereas the limitation of appeal to the Supreme Court in Article 45A Paragraph (2) Sub-Paragraph c of the Supreme Court Law cannot be regarded as a form of discrimination, as the *a quo* article apply only to the Petitioner, but also to other parties in other regions;

- whereas the limitation of appeal to the Supreme Court in the *a quo* article is not discriminatory because insofar as the limitation is not based on religion, nationality, race, ethnicity, group, social status, sex, language, such limitation has already been in accordance with the provision of Article 28J Paragraph (2) of the 1945 Constitution;

- whereas the limitation of appeal in the *a quo* article is intended to reduce the accumulation of appeal cases at the Supreme Court. In addition, such limitation is also intended to improve the quality of decisions at the court of first instance and the appellate court in accordance with the values of justice and equity in the society, as well as to shorten the judicial process to be more quick, simple, and inexpensive so that every person can obtain justice and legal certainty;

- whereas the time-consuming process of appeal to the Supreme Court has also become the background for the limitation of appeal in the *a quo* article, namely the limitation of legal remedy with respect to the dispute objects being the decisions of regional government officials with the intention that judges' decisions be available for follow-up by the officials issuing such decisions, since a judge's decision is often ineffective and cannot be executed due to the fact that the official issuing the decision no longer occupies the relevant position;

Based on the abovementioned reasons, the Government is of the opinion that the limitation regulated in Article 45A Paragraph (2) Sub-Paragraph c of the Supreme Court Law is not contradictory to Article 24 Paragraph (1), Paragraph (2), Paragraph (3), Article 24C Paragraph (1), Article 27 Paragraph (1) and Article 28D Paragraph (1) of the 1945 Constitution;

OPINION OF THE COURT

[3.14] Considering whereas upon hearing and reading the statements of all parties as described above, as well as upon examining the evidence presented by the Petitioner, the Court will subsequently state its opinion or stand with respect to the Principal Issue of the *a quo* Petition. However, prior to stating its specific opinion on the Petitioner's arguments, the Court deems it necessary to first consider whether the norms of the law which sets forth the provision regarding the limitation of appeal to the Supreme Court, as regulated in Article 45A Paragraph (2) Sub-Paragraph c of the Supreme Court Law, are

unconstitutional. In order to address the aforementioned issue, the Court is of the opinion that in the formulation of a norm (legislation), three aspects must be observed, namely the equality aspect (*gerechtigkeit*), the legal certainty aspect (*rechtszekerheit*), the usefulness aspect (*zweckmassigkeit*). The three aspects are not always parallel with each other. Therefore, what is considered fair sometimes has to give way to what is considered certain and useful, and vice versa, depending on the extent of the protected interest;

Considering from the viewpoint of formulation of good regulation (*beginselen van behoorlijke regelgeving*), in the opinion of the Court, the *a quo* law has observed the principle of clear objective of the formulation of a norm (*het beginsel van duidelijke doelstelling*) since it has provided a sufficient description of the real facts which a regulation is expected to handle. This is also evident in the General Elucidation of the *a quo* law which reads, among other things, "*This law provides a limitation on cases which may be appeal against to the Supreme Court. This limitation, in addition to the purpose of discouraging the tendency for every case to be filed for an appeal to the Supreme Court, is also intended to improve the quality of decisions of the courts of first instance and appellate courts in accordance with the values of justice and equity in the society.*"

The underlying idea of the legislators in formulating the legal norm to limit the cases which can be filed for an appeal to the Supreme Court may also be justified from the perspective of the essence of an appeal to the Supreme Court in the judicial system which includes appeal to the Supreme Court in relation to

the level of courts, such as Indonesia in particular and civil law states in general, namely the court of first instance, the appellate court, and the cassation court. The court of first instance is essentially a court with the duty to examine facts in a certain actual event and then determine which laws apply to such facts. Therefore, the court of first instance is called *judex facti*. Meanwhile, the appellate court essentially has the duty to address the issue whether the court of first instance has been appropriately examined the facts presented before it in a certain actual event and whether it has appropriately determined the laws applicable to the facts in the aforementioned certain actual event. Thus, the appellate court, in addition to playing the role of *judex facti*, also plays the role of *judex juris*. Meanwhile, in essence, the cassation court only has the duty to address the issue whether the appellate court has appropriately determined which laws are applicable to a certain actual event. Therefore, in principle, the cassation court is solely *judex juris*;

Based on the foregoing description, the need for a case to be examined until the level of the cassation court will no longer be urgent if the quality of decisions of the courts of first instance and the courts of appeals have reflected the values of justice and equity applicable in the society, as affirmed in the General Elucidation of the Supreme Court Law above. Therefore, such encouragement in the direction of improvement of the quality of court decisions must be supported by all parties, including and especially by the legislators, not only in cases which are within the absolute competency of the state administrative court but also within the jurisdiction of all courts, mainly for civil cases which are within the absolute

competency of the courts of general jurisdiction where there are often caseloads. If the provision of a law has succeeded in providing support towards the realization of an improved quality of decisions of the courts of first instance and the courts of appeal, such law has played not only the role in its classic function as a tool of social control, but has also played its role as a tool of social engineering;

Moreover, it is also important to remember that that such limitation has been a common practice not only in democratic, constitutional states which adopt the continental system, such as Germany and the Netherlands, but also in states adopting the judicial system of jury, such as the United States. In Germany, courts are even granted the authority to determine and revise the threshold of cases which may be categorized as petty cases (*vide* Herbert Jacob *et.al*., *Courts, Law, and Politics in Comparative Perspective*, 1996, h. 257). Therefore, such cases do not require examination up to the level of cassation. Meanwhile, in the United States, the losing party at a lower court level that demands that its case be examined by the Supreme Court will be required to file a petition called the petition for writ of certiorari. The intended petition will not be immediately granted or accepted, but will first be examined by the Supreme Court. If the Supreme Court is of the opinion that the intended petition deserves to be accepted – usually only in cases considered important and mainly related to the basic rights of the citizens – the Supreme Court will therefore issue a writ which is called the writ of certiorari;

Based on the description above, it is evident that the limitation on cases which deserve to be appealed to the Supreme Court has been a commonly accepted practice in democratic, constitutional states which adopt common or civil laws, jury or non-jury systems. It is inappropriate to consider that such limitation is a discrimination, insofar as the decision of the court of first instance has been provided with the opportunity for examination by a court of higher level, *in casu* the court of appeal which plays the roles of both *judex facti* and *judex juris*;

Thus, the limitation of appeal to the Supreme Court *an sich* is not contradictory to the 1945 Constitution;

[3.15] Considering, after considering the foregoing matters, the Court will subsequently state its opinion on the Petitioner's arguments, as follows:

a. The Petitioner argues that Law Number 9 Year 2004 regarding Amendment to Law Number 5 Year 1986 regarding the State Administrative Court has not revoked the provision of Article 131 Paragraph (1) and Paragraph (2) of Law Number 5 Year 1986 regarding the State Administrative Court (the State Administrative Court Law). Therefore, all disputes in State Administration the with the objects of complaints being decisions of regional government officials or decisions of central government officials may be appealed against to the Supreme Court based on the provision of Article 131 Paragraph (1) and Paragraph (2) of Law Number 5 Year 1986 regarding the State Administrative Court.

In respect of the *a quo* argument, the Court is of the opinion that Article 131 Paragraph (1) of the State Administrative Law regulates the court's final decisions which may be appealed against to the Supreme Court, while Article 131 Paragraph (2) of the State Administrative Court Law on the proceedings of cassation examination the provisions of which are regulated in Article 55 Paragraph (1) of Law Number 14 Year 1985 regarding the Supreme Court. In accordance with the provision of Article 24A Paragraph (5) of the 1945 Constitution which states, *"The composition, position, membership and* ***proceedings of the Supreme Court*** *as well as of judicial bodies under it shall be* ***regulated by law***". The proceedings of the Supreme Court are regulated in Law Number 14 Year 1985 regarding the Supreme Court as amended by Law Number 5 Year 2004. Article 55 Paragraph (1) of Law Number 14 Year 1985 states *"The cassation examination for cases decided upon by Courts within the Religious Court Jurisdiction or decided upon by Courts within the State Administrative Court Jurisdiction shall be* ***implemented under the provisions of this law****".* Since Law Number 14 Year 1985 has been amended and supplemented with Law Number 5 Year 2004, the definition of "**this law**" in Article 55 Paragraph (1) of Law Number 14 Year 2005 above must be construed in such a way that it also refers to Law Number 5 Year 2004 which has provided for the limitation of appeal to the Supreme Court for state administrative cases with the objects of complaints being decisions of regional government officials with such

decisions being applicable in the territory of the region concerned, as regulated in Article 45A Paragraph (2) Sub-Paragraph c of the Supreme Court Law. Thus, the provision on the limitation of appeal to the Supreme Court as regulated in Article 45A Paragraph (2) Sub-Paragraph c of the Supreme Court Law shall apply to the intended decisions of the State Administrative Court;

b. The Petitioner argues that Article 45A Paragraph (2) Sub-Paragraph c of the Supreme Court Law is contradictory to Article 28D Paragraph (1) and Article 27 Paragraph (1) of the 1945 Constitution because it has revoked, limited, and eliminated the Petitioner's right to appeal against two decisions of the Jakarta State Administrative High Court Number 60/B/2007/PT.TUN.JKT., dated June 28, 2007 and Number 59/B/2007/PT. TUN.JKT., dated June 28, 2007. The provision of the *a quo* article has also been considered discriminatory by the Petitioner, as it only limits the appeals to the Supreme Court for State Administration cases with the objects of complaints being the decisions of regional government officials, while appeals for State Administration cases with the objects of complaints being the decisions of central government officials are not limited.

In respect of the Petitioner's argument, the Court is of the opinion that Article 27 Paragraph (1) of the 1945 Constitution affirms that without exception, all citizens shall have an equal position before the law and government and shall be obligated to uphold such law and government.

Article 28D Paragraph (1) of the 1945 Constitution affirms that every person shall have the right to the recognition, the guarantee, the protection and the legal certainty of just laws as well as equal treatment before the law. It is also affirmed in Article 28I Paragraph (2) of the 1945 Constitution that 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. Thus, when these provisions are related to the Petitioner's argument, the question will be whether the provision on the limitation of appeal to the Supreme Court as regulated in Article 45A Paragraph (2) Sub-Paragraph c of the Supreme Court Law has caused the Petitioner to be treated unequally before the law and in the government, to be denied from fair legal certainty and equal treatment before the law, as well as to be treated with discrimination. In the context of the *a quo* petition, the Court is of the opinion that the Petitioner's petition evidently has no connection whatsoever with the right to equal treatment in the government. Therefore, insofar as it is concerned with the right to equal treatment in the government, the Petitioner's argument is groundless;

Meanwhile, with respect to the issue of whether the provision of Article 45A Paragraph (2) Sub-Paragraph c of the Supreme Court Law has caused the Petitioner to obtain unequal treatment before the law, the Court is of the opinion that such argument will only be acceptable if there is another party with similar qualification with the Petitioner's, but he/she

has obtained a different treatment due to the enactment of Article 45A Paragraph (2) Sub-Paragraph c of the Supreme Court Law, the matter of which is apparently unproven. If there is an incidence similar to the Petitioner's experience while the intended incidence occurred prior to the amendment to Law Number 14 Year 1985, such matter does not evidence any unequal treatment before the law, but rather a consequence of the amendment to the law;

Likewise, the Petitioner's argument that Article 45A Paragraph (2) Sub-Paragraph c of the Supreme Court Law has created legal uncertainty is groundless because, as described in the consideration in point a above, Article 131 Paragraph (1) and Paragraph (2) of the State Administrative Court Law – which has been used as the basis by the Petitioner to state that the decision of a regional official may be appealed to the Supreme Court – refers to the Supreme Court Law, while the Supreme Court Law itself is then amended where one of the amendments is in the form of the establishment of a provision regarding the limitation of appeal. In other words, since the implementation of the provision in the State Administrative Court Law refers to the Supreme Court Law, if the Supreme Court Law is subsequently amended, the consequence of such amendment cannot be regarded as legal uncertainty;

Meanwhile, in respect of the issue whether Article 45A Paragraph (2) Sub-Paragraph c of the Supreme Court Law has resulted in discriminatory

treatment, it is necessary to first understand the definition of "discrimination" according to law. As often stated in a number of decisions of the Court, Article 1 Sub-Article 3 of Law Number 39 Year 1999 regarding Human Rights states as follows: "*Discrimination is every restriction, harassment, or expulsion which is directly or indirectly based on the distinction of human beings on the basis of religion, nationality, race, ethnicity, group, class, social status, economic status, sex, language, political belief, which causes the reduction, deviation, or the elimination of recognition, implementation or exercise of human rights and basic freedom in life both individually and collectively in the fields of politics, economy, law, social, culture, and other aspects of life*". It is therefore clear that the Petitioner's experience is not included in the definition of discrimination. Therefore, it is true that the Petitioner has received a different treatment; however, the treatment has not originated from a discriminatory norm of legislation, but rather it has been a consequence of the amendment to a law. It is also true that the Petitioner's right to file an appeal to the Supreme Court has been limited, as a consequence of an amendment to a legislation, but as described in the consideration in paragraph [3.14] above, the limitation of appeal is not contradictory to the 1945 Constitution. Considered from another viewpoint, in this matter from the viewpoint of horizontal harmonization among laws and regulations, in this respect between the Supreme Court Law and the Judicial Power Law (Law Number 4 Year 2004), such limitation is

acceptable. Law Number 4 Year 2004 regarding Judicial Power, in its Article 22 states, *"With respect to court decisions at the appellate level, appeals may be filed to the Supreme Court by the parties concerned, unless otherwise provided for in law".*

In addition, even if the judge's decision with respect to which an appeal cannot be filed contains any mistake, default, and error which can impair the Petitioner's constitutional rights, it will still be possible for the Petitioner to file an extraordinary legal remedy, namely a petition for judicial review to the Supreme Court which has the authority to amend any mistake in a legal decision which has already had a binding legal effect. Such provision is regulated in Article 23 Paragraph (1) Law Number 4 Year 2004 regarding Judicial Power which states, *"With respect to any court decision which has obtained a binding legal effect, the parties concerned may file a petition for judicial review to the Supreme Court, in the event that a certain matter or circumstance arises as provided for in law*".

c. The Petitioner argues that Article 45A Paragraph (2) Sub-Paragraph c of the Supreme Court Law is contradictory to Article 24 Paragraph (1), Paragraph (2), Paragraph (3), and Article 24C Paragraph (1) of the 1945 Constitution because it has revoked, limited, and eliminated the Petitioner's right to have access to judicial institutions (access to justice).

In respect of the aforementioned argument of the Petitioner, it is necessary to first understand the essence of the substance regulated in

Article 24 Paragraph (1), Paragraph (2), Paragraph (3), and Article 24C Paragraph (1) of the 1945 Constitution, whether they truly contain the substance of constitutional rights as intended by Article 51 Paragraph (1) of the Constitutional Court Law. Article 24 of the 1945 Constitution reads:

"*(1) Judicial power shall be an independent power to organize judicial administration to uphold law and justice*.

(2) Judicial power shall be exercised by a Supreme Court and its inferior courts, in the courts of general jurisdiction, the religious affair courts, the military tribunal, the state administration courts, and by a Constitutional Court.

(3) Other agencies with functions related to judicial power shall be regulated in law."

Meanwhile, Article 24C Paragraph (1) of the 1945 Constitution reads, "*The Constitutional Court shall have the authority to hear cases at the first and final level the decisions of which shall be final, in conducting judicial review of laws against the Constitution, to decide disputes concerning the authorities of state institutions whose authorities are granted by the Constitution, to make decisions on the dissolution of political parties, and to decide disputes concerning the results of general elections*."

The foregoing description indicates that it is evident that Article 24 Paragraph (1), Paragraph (2), Paragraph (3), and Article 24C Paragraph (1) of the 1945 Constitution do not regulate the substance of constitutional

rights as intended in Article 51 Paragraph (1) of the Constitutional Court Law, but rather the nature and implementers of judicial power. It is therefore irrelevant to base the argument of an impairment of constitutional rights upon the provisions of the aforementioned articles of the 1945 Constitution. In this respect, the Petitioner's argument is therefore groundless;

4. CONCLUSION

Based on all the descriptions, the Court concludes that Article 45A Paragraph (2) Sub-Paragraph c of the Supreme Court Law regulating the limitation of appeal to the Supreme Court, "*In respect of State Administrative Cases with the objects of complaints being decisions of regional government officials with such decisions being applicable in the territory of the region concerned*" is not contradictory to Article 27 Paragraph (1), Article 28D Paragraph (1), Article 24 Paragraph (1), Paragraph (2), and Paragraph (3), as well as Article 24C Paragraph (1) of the 1945 Constitution. Therefore, the arguments presented by the Petitioner are groundless, and thus the Petitioner's petition must be declared rejected;

5. RULINGS

In view of Article 56 Paragraph (5) Law Number 24 Year 2003 regarding 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 Petitioner is rejected;

Hence the decision was made in the Consultative Meeting of Constitutional Court Justices on Wednesday, January 9, 2008 by nine Constitutional Court Justices, and was pronounced in the Plenary Session open for public on this day, Monday, January 14, 2008, by us Jimly Asshiddiqie, as the Chairperson and concurrent Member, H.A.S. Natabaya, I Dewa Gede Palguna, Soedarsono, H.M. Laica Marzuki, H. Abdul Mukthie Fadjar, Harjono, H. Achmad Roestandi, and Maruarar Siahaan, respectively as Members, assisted by Sunardi as the Substitute Registrar, and in the presence of the Petitioner/his Attorney-in-Fact, the Government or its representative, and the People's Legislative Assembly or its representative.

CHIEF JUSTICE,

SGD

Jimly Asshiddiqie

JUSTICES,

SGD **SGD**

H.A.S. Natabaya	I Dewa Gede Palguna
SGD	**SGD**
Soedarsono	H.M. Laica Marzuki
SGD	**SGD**
H. Abdul Mukthie Fadjar	Harjono
SGD	**SGD**
H. Achmad Roestandi	Maruarar Siahaan

6. DISSENTING OPINION

In respect of the Court's decision above, one Constitutional Court Justice has a dissenting opinion, namely: **Constitutional Court Justice H.M.Laica Marzuki**, as follows:

Hendriansyah, the director of CV Sungai Bendera Jaya filed the petition for judicial review of Article 45A Paragraph (2) Sub-Paragraph c of the Supreme Court Law which is deemed contradictory to Article 27 Paragraph (1), Article 28D Paragraph (1), Article 24 Paragraph (1), Paragraph (2), Paragraph (3) and Article 24C Paragraph (1) of the 1945 Constitution.

Article 45A Paragraph (2) Sub-Paragraph c of the Supreme Court Law reads:

(2) *Cases that are excluded as intended in Paragraph (1) shall consist of:*

a. . . .

b. . . .

c. State Administrative Cases with the objects of complaints being decisions of regional government officials with such decisions being applicable in the territory of the region concerned.

Elucidation of Article 45A Paragraph (2) Sub-Paragraph c of the Supreme Court Law reads:

"This provision excludes decisions of state administrative officials resulting from authorities not granted to regions in accordance with laws and regulations".

The formulation of the intended Elucidation to Article 45A Paragraph (2) Sub-Paragraph c of the Supreme Court Law requires that the provision of the *a quo* article excludes decisions *(beschikking)* of state administrative officials resulting from authorities not granted to regional heads in accordance with laws and regulations. This implies that only state administrative decisions issued by regional government officials with such decisions being applicable in the territory of the region concerned, which are limited for appeal to the Supreme Court.

The Petitioner deems that his constitutional rights have been impaired by the coming into effect of the *a quo* article, which has revoked, limited, and eliminated the Petitioner's right to file an appeal to the Supreme Court against two decisions of his two cases, namely Decision of the Jakarta State

Administrative High Court Number 60/B/2007/PT.TUN.JKT dated June 28, 2007 and Decision of the Jakarta State Administrative High Court Number 59/B/2007/PT.TUN.JKT dated June 28, 2007.

Juridische Vraagstuk:

The issue is whether the limitation of appeal as intended in Article 45A Paragraph (2) Sub-Paragraph c of the Supreme Court Law petitioned for review, is solely intended by legislators to reduce, limit, or avoid the caseload *(doorbreken de papieren muur)* of state administrative cases, or in fact brings about constitutional legal consequences *(constitutionele rechtsgevolg)* impairing the constitutional rights of seekers of justice subjected to state administrative decisions of regional government officials, since it appears that they cannot file any appeal to the Supreme Court.

The state administrative decisions issued by regional government officials against which appeals to the Supreme Court are limited constitute a part of governmental activities in autonomous regions, in this matter including the field of government (*bestuursgebied*) in relation to a decentralized government.

The 1945 Constitution positions decentralization as a part of the state's form *(staatsvorm)*. Article 1 Paragraph (1) of the 1945 Constitution stipulates, "*The State of Indonesia shall constitute a Unitary State, having the form of Republic*". When it is related to Article 18 Paragraph (1) of the 1945 Constitution, the unitary state *(eenheidsstaat)* of the Republic of Indonesia was established *based on* a decentralized government. Article 18 Paragraph (1) of the 1945

Constitution, stipulates, "*the Unitary State of the Republic of Indonesia shall be divided into provincial regions and these provincial regions shall be divided into regencies (*kabupaten*) and municipalities (*kota*), whereby each province, regency and municipality shall have a regional government regulated by law*".

The form of state *(staatsvorm)* investigates and observes a state externally. The state is viewed in overall and as a whole. *Der Staat als Ganzheit*. In the event that the form of state *(staatsvorm)* of the Republic of Indonesia is approached and observed externally (outward looking), the state will therefore consist of two horizontal layers, namely the centralized government and the decentralized government (or regional government).

The transfer of authority in relation to a decentralized government, in accordance with Article 1 Sub-Article 7 of Law Number 32 Year 2004 regarding Regional Government shall be the transfer of governmental authority from the central government to autonomous regions to regulate and to manage their own governmental affairs in the system of the Unitary State of the Republic of Indonesia.

The intended transfer of governmental authority by the central government to autonomous regions shall be is conducted through delegation, commonly known as delegation of authority. The transfer of authority over governmental affairs through delegation causes the delegator to lose authority because it has been all transferred to the delegatee, except for governmental affairs which are expressly declared as the affairs of the central government, namely those

including the issues of a. foreign politics, b. defense, c. security, d. administration of justice, e. national monetary and fiscal affairs, and f. religion. In the matter of delegation of governmental authority by *mandatum*, the mandator does not lose the authority it delegates, but in fact, the mandatary acts for and on behalf of the mandator, as it is the case with deconcentration, and *medebewind*. The mandatary reports to the mandator.

Due to the fact that the transfer of governmental authority from the central government to autonomous regions is conducted through delegation, the burden of the implementation of government has been transferred to – and becomes the responsibility of – regional governments. This implies that the complexity of the implementation of government lies with autonomous regions. Regional government officials encounter and must handle the complexity of the implementation of government *(taak vervulling)* in the field, including the implementation of public services *(bestuurszorg)* and the making of state administrative decisions *(beschikkingsdaad van de administratie).*

The complexity of the implementation of government which has become the burden of public duties of the regional government officials has caused considerable number of disputes arising in state administration between individuals or civil legal entities and regional agencies or officials as a result of the issuance of state administrative decisions in autonomous regions.

The complexity of cases of state administrative decisions in autonomous regions also causes the complexity of the *rechtmatigheid* aspect of the

fundamentum petendi of the intended cases of state administrative decisions. The complexity of the *rechtmatigheid* aspect of the cases of state administrative decisions in autonomous regions requires legal remedy in the form of appeal to the Supreme Court. Cases of state administrative decisions in autonomous regions require cassation court examination by the *judex juris* in an *uitputtend* manner, not only in relation to the *des faktum* aspect. Cassation examination for cases of state administrative decisions in regions is a legal necessity.

Legislators should not remove the *rechtsprekende functie* of the Supreme Court for cases concerned with state administrative decisions of regional government officials. Limiting cassation examination for cases of state administrative decisions which are applicable in the territory of the autonomous region concerned is essentially the granting of judicial authority in a discriminatory manner for seekers of justice *(justitiabelen)* in autonomous regions.

The intended matter violates the equal position before the law for citizens, according to Article 27 Paragraph (1) of the 1945 Constitution. They will no longer obtain legal protection and certainty as well as equal treatment before the law, as guaranteed in the Constitution, according to Article 28D Paragraph (1) of the 1945 Constitution.

Based on the foregoing considerations, it should be reasonable to declare that Article 45A Paragraph (2) Sub-Paragraph c of the Supreme Court Law is contradictory to the 1945 Constitution, and at the same time to declare that it

does not have any binding legal effect. The Court, therefore, should have granted the Petitioner's petition in this case.

Substitute Registrar,

SGD

Sunardi