



## DECISION

NUMBER 25/PHPU.D-VI/2008

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 on the objection to the Stipulation of Vote Count Results of the General Elections of the Regional Head and Vice Regional Head of North Lampung Regency, filed by:

- [1.2]
- I. Name : **Hi. Bachtiar Basri, SH., MM;**  
Place/Date of Birth : Tanjung Karang, December 30, 1953;  
Occupation : Civil Servant;  
Address : Jalan Jeruk No. 52 Kelapa Tujuh  
Kotabumi North Lampung.
  
  - II. Name : **Slamet Haryadi, SH., M.Hum;**  
Place/Date of Birth : Metro, June 23, 1962;  
Occupation : Private person;  
Address : Jalan Pangeran Jinul Gg. Arimbi

No. 50 Rejosari Kotabumi, North  
Lampung.

In this matter granting power of attorney to 1) Abi Hasan Mu'an, SH; 2) Amir Aswan, SH; 3) Yuzar Akuan, SH; 4) Jaini Basir, SH; 5) Ahmad Basuki, SH; and 6) M. Idran Fran, SH; all of whom are advocates associated in Bachtiar-Slamet Advocacy Team, domiciled at Jalan Mesuji Number 51 Pahoman Bandar Lampung, based on a Special Power of Attorney dated September 15, 2008, whether jointly or independently, hereinafter referred to as **Petitioners**.

**Against:**

**The General Elections Commission of North Lampung Regency**, with its office at Jalan Merpati Number 468 Tanjung Aman, Kotabumi Selatan District, North Lampung Regency, hereinafter referred to as **Respondent**.

**[1.3]** Having read the petition of the Petitioners;  
Having examined the evidence of the Petitioners.

**3. LEGAL CONSIDERATIONS**

**[3.1]** Considering whereas the main issue of the petition is concerning the objection to the Stipulation of Vote Count Results of the General Elections of Regional Head and Vice Regional Head of North Lampung Regency;

**[3.2]** Considering whereas prior to examining the principal issue of the petition, the Constitutional Court (hereinafter referred to as the Court) shall first

take into account whether the Court has the authority to examine, hear and decide upon the *a quo* petition;

**[3.3]** Considering whereas in respect of the authority of the Court to examine, hear and decide upon the *a quo* petition, the Court is of the following opinion:

**[3.3.1]** Whereas pursuant to the provision of Article 24C paragraph (1) of the 1945 Constitution of the State of the Republic of Indonesia (hereinafter referred to as the 1945 Constitution), Article 10 paragraph (1) sub-paragraph d of Law Number 24 Year 2003 regarding the Constitutional Court (hereinafter referred to as the CC Law), and Article 12 paragraph (1) sub-paragraph d of Law Number 4 Year 2004 regarding Judicial Power (hereinafter referred to as the Law No. 4/2004), one of the authorities of the Court is to decide upon the disputes on the results of general election (*Pemilu*), in this matter the General Elections of Members of DPR, DPD, and DPRD, as well as the General Elections of President and Vice President [*vide* Article 22E paragraph (2) of the 1945 Constitution];

**[3.3.2]** Whereas the Petitioners' petition is concerning the objection to the Stipulation of the Results of the General Elections of Regional Head and Vice Regional Head of North Lampung Regency which was stipulated by the General Elections Commission of North Lampung Regency, therefore based on the authority of the Court as set forth in the provision of Article 24C paragraph (1) of the 1945 Constitution and Article 10 paragraph (1) of the CC Law, the

Petitioner's petition is not included in the absolute authority of the Court to examine, hear, and decide upon such petition. Then pursuant to Article 106 of Law Number 32 Year 2004 regarding Regional Government *juncto* Article 94 of Government Regulation Number 6 Year 2005 regarding the Election, Legalization, Appointment, and Dismissal of Regional Head and Vice Regional Head, the objection to the Stipulation of Vote Results of the General Elections of Regional Head and Vice Regional Head is in the authority of the Supreme Court, the procedure for which is regulated in the Regulation of the Supreme Court Number 2 Year 2005 regarding the Procedures for the Filing of Legal Remedy of Objection To The Stipulation of the Results of Regional Head Election and Vice Regional Head Election of The Provincial General Elections Commission and Regency/Municipality General Elections Commission;

**[3.3.3]** Whereas Law Number 22 Year 2007 regarding the General Election Administrators has stipulated that the general elections of regional head and vice regional head shall constitute the legal regime on general elections;

**[3.3.4]** Whereas it is true that Law Number 12 Year 2008 on the Second Amendment to Law Number 32 Year 2004 regarding Regional Government (hereinafter referred to as Law No. 12/2008 Law) in Article 236C has stipulated that the disputes on vote count results of the general elections of regional head and vice regional head by the Supreme Court shall be delegated to the Constitutional Court. Article 236C of Law No. 12/2008 in full reads as follows:

*“The handling of disputes on vote count results of the general elections of regional head and vice regional head by the Supreme Court shall be delegated to the Constitutional Court by no later than 18 (eighteen) months as of the enactment of this Law.”;*

**[3.3.5]** Whereas the phrase “delegated to the Constitutional Court by no later than 18 (eighteen) months as of the enactment of this Law” contains two legal issues, namely:

- a. the delegation of authority; and
- b. the legal act for the delegation of authority.

With respect to the foregoing two legal issues, the Court is of the following opinion:

**[3.3.5.1]** Whereas based on Law Number 22 Year 2007 regarding the General Election Administrators, the election of regional head and vice regional head is included in the legal regime on general elections. As a consequence, the disputes on the results of general elections of regional head and vice regional head by law shall become the authority of the Constitutional Court as intended in Article 24C of the 1945 Constitution, Article 10 paragraph (1) sub-paragraph d of the CC Law, and Article 12 paragraph (1) sub-paragraph d of Law No. 4/2004. Such matter is regulated further in Article 236C of Law No. 12/2008. Hence, disputes on the results of general elections of regional head and vice regional head by law shall become the authority of the Constitutional Court;

**[3.3.5.2]** Whereas by the existence of the phrase “delegated to the Constitutional Court by no later than 18 (eighteen) months as of the enactment of this Law,” the Court has to answer whether a legal act is necessary for the delegation of the authority concerned prior to the expiration of the time frame of 18 (eighteen) months. According to the Court, the phrase “by no later” means that such delegation can be performed prior to the expiration of the stipulated time limit, but in the event that such delegation is performed prior to the expiration of the stipulated time limit, it is necessary to take a real legal act of delegation of the handling of the disputes on the results of general elections of regional head and vice regional head from the Supreme Court to the Constitutional Court. The juridical consequence of the absence of such act of delegation, according to the Court, is that such delegation will take place automatically (by law) after the expiration of the time limit of 18 (eighteen) months as regulated in Article 236C of Law No. 12/2008 Law. Since such legal act has not taken place until now, the authority concerned has not been effectively delegated to the Court;

**[3.3.5.3]** Whereas if the Court accepts the case of dispute on election of regional head without any legal act of delegation of competence prior to the expiration of the time limit as stipulated by Law No. 12/2008, it can create dualism in the examination and potentially creates overlapping, uncertainty, and *nebis in idem*;

**[3.3.5.4]** Whereas hence the Petitioner's petition in the *a quo* case is still premature in nature, so that the substance of the petition still cannot be examined, heard, and decided upon by the Court.

#### **4. CONCLUSION**

Based on the foregoing opinion and legal considerations, the Court is of the conclusion that according to Article 24C paragraph (1) of the 1945 Constitution and Article 10 paragraph (1) sub-paragraph d of the CC Law *junctis* Article 12 paragraph (1) sub-paragraph d of Law Number 4 Year 2004 regarding Judicial Power, Article 1 sub-article 4 of Law Number 22 Year 2007 regarding the General Election Administrators, Article 236C of Law No. 12/2008, disputes on the results of general elections of regional head and vice regional head shall be the authority of the Court which still requires a legal act for the delegation process. Since such legal act of delegation has not yet taken place and the time limit of 18 (eighteen) months has not expired, thus the delegation will take place automatically after the expiration of the time limit of 18 (eighteen) months. Hence, the Petitioners' petition in the *a quo* case is still premature in nature and the substance of the petition still cannot be examined, heard, and decided upon by the Court.

#### **5. DECISION**

In view of 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), therefore based on the 1945 Constitution of the State of the Republic of Indonesia;

**Passing the Decision,**

To declare that the Petitioner's petition cannot be accepted.

Hence this decision was made in the Consultative Meeting of Justices on Wednesday, September 24, 2008 by eight Constitutional Justices, which was pronounced in the Plenary Session of the Constitutional Court open for public on the same day, by eight Constitutional Justices, namely Moh. Mahfud MD as Chairperson, H. Abdul Mukthie Fadjar, Jimly Asshiddiqie, Maruarar Siahaan, H.M. Arsyad Sanusi, Muhammad Alim, Maria Farida Indrati, and H.M. Akil Mochtar, respectively as Members, assisted by Cholidin Nasir as Substitute Registrar in the presence of the Petitioners/their Attorneys;

**CHAIRPERSON**

**sgd.**

**Moh. Mahfud MD**

**JUSTICES,**

**sgd.**

**H. Abdul Mukthie Fadjar**

**sgd.**

**Jimly Asshiddiqie**



**sgd.****Maruarar Siahaan****sgd.****H.M. Arsyad Sanusi****sgd.****Muhammad Alim****sgd.****Maria Farida Indrati****sgd.****H.M. Akil Mochtar**

## **6. DISSENTING OPINION**

With respect to the foregoing decision of the Court, one Constitutional Justice, H.M. Akil Mochtar, has a dissenting opinion as follows:

### **Dissenting Opinion of the Constitutional Justice, H.M. Akil Mochtar**

Whereas pursuant to Law Number 22 Year 2007 regarding the General Election Administrators; the election of regional head and vice regional head is included in the regime of general elections. Therefore, consequently, disputes on the results of general elections of regional head and vice regional head by law shall become the authority of the Constitutional Court as intended in Article 24C of the 1945 Constitution and Article 10 paragraph 1 sub-paragraph d of Law Number 24 Year 2003 regarding the Constitutional Court *junctis* Article 12 paragraph (1) sub-paragraph d of Law Number 4 Year 2004 regarding Judicial Power, Article 236C of Law Number 12 Year 2008 on the Second Amendment to Law Number 32 Year 2004 regarding Regional Government;

Whereas the Petitioners' petition is concerning the objection to the Stipulation of Vote Count Results of the General Elections of Regional Head and Vice Regional Head of North Lampung Regency. Therefore, the scope of authority and the settlement of disputes on the results of the general elections of regional head and vice regional head shall become the full authority of the Constitutional Court;

Whereas the authority of the Constitutional Court to examine, hear, and decide upon the *a quo* case is based on the authority as regulated by Article 236C of Law Number 12 Year 2008 which reads, "*The handling of disputes on vote count results of the general elections of regional head and vice regional head by the Supreme Court shall be delegated to the Constitutional Court by no later than 18 (eighteen) months as of the enactment of this Law*", the authority concerned being definite and imperative in nature so that it can be performed, which must *a priori* be adhered to, and in concrete situation cannot be set aside as such since it contains instruction and prohibition;

Whereas Article 236C of Law Number 12 Year 2008, can directly be applicable without having to wait for a legal act of delegation from the Supreme Court to the Constitutional Court; in fact such act of delegation is not necessary since the Constitutional Court already has the absolute authority as regulated in Article 236C of Law Number 12 Year 2008 and the exercise of such authority takes place when there is a petition, in which subsequently the *a quo* petition is examined by the Constitutional Court. If such authority of the

Constitutional Court must wait for a legal act of delegation from the Supreme Court to the Constitutional Court, then actually the Constitutional Court has delayed the exercise of the authority granted by Law Number 12 Year 2008, particularly Article 236C which has *de facto* and *de jure* been applicable following the date of its enactment, namely April 28, 2008;

Whereas the time of not later than 18 (eighteen) months as set forth in Article 236C of Law Number 12 Year 2008 is a transitional time limit which shall not prevent the Constitutional Court and the Supreme Court from examining, hearing, and deciding upon the disputes on vote count results of the general elections of regional head and vice regional head, but upon the lapse of the time limit of 18 (eighteen) months, the Supreme Court can no longer examine, hear, and decide upon the handling of disputes on vote count results of the general elections of regional head and vice regional head. If the handling of disputes on vote count results of the general elections of regional head and vice regional head must wait for a legal act of delegation from the Supreme Court to the Constitutional Court, as well as the lapse of the time limit of **no later than** 18 (eighteen) months, then the instruction of the law with the time limit of not later than 18 (eighteen) months does not have any meaning. The phrase "**delegated**" in Article 236C of Law Number 12 Year 2008 constitutes an administrative requirement, while the phrase "**this law shall be applicable as of the date of the enactment**" as intended in Article II of Law Number 12 Year 2008 constitutes a concrete norm that must be adhered to. If the two provisions concerned are mutually conflicting during the implementation, then the

administrative requirement must be set aside;

Whereas the filing of the *a quo* petition to the Constitutional Court is a legal option, and the right of the Petitioners as justice seekers which cannot be reduced only because of the requirement for a legal act of delegation from the Supreme Court to the Constitutional Court. One of the reasons of the legislators for the delegation of authority for the handling of disputes on vote count results of the general elections of regional head and vice regional head to the Constitutional Court is for achieving of simple and speedy judicature, as stipulated in Article 5 paragraph (2) of Law Number 4 Year 2004 regarding Judicial Power, which reads, "***The Court shall assist the justice seekers and attempt to overcome all obstacles and hindrances for achieving a judicature which is simple, speedy, and not costly.***"

Whereas the refusal by the Constitutional Court to examine, hear, and decide upon the *a quo* petition is not in line with Article 16 paragraph (1) of Law Number 4 Year 2004 regarding Judicial Power, which reads, "***The Court must not refuse to examine, hear, and decide upon any case filed on the grounds of nonexistent or unclear law; rather, it shall be obligated to examine and hear the case.***"

Hence, the handling of disputes on the results of general elections of regional head and vice regional head shall automatically (by law) become the authority of the Constitutional Court. In the event that there is a conflict between legal certainty and justice, then for the sake of a greater interest, justice must be

prioritized. Based on the foregoing descriptions, in my opinion, the Constitutional Court has the authority to hear the *a quo* petition.

**SUBSTITUTE REGISTRAR,**

**sgd.**

**Cholidin Nasir**