



DECISION

Case Number 067/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 5 Year 2004 regarding the Supreme Court (hereinafter referred to as Law Number 5 Year 2004) against the 1945 Constitution of the State of the Republic of Indonesia (hereinafter referred to as the 1945 Constitution) filed by:

1. **DOMINGGUS MAURITS LUITNAN, S.H.**
2. **L. A. LADA, S.H.**
3. **H. AZI ALI TJASA, S.H., M.H.** respectively Advocates having their domicile at the Dominika Advocates/Lawyers Office, Jl. Stasiun Sawah Besar No.1-2 Central Jakarta, acting individually or collectively, hereinafter referred to as:
Petitioners;

Having read the petition of the Petitioners;

Having heard the statement of the Petitioners;

Having examined the evidence;

Having heard the statements of the Government and the People's Legislative Assembly of the Republic of Indonesia whether presented in the hearing or in writing filed through the Registry Office of the Constitutional Court of the Republic of Indonesia;

LEGAL CONSIDERATIONS

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

Considering whereas prior to examining the substance or the principal issue of the case, the Constitutional Court must first take the following matters into account:

1. Does the Court have the authority to examine and decide upon the *a quo* petition?
2. Do the Petitioners have legal standing to act as Petitioners in the *a quo* petition?

1. AUTHORITIES OF THE COURT

Whereas in accordance with Article 24C Paragraph (1) of the 1945

Constitution in conjunction with Article 10 of Law Number 24 Year 2003 regarding the Constitutional Court, one of the authorities of the Court is to conduct a judicial review of laws against the 1945 Constitution;

Whereas notwithstanding any dissenting opinion among the Constitutional Court Justices regarding Article 50 of Law Number 24 Year 2003 regarding the Constitutional Court, pursuant to the enactment date of the *a quo* law, the Court has the authority to examine, hear and decide upon this petition. In essence, the Petitioners stress their claims on the argument that Article 36 of Law Number 14 Year 1985 was not revoked by Law Number 5 Year 2004, therefore, according to the Petitioners, causing dualism of the law, since Article 36 of Law Number 14 Year 1985 in question is contradictory to Article 12 of Law Number 18 Year 2003 regarding Advocates which regulates the supervision of advocates. In relation to this matter, a question has arisen for the Court, whether there is any constitutionality issue in such a case that provides grounds to the Court to declare itself to have the authority to examine and decide upon the petition in question;

Considering whereas for the purpose of examination of the *a quo* petition, the Court has requested the statement of the Government/President. Through the oral and written statements of the Minister of Law and Human Rights dated January 17, 2005 it was stated that "*Whereas in accordance with the provision of Article 10 of Law Number 24 Year 2003 regarding the Constitutional Court, the authority of the Constitutional Court shall include:*

- a. *Conducting a judicial review of laws against the 1945 Constitution of the State of the Republic of Indonesia;*
- b. *Deciding upon authority disputes among state institutions, whose authorities are granted by the 1945 Constitution of the Republic of Indonesia;*
- c. *Deciding upon the dissolution of political parties; and*
- d. *Deciding upon disputes regarding the results of general elections.*

*From the above description, the Government is of the opinion that the guidance, measures, and supervision of advocates and the notary title, the regulations for which are found in a number of legislations, do fall under the authority (competence) of the Constitutional Court. In the event of any contradiction or overlap between one law and another governing the same matters, universal legislative principles shall apply such as: *lex specialis derogat lex generalis*. Otherwise, this may be settled through legislative review in accordance with the National Legislation Program (PROLEGNAS) as a main priority, instead of through the Constitutional Court...".* Such opinion by the Government was reiterated by the Director General of Legislation of the Department of Law and Human Rights, acting as a substitute proxy for the Government, in his oral statement in the Court hearing dated February 2, 2005;

Whereas, in addition to the foregoing and written statements of the Government, the Court has also received a written statement from the People's

Legislative Assembly (DPR) which essentially states that the substance of the *a quo* petition is not under the competence of the Court, since the substance of the petition does not constitute the judicial review of a law against the 1945 Constitution.

Regarding such testimony of the Government and DPR, the Court is of the opinion that the Government and DPR were inaccurate in interpreting the authority of the Constitutional Court as well as its relationship with the substance of the *a quo* petition, as it will be evident in the following description:

Whereas, based on the authority vested by the 1945 Constitution, the Court functions as the guardian of the constitution. In performing such function, the Court automatically becomes the interpreter of the constitution through its decisions. Therefore, in the event of any doubt as to whether there is any constitutionality issue regarding a concrete matter, the Court has the obligation to make an interpretation of the provisions of the 1945 Constitution;

Whereas a doctrine has been accepted which states that, in interpreting the constitution in the event of a contradiction between one law and another, the principles that apply in legal interpretation, namely (1) *lex posteriore derogat legi priori*, (2) *lex superiore derogat lex inferiori*, (3) *lex specialis derogat lex generalis*, also apply? Such matter is stressed by Prof. Dr. H.C. Heinrich Scholler, “... *the legal interpretation mentioned above (constitutional interpretation principles) is also the basis of the principles on constitutional interpretation; in reality we can support the idea that basically legal interpretation*

and constitutional interpretation are grounded on the same principles”

Whereas in making such interpretation, regardless of whichever interpretation method being selected, the Court adheres to a number of arguments (propositions), namely:

1. whereas the constitution is a series of rules;
2. whereas the rules contained in the constitution has in the highest position;
3. whereas the rules set forth in laws are of inferior position;
4. whereas in the event of contradiction, the inferior rule should give way to the superior one;
5. whereas in the event of a dispute, the judge shall determine the standard for the evaluation of constitutionality based on the constitution itself, rather than based on what the judge prefers to be interpreted as what is intended by the constitution;

Whereas the above arguments, which are used by the Court as in the standard for evaluating the authority of the Court on the *a quo* petition. The existence of two or more laws that are contradictory to each other and which create ambiguity in its application, leading to a lack of legal certainty to such an extent that pursuant to normal logic, such a situation will have a potential to cause the violation or non-implementation of the provisions of the Constitution and/or the principles inherent therein, therefore it is evident for the Court that

there is a constitutionality issue of the law. As the guardian of the constitution, there is not any doubt in the Court to declare itself competent to examine and decide upon the *a quo* petition, regardless of whether or not the arguments of the Petitioners are proven upon examination in the hearing. However, with such a statement, there is no intention that the Court has the authority to hear every issue of contradiction between laws; only if such contradiction pursuant to normal logic causes a constitutionality issue in the form of an opportunity for the violation or non-implementation of the provisions of the Constitution and/or the principles inherent therein, as reflected in the petition *a quo*.

2. LEGAL STANDING OF PETITIONERS

Whereas Article 51 Paragraph (1) of Law Number 24 Year 2003 regarding the Constitutional Court states that,

“Petitioner is a party who assumes that his constitutional right and/or authority has been impaired by the coming into effect of a law, namely:

- a. an individual Indonesian citizen;*
- b. 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 as regulated governed in law;*
- c. a public or private legal entity; or;*

d. *a state institution*".

Whereas, therefore, in order to qualify to be recognized as having legal standing as a petitioner before the Court, an individual or a party must explain:

1. His capacity in relation to the petition being filed, namely whether as an individual Indonesian citizen, or representing a customary law community unit (with due compliance with the requirements set forth in Sub-Paragraph b of Article 51 Paragraph (1) above, or representing a legal entity (public or private), or representing a state institution;
2. The impairment suffered by him in the capacity as mentioned in point 1 as a consequence of the coming into effect of a law.

Whereas the Petitioners are attorneys; therefore regardless of whether or not the argued constitutional impairment is proven, the Petitioners do have a direct interest with the substance of the petition, thus the Petitioners have the legal standing to act as petitioners in the *a quo* petition.

3. PRINCIPAL ISSUE OF THE CASE

Considering whereas the Petitioners argued that Article 36 of Law Number 5 Year 2004 (along with its Elucidation) regarding Amendment to Law Number 14 Year 1985 regarding the Supreme Court (UU MA) contravened Article 24 paragraphs (1) and (3) of the 1945 Constitution.

The *a quo* Article 36 reads, “*The Supreme Court and the Government shall exercise supervision on Legal Counsels and Notaries.*” The Elucidation of the said Article 36 subsequently state that “*In general, guidance and supervision on Legal Counsels and Notaries are the responsibility of the Government. In performing their duties concerning the judiciary in particular, the Legal Counsels and Notaries shall be under the supervision of the Supreme Court. In exercising such supervision, the Supreme Court and Government shall respect and maintain the independence of Legal Counsels and Notaries in performing their respective duties. In the event that measures need to be taken against a Legal Counsel or a Notary in the form of a lay-off and discharge, including temporary discharge, opinion from their respective professional organizations shall be heard first*”.

The Petitioners argued that the supervision on Legal Counsels exercised by the Supreme Court and the Government, as set out in the above Article 36 and its elucidation, has impaired their constitutional rights since according to the Petitioners it contravenes Article 12 of the Law on Advocates (Law Number 18 Year 2003), which states that supervision on Advocates shall be exercised by the Advocates’ Organization. Therefore, the Law on Advocates in question, in the opinion of the Petitioners, is based on the spirit and inspired by the meaning of Article 24 of the 1945 Constitution, therefore Article 36 in question also contravenes the 1945 Constitution.

Considering whereas supervision on a profession, especially one with a function of serving public interest is a necessity; it can even be said to be an inherent nature of the profession itself. Therefore, supervision on the implementation of the functions of a profession that serves public interest in question is a need as well as a necessity to ensure that the public served by the profession shall not be harmed. Therefore, the independence of a profession may not be construed to mean free from supervision. However, supervision must be construed in such a way which makes it difficult to distinguish from excessive intervention that causes a person following a profession, in this case the advocate profession, to be held back in performing his function independently.

Considering whereas, although an amendment has been made to Law Number 14 Year 1985 (regarding the Supreme Court) with Law Number 5 Year 2004, Article 36 evidently is not included among the amended provisions, therefore remaining left uncharged from its original text. This fact is corroborated by another fact, namely the non-inclusion of the substance of said Article 36 into the agenda to be discussed at the hearings between the People's Legislative Assembly and the Government during the course of the amendment of Law Number 14 Year 1985, as clarified by of attorney of DPR in the Court session on February 2, 2005, which is corroborated by the minutes containing the DIM (Inventory of Issues) for the Side-by-side Comparison of Draft Law on the Amendment to Law Number 14 Year 1985 regarding the Supreme Court issued by the Secretariat of the Legislation Board of DPR RI, which in fact does not

include the substance of Article 36 of Law Number 14 Year 1985 in the agenda for the amendment. As a consequence, the *a quo* Article 36 has caused discrepancy with Law Number 18 Year 2003 regarding Advocates and a number of other laws;

Considering whereas the existence of Law Number 5 Year 2004 regarding the Supreme Court in question is closely related to the amendment to a number of other laws due to the changing perspective in reviewing the existence of a legal regime as relating to supervision, then order to understand the essence of the petition of the Petitioners and the reasoning in reviewing the *a quo* petition, the Court deems it necessary to first review the related provisions contained in the laws, namely:

1. Law Number 18 Year 2003;
2. Law Number 14 Year 1985;
3. Law Number 5 Year 2004;
4. Law Number 2 Year 1986;
5. Law Number 8 Year 2004;
6. Law Number 30 Year 2004:
 - a. Whereas Article 36 of Law Number 14 Year 1985 regarding the Supreme Court states that, *“the Supreme Court and the Government shall exercise supervision on Legal Counsels and Notaries”*.

Furthermore, the elucidation of the article states that, *“In general,*

guidance and supervision on Legal Counsels and Notaries are the responsibility of the Government. In performing their duties concerning the judiciary in particular, the Legal Counsels and Notaries shall be under the supervision of the Supreme Court. In exercising such supervision, the Supreme Court and the Government shall respect and maintain the independence of Legal Counsels and Notaries in performing their respective duties. In the event that measures need to be taken against a Legal Counsel or a Notary in the form of a lay-off and discharge, including temporary discharge, opinion from their respective professional organizations shall be heard first”.

- b. Whereas as described in the foregoing, the provision of Article 36 of Law Number 14 Year 1985 mentioned in item a was not amended by Law Number 5 Year 2004 regarding Amendment to Law Number 14 Year 1985 regarding the Supreme Court;
- c. Whereas Article 54 of Law Number 2 Year 1986 regarding Court of General Jurisdiction states that:
 - (1) *The Head of District Court shall exercise supervision on the work of legal counsels and notaries in his jurisdiction, and shall report the result of his supervision to the Head of the High Court, the Head of the Supreme Court, and the Minister of Justice;*
 - (2) *Based on the report mentioned in paragraph (1), the Minister of*

Justice may take measures on any legal counsel or notary who has violated any laws and regulations that govern the profession in question, upon hearing the recommendation/opinion of the Head of the Supreme Court and the relevant professional organization;

- (3) Before the Minister of Justice takes such measures as referred to in paragraph (2), the relevant individual shall be given an opportunity to defend himself/herself;*
- (4) The procedures for the supervision and measures taken and self-defense as referred to in paragraphs (1), (2) and (3) shall be further regulated by the Head of the Supreme Court and the Minister of Justice under the laws;*

d. Whereas Article 54 of Law Number 2 Year 1986 above was later amended by Law Number 8 Year 2004 regarding Amendment to Law Number 2 Year 1986 (point 35) so as to read as follows:

- (1) The Head of District Court shall exercise supervision on the work of notaries in his jurisdiction, and shall report the result of his supervision to the Head of High Court, Head of the Supreme Court, and the Minister whose duties and responsibilities include the notary profession;*
- (2) Based on the report result as referred to in paragraph (1), the Minister whose duties and responsibilities include the notary*

profession may take measures against any notary who violated the laws and regulations that govern the profession in question, upon hearing the recommendation/opinion of the relevant professional organization;

- (3) Before the Minister as referred to in paragraph (1) takes such measures as referred to in paragraph (2), the relevant individual shall be given an opportunity to defend himself/herself;*
- (4) The procedures for the supervision as referred to in paragraph (1) shall be further regulated by the Supreme Court;*
- (5) Provisions regarding the procedures for the measures taken and self-defense as referred to in paragraphs (2) and (3) shall be further regulated by the Minister as referred to in paragraph (1).*

The word “**legal counsel**” in Article 54 of Law Number 2 Year 1986, which was amended by the Law Number 8 Year 2004, was **deleted**. Therefore, legal counsels (who after the enactment of Law Number 18 Year 2003 were referred to as Advocates) were henceforth no longer under the supervision of the District Court and High Court (as a part of the courts within the Court of General Jurisdiction under the Supreme Court);

- e. Chapter XIII Closing Provisions, Article 91, Law Number 30 Year 2004 regarding the Notary Profession states that,

At the time this law enters into force:

1. *Reglement op Het Notaris Ambt in Indonesie* (State Gazette 1860:3) as amended most recently in State Gazette Year 1956 Number 101;
2. *Ordonantie* dated September 16, 1931 regarding Remuneration for Notaries;
3. Law Number 33 Year 1954 regarding Deputy Notary and Acting Deputy Notary (State Gazette Year 1954 Number 101);
4. **Article 54 of Law Number 8 Year 2004 regarding Amendment to Law Number 2 Year 1986 regarding Court of General Jurisdiction (State Gazette of the Republic of Indonesia Year 2004 Number 34, Supplementary State Gazette of the Republic of Indonesia Number 4379);** and
5. Government Regulation Number 11 Year 1949 regarding Oath/Pledge of Profession for Notaries,
shall be revoked and declared null.

Considering whereas based on the above series of provisions in a number of laws, using grammatical and systematic interpretation, Article 54 of Law Number 2 Year 1986 (as amended by Law Number 8 Year 2004) has been actually revoked in its entirety by the Law on the Notary Profession **which therefore indirectly means that the provisions of**

Article 36 of Law Number 14 Year 1985 in conjunction with Law Number 5 Year 2004 has been amended as well, therefore carrying a judicial implication that supervision on advocates (who prior to the enactment of Law Number 18 Year 2003 were referred to as “legal counsels”) which used to be exercised by the Supreme Court and the courts of General Jurisdiction under it, namely the District Court and High Court, is no longer applicable; what is applicable instead is the provision of Article 12 of Law Number 18 Year 2003 regarding Advocates, paragraph (1) of which states that, “*Supervision on Advocates shall be exercised by the Advocates’ Organization*”, whereas its paragraph (2) states that, “*Supervision as referred to in paragraph (1) is intended to ensure that in practicing their profession Advocates shall consistently uphold the professional code of the Advocate profession and laws and regulations*”,

Considering whereas based on the analysis and reasoning as described above, on the one hand, the Court has found no constitutional right as argued by the Petitioners which has been violated with the non-amendment of the provisions of Article 36. On the other hand, however, it is evident to the Court that the legislators were not meticulous in exercising their authority, resulting in the occurrence of inconsistency between one law and another. Such inconsistency has caused doubt in the implementation of the law in question, leading to legal uncertainty, a condition that can potentially lead to a violation of the constitutional rights as set forth in Article 28D Paragraph (1) of the 1945 Constitution with

states that, “*Every person shall have the right to the recognition, the guarantee, the protection and equitable legal certainty as well as equal treatment before the law*”. Such legal uncertainty is also inconsistent with the spirit to uphold the principles of a constitutional state as mandated by Article 1 Paragraph (3) of the 1945 Constitution which expressly states that Indonesia is a constitutional state in which legal certainty is an inalienable prerequisite;

Considering whereas despite the fact that the Court accepts the universal principle of *lex specialis derogat lex generalis* as one of the principles in performing legal interpretation and constitutional interpretation, the Court does not share the view of the Government as stated in the written statement of the Minister of Law and Human Rights dated January 17, 2005 which states that the *a quo* petition does not fall under the authority of the Constitutional court, but rather the authority of the legislators (legislative review). In addition, the conflict between the two laws is not related to the principle of *lex specialis derogat lex generalis* as expressed by the Government, since it is evident that the two laws in question govern two separate matters, therefore one is not a *lex specialis* of the other;

Considering whereas the Court also disagrees with the Petitioners who in their petition considered themselves to possess a constitutional right under Article 24 Paragraphs (1) and (3) of the 1945 Constitution,

which was referred to by the Petitioners to argue that Article 36 of Law Number 5 Year 2004 contravened the independence of the judiciary principle since Article 36 in question gave authority to the Supreme Court and the Government to exercise supervision on advocates. Pursuant to Article 12 Paragraph (1) of Law on Advocates (Law Number 18 Year 2003), the authority to exercise supervision on advocates is granted to the Advocates' Organization, being intended to ensure that in their professional practices, Advocates shall consistently uphold their professional code of ethics and laws and regulations, as stated in Article 12 Paragraph (2) of the Law on Advocates;

Considering whereas notwithstanding the flaws on the part of the Petitioners in building their arguments to support their claims, the Court concludes that the inaccuracy in the process of amending Law Number 14 Year 1985 into Law Number 5 Year 2004, which did not amend Article 36 of Law Number 14 Year 1985 in question, has caused legal uncertainty in its implementation, so that after the coming into effect of Article 12 of Law Number 18 Year 2003 regarding Advocates, the existence and applicability of Article 36 of Law Number 14 Year 1985 as amended with Law Number 5 Year 2004 contravenes Article 28D Paragraph (1) of the 1945 Constitution and therefore the petition of Petitioners must be granted;

Considering whereas although the Court is of the opinion that

Article 36 of Law Number 14 Year 1985 as amended with Law Number 5 Year 2004 is contradictory to the 1945 Constitution, the opinion of the Court is not intended to be construed to mean that Advocates are entirely independent from supervision by other parties beyond the advocates' organization. The Government, as well as the judicial body, automatically has an inherent power to exercise supervision beyond professional oversight as referred to in the Law on Advocates, such as supervision on the Advocates' Organization and supervision on the Advocates in performing their practices in court hearings.

In view of Article 56 Paragraphs (2), (3) and Article 57 Paragraph (3) of Law Number 24 Year 2003 regarding the Constitutional Court;

PASSING THE DECISION:

To grant the petition of Petitioners;

To declare that Article 36 of Law Number 5 Year 2004 regarding Amendment to Law Number 14 Year 1985 regarding the Supreme Court is contradictory to the 1945 Constitution of the State of the Republic of Indonesia;

To declare that Article 36 of Law Number 5 Year 2004 regarding Amendment to Law Number 14 Year 1985 regarding the Supreme Court has no binding legal effect;

To order the appropriate publication of this decision in the State Gazette of the Republic of Indonesia;

Hence the decision was made in the Plenary Consultative Meeting of nine (9) Constitutional Court Justices on Monday, February 14, 2005, and pronounced in a Session open for the public on this day of Tuesday, February 15, 2005, by us: Prof. Dr. Jimly Asshiddiqie, S.H., as the Chairman and concurrent Member, accompanied by Prof. H.M. Laica Marzuki, S.H., Prof. H.A.S. Natabaya, S.H., LL.M., Prof. H.A. Mukthie Fadjar, SH., M.S., H.A. Roestandi, SH., Dr. Harjono, S.H., M.C.L., I Dewa Gede Palguna, SH., M.H., Maruarar Siahaan, S.H., and Soedarsono, S.H., respectively as Members, and assisted by Rustiani, S.H., M.H., as Substitute Registrar, and in the presence of the Petitioners, the Government, and the People's Legislative Assembly;

CHIEF JUSTICE,

signed

Prof. Dr. Jimly Asshiddiqie, S.H.

JUSTICES,

signed

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

signed

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

signed

signed

Prof. HAS. Natabaya SH. LL.M.

signed

Dr. Harjono, SH., M.CL.

signed

I Dewa Gede Palguna, SH., MH.

signed

H. A. Roestandi, SH.

Maruarar Siahaan, SH.

signed

Soedarsono, SH.

SUBSTITUTE REGISTRAR,

signed

Rustiani, SH.MH.