



DECISION

Number 8/PUU-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 a case of petition for Judicial Review on Law Number 32 Year 2004 regarding Regional Government against the 1945 Constitution of the State of the Republic of Indonesia, filed by:

[1.2] **Drs. H.M. SAID SAGGAF, M.Si.**, occupation: Regent of Mamasa Regency, West Sulawesi Province, residing at Jalan Hertasning Utara 3 B. F.26 Makassar, South Sulawesi Province, by virtue of a Special Power of Attorney Number dated February 18, 2008 granting power to **JAMALUDDIN RUSTAM, S.H.,M.H.**, Advocate/Legal consultant, domiciled in and having his office at Jalan Hertasning VI Block E 8 Number 12 M, Makassar, South Sulawesi Province; Hereinafter referred to as the **Petitioner**;

[1.3] Having read the petition of the Petitioner;

Having heard the statements of the Petitioner/his attorney-in-fact;

Having examined the Petitioner's evidences;

3. LEGAL CONSIDERATIONS

[3.1] Considering whereas the purpose and objective of the Petitioner's petition are as described above;

[3.2] Considering whereas before considering the Principal Petition, the Constitutional Court (hereinafter referred to as the Court) shall first consider the following matters:

1. First, whether the Court has the authority to examine, hear, and decide upon the *a quo* petition;
2. Second, whether the Petitioner has the legal standing to act as Petitioner in the *a quo* petition;

In respect of the aforementioned two issues, the Court is of the following opinions:

AUTHORITY OF THE COURT

[3.3] Considering whereas, based on the provisions of Article 24C Paragraph (1) of the 1945 Constitution of the Republic of Indonesia (hereinafter referred to as the 1945 Constitution), which is further confirmed in Article 10 Paragraph (1) of Law Number 24 Year 2003 on the Constitutional Court (hereinafter referred to as the Constitutional Court Law); it is stated that one of

the authorities of the Court is to hold hearing at the first and final level, the decisions of which are final in nature, in order to conduct judicial review on laws against the Constitution.

[3.4] Considering whereas the Petitioner's petition is a petition for judicial review on Article 58 sub-article o of Law Number 32 Year 2004 regarding Regional Governance (State Gazette of the Republic of Indonesia Number 125, Supplement to State Gazette of the Republic of Indonesia Number 4437, hereinafter referred as the Regional Governance Law) against the 1945 Constitution. Therefore, the Court is authorized to examine, hear, and decide the *a quo* petition.

LEGAL STANDING OF THE PETITIONER

[3.5] Considering whereas Article 51 Paragraph (1) of the Constitutional Court Law reads: *"Petitioner shall be parties who believe that their constitutional rights and/or authorities have been impaired by the enactment 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 social development 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".*

Hence, for a person or a party to be accepted as Petitioner in a petition for judicial review on a law against the 1945 Constitution, the person or party must first explain:

- a. His qualification in the *a quo* petition, whether as an individual Indonesian citizen, customary law community unit (in accordance with the requirements as intended in Article 51 Paragraph (1) Sub-Paragraph b above), legal entity (public or private), or state institution;
- b. His constitutional rights and/or authorities in such qualification as intended in point (a) which are deemed to have been impaired by the enactment of a law;

[3.6] Considering, whereas, since Decision Number 006/PUU-III/2005 and in subsequent decisions, the Court has stated its opinion that such impairment of constitutional rights and/or authorities must meet the following five requirements, namely:

- a. the petitioner holds a constitutional right and/or authority granted by the 1945 Constitution;
- b. such constitutional right and/or authority are deemed by the Petitioner to have been impaired by the enactment of a law;
- c. such impairment of constitutional rights and/or authorities are specific and actual in nature or at least will likely occur based on logical reasoning;
- d. there is a causal connection (*causal verband*) between such impairment of and the law petitioned for judicial review;

- e. there is a possibility that the argued constitutional impairment will not occur or no longer exist with the granting of the petition;

[3.7] Considering whereas based on the description of the provision of Article 51 Paragraph (1) of the Constitutional Court Law and the aforementioned requirements for impaired constitutional rights and/or authorities, the Court shall consider the legal standing of the Petitioner in accordance with the Petitioner's description in his petition, statement in the hearing, and evidences submitted by the Petitioner;

[3.8] Considering whereas the Petitioner in his petition has explained his qualification as an individual Indonesian citizen, as stated in Identity Card Number 21.5010.271242.0001 (*vide* Exhibit P-1), who will run as Regent of Mamasa Regency, West Sulawesi Province, for the term of 2008-2013. Therefore, the Court is in the opinion that the Petitioner may be classified as an individual Indonesian citizen as intended in Article 51 Paragraph (1) of the Constitutional Court Law. The Court shall then assess whether the Petitioner's constitutional rights/authorities as set forth in the 1945 Constitution has been impaired by the enactment of Article 58 sub-article o of the Regional Governance Law;

[3.9] Considering whereas the Petitioner in his petition argues that he has constitutional rights and/or authorities granted by the 1945 Constitution, which reads:

- Article 27 Paragraph (1), “*All citizens shall have equal status before the law and government administration and shall be obligated to uphold such law and government administration, without exception*”;
- Article 28D Paragraph (3), “*Every citizen shall have the right to obtain equal opportunities in government*”;
- Article 28I Paragraph (2), “*.Every person shall have the right to be free from discriminatory treatment on any basis whatsoever and shall have the right to obtain protection against any such discriminatory treatment*”;

[3.10] Considering whereas the Petitioner in the qualification described above considers himself impaired by the Letter from the General Elections Commission (*Komisi Pemilihan Umum* or KPU) dated September 25, 2007 Number 725/15/IX/2007 and the Letter from the Minister of Home Affairs dated September 5, 2007 Number 100/1680/OTDA, which in principle state the following:

- Whereas the Petitioner, Drs. H.M. Said Saggaf. M.Si., served as the Regent of Bantaeng Regency in the term of 1993-1998 and as Regent of Mamasa Regency in the term of 2003-2008, therefore the said person does not fulfill the requirements as a candidate Regional Head/Regent of Mamasa Regency for the term of 2008-2013 as intended in Article 58 sub-article o of the Regional Governance Law *juncto* Article 38 Paragraph (1) sub-paragraph o of Government Regulation Number 6 Year 2005 *juncto* Government Regulation Number 25 Year 2007 (KPU Letter , *vide* Exhibit P-5);

- Whereas the Petitioner, Drs. H.M. Said Saggaf M.Si., has served as regent in both the Bantaeng regency and the Mamasa Regency. Because the said person has served as regent twice, then based on the provisions in Article 58 sub-article o of the Regional Governance Law *juncto* Article 38 Paragraph (1) sub-paragraph o of Government Regulation Number 6 Year 2005 regarding the Election, Validation, Appointment, and Dismissal of Regional Heads and Vice Regional Heads, the Petitioner H.M. Said Saggaf M.Si. cannot be proposed again as a candidate Regent of Mamasa Regency, (Minister of Home Affairs Letter, *vide* Exhibit P-4);

According to the Petitioner, the aforementioned Letters from KPU and the Minister of Home Affairs Letter are based on Article 58 sub-article o of the Regional Governance Law which reads, "*Candidate Regional Heads and Vice Regional Heads are Indonesian citizens who fulfilled the following requirements: ... o. never served as Regional Head or Vice Regional Head for 2 (two) terms of office in the same position*". With the enactment of Article 58 sub-article o of the Regional Governance Law, the Petitioner cannot run for a second term as Regent of Mamasa Regency in the period of 2008-2013;

[3.11] Considering whereas the enactment of Article 58 sub-article o of the Regional Governance Law, which is the basis of Government Regulation Number 6 Year 2005 and referred by both the KPU and the Minister of Home Affairs in stipulating their policies, has obstructed the Petitioner from running for a second

term as Regent of the Mamasa Regency. Therefore the Petitioner's argument in the impairment of his constitutional right as argued *prima facie* is acceptable. Therefore, the court is of the opinion that the Petitioner fulfills the legal standing requirements for filing a petition for judicial review on the Regional Governance Law against the 1945 Constitution. Therefore, the Court shall consider the Principal Petition;

PRINCIPAL PETITION

[3.12] Considering whereas in describing the impairment of his constitutional rights as a result of the enactment of Article 58 sub-article o of the Regional Governance Law, the Petitioner argues as follows:

- Whereas the Petitioner, Drs. H.M. Said Saggaf, M.Si., has served as regional head but not in consecutive terms and in different regions, namely in 1993-1998 as regent of Bantaeng Regency South Sulawesi Province and in 2003-2008 as regent of Mamasa Regency West Sulawesi Province. The Petitioner argues that Article 58 sub-article o of the Regional Governance Law cannot be applied to the Petitioner, because the Petitioner has never served as a regional head in two consecutive terms and in the same region;
- Whereas Article 58 sub-article o of the Regional Governance Law regulating the requirements of regional heads and vice regional heads impairs the Petitioner's constitutional right to run as Regent of the Mamasa Regency in the period of 2008-2013. The Petitioner argues that

Article 58 sub-article o of the Regional Governance Law is not relevant anymore with the spirit of reformation and democracy, and it violates human rights, therefore the Petitioner argues that the *a quo* article is contradictory with Article 27 Paragraph (1), Article 28D Paragraph (3), and Article 28I Paragraph (2) of the 1945 Constitution;

[3.13] Considering whereas to support those arguments, the Petitioners has presented documents or exhibits marked as Exhibit P-1 to Exhibit P-5 and the Petitioner at the hearing dated March 26, 2008 gave his statement which is completely described in the Principal Case, principally describing the following:

- The Petitioner questions the norm of Article 58 sub-article o of the Regional Governance Law, because the *a quo* Article does not explain the definition of two terms of office in the same position and in the same region. If Article 58 sub-article o of the Regional Governance Law explains about that matter, then the Petitioner will not question the constitutionality of the *a quo* Article;
- The limitation to serve as regional head can not be compared to the limitation of Presidential terms of office, because the limitation to serve as a President is set forth in the 1945 Constitution;
- Article 58 sub-article o of the Regional Governance Law cannot be applied to the Petitioner yet, because the Petitioner has never served as a Regent in two consecutive terms. Even though the Petitioner has served as regent in the Bantaeng Regency and the Mamasa Regency, it was not consecutive and it was in different regions;

- Article 58 sub-article o of the Regional Governance Law restricts/obstructs the Petitioner from running as Regional Head in the Mamasa Regency for the term of 2008-2013. The Petitioner argues that no limitation should be imposed on regional head position because such limitation is contradictory to Article 27 Paragraph (1), Article 28D Paragraph (3), and Article 28I Paragraph (2) of the 1945 Constitution;

[3.14] Considering whereas after hearing the aforementioned statements of the Petitioner, and the evidences submitted by the Petitioner, the Court is of the following opinions with regard to the Petitioner's arguments :

[3.14.1] The Petitioner argues that he has served as regional head twice, namely in the Bantaeng Regency and in the Mamasa Regency, but not in consecutive terms and in different regions. Therefore, the Petitioner argues that the requirements for regional head and vice regional head as regulated in Article 58 sub-article o of the Regional Governance Law cannot be applied yet to the Petitioner;

With respect to the aforementioned argument of the Petitioner, the Court is of the opinion that Article 58 of the Regional Governance Law reads: *"Candidate Regional Heads and Vice Regional Heads are Indonesian citizens who fulfilled the following requirements:*

- a. . . .
- b. . . .
- c. . . .

- o. ***has never served as Regional Head or Vice Regional Head for 2 (two) terms of office in the same position”.***

The said provisions of Article 58 sub-article o of the Regional Governance Law, is reaffirmed in Article 38 of the Regulation of the Government of the Republic of Indonesia Number 6 Year 2005 regarding the Election, Validation, appointment, and Dismissal of Regional Heads and Vice Regional Heads (hereinafter referred as PP Number 6 Year 2005) which reads, “*Candidate Regional Heads and Vice Regional Heads shall be Indonesian citizens who fulfill the following requirements:*

- a. . . .
- b. . . .
- c.
- o. ***has never served as Regional Head or Vice Regional Head for 2 (two) terms of office in the same position”.***

The Elucidation of Article 38 of PP Number 6 Year 2005 reads:

- a. . . .
- b. . . .
- c. . . .
- o. ***the person concerned has never served for two terms office in the same region or in different regions and the terms of office shall be calculated as of his inauguration.***

It can be inferred from Article 58 sub-article o of the Regional Governance Law *juncto* Article 38 sub-article o of PP Number 6 Year 2005 and its elucidation that the emphasize in the requirements for running as regional head and vice regional head is on the phrase ***has never served as Regional Head or Vice Regional Head for 2 (two) terms of office in the same position, whether in the same region or in different regions.***

Based on the aforementioned provisions, the Court is in the opinion that the Petitioner as a citizen has the constitutional right to participate in the government, *in casu* by serving as regent. However, the said constitutional right may be limited in accordance with Article 28J Paragraph (2) of the 1945 Constitution which reads, *“In exercising their right and freedom, every person must submit to the limitations stipulated in laws and regulations with the sole purpose to guarantee the recognition of and the respect for other people's rights and freedom and fulfill fair demand in accordance with the considerations of morality, religious values, security, and public order in a democratic society”*. Concerning regional head position, the said limitation may be implemented by law in the forms of: (i) limitation to serve in the same position for two consecutive terms, or (ii) limitation to serve in the same position for two non-consecutive terms, or (iii) limitation to serve in the same position for two terms in different regions. Because the said limitation is intended as an open matter for the lawmakers as options in making policies, therefore, it is not contradictory to the 1945 Constitution. On the contrary, if the said limitation is considered contradictory to the 1945 Constitution, as argued by the Petitioner, and

consequently the said Article must be declared to have no binding legal force, then there would not be any limitation anymore, whereas the said limitation is necessary in the context of implementing the principles of democracy and limitation of power which are the spirit of the 1945 Constitution.

[3.14.2] The Petitioner argues that Article 58 sub-article o of the Regional Governance Law which sets forth the requirements for regional head and vice regional head has impaired his constitutional right to run as Regent of Mamasa Regency for the term 2008-2013 and violates his human rights, and, therefore, it is contradictory to Article 27 Paragraph (1), Article 28D Paragraph (3), and Article 28I Paragraph (2) UUD 1945;

With respect to the Petitioner's arguments, the Court is in the opinion that Article 27 Paragraph (1) of the 1945 Constitution reads: "*All citizens shall have equal status before the law and government administration and shall be obligated to uphold such law and government administration, without exception*". Article 28D Paragraph (3) of the 1945 Constitution reads, "*Every citizen shall have the right to obtain equal opportunities in government*". Also, Article 28I Paragraph (2) of the 1945 Constitution reads, "*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*". Article 58 sub-article o of the Regional Governance Law must be understood as regulating the requirements to serve as Regional Head and Vice Regional Head. Whereas Article 27 Paragraph (1) and Article 28D Paragraph (3) of the 1945 Constitution

regulates provisions regarding the equality of citizen in laws and government. Therefore, each citizen **fulfilling the requirements** as regulated in Article 58 of the Regional Governance Law, especially sub-article o, must be treated as equals to serve as regional head or vice regional head.

The next question is about whether or not Article 58 sub-article o of the Regional Governance Law has created discriminatory practices. To answer that question, it is necessary to define discrimination in the nomenclature of Human Rights Law. Article 1 of Law Number 39 Year 1999 regarding Human Rights reads, *“Discrimination shall be every direct or indirect limitation, abuse, or isolation **based on** human differentiation on the basis of religion, tribe, race, ethnicity, group, class, social status, economic status, gender, language, political belief, causing the decrease, deviation, or abolishment in the recognition, implementation or exercise of human rights and fundamental freedom in individual as well as collective life in the fields of politics, economy, social, culture, and other aspects of life”*.

Therefore it is clear that the provisions of Article 58 sub-article o of the Regional Governance Law which regulates the requirements for serving as regional head and vice regional head and sets forth the limitation of two terms of office for regional head position has no connection whatsoever with Article 28I Paragraph (2) of the 1945 Constitution. The said limitation as regulated in Article 58 of the Regional Governance Law, especially sub-article o, may be implemented as long as the limitation is stipulated by law affecting everyone without any

discrimination, thus not considered discriminative. Even if the Petitioner considers himself impaired by the Letters from KPU and the Minister of Home Affairs as argued in the *a quo* petition, the forum to settle the matter is not the Constitutional Court, but in a court under the Supreme Court. Therefore, the Petitioner's arguments are groundless.

4. CONCLUSION

Based on the whole description above, the court concludes that Article 58 sub-article o of the Regional Governance Law which regulates the requirements for serving as regional head and vice regional head, namely "*never served as regional head or vice regional head for two terms of office in the same position.*" Is not contradictory with Article 27 Paragraph (1), Article 28D Paragraph (3), and Article 28I Paragraph (2) of the 1944 Constitution. Therefore, the arguments presented by the Petitioner are groundless and thus the petition of the Petitioner must be declared rejected;

5. DECISION

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

Declaring that the petition of the Petitioner is rejected;

In witness whereof, decided at the Consultative Meeting of Justices on Monday, May 5, 2008 by nine Constitutional Court Justices, and pronounced at the Plenary Session of the Constitutional Court open for public on this day, Tuesday, May 6, 2008 by us Jimly Asshiddiqie, as the Chairperson and concurrent Member, H.A.S Natabaya, H. Abdul Mukthie Fadjar, H. Harjono, H.M. Laica Marzuki, I Dewa Gede Palguna, Maruarar Siahaan, Soedarsono, and Moh. Mahfud MD respectively as members, assisted by Sunardi as Substitute Clerk, 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.**

H.A.S. Natabaya

sgd.

H. Abdul Mukthie Fadjar

sgd.

H. Harjono

sgd.

H.M. Laica Marzuki

sgd.

I Dewa Gede Palguna

sgd.

Maruarar Siahaan

sgd.

Soedarsono

sgd.

Moh. Mahfud MD

SUBSTITUTE CLERK,

sgd.

Sunardi