



DECISION

NUMBER 6/PUU-VI/2008

FOR THE SAKE OF JUSTICE UNDER THE ONE ALMIGHTY GOD

THE CONSTITUTIONAL COURT OF 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 of Law Number 51 Year 1999 regarding the Establishment of Buol Regency, Morowali Regency and Banggai Kepulauan Regency against the 1945 Constitution of the State of the Republic of Indonesia, filed by:

[1.2] THE PETITIONERS

A. The Customary Law Community Unit of Banggai

Moch. Chair Amir; born in Luwuk on January 27, 1944; Moslem; occupation as Tomundo/ Head of Banggai Customary Discussion Forum (LMAB) Banggai Regency and Banggai Kepulauan Regency; with its address at Jalan Brawijaya No. 1 Banggai in Banggai Royal Palace, Banggai Kepulauan Regency, Central Sulawesi; acting for and on behalf of/representing the interest of Banggai customary community;

Hereinafter referred to as -----**Petitioner I**;

Based on Special Powers of Attorney dated December 10, 2007 and February 20, 2008, authorizing: Arifin Musa, S.H; Dachlan H. Dani, S.H.; and Damrah Mamang, S.H.; the Advocates/Lawyers/Legal Consultants who elect their legal domicile at Arifin Musa, S.H. & Associates Law Office, with its address at Jalan Ir. H. Juanda No. 60 Palu/Jalan Monginsidi No. 113, Palu,

B. Individuals

- 1. Alwi M. Dg. Liwang, S.H.;** born in Poso on November 24, 1964; Indonesian Citizen; occupation as a DPRD (Regional People's Legislative Assembly) Member of Banggai Kepulauan Regency, for 2004-2009 period; with his address at Jalan Benteng No. 9, Lompio Sub-District, Banggai District, Banggai Kepulauan Regency – Central Sulawesi;
- 2. Arpat Liato;** born in Banggai on August 8, 1963; Indonesian Citizen; occupation as a DPRD Member of Banggai Kepulauan Regency, for 2004-2009 period; with his address at Jalan R. Tadjia Dodung Sub-district, Banggai District, Banggai Kepulauan Regency – Central Sulawesi;
- 3. Frans L. Bukamo, BBA;** born in Kaukes on November 20, 1953; Christian; occupation as a DPRD Member of Banggai Kepulauan Regency, for 2004-2009 period; with his address at Jalan Abdul Aziz, Tanobonunungan Sub-District, Banggai District, Banggai Kepulauan Regency – Central Sulawesi;

4. **M. Tanjung;** born in Banggai on July 25, 1971; Indonesian Citizen, occupation as an Entrepreneur, convicted with 8-month imprisonment and 1.2-year probation, declared to have violated Article 214 *juncto* Article 55 of the Indonesian Criminal Code (KUHP) in the social violence which occurred on February 28, 2007; addressed at Jalan Mandapar, Lompio Sub-District, Banggai District, Banggai Kepulauan Regency – Central Sulawesi;
5. **Rizal Arwi;** born in Liang on July 1, 1982; Indonesian Citizen, occupation as an Entrepreneur, convicted with 6-month imprisonment and 1.6-month probation, declared to have violated Article 214 *juncto* Article 55 of KUHP (Indonesian Criminal Code) in the social violence which occurred on February 28, 2007; addressed at Jalan AR. Asgar No. 1, Lompio Sub-District, Banggai District, Banggai Kepulauan Regency – Central Sulawesi;
6. **Yatno Lagona;** born in Banggai on November 3, 1967; Indonesian Citizen, occupation as an Entrepreneur, convicted with 6-month imprisonment and 1.6-month probation, declared to have violated Article 214 *juncto* Article 55 of KUHP in the social violence which occurred on February 28, 2007; addressed at Perumda ATM, Block D, No. 5, Adean Village, Banggai Tengah District, Banggai Kepulauan Regency – Central Sulawesi;

7. **Hasdin Mondika**; born in Banggai on March 3, 1973; Moslem; Indonesian Citizen, occupation as an Entrepreneur, convicted with 1-year imprisonment and 2-year probation, declared to have violated Article 212 *juncto* Article 24 Paragraph (1), *juncto* Article 335 Paragraph (1) 1st *juncto* Article 55 Paragraph (1) 1st of KUHP in the social violence which occurred on February 28, 2007; addressed at Jalan Pattimura No. 166, Lompio Sub-District, Banggai District, Banggai Kepulauan Regency – Central Sulawesi;
8. **Sri Siti Hardianti**; born in Makassar on May 30, 1972; Indonesian Citizen, wife of the late Junais, a death victim of apparatus' violence on February 28, 2007; occupation as a housewife; addressed at Lompio Sub-District, Banggai District, Banggai Kepulauan Regency – Central Sulawesi;
9. **Maryam Yusuf**; born in Gorontalo on June 11, 1976; Indonesian Citizen, wife of the late Ardan Bambang, a death victim of apparatus' violence on February 28, 2007; occupation as an Entrepreneur; addressed at Lompio Sub-District, Banggai District, Banggai Kepulauan Regency – Central Sulawesi;
10. **Harsono Saidia**; born in Poposi on July 1, 1947; Indonesian Citizen; father of the late Ridwan H. Saidia, a death victim of apparatus' violence on February 28, 2007; occupation as an Entrepreneur; addressed at Lompio Sub-district, Banggai District, Banggai Kepulauan Regency – Central Sulawesi;

11. **Arsid Musa**; born in Banggai on August 10, 1943; Indonesian Citizen; father of the late Ilham Musa, a death victim of apparatus' violence on February 28, 2007; occupation as an Entrepreneur; addressed at Lompio Sub-District, Banggai District, Banggai Kepulauan Regency – Central Sulawesi;

The individual Petitioners group number 1 until number 11 mentioned above shall hereinafter be referred to as ----- **Petitioner II**;

Based on Special Power of Attorney dated March 10, 2008, Petitioner I and Petitioner II have authorized AH. Wakil Kamal, S.H.; Advocate of Indonesian Legal Society (MHI), addressed at Jalan Bunga No. 21, Matraman, East Jakarta 1340;

[1.3] Having read the petition of the Petitioners;

Having heard the statement of the Petitioners;

Having heard and read the statements of the related Party Sulaeman Husen, S.E., M.H. and friends;

Having heard and read the statement of the related Party Governor of Central Sulawesi Province;

Having heard and read the statement of the related Party, the Regional People's Legislative Assembly (DPRD) of Banggai Kepulauan Regency, Central Sulawesi;

Having heard and read the statement of the related Party, Regent of Banggai Kepulauan Regency, Central Sulawesi;

Having read the statement of the Government;

Having read the statement of the People's Legislative Assembly (DPR);

Having heard and read the statements of experts of the Petitioners and experts presented by the related Party Sulaeman Husen, S.E., M.H. and friends;

Having read the conclusions of Petitioner I and Petitioner II as well as the related Parties;

Having examined the evidence.

3. LEGAL CONSIDERATIONS

[3.1] Considering whereas the purpose and objective of the Petitioners' petition are concerned with the judicial review of Article 11 of Law Number 51 Year 1999 regarding the Establishment of Buol Regency, Morowali Regency and Banggai Kepulauan Regency (State Gazette of the Republic of Indonesia Year 1999 Number 179, Supplement to State Gazette of the Republic of Indonesia Number 3900, hereinafter referred to as Law No. 51/1999) against the 1945 Constitution of the State of the Republic of Indonesia (hereinafter referred to as the 1945 Constitution);

[3.2] Considering whereas the Constitutional Court (hereinafter referred to as the Court) shall consider three legal issues as follows:

- a. The issue regarding the authority of the Constitutional Court to examine, hear and decide upon the *a quo* petition;
- b. The issue regarding the legal standing of the Petitioners;
- c. The issue regarding the principal issue of the petition, which is the constitutionality of Article 11 of Law No. 51/1999.

Authority of the Court

[3.3] Considering whereas pursuant to Article 24C Paragraph (1) of the 1945 Constitution, one of the authorities of the Court is to conduct judicial review of a law against the 1945 Constitution;

[3.4] Considering whereas the Petitioners' petition is concerned with the judicial review of Law No. 51/1999, which was enacted on October 4, 1999 against the 1945 Constitution, which means that the law was enacted prior to the amendment to the 1945 Constitution on October 19, 1999. Nevertheless, due to the fact that Article 50 of Law Number 24 Year 2003 regarding the Constitutional Court (State Gazette of the Republic of Indonesia Year 2003 Number 98, Supplement to State Gazette of the Republic of Indonesia Number 4316, hereinafter referred to as the CC Law) which became a hindrance to the judicial review of the laws enacted prior to the Amendment to the 1945 Constitution by the Court has been declared as no longer having any binding legal force pursuant to Decision Number 066/PUU-II/2004, and therefore the Court has the authority to examine, hear, and decide upon the *a quo* petition;

Legal Standing of the Petitioners

[3.5] Considering whereas pursuant to Article 51 Paragraph (1) of the CC Law, the parties who can file a petition for judicial review of law against the 1945 Constitution shall be those who assume that their constitutional right and/or authority have been impaired by the coming into effect of a law, namely:

- a. an individual Indonesian citizen (including a group of people having a common interest);

- 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 in law;
- c. a public or private legal entity; or;
- d. a state institution”.

[3.6] Considering whereas following its Decision Number 006/PUU-III/2005 and Decision Number 11/PUU-V/2007 as well as subsequent Decisions, in its legal considerations the Court has had a stand that the impairment of constitutional right and/or authority as intended in Article 51 Paragraph (1) of the CC Law has to fulfill 5 (five) requirements, namely:

- a. the existence of the Petitioner’s constitutional right and/or authority granted by the 1945 Constitution;
- b. such constitutional right and/or authority is deemed to have been impaired by the coming into effect of a law;
- c. such impairment of constitutional right and/or authority is specific (special) and actual or at least is potential in nature which based on logical reasoning will certainly occur;
- d. the existence of a causal relationship (*causal verband*) between the Petitioner’s constitutional impairment and the law petitioned for review;
- e. it is expected that with the granting of the petition, the constitutional impairment argued shall not or shall never occur again;

[3.7] Considering whereas the Petitioners consist of two groups, namely:

- a. The Customary Law Community Unit of Banggai represented by *Tomundo*/Head of Banggai Customary Discussion Forum (LMAB), acting as Petitioner I who claimed himself as the Petitioner of the Customary Law Community Unit category;
- b. 11 (eleven) persons of Individual Indonesian citizens (Petitioner number 1 until Petitioner number 11), hereinafter referred to as Petitioner II, claiming themselves as Individual Indonesian citizens;

[3.8] Considering whereas Petitioner I argues of having the constitutional rights granted by 1945 Constitution, namely:

- a. the rights of respect to the customary law community unit along with their traditional rights insofar as they are still existent [Article 18B paragraph (2)];
- b. the rights of equal position before the law and government [Article 27 paragraph (1)];
- c. the right to improve oneself in striving for his/her rights collectively [Article 28C paragraph (2)];
- d. 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 28D Paragraph (1)];

- e. the right to obtain equal opportunities and benefits for achieving justice. [Article 28H Paragraph (2)];
- f. the rights of respect to culture identities and the rights of traditional communities [Article 28I Paragraph (3)];
- g. the rights of respect to the human rights of another person in the orderly life of the community, nation and state [Article 28J Paragraph (1)].

According to Petitioner I, its constitutional rights as mentioned above have been impaired by the coming into effect of Article 11 of Law 51/1999 which contains provisions regarding the removal of the Capital City of Banggai Kepulauan from Banggai to Salakan five years following the establishment of Banggai Kepulauan Regency, because Petitioner I has lost the chance to maintain and develop cultural values of customary community of Banggai, claims to have been treated discriminately, and it causes dissension to arise in Banggai Kepulauan Community between the proponents of Banggai and the proponents of Salakan;

[3.9] Considering whereas based on the evidence presented by the Petitioners, whether the written evidence (Exhibit P-1 until Exhibit P-28) or the statements of the witnesses and experts in the court hearing, as well as the existence of denial from the Related Party, Sulaeman Husen, S.E., M.H. and friends, therefore the legal standing of Petitioner I as Petitioner being a customary law community unit claiming that their constitutional rights and/or

authority have been impaired by the coming into effect of Article 11 of Law No. 51/1999, still have to be proven together with the considerations regarding the Principal Issue of the Petition;

[3.10] Considering whereas with respect to Petitioners II as individual Indonesian citizens, it is true that the Petitioners indeed have the constitutional rights granted by the 1945 Constitution as they have argued, yet the impairment they have suffered as the result of the coming into effect of Article 11 of Law 51/1999 is not an impairment of constitutional rights, but rather an impairment of financial rights as DPRD members who refuse to move to Salakan and the impairment as a result of the criminal offence related to their refusal of the removal of Capital City of Banggai Kepulauan Regency from Banggai to Salakan. Therefore, for the individual Petitioners the constitutional rights impairment as intended in Article 51 Paragraph (1) of the CC Law has not been established and for that reason, Petitioner II does not have the legal standing to file the *a quo* petition;

[3.11] Considering whereas due to the fact that the legal standing of Petitioner I namely as a customary law community unit still have to be considered together with the principal issue of the petition, the Court shall further consider the principal issue of the petition, namely regarding the constitutionality of Article 11 of Law No. 51/1999;

Principal Issue of the Petition

[3.12] Considering whereas in the principal issue of the petition, the Petitioners have filed a petition for judicial review of Article 11 of Law No. 51/1999, which reads, “*Within a period of no later than five years after the inauguration of Banggai Kepulauan Regency, the location of the Capital City shall be moved to Salakan*”. The Petitioners are of the opinion that the *a quo* article, both in formal and material respects, is contradictory to the 1945 Constitution, with the following arguments:

[3.12.1] Reasons for Formal Review:

- a. The procedures for compiling, forming, and arranging the substance of Article 11 of Law No. 51/1999 were not proper and uncommon, and also not based on the aspect of socio-cultural unity assessment, the aspect of Human Resources preparedness and the aspect of economic ability; and also have set aside the basis of scientific draft assessment which has given a basis for scientific consideration and the consideration of the technical team of Secretariat of the Regional Autonomy Consideration Council (DPOD) that were jointly agreed upon with the regional government (The Regent and DPRD of Banggai Regency) and customary community of Banggai in Banggai Kepulauan Regency;
- b. The substance of contents arrangement, especially regarding the removal of the Capital City of Banggai Kepulauan Regency from Banggai to Salakan, was contaminated by public falsehood, because it is not in

accordance with the community's aspirations, especially Banggai community together with DPRD of Banggai;

- c. The purpose of establishing Salakan as the Capital City of Banggai Kepulauan which domicile on Salakan is contradictory to Article 20 Paragraph (1) of the 1945 Constitution, where DPR with its authority to establish laws is bound by the provisions of the Assembly Rules of Procedure, as set forth in the DPR RI Decision Number 03A/DPR-RI//2001-2002 as the implementation of Article 33 Paragraph (5) of Law Number 4 Year 1999. When the Draft Law on the Establishment of Buol Regency, Morowali Regency and Banggai Kepulauan Regency was approved, an article stipulating the removal of Capital City of Banggai Kepulauan Regency from Banggai to Salakan was forced. Such issue, in the opinion of the Petitioners, is contradictory to Article 192 and Article 193 of the DPR RI Rules of Procedure.

Based on the reasons for the formal review, in the Petitioners' opinion, Article 11 of the *a quo* Law is contradictory to Article 20 Paragraph (1) of 1945 Constitution, so that it has to be declared as not having any binding legal force;

[3.12.2] Reasons for substantive review:

- a. The provision of Article 11 of Law No. 51/1999 was implemented without going through a consultation process especially with the customary community of Banggai and is not in accordance with the aspiration

- represented by DPRD of Banggai Regency as the Main Regency, the region division originator;
- b. The provision of Article 11 of Law No. 51/1999 is not in accordance with the recommendation expressed by the highest institution in the customary community of Banggai, **Basalo Sangkap**, dated August 5, 1999 Number 03/BS/VIII/1999 that, according to the Petitioners, “the division of area of Banggai Kepulauan Regency [*sic!*] to become Banggai Kepulauan Regency with its Capital City in Banggai (*vide* Petitioners’ Petition page 19);
 - c. The provision of Article 11 of Law No. 51/1999 is more oriented as a practical political strategy and does not strengthen the integrity and does not recognize and respect the customary law community units as well as their traditional rights through the acceleration of development in justice;
 - d. The provision of Article 11 of Law No. 51/1999 does not take into account the aspect of socio-cultural unity assessment, the aspect of human resources preparedness and the aspect of economic ability based on the results of the meeting with the technical team of the Secretariat of the Regional Autonomy Consideration Council (DPOD) together with the Regional Government of Banggai on June 4, 1999, in that “The determination of the capital city of Banggai Kepulauan Regency is assigned to DPRD of Banggai Regency”. The Decision of DPRD of Banggai Kepulauan Regency in its third dictum states that “The Capital

City of Level II Region of Banggai Kepulauan Regency shall be Banggai City”;

- e. The provision of Article 11 of Law No. 51/1999 shows that the lawmakers do not respect the customary community and customary law, so that it is contradictory to Article 18B Paragraph (2) of 1945 Constitution;

[3.13] Considering whereas based on the foregoing reasons for formal and material reviews, the Petitioners requested to the Court to declare that the formulation of Article 11 of Law 51/1999 did not comply with the provisions of Laws based on the 1945 Constitution, so that it must also be declared as not having any legal binding force;

[3.14] Considering whereas to support their arguments, the Petitioners filed the written evidence (Exhibit P-1 until Exhibit P-28), which have been approved in the hearing and also presented experts and witnesses, who have given their statements under oath. The statements of the experts and witnesses are completely included in the description concerning the Facts of the Case, which in essence state issues as follows:

[3.14.1] Expert of Petitioners, Haliadi, S.S., M.Hum. (Expert in Cultural History of Communities of Central Sulawesi, a History Lecturer in Tadulako University, Palu):

- a. According to the expert, from the historical perspective, the constitutional rights impairment of the Petitioners due to the existence of Article 11 of

Law No. 51/1999 has been the shift of Banggai as the center of civilization and culture to only become a mere “site”, whereas Article 18B Paragraph (2) of the 1945 Constitution states that “*The state shall recognize and respect customary law community units along with their traditional rights insofar as they are still existent and are in conformity with the development of society and the principle of the Unitary State of the Republic of Indonesia, to be regulated in law.*” Therefore, the formulation of Article 11 of Law No. 51/1999 indicates an action of not recognizing and respecting the customary law community of Banggai;

b. From the socio-cultural aspect, the expert is of the opinion that the provisions in Article 11 of Law No. 51/1999 have resulted in material and moral impairment of the *Hadat* Council Banggai Kepulauan, as follows:

i. Material impairment:

- 1) No Cultural Festival has been held during the last two years;
- 2) the conduct of *adat mabangun tunggul* or the flag-raising tradition for 3, 5, 7, and 9 years at the appointed places or in the shrine no longer obtains any attention;
- 3) The Cost and the Community’s donation in customary procession in order to support the region division;
- 4) The re-maintenance of the customary procession places, such as the palaces, shrines, *Banggai Lalongo*, and others

no longer obtains any attention since the capital city was moved to Salakan;

ii. Moral impairment:

- 1) The Government no longer pays attention to the slogan “*Adat besendi Syara, Syara bersendi Adat*” [sic!] (vide expert’s statement page 9) and on the other hand the *Hadat* Council has also ignored the official government;
- 2) The history and customs of “*Kebanggaian*” or the “*Tano Bolukan*” tradition are no longer recognized officially as the only source of life philosophy and the source of work ethic of the community of Banggai;
- 3) The differences in the names of the islands and differences of tribes in Banggai so far united under the slogan “*Tano Bokuno*” or “*Tano Tumbuno*” which means the land owner for all the community of Banggai have been destroyed because of four people were killed in the 2007 tragedy related to the refusal of capital city removal to Salakan;
- 4) The kingdom structure as the manifestation of the line of thought of Banggai Community, such as *Basalo Sangkap*, et cetera, no longer obtains any attention;

[3.14.2] Expert of the Petitioners, Prof. Dr. H.A. Muin Fahmal, S.H., M.H. (State Administration Law Expert of the Indonesian Islamic University, Makassar):

- a. According to the expert, there is a moral conflict between Article 10 Paragraph (3) and Article 11 of Law No. 51/1999, then in this case based on the principle of preference, Article 10 Paragraph (3) must prevail over Article 11 because, in the expert's opinion, Article 10 Paragraph (3) of Law No. 51/1999 is a *lex specialis* which cannot be negated by Article 11 of Law 51/1999 which is considered by the expert as a *lex generalis*, even though Article 11 is presented subsequent to Article 10 Paragraph (3). In addition to that, the statement in Article 10 Paragraph (3) of Law No. 51/1999 has clearly and explicitly stated that the capital city of Banggai Kepulauan Regency is Banggai, so that the provision in Article 11 of Law No. 51/1999 is not necessary;
- b. In the expert's opinion, the existence and implementation of the substance of Article 11 of Law No. 51/1999 forced by the Government violates the guaranty of recognition and respect of the traditional rights of Banggai community and also violates Article 18B Paragraph (2) and Article 18I Paragraph (3) of the 1945 Constitution;

[3.15] Considering whereas the Court has heard the statement of the Governor of Central Sulawesi, as completely described in the Facts of the Case part, which in substance, states the following matters:

- a. Whereas even though maximum attempts have been put in for the implementation of Law No. 51/1999, there is still a leftover of the complicated and complex capital city problems due to among other things the horizontal conflict in Poso Regency;
- b. Whereas in fact, compared to the case of removal of the capital city of Morowali Regency, the removal of the Capital City of Banggai Kepulauan from Banggai to Salakan tend to be not as intensive as in Morowali regency;
- c. The issue regarding the removal and the functioning of the Capital City of Banggai Kepulauan has become bigger and has come to the forefront after the regional head election and a change has occurred in the political map of the regional government, which has tremendously affected the social condition of the community. The removal of government center from Banggai to Salakan has risen pros and cons in the community reaching its culmination point with the a chaos preceding the demonstration, causing dead and injured victims;
- d. Whereas however, with hard and synergized efforts between the Central Government, Provincial Government, and Regency Government by keeping hold of the right legal basis and procedure, now the situation has been conducive;

[3.16] Considering whereas at Plenary Meeting on March 18, 2008, the Court heard the statements of the Regent of Banggai, the DPRD of Banggai Regency, the Regent of Banggai Kepulauan, and the DPRD of Banggai Kepulauan Regency, as completely described in the Facts of the Case part, which in essence are as follows:

[3.16.1] Statement of the Regent of Banggai

The Regent of Banggai represented by H. Ismail Muid, S.H., M.Si, the Regional Secretary, conveyed the following matters:

- Whereas the Banggai Kepulauan regency is a division of Banggai Regency which has been fought for since year 1964 in line with the community's aspiration and which was subsequently followed-up by the Regent/Regional Head and the DPRD of Regency/Level II Region of Banggai, along with the Governor/Regional Head of Province/Level I Region of Central Sulawesi which finally give birth to Law No. 51/1999;
- Whereas regarding the issue of the Capital City of Banggai Kepulauan, the analysis of the Research and Development Board of Domestic Department has indeed concluded that from the evaluation points, Banggai got the score of 0,55, while Salakan got the score of 0,45, so then it was recommended that there were two candidates for capital city, namely Banggai and Salakan, and the best location was Banggai. Further stipulation of the capital city was not the authority of Level II

Region/Regency Government of Banggai, but was left to the sole authority of the Central Government;

[3.16.2] Statement of DPRD of Banggai Regency

The DPRD of Banggai Regency in the statement given by Drs. H. Basri Sono, MM, Deputy Head, conveyed the following matters:

- Whereas after the birth of Law 51/1999, the DPRD of Banggai Regency considered that its responsibilities and functions have ended;
- Whereas regarding the Banggai Customary Institution mentioned by the Petitioners, DPRD of Banggai together with the Regent have issued Regional Regulation Number 1 Year 2008 regarding the Empowerment, Preservation, Development of Customs and Traditions and Banggai Customary Institution, which consists of three ethnic groups in Banggai Laut and Banggai namely Banggai, Marantak, and Saluan Ethnic groups commonly known with the term: *Babasal, Banggai, Malantak, and Saluan*;

[3.16.3] Statement of Banggai Kepulauan Regent

The Regent of Banggai Kepulauan, Drs. H. Irianto Malingong, MM., described the following matters:

- Whereas since the establishment of Banggai Kepulauan Regency based on Law No. 51/1999, the Regional Government of Banggai Kepulauan Regency has never terminated the activities for the development of culture

- and customs and traditions which have always been responded through the APBD (Regional Revenues and Expenditures Budget) from year to year;
- Whereas since the functioning of Salakan as the capital city pursuant to the provision of Article 11 of Law No. 51/1999, the Regional Government of Banggai Kepulauan Regency has never terminated all kinds of culture and customs and traditions, but has maintained its existence as a partner of the Regional Government in handling all regional programs. Currently, the Regional Government together with DPRD have established a Culture and Tourism Service Office as a working unit which has the authority to handle and develop culture, customs and traditions, and tourism;
 - Whereas the occurrence of the event in February 28, 2007, in the form of attack to the District Police Headquarter of Banggai which caused a clash between the people and apparatus, and caused dead and injured victims from the community members of Banggai Kepulauan, was beyond the power of the Regional government, but had been caused by some provocations from certain people as revealed in the criminal case decision of Luwuk District Court;
 - Whereas the Regent, DPRD, and the Regional Executive Conference of Banggai Kepulauan Regency have never issued any decision or regulation that prohibits the activities of association, gathering, and expressing thoughts for the citizens, even now there are mass

organizations and Non-Government Organizations growing which are not registered in the National Unity and Social Protection and Politics (*kesbanglinmas*) Board of Banggai Kepulauan Regency, but not prohibited;

- Whereas the Regional Government along with DPRD of Banggai Kepulauan Regency have put in efforts for the division of Banggai Kepulauan Regency into two regencies as the best solution for the capital city dispute. This attempt for division has been approved as a DPR initiative recommendation at the Plenary Meeting on January 22, 2008;
- Whereas the functioning of Salakan as the capital city of Banggai Kepulauan Regency based on the provision of Article 11 of Law No. 51/1999 has been implemented pursuant to the letters of the Governor of Central Sulawesi and the Minister of Home Affairs. In the event that the Regent does not implement Article 11 of Law 51/1999 and the Governor and the Minister of Home Affairs Letters, thus the Regent violates the law. Currently, facilities and infrastructures related to the functioning of Salakan to become the Capital City of Banggai Kepulauan have been developed with the funds from the Central Government;

[3.16.4] Statement of DPRD of Banggai Kepulauan Regency:

The DPRD of Banggai Kepulauan Regency through its Deputy Head, Sulaeman Husen, S.H., MH, conveyed the following matters:

- Whereas in principle, the statement of DPRD is similar to the Regent's statement, with additions regarding the matters related to Petitioners II, III, and IV, namely regarding several DPRD members who become the Petitioners;
- Whereas the DPRD Head has never ordered the treasurer or the Secretariat Head of DPRD not to pay the financial rights of the Petitioners from the *a quo* DPRD members;
- Whereas the DPRD members who act as Petitioners in this case do not receive any salary, allowance, and other rights because they do not conducting their tasks and responsibilities as DPRD members as regulated in the Assembly Rules of Procedure, including with their absence from DPRD meetings since December 2006 until now;

[3.17] Considering whereas a number of DPRD members of Banggai Kepulauan Regency and several people of Banggai Kepulauan become the Related Parties in the *a quo* case and through their Attorneys-at-law they have given statements in the Court hearing on March 18, 2008 as follows:

- Whereas our tranquility as Related Parties and the conducive situation in Banggai Kepulauan are disturbed again by the filing of petition for judicial review of Law No. 51/1999. Even though it indeed becomes the right of the Petitioners as citizens, yet it is very ironic because precisely at this present moment, DPR is processing the recommendation for the division

of Banggai Kepulauan Regency into two regencies which is expected to be the solution for the dispute regarding the removal of the capital city of Banggai Kepulauan Regency;

- Whereas the establishment of Banggai Kepulauan Regency has complied with the requirements and mechanisms regulated in Law Number 22 Year 1999 regarding the Regional Government which is now has been substituted with Law Number 32 Year 2004, namely with the existence of recommendations from the Main Regency Government, that is Banggai Regency. Whereas both Banggai and Salakan are both recommended as candidates for capital city of Banggai Kepulauan Regency;
- Whereas the related parties also question the legal standing of the Petitioners, which in the Related Parties' opinion, do not have the legal standing to file a petition for judicial review of Article 11 of Law No. 51/1999, due to the absence of impairment of their constitutional rights;

[3.18] Considering whereas to support their arguments, the Related Parties have filed written evidence (Exhibit PT - 1 until Exhibit PT - 26) and presented an expert whose statement was heard under oath in the Plenary Meeting on April 8, 2008, namely Dr. H. Abdul Rasyid Thalib, S.H., M.Hum which conveyed the following matters:

- Whereas the authority of the Court is to review the law against the 1945 Constitution, not to review the norms of any law against the norms of

another law or to review the norms stated in any article of the law against the norms in another article of the same law;

- Whereas Article 10 Paragraph (3) and Article 11 of Law No. 51/1999 are obviously concrete norms which are closed norms which should not have been reviewed through judicial review in the Court, but through legislative review in DPR;

[3.19] Considering whereas both the Petitioners and the related parties in the *a quo* petition have submitted written conclusions which in principle consistent with their positions;

[3.20] Considering whereas the DPR has given written statement, as completely set out in the Facts of the Case part of this Decision, which in principle, conveyed the following matters:

- Whereas the Petitioners do not have the legal standing to file a petition for judicial review of Article 11 of Law No. 51/1999, whether by formal review or substantive review, due to the lack of evidence of constitutional right and/or authority impairment due to the coming into effect of Article 11 of Law No. 51/1999. The Petitioners are still free to conduct their activities and the Regional Government still recognizes and respects the customary law community unit along with their traditional rights;
- Whereas the establishment of Law 51/1999 has been in line with the applicable procedures regulated by the 1945 Constitution and the DPR RI

Rules of Procedure. The Provisions regarding Article 10 Paragraph (3) and Article 11 of Law No. 51/1999 are the agreement between the DPR and the Government based on the aspirations of the people conveyed to the Government and DPR;

- Whereas in fact, the provisions of Article 10 Paragraph (3) and Article 11 of Law No. 51/1999 have from the beginning actually contained the intention that based on several strategic considerations, the Capital City of Banggai Kepulauan Regency is Salakan, only that a period of 5 (five)-years is needed for the preparation, so that Banggai was determined as a temporary capital city;
- Whereas the DPR requests the Court to reject the Petitioners' petition or at least to declare that it cannot be accepted (*niet ontvankelijk verklaard*);

[3.21] Considering whereas the Government has given written statements, as completely described in Facts of the Case part of this Decision, which in principle, conveyed the following matters:

- The Government is of the opinion that the Petitioners' petition is unclear and obscure (*obscuurlibels*), especially in arguing and constructing the existence of constitutional right and/or authority impairment due to the coming into effect of Article 11 of Law No. 51/1999, because the Petitioners have only argued that the coming into effect of the *a quo* provisions does not respect the aspiration of customary law community

and has caused the loss of chance to develop the culture of the customary community, as well as the potential issue of dissension among the community;

- According to the Government, when there is a disharmony between equal laws and regulations as argued by the Petitioners, that matter is in the authority of the lawmakers (DPR and Government) to amend or substitute such laws through legislative review mechanism, not through judicial review. In the event of excess in the implementation of a law, that matter is not related to the constitutionality issue of the *a quo* Law application;
- The Government also does not agree with the Petitioners' consideration, which states that the discussion and formulation process of Law 51/1999 (*formele toetsingsrecht*) are contradictory to the constitution and other laws and regulations, because of not including or taking into account the aspiration of the customary community. According to the Government, to determine the criteria used for evaluating the constitutionality of a formal review of a law is how far it is stipulated in the appropriate institution and with appropriate procedures. In this case, the formulation procedures and process of Law No. 51/1999 have been in accordance with the provisions of the applicable laws and regulations;
- According to the Government, the Petitioners do not suffer rights and/or authority impairment as the result of the coming into effect of Article 11 of Law No. 51/1999 and furthermore the *a quo* provision is not contradictory

to the 1945 Constitution, thus the Court have to declare the petition cannot be accepted or reject it in its entirety, both the formal and substantive petition;

Court's Opinion

[3.22] Considering whereas based on the arguments of the Petitioners along with written evidence and expert statement, the statement of the Governor of Central Sulawesi, the statements of the Regent and DPRD of Banggai Regency, the statements of the Regent and DPRD of Banggai Kepulauan Regency, and statements of the Related Parties along with the written evidence and statements of experts, written statements of DPR and the Government, as well as the conclusion from each party, the Court is of the following opinion:

- a. Whereas the 1945 Constitution indeed recognizes and respects the customary law community units along with their traditional rights, yet they have to meet four requirements, namely insofar as they are still existent, in conformity with the development of society, in conformity with the principle of the Unitary State of the Republic of Indonesia, and regulated in law [*vide* Article 18B Paragraph (2) of the 1945 Constitution]. Then Article 28I Paragraph (3) of the 1945 Constitution also emphasizes that "*The culture identities and the rights of traditional communities shall be respected in conformity with the development of time and civilization*";

b. Whereas the Court in the legal considerations of Decision Number 31/PUU-V/2007 has determined the parameters of the existence of customary law community units along with their traditional rights as intended in Article 18B Paragraph (2) of the 1945 Constitution *juncto* Article 51 Paragraph (1) Sub-Paragraph b of the CC Law, as follows:

- 1) A customary law community unit along with its traditional rights *de facto* still exists and/or actual, if at least it contains the elements such as:
 - a) the existence of community whose members possess an in-group feeling;
 - b) the existence of customary governance regulations;
 - c) the existence of customary properties and/or goods;
 - d) the existence of norm apparatus of customary law; and
 - e) especially for territorial customary law community unit, also the existence of certain region of customary law element;
- 2) A customary law community unit along its their traditional rights is considered to be in accordance to the development of the society when:
 - a) Its existence has been recognized according to the applicable laws as the reflection of the values considered ideal in the society nowadays, whether the general laws or

sectoral laws, such as in agrarian sector, forestry, fishery, et cetera, or even in regional regulations;

b) the substance of its traditional rights is recognized and respected by the people of the related customary law community unit as well as the people in greater extent, and also not contradictory to human rights;

- 3) A customary law community unit along with its traditional rights is considered to be in line with the principle of the Unitary State of the Republic of Indonesia if it does not disturb the existence of the Unitary State of the Republic of Indonesia as a political unit and legal unit, that is: (i) its existence does not threaten the sovereignty and integrity of the Unitary State of the Republic of Indonesia; and (ii) the substance of its norms of law is in line with and not contradictory to the laws and regulations;
- c. Whereas in relation to the *a quo* petition, the statements of the parties and evidence presented by Petitioner I claiming itself as a customary law community unit, indicate the existence of legal facts that the customary law community unit of Banggai has *prima facie* met the provisions as specified in Sub-Article b mentioned above. However, as revealed in the hearing, there was a denial of the Direct Related Party regarding the capacity of Petitioner I to represent the customary law community unit of Banggai and the impairment of constitutional rights as a result of the

coming into effect of Article 11 of Law No. 51/1999. Such denial or rejection from the Related Party was not denied by Petitioner I. Therefore, the evidence has not been sufficiently valid and convincing that the Petitioner I claiming to represent the customary law community unit of Banggai has met the legal standing requirements as intended in Article 51 Paragraph (1) Sub-Paragraph b of the CC Law *juncto* the Court's opinion regarding the parameters of the existence of a customary law community unit along with its traditional rights as stated in paragraph **[3.22]** letter b above;

- d. Whereas even so, apart from the issue of the Petitioners' legal standing, regarding the Principal Issue of The Petitioners' petition, the Court is of the following opinion:
- 1) whereas a division of an area is allowed by the applicable laws and regulations, yet not only it has to meet the existing requirements and mechanisms, a region division is not supposed to create new problems, such as the occurrence of social conflicts, whether vertical or horizontal;
 - 2) whereas between the recognition and respect towards customary law community unit and the implementation of an expansion of area there is no linear connection, because in reality, the culture, customs and traditions of a customary law community unit may be spread over various areas apart from the government

administrative limits existing or arising as a result of a division, let alone if it has been caused only by the removal of a capital city;

- 3) whereas in relation to the *a quo* petition, based on the evidence and the statements of the parties in the hearing, actually prior to the expansion, the culture, customs and traditions of Banggai was not disturbed when the Capital City of Banggai Regency was in Luwuk, thus it is not significant enough to state that the location of the capital city of a government affects the existence or the non-existence of the recognition and respect of any customary law community unit, or causes a culture or customs and traditions of a community to be set aside;
- 4) whereas based on the evidence presented and the statements given by various parties in the hearing, the process of Banggai Kepulauan Regency establishment through Law No. 51/1999 has met the requirements and mechanisms stipulated by the applicable laws and regulations. Whereas the existence of the names of “*Banggai*” and “*Salakan*” as candidates for the Capital City of Banggai Kepulauan Regency have indeed been recommended at the beginning, so when the stipulations of the lawmakers in Article 10 Paragraph (3) of Law No. 51/1999 that the Capital City of Banggai Kepulauan Regency is Banggai and then in Article 11 of Law 51/1999 stipulated that after five years, the capital city is to be

moved to Salakan, do not constitute an unconstitutional act, even though the stipulation of the capital city creates another controversy;

- 5) whereas the removal of a capital city or a governmental center is a common matter in the state life, including in various countries, even the capital city of the state itself. In the case where at one time the regional government and the people of Banggai Kepulauan want to move the Capital City of Banggai Kepulauan Regency from Salakan back to Banggai or somewhere else, such matter can be done after going through the procedures and mechanism determined by the applicable laws and regulations;
- 6) whereas moreover currently, the conflict that occurred due to the removal of the Capital City of Banggai Kepulauan Regency from Banggai to Salakan is gradually settled, including the existence of attempt for further division of Banggai Kepulauan Regency into two regencies;
- 7) whereas therefore, all arguments of the Petitioners that the establishment and substance of Article 11 of Law No. 51/1999 is contradictory to the 1945 Constitution, do not need to be considered any further;

4. CONCLUSION

According to the issues described above, the Constitutional Court is of the following opinion:

[4.1] Whereas the Petitioners have not been able to prove either their legal capacity to represent the customary law community unit in the *a quo* petition or the impairment of constitutional rights they have suffered as the result of the coming into effect of Law No. 51/1999.

[4.2] Whereas therefore, the Petitioners in the *a quo* petition do not comply with the Provisions in Article 51 paragraph (1) letter b of CC Law, therefore the Petitioners' petition cannot be accepted (*niet ontvankelijk verklaard*).

5. RULINGS

In view of Article 56 Paragraph (1) of Law Number 24 Year 2003 regarding the Constitutional Court (State Gazette of the Republic of Indonesia Year 2003 Number 98, Supplement to State Gazette of the Republic of Indonesia Number 4316);

PASSING THE DECISION:

To declare that the Petitioners' petition cannot be accepted (*niet ontvankelijk verklaard*);

Hence this decision was made in a plenary consultative meeting attended by nine Constitutional Court Justices on Thursday, June 12, 2008, and was pronounced in a Plenary Hearing of the Constitutional Court open for the public today, Thursday, June 19, 2008, by seven Constitutional Court Justices, namely: Jimly Asshiddiqie, as the Chairperson and concurrent Member, H. Harjono, H. Abdul Mukthie Fadjar, Maruarar Siahaan, Soedarsono, H. Moh. Mahfud MD. and H. M. Arsyad Sanusi, respectively as Members and assisted by Eddy Purwanto, acting as Substitute Registrar, and attended by the Petitioners/Attorneys-In-Fact; the Government or its representative, DPR or its representative, the Central Sulawesi Governor or his representative, the Regent of Banggai Regency or his representative, the Regent and DPR of Banggai Kepulauan Regency, as well as other Related Parties/Attorneys-In-Fact.

CHIEF JUSTICE,

sgd.

Jimly Asshiddiqie

JUSTICES,

sgd.

H. Harjono

sgd.

Maruarar Siahaan

sgd.

H. Moh. Mahfud. M.D

sgd.

H. Abdul Mukthie Fadjar

sgd.

Soedarsono

sgd.

H.M. Arsyad Sanusi

SUBSTITUTE REGISTRAR,

sgd.

Eddy Purwanto