



DECISION

Number 023/PUU-IV/2006

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 the case of Petition for Judicial Review of the Law of the State of the Republic of Indonesia Number 49 *Prp.* Year 1960 concerning State Receivables Committee (State Gazette of the Republic of Indonesia Year 1960 Number 156, Supplement to State Gazette of the Republic of Indonesia Number 2104, hereinafter referred to as the SRC Law) against the Constitution of the State of the Republic of Indonesia Year 1945 (hereinafter referred to as the 1945 Constitution) filed by:

1. Name : Kasdin Simanjuntak, S.H.
 - place/date of birth : Simalungun, January 2, 1965
 - age : 41
 - religion : Christian
 - occupation : Advocate
 - citizenship : Indonesia.

2. Name : Yon Richardo, S.H.
place/date of birth : Jakarta, January 19, 1963
age : 43
religion : Islam
occupation : Advocate
citizenship : Indonesia
3. Name : Binoto Nadapdap.,S.H.,M.H.
place/date of birth : Porsea, October 30, 1965
age : 41
religion : Christian
occupation : Advocate
citizenship : Indonesia
4. Name : Darwis D. Marpaung,S.H.
place/date of birth : Medan, February 2, 1965
age : 41;
religion : Catholic
occupation : Advocate;
citizenship : Indonesia;
5. Name : Paustinus Siburian, S.H., M.H.
place/date of birth : Tanahjawa, February 17 , 1966
age : 40;

religion : Catholic
occupation : Advocate;
citizenship : Indonesia;

6. Name : Abdul Razak Djaelani, S.H.
place/date of birth : Jakarta, January 1, 1956
age : 50;
religion : Islam
occupation : Advocate;
citizenship : Indonesia;

Each acting for and on his own behalf, both individually and jointly having a common interest, in this matter choosing the permanent legal domicile at the office of "CONSTITUTION AND ADVOCATE SOVEREIGNTY ADVOCACY TEAM", at Jalan Cibulan Number 13-A, Kebayoran Baru, South Jakarta 12170; Telephone/facsimile: 021-7229343, E-mail: jams@bit.net.id.

Hereinafter referred to as **PETITIONERS**;

Having read the petition of the Petitioners;

Having heard the statements of Petitioners;

Having heard the statement and read the written statement of the Government;

Having read the written statement of the People's Legislative Assembly;

Having read the conclusion of the Petitioners;

Having examined the evidence of the Petitioners.

LEGAL CONSIDERATIONS

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

Considering whereas the Constitutional Court (hereinafter referred to as the Court) must consider three issues in this case, namely:

1. The authority of the Court to examine, hear, and decide upon the petition filed by the Petitioners;
2. The legal standing of the Petitioners to file the *a quo* petition;
3. The principal issue of the petition, namely concerning the constitutionality of law petitioned for review;

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

1. Authority of the Court

Considering whereas pursuant to Article 24C Paragraph (1) of the 1945 Constitution “*The Constitutional Court shall have the authorities to hear at the first and final level, the decision of which shall be final in conducting review of*

laws against the Constitution, to decide upon authority disputes of state institutions whose authorities are granted by the Constitution, to decide upon the dissolution of political parties, and to decide disputes concerning the results of general elections”;

Considering whereas the petition of the Petitioners is concerning judicial review of the SRC Law against the 1945 Constitution, particularly the review of Article 12 Paragraph (2) of the SRC Law against Article 28I Paragraph (2) of the 1945 Constitution;

Considering whereas although the SRC Law was enacted long before the Amendment to the 1945 Constitution, namely on December 14, 1960, the Court shall have the authority to examine, hear, and decide upon the *a quo* petition, because Article 50 of Law of the Republic of Indonesia Number 24 Year 2003 concerning 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 Constitutional Court Law) which reads “*Laws which can be petitioned for judicial review shall be laws enacted following the amendment to the Constitution of the State of the Republic of Indonesia Year 1945*”, has been declared as having no legal binding effect pursuant to Decision Number 066/PUU-III/2005;

2. Legal Standing of the Petitioners

Considering whereas pursuant to Article 51 Paragraph (1) of the Constitutional Court Law, Petitioners in judicial review of a law against the 1945 Constitution shall be parties who deem that their constitutional rights and/or authorities are impaired by the coming into effect of the law, namely:

- a. individual Indonesian citizens (including group of people having a common interest);
- b. customary law community units insofar as they are still in existence and in accordance with the development of the communities and the principle of the Unitary State of the Republic of Indonesia as regulated in law;
- c. public or private legal entities; or
- d. state institutions;

Considering whereas in addition, since the pronouncement of Decision Number 006/PUU-III/2005 and subsequent decisions, the Court has decided five criteria concerning the impairment of constitutional rights as intended in Article 51 Paragraph (1) of the Constitutional Court Law as follows:

- a. The Petitioner must have constitutional rights and/or authorities granted by the 1945 Constitution;
- b. such constitutional rights and/or authorities are deemed to have been impaired by the coming into effect of a law petitioned for review;

- c. the impairment of such constitutional rights and/or authorities is specific and actual in nature, or at least potential in nature which according to logical reasoning will take place for sure;
- d. there is a causal relationship (*causal verband*) between the impairment of constitutional rights and/or authorities and the law petitioned for review; and
- e. if the petition is granted, the impairment of such constitutional rights and/or authorities argued will not or does not occur any longer;

Considering whereas in addressing the issue of whether the Petitioners have the legal standing to file the petition in this case, it is necessary to examine (i) in which qualification the Petitioners will be categorized, and (ii) which constitutional rights are possessed by the Petitioners which are impaired by the coming into effect of the SRC Law;

Considering whereas based on Exhibits P - 1a and P - 1b, the Petitioners can be qualified as individual Indonesian citizens or a group of people having a common interest in their profession as Advocates, who deem that their constitutional rights referred to in Article 28I Paragraph (2) of the 1945 Constitution which reads "*Every person shall have the right to be free from discriminatory treatment on any basis whatsoever and have the right to obtain protection against any such discriminatory treatment*" are impaired by the coming into effect of Article 12 Paragraph (2) of the SRC Law which reads "*In the event as intended in Paragraph (1) of this article, delegating the handling of state*

receivables to lawyers is prohibited". The impairment of constitutional rights of the Petitioners based on Exhibit P - 2 is specific and actual in nature, and has a causal relationship with the coming into effect of Article 12 Paragraph (2) of the SRC Law, and hence it is believed that if the petition is granted such impairment will not or does not occur any longer;

Considering whereas accordingly, the Petitioners have the legal standing to file the petition for review of Article 12 Paragraph (2) of the SRC Law against the 1945 Constitution;

Considering whereas since the Court has the authority to examine, hear, and decide upon the *a quo* petition, and the Petitioners have the legal standing to file the petition, the Court will go into further consideration of the principal issue of the petition;

3. Principal Issue of the Petition

Considering whereas the principal issue of the petition of the Petitioners is concerning substantive review of Article 12 Paragraph (2) of the SRC Law against Article 28I Paragraph (2) of the 1945 Constitution with the following principal arguments:

1. Whereas the provision of Article 12 Paragraph (1) of the SRC Law which reads "*Government agencies and State Bodies intended in Article 8 of this Regulation must delegate their receivables the existence and the amount of which have been definite according to law while the debtors do not want to*

settle such them properly, to the State Receivables Committee” juncto Article 12 Paragraph (2) of the SRC Law which reads, “In the event as intended in Paragraph (1) of this article, delegating the handling of state receivables to lawyers is prohibited”, according to the Petitioners means that government agencies or state bodies are prohibited from delegating the handling of non-performing receivables to Lawyers;

2. Whereas the background of or the reason for provision of Article 12 Paragraph (2) of the SRC Law is unclear, but according to the Petitioners, the provision really undervalues or underestimates Advocates’ profession, because it is discriminatory in nature, as if Advocates’ profession is dangerous, unimportant or useless for the development of the nation and state;
3. Whereas although the state or government has the right to appoint an agency or body to handle state receivables, in this matter the State Receivables Committee (SRC), it is inappropriate to mention explicitly the regulation of prohibition in handling state receivables to a certain professional group, *in casu* Lawyers or Advocates, because it has a connotation which undervalues underestimates Lawyers/Advocates’ profession;
4. Whereas the Petitioners who have the profession as Advocates feel insulted and ashamed because their noble profession (*officium nobile*) is improperly treated by Article 12 Paragraph (2) of the SRC Law, and hence the

Petitioners object to such provision and deem it contradictory to the 1945 Constitution;

5. Whereas in the development of laws and regulations, with the issuance of the Law of the Republic of Indonesia Number 17 Year 2003 concerning State Finance, the Law of the Republic of Indonesia Number 19 Year 2003 concerning State-Owned Enterprises, the Law of the Republic of Indonesia Number 1 Year 2004 concerning State Treasury, and others, there have been many modifications in the meaning of state receivables which have resulted in modifications in the collection procedures, hence the operation of the *a quo* article is no longer complete;
6. Whereas the fact shows that the level of Non Performing Loan (NPL) in Government banks/State-Owned Enterprises is higher compared to private banks, because private banks, on the contrary, use the service of Lawyers/Advocates in the settlement thereof, in which the Petitioners are quite experienced in handling such problems;
7. Whereas in their petition the Petitioners requested that the Court declare Article 12 Paragraph (2) of the SRC Law contradictory to Article 28I Paragraph (2) of the 1945 Constitution and hence it must be declared as having no binding legal effect;

Considering whereas to support their arguments the Petitioners presented written evidence namely Exhibits P-1 through P-8, but did not present witnesses or experts;

Considering whereas the Government, as represented by the Minister of Law and Human Rights and the Minister of Finance, has given its written statement as completely included in the description on the Principal Case which principally state the following matters:

- a. Whereas the Petitioners have no legal standing to file the petition for judicial review of Article 12 Paragraph (2) of the SRC Law, because the interest impaired by the coming into effect of the *a quo* provision is unclear. In addition, according to the Government, the petition of the Petitioners is unclear and obscure (*obscuur libel*), because the Petitioners did not describe in detail whether or not there has been impairment of their constitutional rights and/or authorities granted by the 1945 Constitution caused by the coming into effect of the SRC Law, especially with respect the rejection of the Petitioner's proposal to participate in handling non-performing loans in one of the state banks (State-Owned Enterprise Bank). Whereas according to the Government the Petitioners could not construe that the rejection of a proposal to participate in handling *Non Performing Loan* by a State-Owned Enterprise Bank has impaired their constitutional rights and/or authorities, because the rejection of the Petitioners' proposal constitutes a mere form of business activity in which acceptance and rejection thereof depends on the needs;

- b. Whereas the provision of Article 12 Paragraph (2) of the SRC Law is not an independent formulation, as it is free from the legal considerations, philosophical foundation of the formulation of the *a quo* law, and no to be understood incompletely or partially so as to make it appear discriminatory. Specially, in understanding the *quo* provision, the provisions of Article 12 Paragraph (1), Article 4 Sub-Article 2, and Article 8 of the SRC Law must also be taken into account-;

- c. Whereas one of the main objectives of the formulation of the SRC Law is to handle collection actions of state receivables in a brief, quick and effective manner against “non-cooperative” or “bad” debtors, outside regular procedures as regulated in *Herziene Inlands Reglement* or HIR (Stb. 1941 No. 44) that are deemed to create obstacles and difficulties as well as being time consuming;

- d. Whereas in principle, state receivables that must be settled by debtors at the first stage will be settled by agencies and other entities related to state receivables, including State-Owned Banks. However, if the state receivables cannot be settled or become the so-called non-performing receivables/loans, the handling thereof must be delegated to the SRC (*vide* Elucidation of Article 4 of the SRC Law). In this context, the Government questioned the principal case of rejection by State-Owned Enterprise Bank of the Petitioners’ proposal which was not explained in detail;

- e. Whereas state receivables, the handling of which is delegated to the SRC are receivables having definite existence and amount by law. The ways or procedures for settlement of state receivables shall be the making of a “Joint Statement” between the Chairperson of the SRC and debtor under the heading of “**For the Sake of Justice Under the One Almighty God**”, containing an agreement between the Chairperson of the SRC and the debtor concerning the amount of debts that must be paid or settled and containing other obligations that must be settled by the debtor concerned. Such Joint Statement has an executorial power as a judge’s decision which has been final and conclusive (*in kracht van gewijsde*) in civil cases, the execution can be conducted through warrant, confiscation and auction, or even confinement (*gijzeling*) against the debtor concerned (*vide* Article 10 and Elucidation thereof and Article 11 of the SRC Law);
- f. Whereas the Petitioners have mistakenly and incorrectly understand the formulation of Article 12 Paragraph (2) of the SRC Law, because according to the Government such provision was formed as a response to the need for the handling of state receivables which were difficult to settle, which is certainly different from the current need and spiritual situation. Thus, according to the Government Article 12 Paragraph (2) of the SRC Law does not impair the constitutional rights and/or authorities of the Petitioners and is not contradictory to Article 28I Paragraph (2) of the 1945 Constitution;

- g. Whereas there has been a development in the handling of state receivables in the form of Non-Performing Loan (NPL) in State-Owned Banks (State-Owned Enterprise Bank), namely that, the handling mechanism is fully delegated to the State-Owned Enterprise Banks themselves in accordance with corporate mechanism. Hence, with regard to the *a quo* petition, every decision making of State-Owned Enterprise Banks shall be conducted with the approval of the General Meeting of Shareholders (GMS), while the position of Government will be represented by the State Minister for State-Owned Enterprises as shareholder;

Considering whereas with respect to the foregoing statement of the Government, the Petitioners gave their response as well as final conclusion of the petition in writing as completely set out in the Principal Case, mainly containing the following matters:

- a. Concerning the legal standing of the Petitioners questioned by the Government, the Petitioners assessed that the Government has mistakenly understood the reason why Petitioners filed the petition for judicial review of Article 12 Paragraph (2) of the SRC Law, namely that the rejection of the Petitioners' proposal by the State-Owned Enterprise Bank was based on the provision of Article 12 Paragraph (2) of the SRC Law, hence the Petitioners deemed that their constitutional rights have been impaired by the existence of such provision;

- b. Concerning what is petitioned by the Petitioners, the Petitioners assessed that the Government seemed to have mistakenly understood the meaning of “handling” which is wider than “settlement”. In its statement the Government only questioned that the matter of “settlement” in such a way that “settlement” is seemingly treated as equal to “handling”, while according to the Petitioners many things outside “settlement” are included in “handling”, for example, prior to the settlement a Lawyer can give a legal service in assisting a State-Owned Enterprise Bank by giving advice or completing the necessary data and documents;
- c. Concerning the contradiction between Article 12 Paragraph (2) of the SRC Law and Article 28I Paragraph (2) of the 1945 Constitution, according to the Petitioners, the Government has relied on its misreading of the SRC Law, namely with respect how “handling” has a wider meaning than settlement. In addition, the Government did not give any description at all on its view of Article 28I Paragraph (2) of the 1945 Constitution and did not view Article 12 Paragraph (2) of the SRC Law in the context of Article 28I Paragraph (2) of the 1945 Constitution;
- d. Concerning the development of the handling of State Receivables, the Government has taken steps among others by making Government Regulations and Regulation of the Minister of Finance which, according to the Petitioners, are not relevant to the principal issue of the petition, namely the issue of “prohibition of delegation of the handling to Lawyers”, not the issue of

handling non-performing loans. In addition, a number of laws and regulations (Government Regulations, Regulation of the Minister of Finance, and so forth) issued by the Government do not automatically nullify the provision of Article 12 Paragraph (2) of the SRC Law, because they are hierarchically lower than the SRC Law. Hence, State-Owned Enterprise Banks still rely on Article 12 Paragraph (2) of the SRC Law;

- e. The Petitioners are consistent in requesting that the Court declare Article 12 Paragraph (2) of the SRC Law contradictory to Article 28I Paragraph (2) of the 1945 Constitution and without binding legal effect;

Considering whereas the Government has given additional statement in the form of written response to a number of questions asked by the Panel of Constitutional Court Justices, as follows:

- a. Whereas whether the existence of laws and regulations on the handling of State-Owned Enterprise receivables currently allows the delegation of the handling of non-performing loans to Lawyers, the Government stated that with the issuance of Government Regulation Number 33 Year 2006 concerning Amendment to Government Regulation Number 14 Year 2005 concerning Procedures for the Elimination of State/Regional Company's Receivables, as from October 6, 2006, the handling of State/Regional Company's Receivables shall be conducted in accordance with the prevailing laws and regulations for Limited Liability Companies and State-Owned Enterprises (BUMN) and implementing regulations thereof. In this matter, whether or not a State-

Owned Enterprise wants to cooperate with lawyers in settling non-performing loans shall be the full authority of the State-Owned Enterprise. However, the handling of State Receivables (BUMN/BUMD) that was delegated to the SRC before Government Regulation Number 33 Year 2006 took effect, shall remain conducted by the SRC;

- b. Whereas the SRC still exists up to now and still performs its duties pursuant to Article 4 of the SRC Law, namely handling State Receivables the existence and amount of which have been definite by law while the debtors do not settle them properly, as delegated by the Government or State-Owned Entities;
- c. Whereas the lawyers must not handle, collect state receivables as conducted by SRC, because the handling of State Receivables by the SRC is conducted based on special authorities granted by law, namely :
 - To issue Warrants under the heading "For the Sake of Justice Under the One Almighty God";
 - To request Prosecutor's assistance if it is proved that the loan is misused by the debtors.

Lawyers cannot become members of the SRC either, because the SRC is an interdepartmental committee composed of government officials as members [*vide* Article 2 Paragraph (3) of the SRC Law];

- d. When the SRC Law was being drafted, brief, quick and effective steps were needed in handling non-performing loans (State Receivables), not through regular procedures as regulated in HIR. However, the current need and situation have changed as seen in the development of laws and regulations such as the Law of the Republic of Indonesia Number 17 Year 2003 concerning State Finance, the Law of the Republic of Indonesia Number 19 Year 2003 concerning State-Owned Enterprises, and the Law of the Republic of Indonesia Number 1 Year 2004 concerning State Treasury;

Considering whereas the People's Legislative Assembly (DPR) has submitted its written statement received by the Court Registrar's Office on December 19, 2006 the contents of which are completely set out in the Principal Case, mainly declaring that Article 12 Paragraph (2) of the SRC Law is neither contradictory to Article 28I Paragraph (2) of the 1945 Constitution nor contradictory to Article 15 of the Law of the Republic of Indonesia Number 18 Year 2003 concerning Advocates;

Considering whereas based on the arguments, evidence, and conclusion of the Petitioners, written statement and additional statement of the Government, as well as the written statement of the People's Legislative Assembly, the Court is of the following opinion:

1. Whereas the provision of Article 12 Paragraph (2) of the SRC Law was formulated based on the situation and condition at that time in response to the need for the handling of state receivables which were difficult to settle. The

Government admitted that it would have been different if it is seen in the context of current need and spiritual situation. Hence, the delegation of the handling of state receivables to the SRC, the decisions of which have executorial power, is in fact suitable to the current situation, and not through regular mechanism, including the prohibition referred to in Article 12 Paragraph (2) of the SRC Law;

2. Whereas actually the provision in Article 12 Paragraph (1) of the SRC Law which reads "*Government agencies and State bodies intended in Article 8 of this Regulation are obligated to delegate their receivables the existence and the amount of which have been definite according to law while the debtors do not want to settle them properly to the State Receivables Committee*" has been sufficient, because it means that the task must be delegated to other parties or third parties (including of course Lawyers/Advocates). Hence on one hand it can be said that the provision of Article 12 Paragraph (2) of the SRC Law is an overstatement (*overbodig*), while on the other hand it is only an affirmation of the provision of Article 12 Paragraph (1) of the SRC Law. Such matter can in fact create misinterpretation or misunderstanding as encountered by the Petitioners;
3. Whereas although the provision of Article 12 Paragraph (2) of the SRC Law is said to be an overstatement by the Court, it does not mean that the provision is discriminatory in nature, as argued by the Petitioners who stated that the *a quo* article is contradictory to Article 28I Paragraph (2) of the 1945

Constitution which reads, *“Every person shall be free from discriminatory treatment on any basis whatsoever and shall have the right to obtain protection against any such discriminatory treatment”*. It is true that the Petitioners correctly stated the definition of discrimination by quoting Article 1 Sub-Article 3 of Law Number 39 Year 1999 concerning Human Rights which reads, *“Discrimination is every limitation, harassment or isolation, either directly or indirectly based on human differences on the grounds of religion, nationality, race, ethnicity, group, social status category, economic status, gender, language, politics, having the nature of reduction, deviation or abolition, acknowledgement, implementation or application of human rights and basic freedoms in individual or collective life in the fields of politics, economy, law, social, cultural and other aspects of life”*. In this matter, the Petitioners argued about such discriminatory treatment in relation to their social status of the as Advocates. The Court is of the opinion that the Petitioners’ argument is inadequate because advocates/lawyers’ profession is not a social status as argued by the Petitioners. Meanwhile, Article 12 Paragraph (2) of the SRC Law contains prohibition from delegating the handling of state receivables to lawyers (advocates) because it has been delegated to the SRC which is interdepartmental in nature and which consists of government officials as members. Therefore, the authorities given to the SRC and the right in the lawyers/advocates’ profession are different and cannot be compared to each other or be made as a standards to establish discrimination as intended in Article 28l Paragraph (2) of the 1945

Constitution *juncto* Article 1 Number 3 of the Law of the Republic of Indonesia Number 39 Year 1999 concerning Human Rights, because such prohibition is also applicable to all third parties other than advocates/lawyers. Hence, Article 12 Paragraph (2) of the SRC Law is not contradictory to Article 28I Paragraph (2) of the 1945 Constitution;

4. Whereas the issuance of various new laws and regulations, particularly concerning the settlement of bad debts or non-performing loans in State-Owned Banks which is fully delegated to corporate mechanism, can be considered as having reduced the initial purpose of the SRC Law. The problem encountered by the Petitioners in connection with the rejection of their proposal by a State-Owned Bank should not have been considered relevant to the provision of Article 12 Paragraph (2) of the SRC Law. However, the implementation of laws and regulations has much changed from the initial purpose, so as to hamper the advocate profession to become the (corporate) attorney of State-Owned Enterprise if they are appointed pursuant to the prevailing regulations. However, since the level of such implementing regulations is lower than the SRC Law, such implementing regulations shall not eliminate the existence of Article 12 Paragraph (2) of the SRC Law;
5. Whereas although Article 12 Paragraph (2) of the SRC Law is not contradictory to the 1945 Constitution, the *raison d'être* and spiritual situation of the SRC Law are no longer suitable to the current development, as admitted by the Government, and therefore the Court is of the opinion that the

legislators need to immediately renew the foregoing SRC Law to for an orderly and guaranteed constitutionality of rule of law under the 1945 Constitution;

Considering whereas based on the foregoing, the Petitioners' arguments in the petition for judicial review of Article 12 Paragraph (2) of the SRC Law are not sufficiently grounded, and hence the petition must be rejected;

In view of Article 56 Paragraph (5) of the Law of the Republic of Indonesia Number 24 Year 2003 concerning 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 Petition of the Petitioners is Rejected

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Hence this Decision was made in the Consultative Meeting of nine Constitutional Court Justices on Wednesday, December 20, 2006, and was pronounced in the Plenary Session open for public, on this day, Thursday, December 21, 2006 attended by Jimly Asshiddiqie, as the Chairperson and concurrent Member, Harjono, Abdul Mukthie Fadjar, I Dewa Gede Palguna, H.M. Laica Marzuki, H.A.S. Natabaya, H. Achmad Roestandi, Maruarar Siahaan, and Soedarsono, respectively as Members, assisted by Eddy Purwanto, as

Substitute Registrar, and in the presence of the Petitioners, the Government or its representatives, and the People's Legislative Assembly or its representatives.

CHIEF JUSTICE

Jimly Asshiddiqie,

JUSTICES,

Harjono,

Abdul Mukthie Fadjar

I Dewa Gede Palguna

H. M Laica Marzuki

H.A.S. Natabaya

H. Achmad Roestandi

Maruarar Siahaan

Soedarsono

SUBSTITUTE REGISTRAR,

Eddy Purwanto