



DECISION
Number 92/PUU-XIV/2016
FOR JUSTICE UNDER GOD ALMIGHTY
THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA

[1.1] Adjudicating the constitutional cases at the first and final instance, handed its decision in the case of Review of Law Number 10 of 2016 on the Second Amendment to the Law Number 1 of 2015 on the Stipulation of the Government Regulation in Lieu of Law Number 1 of 2004 in the Election of Governor, Regent, and Mayor into Law against Constitution of the Republic of Indonesia of 1945, filed by:

1. Name: **Juri Ardiantoro, M.Sc., Ph.D.**
Position: Head of General Elections Commission
2. Name: **Ida Budiati, S.H., M.H.**
Position: Member of General Elections Commission
3. Name: **Sigit Pamungkas, S.IP., M.A.**
Position: Member of General Elections Commission
4. Name: **Arief Budiman, S.S., S.IP., M.B.A.**
Position: Member of General Elections Commission
5. Name: **Dr. Ferry Kurnia Rizkiyansyah, S.IP., M.Sc.**
Position: Member of General Elections Commission
6. Name: **Drs. Hadar Nafis Gumay**
Position: Member of General Elections Commission
7. Name: **Hasyim Asy'ari S.H., M.Sc., Ph.D.**
Position: Member of General Elections Commission

acting on behalf of the General Elections Commission [hereinafter, KPU], located at No. 29 Jalan Imam Bonjol, Central Jakarta, in accordance with Presidential Decree No. 34/P dated 5 April 2012, Presidential Decree No. 87/P on Approval of Interim Appointment of Members of the General Elections Commission dated 5 August 2016 and KPU Decision No. 81/Kpts/KPU/2016 on Appointment of Head of General Elections Commission dated 19 July 2016, Hereinafter,

Petitioners;

[1.2] has read the Petition;

has heard the statements of the Petitioners;

has heard and read the statements of the President;

has heard and read the statements from the Parties related to the Body for the Supervision of General Elections [Badan Pengawas Pemilihan Umum, Bawaslu];

has heard and read the statements of the Expert Witnesses for the Petitioners;

has examined the evidence from the Petitioners;

has read the conclusions of the Petitioners and the President;

2. Procedural History

[2.1] Considering whereas the Petition, dated 22 September 2016, received at the Registrar's Office of the Constitutional Court (hereinafter referred to as the Court Registrar) on 26 September 2016, in accordance with the Deed of Filing of Petitions No. 193/PAN.MK/2016, recorded in the Constitutional Case Registration Book on October 4 2016 as No. 92/PUU-XIV/2016, amended and received by the Court Registrar on October 24 2016, essentially describes the following:

I. Precedural Requirements for Commencing Proceedings

A. Authorities of the Constitutional Court

1. Whereas Article 24 Paragraph (2) of the 1945 Constitution of the Republic of Indonesia [hereinafter, the Constitution] states that judicial powers shall be carried out by the Supreme Court and the public courts, religious courts, military courts and state

administrative courts beneath it and by the Constitutional Court. Further, the Constitutional Court is regulated in Law 24/2003 on the Constitutional Court, later amended by Law 8/2011 on the Amendment to Law 24/2003 on the Constitutional Court;

2. Whereas Article 24C paragraph (1) of the Constitution states that one of the authorities of the Constitutional Court is to review at the first and final level the Law against the Constitution and that decisions of the Court are final;
3. Whereas Article 10 sub-paragraph a of Law 24/2003 on the Constitutional Court states that the Court is authorized to review at the first and final level the Law against the Constitution and that decisions of the Court are final;
4. Whereas Article 29 paragraph (1) sub-paragraph a of Law 48/2009 on Judicial Powers states that the Court is authorised to review at the first and final level the Law against the Constitution and that decisions of the Court are final. Furthermore, Article 9 paragraph (1) of Law 12/2011 on Establishment of Laws & Regulations states that in the case of claims that the Law contradicts the Constitution, the Court shall conduct the review;
5. Whereas Article 4 paragraph (2) of Constitutional Court Regulation No. 06/PMK/2005 on Guidelines for Beracara dan Perkara Pengujian Undang-undang states, “Material review is the review of a Law, the content of which, whether an article, paragraph or part, is considered to contradict the Constitution”;
6. Whereas, referring to the aforementioned provisions, the Court is authorised to review the constitutionality of Article 9 sub-paragraph a of Law 10/2016 on the Second Amendment to Law 1/2015 on the Enactment of Government Regulation in Lieu of Law 1//2014 on Gubernurial, Regent and Mayoral Elections as Law against the Constitution.

B. Legal Standing and Impairment on Constitutional Rights and/or Authorities of Petitioners

1. Whereas, in accordance with Article 51 paragraph (1) of the 2003 Constitutional Court Law, the formal requirement for petitioning the Court to review a Law against the Constitution is legal standing. In completion, said Article states, “A Petitioner is any party who claims impairment of constitutional rights and/or obligations due to the enactment of a law, namely:
 - a) an Indonesian citizen;
 - b) a group under customary law provided that the group is still extant and in accordance with the development of society and the principles of the Republic of Indonesia as regulated by Law;
 - c) a public or private legal entity; or
 - d) a state institution.”

Moreover, the Elucidation of Article 51 paragraph (1) asserts that the term ‘constitutional rights’ refers to those rights regulated in the Constitution;

2. Whereas, in accordance with Article 51 paragraph (1), there are two requirements that must be met to assess whether a Petitioner has legal standing in a review of the Law, namely, the Petitioner must (i) fulfill the qualifications to act as a Petitioner, and (ii) possess constitutional rights and/or obligations that have been impaired by the enactment of a Law
3. Whereas, referring to Constitutional Court Decision No. 006/PUU-III/2005 and Decision No. 011/PUU-V/2007, impairment of constitutional rights and/or obligations must meet the following five criteria:
 - a) that constitutional rights and/or obligations have been granted the Petitioner by the Constitution;

- b) that said constitutional right and/or obligation has been impaired by the contested Law;
 - c) that the nature of said constitutional impairment is specific and actual or, at least, has the potential by all logical reasoning to occur;
 - d) that there is a causal relationship (*causal verband*) between the aforementioned constitutional impairment and the contested Law;
 - e) there there is therefore the possibility that, should the Petition be granted, the impairment will disist or will not occur.
4. Whereas the five requirements listed above have been elaborated upon by the Court through Decision No. 27/PUU-VII/2009 in the formal review of the second amendment to the Supreme Court Law, where it stated as follows:
“From the practice of the Constitutional Court (2003–2009), individual Indonesian citizens, particularly taxpayers (vide Decision No. 003/PUU-I/2003) various associations and NGOs concerned with certain laws from the perspective of public interest, legal entities, local governments, state institutions, etc., are deemed by the Court to have the legal standing to file a petition for judicial review, both formal and material,of the Law against theConstitution.”
5. Whereas, in accordance with the above provisions, the Petitioners clarified their legal standing to file a petition for material judicial review as follows:
- a) Whereas, in accordance with Article 22E paragraph (5) of the Constitution, the Petitioner is an independent, national state institution authorised to administer general elections for members of DPR, DPD and DPRD as well as for the President and Vice-President of Indonesia, Governor, Regent and Mayor. Thus, the Petitioner, as a state institution, possesses legal standing as stipulated in Article 51 paragraph (1) of the 2003 Constitutional Court Law.

- b) Whereas, the enactment of Article 9 sub-paragraph a of Law 10/2016 on the Second Amendment to Law 1/2015 on Establishment of Government Regulation in Lieu of Law No. 1/2014 on Gubernatorial, Regent and Mayoral Elections as Law [hereinafter, Law 10/2016], with particular regard to the phrase, “...following consultation with Parliament and the Government, the decisions of which shall be binding”, actually and clearly or at least potentially impairs the Petitioner’s constitutional right to formulate regulations for the administration of elections for the protection of justice.
- c) Whereas, in philosophical, sociological and juridical terms, the administration of democratic general elections may only be accomplished by an independent administrator. As such, as an implementation of political and legal reformation, Article 22E paragraph (5) of the Constitution was formulated in the third amendment to the Constitution, stating that general elections shall be administered by a general election commission, which shall be national, permanent and independent. The term ‘independent’ here must be interpreted as meaning that in conducting its duty, the Petitioner shall be free of interference from any party. This independence is one guarantee of impartiality in the administration of general elections. One characteristic of said independence is that in the formulation and enactment of regulations, decisions and technical guidelines, there may be no intervention from any party. Therefore, Article 9 sub-paragraph a of Law 10/2016, in particular, the phrase “...following consultation with Parliament and the Government, the decisions of which shall be binding”, actually and clearly, or at least potentially, threatens the independence of the constitutionally mandated administrator of general elections.
6. Whereas Article 9 sub-paragraph a of Law 1/2015 on Enacting into Law Government Regulation in Lieu of Law No. 1/2014 on Gubernatorial, Regent and Mayoral Elections

causes actual and potential impairment to the constitutional rights and obligations of the Petitioner.

a) Actual Harm

- Whereas, based on the Petitioner's experience of carrying out its obligation to consult draft KPU Regulations with the Government and the DPR in the administration of elections for Governor and Vice Governor, Regent and Vice Regent and Mayor and Vice Mayor in 2015, an actual impairment did arise.
- The meeting to discuss draft KPU Regulations and hear the views of the DPR and the Government lasted for a protracted period of time because various political interests were brought to the fore between representatives of political parties in the DPR. Even Commission II of the DPR expressed the view that, prior to settling the matters of political party stewardship, the Petitioner should postpone the implementation of KPU Regulations regulating the stages, programs and schedules of the election pending a thorough discussion of the draft Regulation on Candidature [Exhibit P-4].
- Furthermore, in the discussion on the draft KPU Regulation on Candidacy, with particular regard to the issue of dualism in political party stewardship, Commission II requested that the Petitioner give an opportunity for and/or fulfill the rights of political parties to settle their disputes over dualism of stewardship, guiding the court's ruling. This is included in the conclusion of the meeting to be regulated in KPU Regulations [exhibit P-5].
- Whereas the Petitioner's experience indicates that the obligation of the KPU to consult with Parliament and the Government in accordance with Article 9 subparagraph a of Law 1/2015 threatens the Petitioner's independence. Although DPR Commission II formulated the conclusion of the discussion, the Petitioners do not

necessarily have to accommodate the opinion of DPR given that it may be contrary to the principle of legal certainty, impartiality and fairness.

- Whereas, should the Petitioner choose to accommodate the input of the DPR in the event of a dispute over the leadership of a political party, meaning that the pair eligible to register as running partners are those based on the latest decision, this has the potential to cause legal uncertainty and moreover may lead to the Petitioner being perceived as biased. In order to guarantee the political party its right to promote its running partners, the Petitioner pursues a policy whereby two factions of a political party may register their running partners provided they agree to promote the same pair of candidates.
- The Petitioner experienced the consultation on KPU Regulations for the implementation of the 2017 Regional Head Election, as referred to in Article 9 sub-paragraph a of Law Number 10/2016, becoming protracted due to political interests related to candidate requirements. Regarding the requirement for candidacy, as referred to in Article 7 paragraph (2) sub-paragraph g of Law Number 10/2016, that the candidate has never been convicted by court decision that has obtained permanent legal force or that former convicted persons must have openly and honestly told the public about their status as an ex-convict, the Parliament and the Government extended the interpretation of the provision by publishing the conclusion submitted in writing to the Petitioner to regulate that a convicted person whose sentence does not include prison time may run for Governor and Vice Governor, Regent and Deputy Regent or Mayor and Deputy Mayor [Exhibit P-6].
- In addition, Parliament and the Government also extended the interpretation of the provisions of Article 7 paragraph (3) sub-paragraph a of Law Number 10/2016, namely, "Governor and Vice Governor, Regent and Deputy Regent or Mayor and Deputy Mayor

Deputy Mayor may run again in the same region as long as the campaign is conducted during unpaid leave and outside of the state's responsibility". In accordance with the conclusions of the hearing, submitted in writing to the Petitioner, the Governor and Deputy Governor, Regent and Deputy Regent or Mayor and Deputy Mayor running again in the same region shall submit a statement of willingness to take unpaid leave during the campaign period at the time of registration. If such obligations are not met, the candidates are not eligible to run. Such provisions are not in accordance with the fact that legal obligations arise after the candidates are appointed. Furthermore, Parliament and the Government also conclude if no letter of leave is submitted by the candidates after being appointed, deliver the leave letter, then their candidacy shall be revoked [Exhibit P-7].

- Whereas the consultation meeting concerning the KPU Regulation for the 2017 Regional Head Elections were held from 8 August 2016 to 11 September 2016 [Exhibit P-8 in the form of Invitation and Attendance List]. After the consultation meeting, the Petitioner must implement the conclusions of the House of Representatives on the results of the consultation, noting that Parliament and the Government decided that the KPU Regulation should be drafted and ratified no later than 15 September 2016. These conditions affect the quality of administration of the elections. After the issuance of KPU Regulation, pursuant to the provisions of Article 11 letter c and Article 13 letter c of Law Number 10/2016, Provincial KPU and District/City KPU shall prepare and stipulate the working procedures of the election, taking into account the guidelines from KPU.

b) Potential Harm

- Whereas, given the legal fact of the Petitioner's experience in consulting on the draft KPU Regulation for the 2015 Regional Head Elections, mentioned above,

Article 9 letter a of Law Number 10/2016, which reads "...following consultation with Parliament and the Government, the decisions of which shall be binding", potentially impairs the Petitioner's right and/or authority to develop technical guidelines in order to guarantee the principle of impartial and just legal certainty. The obligation to consult with Parliament and the Government, the decisions of which shall be binding, has the potential to threaten the Petitioner's independence, and as such is contrary to the spirit of Article 22E Paragraph (5) of the Constitution.

- Whereas the involvement of Parliament and the Government has the potential to cause partiality in the issuance of KPU Regulations and technical guidelines. Such effects may harm the Petitioner's credibility as administrator of the Elections. The broader impact of the intervention of Parliament and the Government in the preparation of technical guidelines is the emergence of mistrust from the election stakeholders towards the Petitioner as administrator of the elections. Moreover, the potential for further loss, namely, the lack of facilitation for fulfilling the constitutional rights of election participants and voters to receive rules that comply with the principles of legal certainty, equality and fairness.

7. Based on the actual and potential harms described above, a clear causal relationship (*causal verband*) can be seen between Article 9 letter a of Law 10/2016 and the impairment of the constitutional rights and/or obligations of the Petitioner.
8. Whereas the considerations of the Court in the review of Article 119 paragraph (4), Article 120 paragraph (4) and Article 121 paragraph (3) of Law 15/2011 on Election Administrator against the Constitution in Court Decision No. 101/PUU-XIII/2015 are that the constitutional impairment experienced by the Petitioner is in no way related to the regulation concerning the obligation to consult with Parliament and the Government in drawing up KPU, Bawaslu and DKPP regulations, but rather concerns the lack of

facilitation of voters' right to vote and the lack of fulfillment of voters' needs. In light of the aforementioned decision, the Petitioner in the *a quo* case has a legal standing because of the direct impairment to constitutional rights and/or obligations.

9. Whereas, based on the aforementioned legal facts, the Petitioner has the qualification and legal standing to file for a review of the Law *in casu* Law 10/2016 Article 9 letter a, in particular, regarding the phrase "...following consultation with Parliament and the Government, the decisions of which shall be binding", and the Petitioner believes that if the Petition is granted by the Court, the impairment to constitutional rights and/or authorities claimed by the Petitioner shall desist;
10. Whereas, therefore, the Petitioner has legal standing to petition for judicial review of the Law in the *a quo* case, given the fulfillment of the provisions of Article 51 Paragraph (1) of the Constitutional Court Law and its Elucidation, the 5 (five) conditions of impairment of constitutional rights according to Court opinion, which has been entered into jurisprudence, and Article 3 of the Constitutional Court Regulation Number 06 / PMK / 2005.

II. Principle Issues of the Case

C. Reasons for Filing the Petition

1. Whereas amendments to the Constitution are generally made in the name of improving democracy in the implementation of public life and the state. Since the amendment to the Constitution, the implementation of democracy in Indonesia is carried out under the Constitution as the highest law of the land in a nation bound by rule-of-law. In a democratic system, the administration of the state must rely on the participation and interests of the people as a manifestation of respect for and protection of human rights. Implementation of the rule of law should be upheld by a democratic system.
2. Whereas in a democratic legal state, the relationship between the state infrastructure as the owner of sovereignty and the superstructure of the state as the executive of the

people's sovereignty, according to law, is mutually determining and influencing. Therefore, the relationship between the two components of the state structure is regulated and guaranteed by the constitution, in particular, the superstructure has been stipulated a system for the sovereignty of the people as the basis of the supreme authority of the state divided amongst and implemented by state institutions, both horizontally and vertically, in order to realize the government program and the aspirations of the state. The relationship between the rule of law and democracy is inseparable. Democracy without the rule of law will lose form and direction, while the law without democracy will lose meaning.

3. Whereas, in order to create a democratic legal state, a change in management and governance is necessary, based on democratic values. Amendments to the Constitution between 1999 and 2002 have had fundamental influences on state administration and governance as well as the functions, duties and relationships between state institutions. The amendment to the Constitution also resulted in changes in the position and relationship of several state institutions, the abolition of certain state institutions, and the establishment of new state institutions. These changes were motivated by the desire to build a democratic government with equality amongst the branches of power and a system of checks and balances in order to realise the supremacy of law and justice and to guarantee and protect human rights.
4. Whereas some state organs are mentioned in the Constitution explicitly by name, while others are referenced by function only. In addition, there are also institutions or organs, whether referred to by name or by function or authority, that shall be governed by lower regulations, and there are yet others whose authorities are not stipulated in the Constitution.
5. Whereas one of the institutions established under the amendment to the Constitution is the administrator of General Elections. Article 22E Paragraph (1) states that "*General*

Elections shall be held every five years and shall be direct, public, free, secret, honest and fair.” Furthermore, in paragraph (5) it is stipulated that *"Elections shall be administered by a national, permanent, and independent electoral commission"*.

6. Whereas Article 22E of the Constitution can not be separated from the historical experience of elections in the previous era, especially during the New Order, which are considered to have been inconsistent with the principle of democratic elections.
7. Whereas the KPU, as a state institution born of the Constitution, has the same constitutional importance as other state institutions established under the Constitution. The KPU, as a state institution, has the same constitutional standing as Bank Indonesia and the Judicial Commission.
8. Whereas the administrators of General Elections, later referred to in the Legislation as the General Election Commission (KPU), have the authority to administer General Elections independently and impartially, free from the influence or interference of other parties, including DPR and the Government. In performing its duties, the KPU is attributed the authority to draft and enact KPU Regulations and other technical guidelines for each election stage. The independence of the KPU in the drafting and enactment of the Regulation is very important to realize legal certainty and equal, fair and just competition.
9. Whereas the standing of KPU Regulations in the hierarchy of legislation, as regulated in Law 12/2011 on the Establishment of Laws and Regulations, is equivalent to Government Regulations, in which Ministries/Agencies, in exercising the attributive authority to establish and stipulate regulations, have no obligation to consult with the legislator. Article 9 Sub-Article a of Law 10/2016, in particular, the phrase *".... following consultation with Parliament and the Government, the decisions of which shall be binding"* constitutes different treatment of the attributive authority to compile and establish Ministry/Institution Regulations. In addition, regarding the Indonesian

legal system, if a regulation issued by a Ministry/Institution is deemed to be inconsistent with higher legislation, then there is a legal mechanism for the public and/or adversely affected parties to file for judicial review by the Supreme Court. This is in accordance with Article 24A paragraph (1) of the Constitution and Article 9 of Law 12/2011 on the Establishment of Laws and Regulations.

10. Whereas, according to Jimly Asshiddiqie, there are four objectives for General Elections, namely, (1) to enable the orderly and peaceful transition of government leadership; (2) to enable the replacement of officials who will represent the interests of the people in the representative institutions; (3) to implement the principle of sovereignty of the people in the representative institution; (4) to implement the principle of the citizens' rights. Whereas the achievement or failure of these objectives depend on the administrators of the election and their independence. The independence of election administrators has a significant influence on the process of democratic elections.

11. Whereas, in Article 22E paragraph (5) of the Constitution, it is stipulated that "General Elections shall be administered by a national, permanent, and independent electoral commission." Thus, according to the Constitution, the administrator of the General Elections shall be i) national, ii) permanent, and iii) independent.

i) "National" means that the KPU, as the administrator of elections, shall operate throughout the entire territory of the Republic of Indonesia as an embodiment of the Unitary State;

ii) "Permanent" means that the KPU shall perform its duties on an ongoing basis, even though its internal members are governed by term of office;

iii) "Independent" means that, in administering General Elections, the KPU shall be independent and free from any influence of any party.

12. Whereas, regarding independence, Law 15/2011 on The Administrator of Elections, Law 8/2012 on General Election of Members of DPR, DPD and DPRD and Law 48/2009

on General Elections of President and Vice President do not provide a specific definition of independence. However, by comparison, we can see an understanding of independence in the doctrines and/or provisions of other legislation. The International Institute for Democracy and Electoral Assistance (IDEA) defines "*Organisational independence implies freedom of the administrators from the intervention and influence of a person, the powers of government, political parties or any party in its actions or decision making in the administration of elections. The organizer must be able to work freely from the interference of any party. The independence can be seen from the attitude, and the policy taken by the administrator, such as the question of determining the election participants, the scheduling of the campaign, etc.*" Furthermore, the Elucidation of Article 14 sub-article h of Law 14/2008 on Public Information Transparency offers the following definition: "Independence is defined as a state in which the company is managed professionally without conflict of interest nor influence/pressure from any party that is inconsistent with legislation or sound corporate principles".

13. Whereas, based on this understanding, the meaning of independence is not determined by the position of the institution, which under the Constitution is that of an independent institution, nor in terms of the institution's ability to finance its duties and functions, but rather, it must be interpreted as the absence of conflict of interest or pressure from any party to an independent institution in carrying out its duties and authorities.
14. Whereas, in accordance with its standing and its role as mandated by the Constitution, the KPU has the authority to administer General Elections nationally, permanently and independently. The essence of the authority to organize General Elections is not merely for the technical management, but also covers the issuing of policy in the form of regulations to ensure legal certainty. KPU as a state institution has the role and function of formulating regulations based on the Laws, values, principles and fundamentals of the

implementation of democratic elections. This is intended to avoid conflict of interest for the government as an election participant and/or for political parties within DPR. For the purpose of providing such legal certainty, the KPU is given the authority to further regulate the rules of operation of each stage of General Elections in the form of Regulations for implementors of the law, making the institution a self-regulating body in accordance with laws and regulations, codes of ethics and general principles of good government.

15. Whereas, given the importance of the role of KPU in the realisation of a democratic state bound by rule of law, the KPU as a state institution, having standing of constitutional importance, should be treated as equal to state institutions such as the Judicial Commission, Bank Indonesia and other independent institutions. In principle, an independent institution has full authority, i.e. in the act of carrying out its functions, it shall not be influenced by other institutions.
16. Whereas the mandate for the Petitioners' to consult with Parliament and the Government in formulating and enacting KPU Regulations, which in practice became protracted, affected the governance of the election. In the case of Laws that are incomplete or multi-interpretive, such that there is a need for clarification from DPR and the Government, should there exist no obligation to consult, the Applicant shall initiate consultation. This was in fact practiced by the Commission for the 2001–2007 period. Following consultation with and clarification from DPR and the Government, KPU was authorised independently to adopt the policy, and in accordance with the Constitution and legislation, KPU shall be responsible for the policy adopted. In the event that any KPU Regulation is deemed inconsistent with the Law, a petition for judicial review may legally be filed with the Supreme Court.
17. Whereas the establishment of Law 10/2016, in particular, Article 9 sub-article a, along the phrase which reads "*...following consultation with Parliament and the Government,*

the decisions of which shall be binding", actually and clearly, or at least potentially, undermines the independence of the administrator of the election as mandated by the Constitution. Regarding the consultation between KPU and DPR and the Government, which is binding upon the stipulation of KPU Regulations and technical guidelines, this opens up a regulatory chamber that is biased and thus is not consistent with the principles of the implementation of a direct, public, free, confidential, honest and fair General Election. Any bias on the part of the administrator of elections will result in public distrust and guarantee that processes and outcomes are unfair. Thus, the consultation amongst these parties raises the potential for conflict of interest.

18. Whereas the Petitioner, as administering body of elections is national, permanent, and independent, established under Article 22E paragraph (5) of the Constitution, with independence meaning to perform its duties free from the influence of any party. This independence is a measure intended to guarantee the impartiality of the administrator in the recruitment of state or public officials in an election. With such a guarantee of independence in place, the Petitioner shall be able to ensure that General Elections are conducted in accordance with the principles of democracy. The independence attached to the authority of the election administrator is independence in stipulating election regulations, which is derived from the Law regulating elections. Therefore Article 9 sub-article a of Law 10/2016, in particular, the phrase "*...following consultation with Parliament and the Government, the decisions of which shall be binding*", actually and clearly, or at least potentially, threaten the "self-sustaining" guarantee of the administrator of elections mandated by the Constitution.

19. Whereas, thus far, the independence of the Petitioner has been tested with the House of Representatives and the Government in the drafting of KPU Regulation. The results of the hearing were included by the Petitioner as a reference for decision making. Considering the meaning of independence of the election administrators, the

suggestions, inputs and opinions of the Government and DPR in the hearing are not binding. The Petitioner, as the administrator of the General Election has the duty, authority, and strategic role of realising legal certainty by observing the principles election administration. Based on the experience of the Petitioner in conducting a hearing on a draft KPU Regulation, Article 9 sub-article a of Law 10/2016, in stating that the results of such a hearing are binding, causes actual and clear, or at least potential, harm to the Petitioner's independence in stipulating regulations. [Exhibit P-9]

20. Whereas the independence of the Petitioners in determining KPU regulations following consultation with DPR and the Government can be proven by the following facts [Exhibit P-10]:

(1) Article 4 paragraph (1) letter n of KPU Regulation 9/2015 on Candidates for Governor and Deputy Governor, Regent and Deputy Regent, and/or Mayor and Deputy Mayor Elections, which regulates that candidates for Vice Governor, Regent, Vice Regent, Mayor or Deputy Mayor may never "*have served as Governor, Vice Governor, Regent or Mayor...*" is deemed to be contradictory to Article 7 sub-article o of Law 8/2015 on Amendment to Law 1/2015 on Enactment into Law of Government Regulation in Lieu of Law 1/2014 on Gubernatorial, Regent and Mayoral Elections, which regulates that candidates for Vice Governor, Vice Regent or Deputy Mayor may never "*have served as Governor, Regent or Mayor...*" Candidate". Furthermore, the Elucidation of the Law is quite clear, while the KPU Regulation states: "Terms of candidates as referred to in paragraph (1) letter n, provided that the candidate:

1. has never served as Governor, for candidates for Vice Governor, Regent, Vice Regent, Mayor or Vice Mayor;
2. has never served as Vice Governor. for candidates for Regent, Vice Regent or Mayor ; and

3. has never served as Regent or Mayor, for Candidates for Vice Regent or Vice Mayor.

Whereas the intention of these provisions is to avoid the demotion of any candidate who has previously served as a regional head. Public office—in this case, the position of regional head (Governor–Deputy Governor, Regent–Vice Regent, Mayor–Deputy Mayor)—constitutes a career path. Thus, in order to protect the dignity of the position of regional head (Governor–Deputy Governor, Regent–Vice Regent, Mayor–Deputy Mayor) hierarchical increase in rank of office is endorsed rather than decrease in rank, such that the KPU believes there is a need for further explanation in KPU regulations, but that in no way alters the meaning of Article 7 sub-article o, but rather regulates in more detail the requirements for candidature specified in the Law so that it is not vulnerable to multiple interpretations by the parties concerned.

- b) Article 36 paragraph (2) of KPU Regulation 9/2015 on Candidature as amended by KPU Regulation 12/2015, which reads "*If, during the process of dispute settlement, as referred to in paragraph (1), there is a court verdict on the postponement of a Regulation of a Minister, Provincial KPU/Aceh KIP or District or City KIP/KPU, there can be no registration accepted from running pairs until the verdict has permanent legal force and is followed up by the issuance of a Ministerial Decree concerning the stipulation of the Political stewardship of the Party*", which is deemed to be contradictory to several Laws. The existence of such a regulation is based on the principle that everyone, including the KPU, is obliged to respect the ongoing legal process in the judiciary, not only based on those court decisions that do not yet have permanent legal force [Exhibit P-11].

21. Whereas, based on the above facts, the Petitioner is able to maintain the independence in carrying out its duties and authority to formulate and enact regulations bound by no other institution, but based solely on the legislation.

22. Whereas the Petitioner's main concern is the formulation of Article 9 sub-article a of Law 10/2016, which reads "*The duties and authority of the KPU in the administration of Elections include: (a) for, drafting and enacting the KPU Regulations and technical guidelines for each stage of Elections following consultation with Parliament and the Government, the decisions of which shall be binding*" which indicates a relatively central involvement of the DPR and stipulates the authority of the KPU in drafting and enacting KPU Regulations and Technical Guidelines for each stage of elections. Such provisions have the potential to threaten the independence of the Petitioners. This is not in line with the agenda of electoral reform, with elections being administered by an independent institution, given that, based on the evaluation of elections conducted during the New Order era, if the election administrator is under the influence of the Government, election results are known before the election is even held. Demands for democratic electoral reform by independent electoral administrators have been realised through the constitutional amendments in Article 22E paragraph (5). Independent Electoral Administrator means that the body, in carrying out its duties and authorities, shall not be under the influence of any other institution.
23. Whereas the involvement of the DPR and the Government in the drafting of KPU Regulations is very much against the goals of reformation in establishing an independent election administrator. The phrase "*...following consultation with Parliament and the Government, the decisions of which shall be binding*" in Article 9 sub-article a is contrary to the spirit and ideals of a democratic election. By Law, the KPU has the attributive authority to draft and enact technical rules and guidelines for each stage of the election to realize democratic and quality elections. Democratic elections require legal certainty. This means that, amongst the regulations governing the rules of electoral administration, there must be no legal vacuum, there must be consistency with no conflicting provisions, and there must be a clear and single

understanding closed to multiple interpretations. Based on the Petitioner's experience of drafting the KPU regulations as described above, there are legal voids, incomplete regulations and multiple interpretations. The Petitioners have been attributively granted the authority and the role to bring about an election procedure that provides legal certainty and upholds fairness. The Electoral Administrator as an independent, self-regulating body, should be free from influence and intervention in compiling the regulations of administering elections.

24. The phrase "...following consultation with Parliament and the Government , the decisions of which shall be binding" has the potential to threaten the independence and fairness of elections. Consultation with Parliament and the Government should be conducted in accordance with the needs of the electoral administrators in the case of multiple, contradictory, or incomplete Electoral Laws. Such hearings are intended to obtain the legislators' (Government and DPR) explanation of the norms of the Law. Furthermore, the outcome of the hearing shall be for the consideration of the electoral administrators in their decision-making process, which shall take into account the principles of democratic elections. When drafting and establishing regulations, the electoral administrators shall not be influenced by political interests, whether personal or institutional.

25. Whereas the independence of a state institution, including the KPU, is not only determined by the Constitution but also by the mechanism of the institution in exercising its authorities institutionally, functionally and administratively. Therefore, should consultations on KPU Regulations and other Technical Guidelines with Parliament and Government be binding, it will interfere with the independence of the KPU.

26. Whereas the International Institute for Democracy and Electoral Assistance (IDEA) introduces standards in elections to ensure that elections are democratic, in particular,

that the administrators are independent and impartial. One indication of the independence of the KPU is the nature of the regulations it establishes, i.e., whether those regulations provide and ensure legal certainty and justice for all parties or not, because a fair regulation can engender public trust in the KPU as the administrator of the General Elections, and that trust can be measured, for example, through the levels of voter participation. However, with the provisions of Article 9 Sub-Article a of Law 10/2016 stating that consultations with Parliament and the Government shall be binding disrupts and undermines the credibility of the KPU as the electoral administrator and may even have a wider impact on the legitimacy of the electoral results.

27. Whereas therefore, the KPU shall not be subject to the influence of any other party, whether the authorities or political parties. The administrators must work without political allegiances or presuppositions. The KPU should be able to carry out its activities free from interference. The reason for this is that any allegations of manipulation, perception of bias, or alleged interference would have a direct impact, not only on the administrators' own credibility but also on the overall process and results of the election. Specifically to the electoral administrators, the international standards for democratic elections assert the need for legal guarantees in order that the agency can work independently. The independence of electoral administrators is an important issue, as such institutions are the machine behind the creation and implementation of decisions that may affect election outcomes.

28. Whereas the Constitutional Court, in Decisions 072-073/PUU-II/2004, has granted the petition for judicial review of (1) Article 57 paragraph (1) of Law 32/2004, concerning the phrase, "...accountable to DPRD"; (2) Article 66 paragraph (3) e, "Request the KPU to execute its responsibilities"; (3) Article 67 paragraph (1) e: "accountable to DPRD for its use of the budget"; and (4) Article 82 paragraph (2), "....subject to disqualification by DPRD from running for election".

29. In its consideration of the judicial review of Article 57 paragraph (1) of Law 32/2004, the Court declared "With regard to the petition concerning paragraph (1), in particular, the phrase, "...accountable to the DPRD", the Court believes that direct regional elections must be based on the principles of general elections, namely direct, public, free, confidential, honest and fair, and they must be organized by independent administrators. The intent of the Constitution cannot be achieved if the KPU, as the administrator of direct Regional Head Elections, is to be accountable to the DPRD, given that the DPRD is a representative body of the people in the region consisting of elements of political parties who are also participants in the electoral competition. Therefore, the KPU should be accountable to the public rather than to the DPRD. Meanwhile, the DPRD only submits the report on the execution of its duties, as specified in Article 57 paragraph (2) of the Regional Government Law. Thus this petition, in order to ensure the quality of the implementation of democracy in the region, must be granted. Similarly, petition number 4 relating to the provisions of Article 66 paragraph (3) subparagraph e of the *a quo* law shall also be granted *mutatis mutandis*.
30. Furthermore, with regard to Article 67 paragraph (1) letter e, in particular, the phrase, "...to the DPRD", in the implementation of the Regional Head Election, the KPU is not accountable to DPRD for its use of the budget because, in the implementation of elections, the funds used are not only sourced/derived from APBD but also from APBN, therefore use of the budget must be in accordance with the prevailing laws and regulations. More importantly, accountability to DPRD for budget appropriation may threaten the independence of the KPU as the electoral administrator in accordance with the principles of direct, public, free, secret, fair and just elections, as referred to in Article 22E juncto Article 18 Paragraph (4) of the Constitution. The DPRD, a political institution representing the people in the region, has a political interest in the competition power at the regional level and, as such, should be prohibited from

interfering in the independence of the KPUD through budgetary accountability mechanism as it administers Regional Head Elections. Therefore the Petition as it relates to this matter should be granted.

31. Regarding Article 82 paragraph (2), in particular, the phrase, "...by DPRD", the Court believes that, since it is KPUD that verifies electoral candidates for Regional Head and Vice Regional Head [*vide* Article 66 paragraph (1) sub-paragraph g of the *a quo* Law] then the authority to disqualify candidates, according to the universal principle of *contrarius actus*, should also lie with the KPUD rather than the DPRD. To guarantee legal certainty, as contained within the principles of rule of law according to the Article 1 paragraph (3) of the Constitution, given that the KPUD is the body authorised to verify electoral candidates, the KPUD should also be authorised to disqualify candidates. In addition to contradicting the principles of rule of law, the authority of the DPRD to disqualify candidates, given that the DPRD has a direct or indirect interest in the verification of electoral candidates is fundamental and substantive to the maintenance of independence in direct elections as mandated by the Constitution. Thus the Petitioners' argument has legal grounds, and this petition should be granted [Exhibit P-12].

32. Whereas the Constitutional Court, in Decision No. 11/PUU-VIII/2010, has affirmed the independence of electoral administrators, declaring that in order to ensure a direct, public, free, confidential, fair and honest general election, Article 22E paragraph (5) of the Constitution provides that, "General Elections shall be administered by a national, permanent, and independent electoral commission". The sentence of "electoral commission" in the Constitution does not refer to a specific institution, but rather to a function of administering a national, permanent, and independent election. Therefore, according to the Court, the function of the general election is carried out not only by the KPU, but also by the electoral supervisory body, in this case the General Election

Supervisory Board (Bawaslu). This understanding further meets the provisions of the Constitution, which mandates the existence of an independent electoral administrator carry out direct, public, free, confidential, fair and honest general elections. The administration of elections without supervision by an independent institution will threaten these principles. Therefore, according to the Court, Bawaslu, as regulated in Chapter IV Article 70 through Article 109 of Law 22/2007, shall be recognised as an administrator of General Elections in charge of supervising the implementation of General Elections. In fact, the Honorary Board, which oversees the conduct of electoral administrators must also be recognised as an administrator general elections. Thus, the guarantee of independence of electoral administrators is clear and concrete [Exhibit P-13].

33. Whereas, furthermore, the Court, in Decision No. 81/PUU-IX/2011, gave the opinion that the requirements referred to in Article 11 sub-article i and Article 85 Sub-Article i of Law No. 15/2011 are closely related to Article 22E Paragraph (1) of the Constitution, which states, "Elections are administered by a national, permanent, and independent electoral commission", especially with regard to the word, "independent";
34. The term independent, if it refers to the historical background of the process of amending the Constitution, is closely related to the principles of non-partisanship. This means that the independence of the electoral commission, as intended by Article 22E Paragraph (5) of the Constitution, is independence from bias towards any political party or candidate because the electoral commission is the administrator of general elections and political parties are participants in those same general elections. The concept of self-reliance or non-partisanship affirms that the administrator of the general election (electoral commission) must not display bias towards any participant in the election [Exhibit P-14].

35. Whereas Article 9 Sub-Article a of Law No. 10/2016 "...following consultation with Parliament and the Government, the decisions of which shall be binding" is ineffective and tends to deny the nature of the Petitioner's independence, which potentially harms the constitutional rights of the Petitioner. The KPU as a national, permanent, and independent state institution in conducting General Elections should be free of intervention, such that the aforementioned arrangement would obviously undermine the independence of the KPU because it creates loopholes for the DPR and Government to intervene in the drafting and establishment of KPU Regulations and other technical guidelines. The KPU has never denied the opportunity for parties to offer insights regarding the KPU's carrying out of its duties and authorities. Hearing opinions from many parties is a demonstration of fairness, and it is necessary to accommodate varied views on the formulation of rules or other technical guidelines. However, regarding decision-making, the KPU should not be influenced by the interests of any particular person or group.
36. Whereas the Petitioner interprets the implementation of the *a quo* article, in particular, the phrase, "...following consultation with Parliament and the Government, the decisions of which shall be binding", clearly and actually, or at least potentially, harms the Petitioner by inhibiting and complicating the Petitioner's independent decision-making process given the possibility of differences in policy and/or views between the Petitioner and the DPR and Government. In such event, the KPU does not have the ability to take a decision free from the pressure and influence of the DPR and the Government, which ultimately has the potential to slow down the process of establishing KPU Regulations and technical guidelines and even disrupt the election.
37. Whereas Article 9 Sub-Article a of Law No. 10/2016 raises the inequality of treatment between the KPU and the state institutions regulated in the Constitution, among others, the Judicial Commission and Bank Indonesia, which have full authority to form

regulations in accordance with the scope of their duties. The authority of Bank Indonesia is stipulated in Act No. 23/1999 on Bank Indonesia, which states that the Bank Indonesia Regulation is a legal provision issued by Bank Indonesia binding upon every person or entity and is published in the State Gazette of the Republic of Indonesia. Therefore, if Article 9 Sub-Article a of Law No. 10/2016 is applied, the article has in fact impaired the constitutional rights of the Petitioner in its position as independent electoral administrator.

38. Whereas it is clear from the above that the enactment of Article 9 letter a of Law No. 10/2016 has impaired the Petitioner's constitutional rights as an independent institution administering elections free from influence or intervention from any party. Therefore, in the name of legal certainty, Article 9 Sub-Article a of Law No. 10/2016 must be declared contradictory to Article 22E of the Constitution, which reads, "General Elections shall be administered by a national, permanent, and independent general election commission".

III. PETITUM

Based on the above description and the attached evidence, it is clear that Article 9 Sub-Article a of Law No. 10/2016 has obviously impaired the Constitutional Rights of the Petitioner, who is protected, respected, promoted, and guaranteed by the Constitution, so that the Justices of the Constitutional Court are asked to pass the following verdict:

- A. Grant the Petition in full;
- B. Declare Article 9 sub-article a of Law 10/2016 on Second Amendment to Law 1/2015 on the Establishment of Government Regulation in Lieu of Law No. 1/2014 on Gubernatorial, Regent and Mayoral Elections into Law, in particular, the phrase, “*...following consultation with Parliament and the Government, the decisions of which shall be binding*”, contrary to Article 22E paragraph (5) of the Constitution;

C. Declare Article 9 sub-article a of Law 10/2016 on Second Amendment to Law 1/2015 on the Establishment of Government Regulation in Lieu of Law No. 1/2014 on Gubernatorial, Regent and Mayoral Elections into Law, in particular, the phrase, “...*following consultation with Parliament and the Government, the decisions of which shall be binding*”, no longer to be legally binding; and

D. Publish this decision in the State Gazette of the Republic of Indonesia as it should be;

Or,

Should the Court be of a different opinion, to pass the fairest possible decision, *ex aequo et bono*.

[2.2] Considering, whereas, to strengthen its case, the Petitioner has submitted written evidence, accepted in the hearing and labelled P-1 to P-14 as follows:

1. Exhibit P-1: Photocopy of KPU Decision No. 81/Kpts/KPU/2016 dated 19 July 2016;
2. Exhibit P-2: Photocopy of Copy of Law 10/2016;
3. Exhibit P-3: Photocopy of the Constituion of the Republic of Indonesia;
4. Exhibit P-4: Photocopy of Minutes of Hearing with DPR and The Government related to the discussions on KPU Regulations, dated 7 April 2015;
5. Exhibit P-5: Photocopy of Minutes of Hearing with DPR and The Government related to the discussions on KPU Regulations, dated 23 April 2015;
6. Exhibit P-6: Photocopy of DPR RI Letter No. PW/0/25/KOM.II/IX/2016 concerning Summary of DPR Commission II’s Hearing with KPU, Bawaslu and the Ministry of Home Affairs, dated 9 September 2016;
7. Exhibit P-7: Photocopy of DPR RI Letter No. PW/0/25/KOM.II/IX/2016 concerning Summary of DPR Commission II’s Hearing with KPU, Bawaslu and the Ministry of Home Affairs, dated 9 September 2016;
8. Exhibit P-8: Photocopy of invitations and attendance for the hearing with DPR and the Government from 8 August 2016 to 11 September 2016;

9. Exhibit P-9: Photocopy of Minutes of Hearing with DPR and The Government related to the discussions on KPU Regulations, dated 2 April 2015;
10. Exhibit P-10: Photocopy of Minutes of Hearing with DPR and The Government related to the discussions on KPU Regulations, dated 4 April 2015;
11. Exhibit P-11: Photocopy of KPU Regulation No. 12/2015 on Candidacy in Gubernatorial and Vice Gubernatorial, Regent and Vice Regent and/or Mayoral and Vice Mayoral Elections;
12. Exhibit P-12: Photocopy of Constitutional Court Decision No. 072–073/PUU-II/2004;
13. Exhibit P-13: Photocopy of Constitutional Court Decision No. 11/PUU-VIII/2010;
14. Exhibit P-14: Photocopy of Constitutional Court Decision No. 81/PUU-IX/2011;

In addition to the written evidence, the Petitioner has also invited one expert who delivered a statement in hearing via video conference on 28 November 2016 and two further experts who submitted written statements to the hearing on 28 November 2016, received by the Secretariat of the Court on 16 December 2016, which essentially observed as follows:

1. Dr. Zainal Arifin Muchtar

Characteristics of Independent State Institutions

In short, state institutions similar in nature to KPU are those state institutions referred to in theory as independent state institutions. Independent state institutions are a new entity in the Indonesian state administration system post-reformation. Independent state institutions have evolved a new branch of power.

Bruce Ackerman (2003) explains that the structure of the branches of power in the American state system is no longer just three or four branches, but five, namely House of Representatives, Senate, President as chief executive, Supreme Court, and Independent Agencies. Here is Ackerman on the matter: “...the American system contains (at least) five branches: House, Senate, President, Court and Independent Agencies, such as the Federal Reserve Board. Complexity is compounded by the bewildering institutional dynamics of the American federal

system. The crucial question is not the complexity, but whether we Americans are separating power for the right reasons.

Ackerman's view focuses on a three-principle model of separation of powers that has motivated the birth of the doctrine of separation of powers, the three principles being democracy, professionalism and the protection of the basic citizens' rights. Cindy Skach (2007) looks at the model of separation of powers in a semi-presidential government becoming a system of 'newest separation of powers'. This system identifies six branches of power, each of which then stands alone and has its respective powers, one of which is an independent state institution. That is to say that independent state institutions have become a reality in contemporary state systems, including for countries like Indonesia. Independent state institutions or independent regulatory institutions (IRCs), according to Milakovich and Gordon, have differences with ordinary government agencies. One difference is that this commission has a character of leadership that is collegial, such that decisions are taken collectively. In addition, the members or commissioners of this institution do not answer to the desires of the president as with other posts appointed by the president. Regarding this matter of independence, Funk and Seamon explain it in terms of members free from presidential control, although independence is relative, not absolute.

Thirdly, the term of the commissioners is usually definitive and relatively long, for example fourteen-year terms for the Federal Reserve Board in America. Fourth, in addition, the term of office is "staggered", meaning that each year commissioners are gradually replaced so that no president can fully control the leadership of the relevant institutions, because the period of the commissionership does not follow the presidential political period. Fifth, the number of members or commissioners is odd, and decisions are taken by majority vote. Sixth, membership of these institutions usually maintains a balance of partisan representation. With characteristics such as these, the IRCs achieve relative freedom in performing their functions because they are not under any absolute control.

Funk and Seamon elaborate that the characteristics of these independent institutions are, first, that they are headed by multi-member groups, different from those who head the agency; second, that they should not be controlled by a simple majority of a particular party, which means freedom from the control of particular parties; third, the commissioners have fixed and staggered terms, which means terms do not end en masse; fourth, members can only be dismissed from office according to what is specified in the rules and by Presidential stipulation as in executive institutions.

Meanwhile, Michael R. Asimov said that it can be said the nature of a state commission depends on the mechanism of appointment and dismissal of the members of that state commission. According to Asimov, the members of independent state commissions can only be dismissed in accordance with the provisions set forth in the Law on the establishment of the commission concerned.

William F. Fox, Jr. argues that state commissions are independent if expressly stated as such in the Law on the commission in question, made by Congress, or if there is a limitation on the president's discretion in dismissal of the leadership of the state commission. An independent state commission is a public institution that has independence, autonomy and regulatory competence in running a sensitive public space, such protecting competition, supervising capital markets, and regulating services of economic interest in general. The existence of this independent state commission, justified by the complexity of certain regulations, as well as tasks that are supervisory and require special skills and the need for rapid implementation of public authorities in certain sectors that are free from political interference in the implementation of the market.

That is, if the KPU is seen as an independent state institution within the above construct of state administration, then the KPU should also have the characteristics described above. Whereas, the fact that the law has not granted all of these characteristics—for example, staggered terms—it is not necessarily the case that the KPU may not be considered an independent state institution. Of

course what is important to think about and strengthen is how to maintain these characteristics and the mechanisms of the KPU in order that it remain independent as envisaged in the ideals of an independent state institution.

Amongst these traits, one thing that is certain is that state institution such as the KPU are self regulatory institutions in the sense that they must be free to govern themselves, as long as such power is granted by the regulations established by parliament. Simply put, the institution can manage itself with regard to the administration of its authorities as granted by Law. Therefore, if this is linked with another characteristic, namely that it must be free from intervention, then the KPU should be free from dependency on other state institutions, especially those institutions participating in the same political contests governed by the KPU itself. This would be a case of the player refereeing the game, in the sense that the political parties would be determining the rules of their own game.

Provisions Affecting Independence

If viewed in detail, Article 9 sub-article a of Law No. 10/2016, in particular, the phrase, “...following consultation with Parliament and the Government, the decisions of which shall be binding” has provided a very strong and imperative obligation that KPU and other technical regulations can only be established if it has been brought before a hearing, whose outcomes are binding.

This context, if read legally, has the potential to disrupt the implementation of the authority of KPU in at least three ways. Firstly, the KPU is only able to formulate and establish KPU Regulations following a consultation. This means that if the party to be consulted with refuses the consultation, basically the requirements for formulating and establishing KPU regulations and technical guidelines cannot be met, and the regulations may not be established. As such, it can be said that authority to formulate and establish has been transferred from the KPU to the hearing, given that the hearing is a mandatory prerequisite.

Secondly, given that the outcomes of these hearings are binding—i.e., whatever is requested by the House in the forum becomes imperative and must be implemented—it is conceivable that if the DPR forces its will upon the KPU, then the KPU has no power to refuse. If the DPR wills something, then it must be included in the regulations made by the KPU. It therefore can be said that the authority to draft regulations relating to the administration of general elections is transferred from the KPU to the DPR.

There are at least two ways that these provisions can cause interference. The first concerns the theoretical characteristics of the KPU as an independent state institution and self regulatory body. It is self-governing within the scope of its authority. Given that the Constitution clearly authorizes the KPU to administer general elections independently, it is an obligation to safeguard theregulatory authority. Should there arise a problem with KPU Regulations, the judicial review mechanism is available. The second deals with institutional independence. As mentioned above, the provision is very likely to interfere with independence because it generates the potential to transfer the duties and functions of the KPU, which should be carried out independently, to the DPR.

Conclusion

The contested provision has the potential to interfere with the independence of the KPU and undermine the self regulatory authority, which is the main characteristic of an independent state institution.

1. Didik Supriyanto (Written Statement)

Article 22E Paragraph (5) of the Constitution states, "General elections shall be organized by a national, permanent, and independent general election commission," which, in fact, is a crystallisation of the political and constitutional journey of the Republic of Indonesia.

In the New Order era, elections were organized by the Election Institute (LPU), chaired by the Minister of Home Affairs. As a part of a government agency, the LPU was not neutral as it had to carry out the government's mission to facilitate the win of a particular election participant,

namely, the Golkar Group, a social and political organization supporting the government. Therefore, when the New Order regime collapsed, followed by the transitional elections (General Election 1999), Law No. 3/1999 on General Elections altered the duties, authority and organisational structure of LPU to ensure that elections be truly direct, public, free, confidential, honest and fair. Not only did the LPU change its name to the General Election Commission (KPU), but the organisational structure also changed. Whereas the members of the LPU were predominantly bureaucratic and military officials and were chaired by the Minister of Home Affairs, the members of the KPU consist of two elements: first, the government element, appointed by the President, and secondly, elements of political parties participating in the election, appointed by the political parties themselves. Although the number of government representatives is only 5 people and the representatives of political parties are equal the number of parties participating in the election, the votes of these two elements are 50% each.

When the Law on General Elections was being drafted, many political experts, state administrators and election observers reminded that the KPU is an independent institution, having non-partisan elements of membership. Indeed, if the KPU is composed of partisan elements, then there will be conflicts of interest resulting in chaos both in the process of administering the elections and in the results of the elections. However, this warning was ignored by the lawmakers. The counter-argument offered is that if the participating political parties are the administrators of the elections, then there will be equal and mutual control amongst them resulting in honest and fair decision making.

The experience of the 1999 elections really shows the adverse impacts of involving partisan elements in the KPU. The political parties within the KPU do not mutually control one another, but instead conspired to refuse to endorse the outcome of the election. Most KPU members who came from political parties refused to take a decision because their respective parties does not achieve the votes and seats that they had expected. As a result, a smooth election threatened not to produce anything because the Commission did not want to verify the results. The resulting

political crisis was unavoidable, and, consequently, the President took over the duties and authorities of the KPU in determining the election result. This step taken by the President, although not in accordance with the Law, as a means to rescue and secure the results of the election, was accepted by the people in order that the DPR and MPR could be formed and could implement the reformation agenda.

This negative experience during the 1999 elections resulted in three steps of political and state administration reform. First, the General Assembly of the People's Consultative Assembly (MPR), held in October 1999, passed MPR Decree No. IV/MPR/1999 on the Guidelines of State Policy (GBHN), which stipulated that general elections be of a higher quality, more democratic, direct, public, free, confidential, honest, fair and civilized, and that, to this end, the elections would be conducted by an independent and nonpartisan body. Second, the DPR and the government amended Law No. 3/1999 with Law No. 4/2000 on Amendment to Law No. 3/1999, which confirmed that elections should be conducted by an independent and nonpartisan body, namely, the KPU. Thirdly, the SU-MPR, in November 2001, ratified the Third Amendment to the Constitution, in which Article 22E Paragraph (5) stipulated, "General Elections shall be held by a national, permanent, and independent electoral commission". International IDEA (2002) provides a number of international standards that as a benchmark for whether or not an election is democratic. These international standards for democratic elections are derived from various international and regional declarations and conventions, such as the 1948 Universal Declaration of Human Rights, the 1960 International Covenant on Civil and Political Rights, the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, as well as the 1981 African Charter on Human Rights and Society. Based on these documents, 15 aspects of democratic elections have been formulated, namely: a] drafting of legal frameworks; b] determination of the electoral system; c] determination of electoral districts; d] the right to vote and to be elected; e] voter registration and voter register; f] access to ballot papers for political parties and candidates; g] democratic election campaigns; h] access to media and

freedom of expression; i] financing and expenditure; j] voting; k] counting and recapitulation of votes; l] the role of party and candidate representatives; m] election monitoring; n] obedience of the law; o] enforcement of electoral regulations; and p] election administrators.

With regard to the election administrators, the international democratic electoral standards confirm the need for legal guarantees that the agency can work independently. The independence of election administrators is crucial, as electoral such institutions create and implement decisions that affect the outcome of the election. Therefore, the agency must work within a sufficient timeframe, possess qualified resources, and have sufficient funds available. The Election Law must regulate the size, composition, and tenure of members of election administrators. It must also regulate the relationship between the central election administrators and lower level electoral institutions, as well as the relationship between all election agencies and the executive branch. The law should make provisions for the mechanisms to process, decide, and deal with complaints in the General Elections in a timely manner.

The International IDEA asserts that election administrators may not be influenced by any third party, whether an authority or a political party. The administering body must operate without bias or political interests. It must be competent to carry out its duties free from interference because any instance of manipulation from the outside or of bias or interference will have direct impacts, not only on the credibility of the administrator itself, but also on the electoral process as a whole, including its results.

The history of the political and constitutional reforms of the Republic of Indonesiashows clearly the importance of an independent election administration body. Similarly, international democratic election standards also require the establishment and operation of independent electoral administration bodies in order to properly administer elections and validate the election results in accordance with the voters' choice. Nevertheless, there have always been attempts to limit and degrade the importance of the independence of election administrators. This is evident

from some of the provisions in the Election Law, which later had to be corrected by the Constitutional Court.

First, Law No. 32/2004 on Local Governments, in particular, the section governing the election of Regional Heads, stipulated that the regional KPU should be responsible to the DPRD in conducting regional head elections. The provisions contained in Article 57 Paragraph (1), Article 66 Paragraph (3), Article 67 Paragraph (1), and Article 82 Paragraph (2), clearly violated the principle of independence of election organizers by requiring the regional KPU to defer to and be responsible to the DPRD. Through Decision No. 72-73/PUU-II/2004, the Constitutional Court corrected these provisions so as to return to the regional KPU its identity as an independent institution as guaranteed by the Constitution.

Secondly, Law No. 15/2011 on General Election Administrators, particularly the parts governing membership of electoral administration bodies, allows members of political parties to become members of electoral administration bodies. The provisions contained in Article 11 sub-article i and Article 85 sub-article i clearly violate the principle of independence of the election administrator, because these provisions allow partisan persons to become members of electoral administration bodies. Through Decision No. 81/PUU-IX/2011, the Constitutional Court overturned these provisions so that the election administrator was protected from the conflict of interest brought by partisan people. Here the Constitutional Court maintained the principle of independence of the election administrator as referred to in Article 22E paragraph (5) of the Constitution.

Based on Decision No. 72-73/PUU-II/2004 and Decision No. 81/PUU-IX/2011, plus International IDEA's explanation, the term 'independent' with respect to electoral administration bodies should be understood as comprising two aspects: first, that all decisions of the administering committee shall be free from outside influence or intervention; and second, that the election administrator must be peopled by non-partisan members. The Constitutional Court's verdict is very clear, clean, and consistent so that there should no longer be the opportunity for

parties to undermine the independence of the election administrator. However, in reality, political parties, through their people sitting in the House of Representatives and the Government (both legislators), continue to categorically inculcate provisions that reduce, ignore, and even eliminate the principle of independence of election administrators, as indicated by the two provisions in the Law presented below.

First, Article 8 Paragraph (1) Sub-Paragraph c of Law 15/2011 states: "The duties and authorities of the KPU in the administration of the General Election of members of the People's Legislative Assembly, the Regional Representative Council, and the Regional People's Legislative Assembly shall include: ... c. drafting and stipulating technical guidelines for each election stage after consultation with the Parliament and Government." Here, the phrase, "...after consultation with Parliament and Government" seems to suggest no intervention to the KPU in establishing technical guidelines for each election stages. In practice, however, this provision causes significant interference in the independence of the KPU in carrying out its duties and authorities: first, the KPU can not immediately issue its technical guidelines because it is required first to consult with the DPR and the Government, whereas the schedule of the General Election is not always in line with the activities of the DPR and the Government; secondly, the KPU could be held hostage not to issue its technical guidelines because the DPR and the Government can, with any pretext, refuse to be consulted.

Secondly, whereas these provisions did not provide sufficiently for the DPR and the Government to control the KPU, the enactment of Law 10/2016 Article 9 letter a provided as follows: "The duties and authority of the KPU in the administration of Elections shall include: a. drafting and enacting KPU Regulations and technical guidelines for each stage of the Elections following consultation with Parliament and the Government, the decisions of which shall be binding." Whereas the former provision [Article 8 paragraph (1) sub-paragraph c of Law 15/2011] required the KPU to consult with the DPR and the Government, the latter [Article 9a of Law 10/2016], requires the KPU to accept the outcomes of these consultations. This provision's

reference to legally binding outcomes is actually *contradictio in terminis*; nevertheless, it clearly binds the KPU such that the institution is no longer independent in establishing regulations and technical guidelines. This provision is clearly contrary to the provisions of Article 22E Paragraph (5) of the Constitution.

1. Saldi Isra (Written Statement)

In its petition for judicial review of the Law, the KPU questioned the constitutionality of Article 9 letter a of Law No. 10/2016 which states:

“The duties and powers of the KPU in the implementation of the Elections include: a. prepare and enact the KPU Regulations and technical guidelines for each stage of the Elections following consultation with Parliament and the Government, the decisions of which shall be binding.”

According to the Petitioner, the phrase *“...following consultation with Parliament and the Government, the decisions of which shall be binding.”* threatens the Petitioner's independence as a state institution constitutionally declared an independent institution. Therefore, the involvement of the DPR and the Government has the potential to lead to KPU Regulations that are biased and unfair in the administration of regional head elections (pilkada). Thus, the phrase contradicts Article 22E Paragraph (5) of the Constitution, which stipulates that the general election shall be held by a national, permanent, and independent general election commission.

Through this statement, the expert describes two complementary points of view, namely (1) the KPU as an independent institution; and (2) the legal products established or issued by KPU.

1. KPU as an Independent Institution

The independence of the KPU is expressly stated in Article 22E paragraph (5) of the Constitution. To fully understand the definition of "independent", we must take several approaches. Firstly, let us look at the formulation of the article in question during the process of amending the Constitution. As far as we can derive from the intentions of PAH I BP MPR in formulating the article, 'independent' is defined as

the non-partisanship of its members and of the institution itself. Non-partisan here means "not attached to certain political forces" in carrying out its duties (Secretariat General and Registrar of the Constitutional Court, 2010). That is, those amending the Constitution felt that the Election Commission must be an institution that is not aligned with or influenced by certain political forces in carrying out its duties.

Secondly, conceptually speaking, 'independent' means being outside the executive, legislative and judicial branches power. However, this independent institution still has a mixed function, so it is referred to as an independent supervisory body (Jimly Asshiddiqie; 2006, 8). According to Milakovich and Gordon, state commissions can be separated into two types, namely, Dependent Regulatory Agencies (DRAs) and Independent Regulatory Boards and Commissions (IRCs). DRAs are part of a particular department in the government's cabinet/executive structure. Meanwhile, IRCs are independent state institutions, not under any branch of power, not even the executive (Denny Indrayana, 2016,47). Thus, conceptually, the term 'independent' in Article 22E of the Constitution means that the KPU is situated as a state institution free from any influence of power, whether the government, the DPR or any political party.

Third, in decisions concerning independent state institutions, the Constitutional Court has also expressed its views. In the judicial review of the Electoral Administrators Law, the independence of the state election administrators relates to the independence of the institution and the independence of its members. The independence of members means that members of the electoral commission may not be members of political parties (see Constitutional Court Decision No. 81/PUU-IX/2011, p. 57). In the judicial review of the Judicial Commission Law, independence of the Judicial Commission was interpreted as

freedom from interference and influence of other powers in decision making and execution of authorities possessed by the Commission (see Court Decision No. 005/PUU-IV/2008, pg 192). In the Decision on Review of the Law on OJK, the Constitutional Court interpreted the word independent as freedom to achieve the goals set out in the Law and to take decisions to achieving its objectives without intervention by the government or the branches of state power (see Constitutional Court Decision No. 25/PUU-XII/2014, pg 289). Through these decisions, the Constitutional Court explains the independence of state institutions as freedom of the agency from influence or intervention of other powers.

From the perspective of the establishment of norms, concepts and decisions of the Constitutional Court relating to the independence of state institutions, the independent nature of the KPU as referred to in Article 22E paragraph (5) of the Constitution is understood as meaning free from interference and influence of any other power. All electoral administration, whether in the framework of formulating electoral law or of implementing the electoral process, shall be exercised by the KPU without any intervention, influence or constraint from any other power.

The question is whether the phrase "...following consultation with Parliament and the Government, the decisions of which shall be binding" may be said to be contrary to the independence of the Commission as intended by Article 22E Paragraph (5) of the Constitution?

By making the establishment of KPU Regulations (part of the electoral law) dependent upon the Hearing, KPU surely cannot still be independent. With that reality, how could the KPU still be said to be free from the influence of other branches of power, especially the government and the House of Representatives?

In reality then, it is clear that some of the KPU's powers relating to elections are no longer administered independently. Article 9 letter a of Law No. 10/2016 dictates that the KPU share authority with the government and DPR. In fact, it is more than sharing authority; the process of conducting hearings with DPR and the government has great potential to pressure, affect or even control what should be contained in KPU Regulations. This has been proven through the formulation of KPU Regulation No. 9/2016, particularly the provisions of Article 4 paragraph (1) sub-paragraph f, which states that the following persons qualify as electoral candidates: "Any person never convicted by court decision that has obtained permanent legal force; any person convicted for negligence or for political reasons; any former convicted person who has openly and honestly announced to public his/her status as an ex-convict."

The formulation of Article 4 Paragraph (1) Sub-Paragraph f of the above KPU Regulation clearly contradicts the conditions set forth in Article 7 Paragraph (2) Sub-Paragraph g of Law 10/2016, which stipulates, "[the candidate] has never been convicted by court decision that has obtained permanent legal force [or that] former convicted persons must have openly and honestly announced to the public about their status as an ex-convict."

There is contradiction because the limits imposed by Law No. 10/2016 are actually exceeded by KPU Regulation No. 9/2016. The law clearly and unequivocally stipulates that eligible candidates for regional head are persons who have never been convicted or ex-convicted persons who have honestly and openly informed the public about their status, but the KPU Regulation actually allows convicted persons to run for regional head. What is stipulated in Article 4 paragraph (1) letter f of the KPU Regulation is the result of the hearing between the KPU and the Government and the DPR, not the sole will of the KPU as holder of the authority to

Constitutional Court of the Republic of Indonesia| 42

establish KPU Regulations. At that time, the KPU was compelled, due to the existence of Article 9 letter a of Law No. 10/2016, to fulfill the wishes of political parties in the DPR. This is clear evidence that the involvement of the Government and the DPR in the formulation of KPU regulations opens up the potential for intervention by political forces in the KPU's administration of elections. As a result, the KPU is no longer independent in formulating regulations in order to further regulate the matters not fully regulated in Election Law.

Furthermore, even under the intervention of the government and the People's Legislative Assembly, it is still the KPU that is held accountable for such regulations, which are still officially named KPU Regulations, not Joint KPU–Government–DPR Regulations. In the regulatory system, when the KPU Regulation is contested or reviewed, the KPU is fully responsible, with no responsibility at all lying with the government or the DPR. Clearly, this arrangement not only undermines the independence of the KPU, but also the system of supervision and evaluation of existing legislation.

2. Legal Products Formulated by the KPU

Legal products in the form of legislation are deemed valid if they are issued by an institution with the relevant authorisation and in accordance with the Law. KPU Regulations are referred to in Article 8 of Law No. 12/2011 on the Establishment of Regulations and Legislation, meaning that the KPU Regulation is a regulation established by the KPU as an independent state commission.

In accordance with Article 119 of Law No. 15/2011 on Election Administrators, with regard to Article 8 of Law No. 12/2011, KPU Regulations shall be established by the KPU for or in the course of holding General Elections. Since the formulation of KPU Regulations is one of the authorities held by the KPU, it should also not be subject to

interference from other powers. The KPU must be fully independent in formulating regulations in order that elections be carried out in an honest and fair manner.

The involvement of other powers in the formulation of KPU Regulations potentially leads to conflicts of political interest in the administration of elections, which would curb the freedom of the KPU to realise an honest and fair election. Thus, the KPU would no longer be institutionally independent.

The Government and the DPR are legislators. As such, it is inappropriate that the DPR intervene in the lower regulatory framework, including in the formulation of KPU Regulations. If they want to ensure certainty in the administration of elections, the government and the DPR should regulate them more clearly and decisively in the Law, so that there is no room for lower regulations to undermine the provisions of the Law. With that, the Government and the House would no longer need to participate directly in the formulation of KPU Regulations.

If the reason for involving the Government and the DPR in the formulation of KPU Regulations is to supervise and ensure that the KPU Regulations do not contradict the Law, it is certainly not appropriate, given that (1) there has been provided a judicial review mechanism as a means of control over KPU Regulations; (2) the involvement of the Government and the DPR in the formulation of KPU Regulations does not guarantee that the regulations will not contradict the Law, because with the involvement of the Government and the DPR contradictions are still possible; (3) if the intention is to supervise, the Government and the DPR should surely involve themselves in the establishment of all regulations. By only being involved in the formation of KPU regulations, it is difficult to argue that they do not intend to intervene in the election/election process.

In addition, the formulation of KPU Regulations is a delegation of the Law, which is itself established by the DPR and the government. When the formulation of norms is delegated,

the responsibility for the formulation of and all legal implications of the implementation of such norms lies with the institution receiving the delegation, while the delegating agency no longer participates in nor is responsible for norms established on the basis of the delegated authorities. If the delegating agency continues to intervene, then the delegation loses its meaning.

Based on these legal arguments, maintaining the involvement of the Government and the DPR in the formulation of KPU Regulations, as stipulated in Law No. 10/2016 Article 9 letter, effectively violates the Constitution, especially with regard to the administration of elections. Therefore, the Court should consider the Petitioner's requests in order to maintain the constitutionality and the essence of Article 22E of the 1945 Constitution in the holding of the General Elections.

[2.3] Considering, whereas the Court has heard the opening statement of The President at the hearing on 9 November 2016, and the written statement has been received at the Registrar's Office on December 16, 2016, as well as additional information received in the Registrar's Office, which principally was as follows:

I. PRINCIPLE ISSUES OF THE PETITION

1. Whereas, according to the Petitioner, Article 9 letter a of Law 10/2016, which obliges that the KPU engage in consultation, in practice led to the prolonging of the process of drafting KPU Regulations;
2. According to the Petitioner, Article 9 letter a of Law 10/2016, which involves the DPR and the Government in the drafting of KPU Regulations, is contrary to the reformation agenda of establishing an independent election administrator as well as clearly and actually or at least potentially undermine the independence of the institution administering General Elections as mandated by the Constitution;
3. According to the Petitioner, the election administrator should not be subject to direction from other parties, neither the authorities nor political parties;

4. Whereas the KPU never closed down the opportunity for other parties to submit their input to the commission in the conduct of its duties and authorities, but in relation to decision-making, the KPU shall not be subject to interference in the interests of any individual or group;
5. The Petitioner asserts that Article 9 letter a of Law 10/2016 contradicts Article 22E paragraph (5) of the Constitution.

II. LEGAL STANDING

1. Whereas, in accordance with the principle of legal standing, not every party is authorised to file petitions with the Court unless there is a claim of harm or injury. Whereas, in accordance with Constitutional Court Decision No. 006/PUU/III/2005 and No. 011/PUU/PUU-V/2007 and later decisions, there are five prerequisites for harm as follows:
 - a. petitioner must possess constitutional rights granted by the Constitution;
 - b. petitioner must claim that said rights have been harmed or violated by the contested Law;
 - c. said harm or violation must be specific and actual in nature or at least potential by sound reasoning;
 - d. there must be a causal relationship (*causal verband*) between the harm or violation and the contested law;
 - e. there must be the possibility that, should the petition be granted, the harm or violation will not occur or will cease to occur.
2. Whereas the position of the Petitioner with regard to these prerequisites is as follows:

- a. The constitutional right claimed by the Petitioner is derived from Article 22E paragraph (5) of the Constitution, which reads, "general elections shall be administered by a national, permanent and independent general election commission." Regarding this claim, the Government asserts that the article in question does not in fact grant rights to the KPU but rather should be considered a general principle of law that must be upheld and championed by all national elements, including the Government and the DPR, not just the KPU.
- b. The contested article, which the Petitioner claims violates the independence of the KPU, is Article 9 letter a of the Law on Regional Head Elections, in particular, the phrase "*following consultation with Parliament and the Government, the decisions of which shall be binding*". With regard to this claim, the Government asserts that the independence of the KPU is limited to independence in administering elections and does not include independence in the formulation of regulations. The independence of the KPU in administering elections is not determined by the presence or absence of consultations between the KPU and the Government or the DPR. The independence of the KPU in administering General Elections is determined by the integrity of the Commissioners of KPU itself, not by external factors. The claim that consultation with the Government and the DPR threatens the independence of the KPU in administering General Elections is erroneous and is not based in the law.
- c. The harm claimed by the Petitioner is the prolongation of the formulation of KPU Regulations as a result of conducting hearings with the Government and the DPR. The Government asserts that this claim does not constitute a specific violation, nor is it caused by the contested article, but rather it is affected directly by the quality and integrity of the members of the KPU, the DPR and the Government. If all involved have integrity then the hearings would not be

prolonged, and there would be no consideration that the hearings threaten the independence of the Commission in any way. There should be no thought on behalf of any element of the state, including the KPU, that the Government and/or the DPR threatens the independence of the KPU.

Based on these considerations, the Government asserts that the Petitioner has no legal standing and considers it most appropriate that the Honourable Justices should decide, in their wisdom, to reject the Petition.

However, should the Honourable Justices decide differently, the Government has submitted its statement concerning the case.

III. GOVERNMENT'S COMMENTARY ON THE CONTENTS OF THE PETITION

The Government offers the following statement with regard to the Petition:

1. Whereas Article 22E paragraph (5) of the Constitution requires further interpretation before it can be encoded in the form of concrete law. Regarding the content of the article in question, the Government offers the interpretation of the phrase "elections administered by a General Elections Commission" that general elections are to be held an electoral commission, the name of which is not specified in the Constitution. Therefore, the name may be, for example, General Elections Commission, Institute of General Elections or indeed anything, insofar as there is only one. As such, by way of implementing the provisions of Article 22E paragraph (5), there must be formed an electoral commission that is permanent, national and independent. These provisions are manifested by the Government in the form of the KPU. In accordance with Article 22E paragraph (6), further provisions concerning general elections are regulated by Law.
2. It is necessary for the Government to convey to the trial that, during the deliberations concerning the formation of the *a quo* Law, the Petitioner participated

in all stages, such that any matters that the Petitioner considered inappropriate should have been raised during the deliberations where a consensus could have been sought in order that all parties implement the outcomes positively and effectively. In this regard, considering that the *a quo* Law has been agreed upon by all Parties concerned and has been officially enacted, it can be assumed that the KPU also agreed with the enactment of the Law and its contents. Thus, based on the ethics of Government Administration, it is unethical for the Petitioner to file for review of the *a quo* Law.

3. Whereas the term "independent" does not contain the meaning that the KPU can do all things without the involvement of other elements of government, given that the dynamics of governance come not only from the aspect of the elections but must also give consideration to and adapt to various dynamics from all aspects of life, such that this synchronisation process requires that the KPU coordinate with the Government and the DPR in order best to formulate and establish the regulations of the KPU and technical guidance for all stages of General Elections in accordance with the original intent and content of the Law in question.
4. Whereas the norms contained in the object of the petition are a logical implementation of the above interpretation. Under this construction, it can be understood that the KPU, in the framework of performing its duties, which constitute a part of government administration, is expected to coordinate with the administrators of government, namely the Government and the DPR. One form of such coordination is conducting hearings with the aforementioned elements.
5. Whereas various management references suggest that good, efficient and effective management is built upon three essential functions, namely planning, implementation, and supervision, each conducted by a distinct organisational unit.

In the context of the electoral system, implementation is carried out by the independent KPU, and supervision is carried out by the General Election Supervisory Board (Bawaslu) which is also independent. Thus, it is appropriate if the planning or regulation is conducted by the DPR together with the Government in the form of the Law.

6. Whereas the KPU should develop the thought that in every implementation of state administration there is cooperation amongst the main elements, namely the Government as the empirical actor of state administration in all aspects of life and the DPR as a manifestation of the people of Indonesia, while the KPU should focus on the administration of elections, the regulations for which are established by the DPR together with the Government; this will certainly be a major factor in improving the credibility and image of the KPU itself.
7. The Government strongly agrees that decisions taken by the KPU in the context of implementation should not be interfered by anyone. For example, to determine who is eligible to run, to determine the number of votes obtained by each candidate, and so on. Herein lies the KPU's independence.
8. Whereas the definition of independence provided by the applicant is contained on page 18,"The independence of the administrator implies freedom from the intervention and influence of any person, governmental power, political parties or any other party in the decision-making and administration of elections. The administrator must be able to work free from the interference of any party. Independence can be seen from the attitudes of and the policies taken by the administrators, such as the question of determining election participants, setting up campaign schedules and so on."In keeping with this definition from the Petitioner, consultation with the DPR and the Government is not in fact a threat to the

independence of the KPU, but rather falls within the framework of achieving and maintaining harmony between the Law and KPU Regulations.

9. Whereas, from its duties and authorities, it can be seen that the decisions taken by the KPU are *beschikking* in nature and not *regelling* except for those found under letter c.
10. The Government asserts that, even in the event that this petition is granted, the DPR is still entitled to give recommendations to all state institutions, including the KPU, in accordance with Article 74 paragraph (1) of Law No. 17/2014 on the People's Consultative Assembly, the People's Legislative Assembly, the Regional Representative Council and the People's Legislative Assembly, which reads: "The People's Legislative Assembly shall exercise the right to give recommendations to state officials, government officials, legal entities, citizens or residents through the mechanism of work meetings, hearings, public hearings, special committee meetings, working committee meetings, supervisory team meetings, or other team meetings established by DPR for the benefit of the nation and state." as well as paragraph (2), which reads, "Every state official, government official, legal entity, citizen, or resident shall carry out DPR recommendations as referred to in paragraph (1)."
11. Whereas the Government reminds the Petitioner of the oath/pledge taken by the members of the KPU as follows: "In the name of God, I swear that I will fulfill my duties and obligations as a member of the KPU to the best of my abilities in accordance with the legislation and guided by the principles of the Pancasila and the Constitution.
12. Whereas the Government understands that all laws and regulations are state policy and that state institutions are therefore obliged to obey them; it should be for the

people to review the law. It is very important to demonstrate to the people that all state administrators work in unison to advance the nation and state.

IV. PETITUM

Based on the above statements, the Government asks that the Honourable Justices trying and deciding upon the review of Law No. 10/2016 on the Second Amendment to Law No. 1/2015 on the Enactment into Law of Government Regulation in Lieu of the Law No. 1/2014 on Gubernurial, Regent and Mayoral Elections against the Constitution pass the following decision:

Reject the Petition in its entirety.

Nevertheless, should the Honourable Justices see fit to pass a different decision, the Government asks only that they do so wisely and justly (*ex aequo et bono*).

[2.4] Considering, whereas the Court has heard the cases put forth by the Petitioner and the President, which were received by the Registrar's Office on 16 December 2016 and have not in principle changed from their initial positions;

[2.5] Considering, whereas, in order to keep this elaboration concise, the full events of the trial will be laid out in the court proceedings, which should not be considered separately from this decision.

3. Legal Considerations

Authorities of the Constitutional Court

[3.1] Considering, whereas, in accordance with Article 24C paragraph (1) of the Constitution, Article 10 paragraph (1) sub-paragraph a of Law No. 24/2003 on the Constitutional Court later amended by Law No. 8/2011 on the Amendment to Law No. 24/2003 on the Constitutional Court (State Gazette 2011/70, Supplement to the State Gazette No. 5226) and Article 29 paragraph (1) sub-paragraph a of Law No. 48/2009 on Judicial Powers (State Gazette 2009/257, Supplement to the State Gazette No. 5076) one of the authorities of the Constitutional Court is to try at the first and final instance and to review the Law against the Constitution, the decisions of which are final;

[3.2] Considering whereas, given that the Petitioner has filed for a review of the constitutionality of the Law, in this case Article 9 letter a and Article 22B letter a of Law No. 10/2016 on the second Amendment to Law No. 1/2015 on the Enactment into Law of Government Regulation in Lieu of Law No. 1/2014 on Gubernurial, Regent and Mayoral Elections (State Gazette 2016/130, Supplement to the State Gazette No. 5898) against Article 1 paragraph (2), Article 1 paragraph (3), Article 22E, Article 27 paragraph (1) and Article 28D paragraph (1) of the Constitution, which is one of the Court's authorities, the Court is authorised to try this Petition;

Legal Standing of the Petitioner

[3.3] Considering, whereas, pursuant to Article 51 Paragraph (1) of the Constitutional Court Law and the Preamble, any party who claims to have had constitutional rights impaired by the enactment of a Law:

- a. A person of Indonesian nationality;
- b. A community group espousing customary law in existence and in conformity with development in society within the principles of the Unitary State of the Republic of Indonesia as prescribed by law;
- c. A public or a private legal entity; or
- d. A state institution.

Therefore, the Petitioners for the judicial review of Laws against the Constitution must first prove the following:

- a. legal standing to file a petition as regulated in Article 51 Paragraph (1) of the Constitutional Court Law;
- b. impairment to constitutional rights or obligations granted by the Constitution caused by the enactment of the contested Law;

[3.4] Considering, whereas, the Court, subsequent to Constitutional Court Decision No. 006/PUU-III/2005, dated 31 May 2005 and Decision No. 11/PUU-V/2007, dated 20
Constitutional Court of the Republic of Indonesia| 53

September 2007, it has been established that the impairment of constitutional rights and/or obligations as regulated in Article 51 Paragraph (1) of the Constitutional Court Law must meet five requirements, as follows:

- a. there must be a right/obligation granted by the Constitution;
- b. that right/obligation must have been impaired, according to the Petitioner, by the enactment of the Law being brought for review;
- c. this harm must be both specific and actual or at the very least potential according to logical reason;
- d. there must be a clear causal relationship (*causal verband*) between the harm experienced and the enactment of the Law being brought for review;
- e. there must be the possibility that by granting the Petition, the impairment of rights/obligation will not occur or will cease.

[3.5] Considering whereas the Petitioner is the Commissioners of the General Elections Commission of the Republic of Indonesia (KPU) acting for and on behalf of the KPU, having the duty and authority to draft and to stipulate KPU Regulations and technical guidelines for each stage of General Elections following consultation with the People's Legislative Assembly (DPR) and the Government as provided for in Article 9 letter a of Law 10/2016. The KPU and Bawaslu are the independent holders of power in administering elections, including in the formulation of regulations (self regulatory body). Moreover, the consultation process is analogous to an obligation to receive approval from the DPR. As such, said approval under the *a quo* norm is binding on the KPU and Bawaslu. The existence of such provisions potentially impairs the constitutional rights of the Petitioner; indeed the imposition of the consultation process actually contradicts the Constitution. The Petitioner argues that the provisions of the *a quo* article have limited, revoked and abolished the Petitioner's constitutional rights;

[3.6] Considering whereas, based on the aforementioned claim from the Petitioner, according to The Court, the Petitioner clearly and certainly fulfills the requirements laid out in Article 51 Paragraph (1) of the Constitutional Court Law, as Commissioners of the KPU having constitutional rights and having experienced specific or at least potential harm due to the enactment of the contested norm, and with the granting of the petition, the constitutional impairment claimed will not occur or will cease to occur. Therefore, the Petitioner has the legal standing to file the *a quo* petition;

[3.7] Considering whereas since the Court has the authority to adjudicate the *a quo* petition and the Petitioner has the legal standing to file the *a quo* petition, the Court shall further consider the principal issues of the Petition;

Merits of the Case

[3.8] Considering whereas the Petitioner filed a claim that Article 9 letter a of Law 10/2016, which stipulates, “*The duties and authorities of the KPU in the administration of elections shall include: a. Formulating and establishing KPU Regulations and technical guidelines for all stages of the elections following consultation with Parliament and the Government, the decisions of which shall be binding,*” in particular the phrase, “*...following consultation with Parliament and the Government, the decisions of which shall be binding,*” contradicts Article 22E paragraph (5) of the Constitution for the following principal reasons:

1. Whereas one of the institutions established under the amendment of the Constitution is the administrator of General Elections. Article 22E Paragraph (1) states that “*General Elections shall be held in a direct, public, free, confidential, honest and fair manner every five years*”. Subsequently, paragraph (5) stipulates that “*General elections shall be held by a national, permanent, and independent electoral commission*”.
2. Whereas the KPU as a state institution which is born of the Constitution has the same constitutional importance as other state institutions similarly established under the Constitution. The KPU as a state institution has the same constitutional degree as Bank Indonesia and the Judicial Commission.

3. Whereas the administrator of the next General Election, referred to in the Legislation as the General Election Commission (KPU) has the authority to conduct General Elections independently and impartially free from influence or interference from other parties, including the DPR and the Government. In performing its duties, the KPU is attributively granted the authority to draft and enact KPU Regulations and other technical guidelines for each stage of the General Elections. The independence of the KPU in drafting and enacting the Regulations is crucial to the realization of legal certainty, equal competition, justice and fairness.
4. Whereas the position of the KPU Regulation in the hierarchy of laws and regulations as stipulated in Law No. 12/2011 on the Establishment of Laws and Regulations is equivalent to Government Regulations in which the Ministries/Agencies in exercising the attributive authority to establish and stipulate regulations have no obligation to consult with the legislature. With the provision of Article 9 letter a of Law 10/2016, in particular the phrase “*...following consultation with Parliament and the Government, the decisions of which shall be binding*” enforces a difference in the exercise of the attributive authority of the KPU to draft and establish regulations than that of the Ministry/Agency. In addition, with respect to the legal system of Indonesia, if a paragraph issued by a Ministry/Agency is deemed incompatible with the provisions of higher legislation, then there is a legal mechanism for the public and/or the aggrieved party, whose may file for judicial review with the Supreme Court. This is in accordance with the provisions of Article 24A Paragraph (1) of the Constitution and Article 9 of Law No. 12/2011 on the Establishment of Laws and Regulations.
5. Whereas Article 22E Paragraph (5) of the Constitution stipulates, "General Elections shall be administered by a national, permanent, and independent general elections commission." Therefore, according to the 1945 Constitution, the administrator of the General Elections shall be i) national ii) permanent, and (iii) independent.

- i. "National" means that the KPU as the Election Administrator operates across the entire territory of the Unitary State of the Republic of Indonesia as the embodiment of the Unitary State;
 - ii. "Permanent" means that the KPU as an institution performs its duties on an ongoing basis, even though its membership is limited by term of office;
 - iii. "Independent" means that in administering the General Elections, the KPU shall be free from any influence from any party.
6. Whereas, regarding to independence, Law No. 15/2011 on Election Administrators, Law No. 8/2012 on General Elections of DPR, DPD and DPRD Members and Law No. 42/2008 on General Elections for the President and Vice President do not provide a specific definition of "independence". However, by comparison, we may see the understanding of independence in the doctrines and/or the provisions of other legislation. The International Institute for Democracy and Electoral Assistance (IDEA) offers its definition: *"Independence of administrators implies freedom for the administrators from the intervention and influence of a person, the powers of government, political parties or any other party in decision-making and actions in the administration of elections. The administrator must be able to work freely from the interference of any party. The independence can be seen from the attitude and the policies taken by the administrators, such as the question of determining election participants, setting up the campaign schedule, etc."* Furthermore, the Elucidation of Article 14 letter h of Law No. 14/2008 on Public Information Transparency defines as follows: *"Independence is defined as a state in which the company is professionally managed without conflict of interest nor influence/pressure from any party that is inconsistent with legislation and sound corporate principles"*.
7. Whereas, based on this understanding, the meaning of independence is not determined by the position of the institution, whereas the Constitution refers to the KPU as an independent institution, nor in terms of the institution's ability to finance its duties and functions, but rather,

independence must be interpreted as the absence of conflict of interest or pressure from any party in carrying out the duties and authorities of the institution.

8. Whereas, in accordance with the position and role of the KPU as mandated by the Constitution, the KPU has the authority to hold General Elections and is national, permanent and independent in nature. The essence of the authority to administer the General Election is not merely to manage the technical aspects; the election administrator has the authority also to issue policies in the form of regulation with a view to realising legal certainty. The KPU as a state institution has the role and function of formulating regulations based on the Law, and the values and principles of the implementation of democratic elections. This is intended to avoid conflicts of interest for the government, who is a participant in the General Elections and/or the political interests of parties residing in the DPR. For the purpose of providing such legal certainty, the KPU is given the authority to further regulate the rules for the implementation of each stage of elections in the form of regulations as implementors of the Law, known as "selfregulatory bodies" in accordance with laws and regulations, codes of ethics and general principles of good governance.
9. Whereas in view of the importance of the role of the KPU in the realisation of a democratic constitutional state, the KPU as a state institution having a position of constitutional importance should be treated equally with other state institutions, such as the Judicial Commission, Bank Indonesia and other independent institutions. In principle, an independent institution has full authority, i.e. in the act of carrying out its functions, there is no intervention from other institutions.
10. Whereas the existence of the regulation obliging the Petitioner to consult with the DPR and the Government in drafting and enacting KPU Regulations has led in practice to the prolonging of procedures that ultimately impacts on the governance of the election. In the event that provisions of the Law are incomplete or multi-interpretive such that there is a need for further clarification from the DPR and the Government, in the absence any such obligation of

consultation, the Petitioner will initiate consultation. This has actually been seen in practice by the Commissioners for the 2001–2007 period. After consultation with and elucidation from the DPR and the Government, the KPU has the authority independently to adopt policy, and, in accordance with the Constitution and the legislation, the KPU shall be responsible for the policy that has been taken. In the event that KPU Regulation is deemed inconsistent with provisions of the Law, according to the law, a judicial review may be filed with the Supreme Court.

11. Whereas the enactment of Law No. 10/2016, in particular the phrase in Article 9 letter a, "...following consultation with Parliament and the Government, the decisions of which shall be binding", clearly and actually or at least at least potentially undermines the independence of the election administrator as guaranteed by the Constitution. KPU being obliged to consult with the DPR and the Government and the results of the consultation being binding may introduce partiality and contradict the principles of direct, free, confidential, honest and fair general elections. Such partiality of the election administrators will result in public distrust and lead to unfair processes and outcomes. Thus, such consultation has the potential for conflict of interest.
12. Whereas the Petitioner as a national, permanent and independent Election Administrator, established in accordance with Article 22E Paragraph (5) of the Constitution, interprets independence in performing its duties as freedom from any influence from any parties. This independence is intended as a guarantee of impartiality of the administrator and impartiality in appointing state or public officials in elections. With independence providing such a guarantee, the Petitioner will be able to ensure that the administration of General Elections will be in accordance with the principles of democracy. The independence attached to the authority of the election administrator is independence in formulating electoral regulations, which is derived from Electoral Laws. Therefore, the provisions of Article 9 (a) of Law 10/2016, in particular the phrase "*...following consultation with Parliament and the Government, the decisions of which shall be binding*", clearly and actually or at least potentially threatens the independence of the election administrator as mandated by the Constitution.

13. Whereas the independence of the Petitioner has already been tested in consultation with the DPR and the Government in the drafting of KPU Regulations. The outcomes of the consultation were attached by the Petitioner as a reference that can be used as a consideration in taking policy. Considering the above understanding of independence with respect to the election administrators, suggestions, input and opinions of the Government and the DPR in the consultation should not be binding. The Petitioner as the administrator of the General Election has the duty, authority, and strategic role to ensure legal certainty by observing the principles of the election. Based on the experience of the Petitioner carrying out a consultation in drafting KPU Regulations, the provisions of Article 9 letter a of Law 10/2016, stipulating that the outcomes of the consultation are binding, brings the clear and actual or at least potential to harm the Petitioner's independence in formulating regulations. [Exhibit P-9]

14. Whereas the Petitioner's independence in determining KPU regulations after consulting with the DPR and the Government can be proven by the following facts [Exhibit P-10]:

a. Article 4 paragraph (1) letter n of KPU Regulation No. 9/2015 on Candidacy for Gubernatorial and Deputy Gubernatorial, Regent and Deputy Regent, and/or Mayoral and Deputy Mayoral Elections, which reads "has never served as Governor, Vice Governor, Regent or Mayor for Candidates for Vice Governor, Regent, Vice Regent, Mayor or Deputy Mayor" is deemed contradictory to Article 7 letter o of Law No. 8/2015 on Amendment to Law No. 1/2015 on the Enactment into Law of Government Regulation in Lieu Law No. 1/2014 on Gubernatorial, Regent and Mayoral Elections, which reads "has never served as Governor, Regent or Mayor for Candidates for Vice-Governor, Vice-Regent or Vice Mayor". Furthermore, the explanatory section of the Law is quite clear, while the KPU Regulation states:

"The requirements of candidates as referred to in paragraph (1) letter n, provide that they:
1) have never served as Governor for candidates for Vice Governor, Regent, Vice Regent, Mayor or Vice Mayor;

- 2) *have never served as Vice Governor for Candidates for Regent, Vice Regent or Mayor;*
and
- 3) *have never served as Regent or Mayor for Candidates for Vice Regent or Deputy Mayor."*

Whereas the purpose and objective of the provisions of Article 7 letter o above is to avoid any demotion of position for candidates who previously have served in regional head positions. Regarded as a career ladder, the positions of public office, in this case regional heads (Governor, Deputy Governor; Regent, Vice-Regent; Mayor, Deputy Mayor) also indicate a career path. Thus, the achievement and protection of the dignity of these regional head positions is marked by ascension of the hierarchy rather than descent, such that the KPU believes there is a need for further explanation through KPU Regulations but that the meaning of the provisions of Article 7 letter o should not be altered, only regulated in more detail regarding the requirements of candidacy specified in the law so that it can not be interpreted otherwise by the parties concerned.

- b. Article 36 paragraph (2) of KPU Regulation No. 9/2015 on Candidacy as amended by KPU Regulation No. 12/2015 reads "If in the process of dispute resolution as referred to in paragraph (1) there is a determination of the court regarding the postponement of the implementation of a Ministerial, Provincial KPU / Aceh KIP or City/District KPU/KIP Decision, there may be no further registration of Candidates until a legally binding verdict has been passed and implemented by the issuance of a decision of the Minister concerning the stipulation of the Political Party's stewardship," which is deemed to be contradictory to several Laws. This arrangement is based on the principle that every person, including the KPU, is obliged to respect legal processes that are in process in the judiciary, not only based on decisions of the court which do not yet have permanent, binding legal force [Exhibit P-11].

15. Whereas, based on the above facts, the Petitioner is able to maintain its independence in carrying out its duties and authorities to formulate and enact rules without being bound by other institutions, but based solely on legislation.
16. Whereas the Petitioner's focus is on the formulation of Article 9 letter a of Law 10/2016, which reads "*The duties and authority of the KPU in the administration of Elections include: (a) drafting and issuing KPU Regulations and technical guidelines for each stage of Elections after consultation with the DPR and the Government, the decisions of which shall be binding*", which gives the DPR a central role in determining in the formulation of KPU Regulations and technical guidelines. Such provisions have the potential to threaten the Petitioner's independence. This is not in line with the election reformation agenda of having an independent administering institution given that, based on the evaluation of results of elections held during the New Order era, when the election administrator was under the control of the Government, the election results were known before the election had been held. Demands for reform of democratic elections by administered by an independent institution have been answered with constitutional amendments in Article 22E paragraph (5). Independent Election Administrator means that in carrying out its duties and authorities, the administrator is not under the control of other institutions.
17. Whereas the involvement of the DPR and the Government in the drafting of KPU Regulations is very much against the reformation agenda of establishing an independent election body. The phrase "*...following consultation with Parliament and the Government, the decisions of which shall be binding*" in Article 9 letter a is contrary to the spirit and ideals of democratic elections. In accordance with Law, the KPU is attributively granted the authority to draft and enact technical rules and guidelines for each stage of elections in order to realise democratic and quality elections. Democratic elections require legal certainty, which means that all regulations governing elections must be free of legal vacuums, must be consistent with each other, must contain no conflicting provisions and must have a clear and single understanding not open to

multiple interpretations. Based on the Petitioner's experience of drafting the KPU regulations as described above, there are legal voids, incomplete arrangements, and multiple interpretations. Based on the attribution of authority granted to the Petitioner, the Petitioner is responsible for the formulation of election regulations and guidelines that provide legal certainty and uphold fair and just principles. Election administrators as independent and self regulatory bodies should be free of influence and intervention in arranging the regulations for administering elections.

18. The phrase "*...following consultation with Parliament and the Government, the decisions of which shall be binding*" has the potential to threaten the independence and fairness of democratic elections. Consultations with the DPR and the Government should be based on the needs of the election administrators in the case of ambiguous, contradictory, or incomplete Electoral Laws. Consultations are intended to obtain the legislators' explanation of the norms of the Law. Furthermore, the outcome of the consultation shall be for the consideration of the election administrators in the decision-making process, taking into account the principles of democratic elections. In the execution of the task of drafting and issuing regulations, the administrators of the elections shall not be pressured by political interests, whether personally or institutionally.
19. That the independence of a state institution, including the KPU, is not only determined by its position in the Constitution as an independent institution. The independence of an institution is also determined by the mechanism of the institution in exercising its authority institutionally, functionally and administratively. Therefore, binding consultation with the DPR and the Government in the formulation of KPU Regulations and other technical guidelines will interfere with the independence of the KPU.
20. Whereas the International Institute for Democracy and Electoral Assistance (IDEA) introduces standards in elections to ensure that elections are democratic and that the administrators are appointed independently and impartially. One indication that can demonstrate the independence of the KPU as the administrator of the General Election is through the regulations it establishes,

whether or not they provide and ensure legal certainty and justice for all parties or not, because fair regulations can increase public trust in the KPU as the administrator of General Elections, which can be measured, for one, by the level of voter participation. However, Article 9 letter a of Law 10/2016 obliging the KPU to consult with the DPR and the Government and to take the outcomes as binding disrupts and undermines the credibility of the KPU as the administrator of General Elections and may also have a wider impact on the legitimacy of election results.

21. Whereas, therefore, the election organizer shall not be subject to the influence of any other party, neither the authorities nor the political parties. The administrator must work without political allegiances or presuppositions. The KPU should be able to carry out their activities free from interference. This is important because any allegations of manipulation, perception or bias, or alleged interference, will have a direct impact not only on the credibility of the administering body, but also on the overall electoral process and outcome. With specific regard to the election administrator, the international standards of democratic elections confirm the need for legal guarantees that the agency can work independently. The independence of election administrator is an important issue, as electoral administering machines create and implement decisions that may affect election outcomes.
22. Whereas the Constitutional Court, in Decisions 072-073/PUU-II/2004, has granted the petition for judicial review of (1) Article 57 paragraph (1) of Law 32/2004, concerning the phrase, "...accountable to DPRD"; (2) Article 66 paragraph (3) e, "Request the KPU to execute its responsibilities"; (3) Article 67 paragraph (1) e: "accountable to DPRD for its use of the budget"; and (4) Article 82 paragraph (2), "...subject to disqualification by DPRD from running for election".
23. In its consideration of the judicial review of Article 57 paragraph (1) of Law 32/2004, the Court declared "With regard to the petition concerning paragraph (1), in particular, the phrase, "...accountable to the DPRD", the Court believes that direct regional elections must be based on the principles of general elections, namely direct, public, free, confidential, honest and

fair, and they must be organized by independent administrators. The intent of the Constitution cannot be achieved if the KPU, as the administrator of direct Regional Head Elections, is to be accountable to the DPRD, given that the DPRD is a representative body of the people in the region consisting of elements of political parties who are also participants in the electoral competition. Therefore, the KPUD should be accountable to the public rather than to the DPRD. Meanwhile, the DPRD only submits the report on the execution of its duties, as specified in Article 57 paragraph (2) of the Regional Government Law. Thus this petition, in order to ensure the quality of the implementation of democracy in the region, must be granted. Similarly, petition number 4 relating to the provisions of Article 66 paragraph (3) sub-paragraph e of the *a quo* law shall also be granted *mutatis mutandis*.

24. Furthermore, with regard to Article 67 paragraph (1) letter e, in particular, the phrase, "...to the DPRD", in the implementation of the Regional Head Election, the KPU is not accountable to DPRD for its use of the budget because, in the implementation of elections, the funds used are not only sourced/derived from APBD but also from APBN, therefore use of the budget must be in accordance with the prevailing laws and regulations. More importantly, accountability to DPRD for budget appropriation may threaten the independence of the KPUD as the electoral administrator in accordance with the principles of direct, public, free, secret, fair and just elections, as referred to in Article 22E juncto Article 18 Paragraph (4) of the Constitution. The DPRD, a political institution representing the people in the region, has a political interest in the competition power at the regional level and, as such, should be prohibited from interfering in the independence of the KPUD through budgetary accountability mechanism as it administers Regional Head Elections. Therefore the Petition as it relates to this matter this should be granted.

25. Regarding Article 82 paragraph (2), in particular, the phrase, "...by DPRD", the Court believes that, since it is KPUD that verifies electoral candidates for Regional Head and Vice Regional Head [*vide* Article 66 paragraph (1) sub-paragraph g of the *a quo* Law] then the authority to

disqualify candidates, according to the universal principle of *contrarius actus*, should also lie with the KPUD rather than the DPRD. To guarantee legal certainty, as contained within the principles of rule of law according to the Article 1 paragraph (3) of the Constitution, given that the KPUD is the body authorised to verify electoral candidates, the KPUD should also be authorised to disqualify candidates. In addition to contradicting the principles of rule of law, the authority of the DPRD to disqualify candidates, given that the DPRD has a direct or indirect interest in the verification of electoral candidates is fundamental and substantive to the maintenance of independence in direct elections as mandated by the Constitution. Thus the Petitioners' argument has legal grounds, and this petition should be granted [Exhibit P-12].

26. Whereas the Constitutional Court, in Decision No. 11/PUU-VIII/2010, has affirmed the independence of electoral administrators, declaring that in order to ensure a direct, public, free, confidential, fair and honest general election, Article 22E paragraph (5) of the Constitution provides that, "General Elections shall be administered by a national, permanent, and independent electoral commission". The sentence of "electoral commission" in the Constitution does not refer to a specific institution, but rather to a function of administering a national, permanent, and independent election. Therefore, according to the Court, the function of the general election is carried out not only by the KPU, but also by the electoral supervisory body, in this case the General Election Supervisory Board (Bawaslu). This understanding further meets the provisions of the Constitution, which mandates the existence of an independent electoral administrator carry out direct, public, free, confidential, fair and honest general elections. The administration of elections without supervision by an independent institution will threaten these principles. Therefore, according to the Court, Bawaslu, as regulated in Chapter IV Article 70 through Article 109 of Law 22/2007, shall be recognised as an administrator of General Elections in charge of supervising the implementation of General Elections. In fact, the Honorary Board, which oversees the conduct of electoral administrators must also be

recognised as an administrator general elections. Thus, the guarantee of independence of electoral administrators is clear and concrete[Exhibit P-13].

27. Whereas, furthermore, the Court, in Decision No. 81/PUU-IX/2011,gave the opinion that the requirements referred to in Article 11 sub-article i and Article 85 Sub-Article i of Law No. 15/2011 are closely related to Article 22E Paragraph (1) of the Constitution, which states,"Elections are administered by a national, permanent, and independent electoral commission", especially with regard to the word,"independent";
28. Whereas Article 9 Sub-Article a of Law No. 10/2016 "*...following consultation with Parliament and the Government, the decisions of which shall be binding*" is ineffective and tends to deny the nature of the Petitioner's independence, which potentially harms the constitutional rights of the Petitioner. The KPU as a national, permanent, and independent state institution in conducting General Elections should be free of intervention, such that the aforementioned arrangement would obviously undermine the independence of the KPU because it creates loopholes for the DPR and Government to intervene in the drafting and establishment of KPU Regulations and other technical guidelines. The KPU has never denied the opportunity for parties to offer insights regarding the KPU's carrying out of its duties and authorities. Hearing opinions from many parties is a demonstration of fairness, and it is necessary to accommodate varied views on the formulation of rules or other technical guidelines. However, regarding decision-making, the KPU should not be influenced by the interests of any particular person or group.
29. Whereas the Petitioner interprets the implementation of the *a quo* article, in particular, the phrase, "*...following consultation with Parliament and the Government, the decisions of which shall be binding*", clearly and actually, or at least potentially, harms the Petitioner by inhibiting and complicating the Petitioner's independent decision-making process given the possibility of differences in policy and/or views between the Petitioner and the DPR and Government. In such event, the KPU does not have the ability to take a decision free from the pressure and influence

of the DPR and the Government, which ultimately has the potential to slow down the process of establishing KPU Regulations and technical guidelines and even disrupt the election.

30. Whereas Article 9 Sub-Article a of Law No. 10/2016 raises the inequality of treatment between the KPU and the state institutions regulated in the Constitution, among others, the Judicial Commission and Bank Indonesia, which have full authority to form regulations in accordance with the scope of their duties. The authority of Bank Indonesia is stipulated in Act No. 23/1999 on Bank Indonesia, which states that the Bank Indonesia Regulation is a legal provision issued by Bank Indonesia, binding upon every person or entity and is published in the State Gazette of the Republic of Indonesia. Therefore, if Article 9 Sub-Article a of Law No. 10/2016 is applied, the article has in fact impaired the constitutional rights of the Petitioner in its position as independent electoral administrator.

31. Whereas it is clear from the above that the enactment of Article 9 letter a of Law No. 10/2016 has impaired the Petitioner's constitutional rights as an independent institution administering elections free from influence or intervention from any party. Therefore, in the name of legal certainty, Article 9 Sub-Article a of Law No. 10/2016 must be declared contradictory to Article 22E of the Constitution, which reads, "*General Elections shall be administered by a national, permanent, and independent general election commission*".

[3.9] Considering, whereas, upon careful examination of the Petition, the principal issue to the answered by the Court is with regard to the constitutionality of the phrase within Article 9 letter a of Law 10/2016, which states, "*...following consultation with the Government and the DPR, the decisions of which shall be binding*". Does this phrase cause a loss of the KPU's independence as granted in Article 22E paragraph (5) of the Constitution, which states, "*General Elections shall be administered by a national, permanent and independent general elections commission.*"

Regarding this principal issue, the Court offers the following deliberations:

[3.9.1] Whereas the independence of the KPU as referenced in Article 22E paragraph (5) of the Constitution cannot be assessed and understood through a purely textual approach where the matter

of independence is further encoded into law but must also be considered in context of the prevailing norms with an understanding of the unity of the Constitution, practical coherence and the proper validity of the interpretation given by the Constitution towards the term independent. Indeed, giving a constitutional interpretation of a norm of the Law derived from or as an implementation of a norm of the Constitution is an attempt to answer the question of how we view the Constitution along with the goals to be realised or achieved. Therefore, the context of its historical background, teleology and future anticipation must be carefully considered;

[3.9.2] Whereas, from the constitutional perspective as a whole, the independence of the KPU can not be separated from the objective of implementing democratic rule, institutions and practices in order to realise the idea of a democratic state based on law, which is the spirit of the Constitution as defined in Article 1 paragraph (2) and paragraph (3). For this reason, the People's Consultative Assembly (MPR) intentionally incorporated provisions concerning general elections at the time of amending the Constitution. This is in recognition of the well understood notion that a democratic state bound by rule of law cannot be achieved without a democratic election. Meanwhile, the need for democratic elections requires a credible institution as administrator, and independence is vital markers to the credibility of such an institution. For these reasons, the KPU was adopted by the Constitution. Although the KPU itself was not in fact named in the Constitution, the independence of the institution—as well as its national and fixed nature—is inherent and non-negotiable;

[3.9.3] Furthermore, the notion of "independent" or "independence" can be found in a number of other laws, and though the context changes, the spirit remains the same, for example:

1. The Elucidation of Article 14 Sub-Article H of Law No. 14/2008 on Transparency of Public Information, independence is defined as follows: "Independence is defined as a state in which the company is professionally managed without conflict of interest nor influence/pressure from any party not in accordance with legislation and sound corporate principles". Whereas, based on this understanding, the meaning of independence is not determined by the constitutional position of the institution as an independent institution, nor in terms of the institution's ability to finance

its activities, but rather it must be interpreted as the absence of conflict of interest or pressure from any party in carrying out the duties and authorities of the institution. Whereas, in accordance with the position and role of KPU as mandated by the Constitution, the KPU has the authority to hold General Elections and is national, permanent and independent. The nature of the authority to administer General Elections does not merely refer to the technical management but also to the formulation of policy in the form of regulations as implementation of the Law and of its authority. The KPU has the role and function of formulating regulations based on the Law and on the values and principles of democratic elections. This is intended to prevent conflicts of interest for election participants.

2. Whereas, in view of the importance of the role of the KPU in realising a democratic constitutional state, the KPU, which is an institution of constitutional importance, should receive equal treatment with other independent institutions, such as the Judicial Commission and Bank Indonesia. In principle, independent institutions have full authority in the context of enforcing the law and exercising their authority without intervention or influence from other institutions.
3. Although KPU is an independent institution with the authority to formulate its own regulations, this does not mean that the KPU is free to act as it pleases in administering General Elections and Regional Head Elections. Synchronization with the constitutional agenda is essential. As such, consultation with the DPR and the Government is not a threat to the independence of the KPU, but rather is within framework of harmony between KPU regulations and the Law.

Seen from various other perspectives, there are a number of other interpretations of the independence granted the KPU, as follows:

1. The formulation of Article 22E Paragraph (5) of the Constitution can not be separated from the history the General Elections prior to the amendment of the Constitution. Between 1955 and 1999, elections were administered by the Government under the responsibility of the Ministry of Home Affairs and the General Election Body (LPU). In 1999, the elections were administered

by the Government together with the political parties participating in the General Election, because the KPU was peopled by representatives of the government and political parties. Throughout the history of elections administered by the government and political parties, fraud involving the election administrators was a part of the poor record of electoral administration. During the New Order era elections, the KPU led by the Minister of Home Affairs was not only tasked to administer direct, public, free and secret general elections, but also to ensure that the elections were won by those parties that supported the Government. The long history of elections characterised by fraudulent practices involving the administrators was one of the considerations of the MPR in handing over the election to an independent administrator as opposed to the government or the same political parties participating in the General Election.

2. Elections as a means of realising the people's sovereignty as referred to in Article 1 paragraph (2) of the Constitution shall be direct, public, free, secret, honest and fair. Fair elections can only be realised when administered by an institution free from any institutional intervention, moreover, one in which there are no electoral participants. The role of the DPR and the Government ceases at the stage of the formulation of Laws relating to elections and the selection of candidates for membership of the election administrator. Thus, when it comes to the process and stages of the General Election itself, full control must be assumed by the KPU as an independent institution. By looking at the systemic relationship between Article 22E paragraph (5) of the Constitution and Article 1 paragraph (2) and Article 22E Paragraph (1) of the Constitution, it is clear that the Constitution requires that the implementation of the people's sovereignty through General Elections be carried out honestly, where honesty in elections is possible only if elections are conducted by an independent institution;
3. The independence of the KPU is the embodiment of the institution's categorisation conceptually as an independent institution. The phrase "independent" in Article 22E paragraph (5) of the Constitution refers to the KPU's position beyond the authority of the government as well as the power of the DPR. As an independent institution, the KPU has the authority to

exercise some of the functions of the state granted to it by the Constitution and the Law. Theoretically, an institution categorized as independent must possess and fulfill certain characteristics and prerequisites, namely: (1) the legal basis establishing it expresses the independence of the institution; (2) the institution is independent of influence/control of the executive branch of power; (3) the process of appointing the leadership of the institution involves the executive and legislature; (4) the institution's leadership is collective-collegial. The KPU, established in accordance with Article 22E Paragraph (5) of the Constitution, is one such institution and must meet these requirements.

4. The independent attributes attached to the KPU include institutional, functional, and personal independence. Institutional independence means that the KPU as an institute stands alone and free from dependence on other institutions or political infrastructure. Functional independence means that in carrying out the function of administering elections, the KPU is free from intervention from any party or group. In performing the functions of formulating and implementing regulations and carrying out the various stages of General Elections, the KPU is free from any pressure or influence from any party. While personal independence means that every member of the election administering body must be free of partisan membership. Institutional, functional and personal independence is a united interpretation of the independence attributed to the KPU in accordance with Article 22E Paragraph (5) of the Constitution.

[3.9.4] Whereasthe norms of the Law governing the independence of the KPU should also be judged on the aspect of “appropriate working” as well as the anticipatory aspect of any future possibilities. In this sense, the formulation of the norms of the Law shall not be made on an ad hoc, casuistic, nor pragmatic basis, which would cause the the law to immediately lose its relevance and coherence as a general and anticipative system;

[3.9.5] Whereas the KPU is an institution whose independence is guaranteed by the Constitution. Such independence, whether historically, systematically, teleologically or anticipatively, is an

irrevocable prerequisite to ensure the democracy of elections, including the election of regional heads. Meanwhile, by following the rules of interpretation of the Constitution, which views the basic law as a whole, its coherence and its proper implementation, democratic elections, including the election of regional heads, is a prerequisite for the realisation of a healthy democratic culture and in turn the realisation of a democratic state based on law;

[3.9.6] Whereas both ‘*mandiri*’ and ‘*independen*’ mean independent. An institution said to be independent must meet at least two conditions: first, in carrying out its functions in accordance with its position as granted by the Constitution or the Law, it does not in principle depend on the exercise of the functions of other institutions outside itself; secondly, in performing its functions in accordance with its position granted by the Constitution or the Law, it is free from interference or influence from other institutions. However, these two conditions do not necessarily eliminate or obviate the need to coordinate or cooperate with other institutions when there is a reasonable demand in order to achieve the objectives of the institutions in question;

Whereas the independence of KPU, according to the above reasoning, should be reflected in the Laws derived from the spirit of the Constitution, especially in terms of its position and in the exercise of its authority. As such, the KPU is granted the authority to independently formulate regulations in carrying out its functions that are centered on the objective of achieving democratic elections, including the election of regional heads. Administering elections thus does not eliminate the importance of coordination and cooperation with other institutions related to the function of administering elections.

[3.9.7] Whereas, as an independent institution, the KPU is authorised to formulate regulations in order to further regulate that which has been delegated by the Law. This authority is contained in Article 119 paragraph (1) of Law 15/2011, which states, "*For the administration of General Elections, the KPU shall formulate KPU Regulations and the KPU Decision*". KPU Regulations formulated under this mandate constitute a form of legislation as recognised or referred to in Article 8 of Law 12/2011. More than just delegation, according to Article 8 paragraph (2) of

Law 12/2011, the KPU may formulate KPU Regulations that are legally binding insofar as they are formulated in accordance with the institution's authorities. Accordingly, in the formulation of KPU regulation, the position and function of the KPU as an independent institution must be reflected in the process of the formulation of said regulations. The formulation of KPU Regulations must be appropriate and in line with the nature of the autonomy of its constituents. In the event that KPU Regulations are inconsistent with the nature of the KPU as mandated by the Constitution, in a linear manner, it is also contrary to the basis of the formulation of regulations, in particular the sense, "established in accordance with the institution's authorities" as mandated by Law 12/2011. Therefore, the word "authorities" as referred to in Article 8 paragraph (2) of Law 12/2011, is relevant to the existence of the institution.

[3.9.8]Whereas for all types of legislation recognised in accordance with the Constitution, there is provided a relevant control mechanism. Such control mechanisms are a formal and/or substantive examinations of the regulation, article or paragraph in legislation hierarchically below the Law, whereby, if it they are claimed to be contradictory to the law, a petition for judicial review can be filed with the Supreme Court in accordance with Article 24A paragraph (1) of the Constitution. With the existence of such mechanisms to control legislative products established by the institution with the relevant authorities, the system of law formulation also has an independent character. This means that any entity authorised to formulate regulations, whether on the basis of higher laws or on the basis of its attributive authority, has the right to issue those regulations without interference from any institution. Independent institutions that receive the delegation to formulate regulations by Law have full authority in carrying out such delegated authorities. The implementation of such delegations is based solely on the mandate given by the Law. With regard to KPU Regulations, the authority to regulate is delegated by the Election Law, and the authority to formulate regulations is derived from the Election Administration Law. If the implementation of the delegated regulatory authority is deemed to deviate from the provisions of the Law, the judicial review mechanism shall

be the instrument of control, and other institutions shall not interfere with the material or substance of the regulation.

[3.9.9]Whereas in fact, only KPU regulations and Bawaslu Regulations require such a mechanism of binding consultations. While the regulations issued by other independent institutions contain absolutely no necessity to consult with the Government and the DPR. Different treatment of the regulatory process by independent institutions will directly differentiate the degree of independence of the institution. For example, institutions that, in the process of formulating regulations, are required to undergo consultations with binding decision will have a degraded level of independence compared to other similar institutions that are not so required. Arguably, the administration of elections is the area most vulnerable to interference. Nevertheless, to the extent that the deviations in the process of formulating regulations issued by an independent institution does not interfere with the institution's independence, such deviation can be tolerated and may not necessarily be declared contrary to the Constitution. One example of such deviation is the mechanism of consultation with DPR and Government in the formation of KPU regulations. This procedure is not at all regulated as a part of the formulation of regulations by other independent institutions. Despite the deviation, such a consultation process is an ordinary mechanism in order to accommodate input as well as confirmation of norms that will be further regulated by the institution through regulations. As long as the outcome of the consultation is not imposed on the KPU as an institution authorised to formulate regulations, the norms governing the existence of consultations as a stage in the formulation of KPU Regulations can not be categorised as contradictory to Article 22E Paragraph (5) of the 1945 Constitution. However, should the outcomes of consultation be categorised as mandatory and binding on the KPU, this shall be declared contrary to the Constitution.

[3.9.10]Whereas, based on the foregoing considerations, the phrase "*...following consultation with the DPR and the Government*" in Article 9 letter a of Law 10/2016 is not contradictory to the KPU's independence, because such consultations, according to logical reasoning, are necessary for the execution of the functions of the KPU *in casu* in drawing up the KPU regulations and technical

guidance in order to achieve the objectives of administering democratic elections , including the election of regional heads. Such consultation is a requirement because the norms of the Law (which is a product of the DPR and the President jointly) do not always clearly reflect the purpose of the legislators, which may cause difficulties on the part of the KPU in implementing them in practice through the powers granted to the KPU to formulate KPU regulations and technical guidelines. A shared view and understanding or interpretation of the Law between the KPU and the legislators is a necessity. However, it is important that the positions of the KPU and of the legislators during such consultations are equal

[3.9.11] Whereas, however, the existence of the phrase "*the decisions of which are binding*" in Article 9 letter a of Law 10/2016 brings theoretical and practical implications that may lead to the reduced independence of the KPU and at the same time undermines legal certainty. There are several reasons in this relationship. Firstly, it is not impossible that in such hearings, there is no unanimous decision or even no conclusion at all. This can happen because, for example, there is no agreement between the factions in the DPR or between the DPR and the Government or between the DPR and the KPU or between the KPU and the Government. Under such circumstances, the phrase "*the decisions of which are binding*" prevents the KPU from implementing its authority to formulate KPU Regulations and technical guidelines, such that the authority becomes unenforceable because it is unclear which decisions to implement or what should be done by the KPU despite the clear understanding that the KPU Regulations and technical guidelines are necessary for the successful administration of elections. Such an impasse may threaten the constitutional agenda, the sustainability of which depends on KPU Regulations and KPU technical guidelines. Secondly, the phrase "*the decisions of which are binding*" from the perspective of legislative technicalities, is excessive because even without that phrase, it follows that if the consultation reaches an agreement, then KPU will implement the decisions itself without any legislative pressure. Third, the phrase "*the decisions of which are binding*" eliminates, or at least obscures, the meaning of the word "consultation" in the same sentence. As a forum for consultation, in the absence of an

agreement, the KPU as an institution that is guaranteed its independence by the Constitution, must not be held hostage from exercising its authority to formulate regulations and technical guidelines, because it is the agency responsible for ensuring that general elections and regional head elections are conducted democratically.

[3.10] Considering whereas, based on all the above legal considerations, the Court is of the opinion that the Petitioner's arguments relating to the constitutionality of Article 9 letter a of Law 10/2016, in particular the phrase "...*the decisions of which are binding*", are legally founded.

4. Conclusion

Based on the above assessment of the law and facts, the Court concludes:

[4.1] The Court has the authority to examine the petition;

[4.2] The Petitioner has the legal standing to file the *a quo* petition;

[4.3] The Petitioner's arguments are legally founded in part.

Based on the 1945 Constitution of the State of the Republic of Indonesia, Law No 24/2003 on the Constitutional Court as amended by Law No. 8/2011 on the Amendment to Law No. 24/2003 on the Constitutional Court (State Gazette of the Republic of Indonesia 2011/70, Supplement to the State Gazette of the Republic of Indonesia No. 5226), and Law No. 48/2009 on Judicial Power (State Gazette of the Republic of Indonesia 2009/157, Supplement to the State Gazette No. 5076);

4. Injunction of Decision

Orders,

1. To grant the Petition in part;
2. To declare Article 9 letter a of Law No. 10/2016 on the Second Amendment to Law No. 1/2015 on the Enactment into Law Government Regulation in Lieu of Law No. 1/2014 on Gubernurial, Regent and Mayoral Elections, in particular the phrase, "*the decisions of which are binding*";
3. To reject the other and remaining parts of the Petition;

4. To order the proper publication of this decision in the Official State Gazette of the Republic of Indonesia.

So it has been decided in the Consultative Meeting of Justices attended by nine Constitutional Court Justices, namely, Arief Hidayat as Chairman and Member, Anwar Usman, Manahan MP Sitompul, I Dewa Gede Palguna, Maria Farida Indrati, Wahiduddin Adams, Aswanto, Suhartoyo and Saldi Isra, respectively as members, where once Constitutional Justice (Saldi Isra) did not give his opinion, on Tuesday, the thirtieth of May Two Thousand and Seventeen, and by the eight Constitutional Court Justices, namely, Arief Hidayat, as Chairman and Member and Anwar Usman, Wahiduddin Adams, I Dewa Gede Palguna, Suhartoyo, Maria Farida Indrati, Manahan MP Sitompul, and Saldi Isra, respectively as Members, where one Constitutional Court Justice (Saldi Isra) did not give his opinion, on Tuesday, the twentieth of June two thousand and seventeen, and pronounced in the Plenary Session of the Constitutional Court open to the public on Monday the tenth of July two thousand and seventeen, finishing at 15:37 WIB by eight Constitutional Court Justices, namely, Anwar Usman as Chairman and Member and Aswanto, Wahiduddin Adams, Manahan MP Sitompul, I Dewa Gede Palguna, Maria Farida Indrati, Suhartoyo and Saldi Isra, respectively as Members, accompanied by Fadzlun Budi SN as Substitute Registrar, and attended by the Petitioner or a representative, the President or a representative and the House of Representatives or a representative.