



DECISION

NUMBER 12/PUU-VI/2008

FOR THE SAKE OF JUSTICE UNDER THE ONE ALMIGHTY GOD

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA

[1.1] Examining, hearing, and deciding upon constitutional cases at the first and final level, has passed a decision in the case of petition for judicial review of Law Number 10 Year 2008 concerning General Elections of the Members of the People's Legislative Assembly (DPR), the Regional Representative Council (DPD) and the Regional People's Legislative Assembly (DPRD), against the Constitution of the State of the Republic of Indonesia Year 1945, filed by:

[1.2] I. Regional Unity Party (PPD), represented by:

1. DR. Oesman Sapta, born on August 18, 1950, General Chairperson, having his address at Jalan Karang Asem Utara Number 34 RT.07/02, Kuningan Sub-District, South Jakarta;
2. Adhie M Massardi, born on January 26, 1956, Secretary General of PPD, having his address at

Jalan Persada Kemala Block 25/III RT. 011/013, Jaka
Sampurna, West Bekasi.

II. New Indonesian Association Party (PIIB), represented
by:

1. Dr. Kartini Sjahrir, born on February 1, 1950, General
Chairperson, having his address at Jalan Sukabumi
15, Menteng, Central Jakarta;
2. Edi Danggur, SH. MH. MM., born on July 21, 1966,
Secretary General, having his address at Jalan Muara
Baru RT/RW 015/017, Penjaringan, North Jakarta.

III. Freedom Bull National Party (PNBK), represented by:

1. Ir. Suhardi Sudiro, MSc, born on August 7, 1942,
General Chairperson, having his address at Jalan
Rose Merah Number J-15 RT 004 RW 016, Cipinang,
East Jakarta;
2. IP. Thomas Sembiring, born on July 27, 1942,
Secretary General, having his address at Kav. DKI
Block G 27, RT 001 RW 005, Duren Sawit, East
Jakarta.

IV. Pancasila Patriot Party, represented by:

1. H. Said Rusli, SH. born on February 12, 1942, General Chairperson, having his address at Kampung Srengseng RT. 002 Rw. 007, Lenteng Agung, South Jakarta;
2. Ir. Togar M. Nero, SH. born on April 27, 1959, Secretary General, having his address at Jalan Langsung III Number 7, Kebayoran Baru, South Jakarta

V. Social Democrat Labor Party (PBSD), represented by:

1. DR. Muchtar Pakpahan, SH. MA, born on December 21, 1953, General Chairperson, having his address at Komp. PTB. Block B7 Number 1, RT 002 RW 004, Duren Sawit, East Jakarta;
2. Sonny Pudji Sasono, SH. born on January 21, 1959, Secretary General, having his address at Jalan Duri Raya Number 6, Kebun Jeruk, West Jakarta.

VI. Indonesian Union Party (PSI), represented by:

1. Rahardjo Tjakraningrat, born on February 12, 1943, General Chairperson, having his address at Jalan Rambutan Kav 35/7, Pasar Minggu, South Jakarta;

2. Nazir Muchamad, born on November 5, 1968, Secretary General, having his address at Jalan Laut Maluku II Block M/2, Sukmajaya, Depok.

VII. Freedom Party, represented by:

1. Drs. Rosmawi Hasan, born on April 20, 1942, General Chairperson, having his address at Jalan Mampang Prapatan XII Number 6, South Jakarta;
2. Ir. Muchlis Z. Asikin MBA.,MT., born on July 23, 1952, Secretary General, having his address at Jalan Mampang Prapatan XII Number 6, South Jakarta.

Based on Special Powers of Attorney dated March 12, 2008; April 2, 2008; April 4, 2008 and April 23, 2008, grant the power of attorney to: 1). A. Patra M. Zen, SH., LL.M., 2). Erna Ratnaningsih, SH., 3). Tabrani Abby, SH. MHum., 4). Zainal Abidin, SH., 5). Nur Hariandi, SH., 6). Supriyadi WE, SH., 7). Wahyu Wagiman, SH., 8). Febby Maranta Sukatendel, SH., 9). Hotma Raja Nainggolan, SH., 10). Paulus Sanjaya, SH., 11). Reinaldi M. Waroka, SH., 12). Tina Tamher, SH. MH., 13). Firman Wijaya, SH. MH., and 14). I Gede Aryana, SH., all of whom being Advocates and Legal Aid Servants, associated in **Constitutional State Advocates' Team**, choosing their legal domicile at Jalan Pangeran Diponegoro Number 74, Central Jakarta;

Hereinafter referred to as ----- **the Petitioners;**

- [1.3]** Having read the petition of the Petitioners;
- Having heard the statement of the Petitioners;
- Having heard and read the written statement of the Government;
- Having heard and read the written statement of the People's
Legislative Assembly;
- Having examined the evidence;
- Having heard the statements of the experts of the Petitioners;
- Having read the written conclusions of the Government and the
Petitioners;

3. LEGAL CONSIDERATIONS

[3.1] Considering whereas the purpose and objective of the Petitioners' petition are concerned with substantive review of Article 316 Sub-Article d of Law Number 10 Year 2008 regarding General Elections of the Members of the People's Legislative Assembly (DPR), the Regional Representative Council (DPD) and the Regional People's Legislative Assembly (DPRD) (State Gazette of the Republic of Indonesia Year 2008 Number 51, Supplement to State Gazette of the Republic of Indonesia Number 4836, hereinafter referred to as Law 10/2008), against the Constitution of the State of the Republic of Indonesia Year 1945 (hereinafter referred to as the 1945 Constitution);

[3.2] Considering whereas prior to entering the principal issue of the petition, the Constitutional Court (hereinafter referred to as the Court) shall first take the following matters into account:

- a. The authority of the Court of to examine, hear, and decide upon the *a quo* petition;
- b. The legal standing of the Petitioners to file the *a quo* petition;

Authority of the Court

[3.3] Considering whereas based on Article 24C Paragraph (1) of the 1945 Constitution, one of the Court authorities is to hear at the first and final level

the decision of which shall be final in conducting Judicial Review of a Law against the Constitution;

[3.4] Considering whereas the *a quo* petition is regarding judicial review of a law against the Constitution, *in casu* Law 10/2008 against the 1945 Constitution, and therefore the Court has the authority to examine, hear, and decide upon the *a quo* petition;

Legal Standing of the Petitioners

[3.5] Considering whereas pursuant to Article 51 Paragraph (1) along with its Elucidation of Law Number 24 Year 2003 regarding the Constitutional Court (State Gazette of the Republic of Indonesia Year 2003 Number 98, Supplement to State Gazette of the Republic of Indonesia Number 4316, hereinafter referred to as the CC Law), the parties that can file a petition for judicial review against the 1945 Constitution shall be the parties claiming that their constitutional rights and/or authorities granted by the 1945 Constitution are impaired by the coming into effect of a law, namely:

- a. individual Indonesian citizens (including groups of people with a common interest);
- b. customary law community units insofar as they are still in existence and in accordance with the development of the communities and the principle of the Unitary State of the Republic of Indonesia regulated in Law;

- c. public and private legal entities; or
- d. state institutions;

Thus, the Petitioners in the judicial review against the 1945 Constitution have to specify and prove first:

- a. their legal standing as Petitioners as intended by Article 51 Paragraph (1) of the CC Law;
- b. the existence of impairment of constitutional rights and/or authorities granted by the 1945 Constitution, due to the coming into effect of the Law being petitioned for review;

[3.6] Considering also whereas following Decision Number 006/PUU-III/2005 dated May 31, 2005 and Decision Number 11/PUU-V/2007 dated September 20, 2007, the Court has been of the opinion that the impairment of constitutional rights and/or authorities as intended by Article 51 Paragraph (1) of the CC Law, has to meet 5 (five) criteria, as follows:

- a. there are constitutional rights and/or authorities granted by the 1945 Constitution;
- b. such constitutional rights and/or authorities are impaired by the coming into effect of a law petitioned for review;

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

[3.7] Considering whereas the Petitioners consist of 7 (seven) political parties (*Parpol*) in their standing as legal entities, namely: Regional Unity Party (PPD), New Indonesian Association Party (PPIB), Freedom Bull National Party (PNBK), Pancasila Patriot Party, Social Democrat Labor Party (PBSD), Indonesian Union Party (PSI), and Freedom Party. Those seven Political Parties have respectively gained the status as legal entities from the Department of Law and Human Rights, as shown by evidence validated in the hearing, namely Exhibit P-10 (PBSD), Exhibit P-11 (PPD), Exhibit P-12 (Pancasila Patriot Party), Exhibit P-13 (PPIB), Exhibit P-14 (PNBK), Exhibit P-15 (PSI), and Exhibit P-16 (Freedom Party). Therefore, the Petitioners have fulfilled their standing as Legal Entity Petitioners in judicial review of Law 10/2008 against the 1945 Constitution;

[3.8] Considering whereas the Petitioners argue that they have constitutional rights and/or authorities granted by the 1945 Constitution, namely among others as specified in:

- a. Article 27 Paragraph (1), *“Without exception, all citizens shall have an equal position before the law and government and shall be obligated to uphold such law and government”*;
- b. Article 28D Paragraph (1), *“Every person shall have the right to the recognition, the guarantee, the protection and the legal certainty of just laws as well as equal treatment before the law”*;
- c. Article 28I Paragraph (2), *“Every person shall have the right to be free from discriminatory treatment on any basis whatsoever and shall have the right to obtain protection against any such discriminatory treatment”*;

According to the Petitioners, their aforementioned constitutional rights have been impaired by the coming into effect of Article 316 Sub-Article d of Law 10/2008, which reads, *“The Political Parties Participating in the 2004 General Elections which do not meet the provision of Article 315 shall be allowed to participate in the 2009 General Elections under the following conditions:*

- a. ...;
- b. ...;
- c. ...; or

d. *having seats in the People's Legislative Assembly of the Republic of Indonesia (DPR RI) as a result of the 2004 General Elections; or...."*

[3.9] Considering whereas according to the Court, even though the formulation of such constitutional rights argued by the Petitioners in the 1945 Constitution begins with the phrase, "*Every citizen*" or "*Every person*", but pursuant to the Decision of the Court Number 16/PUU-V/2007 dated October 23, 2007, it also applies to legal entities; *in casu* Political Parties acting as the Petitioners in the *a quo* petition;

[3.10] Considering, because the *a quo* article reflects unequal position and treatment, injustice, legal uncertainty, and discriminatory treatment towards the Political Parties participating in the 2004 General Elections which do not fulfill the provisions of Article 315 of Law 10/2008, the assumption of the Petitioners regarding the existence of impairment of their constitutional rights and/or authorities due to the coming into effect of Article 316 Sub-Article d of Law 10/2008, according to the Court is reasonable and has legal grounds. Besides, even though collectively they do not fulfill the electoral threshold, there are Political Parties which, only because they have a minimum of 1 (one) seat in DPR, could automatically participate in the 2009 General Elections, whereas the other Political Parties which do not have any seats in DPR, even though their vote acquisition in the 2004 General Elections was more than that of the parties which only have one seat in DPR, could not automatically participate in the 2009 General Elections;

[3.11] Considering whereas in the event that the provisions of such Article 316 Sub-Article d of Law 10/2008 do not exist, then the constitutional rights not to be treated unjustly, as suffered by the Petitioners, will not or will no longer occur. There are causal relationships between the unequal position and treatment, legal uncertainty, and injustice suffered by the Petitioners by the coming into effect of Article 316 Sub-Article d of Law 10/2008;

[3.12] Considering whereas therefore, according to the Court, the Petitioners have the legal standing to file the *a quo* petition, so that the principal issue of the petition shall further be considered;

Principal Issue of the Petition

[3.13] Considering whereas in the principal issue of their petition, the Petitioners request the Court to declare Article 316 Sub-Article d of Law 10/2008 contradictory to the 1945 Constitution and also to declare that it shall have no binding legal force, for the following reasons:

- a. Whereas according the Petitioners, Article 316 Sub-Article d of Law 10/2008 is contradictory to the Article 1 Paragraph (3) of the 1945 Constitution, that is "*The state of Indonesia shall be a state based on law*", because in a state based on law, all citizens including the law makers have to obey the law, in this case the provisions of law regarding the coming into effect of electoral threshold policy which by the Court has been declared constitutional, pursuant to Decision Number 16/PUU-V/

2007. Furthermore, in a state based on law, it also has to uphold the human rights, including the existence of equal treatment before the law for all citizens or groups of people. In this case, Article 316 Sub-Article d of Law 10/2008 has violated the provisions of law regarding the electoral threshold as well as given unequal treatment to the parties which do not fulfill the electoral threshold;
- b. Whereas Article 316 Sub-Article d of Law 10/2008 is contradictory to Article 28D Paragraph (1) of the 1945 Constitution, that is, "*Every person shall have the right to the recognition, the guarantee, the protection and the legal certainty of just laws as well as equal treatment before the law*", because the *a quo* article has not given the protection and the legal certainty of just laws, and also it has given unequal treatment to the Political Parties which the law has declared as not fulfilling the *electoral threshold*, only due to the reason of seat acquisition in DPR;
- c. Whereas Article 316 Sub-Article d of Law 10/2008 is contradictory to Article 28I Paragraph (2) of the 1945 Constitution, that is "*Every person shall have the right to be free from discriminatory treatment on any basis whatsoever and shall have the right to obtain protection against any such discriminatory treatment*". The reason is that, according to the Petitioners, Article 316 Sub-Article d of Law 10/2008 has discriminated Political Parties which collectively do not fulfill the electoral threshold requirement. There are Political Parties which because they have representatives in

DPR, even though it is only one seat, could directly participate in the 2009 General Elections, whereas on the other hand, the Petitioners, namely the Political Parties which do not have representatives in DPR, even their vote acquisition is greater than that of the Political Parties which obtained one seat in DPR, could not directly participate in the 2009 General Elections;

[3.14] Considering whereas to support their arguments, the Petitioners have presented written evidence (Exhibits P-1 through P-34) which were validated in the Panel hearing on May 8, 2008. Besides, the Petitioners have also presented experts who conveyed their statement under oath at Plenary Meeting dated June 10, 2008, and complemented with the written statements of the relevant experts. The statements of experts of the Petitioners are entirely described in the Facts of the Case part of this Decision, which are principally as follows:

[3.14.1] Statement of Expert of the Petitioners, Abdul Hakim Garuda Nusantara, S.H., LL.M

Whereas the legal policy adopted in the General Elections regime Year 2003, namely the threshold of 3% of the number of seats in DPR as the political requirement to be automatically allowed to participate in the following General Elections, has been amended by the Law 10/2008, with the existence of Article 316 Sub-Article d regarding the requirement to have seats in DPR from the result of the 2004 General Elections, even though the vote acquisition is

below the threshold, which is unreasonable, against sound mind, discriminatory and unjust to the Petitioners;

Whereas Article 316 Sub-Article d of Law 10/2008 is a general provision, not a special provision which gives a privilege to the Political parties which have seats in DPR, although their vote acquisition is below the threshold of 3% of the number of seats in DPR. As it has to follow through a long verification by KPU (General Election Committee) with all the risks, thus Article 316 Sub-Article d has been a DPR product made to benefit the DPR members only, particularly the Political Parties having seats below the threshold of 3% to the disadvantage of other Political Parties. This clearly describes a legal product which is noticeably against the justice principle;

Whereas Article 316 Sub-Article d of Law 10/2008 as a legal product which grants special position to the Political Parties having their vote acquisition below the threshold of 3% which have seats in DPR, is clearly contradictory to the three basic values of law, namely equality, freedom, and solidarity.

First, equality means that a legal product has to guarantee the equal position before the law, which means that such legal product is generally applicable.

Second, the freedom of a legal product has to be a joint consensus to guarantee and protect freedom. This can mean widening or limiting the space of collective freedom, so that it is not an arbitrary decision reflecting the will of ruler namely

either the Government and DPR or the legislator only. The legislator grants a bigger space of freedom to the Political Parties with the threshold below 3% but which have seats in DPR to automatically participate in the next General elections, while on the other hand, limiting the freedom of Political Parties which are with the threshold below 3% outside of DPR to be obligated to follow through the verification by KPU, with the risk of being declared as not passing the verification, which means that they will not be allowed to participate in the following General Elections;

Third, solidarity or togetherness, which in legal sense here means the togetherness values that guide the human behavior. The Political Parties which are in a relatively same condition and achievement that is below 3% have to be treated equally. The seat ownership in DPR does not mean that the status of those with the threshold below 3% is eliminated, because seat acquisition in DPR is only a logical consequence of the counting and allocation of seats in an electoral district. However, seat acquisition in DPR does not eliminate the Political Parties' status below the threshold of 3%;

Whereas a Political Party is one of the forms of organizational rights and freedom, and the denial of Political Parties' rights to the recognition, guarantee, protection, certainty and justice as well as freedom from discrimination will bring consequences to the denial of human rights of those Political Parties;

Whereas such long description clearly shows that Article 316 Sub-Article d of Law 10/2008 is contradictory to Article 28D Paragraph (1) and Article 28I Paragraph (2) of the 1945 Constitution.

[3.14.2] Statement of Expert of the Petitioners, Enny Suprpto, Ph.D

Whereas the matter or principle of prohibition of discrimination in Human Rights has become a universally-adopted principle which can be seen from the numerous international Human Rights instruments that include or refer to this principle. The Human Rights Committee in one of its “jurisprudence”, which is called as the general comment, formulates or defines the meaning of the term ‘discrimination’ as any distinction, exclusion, restriction or preference, based on any reason whatsoever such as race, skin color, sex, language, religion, political views or other perspectives, origin of race or social origin, ownership, birth status or other status, which has purpose of or which cause the elimination or hindrance of the recognition, enjoyment or implementation by all the people with the equality of all rights and freedom;

Whereas in this definition or description there are three elements, namely that the prohibited actions are the distinction, exclusion, restriction and preference. The reason for the prohibited distinction based on race, skin color, sex, language, religion, political perspective or other perspectives, origin of race or social origin, ownership as well as birth status or other status. Such distinction is intended for the elimination or hindrance of the recognition, enjoyment or implementation of Human Rights with equality;

Whereas the definition according to Article 1 Sub-Article 3 of Law Number 39 Year 1999 regarding Human Rights, similarly means that there are three main elements, only that abuse and seclusion are not included in the international instrument, and the basis for prohibited actions of that distinction further specified in Law Number 39 Year 1999, because there are 11 bases for such prohibited distinction;

Whereas the Political Party is one of the forms of the implementation of individual rights of association, and because Political Parties are humans framed in the Political Parties, thus the discrimination in Human Rights can also be referred to for one Political Party.

Whereas in examining whether Article 316 Sub-Article d of Law 10/2008 is contradictory to Article 28I Paragraph (2) of the 1945 Constitution regarding the prohibition of discrimination, the a check-list or list of questions can be made, namely *first*, whether a provision is actually a restriction, or abuse or seclusion or distinction and/or preference, being aimed at or having impacts on a person or a group of people. If the answer is yes, the question is then whether such matter is based on the reasons mentioned in the Human Rights instruments both international and national. According to the expert it seems that in this respect, the distinction is based on a group or a political perspective, because there are two groups of the same position, namely that both do not reach the threshold, but one of them could directly participate in the 2009 General Elections, while the other one could not. Such matter is a reduction of rights,

because of a preference to a certain group. Even though the position is similar, the impact for the group not given the preference is a reduction, and the other one obtaining more than it deserves even though its position is similar.

Whereas if the conclusion is affirmative that certain parties, as a result of the provision of Article 316 Sub-Article d of Law 10/2008 suffer discrimination namely the reduction, hindrance, or restriction of their rights to participate in the administration of the government and their rights to nominate and be nominated, then such condition is a violation of Human Rights as intended in Law Number 39 Year 1999.

[3.15] Considering whereas the Government, represented by the Minister of Home Affairs and Minister of Law and Human Rights, gave it statement in oral and written form at the Plenary Meeting dated June 10, 2008, as completely described in the Facts of the Case part of this decision, which is principally as follows:

- Whereas the Government does agree with the assumption and arguments stated by the petitioners, because even if the assumptions of the Petitioners were true, and their petition be granted by the Constitutional Court, the impairment of constitutional rights and/or authorities arise or occurred by the coming into effect of the *a quo* provision would not be able to be recovered or in other words, if the Petitioners' petition is granted then it would be impossible that the constitutional impairment argued will not or will no longer occur. because Political parties which do not meet

the requirement as determined by Article 9 Paragraph (1) of Law Number 12 Year 2003, still have to fulfill the electoral threshold provision as regulated in Article 315 of Law 10/2008;

- Whereas according to the Government, the provision which regulates the electoral threshold and parliamentary threshold in Law Number 10 Year 2008, is not proper to be immediately deemed as a discriminatory provision, because the *a quo* provision has indeed not create limitation or distinction based on religion, tribe, race, ethnic, group, class, social; status, economy status, sex, language and political belief [*vide* Article 1 Paragraph (3) of Law Number 39 Year 1999 or Article 2 of the *International Covenant on Civil and Political Rights*]. Also the electoral threshold and parliamentary threshold, as well as provision of Article 316 Sub-Article d of Law 10/2008 are legal policy options which cannot be reviewed, because such policies are the authority of the law makers (the President together with DPR).

In other words, the formulation process of Law 10/2008 has met the procedure as ordered by the Constitution of the State of the Republic of Indonesia Year 1945 and Law Number 10 Year 2004 *regarding* the Establishment of Laws and Regulations, and based on such bases, the Government is of the opinion that the provision of Article 316 Sub-Article d of Law 10/2008 is not contradictory to Article 28I Paragraph (2) of the Constitution of the State of the Republic of Indonesia Year 1945 and does

not impair the constitutional rights and/or authorities of the Petitioners either.

[3.16] Considering whereas the People's Legislative Assembly (DPR) has given its statement in oral and written form in the Plenary Meeting dated June 10, 2008, as completely described in the Facts of the Case part of this decision, which is principally as follows.

- Whereas even though the *a quo* Petitioners have met the qualification as parties in the petition for judicial review of the *a quo* petition, the Petitioners are still Political Parties as determined by Article 22E Paragraph (1) of the 1945 Constitution which can become participants in the General Elections of DPR and DPRD members, although they do not meet the legal standing requirement, because the granting or rejection of the Petitioners' petition does not have constitutional effect or that there is no constitutional impairment that will occur to the Petitioners, because the Petitioners as participants in the General Elections still have to go through the verification determined or required by the law or KPU. Therefore, one of the legal standing requirements for the acceptance of the Petitioners' petition is the possibility that by the granting of the petition, the constitutional impairment argued will not or will no longer occur, is not fulfilled.

- Whereas it is not true that Article 316 Sub-Article d of Law 10/2008 is contradictory to Article 1 Paragraph (3), Article 28D Paragraph (1) and 28I Paragraph (2) of the 1945 Constitution, for the following reasons:
 - The provision of Article 316 Sub-Article d of Law 10/2008 constitutes an integral unity with Article 315 and Article 316 Sub-Paragraphs a, b, c and Sub-Paragraph e, which regulate the participation of Political Parties Participants in the 2004 General Elections to be able to participate in the 2009 General Elections, in which the provisions of Article 315 and Article 316 Sub-Paragraphs a, b, c, are exactly the same with the provision of Article 9 Paragraph (2) of Law Number 12 Year 2003, whereas Article 316 Sub-Article d of Law 10/2008 is a Supplementary Provision and is an alternative and also does not reduce the provisions that have been regulated in the Law Number 12 Year 2003, so therefore it is not true that the provision of the Article 316 Sub-Article d is contradictory to the principle of Indonesia as a state based on Law.
 - Whereas the existence of the formulation of Article 316 Sub-Article d of Law 10/2008 which adds the provisions in Article 9 of Law Number 12 Year 2003 in Article 316 of Law 10/2008, is not a form of legal certainty of just laws, but rather an implication of changes of system which adopted in the new law as a legal policy and legal politics currently developed to improve the previous system.

- Whereas the law makers' basis of consideration for the provision in Article 316 Sub-Article d was not because of the reason of discrimination, but because of the consideration of the coming into effect of the parliamentary threshold in the 2009 General Elections, because the electoral threshold concept is actually not a requirement for Political Parties to participate in the following General Elections, but is a requirement for Political Parties to place their representatives in DPR. This concept is then used in the 2009 General Elections, which is then more publicly known as the Parliamentary Threshold, and thus it becomes proper if the Political Parties which have seats in DPR later on be added in the transitional provisions, because they succeeded in placing their representatives in DPR, regardless of the system of vote acquisition stipulation at that time. Therefore, the argument of the Petitioners that the provision of Article 316 Sub-Article d is discriminatory, is not true, because such distinction is based on the result of the 2004 General Elections and is not a discriminatory action from the law makers.

[3.17] Considering whereas the Government and the Petitioners are principally consistent with their respective opinions in the written statements which they have presented;

The Court's Opinion

[3.18] Considering whereas after examining carefully the statement and conclusion of the Petitioners along with the evidence and statements of the experts presented, the statement and conclusion of the Government, as well as the statement of DPR, the Court is of the opinion as follows:

a. Whereas the law makers, namely DPR in agreement with the Government, through the Law 10/2008 has changed the electoral threshold principle adopted by the Law Number 12 Year 2003 concerning General Elections of the Members of the People's Legislative Assembly, the Regional Representative Council and the Regional People's Legislative Assembly (hereinafter referred to as Law 12/2003) with the parliamentary threshold principle. Based on the electoral threshold principle, thus Article 9 of Law 12/2003 determines that:

- 1) To be able to participate in the following General Elections, the Political Parties Participants in the General Elections have to (i) obtain a minimum of 3% of the number of seats in DPR; or (ii) obtain a minimum of 4% of the number of seats in DPRD of province distributed in a minimum of $\frac{1}{2}$ (half) of the number of provinces throughout Indonesia; or (iii) obtain a minimum of 4% of the number of seats in DPRD of regency/municipal distributed in $\frac{1}{2}$ (half) of the number of regencies/municipalities throughout Indonesia;

- 2) Political Parties Participants in the General Elections which do not fulfill the provisions as mentioned in number 1), can only join the next General elections when (i) joining the Political Parties Participants in the General Elections which fulfill the provisions in number 1); or (ii) joining the Political Parties which do not fulfill the provisions as mentioned in number 1) and subsequently using the name and logo of one of the joining Political Parties, so that they fulfill the minimum vote acquisition for number of seats; or (iii) joining Political Parties which do not fulfill the provisions in number 1) by establishing a new Political party with a new name and logo, so that they fulfill the minimum vote acquisition for number of seats;

Based on the parliamentary threshold principle as adopted in Article 202 Paragraph (1) of Law 10/2008, the provision as set forth in Article 8 Paragraph (2) of Law 10/2008, which reads "*The Political Parties Participants in the previous General Elections can be Participants in the following General Elections*" shall apply. However, to be able to place their representatives in DPR, the Political Parties Participants in the General Elections have to fulfill the minimum limit of vote acquisition of 2.5% (two point five percent) of the number of nationally valid votes as intended in Article 202 Paragraph (1) of Law 10/2008.

- b. Whereas to regulate the transition period due to the change from electoral threshold to parliamentary threshold, Law 10/2008 through Transitional

Provisions (Chapter XXIII) in Article 315 and Article 316 determines the Political Parties Participants of the 2004 General Elections which can be Participants in the General Elections after Year 2004, as follows:

- 1) Political Parties Participants in the 2004 General Elections which fulfill the electoral threshold determined in Article 9 Paragraph (1) of Law 12/2003 which is further confirmed in Article 315 of Law 10/2008;
- 2) Political Parties Participants in the 2004 General Elections 2004 which do not fulfill the provisions of Article 315 of Law 10/2008 [fulfill the electoral threshold provisions determined in Article 9 Paragraph (1) of Law 12/2003], to which the provision as regulated in Article 316 of Law 10/2008 shall apply, namely: a) joining the Political Parties which fulfill the provisions of Article 315; or b) joining the Political Parties which do not fulfill the provisions of Article 315 and subsequently using the name and logo of one of the joining Political Parties, so that they fulfill the minimum vote acquisition for number of seats; or c) joining the Political Parties which do not fulfill the provisions as intended in Article 315 by establishing a new Political party with a new name and logo, so that they fulfill the minimum vote acquisition for number of seats; or d) having seats in DPR RI from the result of the 2004 General Elections; or e) fulfilling the verification requirements by KPU to

become Political Parties Participants in General Elections as determined in Law 10/2008;

- c. Whereas the Petitioners question the constitutionality of Article 316 Sub-Article d of Law 10/2008 that is, “*having seats in DPR RI from the result of the 2004 General Elections*”. Basically, the Political Parties Participants in the 2004 General Elections which do not fulfill the provisions of Article 315 of Law 10/2008 are supposed to have no more right to become participants in the 2009 General Elections, because they do not fulfill the electoral threshold provisions, except if they fulfill the provisions of Article 9 Paragraph (2) of Law 12/2003. The Court is of the opinion that the provision of Article 316 Sub-Article d of 10/2008 is not clear in its *ratio legis* if related to the transition period from the electoral threshold to parliamentary threshold principle. This means that the issue is **whether** Article 316 Sub-Article d of Law 10/2008 is intended to give convenience to become participants in the 2009 General Elections to all Political Parties Participants in the 2004 General Elections which actually do not fulfill the stipulated electoral threshold, **or** because of the consideration that the Law 10/2008 adopts the parliamentary threshold, then the convenience is limited to be applied on Political Parties which already have seats in the parliament (DPR). If the intention is to give such convenience, then supposedly all Political Parties Participants in the 2004 General Elections 2004 shall automatically be able to become participants in the 2009 General Elections, without having to go through the verification process by

- KPU, whether administrative verification or factual verification. If the intention is to give limited convenience, then supposedly, such convenience is in line with the provisions of Article 202 Paragraph (1) of Law 10/2008, namely to fulfill the minimum limit of vote acquisition of 2.5% (two point five percent) of the number of the nationally valid votes, certainly based on the result of the 2004 General Elections, but not based on the seat acquisition as provisions in Article 316 Sub-Article d of Law 10/2008. Besides, the value of seats in the system of the 2004 General Elections does not always reflect the number of votes acquired, where there are Political Parties whose national vote acquisition is more than the vote acquisition obtaining seats in DPR (Exhibit P-17);
- d. Whereas the provisions of Article 316 Sub-Article d of Law 10/2008 have indeed shown unequal and unjust treatment towards fellow Political Parties Participants in the 2004 General Elections which do not fulfill the electoral threshold [Article 9 Paragraph (1) of Law 12/2003 *juncto* Article 315 of Law 10/2008]. Such unjust treatment is shown by the fact that there are Political Parties which only gained one seat in DPR, even though their vote acquisition was less than that of the Political Parties which do not have seats in DPR, could be automatically free to become participants of in the 2009 General Elections; whereas the Political Parties which had more vote acquisition, but did not obtain seats in DPR, precisely have to go through a long process to be able to participate in the 2009 General

Elections, namely through the administrative verification or factual verification phase by KPU;

- e. The Court is of the opinion that the provisions of law, *in casu* Article 316 Sub-Article d of Law 10/2008, which gives unequal treatment to those of the same position, in this case the Political Parties which have representatives in DPR and which do not have representatives in DPR, in essence have the same position, namely that they did not fulfill the electoral threshold whether pursuant to Article 9 Paragraph (1) of Law 12/2003 or pursuant to Article 315 of Law 10/2008, contradictory to Article 27 Paragraph (1), Article 28D Paragraph (1), and Article 28I Paragraph (2) of the 1945 Constitution, so they must be declared as having no binding legal force;

4. CONCLUSION

Based on the foregoing issues described above, it can be concluded as follows:

[4.1] Whereas Article 316 Sub-Article d of Law 10/2008 is not clear in its *ratio legis* and consistency as a regulation for the transition period from the electoral threshold principle to the parliamentary threshold principle which is about to be realized through Article 202 of Law 10/2008;

[4.2] Whereas the Political Parties Participants in the 2004 General Elections, both those which fulfill the provisions of Article 316 Sub-Article d of

Law 10/2008 or those which do not, in essence have the same position, that is as Political Parties Participants in the 2004 General Elections 2004 which do not fulfill the electoral threshold, as intended either by Article 9 Paragraph (1) of Law 12/2003 or by Article 315 of Law 10/2008;

[4.3] Whereas Article 316 Sub-Article d of Law 10/2008 is a provision that gives unequal treatment and creates legal uncertainty and injustice towards fellow Participants in the 2004 General Elections which do not fulfill the provisions of Article 315 of Law 10/2008;

[4.4] Whereas therefore the petition of the Petitioners is quite reasonable, so it has to be granted;

5. DECISION

In view of Article 56 Paragraph (2) and Paragraph (3) as well as Article 57 Paragraph (1) and Paragraph (3) of Law Number 24 Year 2003 regarding the Constitutional Court (State Gazette of the Republic of Indonesia Year 2003 Number 98, Supplement to State Gazette of the Republic of Indonesia Number 4316),

Passing the Decision:

To declare that the petition of the Petitioners is granted;

To declare Article 316 Sub-Article d of Law Number 10 Year 2008 regarding General Elections of the Members of the People's Legislative

Assembly, the Regional Representative Council and the Regional People's Legislative Assembly (State Gazette of the Republic of Indonesia Year 2008 Number 51, Supplement to State Gazette of the Republic of Indonesia Number 4836) contradictory to the Constitution of the State of the Republic of Indonesia Year 1945;

To declare that Article 316 Sub-Article d of Law Number 10 Year 2008 regarding General Elections of the Members of the People's Legislative Assembly, the Regional Representative Council and the Regional People's Legislative Assembly (State Gazette of the Republic of Indonesia Year 2008 Number 51, Supplement to State Gazette of the Republic of Indonesia Number 4836) does not have any binding legal force;

To order the inclusion of this Decision in the Official Gazette of the Republic of Indonesia as is supposedly.

Hence this decision was made in the Consultative Meeting of nine Constitutional Court Judges, on Tuesday, eighth of July 2008, and was pronounced in the Plenary Session of the Constitutional Court open for public on this day, Thursday, tenth of July 2008, by us, Jimly Asshiddiqie as Chairperson and concurrent Member, H. Abdul Mukthie Fadjar, Maruarar Siahaan, I Dewa Gede Palguna, H. Harjono, H.A.S. Natabaya, Moh. Mahfud MD, H.M. Arsyad Sanusi, and Muhammad Alim, respectively as Members, assisted by Cholidin Nasir as Substitute Registrar in the presence of the Petitioners and their

Attorneys, the Government/its representative, and the People's Legislative Assembly/its representative;

CHAIRPERSON,

Sgd.

Jimly Asshiddiqie

JUSTICES

Sgd.

H. Abdul Mukthie Fadjar

Sgd.

Maruarar Siahaan

Sgd.

I Dewa Gede Palguna

Sgd.

H. Harjono

Sgd.

H.A.S. Natabaya

Sgd.

Moh. Mahfud MD

Sgd.

H.M. Arsyad Sanusi

Sgd.

Muhammad Alim

SUBSTITUTE REGISTRAR,

Sgd.

Cholidin Nasir