DECISION

Number 15/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 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) against the 1945 Constitution of the State of the Republic of Indonesia, filed by:

[1.2] **Julius Daniel Elias Kaat**, position Village Head, having his address at Jalan Sutoyo Number 14, Neighborhood Ward (RT.) 005/Neighborhood Block (RW.) III, Nusa Kenari Sub-District, Teluk Mutiara District, Alor Regency, East Nusa Tenggara Province, by virtue of a Special Power of Attorney dated May 3, 2008 granting power to 1) Hendra K. Hentas, SH., 2) Arifin Singawijaya, SH., 3) Hasahatan Damanik, SH., and 4) Mira Stephanie, SH., all of them being Advocates at VBL Law Firm, having its address

at Artha Graha Building, 3rd A Floor, Jalan Melawai Raya B.III Number 194 Blok M, Kebayoran Baru, Jakarta 12160, hereinafter referred to as --------- **Petitioner**;

[1.3] Having read the Petition of the Petitioner;

Having heard the statement of the Petitioner;

Having examined the evidence;

3. LEGAL CONSIDERATIONS

[3.1] Considering whereas the purpose and objective of the *a quo* Petitioner' Petition are to petition for judicial review of the constitutionality of Article 50 Paragraph (1) Sub-Paragraph 9 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 the State Gazette of the Republic of Indonesia Number 4836, hereinafter referred to as Law Number 10/2008) against the 1945 Constitution of the State of the Republic of Indonesia (hereinafter referred to as the 1945 Constitution);

[3.2] Considering whereas prior to considering the Principal Issue of the Petition, it is necessary for the Constitutional Court (hereinafter referred to as the Court) to first consider:

1. The authority of the Court to examine, hear, and decide upon the *a quo* Petitioner' Petition;

2. The legal standing of the Petitioner to file the *a quo* petition;

With respect to the aforementioned two matters, the Court is of the opinion as follows:

Authority of the Court

[3.3] Considering whereas based on the provisions of Article 24C Paragraph (1) of the 1945 Constitution *juncto* Article 10 Paragraph (1) of Law Number 24 Year 2003 regarding the Constitutional Court (hereinafter referred to as the CC Law), the Court has the authority to hear at the first and final level the decision of which shall be final for, among other things, to conduct judicial review of a law against the 1945 Constitution.

[3.4] Considering whereas the *a quo* Petitioner' petition is for judicial review law, *in casu* Law No. 10/2008 against the 1945 Constitution, hence the Court has the authority to examine, hear, and decide upon the *a quo* petition.

Legal Standing of the Petitioner

[3.5] Considering whereas the provision of Article 51 Paragraph (1) of the CC Law state that the petitioners shall be the parties that deem that their constitutional rights and/or authority are impaired by the coming into effect of a law, namely:

a. individual Indonesian citizens;

b. customary law community units insofar as they are still in existence and in line with the development of the communities and the principle of the Unitary State of the Republic of Indonesia as regulated in law;

c. public or private legal entities;

d. state institutions;

Accordingly, in order that the legal standing of a party to be accepted in the petition for judicial review against the 1945 Constitution, the party concerned must first clarify the following:

(a) whether his/her position is as an individual Indonesian citizen, customary law community unit, legal entity or state institution;

(b) the impairment of his/her constitutional rights and/or authority in his/her position as referred to in item (a) above.

[3.6] Considering also, following Decision Number 006/PUU-III/2005 dated May 31, 2005 and Decision Number 11/PUU-V/2007 dated September 20, 2007, the Court is of the opinion that the aforementioned constitutional rights and authority must fulfill the following requirements, namely:

a. the Petitioner must have constitutional rights and/or authority granted by the 1945 Constitution;

b. the Petitioner's constitutional rights and/or authority have been impaired by the coming into effect of the law petitioned for review;

c. the impairment of such constitutional rights and/or authority must be specific and actual or at least potential in nature which, pursuant to logical reasoning, will take place for sure;

d. there is a causal relationship (*causal verband*) between the impairment of constitutional rights and/or authority and the coming into effect of the law petitioned for review;

e. if the petition is granted, it is expected that such impairment of constitutional rights and/or authority will not or does not occur any longer;

[3.7] Considering whereas the Petitioner has clarified his position as an individual Indonesian citizen who works as the Head of Tribur Village, Alor Barat Daya District, Alor Regency, East Nusa Tenggara Province. In addition to that, the Petitioner also sits as the Chairperson of the Branch Executive Board (DPC) of the National Awakening Party. Therefore, the Petitioner has fulfilled one of the requirements with respect to the legal standing as referred to in Article 51 Paragraph (1) Sub-Paragraphs a through d of the CC Law, and accordingly the Court shall further consider whether in such position the constitutional rights of the Petitioner have been impaired by the coming into effect of Article 50 Paragraph (1) Sub-Paragraph g of Law No. 10/2008.

[3.8] Considering whereas in clarifying his opinion with regard to the impairment of his constitutional rights by the coming into effect of Article 50 Paragraph (1) of Sub-Paragraph g of Law No. 10/2008, the Petitioner presents the following arguments:

a) Whereas the Petitioner will be nominated by his party, namely the National Awakening Party, as a potential DPR member for the electoral district of East Nusa Tenggara;

b) Whereas prior to being active and sitting as the Chairperson of the Branch Executive Board of the National Awakening Party, the Petitioner was once sentenced to an imprisonment of two years and six months under the Decision of the Kalabahi District Court which has obtained permanent legal force, for committing a criminal act of gross torture as provided for in Article 351 of the Indonesian Criminal Code *(sic!);*

c) Whereas the Petitioner is of the opinion that Article 50 Paragraph (1) Sub-Paragraph g of Law No. 10/2008 has impaired his constitutional rights because the coming into effect of the intended Article 50 Paragraph (1) of Law No. 10/2008 has prevented the Petitioner from being elected by the people as DPR member. Article 50 Paragraph (1) of Law No. 10/2008 states as follows, “The potential DPR, DPD, Provincial DPRD and Regency/Municipality DPRD member candidates must meet the following requirements: a. .....g. *he/she has never been sentenced to imprisonment by virtue of a decision of the court which has obtained*

permanent legal force for committing a criminal act punishable by imprisonment of 5 (five) years or more."

d) Whereas the Petitioner is of the opinion that the provision of Article 50 Paragraph (1) Sub-Paragraph g of Law No. 10/2008 is contradictory to Article 28D Paragraph (1) of the 1945 Constitution which reads as follows: "*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*";

e) Whereas, in addition to that, the Petitioner also claims that he has the same right to develop the community, the state and the nation by participating in the life as a nation and as a state, including by participating in the election of DPR members constituting a right guaranteed constitutionally based on the 1945 Constitution.

Therefore, the Petitioner has fulfilled the requirements of the constitutional rights impairment as described in paragraph **[3.6]** above.

[3.9] Considering whereas based on the description of paragraphs [3.5] up to and including paragraph [3.8] above, the Court is of the opinion that both legal subject requirement and requirement of the constitutional rights impairment of the Petitioner have been fulfilled, and therefore the Petitioner has fulfilled the legal standing requirements to act as a Petitioner in the *a quo* petition.

Accordingly the Court must subsequently examine and consider the Principal Issue of the Petition.

Principal Issue of the Petition

[3.10] Considering whereas the constitutional issue of the principal issue of the *a quo* petition is whether or not the substance of Article 50 Paragraph (1) Sub-Paragraph g of Law No. 10/2008 is contradictory to the constitutional rights of the Petitioner with regard to the recognition, the guarantee, the protection and the legal certainty of just laws as well as equal treatment before the law as provided for in Article 28D Paragraph (1) of the 1945 Constitution;

[3.11] Considering whereas in his arguments with regard to the contradiction between Article 50 Paragraph (1) Sub-Paragraph g of Law No. 10/2008 and Article 28D Paragraph (1) of the 1945 Constitution the Petitioner states as follows:

a) Under the requirements as set forth in Article 50 Paragraph (1) Sub-Paragraph g of Law No. 10/2008, a person who has been sentenced to imprisonment by virtue of court decision which has obtained permanent legal force punishable by imprisonment of less than 5 (five) imprisonment is allowed to become a DPR, DPD, provincial DPRD, and regency/municipality DPRD member candidate. The Petitioner is of the opinion that the matter indicates unjust legal certainty and unequal treatment before the law with regard to the Petitioner;

b) The Petitioner is of the opinion that the requirements as set forth in Article 50 Paragraph (1) Sub-Paragraph g of Law No. 10/2008 have created a different criterion for ex-perpetrators based on the severity of criminal sanction to be elected in general elections. The Petitioner confirms that in general, one of the moral standards required for a person to hold a public position is that the related person has never been sentenced to criminal sanction. In the eyes of the community, there is no difference between a “big sin” and a “small sin” since both of them are sins.

c) The Petitioner is of the opinion that the decision of the Court which excludes minor offence and criminal acts for political purpose in order to determine certain standards, does not have clear criteria because there is no hypothesis which can ensure that an ex-perpetrator once sentenced to a criminal sanction of less than 5 (five) years, or a person with whose negligence commits a criminal act, shall meet certain moral standards so that he/she shall be entitled to being elected in general elections. The Petitioner is of the opinion that after serving his/her an imprisonment sentence, a person’s rights to elect and be elected shall be reinstated and according to the generally accepted principles, the revocation of the right to elect and right to be elected must be made by a court decision which has obtained a permanent legal force;

d) The Petitioner is of the opinion that if the criterion as to whether a person has been or has not been imposed with a criminal sanction is accepted as

a certain moral standard, the aforementioned criterion should not exclude a person based on the severity of criminal penalty as well as minor negligence but should consider the period of punishment imposed by virtue of a court decision since the judges' decision reflects real picture of the perpetrator's mistake;

e) The Petitioner is of the opinion that the classification of the severity of a criminal act based on its criminal penalty, namely 5 (five) years or more is actually applied by the investigators as one of the grounds for detaining someone as regulated with Article 21 Paragraph (4) Sub-Paragraph a of the Criminal Procedural Code (KUHAP). The aforementioned provision still has an exception as provided for in Article 21 Paragraph (4) Sub-Paragraph b of KUHAP. The Petitioner is of the opinion that the classification shall not be applied to determine certain moral standards since the application is used at the investigation phase which still requires substantiation in the hearing.

Opinion of the Court

[3.12] Considering whereas, with respect to the *a quo* petition, in accordance with the provisions of Article 39 of the CC Law, the Panel of Justices has notified as well as advised the Petitioner at the preliminary examination that a similar substance to the *a quo* petition has once been examined, heard, and decided upon by the Court with the decision declaring that "the petition is rejected", however with the consideration that the legal norms being petitioned

for review are declared conditionally constitutional. However, since the Petitioner declared to be consistent with his position, hence in accordance with the provisions of Article 28 Paragraph (4) of the CC Law, the Panel of Justices subsequently reported the aforementioned preliminary examination results to the Consultative Meeting of Justices (RPH) on June 9, 2008. The RPH then decided that it was not necessary to hear the statements of either the DPR or the Government and the legal considerations adopted in such decision shall also apply to the *a quo* petition;

[3.13] Considering whereas the Petitioner's arguments are not substantially different from the Petitioner's arguments filed in Case Number 14-17/PUU-V/2007. With respect to the aforementioned arguments, the Court has declared its opinion which is still relevant to this case. The Petitioner did not file substantially new arguments because basically the Petitioner has only repeated the experts' statement presented by the Petitioner in the Petition Number 14-17/PUU-V/2007 which has been considered by the Court. Therefore, the legal considerations of the Court in Decision Number 14-17/PUU-V/2007 dated December 11, 2007 shall apply, *mutatis mutandis,* to the *a quo* petition. However, considering the importance of this matter, the Court is of the opinion that it is necessary to reaffirm the opinion as follows:

a) With respect to the Petitioner's arguments concluding that based on Article 50 Paragraph (1) Sub-Paragraph g of Law No. 10/2008, a person who has been sentenced to imprisonment by virtue of a decision of the

court which has obtained permanent legal force for committing a criminal act punishable by imprisonment of less than 5 (five) years shall be allowed to become a DPR, DPD, provincial DPRD and regency/municipality DPRD member candidate. The Petitioner is of the opinion that the aforementioned provisions have established unjust legal certainty and unequal treatment before the law with respect to the Petitioner.

With respect to the Petitioner's arguments, the Court is of the opinion that justice does not necessarily mean that every person shall be treated equally. Justice means that we treat the similar matters similarly while the different matters differently. Therefore, it is not fair to treat different matters equally. The concrete case of the Petitioner who has been sentenced to imprisonment due to gross torture, is clearly different from the criminal sanction imposed on a person for a minor negligence or for expressing his/her opinion with respect to his/her political stance or opinion which is different from that of the ruling authorities (*politieke overtuiging*). Actually, in both examples just described, the actor does not have bad intentions (*mens rea*). The foregoing is clearly different from violation, and moreover gross violation (vide further the legal considerations of Decision Number 14-17/PUU-V/2007 dated December 11, 2007, paragraph **[3.16]** sub-paragraph 1). Gross violation contains *mens rea* or bad intentions element. In addition to that, from the perspective of criminal act qualifications, gross torture is classified as *mala in se*, namely an act which principally constitutes a prohibited act, not

solely because it is prohibited by the law or *mala prohibita*. Therefore, the Petitioner as a perpetrator of gross torture is different from a perpetrator of a minor offence and a perpetrator of a political crime who has different political view from the ruling regime.

b) The Petitioner is of the opinion that the requirements set forth in Article 50 Paragraph (1) Sub-Paragraph g of Law No. 10/2008, classify ex-perpetrators of criminal acts based on the severity of criminal penalty to be elected in general elections. The Petitioner confirms that in general, one of the moral standards required of a person who is to hold a public position is that the person concerned has never been punished with a criminal sentence. From the in the eyes of the community, there is no difference between a “big sin” and a “small sin” since both of them are sins. With respect to the Petitioner’s arguments, the Court is of the opinion that supposing that the Petitioner’s opinion is right, *quod non*, that the community does not distinguish a “big sin” from a “small sin” in determining a certain moral standard, it does not necessarily mean that the requirements provided for by law to fulfill a certain public position are automatically contradictory to the 1945 Constitution just because (hypothetically) they include different moral standards from those understood and believed by the community, as a “sin”. However, the requirements provided for by the law will definitely be contradictory to the 1945 Constitution if they include, among other things, discriminatory provisions, namely that such requirements discriminate people on the

basis of religion, race, tribal affiliations, language, gender, political belief or other societal status. Such characteristics do not exist in the provisions of law being petitioned for review in the *a quo* petitioner.

c) The Petitioner has argued that the exclusion of minor negligence and criminal acts for political purpose in the context of determining certain moral standards does not clear criteria because there is no hypothesis which can prove that an ex-perpetrator once sentenced to a criminal penalty of less than 5 (five) years or a person with whose negligence commits a criminal act shall meet certain moral standards so that he/she shall be entitled to being elected in general elections.

The Petitioner is of the opinion that after serving his/her imprisonment sentence, a person's rights to elect and be elected shall be reinstated and according to the generally accepted principles, the revocation of the right to elect and right to be elected must be made by a court decision which has obtained a permanent legal force.

With respect to the Petitioner's arguments, it is necessary for the Court to reaffirm that any person who has committed minor negligence (*culpa levis*) and has once been imposed with a criminal sanction due to a political crime in the context of *politieke overtuiging* as a requirement to hold a public position is excluded from this standard **not** because of the considerations of the criminal penalty, namely less than five years, but the absence of malicious characteristic or criminal morality of the intended to

actions (*vide* further Decision of the Court Number 14-17/PUU-V/2007 dated December 11, 2007, paragraph **[3.16]** sub-paragraphs 1 and 2).

Furthermore, whether or not he is aware of it, the Petitioner actually has ignored his own logic by arguing that it is the court which has the authority to revoke a voting right of a person (the right to elect and right to be elected). If the Petitioner recognizes that the voting right (right to elect and right to be elected) can be limited and even be revoked by a court decision which has obtained permanent legal force, there is a question as to why such limitation may not be made by law. In fact, in the Civil Law tradition, which also applies in Indonesia, a law has in fact a higher position in terms of sources of law, namely as the primary source of law, meanwhile decisions of courts are “only” secondary sources of law. Moreover, such status can be declared existent if the court’s decision concerned has a qualification as a permanent jurisprudence because the *res judicata* and *stare decicis* principles in the countries adopting the Civil Law tradition are not applied absolutely. In addition to that, in certain cases, decisions of courts in the countries adopting the Civil Law tradition tend to constitute a realization of something that has been regulated by law.

With respect to the Petitioner’s arguments stating that after serving his/her criminal sentence, a person’s right to elect and to be elected shall be reinstated, the Court has confirmed in its Decision Number 14-17/PUU-V/2007 dated December 11, 2007 which states among other things, “*It is correct that one of the penal theories states that a person who has served*

his/her punishment shall become an independent person. However, it must be recognized also that, generally, the most real indicator to asses a person's moral quality is whether or not such person has committed a criminal act as evidenced by a decision of court which has obtained permanent legal force, although it is still correct that not all criminal acts can be classified as a culpable acts, as experienced by Bung Karno (The First President of the Republic of Indonesia) or A.M. Fatwa (currently the Deputy Chairperson of MPR) being used as a reference by Petitioner I, which shall be considered separately in another part of this decision".

The criminal act declared in the Court's Decision as "shall be considered separately" refers to a political criminal act which is actually not a crime, since as described in paragraph [3.16] sub-paragraph 2 of Decision Number 14-17/PUU-V/2007 dated December 11, 2007, "*in fact, the aforementioned act constitutes an expression of political perspective or stance (politieke overtuiging) guaranteed in a democratic constitutional state but it is solely described as a criminal act by the positive law applicable at that time since the perspective concerned is different from the political perspective adopted by the ruling regime*."

d) With respect to the Petitioner's arguments that if the criterion as to whether or not a person has been imposed with a criminal sanction is accepted as a certain moral standard, such criterion should not be excluded by considering the severity of criminal penalty and minor

negligence, but rather it must be based on the period of criminal penalty imposed by a court decision reflecting the real description of the perpetrator' fault;

With respect to the Petitioner's arguments concerned, the Court reconfirms that the exclusion intended by the Petitioner is not based on the consideration of the severity of the penalty or a period of a sanction, but the existence of malicious characteristic or criminal morality as described in the considerations item a) above.

e) With respect to the Petitioner's arguments that in fact, the classification with regard to the severity of a criminal act based on the criminal penalty, namely 5 (five) years or more, is merely used as one of the grounds for detaining a person as regulated in Article 21 Paragraph (4) Sub-Paragraph a of the Criminal Procedure Code (KUHAP); The foregoing provision still has an exception as regulated in Article 21 Paragraph (4) Sub-Paragraph b of KUHAP. The Petitioner is of the opinion that the classification shall not be applied to determine certain moral standards since the application in investigation phase still requires substantiation in the hearing;

With respect to the foregoing Petitioner's arguments the Court is of the opinion that such arguments are irrelevant, since the considerations included in the Decision of the Court Number 14-17/PUU-V/2007 dated December 11, 2007 are not based on the issue of the severity of the

criminal penalty or a period of the criminal sanction either. Moreover, the severity of criminal penalty is commonly applied as a distinctive factor, both in the considerations of a criminal sanction (*strafmaat*) and the detention procedures (*gronden van rechtmatigheid en gronden van noodzakelijkheid*).

[3.14] Considering whereas, based on the considerations described in paragraph **[3.13]** above, it is evident that there are no fundamental reasons in the *a quo* petition which distinguish them from the arguments presented by the Petitioner in the Decision of the Court Number 14-17/PUU-V/2007 dated December 11, 2008, so that the Court is of the opinion that the considerations of Decision Number 14-17/PUU-V/2007 dated December 11, 2007 shall also apply to the *a quo* Petition. Therefore Article 50 Paragraph (1) Sub-Paragraph g of Law No. 10/2008 must be declared *conditionally constitutional*, namely insofar as it is not related to the political crime and insofar as it is not related to the criminal act due to a minor negligence (*culpa levis*).

4. CONCLUDING OPINION

Based on the aforementioned description, the Court is of the opinion as follows:

[4.1] Whereas the Court has declared its opinion with respect to the petition which is substantially similar to the *a quo* petition, as prescribed in Decision Number 14-17/PUU-V/2007 dated December 11, 2007;

[4.2] Whereas in line with the conclusion in item [4.1] above, Article 50 Paragraph (1) Sub-Paragraph g of Law No. 10/2008 must also be declared conditionally constitutional, namely that Article 50 Paragraph (1) Sub-Paragraph g of Law No. 10/2008 concerned is constitutional insofar as it does not include criminal act caused by minor negligence (*culpa levis*) and political crime in the definition of an act which actually is an expression of political opinion or stance (*politieke overtuiging*) guaranteed in a democratic constitutional state while the positive law currently applicable classifies the act as a criminal act since it has a different political view from that adopted by the ruling regime;

5. DECISION

In view of Article 56 Paragraph (5) 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 Petitioner is rejected;

Hence the decision was made in the Plenary Consultative Meeting of nine Constitutional Court Justices on Monday, July 7, 2008 and was pronounced in a Plenary Session of the Constitutional Court open for the public on this Thursday, July 10, 2008 by us: Jimly Asshiddiqie, S.H., as the Chairman

and concurrent Member, accompanied by: H. Abdul Mukthie Fadjar, H. Abdul Mukthie Fadjar, I Dewa Gede Palguna, Maruarar Siahaan, H. Harjono, H.A.S. Natabaya, Moh. Mahfud MD, H.M. Arsyad Sanusi, and Muhammad Alim respectively as Members and assisted by Cholidin Nasir as Substitute Registrar and in the presence of the Petitioner/his Attorneys, the Government or its representative and the People's Legislative Assembly or its representative.

CHIEF JUSTICE,

Sgd.

Jimly Asshiddiqie

JUSTICES

Sgd.	**Sgd.**
H. Abdul Mukthie Fadjar	**I Dewa Gede Palguna**
Sgd.	**Sgd.**
Maruarar Siahaan	**H. Harjono**
Sgd.	**Sgd.**
H.A.S. Natabaya	**Moh. Mahfud MD**
Sgd.	**Sgd.**
H.M. Arsyad Sanusi	**Muhammad Alim**

SUBSTITUTE REGISTRAR,

Sgd.

Cholidin Nasir