



DECISION

Number 17/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, passing a decision in the case of petition for Judicial Review of Law Number 32 year 2004 regarding Regional Government and Law Number 12 Year 2008 regarding the Second Amendment to Law Number 32 Year 2004 regarding Regional Government against the 1945 Constitution of the State of the Republic of Indonesia filed by:

[1.2] **Drs. H. Sjachroedin Zp, S.H.**, Indonesian citizen, place/date of birth: Tanjungkarang, February 7, 1947, Religion: Islam, Occupation: Lampung Governor for 2004-2009 period, having his address at Jalan Dr. Susilo Number 12 ABC Sumur Batu, Teluk Betung Utara, Bandar Lampung. By virtue of special power of attorney dated May 24, 2008 granting the power of attorney to Susi Tur Andayani, S.H., and R. Sugiri Probokusumo, S.H., both are Advocate and Legal Consultant, either severally or jointly, choosing their legal domicile at **SUSI TUR ANDAYANI and Partner** Advocate Office at Jalan Cendana Gg. Durian Number 8, Tanjung Senang, Bandar Lampung.

Hereinafter referred to as **Petitioner**;

- [1.3]** Having read the petition of the Petitioner;
Having heard the statement of the Petitioner;
Having heard and read the written statements of the Government;
Having heard and read the written statements of the People's
Legislative Assembly;
Having examined the evidences;
Having heard and read the written statements of Experts presented
by the Petitioner;

3. LEGAL CONSIDERATIONS

- [3.1]** Considering whereas the purpose and objective of the Petitioner's petition shall be for the substantive review of Article 233 paragraph (2) of Law Number 32 Year 2004 regarding Regional Government (State Gazette of the Republic of Indonesia Year 2004 Number 125, Supplement to the State Gazette of the Republic of Indonesia Number 4437, hereinafter referred to as Law 32/2004) and Article 58 sub-article q of Law Number 12 Year 2008 regarding the Second Amendment to Law Number 32 Year 2004 regarding Regional Government (State Gazette of the Republic of Indonesia Year 2008 Number 59, Supplement to the State Gazette Number 4844, h hereinafter referred to as Law 12/2008) 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 examining the Principal Issue of the Case, the Constitutional Court (hereinafter referred to as the Court) shall first consider:

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

Authority of the Court

[3.3] Considering whereas pursuant to Article 24C paragraph (1) of the 1945 Constitution, one of the constitutional authorities of the Court is to hear at the first and final level, the decision of which shall be final, to conduct judicial review of a law against the 1945 Constitution;

[3.4] Considering whereas the *a quo* petition is regarding the judicial review of law against the 1945 Constitution, *in casu* Law 32/2004 and Law 12/2008 against the 1945 Constitution, the Court therefore has the authority to examine, hear and decide upon the *a quo* petition.

Legal Standing of the Petitioner

[3.5] Considering whereas pursuant to Article 51 paragraph (1) and the Elucidation thereof, Law Number 24 Year 2003 regarding the Constitutional Court (State Gazette of the Republic of Indonesia Year 2003 Number 98, Supplement to the State Gazette of the Republic of Indonesia Number 4316,

hereinafter referred to as the Constitutional Court Law), parties who may file a petition for judicial review of laws against the 1945 Constitution shall be those claiming that their constitutional rights and/or authorities have been impaired by the coming into effect of a law, namely:

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

Thus, in the judicial review of a law against the 1945 Constitution, the Petitioner must first explain and prove the following:

- a. his legal standing as Petitioner as intended in Article 51 paragraph (1) of the Constitutional Law;
- b. Whether or not there is an impairment of constitutional rights and/or authorities as a result of the coming into effect of the law petitioned for review;

[3.6] Considering whereas as of Decision Number 006/PUU-III/2005 dated May 31, 2005 and Decision Number 11/PUU-V/2007 dated September 20, 2007 until now, the Constitutional Court is of the opinion that the impairment of the constitutional rights and/or authorities as intended in Article 51 paragraph (1) of the Constitutional Law must meet 5 (five) requirements, namely:

- a. the Petitioner must have constitutional rights and/or authorities granted by the 1945 Constitution;
- b. such constitutional rights and/or authorities have been impaired by the coming into effect of the law petitioned for review;
- c. the impairment of such constitutional rights and/or authorities is specific and actual, or at least potential in nature, which according to logical reasoning will surely occur;
- d. there is a causal relationship (*causal verband*) between the aforementioned impairment and the coming into effect of the law petitioned for review;
- e. if the petition is granted, it is expected that the constitutional impairment argued will not or does not occur any longer;

[3.7] Considering whereas the Petitioner is an Indonesian citizen and was inaugurated as Lampung Governor for the 2004-2009 period on June 2, 2004, and whose term of office ends on June 2, 2009 based on Presidential Decree Number 71/M Year 2004. Hence, the Petitioner meets the qualification to have a legal standing as Individual Indonesian citizen as intended by Article 51 paragraph (1) of the Constitutional Court Law;

[3.8] Considering whereas the Petitioner argues to have constitutional rights and/or authorities, namely as included, among other things in;

- a. Article 27 paragraph (1) of the 1945 Constitution, "*All citizens shall have an equal position before the law and government and shall be obligated to uphold such law and government, without exception*",
- b. Article 28D paragraph (1) of the 1945 Constitution, "*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*".

According to the Petitioner, the aforementioned constitutional rights have been impaired by the coming into effect of Article 233 paragraph (2) of Law 32/2004 and Article 58 sub-article q of Law 12/2008 which read,

- a. Article 233 paragraph (2) of Law 32/2004, "*Regional heads whose term of office end in January, 2009 until July, 2009 shall hold direct regional head election as referred to herein in December 2009*";
- b. Article 58 of Law 12/2008 stipulating the requirement for regional head and deputy regional head candidates to be Indonesian citizen in sub-article q, namely "*resign him/herself as of the registration for the incumbent regional head and/or deputy regional head*".

[3.9] Considering whereas the *a quo* article petitioned for review by the Petitioner caused the Petitioner as the Governor of Lampung Province to not be able to complete the five year term of office as stipulated in Article 110 paragraph (3) of Law 32/2004, where his term of office should end on June 2, 2009. Therefore, if it had not been for the provision of Article 233 paragraph (2) of Law 32/2004 *juncto* Article 58 sub-article q Law 12/2008, the Petitioner's right to hold

the position of Lampung Province Governor, which is guaranteed by Article 27 paragraph (1) and Article 28D paragraph (2) of the 1945 Constitution until June 2, 2009, would not have been impaired;

[3.10] Considering whereas for this reason, the Court is of the opinion that the Petitioner has a legal standing to file the *a quo* petition, thus the Court must further consider the principal issue of the petition.

Principal Issue of the Petition

[3.11] Considering whereas the principal issue of the Petitioner's petition is for the Court to declare that Article 233 paragraph (2) of Law 32/2004 and Article 58 sub-article q of Law 12/2008 are contradictory to the 1945 Constitution and therefore do not have binding effect for the following reasons:

- a. Article 110 paragraph (3) of Law 32/2004 stipulates that the term of office of the regional head and deputy regional head shall be for the period of 5 (five) years as of the inauguration, thus the Petitioner's term of office should end on June 2, 2009 (*vide* Presidential Decree Number 71/M Year 2004);
- b. Article 86 paragraph (1) of Law 32/2004 stipulates the vote count for the election of regional head and deputy regional head candidate pair to is be administered by no later than 1 (one) month before the expiry of the regional head's term of office, thus the regional head election in Lampung should have been held by no later than May 2, 2009;

- c. With the existence of the provisions of Article 233 paragraph (2) Law 32/2004, the regional head election in Lampung was held earlier, namely on December 2008 whereas it should be convened by no later than May 2, 2009,
- d. Article 58 sub-article q of Law 12/2008 requires incumbent regional head and/or deputy regional head who will nominate themselves in regional head and/or deputy regional head election to resign as of the registration and pursuant to the Elucidation of this Article 58 sub-article q such resignation cannot be revoked.

[3.12] Considering whereas according to the Petitioner, with the existence of the aforementioned matters, the provisions of Article 233 paragraph (2) of Law 32/2004 and Article 58 sub-article q of Law 12/2008 have impaired the Petitioner's right to hold office as Lampung Governor up until June 2, 2009. In addition, the provisions in Article 58 sub-article q of Law 12/2008 also causes unequal treatment to the Petitioner as a Regional Head who will re-nominate himself as regional head in the next term of office, since the obligation to resign from one's position is not applied to other state officials, namely President and Vice President, as well as the members of the People's Legislative Assembly (DPR), the Regional Representative Council (DPD), and the Regional People's Legislative Assembly (DPRD) as stipulated in Article 59 paragraph (5) sub-paragraphs h and i of Law 32/2004;

[3.13] Considering whereas the Government's statement regarding the principal issues of the petition has also been heard in the hearing, which in essence states that if a regional head re-nominate himself in regional head election for the next term of office, he, in fact voluntarily complies with the provision on the requirement in Article 58 sub-article q of Law 12/2008. Since, for the concerned, there is no obligation to participate in the next election, thus according to the Government, the Petitioner is not harmed. The provision of Article 233 paragraph (2) of Law 32/2004 is a transitional provision, the content of which is the policy of the legislators to alter the legal condition prior to the coming into effect of the concerned law, thus Article 233 paragraph (2) of Law 32/2004 is not at all related to the constitutionality of the coming into effect of the foregoing article. The existence of Article 58 sub-article q of Law 12/2008 is to avoid the abuse of power, and comparing the provision of regional head and/or deputy regional head election with that of President and/or Vice President election is irrelevant;

[3.14] Considering whereas the statement of DPR conveyed by its attorney, namely Drs. Lukman Hakim Saefuddin has also been heard in the hearing, who in his statement states as follows:

1. Whereas the administrative requirements to become a regional head candidate as intended in Article 58 sub-article q and its elucidation **cannot be categorized as a discriminatory treatment** as stipulated in Law Number 39 Year 1999, since its imposition does not differentiate humans on the basis of religion, ethnic group, race, ethnicities, group, categories,

social status, economic status, gender, language and belief because resignation as of the registration for the incumbent regional head and/or deputy regional head is actually applied in the context of upholding legal authority and equality before the law, so that when the Petitioner follows the process of regional head election, he will be no longer burdened with affairs in respect to performing regional government duties.

2. Whereas the requirements as have been set forth in Article 58 of Law Number 12 Year 2008 regarding the Second Amendment to Law Number 32 Year 2004, where the stipulated requirements are cumulative in nature so that if one of the requirements is not met, it will be considered as not meeting the requirements and void by law. The regulation of the requirement to resign as of the registration for incumbent regional head and/or deputy regional head as regulated in law is the Government's proposal intended for the purpose of fairness and maintaining the neutrality of Civil Servants (PNS). In line with Government Regulation (PP) Number 6 Year 2005, a civil servant (PNS) who will nominate himself/herself as a regional head and/or deputy regional head must resign from his position, and this provision has been effective before the enactment of Law Number 12 Year 2008. In addition, the resignation of incumbent regional head and/or deputy regional head is actually applied in the context of maintaining legal authority and equality before the law, as well as to give the regional head and/or deputy regional head the freedom to take part in the process of regional head election phase without having

- to bear any burden in the form of obstacles or hindrances in performing the duties as regional head and/or deputy regional head.
3. Whereas in one occasion, namely at the Working Meeting of All-Indonesian Provincial Government Association (*Rapat Kerja Asosiasi Pemerintahan Propinsi Seluruh Indonesia* (APPSI)), almost all governors supported the intention to stipulate that an incumbent must resign if he/she re-nominate himself/herself in the next Regional Head Election, such as that is conducted by the Governor of North Sumatra. Thus, if someone indeed has good performance as Regional Head, there shall be no doubt that he will be elected for the second term of office or as Governor or Regent in other places.
 4. Whereas furthermore, in relation to Article 233 paragraph (2) of Law Number 32 Year 2004 regarding Regional Government, it is the transitional provision from indirect Governor election into direct Government election to fulfill the requirements for a more democratic Government election based on the provision of Article 18 paragraph (4) of the 1945 Constitution *juncto* Law Number 32 Year 2004 regarding Regional Government. It needs to be understood that Article 233 paragraph (2) of Law Number 32 Year 2004 regarding Regional Government does not regulate and certainly it is not a limitation of the regional head's term of office as presented in the Petitioner's argument, which assumes that Article 233 paragraph (2) of the *a quo* law has limited or reduced the term of office of a regional head. This means that even if

the new regional head has been elected, the previous regional head will remain incumbent until the expiry of the term of office in accordance with the prevailing laws and regulations. Except if the previous regional head intends to re-nominate him/herself, of course in accordance with the prevailing laws and regulations, he must meet the requirements set forth in Article 58 Law Number 12 Year 2008. This provision applies to all incumbent regional head.

5. Therefore, based on the foregoing arguments, DPR is of the opinion that the provision of Article 233 paragraph (2) Law Number 32 Year 2004 and the provision of Article 58 sub-article q Law Number 12 Year 2008 regarding the Second Amendment to Law Number 32 Year 2004 regarding Regional Government are not contradictory to Article 28D paragraph (1), Article 28I paragraph (2) and paragraph (5) of the 1945 Constitution of the State of the Republic of Indonesia.

[3.15] Considering whereas the statements of the expert presented by the Petitioner, namely Dr. Taufiqurrahman Syahuri, S.H., M.H. have also been heard in the hearing, which in essence states that what is mentioned in Article 233 paragraph (2) of Law 32/2004 and Article 58 sub-article q of Law 12/2008 is not in accordance with common practices. The transitional regulation causes legal uncertainty and harms the regional head whose term of office ends in 2009. Without making any mistake, the term of office of the regional head concerned must be reduced from the five years stipulated by the law. The transitional regulation should not harm those who are subjected to the regulation. Moreover,

the resignation that must be performed by the regional head intending to re-nominate him/herself cannot be revoked (*vide* the Elucidation of Article 58 sub-article q of Law 12/2008);

[3.16] Considering whereas the statement of another expert presented by the Petitioner, namely Dr. Yuswanto, S.H., M.H. has also been heard in the hearing, who in essence states that Article 233 paragraph (2) of Law 32/2004 and Article 58 sub-article q of Law 12/2008 are contradictory to the principle of legal certainty and equal treatment before the law as referred to in Article 6 paragraph (1) sub-paragraph h of Law Number 10 Year 2004 whereas the substantive material of laws and regulations must contain the principle of equal status in law and the government. The election of Lampung Governor was held under Law 32/2004 but since the implementation process was based on Law 12/2008, it gave rise to legal uncertainty and unequal treatment to incumbent candidates. Incumbent candidates do not need to resign when re-nominating themselves and only need to take a leave unpaid by the state. The substance of Article 233 paragraph (2) of Law 32/2004 should be more appropriate if it is laid in the regulated object, rather than the transitional provision. The requirement that incumbent candidates must resign only applies to the position of regional head and there is no similar requirement applied for the President and Vice President, thus according to the expert, there has been an unequal treatment.

Opinion of the Court

[3.17] Considering whereas with regard to the arguments presented by the Petitioner, the statements of the Government, DPR and experts, whether presented in writing or verbally in the hearing, the Court is of the following opinion:

Article 233 paragraph (2) of Law 32/2004 is an article placed by the legislators in Chapter XV regarding Transitional Provisions, which completely reads as follows,

“(1) Regional heads whose term of office end in 2004 until June 2005 shall hold direct regional head election as referred to herein in June 2005.

(2) Regional heads whose term of office end in January 2009 until July 2009 shall hold direct regional head election as referred to herein in December 2008.”

Law 32/2004 came into effect on the date of its enactment, namely October 15, 2004, and constitutes a law which replaces Law Number 22 Year 1999 regarding Regional Government.

[3.18] Considering whereas with regard to the Petitioner’s petition regarding the provision of Article 233 paragraph (2) of Law 32/2004, the Court needs to recognize the intention for providing the *a quo* article. Based on the formulation of the *a quo* article, there are three potential intentions of the legislators of the law to be regulated, namely:

- a. The election of regional head and deputy regional head due to the amendment to law;

- b. The term of office of regional head and deputy regional head due to amendment;
- c. The election of regional head election in regions whose term of office ends at the period as referred to in paragraph (1) and paragraph (2) of the *a quo* article.

[3.19] With the enactment of Law 32/2004 on October 15, 2004, the law came into effect as of the date hereof. Therefore, the election according to this new law will surely be applied on regions in which the term of office of the regional head has expired. Law 32/2004 did not intend to hold election concurrently in all regions according to the new law. It means that the implementation of direct election is adjusted with the schedule of the expiry of the term of office of regional head in certain regions. Hence, the object of regulation with regard to the transitional provision should be the region instead of the regional head. Article 233 paragraph (1) and paragraph (2) should begin with, "*Regions in which the term of office of their regional heads ends....*" The formulation of Law 32/2004 begins with "*Regional head*" and so on, thus it is as if the object of regulation is the regional head, whereas it is actually the regional head election in certain regions instead of in all regions. The substantive material of paragraph (1) of the *a quo* article is, in fact concerned with the implementation of regional head election procedure regulated in the new law. With the enactment of Law 32/2004 on October 15, 2004, the law obviously applies to regions in which the term of office of their regional heads ends on or after the law is enacted. However, Article 233 paragraph (1) stipulates that the direct regional

head election was to commence on June 2005. The formulation of paragraph (2) of the *a quo* article has made the three matters as mentioned above ambiguous. The matter to be regulated should be the regions in which the term of office of their regional heads ends in January 2009 until July 2009, but since the paragraph begins with the words "*Regional head*", the consequence is that the regulated is the regional head. The formulation "*shall hold direct regional head election as referred to herein in December 2008*" raises an issue regarding the clarity of the meaning of such sentence. The Court is of the opinion that the intention of this clause is to stipulate the time for the implementation of the election of regional heads from regions as intended in the aforementioned paragraph (2), so that it is conducted earlier than the supposed schedule. As a result of the changes in election system from the previous law, it is the procedure for regional head election procedure pursuant to the new law that will be used, namely direct election. The word "*direct election*" in this paragraph (2) does not serve as the legal basis for implementing direct election in the regions mentioned. This means that the foregoing regions hold direct election not because of the existence of paragraph (2), but as the consequence of the changes in the election system from the previous law. This is evident from the existence of Article 24 paragraph (5) which states, "*Regional heads and deputy regional heads as referred to in paragraphs (2) and (3) shall be directly elected in one pair by the people of the regions concerned*" and Article 56 paragraph (1) of Law 32/2004 which states, "*Regional heads and deputy regional heads shall be democratically elected in one pair of candidates based on direct, general, free,*

secret, honest and fair principles“. Hence, “*direct election*” in this Article 233 paragraph (2) does not serve as the main substance set forth in the transitional regulation of Article 233 paragraph (2) of Law 32/2004. The provision of paragraph (2) also does not regulate the position of regional head, since this paragraph (2) only regulates the implementation of regional head election. Article 233 paragraph (2) does not determine that, because the regional head election in regions as intended in the aforementioned paragraph (2) is held earlier, the term of office of the regional head to be replaced will therefore become shorter, namely it will end immediately after the election of the new regional head. Hence, the term of office of the regional head does not constitute the main substance of paragraph (2) Article 233 of the *a quo* law. The only main substance in *a quo* paragraph (2) is, in fact concerned with earlier administration of regional head election for regions in which the term of office of their regional heads will end as referred to in *a quo* paragraph (2). The problem is whether such matter is appropriate to serve as the substance of the Transitional Provision. The transition from old to new regulation in the procedure of regional head election has occurred since the existence of regions in which the term of office of their regional heads has expired, which in practice has often occurred. The existence of the provision of Article 233 paragraph (2) of Law 32/2004 is more grounded on the calculation of the schedule of general election for the members of DPR, DPD and DPRD as well as the President/Vice President for the 2009-2014 term of office so as not to be disturbed by regional head election. Therefore, based on the aspect of substance, the provision is not a transitional provision, but more a

special regulation which is required due to a special matter, namely the simultaneous timing between the general election for the members of DPR, DPD, DPRD, President and Vice President and regional head general election.

[3.20] Considering whereas the provision of Article 233 paragraph (2) of Law 32/2004 petitioned for review by the Petitioner, which reads, "*Regional heads whose term of office ends in January 2009 until July 2009 shall hold direct regional head election as referred to herein in December 2008*", has evidently amended with the coming into effect of Article 233 paragraph (2) of Law 12/2008 which reads, "*Voting in the election of regional head and deputy regional head whose term of office ends on November 2008 up to July 2009 shall be administered hereunder by no later than October 2008*". With regard to the Petitioner's petition, the Court is of the opinion that the Petitioner's petition is irrelevant for consideration, since Article 233 paragraph (2) of Law 32/2004 is no longer valid, thus cannot be possibly made into an object of petition. Therefore, the petition of judicial review against Article 233 paragraph (2) of Law 32/2004 does not meet the requirement as stipulated in Article 51 of the Constitutional Court Law;

[3.21] Considering whereas even if the provision petitioned for review by the Petitioner is Article 233 paragraph (2) of Law 12/2008, *quod non*, the Court is of the opinion that the petition is not grounded, since the article does not regulate the reduction of the five years term of office of a regional head, as set forth in Article 110 paragraph (3) of Law 32/2004, but instead only regulates the

scheduling of the election of regional heads whose term of office ends as of January 2009 until July 2009;

[3.22] Considering whereas Law 32/2004 has been amended based on Law 12/2008, where paragraph (1) of Article 233 of Law 32/2004 has been nullified. According to the Court, the nullification of paragraph (1) of Article 233 of Law 32/2004 does not, in fact have any effect, since paragraph (1) is a paragraph that is only valid once (*eenmalig*), namely in regions in which the term of office of their regional heads ends on 2004 until June 2005. When Law 12/2008 was enacted, those regions have held Regional Head Election as regulated in Law 32/2004. Hence, in accordance with the nature of transition, the provision of paragraph (1) of Article 233 Law 32/2004 has automatically become void.

[3.23] Considering whereas the amendment to paragraph (2) Article 233 of Law 32/2004 by Law 12/2008 contains two matters. *First*, the paragraph corrected the wording of paragraph (2) which originally read, “*Regional heads...shall hold*” into, “*voting in the election of regional heads ... shall be administered.*” With such amendment, the intention of new paragraph (2) becomes clearer, namely it is related to the administration of regional head election. However, the amendment has not explained whether the legislators intend to reduce the term of office of regional heads whose term of office ends in January 2009 until July 2009 or not. *Second*, the paragraph is related to the implementation of regional head election which originally would be held by no

later than December 2008 and it is changed into by no later than October 2008. Even though paragraph (2) of Article 233 Law 32/2004 has been amended, the matters explained concerning paragraph (2) prior to amendment remains relevant for consideration;

[3.24] Considering whereas the Court will further consider the petition for judicial review of Article 58 sub-article q of Law 12/2008. Law 12/2008 is a law regarding the second amendment to Law 32/2004, the substance of which is, among others things, amending Article 58 sub-article d and sub-article f, nullifying sub-article l, and adding sub-article q. As a result of addition of sub-article q of Article 58 of the *a quo* law, the requirement of regional head and deputy regional head election increases, from which previously it is not added with as referred to in sub-article q, "*resign as of the registration for incumbent regional head and/or deputy regional head*". This provision is certainly prospective in nature, but the legislators did not consider that the prospective imposition on the additional sub-article q would face two different situations in practice concerning the term of office of a regional head subject to the provision of sub-article q of the *a quo* article. If this provision of sub-article q, which is related to Article 86 paragraph (1) of Law 32/2004 which reads, "*Voting for the election of regional head and deputy regional head shall be administered by no later than 1 (one) month before the expiry of the term of office of the regional head*", applies generally, it will not have different consequences to all regional heads. In reality, however, there are regions whose regional heads will be subject to by the provision of Article 233 paragraph (2) of Law 12/2008 and if this

provision of Article 58 sub-article q is also imposed on the aforementioned regional heads, this will cause even larger loss as compared to regional heads not included in the regions as referred to in Article 233 paragraph (2) of the *a quo* law. A region in which the term of office of their regional head ended as intended in Article 233 paragraph (2) of Law 12/2008 is merely coincidental and not related to the actions of related regional heads. With the addition of sub-article q to Article 58 of Law 12/2008 which in fact faces two different conditions, the implementation of this sub-article q provision requires separate transitional regulation so as not to have adverse consequences;

[3.25] The Court is of the opinion that the effort to prevent abuse of power in the process of administering regional head election is appropriate and indeed, should be made. In a general election, abuse of power should be prevented. On the other hand, it has to be considered that the use of such efforts must not be excessive so as to impair the rights of people guaranteed by the law. For someone elected as a regional head, the law has granted the right to hold office for five years. As a result of the provision included in sub-article 1 of Article 58 of Law 12/2008, a regional head intending to nominate himself/herself as regional head for the next period will lose his right to assume his position for a complete five years. The right to assume a position for a complete five years may be reduced if the concerned no longer meets the requirement as regional head as stipulated in Article 29 paragraph (2) of Law 32/2004. Article 28 of Law 32/2004 has specifically mentioned prohibitions for a regional head and if there is a violation of those prohibitions by the regional head, the concerned regional head

may be dismissed. It is true that, according to the statements of the Government and DPR, the potential conflict of interest for incumbents must be avoided in the regional head election, but this does not necessarily mean that the resignation of the incumbents must be permanent and cannot be revoked which causes the reduction of the term of office that constitutes the constitutional right of the incumbent. The provision requiring permanent and irrevocable resignation is an unproportional provision. In order to avoid conflict of interest, incumbents should only be temporarily dismissed from the duty as of the registration until the stipulation of elected regional head candidates by the General Election Commission (KPU) as in the provision applied to the Chairperson or members of DPRD [*vide* Article 59 paragraph (5) sub-paragraphs h and i]. This is clearly evident in the Elucidation of Article 58 sub-article q which among others states, *“The resignation of governor and deputy governor shall be proven by the submission of resignation letter which cannot be revoked, along with the letter of approval of the Minister of Home Affairs on behalf of the President”*. The aforementioned elucidation shows more of the unproportional arrangement which causes legal uncertainty (*rechtsonzekerheid*). The requirement for the resignation of the incumbent candidates as set forth in Article 58 sub-article q of Law 12/2008 causes legal uncertainty (*rechtsonzekerheid*) on the term of office of the regional head, namely five years [*vide* Article 110 paragraph (3) of Law 32/2004] as well as an unequal treatment between fellow state officials [*vide* Article 59 paragraph (5) sub-paragraph i of Law 32/2004], thus it can be said as contradictory to Article 28D paragraph (1) of the 1945 Constitution;

[3.26] Article 58 of Law 12/2008 contains qualitative and administrative requirements for citizens intending to nominate themselves as regional head and/or deputy regional head. However, with the addition of sub-article q to the article, the article has become ambiguous, both from formulation and substance aspects, since it confuses the requirements for citizens who nominate themselves and requirements for the position. The foregoing provision of Article 58 sub-article q completely reads as follows, “*Regional head and deputy regional head candidates shall be **Indonesian citizens meeting the requirements...resign** as of the registration for incumbent regional head and/or deputy regional head*”.

4. CONCLUSION

Based on the aforementioned considerations, the Court concludes, as follows:

[4.1] Whereas Article 233 paragraph (2) of Law 32/2004 is no longer relevant to be the object of the petition, since the aforementioned Article 233 paragraph (2) has been amended by Article 233 paragraph (2) of Law 12/2008, thus the Petitioner’s petition must be declared as can not be accepted;

[4.2] Whereas the requirement for the resignation of incumbents as set forth in Article 58 sub-article q of Law 12/2008 has caused legal uncertainty (*rechtsonzekerheid*) on the term of office of regional

heads, namely five years [*vide* Article 110 paragraph (3) of Law 32/2004] as well as unequal treatment between fellow state officials [*vide* Article 59 paragraph (5) sub-paragraph i of Law 32/2004], thus contradictory to Article 28D paragraph (1) of the 1945 Constitution;

[4.3] Whereas in addition, Article 58 sub-paragraph q of Law 12/2008 also contains unproportional and ambiguous provision, both based on formulation and substance aspects, since it causes unequal treatment between fellow state officials and legal uncertainty (*rechtsonzekerheid*), thus the Petitioner's petition to review the constitutionality of Article 58 sub-article q of the *a quo* law is sufficiently grounded by law to be granted.

5. DECISION

In view of Article 56 paragraph (1), 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 the State Gazette of the Republic of Indonesia Number 4316), thus under the 1945 Constitution of the State of the Republic of Indonesia,

Passing the Decision:

To declare that the Petitioner's petition is partially granted;

To declare that Article 58 sub-article q of Law Number 12 Year 2008 regarding the Second Amendment to Law Number 32 Year 2004 regarding Regional Government (State Gazette of the Republic of Indonesia Year 2008 Number 59, Supplement to the State Gazette of the Republic of Indonesia Number 4844) is contradictory to the 1945 Constitution of the State of the Republic of Indonesia.

To declare that Article 58 sub-article q of Law Number 12 Year 2008 regarding the Second Amendment to Law Number 32 Year 2004 regarding Regional Government (State Gazette of the Republic of Indonesia Year 2008 Number 59, Supplement to the State Gazette of the Republic of Indonesia Number 4844) has no binding legal effect.

To declare that the Petitioner's petition insofar as it concerns Article 233 paragraph (2) of Law Number 32 Year 2004 regarding Regional Government (State Gazette of the Republic of Indonesia Year 2004 Number 125, Supplement to the State Gazette of the Republic of Indonesia Number 4437) cannot be accepted.

To order the inclusion of this decision in the State Gazette of the Republic of Indonesia accordingly.

Hence the decision was made in the Consultative Meeting of Constitutional Court Justices on Friday, the first of August two thousand and eight which was attended by nine Constitutional Court Justices, pronounced in

the Plenary Session of the Constitutional Court open for the public on this day, Monday, the fourth of August two thousand and eight, by the eight Constitutional Court Justices, namely Jimly Asshiddiqie as Chief Justice and concurrent Member, H. Harjono, H.A.S. Natabaya, H.A. Mukthie Fadjar, HM. Arsyad Sanusi, I Dewa Gede Palguna, Maruarar Siahaan, and Muhammad Alim, respectively as members assisted by Alfius Ngatrin as Substitute Registrar in the presence of Petitioner/Petitioner's Attorney, the Government or its representative, and the People's Legislative Assembly or its representative;

CHIEF JUSTICE,

sgd.

Jimly Asshiddiqie

MEMBERS

sgd.

H. Harjono

sgd.

H. Abdul Mukthie Fadjar

sgd.

I Dewa Gede Palguna

sgd.

H.A.S. Natabaya

sgd.

HM. Arsyad Sanusi

sgd.

Maruarar Siahaan

sgd.

Muhammad Alim

SUBSTITUTE REGISTRAR,

sgd.

Alfius Ngatrin