



## DECISION

Number 27/SKLN-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 Dispute over the authority of State Institutions whose authorities are granted by the 1945 Constitution of the State of the Republic of Indonesia, filed by:

[1.2] **Drs Aziz Kharie, ME**, as Chairperson of the General Election Commission of North Maluku Province and holder of mandate of the General Election Commission having its address at Jalan Arnold Mononutu Number 10, Ternate, North Maluku, represented and/or assisted by the Advocates Bambang Widjojanto, S.H., M.H., Iskandar Sonhadji, S.H., and Diana Fauziah, S.H., of Law Firm Office Widjojanto, Sonhadji & Associates having their address at Citylofts Building Sudirman fl. 21 Suite 2108, Jalan K.H. Mas Mansyur Number 121, Central Jakarta 10220, either individually or jointly acting for and on behalf of the authorizer. The authorizer chooses a permanent legal domicile in the office of its attorney-in-fact.

Hereinafter referred to as ----- **Petitioner**;

Against:

**[1.3]**           **The President of the Republic of Indonesia**, having his domicile at Jalan Medan Merdeka Utara, Central Jakarta. In this matter, granting a power of attorney to Andi Mattalatta, Minister of Law and Human Rights of the Republic of Indonesia, and H. Mardiyanto, Minister of Home Affairs of the Republic of Indonesia, by virtue of a Special Power of Attorney dated December 16, 2008, acting for and on behalf of the President of the Republic of Indonesia.

Hereinafter referred to as ----- **Respondent;**

**[1.4]**           Having read the petition of Petitioner;

                  Having heard the statements of Petitioner;

                  Having Heard and read the written statements of Respondent;

                  Having Heard and read the written statements of the Related Party, namely the General Election Commission;

                  Having Heard and read the written statements of the Related Party, namely the Regional People's Legislative Assembly of North Maluku Province;

                  Having Heard and read the written statements of the Related Party, namely Governor of North Maluku Province;

Having heard the statements of the Related Party, namely Supervisory Committee of the General Election of Regional Head and Deputy Regional Head of North Maluku Province;

Having examined evidence presented by Petitioner, Respondent, and the Related Party, namely Governor of North Maluku Province;

Having heard the statements of the experts and witnesses of Petitioner and Respondent;

Having read the written conclusion of Petitioner, Respondent, and the Related Party, namely Governor of North Maluku Province;

### 3. LEGAL CONSIDERATIONS

**[3.1]** Considering whereas the purpose and objective of the petition shall be concerned with dispute over the authority of state institution granted by the Constitution [Hereinafter referred to as Dispute over Constitutional Authority of State Institution (SKLN)] between the General Election Commission of North Maluku Province (hereinafter referred to as KPU of North Maluku Province) as Petitioner and the President of the Republic of Indonesia (hereinafter referred to as the President) as Respondent. The said SKLN shall be concerned with the authority of Respondent in stipulating the appointment of Governor and Vice Governor of North Maluku through Presidential Decree Number 85/P Year 2008 which according to the Petitioner is deemed as taking, reducing, and/or ignoring the constitutional authority of the Petitioner in designating Candidate Pair of the Elected Governor and Vice Governor as a follow-up to the results of General Election of Regional Head and Deputy Regional Head (hereinafter referred to as Regional Head General Election) of North Maluku Province organized by the Petitioner;

**[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:

1. Authority of the Court to examine, hear, and decide upon the *a quo* petition;

## 2. Legal standing of the Petitioner and the Respondent;

With respect to the aforementioned two matters, the Court is of the following consideration and opinion:

### **Authority of the Court**

**[3.3]** Considering whereas pursuant to Article 24C paragraph (1) of the 1945 Constitution of the State of the Republic of Indonesia (hereinafter referred to as the 1945 Constitution) and Article 10 paragraph (1) sub-paragraph b 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, hereinafter referred to as the Constitutional Court Law) *juncto* Article 12 paragraph (1) sub-paragraph b of Law Number 4 Year 2004 regarding Judicial Power (State Gazette of the Republic of Indonesia Year 2004 Number 8, Supplement to State Gazette of the Republic of Indonesia Number 4358), one of the authorities of the Court shall be to hear at the first and final level, the decision of which shall be final to decide upon the dispute over the authority of state institution granted by the Constitution;

**[3.4]** Considering whereas the *a quo* petition, as argued by the Petitioner, is concerned with the dispute over the authority of state institution granted by the 1945 Constitution, hence *prima facie* constitutes authority of the Court to examine, hear, and decide upon it;

### **Legal Standing of the Petitioner and Respondent**

**[3.5]** Considering whereas based on Article 61 of the Constitutional Court Law, with respect to dispute over the authority of state institution granted by the 1945 Constitution, the following legal standing requirements must be met:

- a. All disputed parties (*subjectum litis*), namely the Petitioner and Respondent, shall be state institutions whose authority is granted by the 1945 Constitution;
- b. The disputed authority (*objectum litis*) shall be authority granted by the 1945 Constitution;
- c. The Petitioner must have direct interest to the disputed authority granted by the 1945 Constitution.

**[3.6]** Considering whereas in the *a quo* case, the Petitioner shall be KPU of North Maluku Province while the Respondent shall be the President. Therefore, with regard to the issue of this legal standing, namely *subjectum litis*, *objectum litis*, and direct interest of the Petitioner, the Court will take into account arguments of Petitioner, Respondent, and the Related Parties, as well as evidence presented by the respective parties, either in the form of written evidence or statements of the experts and witnesses in the hearing, as well as the conclusion of the Petitioner and the Respondent insofar as it is concerned with the issue of legal standing, as follows:

### **Arguments of the Petitioner as well as the Supporting Evidence**

**[3.7]** Considering with regard to the aforementioned issue of *subjectum litis*, the Petitioner argues that the Petitioner and the Respondent are state institutions whose authority granted by the 1945 Constitution, with the following argumentation:

- a. Whereas KPU is a state institution whose authority is granted by the 1945 Constitution based on Article 22E paragraph (5) of the 1945 Constitution which reads, “*General Elections shall be organized by a general election commission which is national, permanent, and independent in nature.*” The term of Commission in the *a quo* article does not refer to certain institution, but to function of an institution, hence general election organizing institution which can be qualified as state institutions organizing the general election shall be the General Election Commission (KPU), Provincial General Election Commission (Provincial KPU), and Regency/Municipality General Election Commission (Regency/Municipality KPU);
- b. Whereas in relation to national characteristic of a general election commission, as referred in Article 22E paragraph (5) of the 1945 Constitution, the *a quo* case must be observed in a contextual manner, especially in relation to the Regional Head General Election the scope of which is only at the province, regency, or municipality level. The Regional Head General Election is not the General Election with national characteristic like the General Election of members of DPR, DPD, and

DPRD, as well as the General Election of President and Vice President, hence in explaining Article 22E paragraph (5) of the 1945 Constitution, it should be related to Article 22E paragraph (6) of the 1945 Constitution which states, *“Further provisions regarding the general election shall be provided for in law”*;

c. According to the Petitioner, Constitutional mandate formulated in Article 22E paragraph (6), among other things, is provided for in Law Number 22 Year 2007 regarding the General Election Organizer (hereinafter referred to as Law 22/2007) in which Article 9 paragraph (3) sub-paragraph j, sub-paragraph k, sub-paragraph l, and sub-paragraph u explicitly state that Provincial KPU has the authority in relation to the General Election of Regional Head and Deputy Regional Head, namely, among other things, in the matter of:

- *“stipulating and announcing the results of the General Election of Regional Head and Deputy Regional Head at the Provincial level”* (sub-paragraph j);
- *“issuing provincial KPU Decision to ratify the results of the General Election of Regional Head and Deputy Regional Head and announcing it”* (sub-paragraph k);



- “*announcing candidate pair of Regional Head and Deputy Regional Head at the Provincial level and drawing up its minutes*” (sub-paragraph l); and
- “*submitting report concerning the results of the General Election of Regional Head and Deputy Regional Head at the Provincial level to DPR, the President, Governor, and Provincial People’s Legislative Assembly*” (sub-paragraph u).

Accordingly, Provincial KPU executes its authority as a state institution based on Constitutional mandate, especially in relation to the Regional Head General Election at the Provincial level, hence the Petitioner has met the criterion of *subjectum litis*, namely as the party to file petition for SKLN to the Court, or in other words, the Petitioner (Provincial KPU) may be qualified as state institution whose authority is granted by the 1945 Constitution;

- d. Whereas in addition, the Petitioner also argues that it has obtained full mandate from KPU to follow-up the issue of the Regional Head General Election of North Maluku to the Court through KPU letter number 2838/15/X/2008 dated October 17, 2008 (exhibit P-22). The granting of such mandate or power is supported by Andi Nurpati representing the Related Party, namely KPU in the hearing on December 23, 2008 by stating, “... *KPU of North Maluku Province has a legal standing as the Petitioner in the dispute over the authority among State Institutions in the*

*Constitutional Court ...*” (vide the conclusion of the Petitioner on January 13, 2009 on page 1).

- e. Whereas with regard to the Respondent, namely the President, Article 4 paragraph (1) of the 1945 Constitution has clearly stated that “*the President of the Republic of Indonesia shall hold the government authority pursuant to the Constitution*” and Article 5 of the 1945 Constitution as well, then the President shall be a state institution having constitutional authority granted by the 1945 Constitution. Therefore, the President has met the criterion as the Respondent in the *a quo* case.

**[3.8]** Considering whereas *objectum litis* or the disputed authority, according to the Petitioner, is the authority granted by the 1945 Constitution, with the following argumentation:

- a. Whereas the Petitioner has the constitutional authority granted by Article 22E paragraphs (5) and (6) of the 1945 Constitution closely related to Article 18 paragraph (4) of the 1945 Constitution stating that, “*Governor, Regent, and Mayor, respectively act as the regional government heads at the provincial, regency, and municipality level elected in a democratic manner*”;
- b. Whereas the implementation of the aforementioned constitutional authority is in accordance with Article 22E paragraph (6) of the 1945 Constitution further provided for by law, *in casu* Law 22/2007. Accordingly, authority of

the Petitioner provided for in Law 22/2007 shall be constitutional authority, as in the opinion of the Court, *“the aforementioned authorities can be included in a law (vide Decision Number 004/SKLN-IV/2006 dated July 12, 2006 on page 90, exhibit P-1);*

- c. Whereas based on Article 22E paragraphs (5) and (6) of the 1945 Constitution *juncto* Law 22/2007, according to the Petitioner, KPU, Provincial KPU, and Regency/Municipality KPU shall have constitutional right to organize the General Election, including the Regional Head General Election (exhibit P-2);
- d. Whereas Article 9 paragraph (3) of Law 22/2007 specifies duties and authorities of Provincial KPU in the organization of the General Election of Regional Head and Deputy Regional Head, among other things, as follows:
- *“to designate candidate pair of regional head and deputy regional head at the provincial level who have met the qualification” (vide sub-paragraph g);*
  - *“to stipulate and announce the results of vote count recapitulation of the General Election of Regional Head and Deputy Regional Head at the Provincial level based on the results of vote count recapitulation in Regency/Municipality KPU in the provincial area concerned by drawing up minutes on vote count and certificate of vote count results” (vide sub-paragraph h);*

- *“to draw up minutes on vote count and certificate of vote count results and be obligated to submit it to the witnesses participating in the General Election, General Election Supervisory Committee at the his Provincial level, and KPU” (vide sub-paragraph i);*
  - *“to issue Provincial KPU decision to ratify the results of the General Election of Regional Head and Deputy Regional Head at the Provincial level and announce it” (vide sub-paragraph k);*
  - *“to submit the report concerning the results of the General Election of Regional Head and Deputy Regional Head at the Provincial level to the People’s Legislative Assembly, the President, Governor, and Provincial People’s Legislative Assembly” (vide sub-paragraph u);*  
and
  - *“to exercise other duties and authorities granted by KPU and/or law” (vide sub-paragraph v).*
- e. Whereas in exercising its constitutional rights to organize the General Election, *in casu* the Regional Head General Election, the Petitioner realizes the principles of the General Election set forth in Article 22E paragraph (1) of the 1945 Constitution, namely direct, general, independent, confidential, honest, and just once in every five years and constitutes an institution which is independent and free from intervention of any party, along with clear transparency and accountability. Therefore, the direct interest of the Petitioner shall be the organization of the Regional Head General Election in North Maluku Province highly

upholding the aforementioned principles of the General Election, including the most significant stages of the Regional Head General Election, namely “...*stipulation of the winner of the General Election based on majority valid votes acquired by participants in the General Election shall be the constitutional authority of the Petitioner, in this matter provincial KPU, which must be exercised independently without any intervention of any institution*” (vide conclusion of the Petitioner dated January 13, 2009, point 24, page 11);

- f. Whereas accordingly, the Petitioner is of the opinion that it has met the criterion of legal standing to file petition for SKLN to the Court as intended in Article 61 of the Constitutional Court Law;

**[3.9]** Considering whereas in order to corroborate its arguments, the Petitioner has also presented documentary or written evidence (exhibit P-1 up to and including exhibit P-32) ratified in the hearing on December 23, 2008 and presented the witnesses as well as experts providing statements under oath in the hearing on January 8, 2009. Such statements are completely included in the description concerning the facts of the case, which in principal insofar as it is related to the legal standing state the following matters respectively:

**[3.9.1] Expert Prof. Dr. Indria Samego**

- The expert approaches the issue from authority of his scientific field, namely political science with a title “to Review Democracy through the

Constitutional Court: Solution to the crisis in the Regional Head General Election of North Maluku”;

- The expert does not discuss the issue of legal standing of the Petitioner, but she only expects that the Court resolves it based on the legal aspect, instead of legal consideration. According to the expert, since the beginning, the crisis of the Regional Head General Election of North Maluku has been marked with various violations committed by the organizer (KPU of North Maluku Province) resulting in takeover by KPU and temporary dismissal of Chairperson and a member of KPU of North Maluku Province. But then, the Government stands on the results of vote count held by the temporary dismissed Chairperson and member of KPU of North Maluku Province. The expert is of the opinion that this attitude of the Government is an intervention to KPU’s authority in the organization of the Regional Head General Election of North Maluku;

**[3.9.2] Expert M. Fajrul Falakh, S.H., M.A., M.Sc.**

- North Maluku KPU is a state institution since it is indeed not a private company, a non-governmental organization, or a part of civil society. Considering that KPUD (KPU of North Maluku Province) is not a state institution means to deem that KPU, with capital letter, is not a state institution, as the 1945 Constitution only specifies the general election commission without capital letter;

- From the *subjectum litis* point of view, state institution is neither in fact private institution nor social institution. In addition it is not natural person, either individually or in group, not private legal person. State institution is an institution intended by the State to perform state functions commonly categorized as public function;
- Authority of provincial KPUD/KPU to organize the Regional Head General Election is the authority granted by the 1945 Constitution since the regional head election set forth in Article 18 paragraph (4) of the 1945 Constitution includes in the legal regime of the General Election, though it is included in a chapter regarding Regional Government, rather than in a chapter regarding the General Election, Article 22E of the 1945 Constitution. Provincial KPUD/KPU is a part of state institution hierarchy organizing the Regional Head General Election as the organization of executive General Election decentralized in or to region;
- Concerning the object of dispute (*objectum litis*), the organization of the General Election pursuant to Article 22E paragraph (1) of the 1945 Constitution constitutes a type of constitutional rights or state function; the term “the General Election” here is still general and abstract in nature. Likewise, the term “the General Election” in Article 22E paragraph (5) of the 1945 Constitution which reads, “*General elections shall be organized by a general election commission which is national, permanent, and independent in nature*”, is also still abstract, general, not specific and is

not intended to any person whatsoever. Thus, standardization of “general election” (*Pemilu*) in the 1945 Constitution still constitutes a general standardization. If it is specified, for example by the experts in the political science, it can be categorized into legislative General Election which can be specified into national legislative General Election for members of DPR/DPD, and local legislative General Election for members of DPRD (province and regency/municipality), as well as executive General Election which can also be categorized into national executive General Election for President/Vice President and local/regional executive General Election for Regional Head/Deputy Regional Head. The existence of general election commission as an administrative institution and the methods of organizing such general elections are not provided for in the 1945 Constitution, but in law, namely Law 22/2007 and Law Number 10 Year 2008 regarding the General Election of Members of People’s Legislative Assembly, Regional Representative Council, and Regional People’s Legislative Assembly, including Law Number 32 Year 2004 regarding Regional Government (hereinafter referred to as Law 32/2004). Constitutional authority for the organization of the General Election is distributed on the basis of spatial area factor, namely with respect to General Elections held simultaneously at the national level, namely the General Election of Members of DPR, DPD, and DPRD, and the General Election of President and Vice President are organized in a centralistic manner by KPU using distributive assistances by regional KPU, even the stipulation of the results of the



General Election of DPRD is held by regional KPU according to its level. Meanwhile, with respect to the Regional Head General Election, the organization through the stipulation of its results is conducted by regional KPU according to its institutional system. Pursuant to Article 1 sub-article 7 *juncto* Article 4 of Law 22/2007, in terms of or in relation to the Regional Head General Election, KPU “only” receives report on the results of the Regional Head General Election from provincial KPU and regency/municipality KPU. Accordingly, the position of regional KPU (provincial KPU and regency/municipality KPU) is a part of state institution in organizing the General Election, in this matter executive General Election at the region level (the Regional Head General Election) and the addressing of general election commission as the General Election organizer has not become a definitive term;

- By using the way of thinking developed all this time, KPU does not have constitutional authority since the 1945 Constitution only mentions a general election commission which is still general and abstract in nature and the method of its organization is also not regulated. Law which subsequently regulates it, namely Law 22/2007 selects the name of the General Election Commission (KPU) hierarchical in nature with the existing KPU existing in the regions, namely Provincial KPU and regency/municipality KPU whereas the 1945 Constitution does not require hierarchical institutionalization of general election commission;

- What is referred in Article 1 sub-article 5 of Law 22/2007 is correct, namely “*General Election Organizers shall be institutions organizing the General Elections of members of People’s Legislative Assembly, Regional Representative Council, Regional People’s Legislative Assembly, and President and Vice President, as well as Regional Head and Deputy Regional Head held in a direct manner by the people*”;

**[3.9.3] Expert Prof. Dr. H.M. Hadin Muhjad**

- There are three legal issues to be answered, namely: a) is provincial KPU authority for organizing the Regional Head General Election the authority granted by the 1945 Constitution; b) does provincial KPU institution in the Regional Head General Election have the characteristic of national, permanent, and independent; and c) can the constitutional authorities of provincial KPU in organizing the Regional Head General Election be taken over and/or intervened by the President;
- In order to answer the aforementioned three issues, it is necessary for us to analyze the provisions of Article 18 paragraph (4) of the 1945 Constitution which states, “*Governor, Regent, and Mayor respectively act as Regional Government Heads at the province, regency, and municipality level elected in a democratic manner.*” The aforementioned norm of Article 18 paragraph (4) of the 1945 Constitution is still transparent which still requires interpretation, as the term “in a democratic manner” will serve as the basis for the method and such method will become the basis for

stipulating the institutions. According to the interpretation of the Court in Decision Number 04/SKLN-IV/2006 (page 92), Article 18 paragraph (4) of the 1945 Constitution is actually intended as a standard regarding the procedures for election. Furthermore, Decision Number 072-073/PUU-II/2003 states that it is the authority of legislator whether to elect direct election method or other democratic manners. With respect to the interpretation made by the Court, Article 1 sub-articles 1, 2, 3, and 4 of Law 22/2007 has provided for that the democratic election of governor, regent, and mayor set forth in Article 18 paragraph (4) of the 1945 Constitution is equalized with the General Election for members of DPR, DPD, and DPRD, and the General Election of President and Vice President as intended in Article 22E paragraph (2) and Article 6 paragraph (1) of the 1945 Constitution;

- Accordingly, the election of governor constitutes constitutional authority since the election method has been stipulated to be in a direct manner by Law. Thus, with respect to the second issue, by quoting the opinion of Hans Kelsen, the institutional aspect of the organizers is determined by function, which seem to be also adopted by the Court as can be read in Decision Number 04/SKLN-IV/2006 on page 87 (*sic*) stating as follows, *"...to determine whether a state institution is as intended in Article 24C paragraph (1) of the 1945 Constitution, the first matter should be observed is the existence of certain authorities in the Constitution and subsequently to what institutions such authorities will be granted."* The conclusion is that

if the authority constitutes constitutional authority, the institution exercising such authority is the state institution, accordingly provincial KPU having authority to organize the Regional Head General Election which is also constitutional authority, shall automatically be categorized as state institution as intended in Article 24C paragraph (1) of the 1945 Constitution. Moreover, whereas based on Law 22/2007, constitutional authority to organize the General Election, including the Regional Head General Election, shall be exercised hierarchically by KPU, provincial KPU, and regency/municipality KPU;

- With respect to the third issue, it is the authority of provincial KPU to determine who is elected as governor and vice governor and such authority cannot be taken over or intervened by other state institutions;

**[3.9.4] The Expert Benyamin Mangkoedilaga, S.H.**

- It is evident that the statement of the experts as included in Facts of the Case related to this case does not pertain to legal standing issue;

**[3.9.5]** In addition to the aforementioned experts, the Petitioner has also presented three witnesses, namely: Sayuti Asyathri, Suratman Basimin, and Rusli Jalil whose respective statements apparently do not pertain to legal standing;

**Response of the Respondent along with Supporting Evidence**

**[3.10]** Considering whereas with regard to the Petitioner's arguments, the Respondent has provided verbal and written response in the hearing held on December 23, 2008 which is completely included in the description concerning Facts of the Case, which principally, insofar as it is related to the legal standing is as follows:

- Referring to the provisions of Article 24C paragraph (1) of the 1945 Constitution and Article 61 of the Constitutional Court Law, as well as the Constitutional Court Regulation Number 08/PMK/2006, the Respondent is of the opinion that the Petitioner has made mistake and error in construing state institutions or other state institutions whose authorities are granted by the 1945 Constitution, since state institutions are categorized into: 1) core state institution or state primary organs, namely: MPR, DPR, DPD, President, Audit Board, the Supreme Court, and the Constitutional Court; 2) supporting state institution or state auxiliary organs, among other things, Judicial Commission, etc; and 3) state institutions established by law, among other things: Indonesian Broadcasting Commission (KPI), Corruption Eradication Commission (KPK), etc. (*vide* written statements of the Respondent dated December 23, 2008, page 5);
- Accordingly, the Petitioner namely KPU of North Maluku Province is not a state institution the existence and authority of which are granted by the 1945 Constitution and therefore the Petitioner has not met the requirement of *subjectum litis* in the *a quo* case. It is actually correct that KPU of

North Maluku Province is an organ under the central KPU having hierarchical relationship, however KPU of North Maluku Province can neither act autonomously nor as legal subject representing organ having higher position unless obtaining special authority from the central KPU. This opinion is supported by the opinion of Expert Prof. Dr. Zudan Arif Fakrulloh in the hearing held on January 8, 2008 which states, "*KPU of North Maluku Province as subordinate institution of KPU cannot act for and on behalf of KPU unless obtaining a special power of attorney from KPU.*" Supported by the opinion of the Expert Suharnoko, S.H., L.L.I. in his statement presented in the hearing on January 8, 2009, the Respondent is of the opinion that KPU Letter Number 2838/15/X/2008 dated October 17, 2008 (exhibit P-22) submitted to the North Maluku KPU is a common letter having no criteria as regulated in Circular Letter of the Supreme Court (SEMA) Number 2 Year 1959 and SEMA Number 6 Year 1994, which should specifically mention relative competency to which court such special power of attorney is used, identity, and legal standing of the parties, as well as the object of dispute questioned. If the aforementioned cumulative criteria are not met, based on the Supreme Court Decision Number 1912 K/Pdt/1984 such power of attorney will be deemed as a common power of attorney which cannot be used in a lawsuit before the court (*vide* conclusion of the Respondent dated January 13, 2009, pages 2-3);

- From the *objectum litis* point of view, the disputed object is not the authority granted or provided for by the 1945 Constitution, but the authority granted by Law, namely Law 32/2004 *juncto* Law 22/2007. This is in line with legal considerations of the Court in its Decision Number 04/SKLN-IV/2006 which states, among other things, "*Formulation of dispute over the authority of state institution granted by the Constitution has only been intended to the authority granted by the Constitution which becomes objectum litis of the dispute and the Court has the authority to decide upon such dispute.* Dispute over the authority granted by law does not constitute the authority of the Court." the Respondent is of the same opinion with Expert Prof. Dr. Zudan Arif Fakrulloh, S.H., M.H., and Dr. Andi Irmanputra Sidin, S.H., M.H., who do not deny the opinion of the expert presented by the Petitioner, Fajrul Falakh, S.H., M.A., stating that the North Maluku KPU is a state institution, however according to the Respondent, the position and authority of KPUD *in casu* KPU of North Maluku Province are granted by Law 32/2004 and Law 22/2007. The standing of the Respondent supported by the aforementioned opinion of expert presented by the Respondent is in line with legal considerations of the Court in Decision Number 002/SKLN-IV/2006 which in principal states that KPUD is a state institution, however in the organization of the Regional Head General Election, the authority is not granted by the Constitution as intended in the 1945 Constitution and the Constitutional

Court Law (*vide* conclusion of the Respondent dated January 13, 2009, pages 7-8);

- Based on the foregoing arguments, it is evident that the Petitioner has no capacity to act for and on behalf of KPU and therefore it is proper if the Court states that the Petitioner has no legal standing in the *a quo* case, and it has also been evident that the object of dispute petitioned is not the dispute of authority granted by the 1945 Constitution, hence the Petitioner's petition must be declared as unacceptable;

**[3.11]** Considering whereas the Respondent's arguments regarding legal standing conveyed in Statement of the aforementioned response and conclusion are supported by the experts presented in the hearing, namely Prof. Dr. Zudan Arief Fakrulloh, S.H., M.H., Dr. Andi Irmanputra Sidin, S.H., M.H., and Suharnoko, S.H., L.L.I., which have been completely included in the description regarding Facts of the Case, which in principal has been conveyed along with the arguments of the Respondent. Meanwhile, since the statement of other experts, namely Prof. Dr. Satya Arinanto, S.H., M.H., Dr. J. Kristiadi, and Prof. Dr. Anna Erlyana, S.H., M.H., as well as arguments of witnesses presented by the Respondent, and written evidence (exhibit T-1 up to and including T-13), is not related to the legal standing, but to principal issue of the petition, it is not or has not been taken into account;

**[3.12]** Considering whereas in the hearing held on December 23, 2008, the Court also heard statement of the Related Parties, namely central KPU,



Governor/Vice Governor of North Maluku Province, DPRD of North Maluku Province, and Supervisory Committee of the Regional Head General Election of North Maluku Province. The statements of the Related Parties is completely included in description concerning Facts of the Case, which principally, insofar as it is concerned with legal standing are as follows:

**[3.12.1] Statements of the Related Parties, namely KPU**

In relation to the legal standing, KPU represented by Members of KPU, Andi Nurpati, states that:

- Whereas based on Article 1 sub-article 5 of Law 22/2007, the General Election organizers shall be institution organizing the General Election for members of DPR, DPD, and DPRD, and President and Vice President, as well as Regional Head and Deputy Regional Head held in a direct manner by the people. Accordingly, based on the aforementioned Law UU 22/2007, KPUD referred in Article 57 paragraph (1) of Law 32/2004 shall be provincial KPU established to organize the General Election, so that there is a change in the term of *Pilkada* (the Regional Head General Election) into the general election of governor and vice governor the duties and authorities of which are in the provincial KPU; accordingly, the authority of such provincial KPU must also be construed as derivative authority of the 1945 Constitution and provincial KPU must be construed as a state institution. Though it is not mentioned in any text set forth in the 1945 Constitution, the authority of Provincial KPU *in casu* KPU of North

Maluku Province in organizing the Regional Head General Election shall be a principal authority, or at least constitutes necessary and proper authority in order to organize the regional head general election in a democratic manner as mandated by Article 18 paragraph (4) of the 1945 Constitution;

- In the event that the authority owned by KPU of North Maluku Province is taken, reduced, violated, ignored, or harmed by other state institutions, KPU of North Maluku Province may file petition for dispute among state institutions to the Court, in this matter is the designated appointment of Thaib Armeiyn and Abdul Gani Kasuba as Governor and Vice Governor of North Maluku by Presidential Decree Number 85/P Year 2008 without basing it on the legal designation of elected candidate Governor and Vice Governor of North Maluku by KPU of North Maluku Province;
- Whereas based on the aforementioned consideration, KPU as the Related Party concludes that KPU of North Maluku Province has the legal standing as the Petitioner in the *a quo* case; moreover, it has been corroborated by KPU letter Number 2838/15/X/2008 dated October 17, 2008 the content of which grants full authority to KPU of North Maluku Province to follow-up the issue of inauguration of Governor and Vice Governor of North Maluku based on laws and regulations;

**[3.12.2]** Whereas the statements of other Related Parties, namely Governor of North Maluku, DPRD of North Maluku Province, and Supervisory Committee of

the Regional Head General Election of North Maluku Province is not or has not been taken into account since it is not related to the legal standing, but to the principal issue of the petition;

### **Opinion of the Court regarding Legal Standing of the Petitioner**

**[3.13]** Considering whereas based on the arguments of the Petitioner and response of the Respondent insofar as it is related to the legal standing, the legal issue disputed between the Petitioner and the Respondent is whether the Petitioner, in this matter KPU of North Maluku Province, constitutes state institution whose authorities are granted by the 1945 Constitution (*subjectum litis*) and whether the authority disputed (*objectum litis*) by the Petitioner and the Respondent constitutes the authority granted by the 1945 Constitution. In this matter, principally the Petitioner argues that either from the aspect of *subjectum litis* or *objectum litis*, the Petitioner has the legal standing to file petition for dispute over the constitutional authority of state institutions while the Respondent is of the different opinion that the Petitioner has no legal standing as it has not met requirement of Article 61 paragraph (1) of the Constitutional Court Law;

**[3.14]** Considering whereas concerning with this legal standing, the Court is of the following opinion with respect of either *subjectum litis* or *objectum litis* aspect:

#### **[3.14.1] KPU of North Maluku Province as *subjectum litis***

- Whereas Article 22E paragraph (5) of the 1945 Constitution states, “*General Elections shall be organized by a general election commission which is national, permanent, and independent in nature.*” With regard to the definition of the general election, Article 22E paragraph (2) of the 1945 Constitution states, “*General Elections shall be organized to elect members of the People’s Legislative Assembly, Regional Representative Council, President and Vice President, and Regional People’s Legislative Assembly.*” Accordingly, general election commission (with small letters) which is national, permanent, and independent in nature constitutes state institution having constitutional rights granted by the 1945 Constitution to organize the General Election as intended in Article 22E paragraph (2) of the 1945 Constitution;
- Whereas Law 22/2007 explicitly states regarding general election organizing institution which is national, permanent, and independent in nature intended in Article 22E paragraph (5) of the 1945 Constitution, namely in Article 1 point 6 of Law 22/2007 which reads, “*General Election Commission, hereinafter referred to as KPU shall be general election organizing institution which is national, permanent, and independent in nature.*” Accordingly, general election commission as the general election organizer intended in Article 22E paragraph (5) of the 1945 Constitution is the General Election Commission, hereinafter referred to as KPU;

- Whereas regarding provincial KPU, Article 1 point 7 of Law Number 22/2007 states that provincial KPU shall be the General Election organizer at the provincial level;
- Whereas regarding definition of General Election, Article 1 point 4 of Law 22/2007 has included the general election of regional head and deputy regional head as to the regime of the General Election, so that the General Election shall not only refer to the General Election for members of DPR, DPD, and DPRD, as well as the General Election of President and Vice President, but also the General Election of regional head and deputy regional head (hereinafter referred to as the Regional Head General Election);
- Whereas Article 1 point 5 of Law 22/2007 reads, “*General Election organizers shall be institutions organizing the General Elections for members of People’s Legislative Assembly, Regional Representative Council, Regional People’s Legislative Assembly, and President and Vice President, as well as regional head and deputy regional head held in a direct manner by the people*”;
- Whereas Article 5 paragraph (1) of Law 22/2007 reads, “*KPU, Provincial KPU, and Regency/Municipality KPU shall be hierarchical in nature*” and Article 5 paragraph (2) of Law 22/2007 reads, “*KPU, Provincial KPU, and Regency/Municipality KPU shall be permanent in nature*”;

- Accordingly, the provisions of Article 22E paragraph (5) of the 1945 Constitution *juncto* Article 1 point 4 of Law 22/2007 represent that the general election commission (small letters) which is national, permanent, and independent in nature granted constitutional rights by the 1945 Constitution as the general election organizer shall be KPU or General Election Commission with capital letters K, P, and U. Meanwhile, provincial General Election Commission (KPU) at the province level *in casu* KPU of North Maluku Province shall not be a state institution whose authority is granted by the 1945 Constitution, but it is only organ of KPU whose authority is granted by Law *in casu* Law 22/2007, instead of the 1945 Constitution. Moreover, the Regional Head General Election is not the General Election as intended in Article 22E paragraph (2) of the 1945 Constitution. On the contrary, it is the interpretation of lawmakers on the provisions of Article 18 paragraph (4) of the 1945 Constitution which reads, “*Governor, Regent, and Mayor respectively act as the regional government heads at the province, regency, and municipality level held in a democratic manner*”, being categorized it as the General Election. The existence of Provincial KPU will highly depend on law regulating the regional head election, whether it is to be held in a direct or indirect manner. As a matter of fact, there are two constitutional court justices still questioning whether the General Election Commission (central KPU) which is written in small letter “*general election commission*” in Article 22E paragraph (5) of the 1945 Constitution is a state institution whose authority

is granted by the 1945 Constitution, not a state institution in the sense of *staatsorganen*, but only a governmental “auxiliary” institution which is independent or frequently referred to as “*zelfstandigebestuurorganen*” or “independent government institution”;

- Whereas the Petitioner argues that KPU of North Maluku Province has obtained full mandate from KPU to follow-up the settlement of the case of the Regional Head General Election of North Maluku which in fact, according to Law constitutes a domain of authority of KPU of North Maluku Province as intended in Article 9 paragraph (3) of Law 22/2007, among other things as included in sub-paragraph j, namely “*to stipulate and announce the results of the General Election of Regional Head and Deputy Regional Head of ... Province...*” Meanwhile, the authority of KPU in the Regional Head General Election is limited only to what is provided for in Article 8 paragraph (3) of Law 22/2007 (exhibit P-22). With respect to the aforementioned Petitioner’s arguments, the Court is of the opinion that a constitutional authority is impossible to be delegated to organ or its subordinate apparatus, *in casu* the authority of KPU granted by the 1945 Constitution is delegated to provincial KPU. In principal, provincial KPU as subordinate organ of KPU only acts as implementing apparatus of KPU, rather than the assignee of KPU’s authority. Even, Article 122 paragraph (3) of Law 22/2007, provides for that this is KPU which has the authority to take over the authority of provincial KPU in implementing a phase of the General Election, not the otherwise. The Court is of the same opinion with

the Respondent and experts presented in the hearing, that the said KPU's letter (exhibit P-22) is not a mandate letter or a special power of attorney instructing provincial KPU to file a lawsuit or petition for dispute over constitutional rights of state institutions in the Court with the President as the Respondent, but it is just a common letter allowing KPU of North Maluku Province to follow-up the issue of the Regional Head General Election of North Maluku. KPU letter Number 2838/15/X/2008 dated October 17, 2008 addressed to the Chairperson of KPU of North Maluku Province completely reads as follows, "*Referring to your Letter Number 270/225/KPU/2008 dated October 10, 2008 regarding the aforementioned subject matter, the General Election Commission fully delegates to KPU of North Maluku Province to follow-up such issue, in accordance with the applicable laws and regulations.*" The phrase "to follow-up" in such letter is general in nature, hence it is very obscure and can be used in various forms, and not specific to file petition for SKLN to the Court;

- Whereas accordingly, from the *subjectum litis* point of view of the *a quo* case, the Court is of the opinion that the Petitioner, namely KPU of North Maluku Province, is not a state institution as referred to in the 1945 Constitution and its authority is not granted by the 1945 Constitution. Meanwhile, the Respondent, namely the President is indeed a state institution whose position and authority are granted by the 1945 Constitution. Therefore, the Petitioner has not met requirements as



referred to in Article 24C paragraph (1) of the 1945 Constitution and Article 61 paragraph (1) of the Constitutional Court Law;

- Whereas in addition, in its Decision Number 2/SKLN-IV/2006, Number 27/SKLN-V/2007, and Number 1/SKLN-VI/2008, the Court has been consistently of the opinion that KPU existing in regions, including Election Independent Commission (KIP) in Aceh, is not state institution whose authority is granted by the 1945 Constitution, hence it does not meet requirement of *subjectum litis* of SKLN as referred to in Article 24C paragraph (1) of the 1945 Constitution, as quotations from the following decision:
  - a. Quotation from the Decision Number 02/SKLN-IV/2006 (page 24) which reads, “...*though KPUD is a state institution, in the organization of Regional Head Election its authority is not the authority granted by the Constitution, as referred to in the 1945 Constitution and the Constitutional Court Law*”;
  - b. Quotation from the Decision Number 27/SKLN-V/2007 (page 156) which reads, “...*KIP of NAD Province and KIP of Aceh Tenggara Regency, are not state institutions as referred to in Article 24C paragraph (1) of the 1945 Constitution, Article 61 paragraph (1) of the Constitutional Court Law, and Article 2 of PMK No. 08/PMK/2006*”;

- c. Quotation from the Decision Number 1/SKLN-VI/2008, page 28 which reads, “*whereas the existence of KPUD and election supervisory committee (Panwaslih) in the Regional Head Election is only enabled if the Regional Head Election is held in a direct manner based on a law, while if the law stipulates that the Regional Head Election shall be held in an indirect manner, then the existence of KPUD and Panwaslih in the Regional Head Election is unnecessary.*” It further reads,
- “*...authority of KPUD in the Regional Head Election is not the order of the 1945 Constitution, but the order of Regional Head Law juncto Law Number 22 Year 2007 regarding the General Election Organizers, so that KPUD cannot be qualified as a state institution whose authority is granted by the 1945 Constitution*”;

**[3.14.2] Objectum Litis of the Petition**

- Whereas pursuant to Article 24C paragraph (1) of the 1945 Constitution *juncto* the Constitutional Court Law *juncto* PMK 08/2006, with respect to dispute over constitutional authority of state institution, the authority disputed or *objectum litis* is the authority granted by the 1945 Constitution;
- Whereas *objectum litis* of the Petitioner’s petition is concerned with authority of KPU of North Maluku Province to designate Governor and Vice Governor of North Maluku based on the results of the Regional Head General Election. Authority of provincial KPUD/KPU to organize the

regional head general election including the authority to designate pair of the elected regional head and deputy regional head is not the authority granted by the 1945 Constitution, but the authority granted by Law, in this matter Law 32/2004 *juncto* Law 22/2007;

- Whereas therefore, *objectum litis* of the *a quo* petition is not the constitutional authority of state institution granted by the 1945 Constitution, so that it is not *objectum litis* of SKLN as referred to in Article 24C paragraph (1) of the 1945 Constitution, but it is only related to the authority granted by Law;

**[3.15]** Considering whereas accordingly, from the aspect of either *subjectum litis* or *objectum litis* of petition for dispute over constitutional authority of state institutions as referred to in Article 61 of the Constitutional Court Law, it is evident that the Petitioner has no the legal standing to file the *a quo* petition, so that the Court will not further consider Principal Issue of the Petitioner's petition;

#### **4. CONCLUSION**

Based on the foregoing legal considerations of legal facts, insofar as it is concerned with the legal standing issue of the Petitioner, the Court concludes that:

**[4.1]** The Petitioner has no legal standing to file the *a quo* petition, since it does not meet requirements provided for in Article 24C paragraph

(1) of the 1945 Constitution and Article 61 of the Constitutional Court Law;

**[4.2]** With respect to the requirement of either *subjectum litis* or *objectum litis*, petition of the Petitioner (KPU of North Maluku Province) is not included in the scope of dispute over the authority of state institution granted by the Constitution as referred to in Article 24C paragraph (1) of the 1945 Constitution;

## 5. DECISION

In view of the 1945 Constitution of the State of the Republic of Indonesia and Article 64 paragraph (1) 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);

### Passing the Decision,

Declaring that the Petitioner's petition is unacceptable.

Hence the decision was made in the Plenary Consultative Meeting of eight Constitutional Court Justices on Monday, the second of February two thousand and nine and was pronounced in a Plenary Session open for the public on Tuesday, the tenth of February two thousand and nine, by us, eight Constitutional Court Justices, namely: Moh. Mahfud MD, as the Chairperson and

Concurrent Member, Abdul Mukthie Fadjar, Maruarar Siahaan, M. Akil Mochtar, Achmad Sodiki, Maria Farida Indrati, M. Arsyad Sanusi, and Muhammad Alim, respectively as Members, assisted by Cholidin Nasir as Substitute Registrar, as well as in the presence of Petitioner and/or its Attorney, Respondent/its Attorney, and the Related Parties/their Attorney.

**CHIEF JUSTICE,**

**Sgd.**

**Moh. Mahfud MD**

**JUSTICES,**

**Sgd.**

**Abdul Mukthie Fadjar**

**Sgd.**

**Maruarar Siahaan**

**Sgd.**

**M. Akil Mochtar**

**Sgd.**

**Achmad Sodiki**

**Sgd.**

**Maria Farida Indrati**

**Sgd.**

**M. Arsyad Sanusi**

**Sgd.**

**Muhammad Alim**

With regard to the foregoing Court's Decision, there were three Constitutional Court Justices having dissenting opinions, namely Maruarar Siahaan, M. Akil Mochtar, and M. Arsyad Sanusi, as follows:

## 6. DISSENTING OPINION

### [6.1] Constitutional Court Justice Maruarar Siahaan

#### I

Requirement of the legal standing of state institution to bring its dispute as dispute over the authority of state institution before the Court shall be state institution granted with authority by the 1945 Constitution, based on Article 24C paragraph (1) of the 1945 Constitution and Article 10 paragraph (1) subparagraph b, as well as Article 61 of the Constitutional Court Law, which is interpreted so far in a textual way that:

- a. Authority of state institution is granted by the 1945 Constitution;
- b. The disputed state institution has direct interest to the disputed authority.

The Court's Decision related to dispute over the authority of state institution which apparently serves as the reference which has been guided in general, is established from the textual definition and also refers to the original intention of the formulators of Amendment to the 1945 Constitution, when adopting Article 24C paragraph (1) of the 1945 Constitution;

The writing of "an election commission which is independent, permanent, and national in nature" in small letters seems to be used as a basis for a structural and formal perspective dominating textual interpretation applied. It

is also seen in the Constitutional Court Regulation Number 08/PMK/2006 (PMK 08/2006), which explicitly states that those who may become Petitioner and Respondent for SKLN shall be the state institutions, namely DPR, DPD, MPR, BPK, and the President, previously referred as high state and the highest state institutions. However, PMK 08/2006 also states that there shall be state institutions recently obtain their authority from by the 1945 Constitution, namely Regional Government (Pemda), without confirming whether or not the Regional Government and DPRD being component of Regional Government, as individual institution, may be categorized as state institution obtaining authority from the 1945 Constitution. However, the Court itself recognizes that such interpretation remains a dynamic interpretation, the development of which has not been defined yet as a final concept, so compromise of debate occurred causes PMK 08/2006, particularly Article 2 sub-paragraph g to restate the existence of “other institutions whose authorities are granted by the 1945 Constitution”. It means that a concept of state institutions obtaining their authority from the 1945 Constitution remains an open ended concept, and opens space for interpretation according to the context and dynamics experienced in living as a nation and a state, prior to acquiring a final form.

## II

Since the beginning, I have dissenting opinion regarding interpretation of which state institution deemed as obtaining authority from the 1945 Constitution, so that it constitutes *subjectum litis* of dispute over state

institution as provided for in the 1945 Constitution. In the Court's Decision Number 06/SKLN-III/2005, in addition to the requirements that the authority shall be granted by the 1945 Constitution, three other requirements for the legal standing are adopted and included in Article 3 of PMK 08/2006:

- (1) The Petitioner shall be state institution deeming that its constitutional right has been taken away, reduced, inhibited, and/or impaired by other state institutions;
- (2) The Petitioner has direct interest to the disputed authority;
- (3) The Respondent shall be state institution deemed as having taken away, reduced, disregarded and/or impaired the Petitioner.

In its Decision Number 04/SKLN-IV/2006, the Constitutional Court provides that the Regent and DPRD as State Institution are not granted the authority by the 1945 Constitution but by Law in exercising autonomy to the greatest extent. At that time, I have dissenting opinion and stated that Regional Government, namely the Regent and DPRD were state institutions obtaining authority to perform Regional Government with the greatest extent autonomy from the 1945 Constitution, granted by Article 18 paragraph (4), namely authority as regional head to lead a part of governmental duties while DPRD shall ratify the Regional Regulation;

Therefore, considering the dynamics occurred due to the need to resolve the nation's problem which cannot be delegated to other institutions, narrow and restrictive interpretation must be left behind, in order to adjust with



the demand and development of era. Furthermore, in my opinion, interpretation used seemed as if a word has been added to the sentence of Article 24C paragraph (1) of the 1945 Constitution which was subsequently used as a standard of the legal standing formulation in *objectum litis* as if the 1945 Constitution decided upon that such dispute only occurs **between** equal state institutions;

The formulator of the Constitution has also no intention to not giving discretion to the Court to make such adjustment, and the formulator of the amendment to the constitution has never had intention to hamper such discretion in the context of performing its duties as guardian of the constitution. Scope of authority or jurisdiction of the Court is stipulated in order to prevent constitutional provisions as the highest law from being violated in the exercise of authority of state institution and to apply the constitutional review in the event that there is a dispute arguing that a certain state institution omits authority of other state institutions, or violates its constitutional authority. Government stability shall be a factor which is also taken into account in assessing dispute over the authority of state institution, which means that if none of the state institution is available to settle dispute over authorities of state institutions which structurally are not stated in *expressis verbis* manner in the 1945 Constitution, then a contextual and functional interpretation should be applied, in order to prevent the occurrence of any constitutional case which is highly fundamental in the life of the Unitary State of the Republic of Indonesia, which is not completely settled based on the standards or parameter of the constitution itself. The meaning of constitution

must be interpreted to a higher level of generality and the application of such more general principle must be adjusted to the condition of each era demanding new solution. The Court must also pay attention to its duties in the context of shifting political conflict into constitutional dialogue, so that the Court may reduce a threat to democracy and maintain its growth under the guard of law and constitution. In order to play such role, the Court must utilize interpretation method in such a way that the constitution may adapt to the needs and development of era. Therefore, the Court should have been more flexible in emphasizing the legal standing aspect, so it will not create an impression that it avoids to give solution to constitutional issue in a substantial manner;

Textual interpretation and structural approach to Article 24C paragraph (1) of the 1945 Constitution regarding authority of the Court to “*decide upon dispute over state institutions obtaining authority from the 1945 Constitution*”, defines as if such dispute shall be “**between**” state institutions explicitly stated by the constitution, so that Article 24C paragraph (1) of the 1945 Constitution reads as if “dispute between state institutions obtaining their authority from the 1945 Constitution”. Whereas none of word in the sentence of Article 24C paragraph (1) of the 1945 Constitution states that the disputed state institutions must be equal state institutions and stated by the 1945 Constitution. The interpretation which is contradictory to the text of Article 24C paragraph (1) of the 1945 Constitution is subsequently adopted so that such wording becomes the content of Article 10 of the Constitutional Court Law providing for the legal standing requirement with more focus on the Petitioner. It is also followed strictly

as seen in the wording of Article 61 paragraph (1) and paragraph (2) of the Constitutional Court Law and PMK 08/2006, accordingly it has caused the Court to be unable to play its role in guarding the constitution optimally in the dispute over state institutions as mandated by the 1945 Constitution.

### III

Article 22E paragraph (5) of the 1945 Constitution reads, "*General Elections shall be organized by a general election commission which is national, permanent, and independent in nature,*" on the other hand, Article 18 paragraph (4) of the 1945 Constitution stipulates, "*Governor, Regent, and Mayor shall respectively act as the regional government heads at the province, regency, and municipality level elected in a democratic manner.*" The aforementioned two articles which are subsequently accorded with Decision Number 072-073/PUU-II/2004, state that either the regional head election held in a direct manner or through DPRD, is a democratic election and both of them are based on the principles referred by Article 22E paragraph (1) of the 1945 Constitution that the general election is held in a direct, general, independent, confidential, honest, and just manner. Following the Legislative General Election, the General Election of the President and the Regional Head General Election are stipulated as the General Election by Article 1 sub-article 4 of Law Number 22 Year 2007 regarding General Election Organizers, therefore although the general election commission is written in small letters, which means that it is not structurally determined which institution established by the constitution to be granted such

authority, based on its function, the authority to be granted to the institutions established under the Law shall functionally make it as the constitutional organ which exercise authority and obtains authority from the 1945 Constitution. The function to organize the general election shall be performed independently, and may not be intervened by other institutions in its decision making. In fact, law Number 22 Year 2007 regarding the General Election Organizers states that relationship between KPU and provincial KPU is hierarchical in nature, but in performing the function of general election organization at the provincial, regency, and municipality level, the said KPU may not be intervened in exercising its constitutional authority, especially in counting vote acquisition and stipulating the winner in the general election held. Such authority is granted by the constitution to a general election commission, rather than to other state institutions and not provided by other laws and regulations, although the implementation is subsequently specified in Law. General elections at the national level and general election at the local level (province, regency, and municipality) do not have any constitutional relationship hierarchically and constitutionally, the local general election and national general election cannot obtain discriminatory treatment, because the General Election and the Regional Head General Election are democratic concepts mandated by the Constitution to be organized by the general election commission. The position of KPU stated as being national, permanent, and independent in nature must answer the question whether or not Provincial KPU may act outside the mandate strictly provided by KPU. In my opinion, as a state institution and public legal entity, the statement of

non-objection or approval expressly provided by KPU to defend interest and authority of KPU in general, as stated by KPU expressly in the plenary meeting of the Court, shall grant sufficient power to provincial KPU to act on behalf of either provincial KPU or central KPU before the Court.

#### IV

One of characteristics of authority of the President in designating a person as Governor/Regent/Mayor based on the results of the Regional Head General Election by virtue of Presidential Decree shall be binding authority, and the President does not have discretionary authority to elect one between two candidates which due to one and another reasons (including due to the internal conflict of the institution) must be stipulated by him. Such concrete, individual, and final stipulation, is not based on the discretionary authority owned, but authority bound to the democratic process of the general election and the stipulation of its results, otherwise the authority to elect the regional head is no longer the people's right, in accordance with constitutional mandate, but shifted to the Government's right (the President);

In the event that such Presidential Decree is subsequently disputed, as has occurred in two cases, and as the interpretation used causes the lack of forum to settle such dispute, there will be a vacuum (*rechtsvacuum*) creating a constitutional impasse or preserving an unconstitutional condition in contradiction to the Court's duties to guard constitution, democracy, and to maintain the government's stability;

The Court shall be administrative judicature handling state administration case related to act against constitutional law, which is not an authority of other forum, since it is also related to the constitutional review of state organ act and policy, not provided to other judicial institutions. This definition is important, since there is a purpose of restriction of power granted by the constitution. Therefore, the parameter of *subjectum litis* and *objectum litis* included in Article 24C paragraph (1) of the 1945 Constitution, are not interpreted similarly between the Petitioner and the Respondent. The requirement of the aforementioned *subjectum litis* should be more focused on the Respondent, because the act to take away, reduce, disregard, and impair the authority of other state institutions *in casu* the Respondent, is argued to have been committed by subject having broader constitutional authority, which in fact, becomes the focus of restriction and supervision in the checks and balances mechanism of our state administration system, as considered by the reform in historical perspective subsequently being the objective (*telos*) of the 1945 Constitution with its four amendments;

Considering it in a more holistic way means trying to reconstruct formalistic perspective against the constitution, because rejection of holistic approach in objective sense will be risky for the government idea by law (rule of law), becoming the fundamental values and principles in the 1945 Constitution, against which interpretation of Article 24C paragraph (1) of the 1945 Constitution must be related to and balanced. If the meaning of a text is understood

appropriately in accordance with a claim it contains, then such text must be understood in any specific situation in a new and possibly different method from its formulator. Therefore, in comprehending and understanding the meaning of the Constitution, it is not only the text which shall serve as the basis for searching the meaning, but also the spirit of the text in such Constitution, in which the following statement must become the guidelines, “...*the existence of the Constitutional Court as a state institution functioning to handle certain case in the state administration system, in the context of maintaining constitution to be implemented in a responsible manner in accordance with the people’s wish and democracy aspiration. The existence of the Constitutional Court is also to maintain the stable state government administration...*”.(vide General Elucidation of the Constitutional Court Law);

Constitutional articles, such as Law, are often ambiguous, obscure, contradictory, not sufficiently clear, or even say nothing about the constitutional dispute to be decided upon. In addition, they often seem insufficient to properly settle the development threatening the principles of living as a state, to be guaranteed by the constitution, the development which constitutes dynamics of living as a state which cannot be fully anticipated at the time of the establishment of the constitution. The Justices decide upon this issue through interpretation which is often problematic and controversial. Paradigm of the State Law shall remain uphold the welfare and peace of its citizen, so that law and constitution are established for the people, and not the otherwise. In my opinion, interpretation of constitution expected in the recent democratic process in

Indonesia may achieve the consolidation stage, constituting the searching for the meaning of constitutional norm in an individual article, must be guided by fundamental values and needs as well as context being faced. In the event that the Court is a constitutional guard, then those being guarded are a set of rules and principles which are not independent, but must be seen holistically and dependent on a broader principle and value being the spirit of the constitution in order to respond the threats indicated;

None of constitutional provisions may be applied out of the context and interpreted independently. Each constitutional provision must always be interpreted in such a way that enables to consider it compatible with fundamental principle as a whole. We do not focus on its specific or isolated meaning, but more on the clause and its relationship with the entire text. In a broader meaning, such provisions do not only seek unity and integrity within the text;

In other state's practice, it is commonly found that in certain cases, especially those related to the political question, it is better to reject applying jurisdiction, by disputing the standing issue in a rigid manner and applying other methods deemed wise to avoid constitutional controversy. However, with respect to the case of North Maluku which is very fundamental as constitutional issue in placing constitutionalism and rule of law in the living as a state, Article 24C paragraph (1) of the 1945 Constitution must be interpreted in such a way that the Court, in accordance with its functions and authorities, is allowed to assess and decide upon whether or not the Government has discretionary authority to



designate a Governor, other than those stipulated by KPU based on the people's choice through the regional head general election;

In my opinion, an approach emphasizing on formalism and structural analysis against state institution and dispute over the authority through textual interpretation on the criteria of "*granted by the 1945 Constitution*", is not in accordance with the duty of the Court to guard Constitution and democracy, to participate in maintaining the stable government administration through checks and balances mechanism. Such approach does also not have contribution to the positioning of constitution as a nation's integration factor, so that in my opinion, the Court should have entered the facts of the case, heard, and decided upon it as it should. Paradigm of prosperous state in a democratic Indonesian Law State must serve as a starting point to protect and provide happiness for the entire nation and mother land, as a real context in interpreting the concepts of *subjectum litis* and *objectum litis* referred to in Article 24C paragraph (1) of the 1945 Constitution.

## **[6.2] Constitutional Court M. Akil Mochtar**

Article 22E paragraph (5) of the 1945 Constitution reads, "*General Elections shall be organized by a **general election commission** which is national, permanent, and independent*", and paragraph (6) states, "*Further provisions concerning general election shall be provided for in law*". According to *Kamus Besar Bahasa Indonesia*, the term "**a**" is used to refer to indefinite goods or thing. It means that Article 22E paragraph (5) has not determined yet names

and types of general election organizer commission. In the event that the two aforementioned paragraphs in Article 22E of the 1945 Constitution are connected, then it means that regulation of names and authorities of General Election organizer commission shall be regulated by law. Thus, Law Number 22 Year 2007 regarding General Election Organizers (hereinafter referred to as Law 22/2007) shall be established by virtue of the order of Article 22E of the 1945 Constitution, so that the existence of KPU and provincial KPU shall be deemed as state institutions established by law by virtue of the order of the 1945 Constitution [*vide* Article 1 paragraph (5) of Law 22/2007];

State institution cannot be interpreted in a narrow manner as the opinion of Montesquieu with his *trias politica* doctrine stating that state institution is state institution implementing one of branches of state power, including executive, legislative, and judicial institutions. Theoretically, institutions existing in a state are known as State Organ (*die Staatsorgane*). Furthermore, State Organ shall be defined as an object determining or assisting the state's will (*staatswil*) as well as assigned by fundamental law to realize it. In other words, State Organ is established to perform state's function and its position and authority are regulated by the Constitution;

Article 2 paragraph (1) of PMK Number 08 Year 2006 has stipulated and provided a more general interpretation concerning state institution. The provisions of Article 2 paragraph (1) of PMK Number 08 Year 2006 states,

*“State Institutions qualified to be the petitioner or the respondent in the case of dispute over constitutional authority of state institution shall be:*

- a. The People’s Legislative Assembly (DPR);*
- b. . . . etc.*
- g. Other state institutions whose authorities are granted by the 1945 Constitution;*

The formulation of **“Other state institutions whose authorities are granted by the 1945 Constitution”** as subject in dispute over the authority of state institution indicates that the said subject of dispute over the authority of state institution is not limited to DPR, DPD, MPR, the President, Audit Board, and the Regional Government;

Extension of meaning of state institution has also been reinforced in Decision Number 004/SKLN-IV/2006 dated July 12, 2006 stating, *“In determining content and limitation of authority being objectum litis of a dispute over the authority of state institution, the Court does not only interpret the text of the Constitutional provisions granting authority to certain state institution, but also see possibilities of implicit authorities containing in a principal as well as necessary and proper authority in order to exercise such certain principal authority. Such authorities may be included in a law”*;

Category of state institution is not solely based on national authority, but it also observes whether or not the said institution performs

administrative function of the General Election as provided for in the 1945 Constitution;

Parameter used to determine whether or not the said institution categorized into state institution is not only structural position of the institution concerned in the 1945 Constitution or its official names, but also the function of the state institution in the 1945 Constitution.

Article 1 sub-article 6 of Law 22/2007 states, "*General Election Commission, hereinafter referred to KPU, shall be General election organizing institution which is national, permanent, and independent in nature*". With respect to the said provisions, it is then defined that KPU as General election organizing institution shall meet three elements, namely national, permanent, and independent. National general elections are not only defined as Legislative General Election and the Presidential General Election, but it is defined as an implementation of the principle of the people's sovereignty in accordance with Article 1 paragraph (2) of the 1945 Constitution stating, "*Sovereignty is in the hands of the people and implemented pursuant to the Constitution*",

As understood, the people's sovereignty is a main pillar in a democratic state, if KPU is deemed as a state institution whose authority is only to organize national Legislative General Election and Presidential General Election, then the duties and authorities of provincial KPU *in casu* KPU of North Maluku Province as General Election organizer in region are not the implementation of the people's sovereignty, but if observed, the Regional Head

General Election held by North Maluku Province which is direct, public, free, secret, honest, and fair in nature is also the implementation of the principle of the people's sovereignty. Meanwhile, the definition of permanent in nature represents that KPU is an institution performing its duties sustainably though restricted by certain term of office, and independent in nature which means that KPU is free from intervention of any party whatsoever in organizing and implementing the general election;

In the event that we observe several provisions regarding General Election Organization being the authority of KPU, then the authority of KPU of North Maluku Province in organizing the Regional Head General Election shall be a delegation of authority from KPU. Such delegation of authority is then formulated in Article 122 paragraph (3) of Law 22/2007 which reads, *"In the event of matters causing Provincial KPU or Regency/Municipality KPU **unable to perform its duties**, stages of General Election organization shall be temporarily implemented by a KPU that is one level above it"*. The *a quo* article has a meaning that KPU is the owner of authority to organize the Regional Head General Election. If such Regional Head General Election constitutes absolute authority of provincial KPU and Regency/Municipality KPU, then it would be impossible for KPU to take over the said authority. Therefore, hierarchical nature of KPU, provincial KPU, and regency/municipality KPU as provided for in Article 5 paragraph (1) of Law 22/2007 is not assessed based on hierarchy of its institution, but based on hierarchy of its authority;

Whereas principal issue in the *a quo* case is concerned with authority of Provincial KPU as provided for in Article 109 paragraph (3) of Law Number 32 Year 2004 regarding Regional Government (hereinafter referred as Law 32/2004) which is taken over by the President. Article 109 paragraph (3) of Law 32/2004 which reads, “*Candidate pair of the elected Governor and Vice Governor shall be nominated by provincial DPRD, no later than 3 (three) days, to the President through the Minister of Home Affairs **based on minutes of designation of the elected candidate pair of provincial KPU to obtain ratification of appointment***”. Authority of the President in the *a quo* article is only limited to “**ratify its appointment**”. It is reinforced that the people’s sovereignty as provided for in Article 1 paragraph (2) of the 1945 Constitution cannot be annulled by any power whatsoever, as minutes of designation of the elected candidate pair stipulated by KPU of North Maluku Province shall be based on the results of the implementation of the Regional Head General Election, in which the people grant mandate to the candidate they elect. The takeover of authority of KPU of North Maluku Province by the President cannot be based on the reason to implement policy (*beleid*). Whereas in principal, authority of the government may be differentiate, namely independent government authority (discretionary) and bounded government authority. Whereas in performing its authority, State Administration official (TUN) may determine its own policy; however, the independence of determining such policy may be justified in the event that fundamental regulation has not stipulated it clearly. Contrarily, in the event that its fundamental regulation has clearly stipulated it in detail, then TUN official

concerned cannot do anything, but to literally implement what is written in the wording of such fundamental regulation;

In its previous decisions, the Court has been of the opinion to give more emphasis on substantive justice than procedural justice (*vide* Decision Number 41/PHPU.D-VI/2008, Decision Number 44/PHPU.D-VI/2008, Decision Number 49/PHPU.D-VI/2008, and Decision Number 57/PHPU.D-VI/2008), hence in the *a quo* case, the Court should do the same thing, which shall not merely assess based on procedural justice. In the event that the Court applies procedural justice that makes the Petitioner to be stated as having no legal standing to file the *a quo* petition, then the question is to which court the Petitioner should seek justice?

Based on legal justice and certainty as the foregoing arguments, I am of the opinion that KPU of North Maluku Province has the legal standing to file dispute over the authority of state institution as provided for in Article 61 of the Constitutional Court Law.

**[6.3] Constitutional Court M. Arsyad Sanusi**

**I. MEANING OF STATE INSTITUTION**

With due observance of map of state institution following the amendment to the 1945 Constitution, whether the Representative Bodies, Governing Bodies, Supporting Bodies, Judiciary Bodies or Election Bodies and etc,

then the first definition required to be understood fundamentally shall be terminology of state institution;

The terminology of "State Institution" is still understood as a debatable concept; moreover, explicit meaning for terminology of the *a quo* "State Institution" is not found in laws and regulations, since the terminology of "State Institution" is only used in Indonesia and not used in other countries. With respect to this matter, I am of the opinion that, at least, definition of State Institution or State Organ can be approached from the point of view of Hans Kelsen concerning the Concept of the State Organ (Hans Kelsen, *General Theory of Law and State*, Russell & Russell, New York, 1961, p. 192). According to Hans Kelsen, "*whoever fulfills a function determined by the legal order is an organ*". In other word, such state organ is not always in organic form. In addition to the organic form organ, each position determined by law may also be referred to as organ, provided that these functions are norm-creating and/or norm-applying in nature. "These functions, be they of a norm-creating or of a norm-applying character, are all ultimately aimed at the execution of a legal sanction";

It means that, in principal, in each discussion concerning state institution or state organization, there are two interrelated principal elements, namely *organ* and *functie*. *Organ* is its form or forum while *functie* is its content; organ is a status of its form (English: *form*, Germany: *vorm*), while *functie* is movement of such forum according to the intention of its establishment;



Furthermore, if observing the script of the 1945 Constitution, it is identified that there are some organs the names of which are mentioned explicitly and there are also some organs merely the functions of which are mentioned. There are also state or organ in which its name, function, or authority will be regulated by subordinate regulation;

With respect to various opinion regarding State Institution, either according to Hans Kelsen or pursuant to the aforementioned provisions of the 1945 Constitution, in relation to the legal standing of the Petitioner (KPU of North Maluku Province), I am of the opinion that the Petitioner (KPU of North Maluku Province) is categorized as a state institution which is norm-applying in nature. Furthermore, its existence as General Election organizer is guaranteed as well as protected by Article 22E of the 1945 Constitution while its function and authority are regulated in Law Number 22 Year 2007 regarding General Election Organizers;

Furthermore, based on the structural-functional theory by Gabriel Almond (<http://setabasri01.wordpress.com/2008/12/01/pendekatan-struktural-fungsional-gabriel-a-almond/>), to avoid a trap of political system analysis against constitution/formal political institution, then it is necessary that the *a quo* analysis is aimed at structure and function performed by the respective units in the political system. Therefore, according to Gabriel Almond, there are significant matters need to be observed, among other things:

- a. political system has a characteristic in the form of totality of interaction among the units and constantly changing balance within the *a quo* system;
- b. the important thing in a political system is not solely formal institution, but also informal structure as well as roles implemented.

Based on the *a quo* structural-functional theory by Gabriel Almond, it is understood that KPU and KPU of North Maluku Province are parts (sub-systems or system units) of Indonesian political system performing totality of interaction among the balance of political system constantly changing. Likewise, KPU as well as KPU of North Maluku Province are formal state institutions having hierarchical relationship [*vide* Article 5 paragraph (1) of Law Number 22 Year 2007 regarding General Election Organizers] and structural-functional relationship as well as their respective functions or roles implemented;

I am of the opinion that in a structural-functional manner, the Petitioner (KPU of North Maluku Province) is an integral part of the General Election Commission as intended in Article 22E paragraphs (5) and (6) of the 1945 Constitution which reads, “*General Elections shall be organized by a general election commission which is national, permanent, and independent in nature*”. The phrase “general election commission” does not refer to a name, but general term to describe the general election

organizing agency or institution and it is more focused on the function or authority assigned;

Therefore, what is desired by the constitution is an agency or a commission called “general election commission which is national, independent, and permanent in nature”, and imperatively, the lawmakers have regulated the General Election organization in Law Number 22 Year 2007 regarding General Election Organizers;

In addition, functions or duties or authorities of Provincial KPU in organizing the Regional Head General Election, as provided for in Article 9 paragraph (3) of Law Number 22 Year 2007 shall include among other things:

- a. to designate candidate pair of regional head and deputy regional head at the provincial level who has met requirements;
- b. to stipulate and announce the results of vote count recapitulation of the Regional Head General Election at the provincial level based on the results of vote count recapitulation in regency/municipality KPU within the province concerned by drawing up minutes on vote count and certificate of vote count results;
- c. to draw up minutes on vote count as well as certificate of vote count result and be obligated to submit them to witness presented by the participants of General Election, Provincial General Election Supervisory Committee and KPU;

- d. to issue provincial KPU decision in order to ratify the results of the regional head general election at the provincial level and announce it;
- e. to submit report concerning the results of the Regional Head General Election at the provincial level to the DPR, the President, Governor, and provincial DPRD; and,
- f. to perform other duties and authorities granted by KPU and/or Law.

In addition to authorities as described above, the authority of provincial KPU is also regulated in Articles 101, 102, and 107 of Law Number 32 Year 2004 regarding the Regional Government;

I am of the opinion that duties and authorities of provincial KPU in the organization of the General Election of Governor and Vice Governor as described above shall be derivative authority of the 1945 Constitution, so the *a quo* authority of provincial KPU must also be interpreted as a derivative authority of the 1945 Constitution. Therefore, provincial KPU must be interpreted as state institution. Even though the position of provincial KPU as state institution is not specified in a textual way in the 1945 Constitution, its existence is guaranteed by the 1945 Constitution and its position and authority are specified in law *in casu* Law Number 32 Year 2004 regarding Regional Government *juncto* Law Number 22 Year 2007 regarding General Election Organizers. Accordingly, the authority of provincial KPU implicitly constitutes principal authority mandated/ordered

by the 1945 Constitution or at least constitutes necessary and proper authority in order to exercise such principal authority, namely to organize the General Election of Regional Head and Deputy Regional Head;

I am of the opinion that the important thing in a political system is not solely formal institution, but also informal structure and function or roles implemented, so that, actually the difference of authority of the Petitioner (KPU of North Maluku Province) is only in the distribution of its duties and authorities. KPU only performs its duties and authorities to organize the General Election at the national level while provincial KPU performs its duties and authorities in its territorial region. However, substantively, its second duty is to organize General Elections, whether the Legislative General Election, the General Election of President and Vice President, or the General Election of Regional Head and Deputy Regional Head;

Therefore, the Petitioner's authority is not only seen from the perspective of law but also from constitutional spirit. In the event of constitutional authority stipulated by the constitution which is related to certain institutional subject, the Petitioner (KPU of North Maluku Province) can be said to have constitutional authority as intended in dispute over the authority of state institution.

## **II. DELEGATION OF AUTHORITY FROM KPU TO PROVINCIAL KPU OF NORTH MALUKU**

Based on verbal and written statements of KPU in the Court's hearing on December 23, 2008 as conveyed by member of KPU, Andi Nurpati, which essentially explains that KPU has submitted letter to the KPU of North Maluku Province Number 2838/15/X/2008 to follow-up the issue of inauguration of Governor and Vice Governor of North Maluku Province, it is understood that the *a quo* meaning of the term to "follow-up" describes the delegation of authority to the Petitioner (KPU of North Maluku Province) to file legal action to the Court;

Based on the opinion of Arthur Lupia explaining that "*delegation occurs when people or organization ask others to perform task on their behalf*" (*Delegation of Power: Agency Theory*, Neil J. Smelser and Paul B. Baltes (Eds.), Elsevier Science Limited, Oxford, UK, 2001, pages 3375–3377), I am of the opinion that the granting of permit to "follow-up" from KPU to Provincial KPU of North Maluku against the issue of inauguration of Governor and Vice Governor of North Maluku Province, through KPU letter Number 2838/15/X/2008 may be interpreted as the form of delegation of authority from KPU to the Petitioner (KPU of North Maluku Province) for and on behalf of KPU to follow-up the issue of inauguration of Governor and Vice Governor of North Maluku based on laws and regulations, including to file legal action to the Court. It is also in accordance with the meaning of "delegation of authority" as written in *Kamus Besar Bahasa Indonesia* that what is referred to as "delegation of

authority” shall be “delegation of authority from a superior (in this matter, KPU) to an inferior (in this matter, KPU of North Maluku Province) in a certain operational area with the obligation to be accountable to those assigning duties (KPU) (Language Center of Ministry of National Education, *Kamus Besar Bahasa Indonesia*, 2008);

Furthermore, Arthur Lupia explains as follows, *“Delegation is beneficial because we can use it to overcome personal limitation. This benefit is important because each of us has limited time, energy and talents. When the people/organization to whom we delegate devote their time, energy and talents to our need, delegation of authority increases the number of duties that we can accomplish”*;

Delegation of authority from KPU to KPU of North Maluku Province can be justified based on verbal and written statements of KPU before the Court’s hearing on December 23, 2008, in which through its letter Number 2838/15/X/2008 KPU grants permit and full delegation to KPU of North Maluku Province to follow-up the issue of election and inauguration of Governor and Vice Governor of North Maluku Province;

Based on the provisions of Article 3 paragraph (1), Article 5 paragraph (1), Article 8 paragraph (3) sub-paragraph b, and Article 9 paragraph (1) of Law Number 22 Year 2007, provincial KPU, has function and authority, among other things, to “exercise other duties and authorities granted by KPU and/or law”. It means that the granting of permit by KPU to the

Petitioner (KPU of North Maluku Province) to follow-up the issue of the Regional Head General Election in North Maluku shall be a mandate of Law.

**III. LEGAL STANDING OF THE PETITIONER AND AUTHORITY OF THE COURT**

I am of the opinion that, based on various *a quo* thoughts and understanding, the Petitioner has the legal standing to become the Petitioner in the dispute over the authority among state institutions and the Court has the authority to examine as well as decide upon the *a quo* case; therefore, the Court should examine the principal issue of the case (*bodem geschil*).

**SUBSTITUTE REGISTRAR,**

**Sgd.**

**Cholidin Nasir**