



## DECISION

Number 32/PUU-VI/2008

FOR THE SAKE OF JUSTICE UNDER THE ONE ALMIGHTY GOD

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA

[1.1] Examining, hearing, and deciding upon constitutional cases at the first and final level, has passed a decision in the case of Petition for Judicial Review of Law Number 10 Year 2008 regarding the General Election of Members of the People's Legislative Assembly, Regional Representative Assembly, and Regional People's Legislative Assembly against the 1945 Constitution of the State of the Republic of Indonesia, filed by:

[1.2] 1. **H. TARMAN AZZAM**, Indonesian citizen, occupation/position: **Editorial Head of TERBIT Daily Newspaper**, Address of the Editorial Office at Jalan Pulo Gadung Number 15 Industrial Estate, East Jakarta 13920.

As ..... the Petitioner I;

2. **KRISTANTO HARTADI**, Indonesian citizen, occupation/position: **Editorial Head of SINAR HARAPAN Daily Newspaper**, Address of the Editorial Office at Jalan Raden Saleh Raya Number 1B-1D, Cikini, Central Jakarta 10430.

As ..... the Petitioner II;

3. **SASONGKO TEDJO, Indonesian** citizen, occupation/position: **Editorial Head of SUARA MERDEKA Daily Newspaper**, Address of the Editorial Office at Jalan Raya Kaligawe Km. 5, Semarang 50118.

As ..... the Petitioner III;

4. **RATNA SUSILOWATI, Indonesian** citizen, occupation/position: **Editorial Head of RAKYAT MERDEKA Daily Newspaper**, Address of the Editorial Office: Graha Pena Building, 8<sup>th</sup> Floor, Jalan Kebayoran Lama Number 12, South Jakarta 12210.

As ..... the Petitioner IV;

5. **H. BADIRI SIAHAAN, S.H, Indonesian** citizen, occupation/position: **Editorial Head of MEDIA BANGSA**, Office Address at Jalan Duren Sawit Raya Number 28, East Jakarta.

As ..... the Petitioner V;

6. **MARTHEN SELAMET SUSANTO, Indonesian** citizen, occupation/position: **Editorial Head of KORAN JAKARTA Daily Newspaper**, Address of the Editorial Office at Jalan Wahid Hasyim Number 125, Central Jakarta 10340.

As ..... the Petitioner VI;

7. **H. DEDY PRISTIWANTO, Indonesian** citizen, occupation/position:  
**Editorial Head/Director of WARTA KOTA Daily Newspaper,**  
Address of the Editorial Office at Jalan Hayam Wuruk Number 122  
Jakarta 11180.

As ..... the Petitioner VII;

8 **H. ILHAM BINTANG,** Indonesian citizen, occupation/position:  
**Editorial Head of TABLOID CEK & RICEK,** Address of the  
Editorial Office at Jalan H. Saaba Number 40 Meruya Selatan,  
West Jakarta 11650.

As ..... the Petitioner VIII;

Under a Special Power of Attorney dated September 5, 2008 has granted power of attorney to **TOROZATULO MENDROFA, S.H.,** Advocate and Legal Consultant at the **Consultation and Legal Assistance Institution (LKBH) of Central PWI,** having its office at Dewan Pers Building 4<sup>th</sup> Fl., Jalan Kebon Sirih Number 34, Central Jakarta 10110. E-mail: torzat\_mendrofa@yahoo.com;

Hereinafter referred to as ----- **THE PETITIONERS;**

[1.3] Having read the Petitioners' petition;

Having heard the Petitioners' statement;

Having heard and read the written statement of the Government;

Having heard and read the written statement of the People's  
Legislative Assembly;

Having examined the evidence;

Having heard and read the written statement of the Experts  
presented by the Petitioners and the Government;

Having read the written conclusions of the Petitioners and the  
Government;

### 3. LEGAL CONSIDERATIONS

**[3.1]** Considering whereas the principal issue of the Petitioners' petition is to conduct judicial review of the constitutionality of Article 98 paragraphs (2), (3), and (4) as well as Article 99 paragraphs (1) and (2) of Law Number 10 Year 2008 regarding the General Election of Members of the People's Legislative Assembly, the Regional Representative Assembly, and the Regional People's Legislative Assembly (State Gazette of the Republic of Indonesia Year 2008 Number 51, Supplement to the State Gazette of the Republic of Indonesia Number 4836, hereinafter referred to as Law 10/2008) against the 1945 Constitution of the State of the Republic of Indonesia (hereinafter referred to as the 1945 Constitution);

**[3.2]** Considering whereas prior to considering the Principal Issue of the Petition, the Constitutional Court (hereinafter referred to as the Court) shall first consider the authority of the Court to examine, hear, and decide upon the *a quo* petition and the legal standing of the Petitioners to file the petition;

#### **Authority of the Court**

**[3.3]** Considering whereas one of the constitutional authorities of the Court based on Article 24C paragraph (1) of the 1945 Constitution which was subsequently reaffirmed in Article 10 paragraph (1) sub-paragraph a of Law Number 24 Year 2003 regarding 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 CC Law) and Article 12 paragraph (1) sub-paragraph a of Law Number 4 Year 2004 regarding Judicial Power (State Gazette of the Republic of Indonesia Year 2004 Number 8, Supplement to the State Gazette of the Republic of Indonesia Number 4358) is to conduct judicial review of law against the 1945 Constitution;

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

#### **Legal Standing of the Petitioners**

**[3.5]** Considering whereas based on Article 51 paragraph (1) of the CC Law including its Elucidation, parties who may file a petition for the judicial review of Law against the 1945 Constitution shall be those whose constitutional rights and/or authorities granted by the 1945 Constitution are impaired by the coming into effect of a Law being petitioned for review, namely:

- a. individual (including groups of people having a common interest) Indonesian citizens;
- b. customary law community units insofar as they are still in existence and in line with the development of the communities and the principle of the Unitary State of the Republic of Indonesia as regulated in law;
- c. public or private legal entities; or

- d. state institutions;

Hence, in the judicial review of law against the 1945 Constitution the Petitioners must explain and substantiate the following:

- a. their qualification pursuant to the foregoing four categories;
- b. their constitutional rights and/or authority granted by the 1945 Constitution which are impaired by the coming into effect of the law being petitioned for review;

**[3.6]** Considering whereas with regard to the impairment of constitutional rights and/or authorities as intended in Article 51 paragraph (1) of the CC Law, following the Court's Decision Number 006/PUU-III/2005 dated May 31, 2005 and Decision Number 11/PUU-V/2007 dated September 20, 2007 as well as subsequent decisions, the Court is of the opinion that the impairment of constitutional rights and/or authority must meet five requirements, namely:

1. the existence of constitutional rights and/or authority of the Petitioners granted by the 1945 Constitution;
2. such constitutional rights and/or authority are deemed by the Petitioners to have been impaired by the coming into effect of the law petitioned for review;
3. the impairment of such constitutional rights and/or authority must be specific and actual or at least potential in nature which, pursuant to logical reasoning, will take place for sure;

4. there is a causal relationship (*causal verband*) between the impairment of constitutional rights and/or authority of the Petitioners and the law petitioned for review;
5. the possibility that by the granting of the Petitioners' petition, the impairment of such constitutional rights and/or authority argued by the Petitioners will not or does not occur any longer;

**[3.7]** Considering whereas the Petitioners in the *a quo* petition claim themselves as individual Indonesian citizens, namely the Editorial Heads/ Persons in charge/Directors of Printed Media Companies having direct interest in relation to the articles of Law 10/2008 being petitioned for review, namely Article 98 paragraphs (2), (3), and (4) as well as Article 99 paragraphs (1) and (2) of Law 10/2008, since they are deemed to have impaired the constitutional rights of the Petitioners set forth in Article 27 paragraph (1), Article 28D paragraph (1), Article 28F, Article 28H paragraph (2), and Article 28J paragraph (1) of the 1945 Constitution;

**[3.8]** Considering whereas based on the arguments conveyed and the evidence presented by the Petitioners, *prima facie* the Petitioners meet the requirement of legal standing as intended by Article 51 paragraph (1) of the CC Law and the Court's opinion which has been conveyed in the foregoing paragraph **[3.6]**;



**[3.9]** Considering whereas the Court has the authority to examine, hear and decide upon the *a quo* petition and the Petitioners have legal standing, the Court shall further consider the Principal Issue of the Petitioners' Petition.

### **Principal Issue of the Petition**

**[3.10]** Considering whereas in the Principal Issue of their Petition, the Petitioners argue the following matters:

1. Whereas Article 98 paragraph (2) of Law 10/2008 which reads, "*In the event of violation to the provisions set forth in Article 93, Article 94, Article 95, the Indonesian Broadcasting Commission or the Press Council shall impose a sanction as regulated in this law*" is contradictory to Article 28D paragraph (1) of the 1945 Constitution which reads, "*Every person shall have the right to the recognition, the guarantee, the protection and the legal certainty of just laws as well as equal treatment before the law*". The reason is that the granting of right to the Indonesian Broadcasting Commission (KPI) or Press Council to impose a sanction on the violation of Article 93, Article 94, and Article 95 of Law 10/2008 creates legal uncertainty, since it is not in accordance with the nature, function, authority, duty, and obligation of KPI as regulated in Article 8 of Law Number 32 Year 2002 regarding Broadcasting (hereinafter referred to as Law 32/2002) and the purpose for the establishment and function of the Press Council pursuant to Article 15 of Law Number 40 Year 1999 regarding Press (hereinafter referred to as Law 40/1999);

2. Whereas Article 98 paragraph (3) of Law 10/2008 which reads, "*Imposition of sanction as intended in paragraph (2) shall be informed to the General Election Commission and Provincial General Election Commission*" is contradictory to Article 28D paragraph (1) and Article 28J paragraph (1) of the 1945 Constitution which reads, "*Every person shall be obligated to respect the human rights of another person in the orderly life of community, nation and state*". The argument presented is that if this article is applied, the just protection and legal certainty would not be obtained by the Petitioners and would make the Petitioners not peaceful and always anxious due to the intervention from any third party in the freedom of the Petitioners in performing their profession and carrying out their business, since it is not in accordance with the provisions of Article 4 of Law 32/2002 and Article 15 of Law 40/1999;
3. Whereas Article 98 paragraph (4) of Law 10/2008 which reads, "*In the event that the Indonesian Broadcasting Commission or the Press Council do not impose a sanction as intended in paragraph (3) in a period of 7 (seven) days as of the finding of evidence of violation in the campaign, the General Election Commission, provincial General Election Commission, and regency/municipality General Election Commission shall impose a sanction to the campaign manager*" is contradictory to Article 28D paragraph (1) and Article 28J paragraph (1) of the 1945 Constitution. The argument is that this article seemed to contain a forced will to take legal

actions against the national press, whereas the Indonesian Broadcasting Commission, Press Council, General Election Commission, provincial General Election Commission, or the regency/municipality General Election Commission do not have the authority to take legal actions against the press and in the event that such article remains applicable, it is afraid that there would be arbitrary actions against the Petitioners, so that it creates legal uncertainty, the absence of legal protection and the occurrence of violation of Human Rights, as well as non-tranquility of the Petitioners;

4. Whereas Article 99 paragraph (1) of Law 10/2008 which reads, "*The sanction as intended in Article 98 paragraph (2) may be in the form of: a. Written reprimand; b. temporary discontinuance of the problem program; c. reduction of duration and time of reporting, broadcasting, and advertisement of the General Election campaign; d. fine; e. Freezing of the activity of reporting, broadcasting, and advertisement of the General Election campaign for a certain period; or revocation of printed mass media publication permit*" and Article 99 paragraph (2) of Law 10/2008 which reads, "*Further provisions with regard to the procedures and imposition of sanction as intended in paragraph (1) shall be stipulated by the Indonesian Broadcasting Commission or the Press Council together with the General Election Commission*" is contradictory to Article 27 paragraph (1), Article 28D paragraph (1), Article 28F, Article 28H paragraph (2), and Article 28J paragraph (1) of the 1945 Constitution. The

argument presented is that Article 99 of Law 10/2008 is classified into censorship, closing down, and prohibition of broadcasting, which under Law 40/1999 such matters are no longer recognized in the national press and constitute violation to the human rights of the Petitioners as guaranteed by the articles of the 1945 Constitution which becomes a test case for the *a quo* petition;

**[3.11]** Considering whereas based on the foregoing arguments, in the *petitum* the Petitioners request for the Court to pass the following decisions:

1. To grant the Petitioners' petition in its entirety;
2. To declare that Article 98 paragraphs (2), (3), and (4), as well as Article 99 paragraphs (1) and (2) of Law 10/2008 are contradictory to the 1945 Constitution;
3. To declare that Article 98 paragraphs (2), (3), and (4), as well as Article 99 paragraphs (1) and (2) of Law 10/2008 do not have binding legal effect;
4. To order the proper promulgation of this Decision in the Official Gazette of the Republic of Indonesia; and/or
5. To pass a decision according to what is equitable;

**[3.12]** Considering whereas to corroborate their arguments, the Petitioners have presented documentary evidence (Exhibit P-1 up to Exhibit P-4), the list of instrument of evidence of which has been included in the description concerning the Facts of the Case. In addition, the Petitioners have also presented experts, namely Drs. H. Kamsul Hasan, S.H. (an expert in the law of

press), Wikrama Iryans Abidin (a member of the Press Council), and Jhonson Panjaitan, as well as witness Marah Sakti Siregar who have given statements under oath in the hearing. The entire statements of experts and witness of the Petitioners are included in the description concerning the Facts of the Case, which principally state as follows:

1. **Expert Drs. H. Kamsul Hasan, S.H.**, in the Plenary Session on January 22, 2009 declared follows:

- Whereas the press has had its own law, namely Law 40/1999 which does not recognize any closing down and censorship institution, since the *a quo* law also does not recognize what is called as the Press Publication Permit (SIUPP) institution as in the previous Press Law, so Article 99 paragraph (1) sub-paragraph f of Law 10/2008 is no longer relevant;
- Whereas Article 99 paragraph (2) of Law 10/2008 which states, *“Further provisions with regard to the procedures and imposition of sanction as intended in paragraph (1) shall be stipulated by the Indonesian Broadcasting Commission or the Press Council together with the General Election Commission”* is in fact not in accordance with the function of the Press Council, namely to protect the freedom of the press, rather than revoke or close down the press;

- Whereas the expert is not of the same opinion with that of the People's Legislative Assembly and the Government stating that there is no impairment suffered by the Petitioners, since in the event that the permit of the press company is revoked, the Petitioners would suffer from losses, namely they will lose their job;
- Whereas in the event of violations committed by press, it is sufficient to apply Law 40/1999 which was actually prepared to impose sanction to the media, instead of applying other law;
- Whereas the provisions with respect to the sanction set forth in Article 99 paragraph (1) of Law 10/2008 raises ambiguity since it adopts the provisions of Law 32/2002 which is not recognized in Law 40/1999. Law of Broadcasting (Law 32/2002) classifies its field as journalistic field to be supervised directly by the Press Council, while the contents of other broadcasting are supervised by the Indonesian Broadcasting Commission, accordingly Law 32/2002 recognizes sanction in the form of written warning, temporary cessation of bad programs, reduction of duration and time of reporting. Whereas printed press institutions, such as those presented by the Petitioners, do not recognize such limitations, since Article 5 and Article 13 of Law 40/1999 provide for the journalistic field of printed press and the field of advertisement respectively. Accordingly, the limitations are different from the

broadcasting institutions in which permit is required since they utilized air spectrum. For printed press, licensing institution such as Publication Permit (SIT) which subsequently replaced with the Press Publication Permit (SIUPP) as applicable in the past is no longer recognized;

2. **Expert Wikrama Iryans Abidin**, in the Hearing held on February 5, 2009 declared as follows:

- Whereas Article 99 paragraph (1) sub-paragraph f of Law 10/2008 related to the sanction of revocation of printed media publication permit is highly controversial, since based on Law 40/1999, printed media no longer requires permit and there is no permit to be revoked, so that even though such provisions have become a positive law, it is unenforceable. The entire provisions of Article 99 paragraph (1) of Law 10/2008 is only a copy-paste of the provisions set forth in Law 32/2002, so that it creates problem when it is also applied to the printed media;
- Whereas with regard to the Press Council which obtain authority to impose sanction from Law 10/2008, it is necessary to take into account that pursuant to Article 15 of Law 40/1999, the Press Council is neither a Law Enforcement agency who can impose a sanction nor a judicial institution. It is an institution that resolve problems arising out of press reporting through mediation which is

also different from any legal mediations, in which it emphasizes the moral aspect, namely the press ethics;

- Whereas Article 99 paragraph (1) of Law 10/2008 is repressive in nature and constitutes a threat for the freedom of press guaranteed by the 1945 Constitution which constitutes the essence of democracy and serves as the gate for nation's improvement and instrument to improve the intellectual capacity of the nation;

**3. Expert Jhonson Panjaitan**, in the Hearing on February 5, 2009 declared as follows:

- Whereas based on his experience as defender of Human Rights, it was really difficult to fight for the freedom of press against the authoritarian regime, so that the closing down and censorship of the press can no longer exist in this country. Accordingly, the freedom of press depicted in Law 40/1999 may not be omitted following the enforcement of law intending to re-enforce provisions regarding the closing down and censorship of the press;
- Whereas the General Election which is intended to realize democracy and human rights may not be limited by the law which regulates it, namely Law 10/2008 setting forth provisions which violates the freedom of press guaranteed by the Constitution, similar to the provisions of Article 99 paragraph (1) of Law 10/2008



which includes the sanction of closing down of the press. Similarly, the aforementioned laws should not include provisions granting authority to the Press Council, which was actually established to protect the freedom of press, to impose a sanction to the press, including to conduct closing down;

**4. Witness Marah Sakti Siregar**, in the Hearing on February 5, 2009 declared as follows:

- Whereas based on his experience as Journalist and manager of media which had once being closed down by Government, or the term used at that time was the cancellation of the Press Publication Permit (SIUPP), such sanction was very painful and made all employees of the press company suffered, since they had to lose their job and could not work;
- Whereas as a consequence of closing down of the press, the witness could no longer assist the Government in handling unemployment and the witness has also lost the freedom to think and express his thoughts and opinions as guaranteed by the Constitution;

#### **Statement of the People's Legislative Assembly (DPR)**

**[3.13]** Considering whereas the People's Legislative Assembly represented by Ir. Pataniari Siahaan has provided verbal statement in the

Plenary Session of the Court on January 22, 2009 as complemented with the written statement which is included entirely in the description concerning the Facts of the Case, which principally states as follows:

- Whereas the People's Legislative Assembly is of the opinion that there is no and/or has been any constitutional rights and/or authority impairment suffered by the *a quo* Petitioners arising from the coming into effect of Article 98 paragraphs (2), (3), and (4), Article 99 paragraphs (1) and (2) of Law 10/2008, accordingly the Petitioners do not meet the requirement of legal standing as intended by Article 51 paragraph (1) of the CC Law to file for petition for judicial review of Law 10/2008 against the 1945 Constitution;
- Whereas with regard to the Principal Issue of the Petition, Article 98 paragraphs (2), (3), and (4) as well as Article 99 paragraphs (1) and (2) of Law 10/2008 constitute the provisions of sanctions which are intended to ensure the implementation of arrangement of equality of right to campaign for the political parties in the General Elections by using printed media and broadcasting institutions so that legal order can be created;
- Whereas according to the People's Legislative Assembly, the freedom of press is not solely freedom without limitations, since it is related to the human rights which may also be limited with law;

- Whereas contradicting Law 10/2008 regarding General Elections with Law 40/1999 regarding Press and Law 32/2002 regarding Broadcasting is not related to the constitutionality issue, accordingly it is not appropriate for the Court to conduct a judicial review;
- Whereas therefore, the People's Legislative Assembly requests for the Court to declare that the Petitioners do not have legal standing so that the petition cannot be accepted, and to declare in the Principal Issue of the Petition that the petition is rejected;

### **Statement of the Government**

**[3.14]** Considering whereas the Government has given verbal statement in the Plenary Session of the Court on January 22, 2009 which subsequently complemented with written statement and conclusion dated February 16, 2009 as included entirely in the description concerning the Facts of the Case, which principally states as follows:

- Whereas the Petitioners do not meet the requirement of legal standing to file the *a quo* petition as intended by Article 51 paragraph (1) of the CC Law and preceding decisions of the Court, since there is no constitutional rights and/or authority impairment arising from the coming into effect of the articles of Law 10/2008 being petitioned for review. In addition, the Petitioners' petition is obscure and unfocused (*obscuur libels*), especially in explaining and constructing an argument that there has been

- constitutional rights and/or authority impairment by the coming into effect of Law 10/2008;
- Whereas it is incorrect, ungrounded, and irrelevant if the Petitioners contradicting the provisions petitioned for review with other laws, since in addition to the fact that what is supposed to serve as the test case is the 1945 Constitution, so that in the event of contradiction or disharmony between a law to another, *in casu* between Law 10/2008 and Law 32/2002, as well as Law 40/1999 concerning the role of the Indonesian Broadcasting Commission and the Press Council, it shall be the duty of legislators (the People's Legislative Assembly together with the Government) to conduct the harmonization and synchronization through the mechanism of legislative review;
  - Whereas in relation to the Principal Issue of the Petition, according to the Government, the articles petitioned for review, namely Article 98 paragraphs (2), (3), and (4) as well as Article 99 paragraphs (1) and (2) of Law 10/2008 have been in accordance with the principles adhered to Law 10/2008, Law 40/1999, and Law 32/2002. In addition, a law may grant additional authority to the Press Council other than those expressively included in Article 15 of Law 40/1999, while with respect to the Indonesian Broadcasting Commission, its authority to impose a sanction, particularly in case of revocation of broadcasting permit, is limited to provide recommendations to the Minister of Communication and Information

- (Menkominfo) as the party granting permits, as set forth in the provisions of Article 33 paragraph (5) of Law 32/2002 *juncto* Court's Decisions in relation to Law 32/2002, namely Decision Number 005/PUU-I/2003 dated July 28, 2004, Decision Number 030/SKLN-IV/2006 dated April 17, 2006, and Decision Number 031/PUU-IV/2006 dated April 17, 2007;
- Whereas the involvement of the Indonesian Broadcasting Commission and the Press Council together with the General Election Commission in the mechanism of arrangement and imposition of sanctions to the broadcasting institutions and printed media violating the provisions on the advertisement of General Election campaign as set forth in Law 10/2008 is intended realize the mechanism of checks and balances and harmonization between the Indonesian Broadcasting Commission, Press Council, and the General Election Commission, since those three institutions concerned have the field of duty related to the organization of General Election campaign;
  - Whereas the arrangement concerning sanctions as set forth in Articles 98 and 99 of Law 10/2008 constitute *lex specialis* of the Law of Press Number 40/1999 and The Law of Broadcasting Number 32/2002 which constitute *lex generali*, since Law 10/2008 is momentous in nature, namely the special condition of General Election as the party of democracy which is held once in every five years;

- Whereas therefore, Article 98 paragraphs (2), (3), and (4) as well as Article 99 paragraphs (1) and (2) of Law 10/2008 are not contradictory to the articles of the 1945 Constitution which is made as the test case by the Petitioners, so that the Government request the Court that the Petitioners' petition is rejected or at least is not accepted due to the legal standing grounds not owned by the Petitioners or that the Court passes decision according to what is prudent and equitable (*ex aequo et bono*)

**[3.15]** Considering whereas the Government has presented the expert Prof. Dr. Ahmad Ramli, S.H., M.H. (Professor of Law of Padjajaran University, Bandung) who gave statement under oath in the hearing on February 5, 2009 as included entirely in the description concerning the Facts of the Case, which principally states as follows:

- First of all, it needs to be conveyed that professionalism is supposed to apply to all institutions, including the press institution which has considerable influence over the community, more than the influence of doctors and advocates. Therefore, if an institution having such significant influence loses its control and do not have high professionalism, it is reasonable that concerns will arise as to the freedom of press which is out of any control whatsoever and any body's control. It is true that major newspapers such as Kompas, Media Indonesia, Republika, Sinar Harapan, et cetera constitute very good instruments of public control and give quite significant contribution, however there are newspapers

published once or twice which contain abusive words. Do they still need to be protected by the name of the freedom of press? Therefore, it is very important and urgent to discuss as to when a publishing company is classified as a press so that it must protected;

- Secondly, the expert is of the opinion that the press is not a law enforcement agency, since the law has clearly stated law enforcement agency as follows, namely judges, public prosecutors, and police. Apart from that, in the event that there is an institution claiming itself as a law enforcement agency, such institution takes the law into its own hands. Therefore, it is our obligation to uphold the correct principle as to who the real law enforcement agencies are;
- Whereas the limitations criticized as assassination of the freedom of press may occur due to the past experience which has provided a relatively “wide and illegal” room as to when the press must be given limitation and sanction. However, the formulation of sanctions in explicit and very detailed manner is part of the effort to make the press become professional, so they do not need to worry about anything. Therefore, it can be imagined if the blockings are tolerated and the media continues to do that, so as to lead to uncompetitive General Election and there is no sanction. Whereas the freedom of press must absolutely exist, however we must also maintain the professionalism of press, so that the community

will respect the press and considers the press as part of the real democracy;

### **Opinion of the Court**

**[3.16]** Considering whereas based on the Petitioners' arguments along with the instrument of evidence presented, whether written evidence or statements of the experts and witness of the Petitioners, statement of the People's Legislative Assembly, statement of the Government along with the statements of its expert, and written conclusion of the Petitioners as well as written conclusion of the Government, the Court shall first convey the following matters:

1. Whereas basically there is fundamental difference between the broadcasting institution as regulated by Law 32/2002 and the printed media as regulated in Law 40/1999, namely that the media in the form of broadcasting institution which uses limited air spectrum needs permit the issuance of which involves the Minister of Communication and Information and the Indonesian Broadcasting Commission, while the printed mass media does not need permit from any agencies. Therefore, regulations of law which tend to generalize those both press institutions are certainly not or less appropriate and may cause various ambiguity in their interpretation and application, as what has occurred with the regulations of Law 10/2008 in relation to Law of Broadcasting Number 32/2002 and Press Law of Press Number 40/1999;



2. Whereas contradiction among laws cannot immediately be categorized or considered as a conflict between *lex specialis* and *legi generali*, as conveyed by the Government deeming Law 10/2008 as *lex specialis* and Law 40/1999 as well as Law 32/2002 as *legi generali*, so that the principle of freedom of press which does not require any permit as set forth in Law 40/1999 can be negated or nullified by Law 10/2008. In fact, such viewpoint constitutes simplification of problem which may create legal uncertainty and injustice which are contradictory to the Constitution/the 1945 Constitution. Inconsistency in regulations will harm the pillars of the constitutional state or the rule of law which also require that “*law must be fairly and consistently applied*” (vide Barry M. Hager, *The Rule of Law: A Lexicon for Policy Makers*, 2000);
3. Considering whereas the Court is not of the same opinion with the Government and the People’s Legislative Assembly arguing that the constitutionality of the articles petitioned for the *a quo* judicial review cannot be reviewed before the Court since they contain contradictions between one law and another, namely among Law 40/1999, Law 32/2002 and Law 10/2008. According to the Court, the articles petitioned for review are not only contradictory to both laws previously stipulated, but also directly contradictory to several articles of the 1945 Constitution. Furthermore, according to the Court the provisions of the articles petitioned for review contain contradictions within themselves (*contradictio*

*in terminis*) so that they create legal uncertainty the prohibition of which is regulated in the 1945 Constitution.

4. Whereas in line with the opinion of the experts presented by the Government stating that not all institutions may claim themselves as law enforcement agencies, the Court in its Decision Number 005/PUU-I/2003 dated July 28, 2004 in its legal considerations states that the imposition of sanction, especially severe sanction such as the revocation of publication permit, must take into account the principle of *“due process of law”*;

**[3.17]** Considering whereas based on the foregoing four matters, the Court shall subsequently consider the constitutionality of articles of Law 10/2008 being petitioned for review as follows:

1. Whereas Article 98 paragraph (2) of Law 10/2008 which reads, *“In the event of violation to the provisions set forth in Article 93, Article 94, Article 95, the Indonesian Broadcasting Commission or the Press Council shall impose a sanction as regulated in this law”*. The use of the term *“or”* may give an interpretation that the institutions having capacity to impose sanctions are alternative in nature, namely the Indonesian Broadcasting Commission or the Press Council, which allows different types of sanction to impose leading to legal uncertainty and injustice. Furthermore, in accordance with its position and function, pursuant to Law 40/1999 the Press Council has no authority to impose a sanction to the press, particularly the printed media. Therefore, the Petitioners’ argument that

- Article 98 paragraph (2) of Law 10/2008 is contradictory to Article 28D paragraph (1) of the 1945 Constitution is sufficiently grounded;
2. Whereas the Petitioners are also of the opinion that Article 98 paragraph (3) of Law 10/2008 which reads, "*Imposition of sanction as intended in paragraph (2) shall be informed to the General Election Commission and Provincial General Election Commission*" is contradictory to Article 28D paragraph (1) of the 1945 Constitution, while according to the Court by referring to the considerations of point 1, the existence of the *a quo* article is no longer relevant and *mutatis mutandis* to the Petitioners' arguments which are also sufficiently grounded;
  3. Whereas the Petitioners are of the opinion that Article 98 paragraph (4) of Law 10/2008 which reads, "*In the event that the Indonesian Broadcasting Commission or the Press Council do not impose a sanction as intended in paragraph (3) in a period of 7 (seven) days as of the finding of evidence of violation in the campaign, the General Election Commission, provincial General Election Commission, and regency/municipality General Election Commission shall impose a sanction to the implementers of the campaign*" is contradictory to Article 28D paragraph (1) and Article 28J paragraph (1) of the 1945 Constitution. The formula of such provisions have mixed up the positions and functions of the Indonesian Broadcasting Commission and the Press Council in imposing sanctions to the General Election campaign managers, which in the Court's opinion may create ambiguity

and legal uncertainty, so that the Petitioners' argument is sufficiently grounded and *mutatis mutandis* to the considerations in points 1 and 2 and also applies for this point 3;

4. Whereas with respect to Article 99 paragraph (1) of Law 10/2008 which principally set forth the types of sanction to be imposed by the Indonesian Broadcasting Commission or the Press Council [*vide* Article 98 paragraph (2)], the Court is of the opinion that Article 99 paragraph (1) sub-paragraphs a up to and including e seem to be relevant only to the broadcasting institutions, since they constitute a copy-paste of the provisions set forth in Law 32/2002 and irrelevant to the printed mass media. At the same time, Article 99 paragraph (1) sub-paragraph f may be applied for broadcasting institutions based on Law 32/2002, however such sanction shall not be imposed by the Indonesian Broadcasting Commission but by the Government (the Minister of Communication and Information) after fulfilling the due process of law (*vide* Decision Number 005/PUU-I/2003, dated July 28, 2004). With respect to the printed mass media, the sanctions as referred to in Article 99 paragraph (1) shall not be applicable since Law 40/1999 no longer recognizes the licensing institution for the printed mass media publication, so that it constitutes unnecessary norm which has lost its legal effect and *raison d'être*. Accordingly, it must be nullified. Furthermore, it is also contradictory to Article 28D paragraph (1) of the 1945 Constitution, namely creating legal uncertainty and also violates the principles of freedom of expression

guaranteed by the 1945 Constitution. Therefore, the Petitioners' argument is sufficiently grounded;

5. Article 99 paragraph (2) of Law 10/2008 which reads, *“Further provisions with regard to the procedures and imposition of sanction as intended in paragraph (1) shall be stipulated by the Indonesian Broadcasting Commission or the Press Council together with the General Elections Commission”*. Since all of the arguments concerning Article 98 paragraphs (2), (3), and (4) as well as Article 99 paragraph (1) of Law 10/2008 have been considered as sufficiently grounded by the Court, therefore they are *mutatis mutandis* to the application of Article 99 paragraph (2) of Law 10/2008.

**[3.18]** Considering whereas since the reform era, the state has given strict guarantee on the protection of freedom to express opinion, either verbally or in writing as a constitutional rights of the citizens and social institutions. At first, such guarantee was implemented by the revocation of provisions on the requirement of Press Publication Permit (SIUPP) and all of its forms as set forth in Law Number 40 Year 1999 regarding the Press the position of which was furthermore supported by the amendment to the provisions of Article 28E paragraph (3) of the 1945 Constitution which reads, *“Every person shall have the right to the freedom of association and assembly as well as expression of opinion”*. Hence, the Court is of the opinion that the provisions of Article 98 paragraphs (2), (3), and (4) as well as Article 99 paragraphs (1) and (2) of Law

10/2008 are contradictory to the freedom of expression as regulated in Article 28E paragraph (3) of the 1945 Constitution. Both of the *a quo* articles are also contradictory to the provisions of Article 28F of the 1945 Constitution which reads, *“Every person shall have the right to communicate and to obtain information to develop him/herself and his/her social environment, and shall have the right to seek, obtain, possess, store, process and convey information by using all available kinds of channels”*;

**[3.19]** Considering whereas the Court has considered that all of the Petitioners’ arguments in the *a quo* petition as grounded, however it does not mean that if the *a quo* petition is granted there would be legal vacuum in public protection in the event that the broadcasting institutions and printed media violate the advertisement of the General Election campaign as set forth in Article 93, Article 94, and Article 95 of Law 10/2008. This is due to the fact that if such matter occurs, Law 40/1999 and Law 32/2002 providing for the imposition of sanctions still can be applied;

#### 4. CONCLUSION

Based on all the foregoing evaluation of facts and laws, the Court concludes as follows:

**[4.1]** Article 98 paragraphs (2), (3), and (4) as well as Article 99 paragraphs (1) and (2) of Law 10/2008 cause legal uncertainty,

injustice, and are contradictory to the principle of freedom of expression guaranteed by the 1945 Constitution;

**[4.2]** The Petitioners' arguments are sufficiently grounded;

## 5. DECISION

Based on the 1945 Constitution of the Republic of Indonesia and in view of Article 56 paragraphs (2) and (3) as well as Article 57 paragraphs (1) and (3) of Law Number 24 Year 2003 regarding the Constitutional Court (State Gazette of the Republic of Indonesia Year 2003 Number 98, Supplement to the State Gazette of the Republic of Indonesia Number 4316),

### Passing the decision,

- To grant the Petitioners' petition in its entirety;
- To declare that Article 98 paragraphs (2), (3), and (4) as well as Article 99 paragraphs (1) and (2) of Law Number 10 Year 2008 regarding the General Election of Members of the People's Legislative Assembly, Regional Representative Assembly, and Regional People's Legislative Assembly (State Gazette of the Republic of Indonesia Year 2008 Number 51, Supplement to the State Gazette of the Republic of Indonesia Number 4836) are **contradictory** to the 1945 Constitution of the State of the Republic of Indonesia;

- To declare that Article 98 paragraphs (2), (3), and (4) as well as Article 99 paragraphs (1) and (2) of Law Number 10 Year 2008 regarding the General Election of Members of the People's Legislative Assembly, Regional Representative Assembly, and Regional People's Legislative Assembly (State Gazette of the Republic of Indonesia Year 2008 Number 51, Supplement to the State Gazette of the Republic of Indonesia Number 4836) **do not have any binding legal effect;**
- To order the proper promulgation of this Decision in the Official Gazette of the Republic of Indonesia.

Hence the decision was made in the Plenary Consultative Meeting attended by eight Constitutional Court Justices on Thursday, the nineteenth of February two thousand and nine, and was pronounced in a Plenary Session of the Court open for the public on this day, Tuesday, twenty-fourth of February two thousand and nine, by us, Moh. Mahfud MD., as the Chairperson and concurrent Member, Maria Farida Indrati, Abdul Mukthie Fadjar, Maruarar Siahaan, Achmad Sodiki, M. Akil Mochtar, M. Arsyad Sanusi, and Muhammad Alim, respectively as Members and assisted by Alfius Ngatrin as Substitute Registrar, in the presence of the Petitioners and/or their Attorneys, the Government and/or its Attorneys, and the People's Legislative Assembly and/or its Attorneys.

**CHIEF JUSTICE,**

**Sgd.**



**Moh. Mahfud MD.**

**JUSTICES,**

**Sgd.**

**Maria Farida Indrati**

**Sgd.**

**Abdul Mukthie Fadjar**

**Sgd.**

**Maruarar Siahaan**

**Sgd.**

**Achmad Sodiki**

**Sgd.**

**M. Akil Mochtar**

**Sgd.**

**M. Arsyad Sanusi**

**Sgd.**

**Muhammad Alim**

**SUBSTITUTE REGISTRAR,**

**Sgd.**

**Alfius Ngatrin**