



## DECISION

Number 51-52-59/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 42 Year 2008 concerning the General Election of President and Vice President against the 1945 Constitution of the State of the Republic of Indonesia, filed by:

[1.2] **Petitioner in Case Number 51/PUU-VI/2008**

**Saurip Kadi**, Indonesian citizen, born in Brebes on January 18, 1951, Islam, Retired Personnel of the Indonesian Army, having his address at Jalan Rantai Timah G.25, KPAD Bulak Rantai, Kramatjati, East Jakarta;

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

[1.3] **Petitioner in Case Number 52/PUU-VI/2008**

**Crescent Star Party** (*Partai Bulan Bintang*), having its address at Jalan Pasar Minggu Km 18, South Jakarta, in this matter represented by H.M.S. Kaban, S.E., M.Si., and Drs. Sahar L. Hasan, respectively act as the Chairperson

and Secretary General of the Central Executive Board of the Crescent Star Party based on Article 11 paragraph (3) of the Articles of Association and therefore legally authorized to act for and on behalf of the Crescent Star Party, granting the power of attorney to Prof. Dr. Yusril Ihza Mahendra, S.H., M.Sc., Hamdan Zoelva, S.H., M.H., Januardi S. Haribowo, S.H., Bayu Prasetio, S.H., M.H. and Irma Sukardi, S.H. associated in Legal Counsels' Team of the Crescent Star Party, having its address at Jalan Kertanagara Number 68, Kebayoran Baru South Jakarta, by virtue of a Special Power of Attorney Number 1203 SK/A/PP/2008 dated November 25, 2008, either individually or jointly to act for and on behalf of the Crescent Star Party;

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

[1.4] **Petitioners in Case Number 59/PUU-VI/2008**

1. **Central Executive Board of the People's Conscience Party (DPP Hanura)**, having its address at Jakarta, Jalan Kotabumi Number 11 A, Central Jakarta, in this matter represented by General of Indonesian Army (Ret.), namely H. Wiranto acting as the General Chairperson and Yus Usman Sumanegara acting as Secretary General;
2. **National Collective Leadership of the Democratic Renewal Party (PKN PDP)**, having its address at Jakarta, Jalan Sisingamangaraja Number 21, Kebayoran Baru, South Jakarta, in this matter represented by H. Roy BB. Janis, S.H., M.H. acting as Daily Managing Executive and KRHT. H. Didi Supriyanto, S.H. acting as Daily Executive Secretary;

3. **Central Executive Board of the Prosperous Indonesia Party (DPP PIS)**, having its address at Jakarta, Jalan Slamet Riyadi Raya Number 19, Matraman, East Jakarta, in this matter represented by H. Budiyanto Darmastono, S.E. acting as the General Chairperson and DR. Marnixon RC. Willa. S.H., M.H. as Secretary General;
4. **Central Executive Board of the Labor Party (DPP PB)**, having its address at Jakarta, Jalan Tanah Tinggi II Number 44 B, Johar Baru District, Central Jakarta, in this matter represented by DR. Muchtar Pakpahan, S.H., M.A. acting as the General Chairperson and Sonny Pudjosasono, S.H., M.M. acting as Secretary General;
5. **Central Executive Board of the National People's Concern Party (DPP PPRN)**, having its address at Jakarta, Jalan Sakti VII Number 2, Slipi, Kemanggisan, West Jakarta, in this matter represented by Amelia Achmad Yani acting as the General Chairperson and H.V.T. Albert Simandjuntak acting as Secretary General;
6. **Central Presidium Council of the Archipelago Republic party (DPP RepublikaN)**, having its address at Office Complex of Pulomas Blok VI Number 1, Jalan Perintis Kemerdekaan, East Jakarta, in this matter represented by Lieutenant General (Ret.) Drs. H. Syahrir, M.S., S.E. acting as the General Chairperson and Drs. Yus Sudarso, S.H., M.H., M.M. acting as Secretary General;

In this matter, granting the power of attorney to DR. H. Teguh Samudera, S.H., M.H., Kores Tambunan, SH., H. Zulkifli Nasution, SH. MH., Sinto Ari Wibowo, SH.M.Kn., R. Bonaran Situmeang, SH. MH., Ibnu Siena Bantayan, SH., H.Taufik Hais, SH., Hj. Siti Aminah, SH.MH., Fredi K. Simanungkalit, SH., Suci Madio, SH., Sitor Situmorang, SH. MH., E. Suherman Kartadinata, SH. MBA., Sheha A. Habib, SH., Yanyo Jaya, SH., DR. Andi M. Asrun, SH. MH., Hj. Elza Syarief, SH. MH., Gusti Randa Malik, SH., Dian Wahyundari Sudjono, SH., Rusdin Ismail, SH., Anthony Hilman, SH., Bahari Gultom, SH., Sulistya Adi, SH. MH., Mehbob, SH. CN. MBA., Ahmad Husni M.D., SH.MH., Syamsuri, SH., Henri Gani Purba, SH., Mangasi Harianja, SH., Ahmad Faisal, SH., H. Djunaidi, SH., Petrus Bala Pattyona, SH., Rudi H. Simanjuntak, SH., Welly Soemardjono, SH., M. Rasyid Ridho, SH. MH., Baginda Siregar, S.Ag. SH., Drs. Khairil Hamzah, SH., Erman Umar, SH., Parulian Hutajulu, SH., Ali Abdullah, SH. MM. MH., Horas Siagian, SH., Jack Sidabutar, SH.MM.MH., Firma Uli Silalahi, SH., Albert Nadeak, SH., M. Jaya Butar-Butar, SH. MH., Hotma Raja B. Nainggolan, SH., Paulus Sanjaya, S.Sos, SH., Ismail Kamarudin Umar, SH., James Simanjuntak, SH., Herianto Sinaga, SH., Ricky Siahaan, SH., H.M. Kamal Singadirata, SH. MH., Fajri Safi'i Singadirata, SH., Tommy Sontosa, SH., Arifin Mohamad Nur Madjid, SH., Syairul Irwanto Tholib, SH, Saepudin Umar, SH., Drs. Satria, SH., Arwinsah Salim Tagending, SH., H. Rangkey Margana, SH., Endarto Budi Waluyo, SH., Agustus P.W. Sutrisno, SH., Hazirun Tumanggur, SH. MH., Prihakasa Kamar, SH., H. Syarifuddin Sudin, SH. MH., Sujudi, SH., Manahara Sitindjak, SH. MH., H. Nasboon Mahmud, SH., Youngky Fernando, SH. MH., A. H. Wakil Kamal, SH.

MH., Wawan Ardianto, SH., Gaguk Bangun Setiyadi, SH., Drs. Misrad, SH., Drs. Taufik CH, MH., Janu Iswanto, SH., Sarjono Harjo Saputro, SH. MBA. M.Hum., Bambang Suheri, SH., Hartono, SH., Hj. Suningsih, SH. MH., H. Nur Hidayat, SH. MH., Hj. Enita Adyalaksmita, SH., Hj. Wiwiek Sugiharty, SH., Waslam Makhsid, SH., L. Alfies Sihombing, SH., M. Yusuf Haseng, SH., Ratriadi Wijanarko, SH., Nicolas Reidi, SH., Sri Utami, SH., R.O.Tambunan, SH., Petrus Selestinus, SH., Robert B. Keytimu, SH., Martin Erwan, SH., Terkelin Brahmana, SH., H. Sigit Herman Binaji, SH. MH., Hasyim Nahumarury, SH., Harris Hutabarat, SH., Silvester Nong M., SH., MM., Ardi Mbalembout, SH., Erlina R. Tambunan, SH., Devita Aresti Hapsari, SH., Egidius Sadipun, SH., Brodus, SH., Ir. Koesnadi Notonegoro, SH., H. Sonie Soedarsono, SH. MH., Yuliani, SH., Agus Saputra, SH., Sattu Pali, SH., C. Suhadi, SH., Menara Iman Hutasoit, SH. LL.M., Julian Wahyudi, SH., Posma GP Siahaan, SH., Robert Situmeang, SH., Ramses Situmorang, SH., Rudy E. Situmeang, SH., DR. Marnixon RC. Wila, SH. MH., David Aruan, SH. MH., Irhamsyah, SH., Medianto Hadi Purnomo, SH., Donny Fernando, SH. MH., Heintje W. Sumampouw, SH., Johni Novian, SH. MH., Farid Hasbi, SH., all of them being Advocates associated in the "Team for the Enforcement of Democracy and Human Rights or *Tim Penegak Demokrasi & Hak Asasi Manusia*" (TPD & HAM), having its secretariat address at Jalan Proklamasi Number 69, Central Jakarta, Telp. (021) 3921913, (021). 392790 Fax. 3921785, by virtue of Special Powers of Attorney dated December 12, 2008 respectively, in this matter acting for and on behalf of the authorizer;

Hereinafter jointly referred to as ----- **Petitioners III**;

[1.5] Having read the petition of Petitioner I, Petitioner II, and Petitioners III;

Having heard the statements of Petitioner I, Petitioner II, and Petitioners III;

Having heard and read the written statement of the Government;

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

Having heard and read the statement of the Experts of Petitioner I, Petitioner II, Petitioners III, and the Government;

Having heard the statement of witnesses of Petitioner II;

Having examined the evidence;

Having read the written conclusions of Petitioner I, Petitioner II, Petitioners III, and the Government.

### 3. LEGAL CONSIDERATIONS

[3.1] Considering whereas the purpose and objective of the Petitioners' petition shall be to review the constitutionality of Article 3 paragraph (5) and Article 9 of Law Number 42 Year 2008 regarding the General Election of President and Vice President (State Gazette of the Republic of Indonesia Year 2008 Number 176, Supplement to the State Gazette of the Republic of Indonesia Number 4924, hereinafter referred to as Law 42/2008) 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 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 Petitioners to act as Petitioners in the *a quo* petition.

With respect to the foregoing issues, the Court is of the following opinion:

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

[3.3] Considering whereas pursuant to Article 24C paragraph (1) of the 1945 Constitution and Article 10 paragraph (1) sub-paragraph a 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 a of Law Number 4 Year 2004 regarding Judicial Power, the Court has authority to hear at the first and final level, the decision of which shall be final, among other things, to conduct judicial review of Laws against the 1945 Constitution;

[3.4] Considering whereas the Petitioners' petition is to review the constitutionality of norms of Article 3 paragraph (5) and Article 9 of Law 42/2008 against the 1945 Constitution, being one of the authorities of the Court; and therefore, the Court has 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 the Constitutional Court Law along with its elucidation, the Petitioners shall be parties who deem that their constitutional rights and/or authorities granted by the 1945 Constitution have been impaired by the coming into effect of a Law, namely:

- a. individual Indonesian citizens (including groups of people having a common interest);



- b. units of customary law communities insofar as they still exist and in accordance with the development of the community and the principle of the Unitary State of the Republic of Indonesia as provided for in law;
- c. public or private legal entities; or
- d. state institutions;

Therefore, in order to file a petition for judicial review of a law against the 1945 Constitution, the Petitioners must first explain and prove:

- a. their capacity as Petitioners as intended in Article 51 paragraph (1) of the Constitutional Court Law;
- b. the impairment of constitutional rights and/or authorities granted by the 1945 Constitution due to the coming into effect of the Law petitioned for judicial review;

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

- a. the Petitioners must have constitutional rights and/or authorities granted by the 1945 Constitution;

- b. the Petitioners deem that such constitutional rights and/or authorities have been impaired by the coming into effect of the Law petitioned for review;
- c. the impairment of such constitutional rights and/or authorities shall be specific and actual in nature or at least potential which, pursuant to logical reasoning, will take place for sure;
- d. there is a causal relationship (*causal verband*) between the said impairment and the coming into effect of the Law petitioned for review;
- e. If the petition is granted, it is expected that the impairment of constitutional rights and/or authorities argued will not or does not occur any longer;

**[3.7]** Considering whereas the Petitioners have presented the following arguments:

**[3.7.1] Petitioner I (Saurip Kadi)**

- The Petitioner is an Indonesian Citizen as intended in Article 51 paragraph (1) of the Constitutional Court Law, who intends to use his right to participate in the government as Candidate President of the Republic of Indonesia, when there is a Political Party or a coalition of Political Parties to nominate him;
- The Petitioner is of the opinion that the application of Article 9 of Law 42/2008, is not in accordance with the Constitutional mandate, and hence

- the Petitioner deems that his constitutional rights and/or authority are impaired by the coming into effect of the aforementioned law;
- The Petitioner shall have the right to participate in the general election of President and Vice President, and to be elected by the Indonesian people. In exercising his rights, the Petitioners shall obtain the guarantee on equal treatment before law and government [Article 27 paragraph (1) of the 1945 Constitution], and the guarantee to obtain just recognition, guarantee, protection, and legal certainty as well as equal treatment before law [Article 28D paragraph (1) of the 1945 Constitution], the guarantee to obtain equal opportunities in government [Article 28D paragraph (3) of the 1945 Constitution], and the right to be free from discriminatory treatment on any basis whatsoever [Article 28I paragraph (3) of the 1945 Constitution], all of them being manifestation of people's sovereignty [Article 1 paragraph (2) of the 1945 Constitution], which should not be hindered by the requirements provided for in Article 9 of Law 42/2008;
  - The Petitioner is a citizen who has the ability and potential to be nominated by parties. However, the wording of article requiring that only a party or a coalition of parties with a minimum of 20 % of seats in DPR or acquisition of 25% of valid votes in the General Election can nominate is highly discriminatory and eliminates the opportunity of being nominated by the parties and coalition of parties and its application has created injustice;

- The coming into effect of Article 9 of Law 42/2008 has impaired the constitutional rights of the Petitioner provided for in Article 1 paragraph (2), Article 6A paragraph (1) and paragraph (2), Article 27 paragraph (1), Article 28C paragraph (2), Article 28D paragraph (1) and paragraph (3) as well as Article 28I paragraph (5) of the 1945 Constitution, namely constitutional rights to obtain just recognition, guarantee, protection, and legal certainty as well as equal treatment before law [Article 28D paragraph (1) of the 1945 Constitution], the guarantee to obtain equal opportunity in the government [Article 28D paragraph (3) of the 1945 Constitution], and the right to be free from discriminatory treatment on any basis whatsoever [Article 28I paragraph (2) of the 1945 Constitution], which constitutes one of the manifestations of people's sovereignty [Article 1 paragraph (2) and Article 6A paragraph (1) of the 1945 Constitution];

**[3.7.2] Petitioner II (Crescent Star Party)**

- The Petitioner is a Political Party participating in the 2009 General Election with Candidacy Number 27, stipulated by the General Election Commission (KPU) in accordance with KPU Decision Number 149/SK/KPU/Year 2008 on July 9, 2007 regarding STIPULATION AND DRAWING OF CANDIDACY NUMBERS OF POLITICAL PARTIES PARTICIPATING IN THE 2009 GENERAL ELECTION;

The provision of Article 6A paragraph (2) of the 1945 Constitution which reads, *"A Candidate Pair of President and Vice President shall be*

*nominated by a Political Party or a coalition of Political Parties participating the general election prior to the implementation of the general election”;*

- Whereas the provisions of Article 22E paragraphs (1) and (2) of the 1945 Constitution read as follows:

Paragraph (1)        *”The general election shall be held in a direct, general, independent, confidential, honest, and just manner once in five years”;*

Paragraph (2)        *”The general election shall be held to elect members of the People’s Legislative Assembly, the Regional Representative Council, President and Vice President and the Regional People’s Legislative Assembly”;*

- Based on Article 6A paragraph (2) and Article 22E paragraphs (1) and (2) of the 1945 constitution, the Petitioners as Political Parties participating in the General Election shall have constitutional rights in the form of:

- The right to nominate a Candidate Pair of President and Vice President;
- The right to nominate a Candidate Pair of President and Vice President prior to the implementation of general election of

members of DPR, DPD, President and Vice President and DPRD held simultaneously.

- Whereas Article 9 of Law 42/2008 reads, *"A Candidate Pair shall be nominated by a Political Party or a Coalition of Political Parties participating the general election meeting the requirement of having a minimum seat acquisition of 20% (twenty percent) of the total seats in DPR or a minimum national valid vote of 25% in the General Election of members of DPR prior to the implementation of the General election of President and Vice President"*;
- Whereas Article 3 paragraph (5) of Law 42/2008 reads:  
  
*"the General Election of President and Vice President shall be implemented after the implementation of the General Election of the members of DPR, DPD and DPRD"*;
- Whereas the provisions of Article 9 and Article 3 paragraph (5) of Law 42/2008 shall limit/reduce the Petitioner's right as a Political Party participating the General Election to nominate a Candidate Pair of President and Vice President by adding the requirement in that a minimum seat acquisition of 20% of the total seats in DPR or a minimum national valid vote of 25% and the reliance on the results of the General Election of DPR, DPD and DPRD. The applicability of material and substance of the aforementioned two articles has clearly impaired the constitutional rights

of the Petitioner granted, guaranteed, and protected by the provisions of Article 6A paragraph (2) and Article 22E paragraphs (1) and (2) of the 1945 Constitution, being the constitutional rights of the Petitioner as a Political Party participating in the General Election in the form of the right to nominate a Candidate Pair of President and Vice President prior to the implementation of the General Election of the members of DPR, DPD, President and Vice President, and DPRD held simultaneously, being reduced, limited and/or hindered;

- Whereas it has been a fact of common knowledge (*notoir feiten*) that it is very difficult for the Petitioner and even for most political parties participating the General Election to meet percentage of vote acquisition required by Article 9 of Law 42/2008; accordingly, potential impairment in the form of lost or at least hindered/reduced constitutional rights of the Petitioner is so obvious and thereby, with regard to the issue of constitutional impairment, the Petitioners shall have legal standing to file a petition for judicial review of Article 9 and Article 3 paragraph (5) of Law 42/2008;

**[3.7.3] Petitioners III (People's Conscience Party (Hanura), Democratic Renewal Party, Prosperous Indonesia Party, Labor Party, National People's Concern Party, Archipelago Republic Party)**

- Whereas the Petitioners are individuals and legal entities having a significant interest in the general election of President either to nominate themselves or to be nominated. Likewise, as Political Parties, the Petitioners have an interest in performing the functions of parties as provided for in Law Number 2 Year 2008 regarding Political Parties (the Political Party Law), namely to absorb, gather, and channel political aspiration of the people in a constitutional manner in formulating and stipulating state policy, as well as other functions namely as political recruitment instruments with regard to the recruitment process of political functions through a democratic mechanism with due observance of gender equality and fairness;
  
- Whereas political parties shall have the right to participate in the general election of President, and Article 12 paragraph (1) of the Political Party Law states that Political Parties shall have the right to nominate Candidate Pairs of President and Vice President, and the aforementioned article does not specify a “conditional right”/unnecessary to be deemed as a “conditional right” for political parties to nominate candidates of President as the Political Party Law was enacted on January 2008 while Law 42/2008 was just enacted on November 14, 2008. However, as the General Election of President and Vice President shall be held directly by the people and each citizen has equal opportunity in the government, “to nominate a Candidate Pair of President and Vice President” may be interpreted as the right of political parties with respect to which no



- requirement and/or limitation in any form shall be required pursuant to Article 6A paragraph (2) of the 1945 Constitution and the Political Party Law. However, the abovementioned rights of political parties are clearly contradictory to Article 9 of Law 42/2008 which reads, *"A Candidate Pair of President and Vice President shall be nominated by a Political party or a coalition of Political Parties participating the General Election meeting requirements of a minimum seat acquisition of 20 % (twenty percent) of the total seats in DPR or a minimum national valid votes of 25 % (twenty-five percent) in the General Election of members of DPR prior to the implementation of the General Election of President and Vice President"*;
- Whereas the Petitioners are of the opinion that the coming into effect of Article 9 of Law 42/2008 is potential to cause the failure in implementing a democratic, direct, general, independent, confidential, honest, and just General Election; moreover, Article 9 of Law 42/2008 hampers the constitutional rights of the Petitioners either as individual Indonesian citizens or legal entities as political parties to nominate themselves and to be nominated as President and Vice President candidates in the general election of President and Vice President, as provided for in 6A paragraph (2), Article 28C paragraph (2), Article 28D paragraph (3), Article 28H paragraph (2), Article 28I paragraph (2) and paragraph (4), and Article 28J paragraph (1) of the 1945 Constitution, as well as articles of Law Number 39 Year 1999 regarding Human Rights;

**[3.7.4]** Considering whereas with special regard to the issue of legal standing of the Petitioners, the Government has provided the following statements:

1. With regard to Petitioner II in the case with registration number 52/PUU-VI/2008 (Crescent Star Party) as a Political Party having representatives in DPR who have attended the entire discussion process and have granted their approval on the *a quo* law, the Government is of the opinion that the submission of petition for review of the foregoing provisions by Petitioner II is inappropriate. Politically, political parties who have also granted their approval in the entire discussion process of the *a quo* law shall be bound by the approval they have granted to the *a quo* Law;
2. With regard to the Petitioners in the case with registration number 51/PUU-VI/2008 and number 59/PUU-VI/2008, the Government is of the opinion that such provisions do not impair their constitutional rights and/or authority because the General Election of President and Vice President is held following the General Election of members of DPR, DPD, and DPRD. In addition to that, such provisions apply not only to the Petitioners, but also to all Political Parties participating in the General Election, either “big” or “new” parties. No guarantee for any Political Party to acquire a minimum seat acquisition of 20% of the total seats in DPR or a minimum national valid votes of 25 % in the General Election of members of DPR in the next legislative General Election; accordingly, the Government is of

the opinion that there is no impairment of constitutional rights either specific or actual in nature on the Petitioners;

**[3.7.5]** Considering whereas based on the criteria stated in the consideration of paragraph **[3.6]** above, either concerning qualification of the Petitioners as individuals and/or legal entity of Political Party or requirement of impairment of constitutional rights as provided for in Article 51 paragraph (1) of the Constitutional Court Law, the Court is of the following opinion:

**[3.7.5.1]** Whereas Petitioner I (Saurip Kadi) as an individual Indonesian citizen arguing that he has the potential to be nominated as Candidate President by Political Parties and that his constitutional rights are impaired by Article 9 of the *a quo* Law 42/2008, according to the Court, has met the criterion of legal standing to file a petition for the *a quo* review;

**[3.7.5.2]** Whereas although Petitioner II (Crescent Star Party), as a legal entity of Political Party having obtained legalization from the Minister of Justice and Human Rights, currently referred as the Minister of Law and Human Rights (Exhibit P.II-6), according to the statement of the Government, has participated in the discussion process of Law 42/2008 and has granted its approval in DPR, according to the Court, it has met the requirement of legal standing. To the Court, that the Petitioners' party gave its approval of the *a quo* Law in DPR but subsequently questioned it shall be deemed to be an issue of political ethics by the Court. However, the Court considers that in the future, political parties and/or members of DPR having taken part and participated in the discussion and

decision-making institutionally on a law petitioned for review will be declared to be having no legal standing through arrangement in the Constitutional Court Regulation;

**[3.7.5.3]** Whereas Petitioners III (People's Conscience Party, Democratic Reform Party, Prosperous Indonesia Party, Labor Party, National People's Concern Party, and Archipelago Republic Party) obtained authorization as legal entities from the Minister of Law and Human Rights respectively on April 3, 2008 while they have also argued to be individual Indonesian citizens (including groups of people having a common interest). However, the Court is of the opinion that the legal standing of the Petitioners to file the *a quo* petition shall be only insofar as their being private legal entities of Political Party. However, with respect to the legal standing as individuals or groups of people having a common interest, no evidence from the powers of attorney of the Petitioners represents that the Petitioners also act in the qualification as individuals;

According to the Court, the said requirements of qualification and impairment of constitutional have been met, and hence the Petitioners have met the criteria of legal standing to file the *a quo* petition;

[3.8] Considering whereas as the Court has authority to examine, hear, and decide upon the *a quo* petition, and the Petitioners have legal standing to act as Petitioners in the *a quo* petition as considered above, the Court shall further consider the principal issue of the petition.

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

[3.9] Considering whereas the principal issue of the Petition filed by the Petitioners is as follows:

#### **[3.9.1] Petitioner I (Saurip Kadi)**

Whereas the Petitioner has filed a petition for substantive review of Article 9 of Law 42/2008, which is argued to be contradictory to the 1945 Constitution for the following principal reasons:

- Article 9 of Law 42/2008 which has provided that only Political Parties or Coalitions of Political Parties having seat acquisition of 20% in DPR or valid vote acquisition of 25% in the General Election shall have the right to nominate Candidate President and Vice President is a highly discriminatory wording of article and it eliminates his opportunity to be nominated by a Political Party or a coalition of Political Parties and that its application has created injustice;
- The Petitioner is a citizen who has the ability and potential to be nominated by parties, but the application of the article in such Law has caused the political and civil rights of the Petitioners to be suppressed and eliminated;
- The aforementioned provisions are contradictory to the 1945 Constitution particularly in Article 1 paragraph (2), Article 6A paragraph (1), Article 6A

paragraph (2), Article 27 paragraph (1), Article 28C paragraph (2), Article 28D paragraph (3), Article 28I paragraph (2) and paragraph (5) of the 1945 Constitution as well as to Article 21 of the 1948 Universal Declaration of Human Rights (UNUDHR) and Article 5 paragraph (1), Article 15, and Article 43 paragraph (1) of Law Number 39 Year 1999 regarding Human Rights;

- Upon such bases, political participation constitutes human right of every citizen to be able to participate in joint activities to take part in setting the goals and future of the state including to determine the people who will hold the government;
- The Petitioner is of the opinion that the requirement of a minimum seat acquisition of 20% in DPR or valid vote acquisition of 25% for political parties or coalitions of political parties in nominating Candidate President and Vice President is more suppressive, restrictive, hampering in nature or at least constitutes an official distortion by law against political rights of citizens and it violates Human Rights as mandated by the 1945 Constitution, particularly in Article 27 paragraph (1), Article 28C paragraph (2), Article 28D paragraph (1), Article 28D paragraph (3), Article 28I paragraph (2) and paragraph (5), and Article 21 of the 1948 UNUDHR;

**[3.9.2]          Petitioner II (Crescent Star Party)**

1. Whereas the provision of Article 9 of Law 42/2008 has impaired the constitutional rights of the Petitioner because the provision of Article 6A paragraph (2) of the 1945 Constitution has been sufficient to provide that the Petitioner as a Political party or a Coalition of Political Parties participating the General Election has met the qualification to nominate Candidate President and Vice President prior to the implementation of the General Election. However, by the coming into effect of Law 42/2008 particularly the aforementioned Article 9, the Petitioner must meet other additional requirements as described above, which have harmed the Petitioners. It is clear and evident that the provision of Article 9 of the aforementioned Law 42/2008 has been contradictory to Article 6A paragraph (2) of the 1945 Constitution which constitutes a superior provision in the hierarchy of laws and regulations of the Republic of Indonesia;

Whereas the provision of Article 7 paragraph (5) of Law 10/2004 explicitly states that inferior regulations should not be contradictory to superior regulations (*lex superiori derogat lex inferiori*). In the hierarchy of laws and regulations in Indonesia, the 1945 Constitution is superior to Laws. Accordingly, Law 42/2008 shall not be contradictory to the provisions of the 1945 Constitution. The legislators of Law 42/2008 should have indeed observed this principle and violation against this principle would allow the provisions of such Law to be declared as having no binding legal effect;

Whereas based on principle of conformity between the type and substantive material of laws and regulations, it is clear that the substance of Law 42/2008 particularly in Article 9 has regulated a matter that should have been regulated/included in the Constitution only because such rule should have been at the same level with the provisions of the Constitution, and if the matter is regulated by the provisions of Law, it is clear that such provisions contradict as well as reduce and impair the provisions of the Constitution;

Whereas the provision of Article 9 of Law 42/2008 has contradicted all material principles and the establishment of laws and regulations as described above. The principles of protection, justice, diversity, equal position in law and government, equality and harmony, have been violated by discriminating other political parties participating in the General Election which according to the provisions of the Constitution should have been treated equally in nominating Candidate President and Vice President without regard to power and uniqueness of all political parties participating in the General Election.

Based on the foregoing description, it is clear that the provision of Article 9 of Law 42/2008 is contradictory to Article 6A paragraph (2) of the 1945 Constitution and Article 22E paragraph (1) and paragraph (2) of the 1945 Constitution; therefore, it must be declared that it has no binding legal effect;



2. Article 3 paragraph (5) and Article 9 of Law 42/2008 providing that the General Election of President and Vice President is not held at the same time with the General Election of members of the People's Legislative Assembly, Regional Representative Council, and Regional People's Legislative Assembly are contradictory to the provisions of Article 22E paragraph (2) *juncto* Article 6A paragraph (2) of the 1945 Constitution;

Whereas with from the grammatical aspect, what is referred to "*nominated prior to the implementation of election*" in the provision of Article 6A paragraph (2) of the 1945 Constitution shall be the election of members of DPR, DPD, President and Vice President, as well as DPRD as intended in Article 22E paragraph (2) of the 1945 Constitution. If the logic of the provision of Article 9 of Law 42/2008 namely "*nominated prior to the implementation of the general election of President and Vice President*", is followed, the additional phrase of "*President and Vice President*" will make it illogical, and clause "*prior to the general election of President and Vice President*" shall be unnecessary because it would impossible to nominate Candidate President and Vice President following the general election. If the intention of the legislators of the Constitution is that the Candidate President and Vice President shall be nominated prior to the general election of President and Vice President, then the final clause "*prior to the implementation of general election*" shall be unnecessary to be included in the aforementioned Article 6A paragraph (2). It is obvious that the

affirmation of “prior to the general election” shall mean “prior to the general election of DPR, DPD, President and Vice President, and DPRD” held simultaneously in every five years as intended in Article 22E paragraph (1) and paragraph (2) of the 1945 Constitution. Moreover, the only general election referred to shall be the general election as referred to in the provision of Article 22E paragraphs (1) and (2) of the 1945 Constitution and no other general elections;

Whereas with respect to the history of the creation of the provisions of Article 22E paragraph (1) and paragraph (2) in the third amendment to the 1945 Constitution and the original intent of the Constitution, the election of President and Vice President shall be organized in the general election organized simultaneously with the election of members of DPR, DPD, and DPRD;

Whereas with respect to state finance, efficiency, as well as social aspects, implementation of the general election held simultaneously must be more effective and efficient for the people who have currently experienced too many elections. With respect to state finance, it must be less costly and more economical especially when the state is now facing difficulties in improving its people’s welfare. In such condition, people’s welfare must be the main focus in the implementation of the democracy itself. The General Election held simultaneously will reduce factors of social instability and time efficiency for the people, political parties

participating in the General Election as well as Candidate President and Vice President joining the competition;

There are four conceptual frameworks concerning the general election in this Constitution. *First of all*, this Constitution intends that the general election is to be held once in five years and the General Election held more than once in five years should be avoided except in a state of emergency. *Second*, to give sovereignty to the people in a direct manner to elect and determine their President, without any censorship, either from any representative agency or any political party. *Third*, the middle way between the granting of role to political parties and individual candidates. During the discussion of the amendment to the Constitution, there was a suggestion that candidate individuals were to be allowed based on the Constitution, but with various considerations on technical issues, individual candidates could not be included in the Constitution. *Fourth*, in relation to the development of political parties and strong presidential government system, namely by granting exclusive roles to political parties to nominate Candidate Pairs of President and Vice President participating in the General Election held in a direct manner by the people;

Whereas, accordingly, the provision of Article 3 paragraph (5) of Law 42/2008 providing for time of implementation of the General Election of President and Vice President, namely following the implementation of the General Election of members of DPR, DPD and DPRD, and the provision

of Article 9 of Law 42/2008 reaffirming that the General Election of President and Vice President is to be held following the General Election of members of DPR, DPD and DPRD, are contradictory to Article 22E paragraph (1) and paragraph (2) *juncto* Article 6A paragraph (2) of the 1945 Constitution;

Based on the foregoing arguments and considerations, the Petitioner is of the opinion that the substantive material of Article 9 and Article 3 paragraph (5) of Law 42/2008 is contradictory to Article 6A paragraph (2) of the 1945 Constitution and Article 22E paragraph (1) and paragraph (2) of the 1945 Constitution as well as has no binding legal effect;

**[3.9.3] Petitioners III (People's Conscience Party, Democratic Reform Party, Prosperous Indonesia Party, Labor Party, National People's Concern Party, and Archipelago Republic Party)**

- Whereas Article 9 of Law 42/2008 has obscured and removed the substance of Article 6A paragraph (2) of the 1945 Constitution which reads, *"A Candidate Pair of President and Vice President shall be nominated by a political party or a coalition of political parties participating in the general election prior to the implementation of the general election"*, and Article 12 sub-article a and sub-article i of Law Number 2 Year 2008 regarding Political Parties;

- Whereas the substance of Article 6A paragraph (2) of the 1945 Constitution provides that a Candidate President and Vice President shall be nominated by a Political Party or a Coalition of Political Parties prior to the implementation of the general election while Article 12 sub-article a and sub-article I of Law Number 12 Year 2008 regarding Political Parties provides that Political Parties shall have the right to obtain equal and just treatment from the state including to nominate a Candidate Pair of President and Vice President;
  
- Whereas the existence of Article 9 of Law 42/2008 has caused Article 6A paragraph (2) of the 1945 Constitution, Article 12 sub-articles a and i of the Political Party Law as well as the Human Rights provisions, giving the opportunity for Political Parties to nominate Candidates of President and Vice President as well as to obtain equal and just opportunity and treatment as well as the right to be elected or to elect to be eliminated because Article 9 of Law 42/2008 provides that only Political Parties or Coalitions of Political Parties meeting requirement of a minimum seat acquisition of 20% of the total seats in DPR or national valid vote acquisition of 25 % in the General Election of members of DPR shall be allowed to nominate Candidate Pairs of President and Vice President;
  
- Whereas there is *contradictio in terminis* between Article 6A paragraph (2) of the 1945 Constitution and Article 12 sub-articles a and i of the Political Party Law as well as Human Rights provisions mentioned above which

- are contradictory to Article 9 of Law 42/2008, causing the intended Article 9 to be legally defective. Article 9 of Law 42/2008 should no longer need the aforementioned requirements as it has been obvious that such rights are the rights of Political Parties or Coalitions of Political Parties;
- Whereas as it raises multi-interpretation resulting in discrimination and eventually ignoring or obscuring and even violating human rights, the inclusion of the sentence *“A Candidate Pair shall be nominated by a Political Party or a Coalition of Political Parties participating in the General Election meeting the requirement of a minimum seat acquisition of 20% (twenty percent) of the total seats in DPR or national valid vote acquisition of 25% (twenty-five percent) in the General Election of members of DPR, prior to the implementation of the general election of President and Vice President”* in the provision of Article 9 of Law 42/2008, indicates legal uncertainty. This is in fact in stark contrast with the establishment of Law 42/2008, as evident in the considerations part thereof, namely: *“(a) whereas the general election held in a direct manner by the people constitutes a facility for the implementation of the people’s sovereignty in order to establish a democratic state government based on Pancasila and the 1945 Constitution of the State of the Republic of Indonesia; (b) whereas the general election of President and Vice President shall be organized in a democratic and civilized manner through the greatest extent of people’s participation based on the principles of a direct, general,*

*independent, confidential, and just election of President and Vice President”;*

- Whereas Article 9 of Law 42/2008 is highly discriminatory and contradictory to Article 28C paragraph (2), 28I paragraph (2) and paragraph (4) of the 1945 Constitution and creates an impression of arrogance of the big Political Party being the winner of the 2004 General Election that gives no opportunity for a change in the socio-political leadership in a democratic manner and which is reluctant to give alternatives of a more varied Candidate Pairs from various sources. Accordingly, Article 9 of Law 42/2008 does not encourage a nationally dynamic change in the socio-political leadership, but defends and protects the socio-political leadership not desiring any change;
  
- Whereas Article 9 of Law 42/2008 does not give an indiscriminate and equal treatment to political parties, either, because it differentiates between the political parties having seats in DPR from those having no seats in DPR, which harms the justice longed for by the people; and therefore, it is also contradictory to Article 43 paragraph (1), paragraph (2), and paragraph (3) of Law Number 39 Year 1999 regarding Human Rights, Article 28D paragraph (3), Article 28H paragraph (2), Article 28J paragraph (1) of the 1945 Constitution; accordingly, it must be declared to have no binding legal effect;

[3.10] Considering whereas in order to support their arguments, Petitioner I has also presented three experts in addition written evidence (Exhibit P.I-1 through Exhibit P.I-5); Petitioner II has presented written evidence (Exhibit P.II-1 through Exhibit P.II-21), and two experts as well as two witnesses while Petitioners III have presented written evidence (Exhibit P.III-1 through Exhibit P.III-13) and an expert, and complete statements of such experts and witnesses have been included in the Facts of the Case part of this Decision, which principally state as follows:

### **Expert of Petitioner I**

#### **Dr. Soetanto Soepiadhy, S.H.**

Theories of law explicitly state that each article or paragraph must have one norm to avoid multi-interpretation, but Article 9 carries norms of dispensation and order. Norms of dispensation norm is included in the proposition of the main clause: *"A Candidate Pair shall be nominated by a Political Party or a coalition of Political Parties participating in the General Election..."*. On the contrary, norm of order is included in the proposition of the subordinate clause: *"...meeting the requirement of a minimum seat acquisition of 20% of the total seats in DPR or national valid vote acquisition of 25% in the general election of members of DPR..."*, while the clause as follows: *"...prior to the implementation of the General Election of President and Vice President."* is an adverb of time;



In the theory of law, it may be stated that order and dispensation cannot be applied at the same time. The relationship between the two norms in the legal standing is referred to as a contradiction relationship, meaning that if Article 9 of Law 42/2008 having more than one norm and that there is a conflict of legal norms or antinomy which cannot be applied at the same time, such article becomes subject to multiple interpretation;

Whereas legal policies are distinguished into three categories, namely: macro, *messo*, and micro. Legal policies in macro level are formulated in a basic norm namely the 1945 Constitution as a superior regulation. The Macro-objective is formulated in various legal policies of *messo* or medium nature through various laws and regulations. Meanwhile, legal policies of in micro nature are implemented through various inferior regulations. Accordingly, laws and regulations are established as national law which strictly follows the principles namely being justified at the macro level of legal policies. Article 9 of Law 42/2008 constitutes legal policy of *messo* nature with a normative concept the content of which cannot be stipulated precisely so its scope with respect to the provisions of legal policy of macro nature is unclear;

Article 6A paragraph (2) of the 1945 Constitution expressly gives equal right to political parties participating in the General Election of President and Vice President to nominate candidates of President and Vice President. Article 9 of Law 42/2008 is contradictory to the principle of people's sovereignty provided for in Article 1 paragraph (2) of the 1945 Constitution;

In addition, Article 9 of Law 42/2008 is contradictory to fundamental rights provided for in the 1945 Constitution as it prevents citizens and/or legal entities of political party from obtaining equal position and opportunity in the government without discrimination;

**Prof. Dr. M. Soerjanto Poespowardoyo**

- Article 9 of Law 42/2008 in a contextual way reflects its previous nature namely being authoritative and resistant to pillars of democracy by prioritizing the interest of the party and group itself, and until now ignoring the principles of public interest and national interest by marginalizing new and small political parties. Therefore, in principle, the coming into effect of Article 9 of Law 42/2008 constitutes a repression and deprivation of the meaning of human rights and people's sovereignty which are really fundamental and universal in nature included into the regulation on the channeling of people's aspiration in a merely relative and pragmatic manner;
- Human status, dignity, and value must be placed in a proper position as mandated by the 1945 Constitution namely that citizens shall have equal status and shall obtain equal opportunity before the law and government. Therefore, the decision formalized in a quantitatively and abstractly unfair manner as formulated in Article 9 of Law 42/2008 in fact denies and degrades the substance of justice, people's sovereignty and political

morality in accordance with the spirit of the 1945 constitution which upholds political ethics with an orientation towards the noble character of humanity;

**Justiani, Ph.D.**

- In many countries, though the parties established by people are small, they are allowed to participate in the general election. These insignificantly small parties come from certain community needs to anticipate change. However, In Indonesia, these insignificantly small parties seem to face many difficulties. This phenomenon begin to show up in many countries where small parties are deemed as the carriers of new ideas **yet to be** accommodated by the existing parties;
- Throughout the world, voters base their choices on programs and program implementers or the candidate leader. In Indonesia, people give their votes without any clear basis. If the parties promise them programs during campaigns, it is clear that it is a public lie as there is still the election of President, in which government programs shall be the programs made by candidate president winning the Election and of the party. If the basis is Article 6A paragraph (2) of the 1945 Constitution as the basis, it is still unclear who the Candidates of President and Vice President of the parties are. People are forced to give bad checks to the parties, then the parties are allowed to find candidates of President. It is very reasonable if the

- party will subsequently elect the Candidate of President who is able to pay the largest amount;
- Parties act like unauthorized brokers in finding Candidates of President and Vice President and this is a distortion of people's sovereignty, but it is legal pursuant to the 1945 Constitution and Law 42/2008 as the system allows that;

### **Experts and Witnesses of Petitioner II**

#### **Prof. Dr. Asep Warlan Yusuf, S.H., M.H.**

Article 9 of Law 42/2008 is implicitly aimed at reducing the number of candidates of president and vice president, as well as establishing a coalition of party permanently in the context of simplifying the number of parties in order that the elected President will gain strong support from DPR. However, this matter is disputable since the reduction of the number of Candidates of President and Vice President to be participating in the general election does not have any adequate basis of legal rationality and democracy since it is actually more concerned with mere technical reasons;

Coalition of parties is not based on the 20% requirement in the nomination of President which is only incidental in nature; the coalition or merger of parties are based more on similarity of ideology, political doctrine, vision-mission and platform of the respective political parties. Therefore, the 1945 Constitution adopts presidential election system. Support or portion of DPR is given

institutionally, so the figure of 20 % does not reflect any rules in the presidential government system;

In the event that the requirement of 20% is declared contradictory to the 1945 Constitution, then the provision of Article 3 paragraph (5) of Law 42/2008 must be amended as well into the Presidential election held at the same time with the election of members of DPR, DPD, and DPRD for the reason that based on Article 6A paragraph (2) of the 1945 Constitution, the election of Candidates of President and Vice President shall be through nomination by political parties or coalitions of political parties prior to the implementation of the General Election, meaning that the Candidates of President and Vice President shall be nominated prior to the legislative election or at least at the same time with the Presidential election;

In the event that the election of President and Vice President is held at the same time with the election of members of DPR, DPD, and DPRD, there will be an extremely efficient allocation of human and financial resources as explicitly stated in Article 2 of Law 42/2008 stating that the Presidential Election must be organized in an effective and efficient manner;

**Prof. Dr. Indria Samego**

From the political engineering perspective, first of all, parties and individuals in Indonesia have not experienced democracy for a long time so that the parties are expected not to monopolize those who desire to go forward as

national leaders provided that they have a clear mass basis. Secondly, it is necessary to establish a party system so that the parties will be consistent in taking sides;

Article 9 of Law 42/2008 indeed has no strong constitutional basis. Furthermore, based on Article 3 paragraph (5) of Law 42/2008, the election of the President and Vice President shall be held at the same time with the General Election of members of DPR, DPD and DPRD;

### **Witness Gregorius Seto Harianto**

The session for the amendment to the 1945 Constitution in MPR at that time was initiated by the idea of the way to reduce power of the President acquired from Article 1 paragraph (2) of the 1945 Constitution stating that, "*Sovereignty shall be held by the people and fully implemented by MPR*". Thus, MPR fully holds people sovereignty, but then the elucidation of the 1945 Constitution states, "*President shall be the mandatory of MPR*". So, people sovereignty which in such a way is held by MPR shall be delegated to one person namely the President. Accordingly, it is understandable that the power of the President can be too extensive. Therefore, there is an agreement that it should be rearranged;

If the President is not declared as a mandatory, how would the presidential principle be maintained? Therefore, at that time the concept was first introduced by the Golkar Party requiring a direct presidential election. At first, the

concept faced strong opposition since there were two concerns. First, it was deemed contradictory to *Staatsfundamentalnorms*, particularly the fourth principle of *Pancasila* stating, *"Democracy Guided by the Inner Wisdom in Consultation/Representation"*. Second, there was doubt about the preparedness of the people for holding a direct Presidential election. At the end, this debate could only be resolved in 2001. In fact, one of the paragraphs in Article 6A, namely paragraph (4), was completed only in 2002;

A question arises, who nominates? At that time, the Societal Group Faction persisted in proposing party reinforcement as a part of interpretation of the representative system. Democracy guided by the inner wisdom in consultation/representation must be exercised through political parties. Therefore, the formulators of the amendment to the 1945 Constitution then agreed to party reinforcement as set forth in Article 6A paragraph (2) of the 1945 Constitution formulated as follows, *"A Candidate Pair of President and Vice shall be nominated by a political party or a coalition of political parties participating in the General Election before the general election is held is held"*;

Thus, at the time it was consciously agreed upon that political parties or coalitions of political parties participating in the general election has authority to nominate President and Vice President Candidate Pairs so as not to deny the right to assemble. Any person can form a political party. However, it is also agreed that in the context of arrangement, only the parties which have been

designated as participants in the General Election shall be entitled to nominate President and Vice President Candidates;

Another question arises, what if there are many Political Parties participating in the General Election such as in the 1999 General Election involving 48 Political Parties? Hence, Article 6A paragraph (3) of the 1945 Constitution states that President and Vice President Candidate Pairs acquiring 50 + 1 votes with 20% distribution in all regions will be directly inaugurated as the President;

The 1945 Constitution does not differentiate between Presidential Election and Legislative General Election. They are all general elections subsequently stipulated and stated in Article 22E paragraph (2) of the 1945 Constitution that the foregoing general elections are held to elect the members of DPR, Provincial/Regency DPRD, DPD as well as President and Vice President. Therefore, there will be five ballot boxes in the election. At that time the imagined picture was that the nomination of presidential candidates political parties or a coalition of political parties participating in General Election illustrated a relationship where the President and Vice President Candidate Pairs and the political party would be one. Therefore, there was no concern that the programs would be different. As a matter of fact, it would generate equivalent results as the program implemented by the president would be the program implemented by the party, and vice versa. The choice is left to the people to determine which program is of high quality and which is not according to their standards. If no



party can fulfill the criteria as set forth in Article 6A paragraph (3) of the 1945 Constitution, then the first and second winners shall proceed to the next round;

**Witness Slamet Effendy Yusuf**

- The definition of general election is as regulated in Chapter VII regarding General Elections, and hence Article 22E paragraph (2) of the 1945 Constitution mentions that General Election is held to elect members of People's Legislative Assembly, Regional Representative Council, President and Vice President, and Regional People's Legislative Assembly;
- The witness, at that time acting as chairperson of meeting and also as Deputy Head of the First Ad Hoc Committee (PAH I) and Deputy Head of the commission, answered the question concerning the Presidential General Election that the concept that in the future, all general elections would be held simultaneously when electing members of DPR, DPD, DPRD, the package of President and Vice President, so that there would be five ballot boxes. The reason for the formulation of such provision was that the presidential selection would be held during the simultaneous General Elections concerned. Hence, in the event that a nominated President does not fulfill the requirement to be elected directly, as the case may be, then a run-off general election will be held;

**Expert of Petitioners III**

**Prof. Dr. Philipus M. Hadjon**

- To analyze the central issue of constitutionality of this Article 9 of Law 42/2008, the Expert sees the issue from two points of view. *Firstly*, with the parameter of Article 6A paragraph (2) of the 1945 Constitution. *Secondly*, with the parameter of provisions in other articles in the 1945 Constitution;
- Is the provision of Article 9 of Law 42/2008 not contradictory to Article 6A paragraph (2) of the 1945 Constitution? It is noticeable that there is a contradiction. Now, the problem is whether it is constitutional or not. Hence, in relation to Article 6A paragraph (5) of the 1945 Constitution, is it true that based on the provision of Article 6A paragraph (5) of the 1945 Constitution, the legislators are granted with authority to add new requirements, particularly the threshold of the provision of Article 6A paragraph (2) of the 1945 Constitution? Following this question, two matters need to be noticed in that Article 6A paragraph (5);
- First, the substantive aspect and the second is the technical aspect of delegation. From the substantive aspect, in the event of addition of new requirements in the form of the threshold in Article 6A paragraph (2), it needs to be observed that the authority granted to legislators by Article 6A paragraph (5) is to regulate the election procedures. Meanwhile, the regulation in Article 6A paragraph (2) clearly states that it shall be prior to

the implementation of general elections. Hence, the legislators have no authority to add any new requirement in the form of threshold of Article 6A paragraph (2);

- From the technical aspect of delegation, Article 6A paragraph (5) is regulated 'in' the law. With regard to the delegation of authority, our law uses two standard terms, namely "by" law, or in other wording, "by or based on" Law, have different meanings. The term "with law" means that it may not be regulated with other regulations. Law may not be delegated. The formula: "by or based on" Law means that sub-delegation is allowed;
- Article 6A paragraph (5) of the 1945 Constitution mentions "in law", not "with law". As a comparison, Article 6A paragraph (2) states, "*The procedures for electing the President and the Vice President shall be further regulated with law*". By using standard term in this law, it means that no delegation is allowed to regulate matters of principal nature. Hence, the provision of Article 6A paragraph (5) of the 1945 Constitution does not delegate to the legislators to add any new requirement in the form of addition of the threshold provision. From this point of view, the expert states that the provision of Article 9 of Law 42/2008 is unconstitutional since it is performed without authority, *onbevoegd*, or *ultra vires*;
- If related to the provision of Article 6A paragraph (2) of the 1945 Constitution stating, "*prior to the implementation of general elections*",

- then the new requirement as intended in Article 9 of Law 42/2008 is irrational and discriminatory, because when there are new political parties that have never participated in the general election, how would the threshold for the party which has never participated in any general election be determined? This means that this requirement is irrational. If it is irrational, it is arbitrary and in fact, there is an indication of abuse of authority;
- Determining the threshold for political parties which have never participated in any general elections is highly irrational. It is an arbitrary action which allows for the abuse of authority, and hence the expert's opinion that Article 9 of Law 42/2008 is supported;
  - Contextually, as seen from the view point of other articles in the 1945 Constitution. The expert has noted that based on Article 27 paragraph (1) of the 1945 Constitution, the addition of threshold has denied the principle of equality before the law. Based on Article 28C paragraph (2) of the 1945 Constitution, the requirement of threshold is also contradictory to the right to improve oneself. Based on Article 28D paragraph (3) of the 1945 Constitution, the provision of threshold is contradictory to the principle of equal opportunity. Based on Article 28I paragraph (2) of the 1945 Constitution, the provision of threshold is contradictory to the principle of freedom from discriminatory treatment;

- Based on Article 28I paragraph (4) of the 1945 Constitution, the Government shall be the party which is responsible to protect human rights as mentioned by the expert above. Hence, the expert concludes that Article 9 of Law 42/2008 is contradictory to Article 6A paragraph (2) or other articles in the 1945 Constitution;

[3.12] Considering whereas the Court has heard the Government's statement, as completely described in the Facts of the Case part of this Decision, which principally explains as follows:

- Whereas Article 3 paragraph (5) of Law 42/2008 constitutes the delegation or implementation of the provision of Article 6A paragraph (5) stating that *"the procedures for electing the President and the Vice President shall be further regulated by law"*. Based on such article, the Government and DPR have further set out the procedures for the election of President and Vice President into Law. In addition, the article concerned also constitutes a logical consequence of the separation of legislative General Election and the President and Vice President General Election which was also implemented in 2004;
- In accordance with the provision of Article 22E paragraph (1) and paragraph (2) of the 1945 Constitution, the General Elections shall be held once in every five years to elect the members of DPR, DPD, the President and Vice President as well as DPRD. From such provision, the Government is of the opinion that the implementation of general election

- as intended in the aforementioned Article 22E paragraph (1) and paragraph (2) shall be performed once in every five years;
- By taking into account the provision of Article 6A paragraph (3) and paragraph (4) of the 1945 Constitution, it is difficult to hold the general election of President and Vice President at the same time with the general election of Members of DPR, DPD and DPRD, since in order for the Candidate Pair of President and Vice President to be elected, the acquisition of more than 50% votes of the number of voters with at least 20% votes in every Province distributed in more than half of the provinces in Indonesia is very hard to achieve in one round, in the event that there are more than two Candidate Pairs of President and Vice President being recommended by the Political Parties or Coalitions of Political Parties participating in the 2009 General Elections;
  - The term of office of the President and Vice President and that of the Members of DPR, DPD and DPRD do not expire at the same time. Hence, simultaneous implementation of the General Elections of President and Vice President, Members of DPR, DPD and DPRD may pose an impact on government administration and development in the regions;
  - By taking into account the provision of Article 6A paragraph (5) *juncto* Article 22E paragraph (6) stating that further provisions concerning General Elections shall be regulated by Law, hence the legislators (DPR) together with the President are granted the authority to regulate further the

legal policy concerning the implementation of general elections, which cannot be examined except that in the discussion there is any content exceeding the authority or being arbitrary (*detournement de pouvoir*). Based on the foregoing matters, the Government is of the opinion that Article 3 paragraph (5) of Law 42/2008 is not contradictory to the provision of Article 6A paragraph (2) and Article 22E paragraph (1) and paragraph (2) of the 1945 Constitution;

- whereas the provision of Article 9 of Law 42/2008 stating that, "*A Candidate Pair shall be nominated by a Political Party or a Coalition of Political Parties participating the general election meeting the requirement of having a minimum seat acquisition of 20% (twenty percent) of the total seats in DPR or a minimum national valid vote of 25% in the General Election of members of DPR prior to the implementation of the General election of President and Vice President*", is a reflection of strong initial support for the Candidate Pairs of President and Vice President, in view of the requirement for the election of the pair of President and Vice President in accordance with Article 6A paragraph (3) of the 1945 Constitution namely the support of more than 50% of the number of voters in the general election. Hence, this requirement of initial support has been in line with the constitutional mandate representing people's sovereignty. In fact, in the event the Candidate of President and Vice President do not have significant initial support, then it is not in line with the spirit of the constitutional mandate;

- The Article concerned also constitutes the delegation and implementation of the provision of Article 6A paragraph (2) of the 1945 Constitution stating that, *“requirements to become the President and Vice President shall be regulated further by law”*. Hence, the Government and the DPR are granted with the authority to prepare regulations (legal policy) in the context of implementing the provisions of the 1945 Constitution;
- Actually the Petitioners do not have any objection to the existence of provision regulating the percentage of seat acquisition in the DPR or the percentage of national valid vote acquisition. Tut the Petitioners' objection, however, is concerned more with the size of the percentage deemed to be too high. Hence, the provision of percentage regulated in Law 42/2008 is not contradictory to the 1945 Constitution;
- The existence of initial support of at least 20% of the number of seats in the DPR will assist the realization of the work program of the elected President and Vice President in the context of implementing national development. Hence, the requirements for the nomination of the Candidate Pair of President and Vice President as regulated in Article 9 of Law 42/2008 will support the realization of sustainable development through a more effective and stable Presidential government system. The provision concerning the requirement of percentage is also intended as an initial selection indicating the acceptability (level of trust) of the Candidates of President and Vice President reflected in the support from voters;



- Whereas the Government is of the opinion that such provision does not give discriminatory treatment or limitation because the limitation concerned is in line with Article 28J paragraph (2) of the 1945 Constitution, and the foregoing provision is not related to the constitutionality issue of the effectiveness of the Law petitioned for review, and therefore it is not contradictory to the 1945 Constitution, either;

[3.13] Considering whereas to support its statement, the Government presented four experts providing statements under oath in the hearing on January 28, 2009, as completely included in the Facts of the Case part, who have principally explained the following matters:

**Dr. Moch. Isnaeni Ramdhan, S.H., M.H.**

Based on the Indonesian Dictionary, for the interpretation of the word "election", the word "elect" means to separate that which is good, and that good thing is to be elected. The President is one of the best personifications this nation will ever have. The selection is also conducted with various provisions such as educational and health qualifications. This matter does not constitute discrimination.

The word "election" requires certain qualifications so as to obtain the good or even the best thing. Judicially, the good or the best shall be nominated by a coalition of Political Parties or by Political Parties participating in the General Election. Not all Political Parties may nominate, but the political

parties which have been registered as participants in the General Election. According to the constitution, the best qualification is when a President and Vice President acquire votes of more than 50%, and they may directly be deemed to have fulfilled the requirement for winning the election, or must have 20% of votes distributed in every province in more than half of the number of provinces in Indonesia;

Basically, this law or Law petitioned for review is a product of the politics of factions or parties to speak for other interests. When it has become a Law, then the factions or Political Parties or the interests concerned must be subject to the law, not the other way around;

### **Dr. Kacung Marijan**

- Coalition of parties supporting the Candidate Pair of President is a development of consensual democracy to build a stable government system in Indonesia, since Indonesia does not follow the two-party system, but the multi-party system. Hence, the building of such consensual democracy obviously becomes a reference in building a political system which is not only democratic, but also stable;
- The Indonesian Constitution adheres to the presidential system. Quoting from the statement of Juan Linz, the expert states that the presidential system is not compatible with a stable government since the President and the DPR are both elected by the people, meaning that they both

consider themselves as having the right of authority from the people. This matter may lead to a conflict between the President and DPR. It is true that the Constitution has regulated everything that has become the rights and obligations of the DPR and the President, but DPR moves not only to the extent as recorded in Laws and the Constitution, but also based on interest. Therefore, the extent of support in DPR has highly substantial implication on the effectiveness of the implementation of policies made by the Government, which in this case is the President;

**Cecep Effendi, Ph.D.**

- The multi-party system in the presidential system currently recognized in Indonesia has created an issue of the relationship between the President and legislative institutions. The President does not always require legislative support to state his/her policies. However, it is most likely that such support is required when the president must implement strategic policies. The increasingly fragmented Government parties as a consequence of a multi-party system has increased the potential decrease of support for Government's party, and this means that it will be more difficult to build support for the President in the parliament. Multi-party system in the presidential system will enable the occurrence of situation where parties supporting the President must compete with other parties, and hence the chance for decrease of support for government's party will occur.

- As a result, the scarcity of legislative support from government's party in the parliament will make it more difficult for the President to implement effective government, and thus will result in *an ungovernability* condition which has a bad impact. Hence, the requirement of 20% threshold is not only concerned with the problem of whether or not this requirement contains democratic values, or this problem constitutes obstacles for better implementation of democracy of this nation. It must be considered carefully whether or not it is possible to build an effective presidential system, which is unsupported by good communication and strong support from the parliament;

**Prof. Dr. Zudan Arif Fakrulloh, S.H., M.H.**

- The norm of Article 6A paragraph (2) and Article 6A paragraph (5) of the 1945 Constitution has comprehensively included the legal subjects given the authority to nominate a President. The legal subjects are obviously the political parties or coalitions of political parties prior to the General Election. The delegation shall be the procedures for the election of President as regulated in Law;
- With regard to the presidential threshold, the expert looks to the existing norms in the Constitution. *Firstly*, concerning the requirements to become President. *Secondly*, procedures for the implementation of the election of President and Vice President. The perspective of Legal institution and

Norm sees that there are two matters in this context. Firstly, from the substantive aspect, not all political parties can have equal authority, e.g., is it true that a political party having the support of 2% of seats is given the same right with another political party having 30% of the seats? From the aspect of different principles conveyed by John Rawls, it is certainly inappropriate. Hence, based on the delegation allowed by the 1945 Constitution, legal policy is made. With regard to legal policy, the Expert quotes from Decision of the Constitutional Court in case Number 010/PUU-III/2005 which principally states that the policy option is constitutional. The requirement in Article 9 of Law 42/2008 related to the support of 20% (twenty percent) of seats in the DPR and 25% (twenty-five percent) of national valid votes constitute the policy option;

- With regard to the time for the Presidential election and legislative election to be held simultaneously, the expert is of the opinion that the Constitution has never strictly regulated the time to be simultaneous, but only mentions the time frame which is five years;

[3.14] Considering whereas the Court has also heard the statement of the People's Legislative Assembly, as completely described in the Facts of the Case part of this Decision, which principally explains as follows:

- In Article 6A paragraph (2) of the Constitution, a candidate pair of president and vice president shall be nominated by a political party or a coalition of political parties. Even though the method of interpretation of

- the Constitution varies, but DPR cannot deviate from the interpretation that such matter has been very clearly and evidently set forth in Article 6A paragraph (2) of the 1945 Constitution. Hence, only the political parties shall be the institutions entitled to nominate the Candidate Pairs;
- Actually such matter has been designed since the beginning so that only political parties are entitled to nominate Candidate Pairs so as to build a system that individual aspiration or the people's aspiration must be institutionalized. Then it is impossible for the effort of aggregating or striving for aspiration to be conducted by every individual independently. The essence of the existence of political parties as institutions whose function is indeed to strive for the aspiration of the aggregation of people of the same understanding and idea. Such ground constitutes the system to be built through a direct election of the President, and hence, there was no bias of political parties' interests when Article 6A paragraph (2) of the 1945 Constitution was created, which then became a reference in delivering the norms in Article 1 paragraph (4), Article 8, Article 9, or Article 13 paragraph (1) of Law 42/2008 since our understanding with respect to such matter is not at all political parties' interests as the formulation was also made by various community groups, and also societal group factions, regional representatives, the National Army/Police, et cetera.

[3.15] Considering whereas the People's Legislative Assembly did not present any evidence, either written evidence or expert or witness;

### **Opinion of the Court**

[3.16] Considering whereas after carefully examining the foregoing descriptions of the Petitioners in their petition and Petitioners' statements, written evidence, statements of experts presented by the Petitioners and statements of witnesses presented by Petitioner II, Statement of DPR, Statement of the Government, evidence and statements of Government's experts, as well as conclusion of the Petitioners and conclusion of the Government, the Court is of the following opinion:

**[3.16.1]** Whereas the main problem to be considered and decided upon by the Court in this case is the issue of constitutionality of Article 3 paragraph (5) and Article 9 of Law 42/2008, which principally concerns with the general elections not being implemented at the same time, and the threshold in the form of a minimum of 20% of seat acquisition in the DPR or acquisition of a minimum of 25% of the national valid vote acquisition;

**[3.16.2]** Whereas prior to considering the articles petitioned for review as described in the foregoing paragraph **[3.16.1]**, the Court shall first convey the legal view point in general as follows:

1. Whereas the paradigm that has changed since the amendment to the 1945 Constitution, namely from the centralistic authoritarian government

paradigm into a decentralist democratic government which in substantial part was conducted at the level of Law, namely the delegation of authority from the central government to the regions such as in the regional autonomy. In addition, award for individual positions was reflected from the increasing legal awareness concerning human rights, whether for individuals or groups. Enhancement of human rights has encouraged the people to soften the repressive nature of the state and also has formed a democratic society which can be in form of direct, free, honest, and fair general elections. Hence, it will create a political climate which is healthy and beneficial for the nation and state;

2. Whereas the paradigm change followed by such legal changes must take into account the level of people's ability to adapt to the changes concerned. Therefore, how long the new law can be accepted and implemented maximally as a process of legal institutionalization as well as what kind of obstacles will be encountered with the existence of the new law must also be taken into account. Without taking into account the external factors of the law concerned, the new law may potentially create uncertainty the risk of which may not be able to be borne by the people. So great is the social and economic burden to be borne by the people and the state as result of the explosion of constitutional system problems such as the number of parties from a General Election to another without clear legal design with regard to what is going to be built by the party system in Indonesia. Such matter is worsened by the reasons claimed to be based



- on the concept individual freedom which is taken for granted without taking into account either the local or international condition. It is also time not to be trapped in limitless freedom, so everything becomes permissive. Democracy built on such ground is a democracy which does not make the people prosperous or happy;
3. Whereas the law also contains static and dynamic nature. The static nature is to maintain and create stability and legal certainty. The dynamic nature is to provide flexibility in keeping pace with the dynamics of the community. Rapid changes will create uncertainty and anomaly in the community as reflected in the disharmony between what is desired by the new law (interpretation) with the actual behavior of the community. There is a gap between formal democracy and substantial democracy. People are shouting for democracy, but what happens is anarchy;
  4. Whereas it has not been even a decade since the amendment to the 1945 Constitution that a new demand to conduct change has occurred. New interpretations of the Constitution is required so it often creates uncertainty among the community since it creates *contradictio in terminis*, we must forget the legal institutionalization processes that took a long time so that one day with clarity we will be able to evaluate what is lacking and what kind of improvement needs to be implemented to the law concerned;
  5. Whereas the legislators as well as the interpreters of the Constitution must be responsible to diagnose and determine the option of interpretations

which is most suitable with the current and future needs of the community, not only from the layer of urban community but also rural community which is full of simple way of thinking and acting in all aspects of community life. The law is no longer monopolized by experts in the field of law, but also must become a common possession. The Court as the guardian and interpreter of the constitution must build an “institutional dialogue at achieving the proper balance between constitutional principles and public policies”. Hence, good arguments or reasons for all parties can be reached;

6. Whereas in fulfilling its function as a means of adaptation to the current changes, the law cannot be determined casually without taking into account the capability of adaptation of the community as *addressat* of the provision of the law concerned. Otherwise, then natural selection (survival of the fittest) will take place, which is going to impair those who do not or who are less able to adapt to the legal changes;

**[3.16.3]** Considering whereas in Law Number 23 Year 2003 regarding General Election of the President and Vice President, the legislators have also applied the threshold policy for the nomination of the Candidate Pairs of President and Vice President by Political Parties or Coalition of Political Parties fulfilling the requirement of a minimum 15% (fifteen percent) seats of the number of seats in the DPR or acquiring 20% (twenty percent) of the national valid votes in the General Election of Members of the DPR prior to the implementation of the

General Election of President and Vice President. Such threshold policy has been applied as legal policy in the electoral threshold (ET) with the aim of achieving a simple multi-party system, the policy of which is set forth in Decision Number 16/PUU-V/2007 dated October 23, 2007, as well as parliamentary threshold (PT) policy concerning the requirement of vote acquisition as many as 2.5% (two point five percent) of the national valid votes to join the competition for seats in the DPR, with Decision Number 3/PUU-VII/2009, have been declared by the Court not to be contradictory to the 1945 Constitution, since they constitute the policies mandated by the 1945 Constitution which is open in nature;

**[3.16.4]** Considering whereas with the foregoing opinion and point of view, the Court shall subsequently assess the constitutionality of the threshold policy provided in Article 9 of Law 42/2008, as follows:

- a. Whereas Article 9 of Law 42/2008 reads, "*A Candidate Pair shall be nominated by a Political Party or a Coalition of Political Parties participating the general election meeting the requirement of having a minimum seat acquisition of 20% (twenty percent) of the total seats in DPR or a minimum national valid vote of 25% in the General Election of members of DPR prior to the implementation of the General election of President and Vice President*". The elucidation of Law 42/2008 point 1 GENERAL states, "*In this Law, the Presidential General Election shall be carried out with the purpose of electing the President and Vice President obtaining strong support from the people so as to be able to perform the*

*function of state government power in the context of the achievement of national goals as mandated in the Preamble of the 1945 Constitution of the State of the Republic of Indonesia. In addition, the arrangement with respect to the General Election of President and Vice President in this Law shall also be intended for affirming a strong and effective presidential system, where the elected President and Vice President obtain not only strong legitimacy from the people, but that in the context of materializing the effectiveness of the government, the basis of support from the People's Legislative Assembly shall also be required”;*

- b. Whereas the Petitioners' objection concerning Article 9 of Law 42/2008 shall be further examined with respect to its constitutionality with the Constitution:
- i. Article 1 paragraph (2) which reads, *“Sovereignty shall be in the hands of the people, and it shall be exercised in accordance with the Constitution”;*
  - ii. Article 6A paragraph (1) which reads, *“The President and Vice President shall be elected as a pair directly by the people”;*  
Paragraph (2) which reads, *“The pair of candidates for President and Vice President shall be nominated by a political party or a coalition of political parties participating in the general elections prior to the implementation of the general elections”;*

- iii Article 22E paragraph (1) which reads, *“General elections shall be held in a direct, public, free, secret, honest and fair manner once in every five years”*;

Paragraph (2) which reads, *“General elections shall be held to elect the members of the People’s Legislative Assembly, the Regional Representative Council, the President and Vice President and the members of the Regional People’s Legislative Assembly”*;

- iv. Article 27 paragraph (1) which reads, *“Without exception, all citizens shall have an equal position before the law and in government and shall be obligated to uphold such law and government”*;

- v. Article 28C paragraph (2) which reads, *“Every person shall have the right to improve him/herself in striving for his/her rights collectively for building his/her society, nation, and state”*;

- vi. Article 28D paragraph (1) 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”*;

Paragraph (3) which reads, *“Every citizen shall have the right to obtain equal opportunities in the government”*;

- vii. Article 28H paragraph (2) which reads, *“Every person shall have the right to obtain facilities and special treatment in obtaining equal opportunities and benefits for achieving equality and justice”*;
  - viii. Article 28I paragraph (2) which reads, *“Every person shall have the right to be free from discriminatory treatment on any basis whatsoever and shall have the right to obtain protection against any such discriminatory treatment”*;  
  
Paragraph (4) which reads, *“The protection, promotion, enforcement and fulfillment of human rights shall be the responsibility of the state, particularly the government”*;
  - ix. Article 28J paragraph (1) which reads, *“Every person shall be obligated to respect the human rights of another person in the orderly life of community, nation and state”*;
- c. Whereas Petitioner I argues that Article 9 of Law 42/2008 is highly discriminatory and eliminates the opportunity to be nominated by a Political Party or a coalition of Political Parties and that its implementation creates injustice, so that it is contradictory to Article 1 paragraph (2), Article 27 paragraph (1), and Article 28I paragraph (2) of the 1945 Constitution. This argument is not correct because whether the Petitioner can be nominated by a Political Party or a Coalition of Political Parties in the General Election of President and Vice President must be determined

by the people in the upcoming legislative General Election, which shall equally apply to all Candidate Pairs of President and Vice President;

- d. Whereas the argument of Petitioner II (Crescent Star Party) stating that Article 9 has been contradictory to Article 6A paragraph (2) of the 1945 Constitution as a higher provision in the hierarchy of laws and regulations, since with the provision of Article 6A paragraph (2), the Petitioner as Political Party participating in the General Election may nominate the Candidate Pair of President and Vice President, but with Article 9 of Law 42/2008 the Petitioner must fulfill additional requirements. In addition, the substance of Article 9 of Law 42/2008 is supposed to be regulated in the Constitution, and in the event it is regulated in a Law, it will reduce the Constitution and contradict Article 22E paragraph (2) *juncto* Article 6A paragraph (2) of the 1945 Constitution. The Court is not of the same opinion with the Petitioner's argument, since it is not true that the substantive material of Article 9 of Law 42/2008 is a substantive material of the 1945 Constitution, as it constitutes a concrete norm which is the elaboration of Article 6A paragraph (2) of the 1945 Constitution. The policy on the requirement for vote acquisition of 20% (twenty percent) of the seats in the DPR or 25% (twenty-five percent) of national valid votes in the General Election of DPR, as it has been the Court's opinion in the previous decisions, which constitutes the open legal policy delegated by Article 6A paragraph (5) of the 1945 Constitution which provides that "*The procedures for electing the President and the Vice President shall be*

- further regulated in law*”, and Article 22E paragraph (6) of the 1945 Constitution which provides that, *”Further provisions on general elections shall be regulated by law”*. The Court is also not of the same opinion with that of the expert Philipus M. Hadjon stating that Article 6A paragraph (5) of the 1945 Constitution does not allow the legislators to add the threshold requirement, since according to the expert, the delegation of authority is only related to the procedures for general elections. The Court is of the opinion that the procedures concerned as the procedures for the Election of President/Vice President are related to Article 22E paragraph (6) of the 1945 Constitution as legislation policy delegated in the implementation of the General Election are legitimate and constitutional as the ground for the threshold policy mandated in the 1945 Constitution;
- e. Whereas with regard to the argument of Petitioners III (People’s Conscience Party, Democratic Reform Party, Prosperous Indonesia Party, Labor Party, National People’s Concern Party, and Archipelago Republic Party) stating that Article 9 of Law 42/2008 may potentially lead to the failure to implement democratic, direct, public, free, secret, honest, and fair General Elections, the Court is of the opinion that there is no logical correlation between the requirement for support of 20% (twenty percent) of the seats in the DPR or 25% (twenty-five percent) of national valid votes that must be acquired by the Parties in order to nominate Candidate Pairs of President and Vice President in democratic, direct, public, free, secret, honest, and fair General Elections, because in fact, the parties’ fulfillment



of the requirements concerned is reached through a democratic process handed in to the sovereign voters. Such matter is also to prove whether the party nominating a Candidate of President and Vice President obtains wide support from the voters;

- a. In addition, the Court is of the opinion that the requirement of support from political parties or coalition of political parties obtaining 20% (twenty percent) of the seats in the DPR or 25% (twenty-five percent) of national valid votes prior to the Presidential general election constitutes the initial support; while the actual support will be determined based on the results of General Election of the President and Vice President, with regard to the Candidates of President and Vice President who will become the future Government which since the beginning of nomination have been supported by the people through political parties obtaining certain support through the General Election;
- b. Article 3 paragraph (5) of Law 42/2008 reads, *"The General Election of President and Vice President shall be implemented after the implementation of the General Election of the members of DPR, DPD and DPRD"*. The Court is of the opinion that decision making must rely on the standards composed of principles, policy, and rules. Principles have meaning of values to be put into realization; policy is a type of standard determining the goal to achieve, which generally is an improvement in the

- field of economy, politics and social field in the community (Ian Mcleod, 2006: 125);
- c. The policy is clearly represented in the Part of General Elucidation of Law 42/2008 affirming that the purpose (*doelmatigheid*) of the *a quo* Law is in accordance with the requirements stipulated in Law Number 10 Year 2004 regarding the Establishment of Laws and Regulations, namely the existence of a clear purpose, the right institution or establishing organ, harmony between the type and material of substance, feasibility, efficiency and effectiveness, clarity of formulation and openness. Whereas rules are the provisions used as the foundation to achieve the goal to be put into realization. Decision or policy to achieve a strategic goal is considered by the legislators to be an the issue of policy to be tested with the question of whether the overall progress has been achieved, not an issue of whether such matter provides every citizen with a right he/she must possess as an individual;
- d. Whereas based on the foregoing legal point of view, it is clear that the values to be put into realization are the values of justice, equality, democracy to be implemented based on the principles of being direct, public, free, secret, honest, and fair with the aim of enhancing the improvement in the field of politics, particularly the Presidential General Election as set forth in Law 42/2008;

**[3.16.5]** Whereas with regard to Article 3 paragraph (5) of Law 42/2008, the Court is of the opinion that such matter is a procedural means or a problem which in the implementation often emphasizes an illogical order based on the experienced common practices. What is referred to as law is not always congruent with the understanding by legal logic, let alone the general logic. Hence, experience and habit may become law. For instance, Article 3 paragraph (5) which reads, *"the General Election of President and Vice President shall be implemented after the implementation of the General Election of the members of DPR, DPD and DPRD"*. The experience that has been practiced is that the Presidential General Election is implemented after the General Election of DPR, DPD, and DPRD, since the President and/or Vice President are inaugurated by the People's Consultative Assembly [Article 3 paragraph (2) of the 1945 Constitution], so that the General Election of DPR and DPD is prioritized so as to establish the MPR. This institution will then inaugurate the President and Vice President, so it must be established first. As a matter of fact what is called *desuetudo* or habit (convention of constitutional system) which has substituted legal provision has occurred, which is a matter that has often occurred either in the practices in Indonesia or in other countries. It is a true that "the life of law has not been logic it has been experience". Since such habit has been accepted and implemented, it is not considered contradictory to the law. Hence, the status of Article 3 paragraph (5) of Law 42/2008 is constitutional;

[3.17] Considering whereas it is impossible for the Court in its function as the guardian of the Constitution to nullify a law or some parts of its contents, if

such norm is an open delegation of authority which may be determined as legal policy by the legislators. Even if the contents of a law were considered bad, as it is the case with the provisions on presidential threshold and separation of the schedule of General Election in the *a quo* case, the Court would not be able to nullify them, because what is considered bad is not always unconstitutional, except if the legal policy product concerned has intolerably violated morality, rationality and injustice. Such legal point of view is in line with Decision of the Constitutional Court Number 010/PUU-III/2005 dated May 31, 2005 stating that insofar as the option of policy is not a matter exceeding the authority of the legislators, it does not constitute an abuse of authority and it is not evidently contradictory to the 1945 Constitution as well. Therefore, such option of policy cannot be nullified by the Court.

#### **4. CONCLUSION**

Based on the foregoing considerations of facts and laws, the Court shall conclude as follows:

[4.1] Article 3 paragraph (5) and Article 9 of Law Number 42 Year 2008 regarding the General Election of President and Vice President (State Gazette of the Republic of Indonesia Year 2008 Number 176, Supplement to State Gazette of the Republic of Indonesia Number 4924) are not contradictory to the 1945 Constitution of the State of the Republic of Indonesia;

[4.2] The arguments of the Petitioners' petition are not grounded.

## 5. DECISION

In view of the 1945 Constitution of the State of the Republic of Indonesia and Article 56 paragraph (5) of Law Number 24 Year 2003 regarding the Constitutional Court (State Gazette of the Republic of Indonesia Year 2003 Number 98, Supplement to State Gazette of the Republic of Indonesia Number 4316);

### **Passing the Decision,**

Declaring to reject the petition of Petitioner I (Saurip Kadi), Petitioner II (Crescent Star Party), and the Petitioners III (People's Conscience Party, Democratic Reform Party, Prosperous Indonesia Party, Labor Party, National People's Concern Party, and Archipelago Republic Party) in its entirety.

Hence the decision was made in the Plenary Consultative Meeting of eight Constitutional Court Justices on Friday, the thirteenth of February two thousand and nine, and was pronounced in a Plenary Session open for the public on this day, Wednesday, the eighteenth of February two thousand and nine by us: Moh. Mahfud MD, as the Chairperson and concurrent Member, Maruarar Siahaan, Maria Farida Indrati, Achmad Sodiki, Abdul Mukthie Fadjar, M. Akil Mochtar, M. Arsyad Sanusi, and Muhammad Alim, respectively as Members and assisted by Cholidin Nasir as Substitute Registrar, in the presence of the

Petitioner I, Petitioner II/its Attorneys, Petitioners III/their Attorneys, the Government or its representatives, and the People's Legislative Assembly or its representatives.

**CHIEF JUSTICE,**

**Sgd.**

**Moh. Mahfud MD.**

**JUSTICES,**

**Sgd.**

**Maruarar Siahaan**

**Sgd.**

**Maria Farida Indrati**

**Sgd.**

**Achmad Sodiki**

**Sgd.**

**M. Akil Mochtar**

**Sgd.**

**Abdul Mukthie Fadjar**

**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 Abdul Mukthie Fadjar, Maruarar Siahaan, and M. Akil Mochtar, as follows:

## 6. DISSENTING OPINION

### **Constitutional Court Justices Abdul Mukthie Fadjar, Maruarar Siahaan, and M. Akil Mochtar:**

1. What is questioned by Petitioners in the *a quo* case is the constitutionality of the articles of Law 42/2008, as follows:
  - a. Article 3 paragraph (5) of Law 42/2008 (by the Petitioners of Case Number 52/PUU-VI/2008) which reads, "*The General Election of President and Vice President shall be implemented after the implementation of the General Election of the members of DPR, DPD and DPRD*", for the reason that such provision is contradictory to Article 6A paragraph (2) of the 1945 Constitution, "*A Candidate Pair of President and Vice President shall be nominated by a political party or a coalition of political parties participating in the general election prior to the implementation of the general election*". It is also contradictory to Article 22E paragraph (2) of the 1945 Constitution, stating that "*General elections shall be held to elect members of People's Legislative Assembly, Regional Representative Council, the President and Vice President and*

*Regional People's Legislative Assembly.*” According to the Petitioners, the two articles of the 1945 Constitution bear the meaning that the implementation of the general elections, whether the General Election to elect members of DPR, DPD, and DPRD, as well as the General Election to elect the President and Vice President must be implemented simultaneously or at the same time, so that *mutatis mutandis* the candidate pairs of the President and Vice President must be nominated prior to the General Election, as intended by Article 6A paragraph (2) of the 1945 Constitution;

- b. Article 9 of Law 42/2008 (filed by the Petitioners of Case Number 51, 52, and 59/PUU-VI/2008) which reads, *“A Candidate Pair shall be nominated by a Political Party or a Coalition of Political Parties participating the general election meeting the requirement of having a minimum seat acquisition of 20% (twenty percent) of the total seats in DPR or a minimum national valid vote of 25% in the General Election of members of DPR prior to the implementation of the General election of President and Vice President.”* According to the Petitioners, Article 9 of Law 42/2008 is contradictory to Article 6A paragraph (2) of the 1945 Constitution which only stipulates that the candidate pair nominated by the political party or coalition of political parties, without any details concerning the threshold.



2. Prior to responding to the substance of the foregoing petition for review of Law 42/2008 filed by the Petitioners, being dissenting opinions to the Court's Decision in Case Number 51-52-59/PUU-VI/2008, we shall first convey the following matters:
  - a. One of the significant changes as the results of the Amendment to the 1945 Constitution (1999-2002) is that the method of assuming of position in the membership of legislative institutions and leadership of the executive institution, whether at the national level or local level, must be implemented through election, not by means of appointment, assignment, or inheritance, certainly with assumption that it would be more democratic in accordance with the principle of people's sovereignty, as provided for Article 1 paragraph (2) of the 1945 Constitution. In addition, Indonesia has adopted the form of republic government as stipulated in Article 1 paragraph (1) of the 1945 Constitution, while the General Election which is the most important pillar for the fulfillment of the three main principles of democracy in a republic government, namely people's sovereignty, legitimacy of the government, and regular succession government, which have been made as norms in Article 22E *junctis* Article 6A paragraph (1) and Article 18 paragraph (4) of the 1945 Constitution.

- b. Generally, all modern democracies implement general elections, but not all general elections are democratic in nature, since a democratic general election is not only a symbolic ritual, but must be competitive, regular (periodic), inclusive, and definitive, namely to determine the leadership of the government. The democratic general election, including the General Election to elect the President and Vice President, must be democratic in respect of electoral laws and electoral process as reflected in the laws regulating the General Election, not the General Election in the New Order Era being “as if” it were a General Election. Actually, by the Amendment to the 1945 Constitution, the grounds for the principle and process towards a democratic government have been laid down by the Constitution; it is only a matter of whether or not the further norm making in organic laws is consistent with the provisions of the Constitution as their legitimacy source.
3. With regard to the substance of the petition, in our opinion, if the Court is consistent with its opinion in the decisions on the previous cases (such as Decision Number 56/PUU-VI/2008 and Decision Number 3/PUU-VII/2009) in the constitutional interpretation which tends to emphasize more on textual interpretation and original intent, the Court is supposed to grant the Petitioners’ petition, since based on the textual interpretation and original intent, even also with systematic interpretation of Article 6A paragraph (2) and Article 22E paragraph (2) of the 1945 Constitution which become the

legitimacy source of Article 3 paragraph (5) and Article 9 of Law 42/2008, it has been very clear (*expressis verbis*) that the Formulators Composers of the 1945 Constitution have desired that:

- a. The General Election comprising the General Election to elect members of DPR, DPD, and DPRD (briefly referred to as Legislative General Election) as well as the General Election of President and Vice President (briefly referred to as Presidential General Election) are to be implemented simultaneously at the same time. The Phrase "*prior to the implementation of the general election*" mentioned in Article 6A paragraph (2) of the 1945 Constitution cannot be separated from the definition of general election as intended by Article 22E paragraph (2) of the 1945 Constitution, namely that the general election is to elect the members of DPR, DPD, the President and Vice President, and DPRD as one unified system and process in the implementation (electoral laws and electoral processes) by "*a national, permanent and independent general elections commission*" [*vide* Article 22E paragraph (5) of the 1945 Constitution]. In fact, in our opinion, it is sufficient to have one law regulating the General Election comprising the arrangement of Legislative General Election and Presidential General Election, not as practiced in the 2004 General Election with Law 12/2003 (Legislative General Election) and Law 23/2003 (Presidential General Election). Subsequently, for the 2009

General Election Law 12/2003 has been substituted with Law 10/2008 and Law 23/2003 has been substituted with Law 42/2008. The arguments referring to Article 3 paragraph (2) of the 1945 Constitution stating that the MPR is the institution inaugurating the President and Vice President, then logically the MPR whose members consist of all members of DPR and members of DPD elected through General Election [*vide* Article 2 paragraph (1) of the 1945 Constitution] must be established first. The argument that the Legislative General Election must be prioritized over the Presidential General Election greatly simplifies the problem, since the simultaneous implementation of General Elections does not mean that the members of DPR and members of DPD who are automatically become members of MPR cannot be inaugurated (for example, according to the Five-Year Constitutional Calendar since 1999, to be held as per October 1) before the inauguration of the President and Vice President (October 20 in every five years). It is also difficult to accept the argument that the implementation of Legislative General Election which is prioritized over the Presidential General Election has been a convention of constitutional system, since it has only taken place for almost twice (in 2004 and as planned in 2009) which still cannot be qualified as convention of constitutional system. In addition, Indonesia is still in the transitional process towards democracy for system building and

appropriate format in the state life in accordance with the 1945 Constitution. The idea to simplify the General Elections in Indonesia which have too many variations, the often deplorable “no day without General Election” condition, for instance, the idea of combining the agenda of General Election at the national level (the General Election of members of DPR, DPD, and the President and Vice President) and combining the local General Election (to elect the members of DPRD and regional heads) have been conveyed by many circles, whether politician (the General Chairperson of the Functional Group Party, M. Jusuf Kalla) or academician (such as Dissertation of Dr. Ibnu Tricahjo, S.H., M.H. at Unibraw, 2008).

- b. Whereas the nomination of the candidate pairs of President and Vice President by political parties of coalition of political parties participating in the General Election listed in Article 6A paragraph (2) of the 1945 Constitution has been very clear in meaning and does not allow the legislators to make legal policy with “tricks” contaminated by *ad hoc* political motive to determine the “presidential threshold” as provided in Article 9 of Law 42/2008 petitioned for review. The reason for the use of Article 6A paragraph (5) of the 1945 Constitution which reads, “*The procedures for electing the President and the Vice President shall be further regulated by law*” as manifestation of the mandate of the 1945 Constitution to legislators can render the “threshold”

inappropriate, since the *a quo* article does not regulate the requirement, but the method, since the requirement has been regulated in Article 6 of the 1945 Constitution, and they cannot be confused. Similarly, the argument that the “*presidential threshold*” is intended for the candidates of President and Vice President to have strong and wide basis of support from the people, because wide support can be brought into reality by the direct election of President and Vice President by the people, as in the provision of Article 6A paragraph (1) *juncto* Article 6A paragraph (3) of the 1945 Constitution concerning the election of candidate pair of the President and Vice President that must acquire votes of more than fifty percent of the number of votes in the general election with at least 20% (twenty percent) votes in each province distributed in at least half of the provinces in Indonesia. Experience from the 2004 Presidential General Election has shown that the result of Presidential General Election is not compatible with the result of Legislative General Election in terms of the number of vote acquisition of a party or a coalition of political parties supporting or nominating them, since the candidate pairs from the political parties or coalition of political parties supporting them and having smaller vote acquisition in the Legislative General Election than the vote acquisition of other candidate pairs, actually won the General Election of President and Vice President. Actually, to be rational, by

the determination of “parliamentary threshold” listed in Article 202 paragraph (1) of Law 10/2008 which by the Court’s Decision Number 3/PUU-VII/2009 dated February 13, 2009 is deemed constitutional, it will be more legitimate if the “presidential threshold” for political parties or coalitions of political parties participating in the General Election is similar to the “parliamentary threshold”, which is only 2.5%.

4. Actually, if the General Election to elect the members of DPR, DPD, and DPRD as well as the General Election to elect the President and Vice President are to held simultaneously at the same time as implicitly contained in Article 22E paragraph (2) *juncto* Article 6A paragraph (2) of the 1945 Constitution, and then *mutatis mutandis* the provision of “presidential threshold” in Article 9 of Law 42/2008 loses its relevance. Hence, Article 3 paragraph (5) and Article 9 of Law 42/2008 are contradictory to their legitimacy sources, namely Article 6A paragraph (2) *juncto* Article 22E paragraph (2) of the 1945 Constitution, so it is proper for the Court to declare that the articles of Law 42/2008 petitioned for review by the Petitioners are contradictory to the 1945 Constitution and do not have binding legal effect. Even though in the event the Petitioners’ petition for the Legislative General Election and Presidential Election to be held simultaneously at the same time is granted, it is impossible to be implemented in the 2009 General Election, but as earliest as in the 2014 General Election, since it may disturb the stages of General Election that

have been prepared by the General Elections Commission. Whereas for the petition related to presidential threshold, in the event the petition is granted, it would be easy to be implemented by the General Elections Commission.

**SUBSTITUTE REGISTRAR,**

**Sgd.**

**Cholidin Nasir**