DECISION

Number 56/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 regarding the General Election of President and Vice President against the Constitution of the State of the Republic of Indonesia Year 1945, filed by:

[1.2] **1.** **M. Fadjroel Rachman**, Indonesian citizen, born in Banjarmasin on January 17, 1964, Muslim, Private Person, having his address at Kopo Permai 1 Blok T Number 3, RT/RW. 007/001, Sukamenek Village, Margahayu District, Bandung Regency, West Java, as ..... **Petitioner I**;

2. **Mariana**, Indonesian citizen, born in Jakarta on March 14, 1976, Muslim, Employee, having her address at Jalan Janur Indah VI LA 17/9 RT/RW. 003/018, Kelapa Gading Timur Sub-District, Kelapa Gading District, North Jakarta, as ..... **Petitioner II**;

3. **Bob Febrian**, Indonesian citizen, born in Duri on February 16, 1982, Muslim, Entrepreneur, having his address at Jalan Sudirman Number 29, RT/RW. 002/004, Talang Mandi Sub-District, Mandau District, Bengkalis Regency, Riau, as ……..... **Petitioner III**;

By virtue of a Special Power of Attorney, dated December 1, 2008 authorizing 1) Taufik Basari, S.H., S.Hum., LL.M., 2) Virza Roy Hizzal, S.H., M.H., and 3) Ricky Gunawan, S.H. All, of whom being Advocates and Legal Consultants having their domicile at the Office of **Taufik Basari and Associates,** Jl. Tebet Timur Dalam III D Number 2, Tebet, South Jakarta 12820, either severally or jointly acting for and on behalf of the authorizers;

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

[1.3] Reading the Petitioners' petition;

Hearing the Petitioners' statements;

Hearing and reading the Written Statement of the Government;

Hearing and reading the Written Statement of the People's Legislative Assembly;

Examining the Petitioners' evidence;

Hearing and reading the Written Statements of the Petitioners' Experts;

Hearing and reading the Written Statement of the Government's Expert

Reading the Petitioners and Government's Written Conclusions;

3. LEGAL CONSIDERATIONS

[3.1] Considering whereas the purpose and objective of the Petitioners' petition is to review the constitutionality of Article 1 Sub-article 4, Article 8, Article 9, and Article 13 paragraph (1) 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 Constitution of the State of the Republic of Indonesia Year 1945 (hereinafter referred to as the 1945 Constitution);

[3.2] Considering whereas prior to considering the Principal Issue of the Petition, the Constitutional Court (hereinafter referred to as the Court) shall first consider the following matters:

1. The Court's authority to examine, hear, and decide upon the *a quo* petition;
2. The Petitioners' legal standing to act as Petitioners in the *a quo* petition.

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

Authority of the Court

[3.3] Considering whereas according to Article 24C paragraph (1) of the 1945 Constitution of the State of the Republic of Indonesia, and Article 10

paragraph (1) sub-paragraph a of Law Number 24 Year 2003 regarding the Constitutional Court (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 (hereinafter referred to as Law 4/2004), the Court has authority to hear in the first and final level whose decision is final, among other things, to review Laws against the 1945 Constitution;

[3.4] Considering whereas the Petitioners' petition is to review the constitutionality of the norms of Article 1 sub-Article 4, Article 8, Article 9, and Article 13 paragraph (1) of Law 42/2008 against the 1945 Constitution, which is one of the authorities of the Court, so that 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 Law Number 24 Year 2003 regarding the Constitutional Court along with its Elucidation (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 Constitutional Court of Law), the persons who may file a petition for judicial review of Laws against the 1945 Constitution shall be those who deem that their constitutional rights and/or authority granted by the 1945 Constitution are 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 community insofar as they still exist and are in conformity with the development of society and the principle of the Unitary State of the Republic of Indonesia;

c. public or private legal entities; or

d. state institutions;

Accordingly, the Petitioners in the review of Law against the 1945 Constitution must first explain and prove:

a. their positions as petitioners as intended in Article 51 paragraph (1) of the Constitutional Court Law;

b. whether or not there is any impairment of constitutional right and/or authority granted by the 1945 Constitution caused by the coming into effect of the Law petitioned for review;

[3.6] Also considering whereas following the Decisions of the Constitutional Court Number 006/PUU-III/2005 dated May 31, 2005 and Number 11/PUU-V/2007 dated September 20, 2007 the Court is of the opinion that the impairment of constitutional right and/or authority as intended in Article 51 paragraph (1) of the Constitutional Court Law shall fulfill five requirements, namely:

a. The Petitioners have constitutional rights and/or authority granted by the 1945 Constitution;

b. The Petitioners deem that their constitutional rights and/or authority are impaired by the coming into effect of the law petitioned for review;

c. such constitutional impairment must be specific and actual in nature or at least potential in nature which, according to logical reasoning, will surely occur;

d. there shall be a causal relationship *(causal verband)* between the intended impairment and the coming into effect of the law petitioned for review;

e. It is expected that by granting the petition, the constitutional impairment argued shall not or shall no longer occur.

[3. 7] Considering whereas the Petitioners argue that:

- Petitioner I (M. Fadjroel Rachman) who is a citizen intending to use his right to participate in government by becoming a Candidate of President of the Republic of Indonesia, who obtains guarantee of equal position before the law [Article 27 paragraph (1) of the 1945 Constitution], and the right to the recognition, guarantee, protection, and legal certainty of just laws, as well as equal treatment before the law [Article 28D paragraph (1) of the 1945 Constitution, 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 28**I** paragraph (2) of the 1945 Constitution], which is one of the manifestations of people's sovereignty [Article 1 paragraph (2) and Article 6A paragraph (1) of the 1945 Constitution];

- Petitioner II (Mariana) and Petitioner III (Bob Febrian) are individual Indonesian citizens intending to use their rights to participate in government through the General Election of President and Vice President, and intend to use their voting rights to elect the Candidate Pair of President and Vice President trusted by the people and not only trusted by the political parties, and the Petitioners who are not the members any of political parties and who do not support any political party whatsoever, and have never granted any mandate to any political party to provide the Candidate Pair of President and Vice President to be elected;

Whereas however such constitutional rights of the Petitioners guaranteed by the 1945 Constitution, namely the right to elect the Candidate Pair of President/Vice President that they trust and the right to participate in Government by becoming the Candidate Pair of President and Vice President in general election have been impaired by the provisions of Article 1 sub-article 4, Article 8, Article 9, and Article 13 paragraph (2) of Law 42/2008, which disallow independent candidates in addition to the Candidate Pair nominated by a political party or a coalition of political parties;

- Whereas according to the Court, the criteria set out in the consideration of paragraph [3.6] above, either regarding the qualifications as individuals or requirements regarding constitutional right impairment as set forth in Article 51 paragraph (1) of the Constitutional Court Law have been fulfilled, so that even though the qualifications and requirements will still be considered together with the Principal issue of the Petition, *prima facie* the Petitioners have fulfilled the legal standing requirements to file the *a quo* petition;

[3.8] Considering whereas because 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 been considered above, the Court will further consider the Principal Issue of the Petition;

Principle Issue of Petition

[3.9] Considering whereas the principal issue filed by the Petitioners is substantive review of Article 1 sub-article 4, Article 8, Article 9, and Article 13 paragraph (1) of Law 42/2008, argued to be contradictory to the 1945 Constitution for the reasons principally as follows:

1. The 1945 Constitution does not disallow Independent Candidate Pair of President and Vice President, and the provision of Article 6A paragraph (2) is not a barrier for Independent Candidate Pair of President and Vice President. Article 6A paragraph (2) does not grant any exclusive right to political parties as the only instrument for citizen aspiration in democracy

which further becomes the parties' exclusive right to nominate the Candidate Pair of President and Vice President. Article 6A paragraph (2) constitutes the preference for the nomination process of President and Vice President, so that as it is preference, then other choices or possibilities beyond the preference are still open;

2. The Petitioners have rights guaranteed by the 1945 Constitution; as Indonesian citizens the Petitioners have the right to participate in the government including in General Elections. The implementation of this right is guaranteed by the 1945 Constitution in the forms of recognition, guarantee of equal opportunities in government, as well as guarantee to be free from discriminatory treatment on any basis whatsoever. (*vide* Article 27 paragraph (1), Article 28D paragraph (1) and paragraph (3) and Article 28**I** paragraph (2). The entire implementation of right to participate in government, including in General Election, shall be conducted in the context of materializing people's sovereignty [Article 1 paragraph (2) of the 1945 Constitution];

3. Whereas there is not any provision in the 1945 Constitution disallowing Independent Candidate Pair of President and Vice President, and Article 6A paragraph (2) of the 1945 Constitution is not the barrier for the existence of independent Candidate Pair of President and Vice President, and every citizen has the right to equal position and opportunity to participate in government without discrimination;

4. Article 1 sub-article 4, Article 8, Article 9, and Article 13 paragraph (1) of Law 42/2008 are contradictory to Article 1 paragraph (2), Article 27 paragraph (1), Article 28D paragraph (1), Article 28D paragraph (3), and Article 28**I** paragraph (2) of the 1945 Constitution, with the following argumentation:

   a. whereas if a person having sufficient support directly from the people, but is not liked by or does not want to be subject to the will or the interest of the management of any political party, then the opportunity for such person will be closed. For a democracy with a presidential system, the Candidates of President produced by such system will be finally subject to the will of their supporting political parties, not subject to the people electing them, so that with such a model the essence of people's sovereignty will be lost and replaced by the sovereignty of political parties; Petitioner II and Petitioner III are forced to elect the Candidates of President and Vice President who have passed through the internal selection of a political party or through the agreement of high-ranking officials of a political party, where the measure used for selecting the best citizen to be the leader is the will and the interest of the political party;

   b. whereas the substance of the provision of the *a quo* Law 42/2008, is contradictory to Article 1 paragraph (2) of the 1945 Constitution, containing the principle of democracy, where sovereignty is

asserted to belong to the people and not to political parties or certain groups. The essence of General Election of President and Vice President is the actualization of people's sovereignty, and direct election stipulated following the amendment to the 1945 Constitution constitutes an effort to confirm that the sovereignty is in the hands of the people;

c. whereas the procedures for the nomination and registration of candidate pairs by political parties hamper and disallow the constitutional right of the citizens to elect and become the Candidate Pair of President and Vice President independently and directly without joining a political party;

d. The Candidate Pair may only be nominated by a Political Party or a Coalition of Political Parties participating in the General Election meeting the requirement of having 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 DPR, so that the people's choice of the Candidates of President and Vice President is determined by domination of certain political parties acquiring majority of seats or votes, and the people who independently support a certain candidate pair with enormous support become meaningless;

e. whereas the existence of constitutional recognition of the possibility of independent candidates in the implementation of democracy in

Indonesia by virtue of the Decision of the Constitutional Court Number 05/PUU-V/2007 allowing independent candidates in the regional head election supported by evidence of polling showing that people greatly agree with the existence of independent Candidate Pair of President and Vice President, has the consequence that the interpretation of the 1945 Constitution must be in conformity with the opinion of the people who desire the opening of the opportunity for independent Candidate Pair of President and Vice President, so that the Petitioners has requested the Constitutional Court to declare that Article 1 sub-article 4, Article 8, Article 9, and Article 13 of Law 42/2008 are contradictory to the 1945 Constitution and do not have any binding legal force;

[3.10] Considering whereas to support their arguments, in addition to presenting written evidence (exhibits P-1 up to P-8), the Petitioners have also presented experts whose statements have been completely included in the Facts of Case part of this Decision which, however, principally explain as follows:

1. Bima Arya, Ph.D

- Debates over whether or not to allow independent candidate pair of President and Vice President must be put in the context of the confirmation of the presidential system adopted by Indonesia. In a presidential system, the head of the state has a sufficiently or extremely great sovereignty, and is even guaranteed with the

principle of "*can do no wrong*" in a state of danger which threatens the sovereignty of the state. Such logic for Presidential power must be balanced with the mechanism of direct election of the President by the people. The role of the President as the highest institution in a presidential system identifies that there must be a direct social contract between the President and the people. The domination or hegemony by a political party in determining the Candidate of President denies the fundamental principle of the presidential system because it limits choices, opportunities, and decreases the understanding of political contract between the President and the people;

- The assumption that the government stability needs to be supported by the presence of majority of political parties of the Government in the parliament, in fact has the potential to hamper *checks and balances* system, because it tends to increase the permanent interest between the President and the coalition having an orientation to maintain and make use of power as well as to mutually protect the interest of the majority of legislative and executive;

- The expert is of the same opinion with Denny Indrayana, that the shortcoming of the process of amendment to the 1945 Constitution is that political parties monopolize the nomination of Presidential

candidates. That is the matter which actually disallows the possibility of independent Presidential candidates and weakens the idea of direct Presidential election. The interpretation of the requirement of President nomination through political parties is discriminatory, because it is not a general requirement but a specific requirement which tends to be out of the subject matter and the commitment to confirm the presidential system;

- The expert concludes that, *first*, there is no relation between the support of political parties to the candidate of president and government stability. *Second*, the Government stability and pattern of relationship between executive and legislative should be more determined by the construction of rights and authorities of the two institutions. *Third*, independent candidate of President is the logical consequence of the unavoidable presidential system. *Fourth*, the nomination limitation through parties is a specific requirement not a general requirement because it constitutes a form of discrimination.

2. Dr. Irmanputra Sidin, SH., MH.

- Constitution may not be trapped by the ages; the constitution may not be contained by the histories of the ages. Based on the contextualization, accordingly the interpretation of the *original intent* of Article 6A paragraph (2) of the 1945 Constitution has been forced to be kept in an academic museum called the

History of Law lecture;

- Article 6A paragraph (2) of the 1945 Constitution, *the living constitution*, does not intend to declare that only Political Parties participating in General Election may nominate the Candidate Pair of President and Vice President. This norm is a norm of instruction; however, an instruction is not always imperative, an instruction may be also affirmative. The affirmative nature in Article 6A paragraph (2) is that the Candidate Pair of President and Vice President shall be nominated by a Political Party because the constitution acknowledges that a Political Party is the noble institution and the main pillar in the establishment of a constitutional democracy, however it does not mean that a Political Party shall be the only pillar in the establishment of a constitutional democracy;

- Article 6A paragraph (2) of the 1945 Constitution also states that not all political parties can nominate Candidate Pairs of President and Vice President, but only the Political Parties participating in the general election which may nominate the Candidate Pairs of President and Vice President. The *a quo* Article may not be interpreted *a contrario* to the effect that those not nominated by a political party may not become the Candidate Pair of President and Vice President. One of the articles of the third amendment to

the 1945 Constitution is also states that the President may not dissolve DPR. This is also an affirmative norm which is negative in nature, which furthermore may not be interpreted *a contrario* to the effect that only President may not dissolve DPR;

- Article 6A paragraph (2) of the 1945 Constitution is not a hindrance to declare that independent candidates may become the Candidate Pair of President and Vice President. There is also an opinion saying that the regional head election is open for independent candidates because Article 18 of the 1945 Constitution states that the election shall be conducted in a democratic manner. The meaning of the word democratic chosen in Article 18 of the 1945 Constitution regarding Regional Head General Election may be broadly open, so that it can be defined, for instance, that the candidate pair of regional head and deputy regional head shall be elected by DPRD;

- The expert quotes the legal consideration of the Constitutional Court in the decision for independent candidates which at the time declared that there was no legal certainty because when at the lower level independent candidates were allowed, how it could be accounted for if it was unnecessary to allow independent Presidential Candidates while the condition was similar, only that the one was at the level of governor,

regent/mayor, while the other was at the level President as the holder of government authority;

- Article 28J of the 1945 Constitution is often used for the Government's argument to limit a person's right. Article 28J has a mystic sense which is frequently forgotten. Article 28J is the ultimate article if the implementation of a constitutional right does not respect the recognition of other people's right and freedom for the reasons of religion, morality, order and security;

- According to the expert, the involvement of independent candidates will not automatically bring about social chaos. Likewise, if only the political parties nominate the Candidate Pair of President and Vice President, then the general election will be automatically safe;

3. Hari Wibowo

- One of the most important aspects of democracy is all of the rule of law, laws, and regulations under the laws, in fact the Constitution may not contradict universal principles and the fundamental nature of the so-called human rights. There are four basic characteristics in human rights. *First*, the universal principles namely all rights, without exception, are applicable wherever, in jurisdiction whatsoever, without any discrimination.

Second, the fundamental rights are not derogable as they are inherent in human beings naturally. *Third*, the rights are inseparable. *Fourth*, such rights are interdependent;

- From Article 1 sub-article 4, Article 8, Article 9, and Article 13 paragraph (1) of Law 42/2008, the expert concludes that limitations and restraints conducted are found in these articles, especially when it is concerned with the matter of electing persons to be the Candidate Pair of President and Vice President only through a political party. This means that, beyond political parties, the persons cannot become the Candidate Pair of President and Vice President. The problem is whether there is any interest necessary to limit a person's nomination to become President only through a political party. This is actually the issue that must be reviewed. When Fadjroel Rachman nominates himself to be the President beyond a political party, would it disturb or in fact deny other persons' human rights? In addition to the freedom to be elected, are there any other persons' human rights disturbed by the nomination beyond political parties? Is the right to join an organization disturbed? These are the matters to be examined carefully;

- In the context of national interest, state jurisdiction, which national interest is to be maintained, so that it is necessary to

make the policy that the Candidate of President shall be nominated only by a political party? Is there any threat of terrorism so that only the Candidate of President through a political party is allowed? Is there any threat of SARS virus that can harm health? Is there any moral threat?

- The substance of Article 6A paragraph (2) of the 1945 Constitution, according to the expert, may not contradict or restrain and limit the right of a citizen to be elected as President or Vice President. Why? Similar to the reason above, it must be examined carefully, is there any other right or freedom being violated? Or that there are national interests, public order, public moral which are urgently needed so that such restraint and limitation are valid and legitimate.

[3.11] Considering whereas the Petitioners also present the statements of experts that have been heard under oath in case Number 23/PUU-VI/2008 regarding the review of Article 1 sub-Article 6, Article 5 paragraph (1), and Article 5 paragraph (2) of Law Number 23 Year 2003 regarding the General Election of President and Vice President, relating to independent Candidate Pair of President and Vice President. Such Law has been declared inapplicable with the promulgation of Law 42/2008, as the evidence to be also considered by the Court. The aforementioned experts' statements have been respectively included completely in the Facts of Case part, which are basically as follows:

1. Saiful Mujani, Ph.D (Expert of Statistics and Survey)

- In two surveys conducted in 2007 and 2008 with approximately similar questions being asked namely concerning the support for or refusal of the nomination of independent nomination for President which in this matter is related to three indicators, namely *first*, support or refusal of the idea that every citizen basically may nominate himself/herself to be President, agree or disagree with such idea? *Second*, support or refusal of the opinion that the nomination of President only by political parties hampers the channel for political rights of citizens, agree or disagree with such idea? *Third*, support or refusal of the opinion that the President may be nominated not only by political parties but also by independent individuals, agree or disagree with such opinion?

- In those surveys, the samples taken were around 1,300 and each survey had 3% of error. The last survey conducted in June 2008 found, *first*, that above 75% agreed with the opinion that every citizen has a right to nominate himself/herself to become President, 12% disagreed. This was consistent with the previous survey. *Second*, above 50% agreed that the nomination by a political party reduces or limits the political rights of the citizens. *Third*, above 65% agreed that the nomination of President must not be

conducted only by political parties but also by individuals or groups of people;

- The aforementioned findings indicate that Indonesian people in general desire independent candidates of President. Such matter is due to the fact that the level of trust in respect of nomination of President which has been the authority of parties so far, is the lowest compared to other institutions, for instance Mass organizations, NGO, or mass media. The results of the surveys also indicate that generally people support independent Candidates of President, either those who are satisfied or dissatisfied with the implementation of democracy and those who evaluate the good and the bad performance of President from any party whatsoever, all of them support independent candidates. Likewise, from the educational backgrounds of the respondents, all of them support independent candidates of President even though from the education of the respondents, the higher the education of the respondent is, the more they prefers independent candidates;

- Therefore, the constitution related to the nomination of President must be interpreted in accordance with people's aspiration so that the constitution may come to life, and become close to the hearts of the people so that it shall become more democratic.

2. Rocky Gerung, S.S. (Expert of Philosophy and Politics)

- Whereas the results of surveys conducted by LSI (*Indonesian Survey Institution*) indicate a *counter-logic* against the General Election Law, namely that there is a surplus of authority on the part of political parties and a deficit of legitimacy on the people concerning political parties. Whereas, the Government's argument stating that in case of being hampered by the provision that nomination of President must be made through political parties, then establish new parties, is extremely illogical because it in fact invites people to increase de-legitimators in the political process;

- The General Election Law has imprisoned the nobility of *citizenship* principle and as if forced all the people to be members of political parties. In other words, the Law has discriminated citizens to be partisan citizens joining political parties and citizens not joining political parties. This is just similar to discriminatory treatment in respect of social status. In fact, the Constitution puts citizens in a primary or imperative position while the position of parties is instrumental or to be used by the citizens;

- According to the expert, the article regarding the right of political parties to monopolize the nomination of President is the result of *copy* and *paste* from the Constitution. Meanwhile, the Constitution does not adhere to such hierarchy, as if there were a hierarchy that after the principle of citizenship there were the principle of political

party membership. The Law has been formulated in such a way to state that the principle used is the sovereignty of people, not the sovereignty of political parties. Therefore, the most important principle is that the General Election Law should protect citizens to be able to grow as citizens not treated discriminately but the fact is that it limits the rights of citizens.

3. Refli Harun, S.H., LL.M (Expert of State Administration Law (HTN) and General Election)

- Public opinion states that the 1945 Constitution disallows independent Candidate of President. This is related to the existence of Article 6A paragraph (2) of the third amendment to 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"*. Based on the interpretation of the *original history* or the *original intent,* it is undeniable that Article 6A paragraph (2) has been made for the purpose that only a political party or a coalition of political parties may nominate the Candidate of President;

- This is understandable because the formulation of Article 6A paragraph (2) is dominated by political parties reflected from the membership of MPR (People's Consultative Assembly) for the

period of 1999-2004. So it is reasonable that according to the *original intent* at that time, in fact the aspiration was that only political parties or coalition of political parties might nominate independent Candidates of President However, based on the jurisprudence of the Constitutional Court regarding the *original intent, as the sole judicial interpreter of the constitution – the Constitutional Court shall not be merely stuck in the original interpretation method by relying only on the original intent of the formulation of articles of the 1945 Constitution, ...* (Decision of the Constitutional Court Number 005/PUU-IV/ 2006)". By virtue of the jurisprudence, the *original intent* does not constitute the only method used in practice in the Constitutional Court;

- The Constitutional Court also has once passed a decision that death sentence is not contradictory to the 1945 Constitution, even though there is a provision in the Constitution regarding the right to life as well as the right to defend one's life and living, and that the right to life also may not be reduced under any circumstances whatsoever. Therefore, when compared to the independent Candidate of President, then declaring independent Candidate of President not contradictory to the 1945 Constitution would create less resistance, either from constitutional perspective or from the people's acceptance. Accordingly, from the aspect of *constitutional morality* there is no problem to declare that independent Candidate

of President is not contradictory to the 1945 Constitution. From the perspective of International Human Rights there is not any contradiction at all; in fact, such matter is a common practice in democratic states.

4. Dr. Taufiqurrahman Syahuri, S.H., M.H. (Expert of State Administration Law)

- The interpretation of democracy is very interesting following the Decision of the Constitutional Court Number 5/PUU-V/2007 declaring that independent candidate is not contradictory to democracy in regional head elections. Article 6 paragraph (2) of the 1945 Constitution grants authority to political parties to nominate the Candidate of President. However, actually it does not stop with that because there are still people's authorities. Therefore, the interpretation regarding democracy is not only concerned with matters explicitly set forth in the Constitution but also matters not explicitly set forth in the Constitution;

- The substantive norm in the General Election of President and Vice President is the norm set forth in Article 6A paragraph (1) namely that President and Vice President shall be elected as a pair directly by the people, while paragraph (2) regulates the technical way or the recruitment process of the Candidate Pair. This is one of the sovereignty of people written down in the constitution. The

substance of Article 6A paragraph (2) of the 1945 Constitution does not disallow the opening of the opportunity for other procedures in the recruitment of the Candidate Pair through non-political parties. It can be interpreted that the substance of Article 6A paragraph (2) has not been intended to limit the nomination of Candidate Pairs only from political parties because there is no word “only” in the text;

- Sovereignty of the people or democracy must be implemented within the basic legal frame. Democracy in executive General Elections namely Regional Head and Presidential General Election in accordance with the 1945 Constitution shall be implemented by way of *recruitment* of Candidate Pairs through political party and non-political party channels. The limitation of the nomination of Candidate Pair only through political parties is not in accordance with the interpretation of democracy by the Constitutional Court as the official interpreter of the 1945 Constitution.

5. Effendy Gazali, Ph.D (Expert of Communication and Politics)

- What is occurring at present is hoped not to bring about Potential Constitutional Impairment (KKP) to other citizens. *First*, the direction of political communication has been appropriate, one of which is by Decision of the Constitutional Court Number 5/PUU-V/2007 allowing independent candidates in Regional Head

elections. *Second*, ideology as the public interest claimed by the public or being the part of the public will never be totally distributed or will never be accommodated by political parties regardless of how many political parties there are in any country in the world. Here the potential constitutional impairment appears, where a person who will bear a certain ideology or certain interest will never find it in any of all existing political parties, likewise when he/she shall cast a vote. Therefore, both the right to elect and the right to be elected have the implication of potential constitutional impairment. *Third*, whereas Article 6A paragraph (2) must be in line with or must be read in line with Article 28F of the 1945 Constitution. *Fourth*, the empirical level of limited exploration of democracy is hoped not to make [people] paranoid that the independent Candidates of President would not be recognized because of being stuck only in the candidates of the main parties. Independent Candidate of President in politics and in the study of communication is the vaccine or *antibody* which is consistently required even though you dislike it simply because you love to have a consistently fit body. Lastly, why is independent candidate in Regional Head election allowed as a result of the Decision of the Constitutional Court while independent candidate in Presidential election is not allowed?

6. Drs. Andrinof Chaniago, M.Si (Expert of Political Science and Policy Studies)

- The main content of a constitution of a state is the declaration regarding the purpose or the common ways of the people of the state and second regarding several ways and basic norms to achieve such common purpose. Back to the purposes as a state as included in the fourth paragraph of the 1945 Constitution, the manifestation of the purposes is no other than how far the state is able to supply the best public goods and services as much as possible and as broadly as possible to reach the people. However, because public goods and services are also by nature scarce and limited, while the scarcity and limitation cannot be covered by the system, the way and instrument to supply private goods, the only way to overcome the limited quantity of such public goods and services to the people is by providing quality process or way or instrument to plan, determine. execute and control the supply of public goods and services. Such way is no other than creating quality democracy, not formal juridical democracy or procedural democracy. Seeing the current system and the tendency of behavior of political elites in obtaining and maintaining political positions which can deny the aspiration of the majority of people and seeing the opportunity to improve the quality of democracy, independent Candidate Pairs of President and Vice President shall

be allowed. Therefore, it will improve the quality of democracy and will eliminate the opportunities of distortion and manipulation of people's votes by a small group of elites in the current system.

7. Yudi Latif, Ph.D (Expert of Political Science)

- Laws and regulations granting the exclusive right to political parties to nominate the Candidate Pairs of President and Vice President encounter multiple logical fallacies according to the logic of authority, logic of sovereignty, logic of democracy and constitutional logic. According to the logic of authority, the head of state in a presidential system is not the extension of the parliament, which also means not the extension of political parties. Therefore, political parties do not have the right to monopolize the nomination of President. When the President is directly elected by the people, then it will bring about the consequence that political parties lose their exclusive right. In the United States of America this is possible by non partisan parties;

- Political Representation is not only represented by political parties, because there is still DPD (Regional Representative Council), and accordingly political parties do not completely take away people's representation to articulate their political rights. On that basis, the right to nominate President must be open for other *parties*. A *Party* according to the definition of Max Weber is not like political party,

but the *party* in a sense of collectivity, namely every collectivity intended to influence *collective action* or positions of authority may be deemed as *party*. In fact, *collective action* can be in forms of political parties*, pressure groups, interest groups, or social movement*s. All of them have the opportunity to nominate their own President;

- According to the logic of sovereignty, the constitution declares that sovereignty shall be in the hands of the people, so the position of people's right to sovereignty cannot be represented, meaning that it cannot be fully monopolized by a single representation institution. *Nation* in the system of republic democracy is *nation of citizens*. So *nation* of individuals as the *legal subject* is not *nation of political party,* not *nation of religious community*, not *nation of the table group*, not *nation* in group representation, but *nation of citizens*, as individuals (*legal right)*;

- Democracy must always provide other systems such as *safety veil/emergency exit*. If parties are incredible and the people do not want to elect the President nominated by the political parties, no matter if that would make democracy bankrupt. Therefore, there must be an *emergency exit*. In the United States of America there is *emergency exit* where independent candidates are allowed to be nominated as President. The logic to nominate independent

candidate is not to kill political parties at all, but is in fact in the context of revitalizing the political parties;

- According to constitutional logic, none of the articles of the Constitution blockades the possibility of independent candidates. The word '*diusulkan*/nominated' in Article 6A paragraph (2) of the 1945 Constitution, according to the official Indonesian dictionary (*Kamus Besar Bahasa Indonesia*) means "suggestion presented to be considered". In the *a quo* article there is not any *wording* at all which obligates the Candidate Pairs of President and Vice President to be nominated by political parties. Therefore, Article 6A paragraph (2) of the 1945 Constitution does not blockade at all the rights of independent candidates to be nominated in the Presidential General Election.

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

Concerning Legal Standing of the Petitioners

1. Petitioner I is not in a position, where his rights to participate in government are hampered reduced or disturbed and likewise Petitioner I is not in a condition of obtaining discriminatory treatment before the law, because in fact Petitioner I may perform any activity whatsoever, including

the activity in the context of participating in government through various existing fields, both formal and informal. Every person in order to be able to participate in government does not have to be a formal official such as President and/or Vice President. If Petitioner I feels dissatisfied, unsuitable, inappropriate, and does not agree with the existence of the political parties participating in the General Election of legislative or President and Vice President because the political parties are deemed incredible, do not represent the interest of a part of the people (including Petitioner I), then Petitioner I may establish a political party deemed to be in accordance with the desire and expectation of Petitioner I, so that the party can nominate Petitioner I to be the Candidate of President or Vice President;

2. Whereas if Petitioners II and III choose not to use their rights to participate in government through President and Vice President General Election because they cannot use their voting rights to elect the Candidate Pair not nominated by political parties, this is a voluntary choice which is consciously made as the best choice, because the right not to elect anyone/anything (white group/*golput*) is also the fundamental right of every person to be used;

Based on the description, the Government is of the opinion that there is no impairment of constitutional right and/or authority of the Petitioners arising due to the coming into effect of Article 1 sub-article 4, Article 8, Article 9

and Article 13 paragraph (1) of Law 42/2008, and therefore the Petitioners' legal standing does not meet the requirements as included in Article 51 paragraph (1) of Law Number 24 Year 2003 regarding the Constitutional Court or based on the previous decisions of the Court. Therefore, the Constitutional Court should appropriately declare that the Petitioners' petition cannot be accepted.

Concerning the Principal Issue of the Petition

1. a. The provision of Article 1 sub-article 4 of Law 42/2008 contains the definition, abbreviation or acronym used in regulations, and other matters which are common in nature applicable for the following articles.

   b. The purpose of general provisions of laws is that the limit of meaning or definition, abbreviation or acronym whose function is to explain the meaning of a word or term must be formulated in order to prevent ambiguity.

   The Government is of the opinion that the Petitioners' petition arguing the limitation of definition, abbreviation, or common matters to be the basis/footing for the following articles of the *a quo* Law*,* is highly groundless and inaccurate because the *a quo* provision provides a clear picture and direction of what is meant by the Candidate Pair of President and Vice President, as well as who have authority to nominate the Candidate Pair in the General Election of President and Vice President, so

that according to Government's opinion it is not at all related to the constitutionality of the coming into effect of Law 42/2008;

2. Whereas the Government is not of the same opinion with the reason, arguments and opinion of the Petitioners stating that the aforementioned provisions only grant exclusive right to a political party or coalition of political parties to nominate the Candidate Pair of President and Vice President, and therefore the provisions are deemed to have reduced and hampered the Petitioners' rights to elect or to become the independent Candidates of President and Vice President for the following reasons:

   a. whereas Article 6A paragraph (2) of the 1945 Constitution has been very obvious that "*A Candidate Pair of President and Vice President shall be nominated by a political party or coalition of political parties participating in the general election prior to implementation of the general election*". There should not be *dispute* in the formulation of norm in the 1945 Constitution. Our Constitution does not recognize independent Candidate Pair of President and Vice President. Therefore, Article 8 and Article 13 paragraph (1) of Law 42/2008 are not contradictory to but in fact are in conformity with Article 6A paragraph (2) of the 1945 Constitution;

   b. where as in general, Law 42/2008, as the implementation of the provision of Article 6A paragraph (5) of the 1945 Constitution

stating, "*The procedures for the election of President and Vice President shall be further regulated by law".* The construction established in the Constitution, that the nomination of the Candidate Pair by a political party or coalition of political parties reflects that the system established refers to communal/collegial system, not based on individual system, so that the provisions included in Article 8 and Article 13 paragraph (1) of Law 42/2008 have been in accordance with the mandate of the Constitution, and have also implemented the mandate consistently;

c. The Government is not of the same opinion with the Petitioners' argumentation arguing that the regional head election (Governors, Regents/Mayors) where candidates are nominated by political parties, coalition of political parties and independent candidates (based on the decision of Constitutional Court Number 05/PUU-V/2007) may be *mutatis-mutandis* equalized with the general election of President and Vice President, because according to the Government both have differences in the regulation namely (i) General Election of President and Vice President is in the context of executing the authority of state government (Article 4 up to Article 16 of the 1945 Constitution) and the operational regulation is regulated in Law 42/2008. (ii) Meanwhile, the election of regional head and deputy regional head (Governors, Regents/Mayors) is in the context of implementing regional autonomy and duties of

assistance (Article 18 up to Article 18B of the 1945 Constitution), and the operational regulation is regulated in Law Number 12 Year 2008 regarding the Second Amendment to Law Number 32 Year 2004 regarding Regional Government;

3. If the Petitioners want independent candidates to participate in the nomination of President and Vice President, in addition to the candidates nominated by a political party or coalition of political parties, then the Petitioners should present their aspiration, and propose it through the People's Consultative Assembly, in order to amend the 1945 Constitution;

4. Furthermore, the government is not of the same opinion with the Petitioners' assumption stating that the aforementioned provisions have provided discriminatory treatment and limitation, because such limitation is in accordance with the provision of Article 28J paragraph (2) of the 1945 Constitution. Likewise, the provisions of Article 1 sub-article 4, Article 9, and Article 13 paragraph (1) of Law 42/2008 do not provide discriminatory treatment to the Petitioners, except if the *a quo* provisions provide limitation and differentiation based on religions, tribes, races, ethnic groups, groups, social status, economic status, gender, languages and political belief as set forth in Article 1 paragraph (3) of Law Number 39 Year 1999 regarding Human Rights, or Article 2 of ICCPR. The articles of the *a quo* Law are not discriminatory and in fact they provide legal certainty with respect to the process of election of President and Vice

President, and are not related to the constitutionality of the coming into effect of the Law petitioned for review. Accordingly the articles are not contradictory to Article 27 paragraph (1), Article 28D paragraph (1) and paragraph (3), and Article 28**I** paragraph (2) of the 1945 Constitution, and the Court is requested to reject the Petitioners' petition.

[3.13] Considering whereas to support its statement, the Government has presented four expert witnesses who conveyed their statements under oath in the hearing on January 28, 2009, as completely included in the Facts of Case part, which basically explain the following matters:

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

- Concerning independent candidates, the expert is of the opinion that referring to the Fourth Principle of *Pancasila*, independent candidates should be eliminated because independent candid dates are individualistic and are not collective in nature as required by the fourth principle which desires the existence of representative democracy. Independent candidate does not constitute the object of constitutional petition in the Constitutional Court but it might be discussed as the discourse for the fifth amendment to the 1945 Constitution;

- Basically the Law petitioned for this review is the political product of factions or parties dealing with other interests. When it has become

Law, then the factions or political parties or such interests must be subject to the law, not otherwise;

2. Dr. Kacung Marijan

- The coalition of parties nominating the Candidate Pair of President and Vice President is the development of consensual democracy to establish a stable government system in Indonesia, because Indonesia is not the adherent of a two-party system, but a multiparty system. Therefore, the construction of consensual democracy certainly furthermore becomes the reference in establishing the political system which is not only democratic but also stable.

- The Indonesian Constitution adheres to a presidential system. Quoting Juan Linz, the expert states that presidential system was not compatible with a stable government because the President and DPR are similarly elected by the person, which means that both claim to have the right of authority from the people. This may possible lead to conflict between the President and DPR. In fact all the rights and obligations of DPR and the President have been regulated in the Constitution. However DPR is engaged not within the limit of what is specified in the Law and constitution, but furthermore based on interest. Therefore, the extent of support in

DPR, has a great implication to the effectiveness of policy implementation by the Government, in this matter the President;

3. Cecep Effendi, Ph.D.

- The multi-party system, in a presidential system recognized in Indonesia at present brings about the problem in the relationship between President and legislative institution. President does not have to require legislative support to declare his/her policies. However, it is almost certain that the support is required when the president shall execute strategic policies. The increasingly fragmented government parties as the consequence of multi-party system is likely to decrease the support to the government parties, and this means that it is increasingly difficult to establish support to the President in the parliament. The multi-party system will likely to create a situation where the parties supporting the President must compete with other parties, and therefore will lead to the increasingly smaller support to the government parties;

- As a result, the scarcity of legislative support from government parties in parliament will make it difficult for the President to run an effective government, and therefore it will create a condition of *an ungovernanciability*, which has bad impacts, and accordingly it must be considered carefully whether or not it is possible to establish an effective presidential system, which is not supported

by a good communication and strong support from the parliament.

4. 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 completely included who the subject of law is, and has granted the authority to nominate President. The subject of law is obvious namely a political party or coalition of political parties, prior to the General Election. The delegation is that the procedure of Presidential election shall be regulated by Law;

- Concerning legal standing, the expert shares the same opinion with Decision of the Constitutional Court Number 054/PUU-III/2004 stating that the nomination of the Candidates of President and Vice President constitutes the constitutional right of political parties. Actually, from the legislative politics point of view this matter can be understood, because the domain of Constitution preparation is in the hands of political institutions in *Senayan* by way of amendment to the 1945 Constitution. Therefore, the discussion regarding independent candidates will allow the amendment to the Constitution and the most appropriate forum for independent candidates will be through the amendment of the Constitution, not through the interpretation of Constitution in the Constitutional Court;

- Furthermore, many experts equalize the construction of Article 18

paragraph (4) of the 1945 Constitution regarding Regional Head Election with Article 6A paragraph (2) of the 1945 Constitution regarding Presidential Election. The norms in the articles are really different. The subjects in Article 18 paragraph (4) are governors, regents, and mayors. Who nominate them is not explained in the Constitution. Therefore, there can be given opportunities for choices of policies. However, it is different with Article 6A paragraph (2), the nominating legal subjects have been clear namely political parties or coalition of political parties;

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

§ In Article 6A paragraph (2) of the 1945 Constitution, the Candidate Pair of President and Vice President shall be nominated by a political party or coalition of political parties. Even though the method of interpretation is highly different but DPR cannot go beyond from the interpretation that such matter has been very explicit, has been very clearly specified in Article 6A paragraph (2) of the 1945 Constitution. Therefore, only the institutions of political parties have authority to nominate Candidate Pairs;

§ As a matter of fact, such matter has been designed from the beginning that only political parties are entitled to nominate Candidate Pairs because of the intention to establish a system whereby the aspirations of individual

persons or the of the people must be institutionalized. Furthermore it is impossible that the effort to aggregate or struggle for aspiration is conducted freely by all people. The nature of the existence of political parties is to serve as the institutional infrastructure whose function is to strive for the aspirations of the aggregation of people having similar ideas. Such basis constitutes the system which is going to be established through direct Presidential election. Therefore, there was no bias of political parties' interests when Article 6A paragraph (2) was formulated, which has furthermore become the reference for formulating the norm containing in Article 1 sub-article 4, Article 8 or Article 13 paragraph (1) of Law 42/2008 because in fact our understanding regarding such matter is not at all for the interest of political parties because the formulation has also been made by various groups of people, such as faction of group delegates, provincial delegates, Indonesian National Army (TNI)/ Indonesia National Police *(Polri)* delegates, and so on;

§ Whereas when DPR and the Government formulated Law Number 42 Year 2008, it was jointly understood that Regional Head Election (*Pilkada*) was highly different from Presidential Election (*Pilpres*), because the two elections were related to the candidates who were allowed to participate in the competition in those elections. In accordance with the provision of the Constitution, regional head election is only regulated in Article 18 even it is not directly regulated because Article 18 paragraph (4) obviously states that the regional head election shall be conducted in a democratic manner

with respect to which based on the decision of the Constitutional Court, independent candidates are allowed. However, the Presidential election is explicitly stated in the 1945 Constitution, that only a Political Party or coalition of political parties shall be entitled to nominate. Therefore, from the construction the two elections are completely different.

Opinion of the Court

[3.15] Considering whereas after examining carefully the Petitioners' description in their petition and the Petitioners' statements in the hearing, written evidence, experts' statements presented by the Petitioners, statement of DPR, statement of the Government, evidence and Government experts' statements, as well as the conclusions of the Petitioners and the Government as described above, the Court is of the following opinion:

[3.15.1] Whereas the main matter that must be considered and decided upon by the Court in this case is concerning the unconstitutionality of Article 1 sub-article 4, Article 8, Article 9, and Article 13 paragraph (1) of Law 42/2008, which according to the Petitioners do not accommodate individual or independent Candidates of President and Vice President in addition to the candidates nominated by a political party or coalition political parties;

[3.15.2] Whereas based on such legal matter, then the matters that shall obtain legal evaluation are as follows:

1. Whether or not independent individuals in order to be the Candidates of President and Vice President in addition to the nomination from a political party or coalition of political parties are allowed by the 1945 Constitution;

2. Whether the articles in Law 42/2008 not containing independent candidates to be the Candidates of President and Vice President are contradictory to the 1945 Constitution.

[3.15.3] Considering whereas prior to considering the articles petitioned for review as described in paragraph **[3.15.1]** above, the Court shall first present the following legal opinions:

1. Whereas Article 6A paragraph (2) of the 1945 Constitution reads, *"A Candidate Pair of President and Vice President shall be nominated by a political party or coalition of political parties participating in the general election meeting prior to the implementation of the general election"*. Article 6A paragraph (5) of the 1945 Constitution reads, "*The procedures for the implementation of President and Vice President election shall be further regulated by law";*

2. Whereas the Petitioners' arguments with respect to Article 6A paragraph (2) of the 1945 Constitution above are concerned with the absence of the word "*hanya*/only" or "*harus*/must" be nominated by a political party or coalition of political parties, so that independent candidates may be nominated not through a political party or coalition of political parties.

According to the Court, even though there is not the word "*hanya*/only" or "*harus*/must", such necessity shall be automatically certain in accordance with the original intent of the formulators of the 1945 Constitution. If the reason is the absence of the word "*hanya*/only" or "*harus*/must" then it is defined that the Candidate Pairs of President and Vice President may be nominated not through a political party or coalition of political parties, and then Article 4 paragraph (2) stating *"…President shall be assisted by a Vice President"*, without the word "*hanya*/only" or "*harus*/must" may be furthermore interpreted that President shall be assisted by several Vice Presidents. Meanwhile, from any point of view whatsoever, such interpretation cannot be accepted;

3. Whereas the Petitioners in their conclusion quote the opinion of Herman Heller stating that "Constitution is as what is understood by the people" *(Die Politische Verfassungs als Gesselschaftlich wirklichkeit).* By reading the formulation of Article 6A paragraph (2) of the 1945 Constitution, in fact the legislators and the people understand that the phrase *"A Candidate Pair of President and Vice President shall be nominated by a political party or coalition of political parties..."* is understood in a way that only a political party or coalition of political parties may nominate the Candidates of President and Vice President. The result of findings of the Indonesian Survey Institution in 2007 and 2008 concluding that the majority of Indonesian people desired the opening of the opportunity for independent President Candidates, according to the Court may not become the reason

for interpreting the provision of Article 6A paragraph (2) of the 1945 Constitution to allow the independent Candidate Pairs of President and Vice President. The reason is that the result of the survey which does not or has not become the content of the Constitution may not be used as the guideline.

4. Whereas the phrase *"a political party or coalition of political parties",* in Article 6A paragraph (2) of the 1945 Constitution explicitly means that only a political party or coalition of political parties may nominate the Candidate Pair of President and Vice President in the general election of President and Vice President. Therefore, the intended phrase disallows other interpretations, such as interpreting it with the words nominated independently and moreover at the time of the discussion in MPR there had been the discourse of independent Candidate of President not nominated by a Political Party or Coalition of Political Parties, but it was not approved by MPR. The original intent in Article 6A paragraph (2) of the 1945 Constitution obviously describes that only a political party or coalition of political parties may nominate the Candidate Pair of President and Vice President in the general election of President and Vice President (*vide Naskah Komprehensif Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 Buku IV "Kekuasaan Pemerintahan Negara"/Comprehensive Script of the Amendment to the 1945 Constitution of the State of the Republic of Indonesia Book IV "Authority of State Government" Volume 1, page 265 - 360);*

5. Whereas based on Article 6A paragraph (5) of the 1945 Constitution, the legislators in accordance with their authority in Article 20 of the 1945 Constitution has further formulated Law 42/2008, which contains articles which among other things are petitioned for review namely Article 1 sub-article 4, Article 8, Article 9, and Article 13 paragraph (1). Such articles use the phrase *"a political party or coalition of political parties"* to nominate the Candidate Pair of President and Vice President as the articles derived directly from the phrase of the 1945 Constitution;

6. Whereas the substance of the formulation of Article 1 sub-article 4, Article 8, Article 9, and Article 13 paragraph (1) of Law 42/2008 is to determine that the Candidate Pair of President and Vice President shall be nominated and registered by a political party or coalition of political parties participating in the general election (meeting the requirements) prior to the implementation of the general election. Such formulation according to the Court is not discriminatory because any person meeting such requirements may be nominated and registered by a political party or coalition of political parties to become President and/or Vice President without having to become the Management or Member of a Political Party;

7. Whereas interpreting Article 6A paragraph (2) of the 1945 Constitution, which becomes the source of the formulation of the articles of Law 42/2008 in a different and broader way so that it shall accommodate independent Candidate Pairs of President and Vice President would

constitute a change of meaning from the intention of the People's Consultative Assembly, which means that if the Court nullifies the *a quo* article, the Court has made amendment to the 1945 Constitution, which is contradictory to the Court's authority set forth in Article 24C paragraph (1) and paragraph (2) of the 1945 Constitution and Article 10 of Law Number 24 Year 2003 regarding the Constitutional Court *juncto* Article 12 of Law Number 4 Year 2004 regarding Judicial Power;

8. The Petitioners' statements in the hearing regarding the allowing of independent Candidate Pair of President and Vice President just as the Presidential election system in the United States of America according to the Court may not be automatically conducted in Indonesia because in addition to different constitution and the character of general election system applied in Indonesia, there are also other aspects such as the difference of political culture, both the elite and the people respectively;

9. With respect to the statements of the Petitioners' experts stating that we need to establish the Constitution as "*the living constitution*" for the 1945 Constitution, according to the Court, with the articles reviewed not accommodating the independent candidates shall not necessarily cause the 1945 Constitution not to be "*the living Constitution*". In fact, the living Constitution shall be realized when the constitution is accepted and implemented as properly as possible;

10. Whereas in a condition where people are free to establish political parties at present, a candidate may establish his/her own party along with the vision and mission of the party which is going to be established if he/she is not interested in the existing parties without any obstacle so that the reason for the nomination of President beyond political parties shall be irrelevant or groundless.

[3.16] Considering whereas in accordance with the aforementioned legal viewpoint, the Court shall further consider the articles petitioned for review as follows:

1. The Court's opinion with respect to the provision of Article 1 sub-article 4 of Law 42/2008:

    a. The provision of Article 1 sub-article 4 of Law 42/2008 is regulated in Chapter I regarding General Provisions, containing definition, abbreviation or acronym used in regulations, and other common matters applicable to the following articles among other things the provisions reflecting principles, purposes and objectives (*vide* attachment C.1. 74 of Law Number 10 Year 2004 regarding Formulation of Laws and Regulations). Such General Provisions in a law and regulation are created for the purpose of limiting the definition, abbreviation or acronym serving the function of to explaining the meaning of a word or term which in fact must be formulated in such a way so that it will not create ambiguity (*vide*

attachment C.1. 81 of Law Number 10 Year 2004 regarding Formulation of Laws and Regulations);

b. The definition or what is meant by Candidate Pair of President and Vice President hereinafter referred to as Candidate Pair, as set forth in Law 42/2008, shall be the Candidate Pair meeting the requirements to participate in the general election of President and Vice President, namely from who the Candidate Pair nominated by a political party or coalition of political parties are; the requirements for the Candidate Pair; mechanism of Candidate Pair nomination; procedures of campaign to be conducted by the Candidate Pairs; voting mechanism to elect the Candidate Pair up to the Stipulation of the elected Candidates as President and Vice President;

c. The Petitioners' petition questioning the limit of definition, abbreviation or other common matters on which the following articles of the *a quo* Law are based, is highly groundless and incorrect, because in fact the construction of the *a quo* provision has provided a clear overview and direction regarding what is meant by Candidate Pair of President and Vice President;

2. The Court's opinion with respect to the provisions of Article 8 and Article 13 paragraph (1) of Law 42/2008:

a. The original intent of the formulators of the 1945 Constitution regarding Article 6A paragraph (2) of the 1945 Constitution has been obvious that "*A Candidate Pair of President and Vice President shall be nominated by a political party or coalition of political parties participating in the general election prior to the implementation of the general election*". Based on such original intent, the 1945 Constitution only recognizes the Candidate Pair of President and Vice President nominated by a political party or coalition of political parties participating in the general election, so that in general, Law 42/2008 only constitutes the implementation the provisions of Article 6A paragraph (5) of the 1945 Constitution stating "*The procedures for the implementation of the election of President and Vice President shall be further regulated by law";*

b. Accordingly, the regulation regarding political party or coalition of political parties entitled to nominate the Candidate Pair of President and Vice President as regulated in the provision of Article 8 and Article 13 paragraph (1) of Law 42/2008, constitutes the implementation of the provision of Article 6A paragraph (2) of the 1945 Constitution, stipulating, "*A Candidate Pair of President and Vice President shall be nominated by a political party or coalition of political parties participating in the general election prior to the implementation of the general election*". In other words, the construction established in the Constitution, that the nomination of

the Candidate Pair by a political party or coalition of political parties reflects that the political system established refers to the communal/collegial system, not based on individual system;

3. With respect to the provision of Article 9 of Law 42/2008, particularly in relation to the phrase "*a political party or coalition of political parties",* the Court refers to the consideration in point 2 above which, *mutatis-mutandis* shall apply to the phrase "*a political party or coalition of political parties",* in the provision of the *a quo* Article 9;

[3.17] Considering whereas the Petitioners' argument stating that Article 27 paragraph (1), Article 28D paragraph (1) and paragraph (3) and Article 28**I** paragraph (2) of the 1945 Constitution constitute the form of the realization of sovereignty of the people formulated in Article 1 paragraph (2) of the 1945 Constitution is correct. However, the implementation of Article 1 paragraph (2) of the 1945 Constitution shall not violate a person's right *"to elect and to be elected".* In the implementation of the General Election, every person shall have the right and shall be guaranteed to exercise his/her sovereignty to elect the President and Vice President; however, in order to be elected as the President and Vice President there are requirements included in Article 6A paragraph (2) of the 1945 Constitution, as further regulated in the *a quo* Law 42/2008. Therefore, the definition of Article 1 sub-article 4, Article 8, Article 9, and Article 13 paragraph (1) of Law 42/2008 is not contradictory to Article 6A paragraph (2) of the 1945 Constitution and does not constitute a discriminatory regulation.

Moreover, based on the provision of Article 1 paragraph (2) of the 1945 Constitution, the sovereignty of the people shall be exercised in accordance with 1945 Constitution.

[3.18] Considering whereas related to independent candidates in the general election of President and Vice President, in the Decision Number 007/PUU-II/2004 dated July 23, 2004, Decision Number 054/PUU-II/2004 dated October 6, 2004, and Decision Number 057/PUU-II/2004 dated October 6, 2004, in its legal consideration (basically) the Court has declared that to become President and Vice President is the right of every citizen guaranteed by the Constitution in accordance with the provision of Article 27 paragraph (1) and Article 28D paragraph (3) of the 1945 Constitution insofar as he/she meets the requirements as regulated in Article 6 and Article 6A of the 1945 Constitution. Whereas, in implementing such matter, Article 6A paragraph (2) of the 1945 Constitution determines the procedure namely that it must be nominated by a political party or coalition of political parties. The granting of the constitutional right to nominate the Candidate Pair of President and Vice President to political parties by the 1945 Constitution does not mean the impairment of constitutional rights of the citizens, *in casu* the Petitioners to become the Candidate of President or Vice President because it is guaranteed by the 1945 Constitution, as stated by Article 27 paragraph (1) and Article 28D paragraph (3) of the 1945 Constitution if the citizens concerned have met the requirements specified by Article 6 and the nomination has been conducted in accordance with the procedure as intended by Article 6A paragraph (2) of the 1945 Constitution, the

requirements which constitute the procedure and mechanism binding every person who desires to be the Candidate of the President of the Republic of Indonesia.

4. CONCLUSION

Based on the foregoing considerations on facts and laws, the Court concludes as follows:

[4.1] Article 1 sub-article 4, Article 8, Article 9 to the extent they are concerned with the phrase “a political party or coalition of political parties”, and Article 13 paragraph (1) of Law Number 42 Year 2008 regarding President and Vice President General Election (State Gazette of the Republic of Indonesia Year 2008 Number 176, Supplement to the State Gazette of the Republic of Indonesia Number 4924) are not contradictory to the 1945 Constitution of the State of the Republic of Indonesia in their entirety;

[4.2] The arguments of the Petitioners’ petition are groundless.

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 the State Gazette of the Republic of Indonesia Number 4316);

Passing the decision,

To declare that the Petitioners' petition is rejected in it's entirely.

Hence the decision was made at the Consultative Meeting of Constitutional Court Justices attended by eight Constitutional Court Justices on Friday, the thirteenth of February two thousand and nine, and was pronounced in the Plenary Session of Constitutional Court open for public on this day, Tuesday, the seventeenth 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, assisted by Cholidin Nasir as the Substitute Registrar, and in the presence of the Petitioners/Petitioners' Attorneys, the Government or its representative, and People's Legislative Assembly or its representative.

CHIEF JUSTICE,

sgd.

Moh. Mahfud MD.

JUSTICES,

Sgd.	**Sgd.**
Maruarar Siahaan	**Maria Farida Indrati**
Sgd.	**Sgd.**
Achmad Sodiki	**Abdul Mukthie Fadjar**
Sgd.	**Sgd.**
M. Akil Mochtar	**M. Arsyad Sanusi**

Sgd.

Muhammad Alim

In regard to the Court's Decision above, three Constitutional Court's Justices have dissenting opinions, namely Abdul Mukthie Fadjar, Maruarar Siahaan and M. Akil Mochtar as follows:

6. DISSENTING OPINIONS

[6.1] Constitutional Court Justice Abdul Mukthie Fadjar

1. The main issue in the *a quo* case is whether Article 1 sub-article 4, Article 8, Article 9, and Article 13 paragraph (1) of Law 42/2008 which disallow the nomination of independent candidates of President and Vice President in addition to those nominated by political parties or coalition of political parties are contradictory to the 1945 Constitution;

2. Article 27 paragraph (1) and Article 28D paragraph (3) of the 1945 Constitution has explicitly specified the principle that every citizen shall

have equal position, right, and opportunity in the government, which means that there shall not be any provision preventing access for any person who meets the requirements specified by law to occupy public positions, *in casu* the positions of President and Vice President. If there is such provision, it means discriminating citizens or a person [Article 28I paragraph (2) of the 1945 Constitution] and violating the principle of equal position in law and government.

3. Meanwhile, to occupy the positions of President and Vice President, Article 6 paragraph (1) of the 1945 Constitution has specified the main requirements, namely:

a. the person must be an Indonesian citizen since birth;
b. the person has never accepted other citizenship at his/her own will;
c. the person has never betrayed the state; and
d. the person must be mentally and physically capable to conduct the duties and obligations as the President or Vice President.

Furthermore, the requirements to become President and Vice President by the order of Article 6 paragraph (2) shall be regulated by law*, in casu* Law 42/2008 Article 5. Accordingly, Article 6 paragraph (1) and paragraph (2) of the 1945 Constitution *juncto* Article 5 of Law 42/2008 regulate the requirements for the candidates of President and Vice President in which there is not any provision requiring the nomination only by political parties. Therefore, any Indonesian citizen who meets the provision of Article 6

paragraph (1) of the 1945 Constitution *juncto* Article 5 of Law 42/2008 must obtain equal access to become the candidates of President and Vice President.

4. Article 6A of the 1945 Constitution is not a provision regulating the requirements, but regulating the nomination method or procedure which should not deny any person who meets the requirements to become the candidate of President and Vice President, whether the person nominates himself/herself or is nominated/proposed by a political party or coalition of political parties. It is similar to a person who wants to study in a university, the important issue is that he/she meets the requirements, not that he/she pays for the study himself/herself or by his/her parents or by any other person. Therefore, the procedure should not precede the requirements. Political Parties or coalition of Political Parties are only ”vehicle” or ”point of departure” (embarkation) for the candidates the use of which are not absolutely a must.

5. Moreover, if there are disputes over the results of General Election of President and Vice President (PHPU), the “*subjectum litis”* is not the political party or the coalition of political parties which support him/her, but the related Candidate Pair of President and Vice President, so that it is individual in nature, not collective of the parties supporting him/her. Consider the provision of Article 74 paragraph (1) sub-paragraph b of the Constitutional Court Law, that the petitioners in the disputes over the results

of General Election of President and Vice President are the candidate pairs, not the supporting party/parties. Likewise, Article 201 of Law 42/2008 states, "*With regard to the stipulation of the results of General Election of President and Vice President, an objection may be submitted* ***only by the Candidate Pair*** *to the Constitutional Court ..."*

6. Accordingly, independent candidates should be allowed for nomination as President and Vice President, in addition to the candidates nominated by political parties or coalition of political parties. Such aspiration has once been proposed by the Constitutional Commission established by the People's Consultative Assembly (MPR) in its recommendation regarding the Amendment to the 1945 Constitution as follows.: "*Constitutional Commission also shall propose substantial revision to Article 6A paragraph (2) by adding independent candidates for President candidates, so that it is not limited by the aspiration of political parties (including coalition of political parties) but also the candidates beyond political parties. By formulating this article it is hoped that the struggle for participatory democracy may be more realized in the life of Indonesian state administration"* (*vide Buku I Naskah Akademik Kajian Komprehensif Komisi Konstitusi tentang Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945* / *Book One Academic Manuscript of Comprehensive Analysis of Constitutional Commission regarding the Amendment to the 1945 Constitution of the State of the Republic of Indonesia, page 126*). In fact, Article 6A paragraph (2) of the 1945 Constitution has seemingly denied the independent candidate

which is further derived in Law 42/2008, however the living aspiration should be accommodated, either with or without the amendment to the 1945 Constitution, particularly Article 6A paragraph (2) of the 1945 Constitution.

7. Even though the independent candidate needs to be allowed in the General Election of President and Vice President, to be realistic, it is impossible for the upcoming 2009 General Election which is in very near. Perhaps it may be realized in the 2014 or 2019 General Election, so that in my opinion the Articles of Law 42/2008 petitioned for review shall be *"conditionally constitutional"* or "*conditionally unconstitutional"* in nature, namely that they are "constitutional if the articles allow independent candidate" or "unconstitutional if the articles disallow independent candidate".

[6.2] Constitutional Court Justice Maruarar Siahaan

I

The review of Article 1 sub-article 4, Article 8, Article 9 and Article 13 paragraph (1) of Law 42/2008, naturally regarding the constitutionality of the *a quo* norms which do not allow the nomination of independent candidates without following the mechanism of political parties. The constitutional review is conducted by referring to Article 6A paragraph (2), Article 27 paragraph (1), Article 28D paragraph (1), Article 28D paragraph (3), and Article 28**I** paragraph

(2) of the 1945 Constitution. Prior to evaluating or reviewing the articles petitioned by the Petitioners, we need to express again our position regarding the interpretation of the Constitution and the partial amendment to the 1945 Constitution in a different period of time with different context, also which has impact on understanding the 1945 Constitution individually which may not be in accordance with other articles of the 1945 Constitution, as well as the spirit and soul of the constitution in its entirety. The Constitutional Court as the guardian and interpreter of the Constitution conducting its duties in such a situation, shall conduct comprehensive harmonization through appropriate interpretation so that the 1945 Constitution with its four-time amendments shall meet the principle of ***the unity of constitution****,* so that the 1945 Constitution shall constitute thoughts or single and coherent conception and document, and the amendment to articles in different times shall not set aside the constitutional norms establishing the constitutional rights and shall also protect the fundamental rights and the freedom of citizens, which in fact shall become the constitutional duties of the State and Government to protect, guarantee, and to fulfill (*obligation to protect, to promote, to guarantee and to fulfill)* as clearly specified in Article 28**I** paragraph (4) of the 1945 Constitution;

II

Article 6A paragraph (2) is adopted as the part of the 1945 Constitution in the third amendment to the 1945 Constitution in 2001, which according to the Government, as included in the conclusion, is to regulate the

political rights of parties to nominate the Candidate Pairs of President and Vice President, and not to regulate the right of independent candidates. Meanwhile, the idea of independent nomination or independent candidates, according to the Government, in its written statement submitted to the Court is the idea of individualism, while Indonesia adheres to the idea of collectivism. On the other hand, the constitutionalization of human rights in a comprehensive manner which was first regulated in Law Number 39 Year 1999, which was subsequently included in Chapter XA of the 1945 Constitution, has been conducted through the second amendment in 2000, addressing “personal rights and freedom”;

The difference in the amendment periods of the 1945 Constitution in the two topics, will surely have its own impact on its understanding, in order to be compatible and harmonious one to another as well as with the entire 1945 Constitution as an integral unity (the unity of the Constitution). As we have presented previously in another case, there is not any single article of the 1945 Constitution which may be driven out in individual manner from the 1945 Constitution as a whole, or define it independently, being separated from other articles or from the soul, spirit, *rechtsidee* and *staatsidee* contained in the 1945 Constitution as a whole. Such paradigm of the unity of constitution has further guided the Court to define the meaning of the articles of the 1945 Constitution;

III

Prior to giving the opinion regarding the main issue in the *a quo* case, it is necessary to ascertain whether the system of our state actually

adheres to collectivism as presented by the Government in its statement, and whether it is correct that the individual rights in the 1945 Constitution are not acknowledged or protected. In the debate of BPUPKI (Indonesian Independence Preparations Investigative Assembly) when discussing the Preamble to the Constitution for Independent Indonesia, the refusal of the concept of individualism, which was further stated in the speech of Soepomo that the founding fathers of the Republic refused the individualist concept and accepted as well as encouraged the concept of idea of family relationship, namely that our state is based on the family relationship system, which was specifically said to be an integralistic state. In further debates it was also said that there was an opinion intending to include the human rights in the Constitution to be formulated, and stated that it was necessary for such human rights to be protected, so that there would be no fear for the citizens for instance to express their opinions. From the debate and the formulation which were accepted later, even though the state established did not adopt the idea of individualism, however the state did not set aside the individual rights in the so called integralistic or family relationship-based, but in fact the individual rights were guaranteed, even though such rights were not included completely in the formulated Constitution. Soepomo gave an illustration that: *"In the family relationship system the attitude of the citizens is not an attitude of consistently questioning what my rights are, but an attitude of questioning what my obligations are as a member of the big family, namely the state of Indonesia. What is my position as a member of consanguinity... This is the opinion which must be consistently realized by all of us* (*Minutes of Meeting*

of BPUPKI and PPKI, as quoted in the Comprehensive Script of the Amendment to the 1945 Constitution of the State of the Republic of Indonesia, Book VII, Secretariat General and Constitutional Court Registrar's Office, 2008, page 23). A strong refusal of Hatta requesting to include the regulation of the freedom of citizens in the broadest manner in the Constitution, and he refused all reasons presented not to include it because it was related to the people. He said explicitly: *"If this matter is not clear in the basic law, the fault of the ground norm (grondwet); grondwettelijk fout, it will be a great sin to the people who are expecting such right from the republic* (*Minutes of Meeting of BPUPKI and PPKI, as quoted in the Comprehensive Script of the Amendment to the 1945 Constitution of the State of the Republic of Indonesia, Book VIII, Secretariat General and Constitutional Court Registrar's Office, 2008, page 24*);

In the second amendment to the 1945 Constitution 2000, when Chapter XA was accepted, the opinion regarding the need to regulate into details the Human Rights to a great extent took into account the opinion that the Human Rights constituted the substance of modern Constitution, and it was said that in the idea of constitutionalism, the constitution was to limit the authority of the government in the context of granting a guarantee for its citizens' rights. Therefore, even though the idea of integralistic state has been presented and practiced in the state administration system in the past, then such idea of an integralistic state has never been intended as the idea of collective-integralistic which sets aside the individual rights and freedom. The subsequent empirical experience of Indonesia which in fact deems that the integralistic idea not to be in

accordance with the ideals of the independence, has been asserted in the amendment to the Constitution adopting comprehensively the system of human rights, which is also pursuant to the universally applicable system of human rights. Therefore, the arguments stating that the State of the Republic of Indonesia adheres to the idea of collectivism and accordingly refuses the human rights system because it constitutes the idea of individualism is not relevant, because the human rights protected by the constitution constitutes a form of limitation to the authority of state and Government, so that the collectivism of the Indonesian people having rights and freedom, is not seen from its difference but considered complementary one to another. Furthermore, after the amendment to the 1945 Constitution and the ratification of human rights instruments produced by the United Nations Organization (UNO), the human rights in the legal system and the constitutions of modern states, constitute a universally applicable principle, over which the individual recognition in the life of the people and nation is not disputed, but considered complementary one to another. Therefore, any argument which attempts to set aside the principles of human rights as fundamental rights which constitute the relevant part the 1945 Constitution, whose articles need to be understood and grasped holistically, and not individually separated from each other, cannot be justified. Article 6A paragraph (2) reads: *"A Candidate Pair of President and Vice President shall be nominated by a political party or coalition of political parties participating in the general election prior to the implementation of the general election".* In fact, it is interpreted separately, and the text of such article does not allow for any other

meaning, because in fact from its norm which is actually very concrete, such text does not constitute the substance of the Constitution, which actually contains general abstract formulation in a language of principles. The substance of the Constitution should appropriately be related to three categories, namely, *first,* protection of human rights, *second*, basic structure of state administration, and *third,* division and limitation of basic duties of state administration (Sri Sumantri, in *Naskah Komprehensif Perubahan UUD1945*/ *Comprehensive Script of the Amendment to the 1945 Constitution, Secretariat General and Constitutional Court Registrar's Office, 2008, Book VIII page 130*). The substance regulated in Article 6A paragraph (1) of the 1945 Constitution along with paragraph (2) and furthermore in the provision of Law 42/2008 as found in Article 8, is actually similar, even though with small variation, so that it reads: *"The Candidates of President and Vice President shall be nominated in 1 (one) pair by a Political Party or Coalition of Political Parties".* Therefore, at a glance based on the textual individual interpretation of Article 6A paragraph (1) of the 1945 Constitution, it is easy to say that there is no conflict between Article 8 of Law 42/2008 and other related articles regarding the phrase *"nominated by a Political Party or Coalition of Political Parties"* by saying that Article 8 and other related articles only copy the phrase of the Article 6A paragraph (2). However, such interpretation has obviously denied the doctrine *"the unity of constitution",* which has to read the Article 6A paragraph (2) in relation to the whole principle part of the 1945 Constitution to be able to find the real meaning of the *a quo* article. If otherwise, then such interpretation will bring about basic digression, which is as if the

gradual and partial amendments to the Constitution were separated from one another, and did not become a problem, bringing about the consequence to the unity of the 1945 Constitution as a *staatsidee* and *rechtsidee* and were only seen merely as a pragmatic textual interpretation independent and separated from other articles and not included in one system. Moreover the participants in the General Election of President and Vice President are not Political Parties, but independent Candidate Pairs as DPD (Regional Representative Council) election, and Political Parties are the participants in the General Election of People's Legislative Assembly (DPR) and Regional People's Legislative Assembly (DPRD) [Article 22 paragraph (3) and paragraph (4)];

IV

Article 6A paragraph (2) reads, *"A Candidate Pair of President and Vice President shall be nominated by a political party or coalition of political parties participating in the general election prior to the implementation of the general election",* which is adopted as from the third amendment of the 1945 Constitution in 2001, must be read in one system with Article 1 paragraph (2) which reads, *"Sovereignty shall be in the hands of people and shall be exercised according to the Constitution",* and the articles in Chapter XA regarding fundamental rights adopted in the second amendment in 2000, which can become the guarantee for the sovereignty possessed by the people through the fundamental rights which mention among other things the right to elect and to be elected in the context of participating in the government to improve

himself/herself in striving for his/her rights collectively for building his/her society, nation and state in an equal or non-discriminatory treatment. A democratic constitutional state shall guarantee the equal opportunity for **every individual** citizen to participate in determining the direction of government policies for the realization of the outlined purpose of the state, through the right to elect and to be elected for public offices such as President/Vice President;

Separately from the wording of Article 6A literally, the meaning of granting the constitutional right to Political Parties to nominate the Candidates of President and Vice President in General Election, from the system of unity of the Constitution where individual rights are guaranteed and protected by the same Constitution, then the constitutional rights of Political Parties mentioned by the Government which are included in Article 6A paragraph (2) are not intended to deny the fundamental rights mentioned in Chapter XA mentioned to be possessed by and guaranteed for every person to participate in the government, and to be equally treated, either those who join a political party and nominated by the political party, or those who do not join any political party [Article 28D paragraph (3) and Article 28**I** paragraph (2) of the 1945 Constitution]. If it is correct that Article 6A paragraph (2) of the 1945 Constitution constitutes the constitutional right of the political parties, then such right constitutes the derivation of fundamental rights of citizens to participate in the government, organized through political parties, which constitutes the realization of the right of association and assembly and expression of opinions as well as to improve oneself in striving for his/her rights collectively for building his/her society, nation

and state [Article 28, 28C paragraph (2), Article 28D paragraph (3) and Article 28**I** paragraph (2)]. The interpretation of Article 6A paragraph (2) of the 1945 Constitution which sets aside the articles of the Constitution mentioned above, shall surely reflect the illogically ambiguous way of thinking in the idea of constitutionalism in the life of the state;

The decision of the Court Number 5/PUU-V/2007, which allows independent candidates in the regional head election (*Pemilukada*), constitutes a highly relevant reference for the interpretation of Article 6A paragraph (2), even though it is denied by the Government and DPR to be different, for the reason that the chapter of *Pemilukada* is in the regime of Regional Government, while the President/Vice President Election is in the regime of General Election. We do not share the same opinion with such argument, because from the category of the head of state executive, both are in the similar category. Moreover Article 22E of the 1945 Constitution is the result of the third amendment in June, while Article 18 paragraph (4) is the result of the second amendment in 2000 which was still influenced by Law Number 22 Year 1999 regarding Regional Government which came into effect in 2001. There is no basic reason to distinguish the electability of the President as the head of national executive with the regional head as the head of local executive. Therefore, the development of thinking and constitutional awareness absorbed from such decision constitute highly relevant variables as the reference for interpreting Article 6A paragraph (2) of the 1945 Constitution. The Court writes down its opinion as follows:

"Whereas the progress of the regulations on Pilkada as practiced in Aceh has created a new reality in the dynamics of state administration which has brought about a new reality in the dynamics of state administration which has resulted in an impact on the constitutional awareness at the national scale, namely the opening of the opportunity for independent candidates in pilkada...".

*"...whereas political parties constitute **one of the forms** of important social participation in developing the life of democracy..., so that it is reasonable to allow participation with different mechanism beyond the political parties for independent candidates in the election of regional head and deputy regional head";*

We are consistently of the opinion that the progress of opinion and awareness growing in the community regarding the nomination of President and Vice President, as described by the survey conducted by the Petitioners' expert which becomes the part of evidence in this matter, has increasingly asserted the possibility of independent candidates being not only by way of political parties shall be deemed to be a living opinion and shall become the aspiration of the people, where the majority of people regard that every citizen has a right to nominate himself/herself as President, and the nomination only through political parties is deemed to decrease and limit the political rights of the citizens. Such a new progress of awareness which in fact grows in the society and among the citizens as the holders of sovereignty, may not be set aside by the interpreter of the Constitution as the real context, on and from which the 1945 Constitution is based and derived. Therefore, the interpretation of Article 6A paragraph (2) from

the whole system of the 1945 Constitution in different stages of amendment, and the constitutional awareness and the growing aspirations in the society, which contribute in determining the meaning of such article contextually in the Indonesian society which is in the transitional process toward democratic consolidation under the 1945 Constitution, shall allow the nomination of Candidate Pairs of President and Vice President beyond a political party or Coalition of Political Parties, being one of the forms of social participation in developing the life of democracy, and the other form of social participation in democracy beyond political parties, namely by allowing independent candidates. The meaning of “independent“ shall include the groups of people which have similar interest, so that it is not always defined as “individual” by setting aside the organization of interest beyond political parties.

V

Based on the interpretation of Article 6A paragraph (2) as the constitutional norm which becomes the source of legitimacy for the arrangement of Article 8 and other articles related to the nomination of the Candidate Pair of President and Vice President which not only by Political Parties or Coalition of Political Parties as described above, accordingly Article 1 sub-article 4, Article 8, Article 9 and Article 13 paragraph (1) of Law Number 42 Year 2008 regarding President and Vice President Election, should be declared by the Court to be contradictory to the 1945 Constitution, if it is interpreted not to provide the way for independent nomination beyond the nomination by political parties or coalition of

political parties (***conditionally unconstitutional)*.** The setting aside of fundamental rights of the citizens to participate in the government by becoming the independent candidates of President and Vice President with the limit which becomes the substance of Article 8 and the related articles in Law 42/2008, cannot be approved because it does not meet the principle of proportionality, which requires the balance of purpose and the quality of fundamental rights protected and guaranteed by the 1945 Constitution;

However, similar to allowing for nomination of independent candidates for regional head and deputy regional head in the Decision Number 05/PUU-V/2007, then if the Decision of the Court in the *a quo* case had granted the Petitioners' petition, such decision would have required implementation in the form of revision to Law 42/2008, so that proper arrangement could be conducted for the procedures on the nomination of independent candidates which are balanced and equal to the requirements for the candidates nominated by Political Parties or Coalition of Political Parties, so that rational justice will be achieved. Based on such reason, if this dissenting opinion had become the Court's decision, then it would not be is rational to implement it in the 2009 General Election, but the Court should provide the time for adjustment until the following general election in 2014.

[6.3] Constitutional Court Justice M. Akil Mochtar

Whereas the Articles reviewed are Article 1 sub-article 4, Article 8, Article 9, and Article 13 paragraph (1) of Law 42/2008 against Article 6A

paragraph (2), Article 27 paragraph (1) Article 28D paragraph (3), and Article 28I paragraph (2) of the 1945 Constitution which according to the Petitioners do not provide any opportunity to citizens to become independent candidates of President and Vice President;

Whereas the amendment to the articles of the 1945 Constitution shall be conducted in a different time frame, and also in different context of matters, so that such amendment has resulted in a different understanding of the articles of the 1945 Constitution from one article to another, for instance Presidential election is set forth in Article 6A of the 1945 Constitution, and Governor and Regent/Mayor elections are set forth in Article 18 paragraph (4) of the 1945 Constitution, while the two articles specify the ways and procedures for the recruitment of public positions even though they are in different levels, however both conduct electability process where in the previous regional heads election it was only conducted by the nomination of political parties then it was also made possible for independent candidates. In such position, in my opinion, the role of the Constitutional Court as the interpreter of the Constitution in fact becomes important in order that the constitution spirit, soul and morality shall be consistently maintained in managing the construction of the constitution which does not merely perceive the Constitution from its textual meaning but also in its contemporary context;

In the 1945 Constitution prior to amendment, the authority to elect President and Vice President was fully entrusted to the People’s Consultative

Assembly (MPR) [Article 6 paragraph (2)]. Such President and Vice President election had been practiced for 5 times in the Indonesian state administration system, so that in my opinion, the President and Vice President election conducted through MPR, the Candidates of President and Vice President were actually “independent” candidates. Following the third amendment to the 1945 Constitution (Article 6A) the President and Vice President election has been directly conducted, in which in the mechanism of the nomination of the Candidate Pair grants a monopoly of right to political parties and coalition of political parties. The formulation of the 1945 Constitution amended by the Ad Hoc Committee I (PAH I) of MPR regarding independent candidates has become an intense debate with the candidates from Political Parties or coalition of Political Parties, namely *“During the discussion of the provision of this Presidential Election, MPR encountered choices; for the way of election there were ideas of direct election and election by MPR. For candidacy there were ideas of candidacy by Political Parties/coalition of Political Parties and independent candidacy”* (Jakob Tobing, *PANCASILA DAN UUD 1945, REPLEKSI ATAS PENYELANGGARAAN SISTEM PEMERINTAHAN MENURUT UUD 1945 SETELAH PERUBAHAN*/PANCASILA AND THE 1945 CONSTITUTION, REFLECTION OF GOVERNANCE ORGANIZATION SYSTEM ACCORDING TO THE 1945 CONSTITUTION AFTER THE AMENDMENT);

Referring to the foregoing descriptions, then in my opinion *“The Constitution must be interpreted in a broad way because the constitution is intended to be applied to unpredictable or unexpected conditions and situations*

at the time when the constitution is formulated and because the meaning of the constitution is consistent from time to time. (Sir Antony Mason, *Interpreting constitution*: *Theories principles and constitution*);

Article 6A paragraph (2) of the 1945 Constitution stating, *"A Candidate Pair of President and Vice President shall be nominated by a political party or coalition of political parties participating in the venereal election prior to the implementation of the general election".* If the text of the article is interpreted to have been explicit, categorical and imperative which excludes any possibility for other meaning, such a text if viewed from its norm constitutes the substance of a Law. Whereas, in formulating the substance of the Constitution there are several matters which need to be paid attention to, namely: *"Just include the essential principles, because in that way the formulation of permanent and unchangeable provisions which will be hard to accommodate themselves to the progress of time and course of events in the community can be avoided; and use simple and accurate language".* (Kammen, Michael A. Vehicle of life, Sep. 1987); Likewise, Article 6A of the 1945 Constitution regulates the way and procedure to become President and Vice President in which a citizen may not be discriminated to be the Candidate of President and Vice President, because such principle has impaired the right of every citizen who has equal position, right, and opportunity in the government as specified in Article 27 paragraph (1), Article 28D paragraph (3), and Article 28**I** paragraph (2) of the 1945 Constitution. Accordingly, every citizen who meets Article 6 paragraph (1) of the 1945 Constitution must have

equal opportunity to become President and Vice President, either through political parties or as independent candidates;

Based on the foregoing matters, I am of the opinion that Article 1 sub-article 4, Article 8, Article 9, and Article 13 paragraph (1) of Law Number 42 Year 2008 regarding the General Election of President and Vice President petitioned for judicial review is *conditionally constitutional* namely by taking into account the national agenda of the 2009 Presidential Election which has been very near at hand. Therefore, nomination of for independent Presidential Candidates must be accommodated in Law 42/2008 and shall be conducted in the 2014 Presidential Election.

SUBSTITUTE REGISTRAR,

Sgd.

Cholidin Nasir