



DECISION

Number 80/PUU-IX/2011

FOR THE SAKE OF JUSTICE UNDER THE ONE ALMIGHTY GOD

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA

[1.1] Hearing constitutional cases at the first and final level, has passed a decision in the case of petition for Judicial Review of Law Number 15 Year 2011 concerning General Election Organizer under the 1945 Constitution of the State of the Republic of Indonesia, filed by:

[1.2] Name : **TUGIMAN**
Occupation : Civil Servant/Member of the General Election Commission of Bogor
Address : Pasir Tengah Village, Sukaharja Hamlet, Cijeruk District, Bogor Regency
Hereinafter referred to as ----- **the Petitioner;**

[1.3] Having read the petition of the Petitioner;
Having heard the statements of the Petitioner;
Having examined the evidence of the Petitioner;
Having heard the statements of the Witness of the Petitioner;
Having heard the statements of the Government;

Having read the conclusion of the Petitioner;

2. FACTS OF THE CASE

[2.1] Whereas Petitioner filed a petition dated November 1, 2011, which was received and registered at the Registrar's Office of the Constitutional Court (hereinafter referred to as the Registrar's Office of the Court) on November 7, 2011 with the Deed of Petition File Receipt Number 406/PAN.MK/2011 and was registered on November 17, 2011 under Case registration Number 80/PUU-IX/2011, which was revised and received at the Registrar's Office of the Court on December 9, 2011, principally describing the following:

I. AUTHORITY OF THE CONSTITUTIONAL COURT TO EXAMINE, HEAR, AND DECIDE UPON THIS PETITION

1.1 Whereas the Petitioner requested the Constitutional Court to conduct Judicial Review of Article 27 paragraph (1) subparagraph b and paragraph (3) of Law Number 15 Year 2011 concerning General Election Organizer [(State Gazette Year 2011 Number 101, Supplement to the State Gazette Number 5246), hereinafter referred to as Law 15/2011] under Article 28C paragraph (2), Article 28D paragraph (2), Article 28D paragraph (3), and Article 28E paragraph (1) of the 1945 Constitution. These articles are related to the resignation of the members of the General Election

Commission, Provincial General Election Commission, and regency/municipal General Election Commission before the end of the term of service.

Full text of Article 27 paragraph (1) is as follows:

"Members of the General Election Commission (KPU), Provincial General Election Commission, and regency/municipal General Election Commission shall quit before the end of the service term because of: b. Resigning for acceptable an reason "

In the elucidation of this article, "to resign" refers to shall be resignation for health reasons and/or physical and/or mental disorders to fulfill their obligations as members of the General Election Commission, Provincial General Election Commission, and regency/municipal General Election Commission.

Meanwhile, Article 27 paragraph (3) reads:

"Members of the General Election Commission, Provincial General Election Commission, and regency/municipal General Election Commission who resign for unacceptable reasons and who are dishonorably dismissed shall return the honorarium as much as 2 (two) times the received amount"

Therefore, in accordance with the authorities possessed by the Constitutional Court pursuant to Article 24C paragraph (1) of the 1945 Constitution, the petition is under the judicial review category;

1.2 Whereas the provision of Article 24C paragraph (1) of the 1945 Constitution states that the Constitutional Court has authority to hear at the first and final levels whose decision shall be final in conducting judicial review of Laws under the 1945 Constitution. Article 10 paragraph (1) sub-paragraph a of Law Number 24 Year 2003 concerning the Constitutional Court, as amended by Law Number 8 Year 2011 concerning Amendment to Law Number 24 Year 2003 concerning the Constitutional Court confirms the same, namely by stating that the Constitutional Court has authority to hear at the first and final levels whose decision shall be final, among other things, to conduct judicial review of Laws under the 1945 Constitution;

1.3 Whereas the provision of Article 9 paragraph (1) of Law Number 12 Year 2011 concerning Formulation of Laws and Regulations states, *"In the event that a Law is assumed to be inconsistent with the 1945 Constitution, the law shall be reviewed by the Constitutional Court"*;

1.4 Based on the explanations in points 1 up to 3 above, the Petitioner concludes that the Constitutional Court has authority to hear the petition for judicial review of this Law at the first and final levels whose decision shall be final.

II. LEGAL STANDING OF THE PETITIONER

2.1 Whereas Article 51 paragraph (1) of Law Number 24 Year 2003 concerning the Constitutional Court states that Petitioner in a judicial review of Law shall be "those who deem that their constitutional rights and/or authorities have been impaired by the coming into effect of Law shall be:

- a. individual Indonesian citizens;
- b. customary law community units insofar as they are still in existence and in line with the development of the communities and the principle of the Unitary State of the Republic of Indonesia as regulated in law;
- c. public or private legal entities; or
- d. state institutions.

Furthermore, the Elucidation of Article 51 Paragraph (1) of the Law *a quo*, states that "constitutional rights refer to the rights regulated in the 1945 Constitution";

2.2 Whereas the Constitutional Court, as set forth in Decision Number 006/PUU-III/2005 *juncto* Decision Number 11/PUU-

V/2007 and subsequent decisions, has provided the definition and cumulative limitations concerning what "constitutional impairment" means by the coming into effect of a norm of a Law, namely:

- a. existence of constitutional rights and/or authority of the Petitioners granted by the 1945 Constitution;
- b. the Petitioners believe that such constitutional rights and/or authority have been impaired by the coming into effect of the law petitioned for review;
- c. the impairment of such constitutional rights and/or authority must be specific and actual or at least potential in nature which, pursuant to logical reasoning, can be assured of occurring;
- d. there is a causal relationship (*causal verband*) between the impairment of constitutional rights and/or authority of the Petitioners and the law petitioned for review;
- e. it is likely that with the granting of the Petitioners' petition, the impairment of such constitutional rights and/or authority argued by the Petitioners will not or will no longer occur;

2.3 Whereas based on the provisions above, there are two conditions that must be met to be able to act as a party in filing a petition for judicial review of Law, namely that the

party shall have the qualification as Petitioner or legal standing in a case of judicial review of Law. Second, the impairment of the constitutional right of the Petitioner occurs by coming into effect of a Law;

2.4 Whereas the petitioner is an individual citizen of Indonesia based on the Decision of the General Election Commission of West Java Number 165/SK/KPUOJB/2008, dated September 28, 2008 who has been appointed as a Member of General Election Commission of Bogor Regency. The Court has given legal standing to a member of a state institution as an individual to file a petition for judicial review of the Law related to his rights as set out in the Constitutional Court Decisions Number 11/PUU-VIII/2010 and Number 26/PUU-VII/2010;

2.5 Whereas the petitioner has constitutional rights granted by the 1945 Constitution, in the form of the rights to improve himself, rights to participate actively in government in a professional manner and to get fair and proper treatment in situations that are mutually beneficial as well as to choose a job that he wants specifically mentioned in Article 28C Paragraph (2), "Every person shall have the right to improve him/herself through collective struggle for his/her rights to develop his/her society, nation and state", Article 28D

paragraph (2) which reads, "*Every person shall have the right to work and to receive fair and proper remuneration and treatment in employment*" and Article 28D Paragraph (3) which reads, "Every citizen shall have the right to obtain equal opportunities in government" as well as Article 28E Paragraph (1), "Every person shall be free to choose and to practice the religion of his/her choice, to choose one's education, to choose one's employment, to choose one's citizenship, and to choose one's place of residence within the state territory, to leave it and to subsequently return to it".

- 2.6 Whereas the coming into effect of Article 27 paragraph (1) sub-paragraph b has greatly impaired the constitutional rights of the Petitioner because the prohibition of resignation, namely that it can be only accepted with the limitation of "health reasons and/or physical and/or mental disorders", while as an Indonesian citizen, the petitioner has the right to improve himself in developing the nation and state in various positions as a Commissioner of the General Election Commission, a member of the People's Legislative Assembly, a member of the Regional People's Legislative Assembly, a Justice of Criminal Act of Corruption, a lecturer, or any position that contributes to the development of the nation and state. The right is automatically muzzled when

the Petitioner in his capacity as a member of the General Election Commission of Bogor Regency may not resign in the middle of his term of service;

- 2.7 Whereas the application of Article 27 paragraph (1) subparagraph b potentially results in the impairment to the Petitioner, namely by denying the Petitioner of the opportunity to take part in a higher position such as a member of the General Election Commission. As an illustration, had the Petitioner intended to become a commissioner of the Central General Election Commission, then based on Article 129 paragraph (4) of Law 15/2011, the formation of the committee for the selection of the members of the General Election Commission shall be held 2 (two) months following the enactment of Law 15/2011, and thus, the selection Team will be formed on December 16, 2011. With the assumption that the Petitioner reaches the final stage of selection, namely up to the inauguration as a member of the General Election Commission estimated to be held in March or April 2012, of course the Petitioner must resign from his position as a Member of the General Election Commission of Bogor Regency before the end of the Petitioner's term of service which, based on the Decision of the General Election Commission of West Java Province, will end in December 2013, which is the mechanism that

must be followed by the Petitioner. The whole text of Article 27 paragraph (1) of the Law *a quo* reads,

“Members of the General Election Commission, Provincial General Election Commission, and regency/municipal General Election Commission shall quit before the end of his service term because of:

- a. demise;
- b. resignation for acceptable reasons;
- c. other permanent impediments; or
- d. being dishonorably dismissed.

Based on the formulation of the article above, the only article that is very likely to be used by the Petitioner is to resign for the reason specified by Article 27 paragraph (1) sub-paragraph b of the Law *a quo* that reads, "Resignation for acceptable reasons". However, according to the legislator, the permitted resignation means "resignation for health reasons and/or physical and/or mental disorders to fulfill their obligation as members of the General Election Commission, Provincial General Election Commission, and regency/municipal General Election Commission". It means that for the resignation of the petitioner to be acceptable, the petitioner must be sick with physical and/or mental disorders in order to participate in the selection of the members of the General Election Commission, whereas one of the

requirements to become a member of the General Election Commission in accordance with Article 11 sub-article h of Law 15/2011 is physical and mental health;

- 2.8 Whereas Article 27 paragraph (3) states that, "Members of the General Election Commission, Provincial General Election Commission, and regency/municipal General Election Commission who resign for an unacceptable reason and who are dishonorably dismissed shall return the honorarium as much as 2 (two) times the amount", the Petitioner believes that this paragraph has been intentionally designed to obstruct the rights of the Petitioner to take part in government and to eliminate the right of the Petitioner to get a better job than his recent job. It means that at the time the Petitioner chooses to resign from the General Election Commission, the Petitioner must return the special allowance (named Expenditure Budget Item (MAK) in the Budget Implementation Entry List (DIPA) of the General Election Commission) during his membership with the General Election Commission of Bogor Regency being calculated at the nominal amount of Rp360,000,000. - which comes from $2 \times 60 \times \text{Rp}3,000,000$. -. According to the feelings and the economic capacity of the Petitioner, the amount is extremely large and unreasonable;

2.9 Whereas with the granting of the petition for judicial review of this Law, the Petitioner expects the constitutional rights of the Petitioner and also other commissioners of the General Election Commission/Provincial General Election Commission and regency/municipal General Election Commission to obtain equal right to resign for "other reasons" besides physical and/or mental health reasons can be satisfied. Whereas evidently in the future, the Petitioner's wish to be a member of a party or a state official or a regional official or to take another position, is entirely the personal affair of the Petitioner that may not be interfered by anybody, including the legislator because it has been clearly regulated that such right is protected by the 1945 Constitution;

2.10 Whereas based on the arguments as described in points 2.1 up to 2.9 above, the Petitioner has legal standing to file this petition for several reasons, namely:

- a. As an individual Indonesian citizen, the petitioner has constitutional rights whose norms have been regulated in and granted by the 1945 Constitution, namely the right to improve himself, the right to participate actively in government in a professional manner and to get fair and proper treatment in situations that are mutually beneficial as well as to

choose a job that he wants as specified in Article 28C paragraph (2), Article 28D paragraph (2), Article 28D paragraph (3), and Article 28E paragraph (1) of the 1945 Constitution;

- b. Whereas the Petitioner feels being impaired by the coming into effect of Article 27 paragraph (1) sub-paragraph b and paragraph (3) of Law 15/2011 because such articles eliminate the rights of Petitioner to resign for reason beside health reason to take part in a better position in government, find the desired job and a decent living;
- c. Whereas the impairment due to the coming into effect of Article 27 paragraph (1) sub-paragraph b and paragraph (3) of Law 15/2011 is likely to occur based on logical reasoning at the time the Petitioner resigns, namely in the form of the impairment of the loss of the opportunity and material loss of returning the honorarium as much as 2 (two) times the amount of the honorarium;
- d. Whereas the constitutional impairment will obviously occur based on a causal relationship (*causal verband*) namely that the constitutional rights of the Petitioner have been impaired due to the coming into effect of the articles that being reviewed

- e. By the decision of the Constitutional Court that is expected will grant the petition of this petition, the aforementioned constitutional impairment of the Petitioner, is expected will never or no longer occur.

3 Legal Considerations that Article 27 paragraph (1) subparagraph b and paragraph (3) of Law Number 15 Year 2011 concerning General Election Organizer (State Gazette Year 2011 Number 101, Supplement to State Gazette Number 5246) are inconsistent with Article 28C paragraph (2), Article 28D paragraph (2), Article 28D paragraph (3) and Article 28E paragraph (1) of the 1945 Constitution

3.1 Whereas the long journey of the General Election Commission began after the amendment of the 1945 Constitution when the people's representatives agreed that the implementation of General Elections had to be held by an independent institution. The consensus was set forth in the constitution of the Republic of Indonesia namely in Article 22E paragraph (5), "General Elections shall be organized by a national, permanent and independent commission for general elections". There have been no less than 3 (three) Laws to regulate the implementation of General Elections. At the first time, the General Election Commission was established based on Law Number 12

Year 2003 which at that time was still integrated with the General Election Law. However, in view of the extremely vital urgency and position of a general election organizer, the Legislators agreed to make a special Law concerning General Election organizer so Law Number 22 Year 2007 concerning General Election Organizer was made and the last one is the Law currently reviewed, namely Law 15/2011;

- 3.2 Whereas all the three Laws which have been formed regulate resignation. Article 20 paragraph (1) of Law Number 12 Year 2003 provided that, "Members of the General Election Commission, Provincial General Election Commission, and regency/municipal General Election Commission shall quit before the end of their service term because of: b. resignation", Article 29 paragraph (1) of Law Number 22 Year 2007 also provided that, " Members of the General Election Commission, Provincial General Election Commission, and regency/municipal General Election Commission shall quit before the end of the service term because of: b. resignation" where the elucidations of both Laws read, "resignation for health reasons and/or physical and/or mental disorders to perform their obligations as members of the General Election Commission, Provincial General Election Commission, and regency/municipal General Election Commission". This is included in the

regulation of the Law that being reviewed. The question is: Why is it not allowed for members of the General Election Commission, Provincial General Election Commission, and regency/municipal General Election Commission to resign in the middle of their term of service? Is it effective to stop members of the General Election Commission, Provincial General Election Commission, and regency/municipal General Election Commission from resigning?

- 3.3 Whereas considering some of the comments of the politicians who have been actively involved in the formulation of the three Laws, one of the reasons for members of the General Election Commission to be prohibited from resigning in the middle of the term of service is related to the independence of members of the General Election Commission especially following the declaration of the case of resignation of Anas Urbaningrum and Andi Nurpati. During that period, questioning or concern about independence was indeed very relevant if related to the prohibition for members of General Election Commission from becoming members of political parties as stipulated in Law Number 12 Year 2003 and Law Number 22 Year 2007. However, after the opportunity was opened for "ex" members of political parties to become members of the General Election Commission, Provincial General Election

Commission, and regency/municipal General Election Commission as regulated in Law 15/2011, such comment becomes no longer relevant because the public will be more suspicious of the independence of the ex-members of political parties who become members of the General Election Commission, Provincial General Election Commission, and regency/municipal General Election Commission. Moreover, such ex-members of the political parties will be involved directly in the General Election process, while it is not certain that ex-members of the General Election Commission are active in the political parties. From among fellow members of regency/municipal General Election Commission almost the majority of them have resigned to study or to return to their habitat as lecturers, and only few who have joined political parties;

- 3.4 Whereas assumption that the resignation of any Member of the General Election Commission, Provincial General Election Commission, and regency/municipal General Election Commission will disturb the General Election stages is not appropriate because the regulation of interim replacement for Members of the General Election Commission, Provincial General Election Commission, and regency/municipal General Election Commission is different from that of other institutions such as the Corruption

Eradication Commission, the Audit Board, and the Judicial Commission. It means that when there is a member of the General Election Commission, Provincial General Election Commission, and regency/municipal General Election Commission resigns, it is sufficient to appoint a Member of the General Election Commission, Provincial General Election Commission, and regency/municipal General Election Commission who is in the next place based on fit and proper test results by the People's Legislative Assembly for the General Election Commission, fit and proper test results by the General Election Commission for the Provincial General Election Commission and fit and proper test results by the Provincial General Election Commission for the regency/municipal General Election Commission, so that it does not require a lot of cost and time as regulated in Article 27 paragraph (5) of Law 15/2011. Even in the event of an extraordinary event in which all members of the General Election Commission, Provincial General Election Commission, and regency/municipal General Election Commission resign, Article 127 paragraph (1) up to paragraph (3) of Law 15/2011 has provided a very clear regulation which reads:

- (1) In the event of occurrence of things causing the General Election Commission to be unable to perform

the implementation phases of the General Election in accordance with the provisions of the Law, the implementation phases of the General Election shall be temporarily implemented by the Secretary General of the General Election Commission;

(2) In the event that the Commission cannot perform its duties as referred to in paragraph (1), within no later than 30 (thirty) days, the President and the People's Legislative Assembly shall take steps in order that the General Election Commission can perform its duties again;

(3) In the event of occurrence of things causing the Provincial General Election Commission or regency/municipal General Election Commission to be unable to perform its duties, the implementation phases of the General Election shall be temporarily implemented by the General Election Commission at one level above it.

3.5 Whereas the view of observers that the resigning Members of the General Election Commission, Provincial General Election Commission, and regency/municipal General Election Commission have confidential data concerning the condition of political parties is also inaccurate as to which

one is more dangerous between political data or corruption data owned by the Audit Board, the Corruption Eradication Commission, or the Public Prosecutor's Office. However, the regulation that was created allows Members of the Audit Board and the Head of the Corruption Eradication Commission to resign;

- 3.6 Whereas the lack of option to resign for reasons other than sickness/mental disorder in the two old Laws has led to legal uncertainty to the Members of the General Election Commission, Provincial General Election Commission, and regency/municipal General Election Commission who want to resign. Several cases of the members of regency/municipal General Election Commission who will resign who chose to attend the session in the Honorary Board so that there some Members of regency/municipal General Election Commission have been allowed to resign, while some cases have not been granted or even suspended unclearly. However, this option now cannot be used because according to Article 28 paragraph (1) of Law 15/2011, DKPP will only verify the resignation of members of the General Election Commission, Provincial General Election Commission, and regency/municipal General Election Commission in the event that they are dishonorably dismissed;

The dismissal of Members of the General Election Commission, Provincial General Election Commission, and regency/municipal General Election Commission who have met the provisions as referred to in Article 27 paragraph (2) sub-paragraph a, sub-paragraph b, sub-paragraph c, sub-paragraph f, and/or sub-paragraph g shall be preceded by verification by DKPP of:

- a. written complaints from the General Election organizers, General Election participants, campaign team, community, and voters; and/or
- b. recommendation from the People's Legislative Assembly (DPR).

Article 27 paragraph (2) explains the causes of dishonorable dismissal of members of the General Election Commission, Provincial General Election Commission, and regency/municipal General Election Commission, which reads:

- (2) A member of the General Election Commission, Provincial General Election Commission, and regency/municipal General Election Commission shall be dishonorably dismissed as referred to in paragraph (1) sub-paragraph d in the event that he/she:

- a. no longer meets the requirements as a member of the General Election Commission, Provincial General Election Commission, and regency/municipal General Election Commission;
- b. violates the oath/official oath and/or code of conduct;
- c. cannot perform his/her duties for 3 (three) consecutive months without any valid reason;
- d. is sentenced with a criminal sanction of imprisonment based on a court decision that has legal force for committing a criminal act punishable by imprisonment of 5 (five) years or more;
- e. is sentenced by a court decision that has legal force for committing a criminal act in the General Election;
- f. has not attended plenary sessions according to his/her duties and obligations for 3 (three) times consecutively without any valid reason;
or
- g. commits any act proven to inhibit: the General Election Commission, Provincial General Election Commission, and regency/municipal

General Election Commission in making decisions and stipulations according the provisions of the laws and regulations.

Meanwhile, Article 27 paragraph (1) sub-paragraph b does not give any explanation concerning who is the party that shall declare whether the reason for such resignation is acceptable or not.

3.7 Whereas such prohibition is beyond the customary practices applicable to all bodies/institutions or commissions in the state of Indonesia. Almost all of them provide the rights/space to their personnel to resign before the end of their term of service. Subsequently, we will describe the resignation clauses in other institutions, namely, among others:

- a. The Constitutional Court, Article 23 paragraph (1) of Law No. 8 Year 2011 concerning Amendment to Law Number 24 Year 2003 concerning the Constitutional Court: constitutional justices shall be honorably discharged for the reason of:
 - b. resignation at their own request submitted to the Chief Justice of the Constitutional Court;
- b. The Audit Board, Article 18 of Law Number 15 Year 2006: "The Chairperson, Vice Chairperson, and/or

members of the Audit Board shall be honorably discharged from office by a Presidential decree upon the recommendation of the Audit Board's decision because of: b. resignation by their own request submitted to the Chairperson or Vice Chairperson of the Audit Board;

- d. The Corruption Eradication Commission, Article 32 paragraph (1) of Law Number 30 Year 2002: the Chairperson of the Corruption Eradication Commission shall resign or be discharged because of: 5. resignation;
- e. The Judicial Commission, Article 32 of Law Number 22 Year 2004: Chairperson, Vice Chairperson, and Members of the Judicial Commission shall be honorably discharged from office by the President upon the recommendation of the Judicial Commission: b. at their own request;
- f. The People's Legislative Assembly, Article 213 paragraph (1) of Law Number 27 Year 2009: Members of the People's Legislative Assembly shall quit before the end of the service term because of: b. resignation;

Are the members of the General Election Commission, Provincial General Election Commission, and

regency/municipal General Election Commission so vital that they can surmount other institutions in Indonesia even the President;

- 3.8 Whereas, based on the considerations in point 3.4 up to point 3.7, prohibition for Member of the General Election Commission, Provincial General Election Commission, and regency/municipal General Election Commission to resign for the aforementioned reasons become unconstitutional because as citizens of Indonesia, members of the General Election Commission also have the constitutional right to improve themselves through collective struggle for their rights to develop their society, nation and state by serving in other fields as provided for in Article 28C Paragraph (2) of the 1945 Constitution, the right to participate actively in government in a professional manner as provided for in Article 28D paragraph (3) of the 1945 Constitution and the right to be able to choose employment they want as provided for in Article 28E Paragraph (1) of the 1945 Constitution. These rights are not inconsistent with public interest because public interest that may be disrupted by the resignation of the Members of the General Election Commission, Provincial General Election Commission, and regency/municipal General Election Commission has been anticipated by this Law.

3.9 Whereas Article 27 paragraph (3) which reads, "Members of the General Election Commission, Provincial General Election Commission, and regency/municipal General Election Commission who resign for unacceptable reasons and who are dishonorably dismissed shall return the honorarium as much as 2 (two) the times the amount received". is the arbitrariness of the legislator towards the Members of the General Election Commission, Provincial General Election Commission, and regency/municipal General Election Commission because, as described in point 3.7, the rules in Indonesian bodies/institutions have provided a respected place to the resigning party with the phrase "honorably discharged ". Although this is intended to frighten members of the General Election Commission, Provincial General Election Commission, and regency/municipal General Election Commission so that they will not resign, this threat is unwarranted and inconsistent with the constitutional rights of the members of the General Election Commission to work and receive fair and proper remuneration and treatment in mutually beneficial situations as regulated in Article 28D paragraph (2) of the 1945 Constitution;

3.10 Whereas the final view of the Special Committee for Amendments to the General Election Organizer Law conveyed by the Vice Chairperson of Commission II Ganjar Pranowo before the plenary session of the People's Legislative Assembly on September 20, 2011 stated that one of the important amendment to Law Number 22 Year 2007 is "the Amendment to the definition of General Election organizers namely the institutions organizing General Elections which consist of the General Election Commission and the General Elections Supervisory Board as an integral function of organizing general elections." This implies that the position of the General Election Commission and General Elections Supervisory Board shall be equal. However, the regulation of this Law bears discrimination because in the article regulating the dismissal of General Elections Supervisory Board namely Article 99 of Law Number 15 Year 2011 has clause regulating that Members of the General Elections Supervisory Board, provincial General Elections Supervisory Board, regency/municipal General Elections Supervisory Board who resign for unacceptable reasons and who are dishonorably dismissed have to return the honorarium as much as 2 (two) times the amount received as for members of the General Election Commission, Provincial General Election Commission, and

regency/municipal General Election Commission as provided for in Article 27 Paragraph (3). Is this the so-called equality?

3.11 Whereas making it difficult for Members of the General Election Commission, Provincial General Election Commission, and regency/municipal General Election Commission to resign is, in essence, similar to eliminating the opportunity for members of the General Election Commission, Provincial General Election Commission, and regency/municipal General Election Commission to take part in the government. In the event that in the future Members of the General Election Commission, Provincial General Election Commission, and regency/municipal General Election Commission become politicians or other state officials, and the legislator may not restrict it through the formation of Law that is discriminative because it will violate the principle of the formulation of the Law as regulated in Article 6 of Law Number 12 Year 2011 concerning the formulation of laws and regulations, especially the principles of humanity, justice, and equality in law;

3.12 Based on the descriptions as set forth in point 3.1 up to point 3.11 above, it is evident that the legal norms in Article 27 paragraph (1) sub-paragraph 1 of Law 15/2011,

especially in the phrase "acceptable reasons" and the elucidation that reads "for health reasons and/or physical and/or mental disorders" and paragraph (3) in the phrase that reads: "Members of the General Election Commission, Provincial General Election Commission, and regency/municipal General Election Commission who resign for unacceptable reasons and who are dishonorably dismissed shall return the honorarium as much as 2 (two) times the amount received" are inconsistent with human rights that have been regulated by the 1945 Constitution namely the rights to improve him/herself through collective struggle for his/her rights to develop his/her society, nation and state as regulated in Article 28C Paragraph (2) of the 1945 Constitution; the right to work and to receive fair and proper remuneration and treatment in employment as regulated in Article 28D paragraph (2) of the 1945 Constitution, the right to obtain equal opportunities in government as regulated in Article 28D paragraph (3) of the 1945 Constitution, the right to choose a job as regulated in Article 28E Paragraph (1) of the 1945 Constitution;

IV. CONCLUSION

Based on the descriptions as set forth in point I, point II, and point III above, the Petitioner has conveyed his conclusion of this petition which can be formulated as follows:

1. The Petitioner requests the Constitutional Court to conduct judicial review of the norms of Law as stated in Article 27 paragraph (1) sub-paragraph b along with its elucidation and paragraph (3) of Law Number 15 Year 2011 concerning General Election Organizer (State Gazette of the Republic of Indonesia Year 2011 Number 101, Supplement to the State Gazette of the Republic of Indonesia Number 5246) under Article 28C Paragraph (2), Article 28D paragraph (2), Article 28D paragraph (3), and Article 28E Paragraph (1) of the 1945 Constitution;
2. Based on the norms set forth in Article 24C Paragraph (1) of the 1945 Constitution, Article 10 paragraph (1) sub-paragraph a of Law Number 24 Year 2003 concerning the Constitutional Court, as amended by Law Number 8 Year 2011 concerning Amendment to Law Number 24 Year 2003 concerning the Constitutional Court, and Article 9 paragraph (1) of Law Number 12 Year 2011 on the Formulation of Laws and Regulations, the Constitutional Court has authority to examine, hear and decide upon this petition at the first and final levels with a final decision;
3. The Petitioner is an individual Indonesian citizen who has constitutional rights, both directly and indirectly, as granted by

Article 28C Paragraph (2), Article 28D paragraph (2), Article 28D paragraph (3), and Article 28E Paragraph (1) of the 1945 Constitution. Such constitutional rights obviously have been impaired by the coming into effect of the legal norms regulated in Article 27 paragraph (1) sub-paragraph b and along with its elucidation and Article 27 paragraph (3) of Law Number 15 Year 2011 concerning General Election Organizer;

4. Based on various legal considerations that the Petitioner has stated in the explanation in point III above, the Petitioner concludes that the legal norms set forth in Article 27 paragraph (1) sub-paragraph b of Law Number 15 Year 2011 concerning General Election organizer, in particular the phrase "acceptable reasons" and the elucidation that reads "for health reasons and/or physical and/or mental disorders" and paragraph (3) to the extent of the phrase that Members of the General Election Commission, Provincial General Election Commission, and regency/municipal General Election Commission who resign for unacceptable reasons and who dishonorably dismissed shall return the honorarium as much as 2 (two) times the amount received" are inconsistent with the human rights that have been regulated by the 1945 Constitution namely the right to improve him/herself through collective struggle for his/her rights to develop his/her society, nation and state as regulated in Article 28C Paragraph (2) of the 1945 Constitution, the right to work and to receive fair and proper

remuneration and treatment in employment as regulated in Article 28D paragraph (2) of the 1945 Constitution, the right to obtain equal opportunities in government as regulated in Article 28D paragraph (3) of the 1945 Constitution, the right to choose a job as regulated in Article 28E Paragraph (1) of the 1945 Constitution, and therefore there are enough reasons for the Court to declare the intended articles inconsistent with the 1945 Constitution, and simultaneously to declare that they have no binding legal effect.

V. PETITUM

Based on the explanations above, the Petitioner requests to the Panel of Constitutional Court Justices to pass the following decisions:

1. Declare that the Petitioner has legal standing to file the petition for judicial review of the Law, namely Law Number 15 Year 2011 concerning General Election Organizer (State Gazette of the Republic of Indonesia Year 2011 Number 101, Supplement to the State Gazette of the Republic of Indonesia Number 5246);
2. Declaring that Article 27 paragraph (1) sub-paragraph b of Law Number 15 Year 2011 concerning General Election Organizer, in particular the phrase, "acceptable reasons," and the elucidation which reads, "for health reasons and/or physical and/or mental disorders" and paragraph (3) namely the phrase that Members of the General Election Commission, Provincial General Election

Commission, and regency/municipal General Election Commission who resign for unacceptable reasons and who are dishonorably dismissed shall return the honorarium as much as 2 (two) times the amount received" are inconsistent with Article 28C Paragraph (2), Article 28D paragraph (2), Article 28D paragraph (3), and Article 28E Paragraph (1) of the 1945 Constitution;

3. Declaring that Article 27 paragraph (1) sub-paragraph b of Law Number 15 Year 2011 concerning General Election organizer, in particular the phrase "acceptable reasons" and the elucidation which reads "for health reasons and/or physical and/or mental disorders" and paragraph (3) the phrase that reads Members of the General Election Commission, Provincial General Election Commission, and regency/municipal General Election Commission who resign for unacceptable reasons and who dishonorably dismissed shall return honorarium as much as 2 (two) times the amount received do not have any binding legal effect;
4. Requesting for this decision to be included in the Official Gazette of the Republic of Indonesia;
5. In the event that the Court has other opinions, the decision is requested to be as just as possible.

[2.2] Whereas to prove his arguments, the Petitioner has filed written evidence marked as Exhibit P-1 up to Exhibit P-3, as follows:

1. Exhibit P-1 : Copy of Law Number 15 Year 2011 concerning General Election Organizer;
2. Exhibit P-2 : Copy of the 1945 Constitution of the Republic of Indonesia;
3. Exhibit P-3 : Copy of the Decree of the General Election Commission of West Java Province Number 165/SK/KPU-JB/IX/2008 concerning the Appointment of the Members of the General Election Commission of Bogor Regency, dated September 19, 2008.

In addition, the Petitioner has presented a Witness namely Drs. Teten W. Setiawan at the hearing on December 28, 2011, which has provided statements among others as follows:

Whereas the witness is a member of the General Election Commission of West Java Province, for the 2008-2013 Period, who provides statements on behalf of himself and not on behalf of the institution of the General Election Commission of West Java Province, namely:

First, whereas as to the provision concerning the resignation of members of the General Election Commission, Provincial General Election Commission, and regency/municipal General Election Commission, the witness' friend named Setia Permana (deceased)

resigned from his position as a member or chairperson of the General Election Commission of West Java Province for the 2003-2008 period, after organizing the election of Governor and Vice Governor of West Java in 2008. At that time, the witness had finished performing his duties as General Election Supervisor of the election of Governor and Vice Governor of West Java; Then, Setia Permana (deceased) became a candidate member of the People's Legislative Assembly from PDIP Electoral District I, West Java, Bandung City and Cimahi City. The resignation of Setia Permana was criticized by one of the academicians in Bandung city through *Pikiran Rakyat* newspaper. By reminding him of the provision of Article 29 paragraph (1) sub-paragraph b of Law Number 22 Year 2007 concerning General Election Organizers, which reads, "Members of the General Election Commission, Provincial General Election Commission, and regency/municipal General Election Commission shall quit before the end of the service term because of resignation," and the Elucidation of Article 29 paragraph (1) sub-paragraph b of Law Number 22 Year 2007 which reads, "Resignation means resignation for health reasons and/or physical and/or mental disorders to fulfill their obligations as members of the General Election Commission, Provincial General Election Commission, and regency/municipal General Election Commission."

Then it was asked, why Setia Permana could pass the health test as a candidate member of the People's Legislative Assembly, whereas the reason for his resignation from his position as member and

Chairperson of the General Election Commission of West Java Province must have a statement from the doctor that the concerned person was "permanently sick" and/or "insane."

In response to this news, the witness also contributed to the consideration that Setia Permana resigned not during the period of 5 years term of service, but during the extension period being the term of service related to the implementation of the Election of Governor and Vice Governor of West Java, so that the provision of Article 29 paragraph (1) sub-paragraph b of Law Number 22 Year 2007 was not binding to Setia Permana.

This issue was settled when registering as a candidate member of the General Election Commission of West Java Province for 2008-2013 period, the witness was fully aware that he was going into a cage, into which he could enter but from which he could not get out, unless willing to have the status of permanently sick or insane person or a criminal or violating the official oath and / or code of conduct or dead;

Second, in 2010, there was a commissioner of the General Election Commission of Sukabumi Regency and there was a commissioner of the General Election Commission of Karawang Regency who were rumored to be interested in becoming candidates for regional head and/or vice regional head in their respective regencies;

Whereas the risk that they would face if they resigned was that they would potentially be questioned from the aspect of health. On the one hand, for resigning from membership in the Regency General Election Commission, one must have the status of being permanently sick or insane, while on the other hand, to become a candidate for the regional head or vice regional head one must pass the physical and mental health test. In the event that they choose to be dismissed because they no longer qualify as members of Regency General Election Commission, it will be difficult because they would have to go through the mechanism of the Honorary Council or DK (*Dewan Kehormatan*). To form the Honorary Council, there should be a recommendation from the General Elections Supervisory Board or complaints from the community members with clear identity *vide* Article 30 paragraph (1) of Law Number 22 Year 2007.

Third, whereas Article 29 paragraph (1) sub-paragraph b of Law Number 22 Year 2007 has been included again with an additional phrase in the provision of Article 27 paragraph (1) sub-paragraph b of Law Number 15 Year 2011 concerning General Election Organizer or Law Number 15 Year 2011 which reads, "Members of the General Election Commission, Provincial General Election Commission, and regency/municipal General Election Commission shall quit before the end of the service term because of: resignation for acceptable reasons." Meanwhile, the elucidation of Article 29 paragraph (1) sub-paragraph b of Law Number 22 Year 2007, Elucidation of Article 27 paragraph (1) sub-paragraph b of Law Number 15 Year 2011 read, "resignation" means

resignation for health reasons and/or physical and/or mental disorders to fulfill their obligations as members of the General Election Commission, Provincial General Election Commission, and regency/municipal General Election Commission.

It turns out that there is an additional provision of Article 27 paragraph (3) of Law Number 15 Year 2011 that reads, "Members of the General Election Commission, Provincial General Election Commission, and regency/municipal General Election Commission who resign for unacceptable reasons and who are dishonorably dismissed shall return the honorarium as much as 2 (two) times the amount received."

It turns out that the material of the provisions of Article 29 paragraph (3) of Law Number 15 Year 2011 does not apply to General Election supervisors. Why is there discriminatory treatment in one Law? So, in the event that someone wants to resign as a member of the General Election Commission of West Java Province, he/she must select one status of being permanently sick or insane, or being a criminal, or violating the official oath, and/or code of conduct, or being dead, or having an additional status of being poor;

Fourth, whereas there are loopholes in Law Number 15 Year 2011 in order to resign without being exposed to the provision of Article 27 paragraph (1) sub-paragraph b of Law 15/2011; Elucidation of Article 27 paragraph (1) sub-paragraph b of Law 15/2011 and Article 27 paragraph (3) of Law 15/2011, by utilizing the provision of Article 11 sub-

article m of Law 15/2011, which reads, "The requirements to become a candidate member of the General Election Commission, Provincial General Election Commission, and regency/municipal General Election Commission is, among others, that a person is not in a marital bond with any fellow organizer of the General Election."

In addition, elucidation of Article 11 sub-article m of Law 15/2011 reads, "This provision means that one of the members must resign in the event that he/she is married to a fellow organizer of general election." Should one use this naughty mode of operation in order to resign from the position as a member of the general election organizers, without being exposed to the status of being permanently sick, or insane, and so forth.

Fifth, the provision of Article 129 paragraph (1) of Law 15/2011 reads, "The term of service of the members of General Election Commission and members of General Elections Supervisory Board based on Law Number 22 Year 2007 concerning General Election Organizer, will end at the time of pronouncement of official oath of the new members of the General Election Commission and the new members of the General Elections Supervisory Board under the law."

Subsequently, the provision of Article 130 paragraph (1) reads, "Membership of the Provincial General Election Commission based on this Law shall be determined after a period of membership of the

Provincial General Election Commission as intended by the Law Number 22 Year 2007 concerning General Election Organizer.”

The provision of Article 131 paragraph (1) reads, "Membership of regency/municipal General Election Commission based on the Law shall be determined after the end of the membership of the regency/municipal General Election Commission as intended by Law Number 22 Year 2007 concerning General Election Organizer.”

Based on the provision of Article 129 paragraph (1) of Law 15/2011, then the term of service of the General Election Commission will be cut. Now, the term of service of the General Election Commission will expire around April 2012, whereas based on the provisions of Article 130 paragraph (1) and Article 131 paragraph (1) of Law 15/2011, the term of service of the Provincial Provincial General Election Commission, and regency/municipal General Election Commission shall remain for five years.

The term of service of the witness and his friends as Members of General Election Commission of West Java Province will still be expired in November 2013. By leaving the time difference of about 18 to 20 months, in the event that witness is interested in participating in the selection of members of the General Election Commission and the General Elections Supervisory Board, the witness is worried about being exposed to the provisions of Article 27 paragraph (1) sub-paragraph b of Law 15/2011, Elucidation of Article 27 paragraph (1) sub-paragraph b Law

15/2011 and Article 27 paragraph (3) of Law 15/2011. Therefore, the witness is caged, as he cannot participate in the selection become a member of the General Election Commission and/or the General Elections Supervisory Board for the new period. This factor becomes one reason why he does not dare to take the registration forms to become a member of the General Election Commission and the General Elections Supervisory Board.

Therefore, the substance of the provisions of Article 27 paragraph (1) sub-paragraph b of Law 15/2011, elucidation of Article 27 paragraph (1) sub-paragraph b of Law 15/2011 and Article 27 paragraph (3) of Law 15/2011 is equivalent to the provision of Article 23 paragraph (1) sub-paragraph b of Law 24/2003 concerning the Constitutional Court, which reads, "Resignation at their own request submitted to the Chief Justice of the Constitutional Court."

Sixth, the provisions of Elucidation of Article 29 paragraph (1) sub-paragraph b of Law 22/2007 and Elucidation of Article 27 paragraph (1) sub-paragraph b of Law 15/2011 have also been previously contained in the elucidation of Article 20 paragraph (1) sub-paragraph b of Law Number 12 Year 2003 concerning General Elections of Members of the People's Legislative Assembly, Regional Representatives Council and the Regional People's Legislative Assembly, which was enacted on March 11, 2003 which reads, "Resignation in paragraph (1) sub-paragraph b means resignation for a reason, and/or due to physical and/or mental disorders to

fulfill their obligations as Members of members of the General Election Commission, Provincial General Election Commission, and regency/municipal General Election Commission.

In 2003's, when this provision was applicable, someone resigned from his position as a member or chairperson of the General Election Commission of a province in Indonesia in order to participate in the selection to be one of Constitutional Court justices. However, no element of society in Indonesia questioned it. Finally, not only that he succeeded as a Constitutional Court Justice, but he also succeeded to carry out the mandate as a guardian of the Constitution and democracy in Indonesia.

[2.3] Whereas at the hearing on December 28, 2011, the statements of the Government were heard that explained as follows:

I. Substance of the Petition

Whereas the Petitioner assumes that the coming into effect of the articles *a quo* would harm the constitutional rights, among others things:

The Petitioner as a member of the General Election Commission of Bogor Regency may quit before the end of the service term, among others things because of resignation for acceptable reasons which, as referred to in the elucidation of the articles, means resignation

for health reasons or due to physical and/or mental disorders to fulfill their obligations as members of the General Election Commission, Provincial General Election Commission or Regency/Municipal General Election Commission. In addition, in the event of resignation for unacceptable reasons and being dishonorably dismissed the person shall return the honorarium as much as two times the amount of the honorarium received. Such provision is considered to have prevented the Petitioner from resigning for other reasons such as to become a member of the General Election Commission or a member of the General Elections Supervisory Board;

II. Concerning Legal Standing of the Petitioner

The government wants to convey that the in the Petitioner's petition for judicial review of Law Number 15 Year 2011, whereas the Petitioner cannot describe the constitutional impairment suffered, either actually or potentially due to the coming into effect of the norms petitioned for review.

In Law Number 24 Year 2003 concerning the Constitutional Court, Article 51 paragraph (1) states that the Petitioners shall be those who deem that their constitutional rights and/or authorities have been impaired by the coming into effect of a Law, namely:

- a. individual Indonesian citizens;

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

Whereas the definition and cumulative limitations concerning the impairment of constitutional rights and/or authorities of the Petitioner due to the coming into effect of a Law have limitations namely:

- a. existence of constitutional rights and/or authority of the Petitioners granted by the 1945 Constitution;
- b. the Petitioners believe that such constitutional rights and/or authority have been impaired by the coming into effect of the law petitioned for review;
- c. the impairment of such constitutional rights and/or authority must be specific and actual or at least potential in nature which, pursuant to logical reasoning, can be assured of occurring;
- d. there is a causal relationship (*causal verband*) between the impairment of constitutional rights and/or authority of the Petitioners and the law petitioned for review;
- e. it is likely that with the granting of the Petitioners' petition, the impairment of such constitutional rights and/or authority argued by the Petitioners will not or will no longer occur;

The Petitioner is an individual Indonesian citizen and a private entity claiming to have been harmed by the existence of the articles *a quo*. Concerning legal standing of the Petitioner, the Government is of the opinion that the Petitioner does not meet the requirements of legal standing of the Petitioner as set forth in Article 51 paragraph (1) of Law Number 24 Year 2003 concerning the Constitutional Court. The Petitioner cannot meet the qualification as a party who is harmed due to the coming into effect of the Law *a quo*. The Petitioner only presents assumptions and presumptions about material loss resulting from the coming into effect of object of the petition of the article *a quo*.

By understanding the legal standing of the Petitioner, then Government has fully left it to the Chief Justice/Panel of Constitutional Court Justices to consider and judge whether or not the Petitioner meets the qualification as a party who has legal standing, as set forth in Article 51 paragraph (1) of Law Number 24 Year 2003 concerning the Constitutional Court.

III. Concerning the material of judicial review of Law Number 15 Year 2011 concerning General Election Organizer

1. Whereas the Government can understand the confusion of the Petitioner with the presence of the norms *a quo* which according to the Petitioner, impair his constitutional rights.

2. With respect to the substance of the provisions *a quo* petitioned by the Petitioner, the Government may provide the following explanations:
 - a. Whereas to occupy public offices whose recruitment procedures are through an election mechanism, the candidates actually have to know all the consequences and impacts, including the consequences of the duration of the term of office he/she must assume;
 - b. Whereas a candidate who has been elected in a public office have duties, authority, obligations as well as rights that must be performed comprehensively in connection of the assigned office during a certain period. Periodization of the office that has been agreed upon or public legal norms must be obeyed at the time his/her election to occupy that office;
 - c. Ethically, it is not proper in for an officer to leave the duties, obligations and responsibilities which have not been completed to pursue another position considered more prestigious by sacrificing his/her old position;
 - d. Whereas the norm *a quo* has been designed so that members of the General Election Commission, Provincial General Election Commission or

Regency/Municipal General Election Commission can fully concentrate on completing the duties and responsibilities;

- e. Whereas within the implementation framework of the constitutional rights of the Petitioner such as the right to improve himself, the right to participate actively in government in a professional manner constitute the legal options of the petitioner to comply with the provisions of the laws. When one finally chooses a particular public office then he should be consistent, principle-centered and consistent with all the consequences that must be fulfilled including the periodization of the position that must be finished. This is the legal options that can be taken by the Petitioner. As a matter of fact we therefore really have to interpret that the law in this case as represented in the Law *a quo* contains legal facilities and legal choices that may be taken or may not be taken by the citizens after taking into account all the impacts for themselves.

IV. Conclusion

Based on the foregoing explanation, the Government requests to the Chairperson/ Panel of Constitutional Court Justices hearing the petition

for judicial review of Law Number 15 Year 2011 under the 1945 Constitution of the Republic of Indonesia, presumably to pass the following decisions:

1. Rejecting the petition in its entirety;
2. Declaring that the provisions of Article 27 paragraph (1) and paragraph (3), Article 11 sub-article i and Article 85 sub-article i, Article 109 paragraph (4) sub-paragraph c, sub-paragraph d, and sub-paragraph e, paragraph (5) and paragraph (11) of Law Number 15 Year 2011 are not inconsistent with the 1945 Constitution;
3. In the event that the Chairperson/Panel of Constitutional Court Justices have another opinion, requesting for a decision according to what is good and fair (*ex aequo et bono*).

[2.4] Whereas on January 2, 2012 the Registrar's Office of the Court received the written conclusion of the Petitioner as completely included in the petition file;

[2.5] Whereas to shorten the description in this decision, all matters occurring in the hearing shall be referred to in the minutes of the hearing, and shall constitute an integral part of this Decision;

3. LEGAL CONSIDERATIONS

[3.1] Whereas the main legal issue of the Petitioner's petition is to review the constitutionality of Article 27 paragraph (1) sub-paragraph b and paragraph (3) of Law Number 15 Year 2011 concerning General Election Organizer (State Gazette of the Republic of Indonesia Year 2011 Number 101, Supplement to the State Gazette of the Republic of Indonesia Number 5246, hereinafter referred to as Law 15/2011), that reads:

Article 27 of Law 15/2011

Paragraph (1)

"Members of the General Election Commission, Provincial General Election Commission, and regency/municipal General Election Commission shall quit before the end of the service term because of:

- a. ...
- b. resignation for acceptable reason";

Paragraph (3)

"Members of the General Election Commission, Provincial General Election Commission, and regency/municipal General Election Commission who resign for unacceptable reason and who are dishonorably dismissed shall return the honorarium as much as 2 (two) times the amount received";

are inconsistent with Article 28C paragraph (2), Article 28D paragraph (2), Article 28D paragraph (3), and Article 28E paragraph (1) of the 1945

Constitution of the State of the Republic of Indonesia (hereinafter referred to as the 1945 Constitution), which read:

Article 28C paragraph (2) of the 1945 Constitution

"Every person shall have the right to improve him/herself through collective struggle for his/her rights to develop his/her society, nation and state ";

Article 28D paragraph (2) of the 1945 Constitution

"Every person shall have the right to work and to receive fair and proper remuneration and treatment in employment";

Article 28D paragraph (3) of the 1945 Constitution

"Every citizen shall have the right to obtain equal opportunities in government ";

Article 28E paragraph (1) of the 1945 Constitution

"Every person shall be free to choose and to practice the religion of his/her choice, to choose one's education, to choose one's employment, to choose one's citizenship, and to choose one's place of residence within the state territory, to leave it and to subsequently return to it";

[3.2] Whereas prior to entering the Substance of the Petition, the Constitutional Court (hereinafter referred to as the Court) shall first consider the authority of the Court to hear the petition *a quo* and the legal standing of the Petitioner;

Authority of the Court

[3.3] Whereas one of the constitutional authorities of the Court pursuant to Article 24C paragraph (1) of the 1945 Constitution, Article 10 paragraph (1) sub-paragraph a of Law Number 24 Year 2003 concerning Constitutional Court as amended by Law Number 8 Year 2011 concerning Amendment to Law Number 24 Year 2003 concerning the Constitutional Court (State Gazette Year 2003 Number 70, Supplement to the State Gazette Number 5226, hereinafter referred to as the Constitutional Court Law) *juncto* Article 29 paragraph (1) sub-paragraph a of Law Number 48 Year 2009 concerning Judicial Authority (State Gazette of the Republic of Indonesia Year 2009 Number 157, Supplement to State Gazette of the Republic of Indonesia Number 5076), is to hear at the first and final levels whose decision shall be final to conduct judicial review of Laws under the 1945 Constitution;

[3.4] Whereas the petitioner's Petition is to conduct judicial review of the constitutionality of Law *in casu* Article 27 paragraph (1) sub-paragraph b and paragraph (3) of Law 15/2011 under the 1945 Constitution, which becomes one of authorities of the Court, and then the Court has authority to hear the petition *a quo*;

Legal Standing of the Petitioner

[3.5] Whereas based on the provision of Article 51 paragraph (1) of Constitutional Court Law along with its Elucidation, the parties who can file a petition for judicial review of a law under the 1945 Constitution shall be those who deem that their constitutional rights and/or authorities have been impaired by the coming into effect of a law, namely:

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

Therefore, the Petitioner in the judicial review of a Law under the 1945 Constitution must first explain and prove:

- a. his legal standing as petitioners as intended in Article 51 paragraph (1) of the Constitutional Court Law;
- b. whether or not there is any impairment of the constitutional rights and/or authorities granted by the 1945 Constitution due to the coming into effect of the law petitioned for review;

[3.6] Considering also that following Decision Number 006/PUU-III/2005 dated may 31, 2005 and Decision Number 11/PUU-V/2007 dated September 20, 2007 and subsequent decisions, the Court is of the

opinion that the impairment of the constitutional rights and/or authorities as intended in Article 51 paragraph (1) of the Constitutional Court Law must meet 5 (five) requirements, namely:

- a. the existence of constitutional rights and/or authority of the Petitioners granted by the 1945 Constitution;
- b. the Petitioners believe that such constitutional rights and/or authority have been impaired by the coming into effect of the law petitioned for review;
- c. the impairment of such constitutional rights and/or authority must be specific and actual or at least potential in nature which, pursuant to logical reasoning, can be assured of occurring;
- d. there is a causal relationship (*causal verband*) between the impairment of constitutional rights and/or authority of the Petitioners and the law petitioned for review;
- e. it is likely that with the granting of the Petitioners' petition, the impairment of such constitutional rights and/or authority argued by the Petitioners will not or will no longer occur;

[3.7] Whereas based on the explanations as stated in paragraph **[3.5]** and **[3.6]** above, the Court will subsequently consider the legal standing of the Petitioner in the petition *a quo*, as follows:

[3.8] Whereas the petitioner is an individual citizen of Indonesia who, based on the Decision of the General Election Commission of West Java Number 165/SK/KPU-JB/IX/2008 concerning the Appointment of

the Member of the General Election Commission of Bogor Regency dated September 19, 2008, was appointed as a Member of the General Election Commission of Bogor Regency [*vide* Exhibit P-3], may not resign to look for another job unless for health reasons and/or due to physical and/or mental disorders. However the Petitioner has constitutional rights, among other things, to be free to choose a job based on the provision of the Article 28E paragraph (1) of the 1945 Constitution, so that according to the Court, the Petitioner has legal standing;

[3.9] Whereas since the Court has authority to hear the petition *a quo*, and the Petitioner has legal standing, then the Court will consider the substance of the petition;

Substance of the Petition

[3.10] Whereas the Petitioner argues that the coming into effect of Article 27 paragraph (1) sub-paragraph b, potentially results in the impairment to the Petitioner, namely the closing of the opportunity for the Petitioner to take part in a higher position such as a member of the General Election Commission. The Petitioner intends to become a commissioner of the General Election Commission, based on Article 129 paragraph (4) of Law 15/2011 which reads, "Formation of the committee for the selection of the members of the General Election Commission and the General Elections Supervisory Board according to this Law should be formed by no later than 2 (two) months following the enactment of this

Law,” then the selection team will be formed on December 16, 2011. With the assumption that the Petitioner reaches the final stage of selection up to his inauguration as a member of the General Election Commission estimated to be in March or April 2012, of course the Petitioner must resign from his position as a Member of the General Election Commission of Bogor Regency before the end of the Petitioner’s term of service which, based on the Decision of the General Election Commission of West Java Province, will end in December 2013;

Whereas the only article that is very likely to be used by the Petitioner to resign as specified by Article 27 paragraph (1) sub-paragraph b that reads, "Members of the General Election Commission, Provincial General Election Commission, and regency/municipal General Election Commission shall quit before the end of the service term because of: ... b. resignation for acceptable reasons". According to the legislator as stated in the Elucidation of that Article, resignation for acceptable reasons means "resignation for health reasons and/or due to physical and/or mental disorders to fulfill their obligation as members of the General Election Commission, Provincial General Election Commission, and regency/municipal General Election Commission". It means that for the resignation of the petitioner to be granted, the Petitioner must be physically and/or mentally sick so that he can participate in the selection of the members of the General Election Commission, whereas one of the requirements to become a member of General Election Commission in accordance with Article 11 sub-article h of Law 15/2011 is physical and

mental health. Such mutually contradictory provisions have created difficulties and impaired the constitutional rights of the Petitioner;

Article 27 paragraph (3) states that, "Members of the General Election Commission, Provincial General Election Commission, and regency/municipal General Election Commission who resign for unacceptable reasons and who are dishonorably dismissed shall return the honorarium as much as 2 (two) times the amount received". According to the Petitioner, this paragraph intentionally obstructs his rights to take part in government as well as eliminates the rights to get a better job. It means that at the time the Petitioner chooses to resign from the General Election Commission of Bogor Regency, the Petitioner must return the special allowance received during his membership with the General Election Commission of Bogor Regency being calculated at the nominal amount of Rp360,000,000. - which comes from $2 \times 60 \times \text{Rp}3,000,000$. -. According to the feelings and the economic capacity of the Petitioner, the amount is extremely large and unreasonable;

Opinion of the Court

[3.11] Whereas after the Court has carefully examined the petition of the Petitioner, the statements of the Witness of the Petitioner as well as letters/written evidence presented by the Petitioner, the conclusion of the Petitioner and the statement of the Government, as stated in the Facts of the Case, the Court is of the following opinion:

[3.12] Whereas the substance of the Petitioner's petition is to conduct judicial review of Law 15/2011 that reads:

- Article 27 paragraph (1), "Members of the General Election Commission, Provincial General Election Commission, and regency/municipal General Election Commission shall quit before the end of the service term because:
 - a. ...
 - b. resignation for acceptable reason";
- Article 27 paragraph (3), "Members of the General Election Commission, Provincial General Election Commission, and regency/municipal General Election Commission who resign for unacceptable reason and who are dishonorably dismissed shall return the honorarium as much as 2 (two) times the amount received";

[3.13] Whereas Article 27 paragraph (1) sub-paragraph b of Law 15/2011 reads, "Members of the General Election Commission, Provincial General Election Commission, and regency/municipal General Election Commission shall quit before the end of the service term because of resignation for acceptable reasons," in the elucidation reads, ""resignation means resignation for health reasons and/or physical and/or mental disorders to fulfill their obligations as members of the General Election Commission, Provincial General Election Commission, and regency/municipal General Election Commission", according to the

Petitioner have greatly impaired their constitutional rights, because for the resignation of the Petitioner to be accepted, the Petitioner must be physically and/or mental sick. In addition, such resignation requirements are different from the resignation requirements for constitutional justices, the Chairperson and Vice Chairperson and member of the Audit Board, the Chairperson, Vice Chairperson, Young Chairperson of the Attorney General's office, justices of the supreme court, commissioners of the Corruption Eradication Commission which usually shortened by KPK and commissioners of Judicial Commission;

With respect to the argument of Petitioner *a quo* the Court considers that work is a means for humans to earn income in order to retain the right to life, survival and life (Article 28A of the 1945 Constitution). In addition, work is a means for human to keep his honor, because without having a job it will be easy for him to do anything illegal. Without a job he would be a burden to others. With the work he will earn income, among other things, for keeping his honor. Article 28D paragraph (2) of the 1945 Constitution determines as a human right that "Every person shall have the right to work and to receive fair and proper remuneration and treatment in employment". Humans would be happy if the jobs and income can enhance dignity and status. Therefore, it is the right of every human being to be given the freedom to achieve happiness by getting a better job that allows him to live more happily. The task of the state is to make every citizen closer to the achievement of happiness, both within and outside government. Therefore, the second paragraph of the

Preamble to the 1945 Constitution reads, "Indonesia's independence struggle movement has now reached a joyful moment, leading the people of Indonesia safe and sound to the gateway of independence of the Indonesian State which is free, united, sovereign, just and prosperous";

Elucidation of Article 27 paragraph (1) sub-paragraph b of Law 15/2011, stated, "Resignation means resignation for health reasons and/or physical and/or mental disorders to fulfill their obligations as members of the General Election Commission, Provincial General Election Commission, and regency/municipal General Election Commission". According to the Court, such Elucidation has narrowed the freedom of a person to obtain a better job and income in order to be able to fulfill their right to life, survival and life. In fact, getting a job and a better income is to get closer to the achievement of happiness for humanity apart, according to the law of progressive, is the goal of every law and legislation in particular also a thing to be one obligation of the State Government of Indonesia as referred to in the fourth paragraph of the Preamble to the 1945 Constitution, namely to promote the general welfare. Elucidation of Article 27 paragraph (1) sub-paragraph b Law 15/2011 is unconstitutional because it has prevented the independence of the Petitioner to achieve happiness as well as his efforts to promote himself as well as the freedom of the Petitioner to seek employment in the government as a statement of Article 28C Paragraph (2) of the 1945 Constitution that, "Every person shall have the right to improve him/herself through collective struggle for his/her rights to develop his/her

society, nation and state "; Article 28D Paragraph (2) of the 1945 Constitution which states, " Every person shall have the right to work and to receive fair and proper remuneration and treatment in employment "; Article 28D paragraph (3) of the 1945 Constitution which states, " Every citizen shall have the right to obtain equal opportunities in government";

In addition, Article 23 paragraph (1) sub-paragraph b of Law Number 24 Year 2003 concerning the Constitutional Court, as amended by Law No. 8 Year 2011 regarding Amendment to Law Number 24 Year 2003 concerning the Constitutional Court (State Gazette of the Republic Indonesia Year 2011 Number 70, Supplement to the State Gazette of the Republic No. 5226), states, "Constitutional court justices shall be honorably discharged for the reasons of: a. ... b. resignation at their own request submitted to the Chief Justice of the Constitutional Court "; Article 18 sub-paragraph b of Law Number 15 Year 2006 concerning the Audit Board (State Gazette of the Republic of Indonesia Year 2006 Number 85, Supplement to the State Gazette of the Republic of Indonesia Number 4654), determined," Chairperson, Vice Chairperson and / or members of the Audit Board shall be honorably discharged from office by Presidential decree upon the recommendation of the Audit Board because of: a. ... b. resignation at their own request submitted to the Chairperson or Vice Chairperson of the Audit Board", Article 11 sub-paragraph c of Law Number 3 Year 2009 concerning Second Amendment to Law Number 14 Year 1985 concerning the Supreme Court (State Gazette of the Republic of Indonesia Year 2009 Number 3, Supplement to the State Gazette of

the Republic of Indonesia Number 4958), stated, "the Chairperson, Vice Chairperson, Chairperson of the Supreme Court and Youth Justice honorably discharged from office by the President upon the recommendation of the Supreme Court because of: a. ... B. ... C. resignation at their own request in writing "; Article 32 paragraph (1) subparagraph e of Law Number 30 Year 2002 concerning the Corruption Eradication Commission (State Gazette of the Republic of Indonesia Year 2002 Number 137, Supplement to the State Gazette of the Republic of Indonesia Number 4250), provides that," the Chairperson of the Corruption Eradication Commission shall resign or be dismissed because of a, b, c, d ... e. resignation," or, Article 32 sub-article b of Law Number 22 Year 2004 concerning Judicial Commission, as amended by Law Number 18 Year 2011 concerning Judicial Commission (State Gazette of the Republic of Indonesia Year 2011 Number 106, Supplement to the State Gazette of the Republic of Indonesia No. 5250), which states, "the Chairperson, Vice Chairperson, and Members of the Judicial Commission shall be honorably discharged from office by the President upon the recommendation of the Judicial Commission: a. ... B. at their own request. "In the elucidation of the articles mentioned above, it states," Self-explanatory" which refer to constitutional justice, the Chairperson, Vice Chairperson, and members of the Audit Board, the Chairperson, Vice Chairperson, Junior Chairperson and justices of the Supreme Court, Chairperson of the Corruption Eradication Commission, the Chairperson, Vice Chairperson, and Members of the Judicial Commission may resign at

their own request, without conditions "for acceptable reasons ". According to the Court there is a difference and inequality before the law concerning the right to resignation from work among members of the General Election Commission, Provincial General Election Commission, and regency/municipal General Election Commission on the one hand and that for constitutional court justices, the Chairperson, Vice Chairperson, Member of Audit Board, the Chairperson and Vice Chairperson, Junior Chairperson of the Supreme Court, Supreme justices, Chairperson of Corruption Eradication Commission, the Chairperson, Vice Chairperson, and Members of the Judicial Commission on the other hand, although, Article 27 paragraph (1) of the 1945 Constitution asserts, "All citizens shall be equal before the law and government and shall uphold the law and government without exception ", and Article 28D paragraph (1) of the 1945 Constitution states, " Everyone is entitled to the recognition security, protection, and legal certainty of fair and equal treatment before the law". That means that the differential treatment in the event of resignation, as considered above, is inconsistent with the 1945 Constitution. Thus the phrase "for acceptable reasons " in Article 27 paragraph (1) sub-paragraph b of Law 15/2011 and its elucidation are inconsistent with the 1945 Constitution so that Article 27 paragraph (1) sub-paragraph b Law 15/2011 must be interpreted, "Members of the General Election Commission, Provincial General Election Commission, and regency/municipal General Election Commission shall quit before the end

of the service term because of: a. b. Resignation for acceptable reasons”;

[3.14] Whereas under certain circumstances a person who has committed him/herself in a job, for example, a person who is bound in the official commitment, may not resign before the end of his/her term of office. According to the Court, members of the General Election Commission, Provincial General Election Commission, and regency/municipal General Election Commission who are committed to the work with free choice nature despite having the responsibility for conducting elections during their term of service, while the position of members of the General Election Commission, Provincial General Election Commission, and regency/municipal General Election Commission is not the same as the position of someone bound in a term of office that he must complete as agreed upon until the end of the term of office with the consequences of, among others, paying compensation in accordance with an agreement to resign before the end of the term of office without any acceptable reason;

[3.15] Whereas based on the Court's opinion it is impossible to refuse resignation. The Petitioners' argument concerning judicial review of the constitutionality of Article 27 paragraph (3) of Law 15/2011 cannot be maintained, so it does not need any further consideration. Therefore, the petitioner's petition insofar as Article 27 paragraph (3) of Law 15/2011 has legal ground;

[3.16] Whereas as to the concern that in the event that in case that all the members of the General Election Commission, Provincial General Election Commission, and regency/municipal General Election Commission simultaneously resign so as to result in vacancies or vacuum, it must first be stated that the resignation of a person to choose another job, is a freedom which is one of the human rights as defined in Article 28E Paragraph (1) of the 1945 Constitution, so it should not be hindered by any provision under the Constitution. In addition to anticipating the possibility of such events the Legislator has determined each issue in Law 15/2011 as follows:

- Article 14 paragraph (1), "The President shall submit 14 (fourteen) names of the candidates or 2 (two) times the number of members of the General Election Commission to the People's Legislative Assembly by no later than 14 (fourteen) days following the receipt of the file of candidates members of the General Election Commission";
- Article 19 paragraph (1), " The Selection Team shall submit 10 (ten) names of the candidates for Provincial General Election Commission of the selection results to the General Election Commission";
- Article 23 paragraph (1), "The Selection Team shall submit 10 (ten) names of the candidates for regency/municipal General Election

Commission of the selection results to the Provincial General Election Commission”;

The mechanism of interim replacement of members of the General Election Commission, Provincial General Election Commission, and regency/municipal General Election Commission as provided for in Article 27 of the Law *a quo* who resign as intended to in paragraph (1) shall be conducted with the following provisions:

- a. A member of the General Election Commission shall be replaced by a candidate of General Election Commission in the next rank order of the results of the election conducted by the People's Legislative Assembly;
- b. A Member of the Provincial General Election Commission shall be replaced by a candidate of Provincial General Election Commission in the next rank order of the results of the election that was conducted by the General Election Commission;
- c. A Member of regency/municipal General Election Commission shall be replaced by a candidate of regency/municipal General Election Commission in the next rank order of the results of the election that was conducted by the Provincial General Election Commission”;

In addition, the Legislators have made a temporary/emergency anticipation of when the General Election Commission, Provincial General Election Commission, and regency/municipal General Election

Commission may not perform their duties, among others, in the event that they all resign, namely as regulated in Article 127 of Law 15/2011 which reads:

- (1) In the event of occurrence of things causing the General Election Commission to be unable to perform the implementation phases of the General Election in accordance with the provisions of the Law, the implementation phases of the General Election shall be temporarily implemented by the Secretary General of the General Election Commission;
- (2) In the event that the Commission cannot perform its duties as referred to in paragraph (1), within no later than 30 (thirty) days, the President and the People's Legislative Assembly shall take steps in order that the General Election Commission can perform its duties again;
- (3) In the event of occurrence of things causing the Provincial General Election Commission or regency/municipal General Election Commission to be unable to perform its duties, the implementation phases of the General Election shall be temporarily implemented by the General Election Commission at one level above it.;

[3.17] Based on the foregoing considerations, according to the Court, the arguments of the Petitioner have legal grounds;

4. CONCLUSION

Based on the foregoing considerations of the facts and laws, the Court has come to the following conclusions:

- [4.1]** The Court has authority to hear the petition of the Petitioner;
- [4.2]** The Petitioner has legal standing to file the petition *a quo*;
- [4.3]** The substance of the petition has legal grounds.

Based on the 1945 Constitution of the State of the Republic of Indonesia and Law Number 24 Year 2003 concerning the Constitutional Court as amended by Law Number 8 Year 2011 concerning the Amendment to Law Number 24 Year 2003 concerning the Constitutional Court (State Gazette of the Republic of Indonesia Year 2011 Number 70, Supplement to State Gazette of the Republic of Indonesia Number 5226) as well as Law Number 48 Year 2009 concerning Judicial Authority (State Gazette of the Republic of Indonesia Year 2009 Number 157, Supplement to State Gazette Number 5076).

5. DECISIONS

Passing the decision,

Declaring:

- To grant the petition of the Petitioner in its entirety;
- The phrase "...for acceptable reasons" in Article 27 paragraph (1) sub-paragraph b of Law Number 15 Year 2011 concerning General Election Organizer (State Gazette Year 2011 Number 101,

Supplement to State Gazette Number 5246) and its Elucidation inconsistent with the Constitution of the State of the Republic of Indonesia Year 1945;

- That the phrase "... for acceptable reasons" in Article 27 paragraph (1) sub-paragraph b of Law Number 15 Year 2011 concerning General Election Organizer (State Gazette Year 2011 Number 101, Supplement to State Gazette Number 5246) and its Elucidation has no binding legal effect;
- Article 27 paragraph (3) of Law Number 15 Year 2011 concerning General Election Organizer (State Gazette Year 2011 Number 101, Supplement to State Gazette Number 5246) inconsistent with the Constitution of the State of the Republic of Indonesia Year 1945;
- That Article 27 paragraph (3) of Law Number 15 Year 2011 concerning General Election Organizer (State Gazette Year 2011 Number 101, Supplement to State Gazette Number 5246) has no binding legal effect;
- To order the inclusion of this Decision in the Official Gazette of the Republic of Indonesia properly;

In witness whereof, this decision was made in the Consultative Meeting of Justices attended by nine Constitutional Court Justices namely, Moh. Mahfud MD., as Chairperson and concurrent Member, Achmad Sodiki, Muhammad Alim, Maria Farida Indrati, Ahmad Fadlil Sumadi, Anwar Usman, Hamdan Zoelva, Harjono, and M. Akil Mochtar,

as Members, on **Wednesday dated the fourth of January year two thousand and twelve**, and was pronounced in the Plenary Session of the Constitutional Court open for the public on this day, **Wednesday dated the fourth of January year two thousand and twelve**, by nine Constitutional Court Justices, namely Moh. Mahfud MD., as Chairperson and concurrent Member, Achmad Sodiki, Muhammad Alim, Maria Farida Indrati, Ahmad Fadlil Sumadi, Anwar Usman, Hamdan Zoelva, Harjono, and M. Akil Mochtar, as Members, assisted by Eddy Purwanto as Substitute Registrar, in the presence of the Petitioner, the Government or its representative, and the People's Legislative Assembly or its representative.

CHIEF JUSTICE,

Signed.

Moh. Mahfud MD.

JUSTICES,

Signed.

Achmad Sodiki

Signed.

Maria Farida Indrati

Signed.

Muhammad Alim

Signed.

Ahmad Fadlil Sumadi

Signed.

Anwar Usman

Signed.

Harjono

Signed.

Hamdan Zoelva

Signed.

M. Akil Mochtar

SUBSTITUTE REGISTRAR,

Signed.

Eddy Purwanto