



DECISION

Number 031/PUU-IV/2006

FOR THE SAKE OF JUSTICE UNDER THE ONE ALMIGHTY GOD

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA

Examining, hearing and deciding upon constitutional cases at the first and final level has passed a decision in a case of petition for Judicial Review of the Law of the Republic of Indonesia Number 32 Year 2002 regarding Broadcasting against the 1945 Constitution of the State of the Republic of Indonesia, filed by:

THE INDONESIAN BROADCASTING COMMISSION, in this matter represented by Dr. S. Sinansari Ecip; Sasa Djuarsa Sendjaja, Ph.D; Dr. Andrik Purwasito, DEA; Dr. Ilya Revianti Sunarwinadi; Dr. Ade Armando; Amelia Hezkasari Day, SS; Bimo Nugroho Sekundatmo, SE, M.Si; Drs. Dedi Iskandar Muda, MA, all of them are Members of the Indonesian Broadcasting Commission, having their address at the State Secretariat Building, Fourth Floor, Jalan Gajah Mada Number 8, Jakarta, acting jointly or individually for and on behalf of the Indonesian Broadcasting Commission;

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

Having read the petition of the Petitioner;

Having heard the statement of the Petitioner;

Having heard and read the written statements of the Government;

Having heard and read the written statements of the People's
Legislative Assembly of the Republic of Indonesia

Having heard the statements of the Experts and Witness of the
Petitioner;

Having heard the statements of the Experts and Witnesses of the
Government;

Having read the written statement of the Indirect Related Party,
Indonesia Media Law and Policy Centre;

Having examined the evidence;

LEGAL CONSIDERATIONS

Considering whereas the purpose and objective of the petition of
the Petitioner are as described above.

Considering whereas the following matters will be taken into account in this case:

1. The authority of the Constitutional Court (hereinafter referred to as the Court) to examine, hear, and decide upon the petition of the Petitioner;
2. The legal standing of the Petitioner;
3. The principal issue of the petition, namely concerning the constitutionality of the paragraph, article, and/or section of the laws petitioned for judicial review.

Considering whereas in respect of the foregoing three issues, the Court is of the following opinion:

1. AUTHORITY OF THE CONSTITUTIONAL COURT

Considering whereas based on Article 24C Paragraph (1) of the 1945 Constitution as subsequently reaffirmed in Article 10 Paragraph (1) Sub-Paragraph (1) of Law Number 24 Year 2003 on the Constitutional Court (State Gazette of the Republic of Indonesia Year 2003 Number 98, Supplement to the State Gazette of the Republic of Indonesia Number 4316, hereinafter referred to as the Constitutional Court Law), one of the authorities of the Constitutional Court is to conduct judicial review of laws against the 1945 Constitution;

Considering whereas the petition of the Petitioner is for the judicial review of the Law Number 32 Year 2002 on Broadcasting (State Gazette of the Republic of Indonesia Year 2002 Number 139, Supplement to the

State Gazette of the Republic of Indonesia Number 4252, hereinafter referred to as the Broadcasting Law), so that the *a quo* petition is within the scope of authority of the Constitutional Court;

Considering whereas the People's Legislative Assembly of the Republic of Indonesia, in its written statement dated February 22, 2007, has stated that the provision of Article 42 Paragraph (2) of the Regulation of the Constitutional Court (PMK) Number 06/PMK/2005 is contradictory to Article 60 of the Constitutional Court Law, and based on such provision the Constitutional Court has annulled Article 60 of the Constitutional Court Law, and the Constitutional Court has extended its authority in conducting judicial review of Law through Article 42 Paragraph (2) of the PMK Number 06/PMK/2005, and such provision of the PMK is not a procedural law provision.

Considering whereas apart from the objection of the People's Legislative Assembly to the PMK Number 06/PMK/2005 concerning the granting of permission to file a judicial review of the substance, paragraph and/or section of the law which have already been reviewed by the Court in so far as there is a different constitutionality requirement or reason, which according to the People's Legislative Assembly is in contradiction with Article 60 of the Constitutional Court Law, but the Petitioner's petition for the judicial review does not merely involve Article 62 Paragraph (1) and Paragraph (2), but also involves Article 33 Paragraph (5) of the

Broadcasting Law, and hence because the Court has the authority to examine and decide upon the Petitioner's petition, the objection of the People's Legislative Assembly will be considered simultaneously with the Principal Issue of the Petition.

2. LEGAL STANDING

Considering whereas Article 51 Paragraph (1) of the Constitutional Court Law with its elucidation have stipulated that the Petitioners in a judicial review of a law against the 1945 Constitution shall be the parties that deem their constitutional rights and/or authorities are 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;

Considering whereas therefore, for a party to qualify as Petitioner in a petition for judicial review of a law against the 1945 Constitution, such party must explain:

1. his qualification in the petition, either as an individual Indonesian

citizen, a customary law community unit, a public or private entity, or a state institution;

2. The impairment of his constitutional rights and/or authorities by the coming into effect of the law petitioned for judicial review.

Considering whereas following the Court's Decision Number 006/PUU-III/2005 and its subsequent decisions, the Court has determined five requirements of the constitutional rights and/or authorities impairment as intended in Article 51 Paragraph (1) of the Constitutional Court Law, namely:

- a. The Petitioner must have constitutional rights granted by the 1945 Constitution;
- b. Such constitutional rights are deemed to have been impaired by the coming into effect of the law petitioned for review;
- c. The impairment of constitutional rights and/or authority shall be specific and actual or at least potential in nature which, pursuant to logical reasoning, will take place for sure;
- d. There is a causal relationship (*causal verband*) between the impairment of constitutional rights/authority and the coming into effect of the law petitioned for judicial review;
- e. If the petition is granted, it is expected that such impairment of the constitutional rights and/or authority argued will not or does not occur any longer.

Considering whereas the Petitioner consisting of eight members of the Indonesian Broadcasting Commission (KPI) have been appointed based on the Presidential Decree Number 267/M Year 2003, have declared to have acted jointly or individually for and on behalf of KPI. Therefore, the eight Petitioners deem that they qualify as a state institution based on Article 1 Sub-Article 13 of the Broadcasting Law which provides that "*The Broadcasting Commission is an independent state institution which exists in the capital city and in the regions, whose duties and authorities are regulated in this law as a form of community participation in the field of broadcasting*";

Considering whereas in accordance with the decision of the Constitutional Court Number 005/PUU-I/2003 dated July 28, 2004, the Court has determined that the terminology of state institution does not always mean a state institution as mentioned in the 1945 Constitution whose existence is mandated by the constitution, but there is also a state institution established based on Law and there is even a state institution established based on a regulation which is below the law, and the Court is of the opinion that KPI is a state institution whose establishment and authority are granted by a law, *in casu* the Broadcasting Law. The Court's opinion has been set forth in the aforementioned decision of the Court;

Considering whereas because the Petitioner qualifies as a state institution, then in accordance with the provision of Article 51 Paragraph

(1) of the Constitutional Court Law, the impairment of the constitutional rights of the Petitioner by the coming into effect of a law is required to establish the legal standing basis to file a petition for judicial review;

Considering whereas according to the Petitioner, based on Article 1 Sub-Paragraph 13 and Article 7 Paragraph (2) of the Broadcasting Law, KPI which is determined as an independent state institution regulating matters concerning broadcasting, becomes not independent if the regulations are made through Government Regulations as stipulated in Article 62 Paragraphs (1) and (2) of the Broadcasting Law, so that according to the Petitioner, such Law has impaired the Petitioner's constitutional rights. The same applies to "**matters concerning broadcasting**" that include the whole broadcasting matters, including the granting of permit, as a result of reform spirit shall lie on the community itself, so that the broadcasting permit formulated by the phrase "**the State through KPI**" which shall be interpreted in such a way that the permit is granted by the Government, is deemed impairing the Petitioner's constitutional rights, because it is not in accordance with Article 28D Paragraph (1) of the 1945 Constitution;

Considering whereas referring to the elements concerning the legal standing requirements, the Petitioner is of the opinion that the Broadcasting Law particularly Article 62 Paragraphs (1) and (2) and also Article 33 Paragraph (5) have impaired its constitutional rights, be it with

regard to the causal relationship (*causal verband*), impairment of specific nature, and the possibility that the impairment will not occur any more if the petition is granted. In this respect the Court is of the opinion that the Petitioner's constitutional rights impairment caused by the coming into effect of the Broadcasting Law will be explicitly decided by considering it simultaneously with the substance or the Principal Issue of the Petition, so that the Court will decide whether or not the Petitioner's legal standing exists in the consideration section of the Principal Issue of the Petition;

Meanwhile two Constitutional Court Justices have dissenting opinion, by strongly believing that the Petitioner does not have legal standing, because based on the Constitutional Court opinion in the case Number 030/SKLN-IV/2006 it has been stated that the authority of KPI is not a constitutional authority granted by the 1945 Constitution, so that *mutatis mutandis* in the matter of the judicial review of law against the 1945 Constitution, KPI does not have constitutional rights either, and hence KPI does not suffer any constitutional impairment as a result of the coming into effect of the Broadcasting Law. With such opinion, two Constitutional Court Justices are of the opinion that without going further into the Principal Issue of the Petition, the Court can immediately declare the Petitioner's petition cannot be accepted;

Considering whereas because the Court has the authority to examine, hear, and deciding upon the *a quo* petition, but that the

Petitioner's legal standing relates to the Principal Issue of the Petition, then the determination on the Petitioner's legal standing to file the *a quo* petition will be considered simultaneously with the following Principal Issue of the Petition.

3. PRINCIPAL ISSUE OF THE PETITION

Considering in the Principal Issue of the Petition, the Petitioner has argued that Article 62 Paragraphs (1) and (2) and also Article 33 Paragraph (5) of the Broadcasting Law, are contrary to Article 28D Paragraph (1) of the 1945 Constitution, which arguments are as follows:

a. Article 62 Paragraphs (1) and (2)

Article 1 Sub-Paragraph 13 and Article 7 Paragraph (2) of the Broadcasting Law, confirm that KPI is an independent state institution which regulates matters concerning broadcasting, however Article 62 Paragraphs (1) and (2) stipulate that the regulations concerning broadcasting are made in the form of Government Regulations. A state institution cannot be independent if its authority is regulated by Government Regulations, because it will open a big opportunity for intervention of the Government that according to the 1945 Constitution has monopolized the constitutional authority in the making of Government Regulations. To guarantee the independence of KPI as an independent agency,

KPI has been granted with the right of self-regulating authority, which is in accordance with Article 7 Paragraph (2) of the Broadcasting Law as well as the doctrine that an independent state institution is a self regulatory body. If Government Regulations monopolize the regulation of the detail of KPI's authority, then KPI will tend to transform into an executive agency. An independent state institution is a state organ which is designed to be independent and therefore exists outside the executive, legislative and judicial power branches, and in accordance with the opinion of Funk and Seamon, an independent state institution often has a "quasi legislative power, executive power and quasi judicial power". Although the contradictory provisions are the provisions in Article 1 Sub-Paragraph 13 and Article 7 Paragraph (2) and Article 62 Paragraphs (1) and (2) of the Broadcasting Law, Article 1 Sub-Article 13 and Article 7 Paragraph (2) are not petitioned for judicial review because the Constitutional Court has decided that the regulation of KPI as a State Institution is not contrary to the 1945 Constitution. However, Article 62 Paragraphs (1) and (2) clearly obstruct the Petitioner in exercising its authority as an independent state institution, and the regulation of the Petitioner's authority concerning broadcasting is not in line with the concept of independent state institution which has already been recognized by the Constitutional Court, so that such matter has created legal

uncertainty and is contrary to Article 28D Paragraph (1) of the 1945 Constitution.

b. Article 33 Paragraph (5)

The phrase "**by the state**" in Article 33 Paragraph (5) of the Broadcasting Law creates legal uncertainty and is contrary to Article 28D Paragraph (1) of the 1945 Constitution, because in practice, the phrase "**by the state**" has been interpreted as referring to the Government, in particular the Ministry of Communication and Informatics, in fact if that is the case, then the phrase should have clearly stated "granted by the **Government** through KPI", in accordance with the definition in Article 1 Sub-Article 12 that "the Government shall be the Ministry or other officials appointed by the President of the Governor".

Considering whereas to support its petition's arguments, the Petitioner has submitted written evidences in the form of Exhibits P-1 through P-6, and a witness and three experts, whose statements have been set forth in complete version in the Principal Case section, which basically have stated the following matters:

1. Witness Drs. H.A. Effendy Choirie M.Ag., M.H.

- The Broadcasting Law has been a mandate of reform to replace the previous Broadcasting Law which has been regarded as

undemocratic. In this Law, there are some important points to be noticed by all parties, *first, demand for democracy, second, demand for deregulation*, so that the frequency channel as a limited public domain is not controlled by certain people only but shall be fairly distributed within the whole territory of Indonesia.

- This limited public domain shall be regulated by a specific agency which we call the Indonesian Broadcasting Commission, by determining the philosophical and sociological basis thereof and the spirit of Article 33 of the 1945 Constitution is there although only by implication.
- Because of the opinion that the broadcasting commission shall not manage the whole matters, due to the new start of the democracy, the regulation formulation has been stipulated in the articles as "KPI together with the Government", not "the Government with KPI", including in the matter of the Government Regulation, which is in fact a compromise, but our intention at that time was that all should be made by KPI not the Government, because the pendulum of democracy or reform shall be with KPI and no longer with the Government;
- The spirit within the People's Legislative Assembly at that time was that the substance shall be regulated by KPI by asking the Government's participation in formulating the Government

Regulations, but KPI shall be the leading sector, thereafter the regulation shall be passed to the President. It has been mutually agreed. However, according to the witness, the interpretation of that law is not strictly grammatical, but that historical, philosophical, and theological interpretations are also important;

- The Government's statement that KPI merely manages the content is totally incorrect; instead KPI as a state institution which regulates broadcasting shall include all matters, except for the frequency permit.

2. Expert Prof. M. Alwi Dahlan, Ph.D.

- Broadcasting is a very important communication media which currently is the only media capable to reach the whole territory of our country, all at once and at the same time. Broadcasting has a potential to gather opinion and stimulate common actions, sometimes spontaneously, so that in communication literature, broadcasting is also known as hot media, and that it spontaneously heats and has a direct effect. Therefore, it is reasonable that such media becomes an arena for power and domination in society for various purposes be it politics, economy, business, groups' or individual's belief.

- Therefore, in many countries, broadcasting is regulated by a state institution that has strong constitutional authority so that it can work independently, unrelated with parties who have direct interest. The sole reference basis of such institution shall be solely the interest of the people at large and the interest in social life. The list of countries that turn from Government regulation to independent state institutions becomes longer, moreover, most of the former communist countries have turned to such independent institution.
- The other source of authority bias which has been mentioned in Article 33 of the 1945 Constitution, wherein the broadcasting uses physical media of frequency which in fact is natural resource commonly owned by the people of Indonesia. Broadcasting is often regarded the same as the press. In fact, the press media uses private or corporation resources, but broadcasting uses resources commonly owned by the community. It is true that the frequency as natural resources cannot be treated alike with other natural resources which can be exploited as physical products, but it needs bigger and more extensive effort, not only in respect of content but also the whole implementation, because if it is concerned solely with the content, we will actually come back to the former regulating

concept. We are of the opinion that this law shall mean democratization of communication.

- In the United States of America, specifically in regard to broadcasting, the regulatory body is the Federal communication commission, a federal broadcasting commission that regulates broadcasting. Although it is outside the Government, it has a very extensive reach, not only in respect of the broadcasting station permit issue but also the issue of regulating the standardization of frequency conduction technology.

3. Expert Effendy Ghazali Ph.D.

- According to Prof. Dennis McQual what we are currently and have long been discussing can be categorized into three aspects, namely the interest of the investor, the interest of the public and the interest of the Government;
- The first assumption is that investors are afraid of the public's interest in the broadcasting domain and they will try to hide behind the Government. The second assumption is that the Government that doubtfully or not seriously takes the public's interest into account will prefer to take the side of investors, and the third assumption is that the public are forced to surrender to the investor's interest in the broadcasting industry context;

- The previous Broadcasting Law was created as a compromise in communication politics domain where there were investor's interests at the background, as that which what happened in various countries in the world. The question is why we cannot just return to the spirit of the Broadcasting Law by giving back the authority especially the leading sector to KPI. If not, then our reform will not go to the direction that is commonly taken in many other countries, but we will go back to the paradigm which moves back where we have left broadcasting matters to the Ministry of Communication and Informatics with its staff;

4. Expert Hinca Panjaitan, S.H., M.H., ACCS.

- The Broadcasting Law seriously adopts the idea of an independent institution that regulates broadcasting to replace the Government's role that exercises very strict control. Then this idea becomes its legal norm and material as noticeable and easily read in Article 6 through Article 7. The formulation of Article 6 and Article 7 which interpret that the Government no longer manages broadcasting matters including the words "matters concerning broadcasting" in fact describes the whole matters concerning broadcasting. This is because the spirit is indeed totally terminating the Government's total domination during all this time;

- The policy making function concerning the frequency spectrum allocation has been regulated in Law Number 36 Year 1999 on Telecommunication, where the state (read: the Government) is represented by the Directorate General of Post and Telecommunication which is currently under the Ministry of Communication and Informatics. Meanwhile the regulatory function, the control and supervisory function lie in the hands of the Indonesian Broadcasting Commission, including but not limited to the position of permit regulation. The Joint Forum Meeting between the Indonesian Broadcasting Commission and the Government (read: the Directorate General of Post and Telecommunication) has been firmly convened in order to ensure that the frequency allocations to be granted to the broadcasting institutions are already in accordance with the policy and regulations stipulated by the state;
- Therefore, the interpretation of "the permit shall be granted by the state through KPI" in Article 33 Paragraph (4) is an interpretation that the permit shall be granted by KPI not by the Government. The role of the Government is merely to ensure that the frequency allocation to be granted to an applicant or a broadcasting institution is in accordance with its intended purpose as stipulated in the telecommunication regulations. The permit granted by KPI after the Joint Forum Meeting shall be

referred to as the Broadcasting Permit while with respect to the frequency allocation granted by the broadcasting institution a Radio Station Permit shall be granted in the form of call sign in line with the international telecommunication regulation. Therefore there is not even little doubt that actually “the permit granted by the state through KPI” has a very clear meaning ...”the broadcasting permit shall be granted by KPI”;

5. Expert Denny Indrayana, SH.,LL.M.,PH.D (Written Statement)

- There are many expert opinions which state that the independence criteria of an institution exist, among others, if explicitly stated in the law concerning the relevant commission, or if the President is restricted in or cannot freely decide the dismissal of the head of the commission (William J. Fox); the independent nature closely relates to the dismissal of the members which can only be made based on reasons regulated in the law establishing the commission (Michael R. Asimov); the independent nature shall be reflected in: (1) the collectivity of the leadership, (2) the leadership is not controlled by/the majority of the leadership do not come from certain political parties, and (3) the terms of service of the commission’s members do not expire concurrently, but shall be staggered terms;

- Another characteristic of independent state institutions is the authority to issue an independent regulation in connection with its duty (self-regulatory agency). This is in line with Article 7 Paragraph (2) of Law Number 32 Year 2002 which provides that "KPI as an independent state institution shall regulate matters concerning broadcasting". In order to guarantee the independence of KPI, the broadcasting matters should be regulated in a product of law which shall be further stipulated in KPI Regulations;
- Further regulation concerning broadcasting in the form of Government Regulations as stipulated in Article 62 Paragraphs (1) and (2) of the Law Number 32 Year 2002, has a potential to disturb the independence of KPI. The regulation in the form of Government Regulations, has made it more appropriate for KPI to be classified as an executive agency rather than as an independent agency;
- With regard to Article 33 Paragraph (5) of the Broadcasting Law, it is better to explicitly stipulate the granting of permit through KPI in order to ensure legal certainty. In practice, the Minister of Telecommunication and Informatics unilaterally interprets "the State as the Government". In fact "the Government" has been specifically interpreted in Article 1 Sub-Article 12 of the

Broadcasting Law, hence the meaning of "the state" in Article 33 Paragraph (5) shall be outside the Government that has had a special meaning pursuant to the Broadcasting Law;

Considering whereas the Government has presented its written statement that was read in the hearing in February 19, 2007, along with verbal statement and responses, as completely set forth in the Principal Case section, which basically have stated the following matters:

- The provision of Article 33 Paragraph (5) in the Broadcasting Law in the eleventh section under the sub-title of permit cannot be separated from Article 33 Paragraph (8) as well as Article 62 Paragraphs (1) and (2), therefore although it was not separately petitioned in the previous petition, but the Petitioner admits that it is inseparable from the articles that have been petitioned for review.
- Article 33 Paragraph (5) of the Broadcasting Law basically stipulates that based on consensus (this is with reference to the provision in Paragraph (4)], administratively, the broadcasting permit shall be granted by the state through KPI. Article 33 Paragraph (8) of the Broadcasting Law stipulates "further provisions concerning the procedure and requirements of broadcasting shall be formulated by the Government", and the provision of Article 33 Paragraph (8) of the Broadcasting Law that is included in Article 62 Paragraph (1) of the

Broadcasting Law which has been amended as a result of the petition for judicial review.

Therefore the substantive content of Article 33 Paragraph (5) is an integral part with Article 33 Paragraph (8) and with Article 62 Paragraph (1). Hence according to the Government, the Petitioner's petition cannot be just separated from or become independent of Article 33 Paragraph (5) of the Broadcasting Law.

Furthermore, in connection with the argumentation that relates this petition with the provision of Article 42 Paragraph (2) of the Constitutional Court Regulation Number 06/PMK/2005 which declares the possibility to review the content of a Paragraph, and or a part that is the same as a case which is already decided by the Constitutional Court having different constitutional requirements as grounds for the petition.

The Government is of the opinion that different constitutionality requirements are not present as provided for in Article 51 of Law Number 24 Year 2003 on the Constitutional Court in conjunction with Article 42 Paragraph (2) of the Constitutional Court Regulation Number 06/PMK/2005 concerning the Guidelines on the Procedures for Judicial Review Cases.

- Whereas Article 8 of the Broadcasting Law expressly stipulates that the Petitioner's authority shall include the authority regarding the content of the broadcasting and shall not include the authority concerning permit matters.
- Whereas the Petitioner's authority as intended in Article 8 Paragraphs (1) through (3) of the Broadcasting Law, has strongly indicated the existence of harmony between the function and role of the Petitioner as a form of community's participation.

Furthermore, the Petitioner's authority is also confirmed in the elucidation of Article 8 Paragraph (2) Sub-Paragraph c of the Broadcasting Law, namely that it is limited to supervisory authority based on the implementation of provisions made by KPI in the form of description of Article 8 Paragraph (2) Sub-Paragraphs a through d of the Broadcasting Law, which consists the regulation concerning the broadcasting content only.

Therefore, the regulation in the field of broadcasting should be referred back to the provision of Article 7 Paragraph (2) of the Broadcasting Law, but the understanding that such regulatory authority through KPI Regulation is within the context of implementing the Government Regulation as Implementation of the Broadcasting Law (*vide* Constitutional Court Decision Case 005/PUU-I/2003).

Whereas the independent nature of the petitioner as stipulated in Article 7 Paragraph (2), cannot be separated from the Petitioner's authority based on Article 8 Paragraph (2) Sub-Paragraphs a through d of the Broadcasting Law, which merely consists of authority concerning the broadcasting content as mentioned above;

The same applies with the legal position of Article 7 Paragraph (2) of the Broadcasting Law, which stipulates "KPI as an independent state institution shall regulate matters concerning broadcasting", must be understood in its role as a neutral state institution with the duty to regulate matters concerning broadcasting in its role in community's empowerment in exercising social control and its participation in national broadcasting development, by accommodating the community's aspiration and representing public interest in the broadcasting itself;

Considering whereas to support its arguments, the Government also has presented documentary evidence in the form of Exhibit T-1 through Exhibit T-4, as well as a witness and an expert, whose statements have been completely set forth in the Principal Case section, which basically have stated the following matters:

1. **Expert Prof. Dr. I Gde Pantja Astawa, S.H., M.H.**

- The Government Regulation shall be the full authority of the Government, without intervention from the People's Legislative Assembly, because a delegation occurs from the Legislator to the Government, whereas later on there is a concern that a blank delegation will occur, a judicial review system has been established should a party objects to the Government Regulation that becomes the authority of the Supreme Court. The Government's authority in legislative function must be linked to Article 5 Paragraph (2) in Indonesian legislation system to break down a law through a Government Regulation as a constitutional mandate.
- Law Number 10 Year 2004 does not recognize that which is called KPI Regulation, and refers explicitly to the 1945 Constitution as the highest regulation and subsequent regulations through Perda. Therefore within the context of Indonesian legislation system, based on the Constitution, it is appropriate for the Government to issue Government Regulations, whereas any disapproval of the substance of the Government Regulation later on is another matter.
- The Government has an administrative function, because the highest state administrator office is embodied within the President, who shall have the authority to issue permit, which authority is later on derivatively granted to the Minister responsible for broadcasting matters.

- The clause in the Human Rights Chapter is intended to provide guarantee and legal protection for individual persons not institutions. Whereas according to the expert, it is not relevant for KPI to refer to one provision in Article 28D of the 1945 Constitution, meaning that it does not touch upon its constitutional rights as an institution. Citing the definition of human rights in the Law of the Republic of Indonesia Number 39 Year 1999, the Human Rights refer to a set of rights attached to a human being as a gift from God, which must be respected, protected and upheld by the State, the Government, the law and individual persons. Speaking of human rights in the constitution, then it is the main responsibility of the Government, not solely KPI's domain.
- By referring to our state administration system, then in connection with the Broadcasting Law, the authority to issue regulation as well as in relation to permits, shall remain with the Government, and if KPI does not agree with the substance of the Government Regulation, then the judicial review mechanism is available.

2. Witness Jonggi Humala Tua Manalu

- The witness is coincidentally an administrator of PRSSNI, so that in organizational respect, the witness is involved in the constitutional review, and at that time we complained or objected to the existence of

an institution that hold three authorities at the same time, because we were afraid that this would become stronger than the former Ministry of Information. Formerly, it was involving other institutions, now all authorities are within one institution, both with respect to the granting of permit and execution, so that a question arises as to who shall control and the lack of balance;

- The victims actually are the broadcasting institutions, and to our understanding, reform is an improvement of what has been imperfect during the previous era. During the previous era, normally if the permit was issued in March, and the administrative matter was issued in June. Currently, in November 2006, more or less one thousand eight hundred radios, seventy local televisions, ten national televisions are illegal. The witness thinks why the reform caused more issues, and all are stopped. Therefore the witness appeals to the victim of the broadcasting industry be it radio or television, that this dispute is stopped, because this Republic would become unorganized.

Considering whereas the Attorneys' Team of the People's Legislative Assembly of the Republic of Indonesia (DPR-RI) has also presented written statement as read in the hearing of the Constitutional Court on March 8, 2007, as completely set forth in the Principal Case section, which basically has stated the following matters:

- Article 62 Paragraphs (1) and (2) is petitioned for review because it is deemed contrary to Article 28D of the 1945 Constitution. According to the Petitioner, due to the regulation of broadcasting in the form of Government Regulation, it will be difficult for KPI to become an independent state institution as guaranteed in Article 1 Sub-Article 13 and Article 7 Paragraph (2) of the Broadcasting Law and that it will cause the regulation of broadcasting issues to be under the executive interest, which more or less will affect the independence of KPI.
- According to the Petitioner, the phrase "by the State " in Article 33 Paragraph (5) creates legal uncertainty and therefore must be declared contrary to Article 28D Paragraph (1) of the 1945 Constitution, because in practice, the phrase "by the State " is interpreted as "by the Government", in particular the Ministry of Information. In fact, if it is true that what was intended by the State is the Government, the Petitioner is of the opinion that the phrase must expressly states, "granted by the Government through KPI". Such affirmation will be consistent with the definition of Article 1 Sub-Article 12 of the Broadcasting Law.
- Article 62 Paragraphs (1) and (2) of the Broadcasting Law was reviewed and decided by the Constitutional Court on July 28, 2004 under Case Number 005/PUU-I/2003, so that based on Article 60 of the Constitutional Court Law they cannot be reviewed once again by the Constitutional Court.

- The regulation of broadcasting in the form of Government Regulation as mandated by Article 62 Paragraphs (1) and (2) of the Broadcasting Law which according to the Petitioner has created legal uncertainty and therefore is contrary to Article 28D Paragraph (1) of the 1945 Constitution, is a mistaken opinion, because the regulation in the form of Government Regulations as intended by Article 62 Paragraphs (1) and (2) is already correct pursuant to Article 5 Paragraph (2) in conjunction with Article 10 of the Law of the Republic of Indonesia Number 10 Year 2004 concerning the Formulation of the Laws and Regulations.
- The authority granted to KPI to regulate broadcasting matters is reflected in Article 14 Paragraph (10), Article 18 Paragraph (3) and Paragraph (4), Article 29 Paragraph (2), Article 30 Paragraph (3), Article 31 Paragraph (4), Article 32 Paragraph (2), Article 33 Paragraph (8), Article 55 Paragraph (3) and Article 60 Paragraph (3) of the Broadcasting Law. The provisions of the aforementioned articles have granted the role and authority to KPI to regulate matters concerning broadcasting jointly with the Government. KPI's involvement with the government in formulating Government Regulations has been a result of political compromise and here KPI has received sufficiently dominant place to formulate Government Regulations.

- The authority of KPI as stipulated in Article 7 Paragraph (2) of the Broadcasting Law cannot be separated from the provision of Article 62 Paragraphs (1) and Paragraph (2), meaning that they must be read as an integral part. Article 7 Paragraph (2) grants the authority and Article 62 Paragraph (1) and (2) stipulates that such authority must be exercised jointly with the Government.
- The Law on Bank Indonesia explicitly grants authority to Bank Indonesia to issue Bank Indonesia Regulations, meanwhile in the Broadcasting Law, the Indonesian Broadcasting Commission is not granted with the authority to issue Indonesian Broadcasting Commission's Regulations. Therefore, the difference of authorities granted by the law to independent state institutions is clear. Based on such juridical argumentation, Article 62 Paragraphs (1) and (2) of the Broadcasting Law are not contrary to Article 28D Paragraph (1) of the 1945 Constitution.
- The Petitioner's argument that the phrase "by the State" in Article 33 Paragraph (5) of the Broadcasting Law which is interpreted as a phrase "by the Government", is not relevant to legal certainty, because legal certainty can be understood as the availability of legal protection by the Law which is implemented in law enforcement measures. There is a theory in the State Administration Law that deems the state to be in a static condition while the Government is in dynamic condition,

meaning that the state is the organization and the Government is the state organ that administers the governance. Whereas the authority granted to the Government to administer the state can be seen in Chapter III concerning the Powers of the State Government Administration, Article 4 through Article 16 of the 1945 Constitution;

Considering whereas the statements of the Attorneys' Team of the People's Legislative Assembly of the Republic of Indonesia have in fact been in contradiction with the Statement presented by the Member of Commission I of the People's Legislative Assembly of the Republic of Indonesia, which verbally has stated the following matters:

- The birth of KPI has been a manifestation of the extremely rapid democratization which has become the people's demand. KPI is a social institution which has checks and balances functions, hence a part of the Government's role is distributed to the community. In this case, KPI as an independent institution and which serves the function of regulating matters concerning broadcasting should be granted the authority to regulate broadcasting-related matters. The problem arises when the Government, based on its legal interpretation, makes regulations which create *contradictio in terminis* with the articles in the Broadcasting Law.
- Therefore, Commission I of the People's Legislative Assembly in meetings with the Ministry of Telecommunication and Informatics

always takes the position to safeguard the law and, in this connection, **together with the Petitioner**, to uphold the law that becomes a dispute from the legal point of view. Therefore, Commission I rejects five Government Regulations concerning Broadcasting.

- If KPI states that the permit should be granted by KPI because the state shall mean KPI, in this case as an independent state institution, and the Government interprets the state as the Government itself, then both have their respective references, but such interpretations create uncertainty to KPI itself.
- The People's Legislative Assembly has once recommended a political compromise by joint signatures between the Government and KPI, taking into consideration that both claims have legal basis. Actually if the understanding that the regulation shall be established jointly by the Government and KPI or KPI and the Government, if both parties have the same empathy regarding the position of that statement, then the Government Regulations should have been acknowledged, understood and agreed by both parties. In fact, that is not the case, because there is a party who takes step too far by claiming that that is its own authority, so that this dispute occurs, and until now the recommendation or suggestion of the People's Legislative Assembly to have a compromise by joint signatures has yet to be implemented.

Considering whereas the Indirect Related Party, namely the Indonesian Media Law & Policy Centre (IMLPC), based on document of minutes of meeting of the Secretariat of the Commission I of the People's Legislative Assembly, has presented statements of *ad informandum*, as completely set forth in the principal case section, which basically have stated the following matters:

- Whereas from the beginning, the related party has found that the initiative draft law on Broadcasting has mentioned the Indonesian Broadcasting Commission as an independent broadcasting regulatory institution;
- Whereas Broadcasting Regulatory Body in principle is a state institution which, by the law, is granted with the authority on behalf of the state, to exercise all provisions of the Broadcasting Law, accompanied by a confirmation that from the beginning the Draft Law initiators have reminded that the new Broadcasting Law is intended to anticipate the ambiguity regarding the legal certainty in the field of broadcasting occurred in the past with various kinds of implementing regulations.
- Whereas the responses from the Faction of Indonesian Armed Forces/The Police of the Republic Indonesia, *Kasih Bangsa* Democratic Party Faction, Indonesian National Unity Faction, the National Awakening Faction, Functional Group (Golkar) Faction, the

Indonesian Democratic Party of Struggle Faction, generally emphasize the need for an independent institution which handles broadcasting, to be managed by the Civil Society and shall no longer be dominated by the Government;

Considering whereas subsequently based on the statements of the Government, the People's Legislative Assembly, Witnesses, Experts, and the Related Party, the Court will consider the following matters:

1. Because there is already a preceding Court's Decision in the Case Number 005/PUU-I/2003 concerning the judicial review of the same article of the *a quo* law, whether the substance of the Court's decision differ from the case petitioned for review;
2. How an interpretation should be done on a provision of a law;
3. Whether the judicial review of Article 62 Paragraphs (1) and (2) as well as Article 33 Paragraph (5) of the Broadcasting Law petitioned by the Petitioner can be deemed as impairing the Petitioner's authority, pursuant to the provision of Article 51 Paragraph (1) of the Constitutional Court Law, even though the Petitioner was established and created by the enactment of the Broadcasting Law;
4. If KPI does not accept that the exercise of the authority to issue Broadcasting permit by the Government as the interpretation of the phrase "*by the Government through KPI*", then the substance of the issue is whether the *a*

quo law or the Government Regulation which shall regulate the intended authority of KPI;

Considering whereas the Constitutional Court Decision dated July 28, 2004 Number 005/PUU-I/2003, which pertained to the judicial review of Article 7 Paragraph (2), Article 10 Paragraph (1) Sub-Paragraph g, Article 14 Paragraph (1), Article 15 Paragraph (1) Sub-Paragraphs c and d, Article 16 Paragraph (1), Article 18 Paragraph (1), Article 19 Sub-Paragraph a, Article 20, Article 21 Paragraph (1), Article 22 Paragraph (2), Article 26 Paragraph (2) Sub-Paragraph a, Article 27 Paragraph (1) Sub-Paragraph a, Article 31 Paragraphs (2), (3), and (4), Article 32 Paragraph (2), Article 33 Paragraphs (4) and (8), Article 34 Paragraph (5) Sub-Paragraphs a, e, f, Article 36 Paragraph (2), Article 44 Paragraph (1), Article 47, Article 55 Paragraphs (1), (2) and (3), Article 60 Paragraph (3), and also Article 62 Paragraphs (1) and (2) of the Broadcasting Law, which was petitioned by 6 (six) groups of broadcasting actors as Petitioners, both as business people as well as workers in the field of broadcasting;

Considering whereas in its decision, the Court has declared that the phrase, "... *or an objection occurs*", in Article 44 Paragraph (1) of the Broadcasting Law and the phrase, "...*KPI together with*..." in Article 62 Paragraphs (1) and (2) of the Broadcasting Law are contrary to the 1945 Constitution and therefore shall not have any binding legal effect. The Court's

consideration on the statement of in constitutionality of Article 62 Paragraphs (1) and (2) of the Broadcasting Law reads as follow:

"Article 62 of the Broadcasting Law states that the said regulating authority of the Indonesian Broadcasting Commission (KPI) and the Government is set forth in the form of a product of law namely a Government Regulation, whereas based on the provision of Article 5 paragraph (2) of the 1945 Constitution, Government Regulation is a product of law stipulated by the President to implement the law in a proper manner. In formulating a government regulation, the President may receive inputs from a variety of sources related to the principal issue to be regulated, but the sources concerned do not need to be explicitly set forth in Law requiring a government regulation for its implementation. Accordingly, the above mentioned provision of Article 62 of the Broadcasting Law is in fact contradictory to the 1945 Constitution, so that it must be declared as having no binding legal effect. Therefore, it would be proper if the authority of regulation in the field of broadcasting is returned to the provision of Article 7 Paragraph (2) of the Broadcasting Law which states that "The Indonesian Broadcasting Commission (KPI) as an independent state institution regulates matters concerning broadcasting", however with the understanding that such an authority to regulate through the Indonesian Broadcasting Commission (KPI) Regulation is in the context of implementing Government Regulation as an implementation of the Broadcasting Law";

Considering whereas following the Court's Decision Number 005/PUU-I/2003, with the aforementioned legal considerations, the People's Legislative Assembly is of the opinion that pursuant to Article 60 of the Constitutional Court Law the judicial review of Article 62 Paragraphs (1) and (2) of the Broadcasting Law should not be conducted anymore. However, Article 42 Paragraph (2) of the Constitutional Court Regulation Number 06/PMK/2005, makes it possible to review once again the petition for judicial review of Article 62 Paragraphs (1) and (2) of the Broadcasting Law. According to the People's Legislative Assembly, based on the *a quo* provision of Article 42 Paragraph (2) of the Constitutional Court Regulation, the Court has extended its authority, even though Article 86 of the Constitutional Court Law only gives mandate to regulate further the necessary law of procedures and not to regulate the substantive law.

Towards such opinion of the People's Legislative Assembly, the Court is of the opinion that it is obvious, both the grounds and the statement of claims (petitum) of the petition submitted in the Case Number Number: 005/PUU-I/2003 were different from the grounds and the statement of claims (petitum) of the petition submitted in this case. Moreover, Article 42 Paragraph (2) of the Constitutional Court Regulation Number 06 Year 2005 is in the context of complementing the procedural law in accordance with the intention of the Elucidation of Article 86 of the Constitutional Court Law which reads, "*This provision is intended to fill in the possibility of insufficiency or a vacancy in the procedural law based on this Law.*" Article 42 Paragraph (2) of the Constitutional Court Regulation Number 06 Year

2005 cannot be categorized as substantive law, because the making of that law, which is affirmed by Article 86 of the Constitutional Court Law, is to fulfill the need as a result of vacancy of procedural law arising from Article 60 of the Constitutional Court Law. Such vacancy occurs because according to Article 60 of the Constitutional Court Law, a law that has already petitioned for judicial review cannot be petitioned for another judicial review. In fact, it often occurs that a provision of a law can be reviewed against different articles of the 1945 Constitution, as what has been used by the Petitioner as grounds. In addition, it can also occur that a law which has been declared as conditionally constitutional by the Court, is, in implementation, not in accordance with the condition stipulated by the Court. That matter also needs a separate procedural law regulation. Therefore, it is clear that the regulation in Article 42 Paragraph (2) of the Constitutional Court Regulation Number 06/PMK/2005 is in fact intended to fill in the vacancy in the procedural law which is insufficiently regulated by Article 60 which is part of Chapter V of the Procedural Law, the Eight Section of the Constitutional Court Law;

Considering whereas according to the Petitioner, which is supported by Expert and Witnesses it has presented in the hearing, the reform spirit and soul which have been the basis of the Broadcasting Law to respond the demand for democracy and deregulation that expects the *leading sector* in the broadcasting regulation – including the granting of permit – to be left with the KPI as an independent institution to replace and to terminate the role and domination of the Government in controlling broadcasting, have been claimed to be made as

the basis in interpreting the Broadcasting Law. With regard to such opinion, the Court is of the opinion that whatever the chosen interpretation method is, the first starting point in understanding the law is the text of the law itself because the text of the law must be deemed as having accommodated all ideas and conceptual thoughts which have been set forth in words systematically formulated. If by reading such text the meaning of a particular law is clear, then it is not necessary to have other interpretation in understanding the meaning contained therein;

Considering whereas *in casu* the Petitioner's interpretation which relies on the spirit of reform towards deregulation and democratization of the field of broadcasting gives the leading role to KPI as an independent institution, including the licensing, and then the law which is a result of political compromise containing a common consensus, shall be formulated in explicit texts which reflect the intended compromise, because basically it is the text of the law which shall be the guidance in implementing such law. If the interpretation of Article 33 Paragraph (5) on the granting of broadcasting permit which is granted "by the State through KPI", which according to the Petitioner must be understood in such a way that the permit shall be granted by KPI on behalf of the State and not by the Government, the Court does not agree with such Petitioner's construction of thought, because Article 1 Sub-Article 13 –which formulates the definition of KPI– and Article 8 Paragraphs (2) and (3) –which regulates the scope of the duties and authorities of KPI– do not include the granting of permit in the scope of the duties and authorities of KPI. Therefore, the Court cannot accept the interpretation that sees Article 33 Paragraph (5) on the phrase "granted by the

State through KPI”, as having a meaning that the broadcasting permit shall be granted by KPI, because such phrase must also be read and interpreted within the scope of the duties and authorities of KPI pursuant to the *a quo* Broadcasting Law;

Considering whereas if such opinion of KPI is truly the policy choice which has been the spirit at the time when the Broadcasting Law was formulated, such opinion is not *expressis verbis* (explicitly) contained in the formulation of the *a quo* provision of the law. The policy that leaves the granting of permit to KPI on behalf of the state, or the issuance of the permit by the Government after receiving recommendation from KPI, both may be constitutional. However, the policy choice has to be clearly stated in the text of the law;

Considering also, the Petitioner has also stated that the independence of KPI as stipulated in Article 1 Sub-Article 13 and Article 7 Paragraph (2) shall be understood in such a way that KPI itself is the independent institution that regulates **”matters concerning broadcasting”**, so that it becomes not independent if the regulation is made with Government Regulations.

With regard to such KPI’s opinion, the Court needs to remind the Petitioner of the Court Decision Number 005/PUU-I/2003 which has stated that the phrase **“KPI together with”** in Article 62 Paragraph (1) of the Broadcasting Law is contradictory to the 1945 Constitution and does not have any binding legal effect so that the intended article must be read, “The provisions formulated by the

Government as intended in Article 14 Paragraph (10), Article 18 Paragraph (3) and Paragraph (4), Article 29 Paragraph (2), Article 30 Paragraph (3), Article 31 Paragraph (4), Article 32 Paragraph (2), Article 33 Paragraph (8), Article 55 Paragraph (3), and Article 60 Paragraph (3) **stipulated by Government Regulations.**” Therefore, the Court is of the opinion that the substance disputed by the Petitioner is a Government Regulation substance and is not the Court’s authority;

Considering whereas based on such description of the scope of the duties and authorities of KPI, even though resulting in KPI’s dissatisfaction in their implementation, the basic question now is, whether the coming into effect of the Broadcasting Law, which has given birth to and formed the Indonesian Broadcasting Commission (KPI) itself, has impaired such KPI’s authority. The Petitioner’s opinion that the Broadcasting Law, in particular Article 62 Paragraphs (1) and (2) and also Article 33 Paragraph (5), has impaired its constitutional authority, cannot be accepted by the Court because of the following reasons:

- whereas the Petitioner obtains the authority as a state institution based on the Broadcasting Law. However, the Broadcasting Law as the basis of the authority of KPI, and at the same time as a law that forms and gives birth to it, cannot possibly impairs its authority because the formulation, the scope, and the content of the authority of KPI have been formulated in the law that forms KPI itself, so that according to the Court, KPI as a state institution that is a “product” or “child” of the *a quo* law, does not have legal standing to file a

petition for judicial review of the law that gives birth to it, because that is the same as disputing its own existence;

- A body or an institution that is born and formed by a law will receive its existence and all authorities, duties, and obligations, with all the weaknesses and deficiencies as well as the advantages and disadvantages, as something attached to itself. It would be impossible that a law that gives birth to an institution with all its authorities, functions, duties, and obligations impairs the authority granted by that law. Even if there is a state institution whose constitutional authority is impaired in the context of Article 51 Paragraph (1) of the Constitutional Court Law, then such state institution shall be another state institution, not the state institution which is created by the *a quo* law. In addition to the state institution, individual person or private/public legal entity are also granted with legal standing for judicial review of a law if such law impairs its constitutional rights guaranteed by the 1945 Constitution. However, it is not proper for the Petitioner as a state institution to rely on Article 28D Paragraph (1) of the 1945 Constitution. That article reads, "Every person shall have the right to fair recognition, guarantee, protection and legal certainty as well as equal treatment before the law", so that it is clear that the legal subject in this article is person in the context of individual person (*natuurlijke persoon*). Even if such human rights can be interpreted as applicable to legal entity (*rechtspersoon*), that does not apply to the Petitioner either, not only because the Petitioner claims itself as a state institution but

also because not all of the constitutional rights possessed by an individual person applies at once to a legal entity;

- KPI as a state institution which is a “product” of the Broadcasting Law that gives its birth, will never be impaired by the Broadcasting Law itself, based on whatever interpretation applicable to Article 51 of the Constitutional Court Law on the constitutional authority of a state institution. The reason is that by the existence and its authority, KPI (the Petitioner) is merely a beneficiary, apart from the possibility of some people’s opinion that the policy formulation in the *a quo* law is obscure or self-contradictory;

Considering whereas although the Court does not deny the fact that the Broadcasting Law is a result of a political compromise and that such compromise is not prohibited insofar as it is not contrary to the constitution as the highest law, but the legal standing to dispute a law that gives birth to a particular institution does not lie with the institution born by the reviewed law. In other words, even if there is *-quod non-* obscurity or *self-contradiction* in the law in such a way that it is not in line with the spirit and aspirations that stimulate its birth, that matter cannot be used as reason by the institution born by a law to file a petition for judicial review of the law that gives birth to it. It is left to the legislators to express their chosen policy;

Considering based on the foregoing considerations, the Court is of the opinion that the coming into effect of the Broadcasting Law does not impair the constitutional rights or authorities of the Petitioner as intended in Article 51

Paragraph (1) of the Constitutional Court Law. Therefore, the Petitioner does not have the legal standing to file the *a quo* petition, so that it must be declared that the Petitioner's petition cannot be accepted (*niet ontvankelijk verklaard*);

In view of Article 56 Paragraph (1) of the Law of the Republic of Indonesia Number 24 Year 2003 regarding the Constitutional Court (State Gazette of the Republic of Indonesia Number 98, Supplement to the State Gazette of the Republic of Indonesia Number 4316);

PASSING THE DECISION

To declare that the petition of the Petitioner cannot be accepted (*niet ontvankelijk verklaard*).

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Hence this decision was passed in the Consultative Meeting of Constitutional Court Justices on Monday, April 16, 2007 by nine Constitutional Court Justices, which was pronounced in the Plenary Meeting of the Constitutional Court open for public held today, Tuesday, April 17, 2007, attended by nine Constitutional Court Justices, Jimly Asshiddiqie, as the Chairperson and concurrent Member, Maruarar Siahaan, H.M. Laica Marzuki, H. Achmad Roestandi, H.A.S. Natabaya, H. Abdul Mukthie Fadjar, H. Harjono, I Dewa Gede Palguna, and Soedarsono, respectively as Members, assisted by Cholidin Nasir as the Substitute Registrar, in the presence of the Petitioner, the Government or its representative, and the People's Legislative Assembly or its

representative and also the Indirect Related Party, the Indonesian Media Law and Policy Centre;

CHIEF JUSTICE,

SGD.

Jimly Asshiddiqie.

JUSTICES

SGD.

Maruarar Siahaan

SGD.

H.M. Laica Marzuki

SGD.

H. Achmad Roestand

SGD.

H.A.S. Natabaya

SGD.

H. Abdul Mukthie Fadjar

SGD.

H. Harjono

SGD.

I Dewa Gede Palguna

SGD.

Soedarsono

SUBSTITUTE REGISTRAR

SGD

Cholidin Nasir