



## DECISION

Number 20/PUU-V/2007

FOR THE SAKE OF JUSTICE UNDER THE ONE ALMIGHTY GOD

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA

[1.1] Examining, hearing and deciding upon constitutional cases at the first and final level, has passed a Decision on the Petition for Judicial Review on Law of the Republic of Indonesia Number 27 Year 2004 concerning Natural Oil and Gas against the 1945 Constitution of the Republic of Indonesia, filed by:

[1.2] 1) **Zainal Arifin**, 2) **Sonny Keraf**, 3) **Alvin Lie**, 4) **Ismayatun**, 5) **Hendarso Hadiparmono**, 6) **Bambang Wuryanto**, 7) **Dradjad Wibowo**, 8) **Tjatur Sapto Edy**, all of whom are Indonesian citizens in their capacity as members of the People's Legislative Assembly of the Republic of Indonesia ("*DPR-RI*"), having their office address at Gedung Nusantara I, Jalan Jenderal Gatot Subroto, Jakarta 10270, who based on the Special Power of Attorney Number 050/SK/ZJ/VI/2007 dated on the 7th of June 2007, have authorized Januardi S. Haribowo, S.H., Bayu Prasetyo, S.H., M.H., Kartini Amir, S.H., M.H., Erni Rasyid, S.H., and Ahmad Waluya M, S.H., advocates and legal consultants joined in the Team of Advocates for the Judicial Review on the Natural Oil and Gas Law, in this matter acting both jointly and individually, having

their office address at Plaza DM, 12<sup>th</sup> Floor, Jalan Jenderal Sudirman Kav. 25, South Jakarta 12920. Hereinafter referred to as ..... **Petitioners**;

- [1.3]** Having read the Petition of the Petitioners;
- Having heard the testimonies of the Petitioners;
- Having heard and read the affidavits of the Government;
- Having read the affidavits of the People's Legislative Assembly of the Republic of Indonesia;
- Having heard the testimonies of the experts presented by the Petitioners and the Government;
- Having examined the evidence;
- Having read the written conclusions of the Petitioners and the Government;

### **3. LEGAL CONSIDERATIONS**

[3.1] Considering whereas the purpose and objective of the *a quo* petition is to conduct judicial review on Article 11 Paragraph (2) of Law Number 22 Year 2001 concerning Natural Oil and Gas (State Gazette of the Republic of Indonesia Year 2001 Number 136, Supplement to the State Gazette of the Republic of Indonesia Number 4152, hereinafter referred to as the Natural Oil and Gas Law) against the 1945 Constitution of the Republic of Indonesia (hereinafter referred to as the 1945 Constitution);

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

1. whether or not the Court has the authority to examine, hear and decide upon the petition filed by the Petitioner;
2. whether or not the Petitioners have the legal standing to file the *a quo* petition;

With regard to the aforementioned two matters, the Court is of the following opinions:

### **THE AUTHORITY OF THE COURT**

[3.3] Considering whereas with regard to the authority of the court, Article 24C Paragraph (1) of the 1945 Constitution states that the Court has the authority, among others, to try cases at the first and final level, the decision of which shall be final, in judicial reviews of laws against the Constitution. The aforementioned provision has been restated in Article 10 Paragraph (1) point (a) of Law Number 24 Year 2003 concerning Constitutional Court (hereinafter referred to as the Constitutional Court Law) *juncto* Article 12 Paragraph (1) of Law Number 4 Year 2004 concerning Judicial Authorities (State Gazette of the Republic of Indonesia Year 2004 Number 8, Supplement to the State Gazette of the Republic of Indonesia Number 4358);

**[3.4]** Considering whereas the object of the petition filed by the *a quo* Petitioners is judicial review on Law, in this case (*in casu*) Article 11 Paragraph (2) of the Natural Oil and Gas Law promulgated on the 23<sup>rd</sup> of November 2001, against the 1945 Constitution. Therefore, the Court has the authority to examine, try and decide upon the *a quo* petition;

### **LEGAL STANDING OF THE PETITIONERS**

**[3.5]** Considering whereas pursuant to the provision of Article 51 Paragraph (1) of the Constitutional Court Law, the parties who may file petition for judicial review of laws against the 1945 Constitution are those who deem that their constitutional rights and/or authorities have been impaired by the coming into effect of the law being petitioned for review, namely: a) Individual Indonesian Citizens (including groups of people having similar interest); b) units of customary law communities insofar as they are still in existence and in accordance with the development of the community and the principle of the Unitary State of the Republic of Indonesia; c) public or private legal entities; or d) state institutions;

**[3.6]** Considering thus far the Court is of the opinion that the aforementioned impairment of constitutional rights and/or authorities must meet 5 (five) requirements, namely:

- a. The Petitioners must have constitutional rights granted by the 1945 Constitution;

- b. such constitutional rights and/or authorities shall be deemed by the Petitioners to have been impaired by the coming into effect of the law petitioned for review;
- c. the constitutional right impairment shall be specific and actual or at least potential in nature which pursuant to a logical reasoning will certainly take place;
- d. there is a causal relation (*causal verband*) between the constitutional right impairment and the coming into effect of the law petitioned for review;
- e. there is a possibility that upon the granting of a petition, the constitutional right impairment argued shall not come into existence or shall cease to exist;

**[3.7]** Considering whereas in order to be admitted as a Petitioner in a case of judicial review of law against 1945 Constitution, pursuant to the provision of Article 51 Paragraph (1) of the Constitutional Court Law, a person or a party must:

- a. explain his/her/its qualification, either as an individual Indonesian citizen, a unit of customary law communities, legal entity, or state institution;
- b. explain the impairment to his/her/its constitutional rights and authorities, in the qualification as intended in point (a), as a result of the coming into effect of the law petitioned for review;

**[3.8]** Considering whereas based on the explanations on the provision of Article 51 Paragraph (1) of the Constitutional Court Law and the requirements of the impairment to constitutional rights and authorities as described above, the Court will then take into account the legal standing of the Petitioners in accordance with the Petitioners' explanations in their petition along with the relevant evidence;

**[3.9]** Whereas the Petitioners principally argue that their capacity is as individual Indonesian citizens acting as members of the People's Legislative Assembly whose constitutional rights are associated with the constitutional rights of the People's Legislative Assembly, because, according to the Petitioners, the constitutional rights of the People's legislative Assembly can only be implemented by the members of the People's Legislative Assembly as the position holders. The constitutional rights of the People's Legislative Assembly which are also the constitutional rights of the People's Legislative Assembly, according to the Petitioners, are the constitutional rights to:

- give or refrain from giving approval on "*other international treaties which bring an extensive and fundamental impact on the life of the people in relation to state financial burden ...*" as set forth in Article 11 Paragraph (2) of the 1945 Constitution;
- conduct oversight on the state administration as intended in Article 20A Paragraph (1) of the 1945 Constitution;

- conduct oversight to ensure that the land and water and the natural resources contained therein are used for the prosperity of the people to the utmost possible extent [Article 33 Paragraph (3) and Paragraph (4) of 1945 Constitution].

The aforementioned impairment to the constitutional rights of the Petitioners is caused by the provision of Article 11 Paragraph (2) of the Natural Oil and Gas Law which reads as follows, “*Every cooperation contract that have been signed must be notified in writing to the People’s Legislative Assembly of the Republic of Indonesia*”.

**[3.10]** Considering whereas based on the Petitioners’ explanations above, in order to assess whether the Petitioners have proper legal standing pursuant to Article 51 Paragraph (1) of the Constitutional Court Law, the Court must consider two things, namely:

- (1) Whether the Petitioners as individual Indonesian citizens acting as members of the People’s Legislative Assembly of the Republic of Indonesia can be qualified as Petitioners with the status of individual Indonesian citizens as set forth in Article 51 Paragraph (1) of the Constitutional Court Law;
- (2) Whether or not the constitutional rights of the Petitioners as individual Indonesian citizens acting as members of the People’s Legislative

Assembly of the Republic of Indonesia have been impaired by the coming into effect of Article 11 Paragraph (2) of the Natural Oil and Gas Law;

**[3.11]** Considering whereas both the Government and People's Legislative Assembly have given their statements in relation to the legal standing of the Petitioners which have been described entirely in the Principal Issue section hereof, as follows:

### **Statements of the Government**

- The provision set forth in Article 11 Paragraph (2) of the 1945 Constitution as well as the provision of Article 11 Paragraph (2) of the Natural Oil and Gas Law are applicable for the People's Legislative Assembly as a State Agency/Institution, please refer to Article 20 up to Article 22B of the 1945 Constitution.
- The Rights and Obligations of the members of the People's Legislative Assembly have been regulated in details in laws and regulations as well as the Code of Conduct of the People's Legislative Assembly (please refer to Law Number 22 Year 2003 concerning the Structure and Position of the People's Consultative Assembly, People's Legislative Assembly, Regional Representative Council, and Regional People's Legislative Council, hereinafter referred to as *UU Susduk MPR, DPR, DPD, and DPRD*).
- The Petitioners acting in their capacity as Members of the People's Legislative Assembly as stated by the Petitioners themselves-please refer to



the Petition page 2- have acted inconsistently and ambiguously, namely on one hand, the Petitioners are parts of the party having the law-making authority (legislative function) while on the other hand, they are questioning their own legislative products.

- If there are mindset changes with regard to laws and regulations which have been jointly discussed and ratified by the President and People's Legislative Assembly, in this case the Natural Oil and Gas Law, the Petitioners should put forward prioritized proposal for amendments to the Natural Oil and Gas Law as the initiative of the People's Legislative Assembly . In other words, it is wiser to take the mechanism of legislative review rather than judicial review or constitutional review. This is because by filing a petition for judicial review for the reversal of the *a quo* provision, it would mean that the Petitioners intend to reverse their own decision. The situation would be different if the Petitioners were acting in their capacity as common citizens or individual Indonesian citizens.
- The oversight or controlling function of the People's Legislative Assembly is not impeded or reduced at all since the People's Legislative Assembly can perform such controlling by applying the working meeting mechanism and the right to raise a question or the right of interpellation.

### **Statements of the People's Legislative Assembly**

- In relation to the legal standing of the Petitioners, it is deemed necessary to firstly elaborate the rights of the People's Legislative Assembly and the right of the members of the People's Legislative Assembly set forth in the 1945 Constitution. The constitutional rights and authorities of the People's Legislative Assembly as an institution are related to at least 15 (fifteen) things, namely;
  1. giving approval on declaration of war, making peace and concluding treaties with other states, Article 11 Paragraph (1);
  2. giving approval on other international treaties having extensive and fundamental impacts on the people's life in relation to state financial burden, and/or requiring amendments or formulation of laws, Article 11 Paragraph (2);
  3. providing considerations on the appointment of ambassadors, Article 13 Paragraph (2);
  4. providing considerations on the placement of ambassadors of other countries, Article 13 Paragraph (3);
  5. providing considerations on the granting of amnesty and abolition, Article 14 Paragraph (2);
  6. having the power to make Law, Article 20 Paragraph (1)
  7. having legislative, budgetary and oversight functions, Article 20 Paragraph (1);
  8. having the right of interpellation, Article 20A Paragraph (2);
  9. having the right of inquiry, Article 20A Paragraph (2);

10. having the right to express opinion, Article 20A Paragraph (2);
  11. giving approval on government regulations in lieu of law, Article 22 Paragraph (2);
  12. selecting members of the Audit Board, Article 23F Paragraph (1);
  13. giving approval on candidates for Justices proposed by the Judicial Commission, Article 24A Paragraph (3);
  14. giving approval on the appointment and dismissal of members of the Judicial Commission, Article 24B Paragraph (3); and
  15. nominating three candidates for Constitutional Justices, Article 24C Paragraph (3).
- Whereas the constitutional rights and authorities of the members of the People's Legislative Assembly set forth in 1945 Constitution are related to the 5 (five) things, namely:
    1. the right to vote and to be elected, Article 19 Paragraph (1);
    2. the right to propose draft laws, Article 21;
    3. the right to raise questions, Article 20A Paragraph (3);
    4. the right to give suggestions and express opinions, Article 20A Paragraph (3); and
    5. the right of immunity, Article 20A Paragraph (3).

Therefore, based on the explanation above, the Petitioners as members of the People's Legislative Assembly fail to meet the requirements to have legal

standing as Petitioners, as set forth in Article 51 Paragraph (1) of the Constitutional Court Law;

- If the Petitioners are of the opinion that the provision of Article 11 Paragraph (2) of the Natural Oil and Gas Law is contradictory to the recent political, economic and legal developments, the Petitioners as members of the People's Legislative Assembly who have constitutional rights and/or authorities to propose draft laws should file for a legislative review of Article 11 Paragraph (2) of the Natural Oil and Gas Law to the People's Legislative Assembly.

**[3.12]** Considering whereas statements of the experts presented by the Petitioners and the Government have also been heard at the hearing, however the aforementioned expert statements do not relate to the legal standing of the Petitioners;

### **Opinion of the Court**

**[3.13]** Considering whereas after thoroughly examining the descriptions given in the petition and the arguments presented by the Petitioners, the evidence produced, verbal or written statements of the People's Legislative Assembly and the Government in relation to the legal standing of the Petitioners, the Court is of the following opinion:

- Whereas the definition of "*individual Indonesian citizens*" in Article 51 Paragraph (1) sub-paragraph (a) of the Constitutional Court Law is not the

same as “individual Indonesian citizens in their capacity as Members of the People’s Legislative Assembly” as argued by the Petitioners. Individual Indonesian citizens who are not Members of the People’s Legislative Assembly do not have the constitutional rights as stipulated in Article 11 Paragraph (2) and Article 20A Paragraph (1) of the 1945 Constitution, namely the rights argued as constitutional right impairment for filing the *a quo* petition. In fact, the way of thinking established by the Petitioners automatically elaborate such disparity. By working on the assumption that Production Sharing Contract is categorized as an international treaty, the Petitioners then argue that because of the application of Article 11 Paragraph (2) of the Natural Oil and Gas Law, the constitutional right of the People’s Legislative Assembly, as an institution, to grant approval as referred to in Article 11 Paragraph (2) of the 1945 Constitution has been impaired. This means that, provided that such constitutional impairment does exist, namely if such Production Sharing Contract is deemed as an international treaty, so that it requires the approval of the People’s Legislative Assembly rather than mere written notice after its execution, *quod non*, the party suffering such impairment is the People’s Legislative Assembly as a state institution rather than its members as individual Indonesian citizens;

- Whereas the 1945 Constitution explicitly provides for the constitutional rights of Indonesian citizens, Members of the People’s Legislative Assembly and People’s Legislative Assembly. Every member of the People’s Legislative Assembly has constitutional rights as set forth in Article 20A Paragraph (3) of

the 1945 Constitution which reads, *“In addition to the rights stipulated in other articles hereof, every member of the People’s Legislative Assembly shall have the right to raise questions, to present suggestions and to express opinions, as well as the right of immunity”*. Furthermore, the constitutional rights of the People’s Legislative Assembly to exercise its legislative, budgetary and oversight functions are set forth in Article 20A Paragraph (1) of the 1945 Constitution, which reads, *“In performing its functions, in addition to the rights stipulated in other articles hereof, the People’s Legislative Assembly shall have the right of interpellation, the right of inquiry and the right of to express opinions”*, and Article 21 of the 1945 Constitution which reads, *“Members of the People’s Legislative Assembly shall have the right to propose draft laws”*.

- Whereas further provisions concerning the rights of the People’s Legislative Assembly and the rights of Members of the People’s Legislative Assembly are set forth in laws, as provided for in Article 20A Paragraph (4) of the 1945 Constitution, which reads, *“Further provisions on the rights of the People’s Legislative Assembly and the rights of members of the People’s Legislative Assembly shall be regulated in laws.”* Further elaboration of Article 20A Paragraph (4) of the 1945 Constitution is set forth in Law concerning Organizational Structure and Status of MPR, DPR, DPD and DPRD, which furthermore, based on Article 31 of the aforementioned law is derived to the Rules of Procedures of the People’s Legislative Assembly. In the Rules of Procedures of the People’s Legislative Assembly, the rights of Members of

the People's Legislative Assembly to propose draft law (initiative rights) may be exercised by at least 13 Members of the People's Legislative Assembly [vide Article 130 Paragraph (1) of 2005-2006 DPR Rules of Procedures]. Therefore, it is evident that in the Rules of Procedures of the People's Legislative Assembly (DPR), a member of the People's Legislative Assembly cannot exercise his/her rights to propose a draft law (RUU) individually, but rather it must be exercised collectively. Draft Laws formulated by members of the People's Legislative Assembly must also be approved by the Plenary Session of the People's Legislative Assembly to be submitted as parliament-initiated draft laws.

- Whereas the authority to formulate law based on Article 20 Paragraph (1) of the 1945 Constitution is held by the People's Legislative Assembly as an institution. Therefore, it is truly peculiar if members the People's Legislative Assembly, who discussed and approved the law jointly with the President, raise questions about the constitutionality of the law made by the People's Legislative Assembly having the authority to do so. Indeed, it is true that minority groups in the People's Legislative Assembly may possibly dissatisfied with laws approved by the majority members of the People's Legislative Assembly during the Plenary Session. However, according to political ethics (*politieke fatsoen*,) when a law has been approved by the People's Legislative Assembly as an institution, including all of its members, by applying a democratic procedure and in accordance with the applicable laws and regulations, the law must certainly be complied with all Members of

the People's Legislative Assembly, including the minority groups which do not approve the same;

- Whereas in the meantime, the People's Legislative Assembly, as an organization in the form of panel (*college*), has a number of single functionaries (*eenmansambten*). However, each member does not represent himself/herself, but they must rather work jointly as an institution (*institutie*). As a decision of a complex institution (the People's Legislative Assembly), the decision is a consensus achieved collectively. This is in line with the opinion of J.H.A. Logemann, *Ambten kunnen zijn éénmansambt, d.i. vertegenwoordigd door enkele ambtsdrager, of veelhoofdig ambt. Hier is een veelheid van ambtsdragers, die echter niet ieder voor zich het ambt vertegenwoordigen, maar slechts in samenwerking. Als besluit van het ambt geldt slechts een door hen in samenwerking gevonden formule* (J.H.A. Logemann, 1954: 105). Therefore, the position as Member of the People's Legislative Assembly is not categorized as a single functionary (*éénmansambt*) but rather a complex position or *samengesteldeambt*. The members cannot represent the institution individually but they must do so in a collegial manner. Therefore, the People's Legislative Assembly as an institution cannot be represented by the Petitioners individually;
- Whereas based on the aforementioned explanation, there is apparently a difference between constitutional rights and/or authorities of Members of the People's Legislative Assembly and the constitutional rights and/or authorities



of Members of the People's Legislative Assembly as an institution (*institutie*). Pursuant to the 1945 Constitution, Members of the People's Legislative Assembly have five constitutional rights and/or authorities as stipulated in Article 19 Paragraph (1), Article 21 and Article 20A Paragraph (3). In the meantime, the People's Legislative Assembly as an institution has fifteen constitutional rights and/or authorities as stipulated in Article 11 Paragraphs (1) and (2), Article 12 Paragraph (3), Article 13 Paragraph (2) Article 14 Paragraph (2), Article 20 Paragraph (1), Article 20A Paragraph (2), Article 22 Paragraph (2), Article 24B Paragraph (1), Article 24A Paragraph (3) and Article 24C Paragraph (3) of the 1945 Constitution;

- Whereas it is true that the People's Legislative Assembly is an institution comprising Members of the People's Legislative Assembly and Decisions of the People's Legislative Assembly as an institution are made by Members of the People's Legislative Assembly are correct. However, this does not mean that an opinion of Members of the People's Legislative Assembly is an opinion of the People's Legislative Assembly as an institution. It is true that an opinion of the People's Legislative Assembly as an institution is made based on the opinion of each Member of the People's Legislative Assembly, but it would become an opinion of the People's Legislative Assembly after being converted in a Plenary Session of the People's Legislative Assembly and decided upon through deliberations to reach a consensus or voting. The constitutional rights and/or authorities argued by Petitioners as having been impaired are the rights granted to the People's Legislative Assembly as an

institution rather than the rights granted to the Members of the People's Legislative Assembly as individuals. In other words, the Petitioners as Members of the People's Legislative Assembly do not have any rights and/or authorities which have been impaired by the application of Article 11 Paragraph (2) of the Natural Oil and Gas Law.

- Whereas, based on the aforementioned explanations, if the Petitioners as individual Members of the People's Legislative Assembly are of the opinion that Article 11 Paragraph (2) of the Natural Oil and Gas Law is contradictory to Article 33 Paragraphs (3) and (4) of the 1945 Constitution, as argued by the Petitioners, therefore in accordance with the provisions of Article 21 of the 1945 Constitution, the Petitioners have rights to propose amendments to the provision of the *a quo* law. Any individual Indonesian citizens who are not Members of the People's Legislative Assembly do not have such right. This also confirms that the definition of "*individual Indonesian citizens*" as intended in Article 51 Paragraph (1) sub-paragraph (a) of the Constitutional Court Law is not as argued by the Petitioners;
- Whereas based on the aforementioned explanations, it has been evident that the main issue of the *a quo* petition is an issue of *legislative review*, rather than *judicial review*. If the People's Legislative Assembly is of the opinion that its constitutional rights has been impaired by the application of Article 11 Paragraph (2) of the Natural Oil and Gas Law, whereas it has the authority to establish and amend to the law, it would be very peculiar if the People's

Legislative Assembly files a petition for a judicial review against the law to the Constitutional Court, because it would mean that the People's Legislative Assembly is questioning the constitutionality of its own product before the Constitutional Court. If the People's Legislative Assembly is negligent that it establishes a law impairing its own constitutional rights, **which is an unimaginable event to occur**, it has no constitutional barrier whatsoever to amend the law;

- Whereas based on the aforementioned explanations, the Court is of the opinion that the Petitioners as individual Indonesian citizens acting as Members of the People's Legislative Assembly do not meet the qualifications as provided for in Article 51 Paragraph (1) sub-paragraph (a) of the Constitutional Court Law, so that their constitutional rights and/or authorities are not impaired as argued by the Petitioners. Therefore, the Petitioners do not have the legal standing as Petitioners in the petition for Judicial Review of the *a quo* law;
- Whereas if the Petitioners have the legal standing, *quod non*, their petition *a quo* cannot also be granted, because by declaring that Article 11 Paragraph (2) of the Natural Oil and Gas Law does not have binding legal force, there will be no more provisions requiring written notice to the the People's Legislative Assembly. This may be more harmful for the People's Legislative Assembly as an institution and Members of the People's Legislative Assembly;

#### 4. CONCLUSIONS

Considering whereas based on the aforementioned explanations, the Court draws the following conclusions:

**[4.1]** whereas the Petitioners do not have legal standing in the petition for judicial review of the *a quo* law, therefore the Petitioners' petition must be declared as cannot be accepted (*niet ontvankelijk verklaard*);

**[4.2]** whereas since the Petitioners' petition has been declared as cannot be accepted, the Principal Issue of the Petition no longer needs to be considered further.

#### 5. RULINGS

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

##### **Passing the Decision:**

To declare that the petition of Petitioners cannot be accepted (*niet ontvankelijk verklaard*);

Hence this decision was made in the Consultative Meeting of Constitutional Justices on Thursday December 13, 2007 by nine Constitutional

Justices and was pronounced in a Plenary session open for public on this day Monday December 17, 2007 by us, Jimly Asshiddiqie as the Chairperson and Concurrent Member, H. A.S. Natabaya, H. M. Laica Marzuki, H. Achmad Roestandi, H. Abdul Mukthie Fadjar, Soedarsono, H. Harjono and Maruarar Siahaan, respectively as Members and accompanied Cholidin Nasir as Substitute Registrar and in the presence of the Petitioners/their Attorneys-in-Fact, the Government/its Representatives, and People's Legislative assembly or its representatives as well as the Directly Related Parties;

**CHIEF JUSTICE,**

**Signed**

**Jimly Asshiddiqie**

**JUSTICES**

**Sgd.**

**H.A.S. Natabaya**

**Sgd.**

**Soedarsono**

**Sgd.**

**H. Abdul Mukthie Fadjar**

**Sgd.**

**H. M. Laica Marzuki**

**Sgd.**

**H. Achmad Roestandi**

**Sgd.**

**Maruarar Siahaan**

**Sgd.**

**H. Harjono**

## **6. DISSENTING OPINIONS**

With respect to the aforementioned decision of the Court, two Constitutional Justices, namely Constitutional Justice H. Harjono and Constitutional Justice Maruarar Siahaan, have dissenting opinions the full texts of which are as follows:

### **[6.1] Constitutional Justice H. Harjono**

In order to be able to determine whether the Petitioners, which in this case are individual Members of the People's Legislative Assembly, have legal standing in the *a quo* case, the following matters must be taken into consideration:

The Petitioners file a judicial review of a law against the Constitution, of which authority is granted by Article 24C of the 1945 Constitution to the Constitutional Court.

Judicial Review is basically based on the principle that a law must not contradict a constitution. Constitution cannot be contradicted because it is the highest law that includes, among other things, constitutional rights. A law, which position is lower than a constitution, is deemed contradictory to the constitution when any

constitutional rights, namely those expressed in the constitution, are violated by the law, because the related law impairs, prejudices or may even eliminate the rights expressed in the constitution. For this reason, constitutional right is highly important in a judicial review because it is the *sine quo non* condition.

In order to determine whether members of the People's Legislative Assembly have legal standing in a judicial review, the existence of constitutional rights of members of the People's Legislative Assembly must first be established. Article 20A Paragraph (3) of the 1945 Constitution reads, "... *every member of the People's Legislative Assembly shall have the right to raise questions, to present suggestions and to express opinions, as well as the right of immunity*", and Article 21 states that Members of the People's Legislative Assembly have the right to propose draft laws. In addition to the rights of Members of the People's Legislative Assembly set forth in these two articles, the 1945 Constitution stipulates the functions of the People's Legislative Assembly as set forth in Article 20A, namely the legislation function, budgetary function and supervisory function. The 1945 Constitution clearly and logically provides for the relation between the People's Legislative Assembly functions with the rights of Members of the People's Legislative Assembly. The fact that the People's Legislative Assembly comprises of members is a very clear matter and for that reason the 1945 Constitution stipulates that members of the People's Legislative Assembly shall be elected in a general election (*vide* Article 19 of the 1945 Constitution). To allow the People's Legislative Assembly to perform its legislation function, it is very essential to furnish the Members of the People's Legislative Assembly with

the right to propose draft laws, as stated in Article 21 of the 1945 Constitution. It will very unreasonable if members of the People's Legislative Assembly do not have the right to propose draft law considering the fact that they have a legislation function. There will then be a confusion as to the party expected to make draft laws and how can the People's Legislative Assembly make draft laws if it does not have any member. A draft law is basically an opinion of the person drafting the law, thus the right to propose draft laws also includes the right of the members to express their opinions, which in this case is in the form of draft laws.

Article 11 Paragraph (1) of the 1945 Constitution states that the President may, with the approval of the People's Legislative Assembly, declare war, make peace and agreements with other countries. We would then ask about how the People's Legislative Assembly can give its approval. This will certainly be done after hearing the opinion of its members. Therefore, the right of Members of the People's Legislative Assembly to express opinion is the basis for all authorities and functions of the People's Legislative Assembly as an institution.

Besides the legislation function, the People's Legislative Assembly also has supervisory function. Supervision is principally in the form of "opinions" of the People's Legislative Assembly regarding the objects of its supervision. The People's Legislative Assembly communicates the results of its supervision on the object of its supervision through its opinions, namely whether or not the object has problems. Such opinions are certainly derived from the opinions of Members of the People's Legislative Assembly. Therefore, it has been proved that there is



a very close relation between the right of the People's Legislative Assembly to express opinions [Article 20A Paragraph (2)] and the right of Members of the People's Legislative Assembly to express opinions [Article 20A Paragraph (3)]; accordingly, it is very logical for the 1945 Constitution to grant the right to Member of the People's Legislative Assembly to express their opinions. Likewise, it is very unreasonable to assign to the People's Legislative Assembly a supervisory function, which comprises opinions of the People's Legislative Assembly, without granting the right to express opinion to its members. The issue is certainly about the source for formulating the results of supervision, namely the opinions of Members of the People's Legislative Assembly.

The functional relation between the right of the People's Legislative Assembly and the right of Members of the People's Legislative Assembly can be expressed in the following proposition: if the supervisory function of the People's Legislative Assembly on a certain object is eliminated, then the right of Members of the People's Legislative Assembly to express their opinions on the object will then be eliminated. On the contrary, if the supervisory function of the People's Legislative Assembly is expanded to other objects, the opinions of the Members of the People's Legislative Assembly on the objects will then be required, or opinions of Members of the People's Legislative Assembly required will increase in number.

Based on the aforementioned explanation, the right of Members of the People's Legislative Assembly to express opinions is a *sine qua non* condition to allow the People's Legislative Assembly to perform its supervisory function. Based on the

principle of democracy which basically grows out of the people, opinions of Members of the People's Legislative Assembly are the reflection of the people's aspiration because the People's Legislative Assembly represents the people. Consequently, opinions of Members of the People's Legislative Assembly serve as the basis or foundation of the rights of the People's Legislative Assembly rather than the opposite namely that the right of Members of the People's Legislative Assembly to express opinion is a derivation of the rights of the People's Legislative Assembly.

The Constitution provides for this matter clearly and firmly as well as logically, thus it does not need sophisticated analytical thought to understand it. The ordering of paragraphs of Article 20A reflects the same thing: started with Paragraph (1) that states the functions of the People's Legislative Assembly, followed by Paragraph (2) that also clearly states that "*to perform its functions*" the People's Legislative Assembly has interpellation right, right for inquiry and right to express opinion. The rights of Members of the People's Legislative Assembly stated in Paragraph (3) are the right to raise question, to convey suggestions and opinions as well as certain immunity right related to Paragraph (1). This is the correct manner to read the paragraphs according to the legal science. The entire explanation is not a result of mere assumption because it is concretely, firmly, plainly and clearly expressed in the 1945 Constitution.

The next issue is related to the question whether the constitutional rights of Members of the People's Legislative Assembly explicitly written in the

Constitution have to be maintained so as not to be violated. If the intention of a judicial review is to uphold the constitution, it is then clear that such right is included in the rights that have to be upheld. The required regulation is about the enforcement procedures or known as procedural law. The procedural law that is addressed to as a formal law must refer to material law in such a way that the procedural law is related and bound by the material law. The Constitution, which is a material law, has granted constitutional rights to Members of the People's Legislative Assembly of which, like other constitutional rights, may possibly be violated. The procedural law must provide ways so that a subject whose constitutional right has been violated can defend his/her right by complying with the stipulated procedures.

Article 51 of the Constitutional Court Law which does not only determine but also limit the parties that may file a judicial review should refer to the material law, namely the 1945 Constitution. If the constitution grants the rights to a certain legal subject, the procedural law of the Constitutional Court Law should give the opportunity to the aforementioned subject to file a judicial review. Article 51 Paragraph (1) Sub-Paragraph (b) of the Constitutional Court Law provides that units of customary law communities insofar as they are still in existence and in accordance with the community development and the principle of the Unitary State of the Republic Indonesia may act as Petitioners.

Such provision is not without any basis or consideration, as a matter of fact, the 1945 Constitution guarantees the rights of customary law communities as

provided for in Article 18B Paragraph (2). The phrases in the 1945 Constitution are also quoted in Article 51 Paragraph (1) Sub-Paragraph (b) of the Constitutional Court Law. The Constitutional Court Law also provides that any state institution may act as Petitioner because the material law in the 1945 Constitution provides for the authorities of state institutions, as is the case with public and private legal entities. Such provision has been used by the Constitutional Court in its decisions to provide legal standing to Non-Governmental Organizations as private legal entities.

It has been specifically stated that the members of the People's Legislative Assembly have been given constitutional rights that are different from those of Non-Governmental Organizations. Therefore, the procedural law should also grant the right to customary law communities to act as Petitioner under the abovementioned provision. If it is evident that the procedural law does not give any of rights to members of the People's Legislative Assembly, it can be confirmed that there is an error in the drafting since it does not refer to the Constitution as a material law and judicial review may then be filed against such law. Among four qualifications stated in Article 51 Paragraph (1) of the Constitutional Court Law, the most appropriate qualification for members of the People's Legislative Assembly to be eligible to file for a judicial review is individual Indonesian citizens because it is clear that they cannot be categorized as private or public legal entities, customary law communities, or state institutions. To provide legal standing to individuals, the Court, in its decisions, has in fact applied two additional criteria after the Petitioner has met the

qualification as individual Indonesia citizens. The first one is the capacity in which the individual file for a judicial review. A doctor who was an Indonesian citizen in his/her capacity as a doctor was given a legal standing by the Court to file for a judicial review on Medical Practice Law because the Law provides for the obligations, prohibitions, and rights of doctors. Meanwhile, the Court rejected the legal standing made by a patient who was also an Indonesian citizen because he/she did not have the capacity as a doctor (Please refer to Decision on Case Number 4/PUU-V/2007). A member of the People's Legislative Assembly meets the qualification as an individual Indonesian citizen and to provide a legal standing, a relation should be established to the capacity in which he/she files for the judicial review of Law *a quo*. The answer to that question is the capacity as a member of the People's Legislative Assembly because the rights argued are those related to the rights of the members of the People's Legislative Assembly. A legal standing should be given to the members of the People's Legislative Assembly as the Constitution grants constitutional rights to them and it is in line with the logic applied by the Court for differentiating the status of a doctor and a patient in the legal standing for the judicial review of the Medical Practice Law. After determining the capacity of the Petitioner in relation to his/her constitutional rights, then the Court should consider whether the Petitioner is allowed to present an opinion, not necessarily an argument that his/her constitutional rights have been potentially impaired. It means that the petitioner does not have to prove that his/her rights have been impaired because it will be the part of examination in the Principal Issue of the Petition.

Article 11 of the 1945 Constitution provides the need for the President to obtain the approval of the People's Legislative Assembly in declaring war, making peace, and entering into an agreement with other countries. Article 11 of the 1945 Constitution is aimed at preventing the President from acting arbitrarily when declaring war, etc., which refers to the requirement of the People's Legislative Assembly to supervise the use of the President's authorities in the international affairs. The 1945 Constitution is silent as to whether war declaration should be set forth in the form of law as a consequence of the requirements to obtain the approval of the People's Legislative Assembly. The approval of the People's Legislative Assembly in Article 11 of the 1945 Constitution represents the supervisory or controlling right of the People's Legislative Assembly which is different from the legislative right of the People's Legislative Assembly in law-making. The President is indeed, the state representative for international affairs. However, the use of the aforementioned authority needs to be supervised by the People's Legislative Assembly, namely by granting approvals. It is different from the President's position in law-making as the People's Legislative Assembly is the party entitled to make law as stated in Article 20 Paragraph (1) of the 1945 Constitution. Article 11 of the 1945 Constitution also grants authorities to the President under the control or supervision of the People's Legislative Assembly. Other Articles in the 1945 Constitution also provide for less strict supervisory rights of the People's Legislative Assembly on the President, namely the right to give a consideration, not an approval in the event of the President appoints ambassadors and receives the placement of ambassadors from other countries

[Article 13 Paragraph (2) and (3) of the 1945 Constitution], and grants amnesty and abolition [Article 14 Paragraph (2) of the 1945 Constitution].

Relation between the supervisory right of the People's Legislative Assembly and the right of the members of the People's Legislative Assembly to give an opinion as the basis for allowing the People's Legislative Assembly to exercise its supervisory right as well as the requirement to obtain the approval of the People's Legislative Assembly, which in principal is also the right to supervise the President in using his/her authorities to declare war, make peace, and enter into agreements with other countries as provided for by Article 11 of the 1945 Constitution, is sufficient to provide the ground *prima facie* that the People's Legislative Assembly has a legal standing. Such matter should be separated from the legal issues in the case *a quo* that has not been examined. The abovementioned legal issues are:

- Whether the supervisory right of the members of the People's Legislative Assembly represented by the right to express opinion which leads to the granting of approval to the President as referred to in Article 11 Paragraph (2) of the 1945 Constitution has been omitted by Article 11 of the Natural Oil and Gas Law, or
- Whether the supervisory right of the members of the People's Legislative Assembly through the right to express opinion which leads to the approval of the People's Legislative Assembly in granting Mining Authorizations as required by the Mining Law has failed to provide a constitutional basis for the

issuance of Production Sharing Contract as referred to in Article 11 of the Natural Oil and Gas Law because the Natural Oil and Gas Law as well as the Mining Law are based on the same Article namely, Article 33 Paragraph (3) of the 1945 Constitution which grants the right to the state to manage the land, water, and natural resources contained therein.

Based on the abovementioned explanations, the Court should give legal standing to the members of the People's Legislative Assembly for meeting the requirements as individual Indonesian citizens with the capacity as members of the People's Legislative Assembly. If the members of the People's Legislative Assembly are not given the legal standing as they are not qualified as individual Indonesian citizens, it can be concluded that the interpretation of the Constitutional Court on Article 51 Paragraph (1) of the Constitutional Court Law completely eliminate the opportunity for members of the People's Legislative Assembly to file for a judicial review, although their constitutional rights have been clearly stated in the 1945 Constitution. Such interpretation may result in the Constitutional Court Law as the procedural law to be defective as it fails to facilitate the material law, namely the 1945 Constitution which grants constitutional rights to the members of the People's Legislative Assembly and petition may be filed for a judicial review of the law, in this case Article 51 Paragraph (1), as it has impaired the constitutional rights of the members of the People's Legislative Assembly. Since the Constitutional Court refuses to give a legal standing to the members of the People's Legislative Assembly, it has failed to guard the Constitution by making illogical interpretation. The Constitutional



Court applies the procedural law to guard the Constitution. This will not occur if the Court applies consistent interpretation that has been established so far.

In the case *a quo*, the Court should also not form an opinion that the members of the People's Legislative Assembly have been deprived of their constitutional rights to file for a judicial review of a Law before the Constitutional Court as they also have participated in the discussion and promulgation of the law, because in compliance with the political ethics, as the Court argues, the aforementioned members should comply with the law although they are among the minority group refusing to approve the law. The Court failed to give any reason or constitutional basis for the deprivation of the rights of the members of the People's Legislative Assembly are omitted upon participating in the discussion or promulgation of a Law. Will the Court grant the constitutional rights to the members of the People's Legislative Assembly if they do not participate in the discussion and promulgation of the Law, which indicate that they were absent from all sessions? The next issue is related to which political ethics to be used as the basis. The Court should carefully consider its opinion. If a law contradicts the 1945 Constitution, it will jeopardize the existence of what the Court refers to as ethics. The question is why the Court refuses to provide legal standing to the members of the People's Legislative Assembly only for the reason of political ethics as interpreted by the Court itself while at the same time, the Court is aware that there are constitutional grounds that may support the granting of legal standing for the members of the People's Legislative Assembly. In a judicial review against the Constitution, the highest value in the political ethics is appreciation and honor for

the rights guaranteed by the 1945 Constitution and not the other values. Therefore, the 1945 Constitution as the highest organic law should become the source of political ethics rather than using other political ethics that are in contradictory to the 1945 Constitution.

With regard to the opinion that the Petitioners should have taken legislative review procedure instead of judicial review, I am of the following opinion:

Those two procedures indeed can be used to revise or amend the substance of a law. However, it is incorrect that the constitutionality issue of a law can always be settled through legislative review. It is possible that although legislative review has been done, the concerned law is still contrary to the 1945 Constitution. The Constitutional Court has already performed judicial review of an amendment to a previous law, but a substance that is contrary to the 1945 Constitution can still be found. (please refer to Decision on Case Number 67/PUU-II/2004). It is different from judicial review. The Constitutional Court had already decided several judicial review with regard to constitutionality issue, based on which decisions legislators subsequently were required to make adjustments, and then the legislators prepared draft amendment to the law (please refer to Decision on Case Number 5/PUU-V/2007 and Decision on Case Number 012-016-019/PUU-IV/2006), which means that with regard to constitutionality of a law, indeed, judicial review is the procedure to be taken. In the petition, the Petitioners do not merely want to amend Article 11 of the Natural Oil and Gas Law , for which a legislative review should have been conducted and the result of which will be determined by the

support/votes in the People's Legislative Assembly and the approval of the President. The issue raised by the Petitioners is rather whether or not Article 11 of the Natural Oil and Gas Law is constitutional, which answer, legally, shall only be possible to be obtained by conducting a judicial review. Tom Ginsburg stated in the conclusion of his writing that "*By ensuring that losers in the legislative arena will be able to bring claims to court, judicial review lowers the cost of constitution making and allows drafters to conclude constitutional bargains that would otherwise be unobtainable*" (*Judicial Review in New Democracies, Constitutional Courts in Asian Cases*. p. 33). That statement means that those who lose in the legislative arena can bring the case to court, certainly for issues related to constitutionality and not the selection of law policies, and that procedure can put an end to constitutional bargains that would otherwise be unobtainable in the legislative arena. The recommendation of the Constitutional Court that the *a quo* case be settled through legislative review has reflected the ambiguous opinion of the Constitutional Court because the Constitutional Court has rejected the Petitioners' legal standing based on the reason that the Petitioners are members of the People's Legislative Assembly and it is not the People's Legislative Assembly that can question the right to control, but at the same time the Constitutional Court has stated that the *a quo* case, that directly involves the Petitioner, be settled through legislative review when the legislative right is clearly vested on the People's Legislative Assembly and not the Petitioner.

The existence of Article 130 Paragraph (1) of the Rules of Procedure of the People's Legislative Assembly which requires the initiative right with respect to a draft law be proposed by not less than 13 people, I have a dissenting opinion if that matter is used by the Constitutional Court to prove that a member of the People's Legislative Assembly cannot use his right personally or has eliminated the individual right of a member of the People's Legislative Assembly. Following the Constitutional Court's opinion will rise another legal problem. The Rules of Procedure of the People's Legislative Assembly is a procedural/formal law to complement the implementation of rights that is guaranteed by the 1945 Constitution. If the procedural law eliminates individual right of a member of the People's Legislative Assembly that is stipulated in the 1945 Constitution, then such procedural law must be set aside. This is the applicable general principle of procedural law. I am of the opinion that the aforementioned Rules of Procedure does not eliminate individual right of the member of the People's Legislative Assembly. That rules must be interpreted as although a member of the People's Legislative Assembly has the right to propose a draft law or to convey opinion, but in order for an individual draft law to become the opinion of the People's Legislative Assembly, sufficient votes are certainly required in the People's Legislative Assembly forum. The requirement of 13 members is intended to provide preliminary proof of sufficient support to a draft law or opinion of a member of the People's Legislative Assembly, so that the proposal will be deemed necessary and subsequently will be discussed in the People's Legislative Assembly and the Rules of Procedure do not intend to eliminate

individual right. The provision requiring that the proposal must be submitted by not less than 13 members does not require that the proposal shall be made by the 13 members of the People's Legislative Assembly. If there is a proposal or opinion of a member that is later supported by other twelve members then that draft proposal or opinion must be accepted by the People's Legislative Assembly and shall be discussed thereafter. Therefore, there is still a right of a member of the People's Legislative Assembly. The Rules of Procedure are still based on the substantive law, namely the 1945 Constitution. The intention of the Constitutional Court's opinion is also unclear as to whether the Petitioners must consist of 13 members in order to be able to use the constitutional right before this Constitutional Court. Therefore, it is necessary to refer to the Rules of Procedure of the People's Legislative Assembly. If that is the case, the problem of the Petitioners is therefore the insufficient number of supporters. It is important to note that in addition to the *a quo* Petitioners, there has been a petition once filed by many other members of the People's Legislative Assembly to join in as Petitioners, but the Consultative Meeting of Justices rejected the petition for the reason that the number of Petitioners in the *a quo* petition was irrelevant because the petitioned issue concerned the same legal issue. Based on the aforementioned description, the Constitutional Court should have granted legal standing to the Petitioners.

**[6.2] Constitutional Court Justice Maruarar Siahaan**

I am of the opinion that the Petitioners that consists of eight people who qualify themselves as individual members of the People's Legislative Assembly have legal standing based on the following reasons:

1. A state institution that consists of many members such as the People's Legislative Assembly, each constitutes a position that bears and exercises institutional rights and authority equally with the other members. An institution as a structure that is constructed by its members can only exercise its rights and authorities through its members and without such members as the institution supporters that exercises the institution's rights and authorities, the People's Legislative Assembly as an institution cannot perform its function. The members shall exercise their function collectively or individually in a reciprocal relationship, as their authority has been granted by the 1945 Constitution.
2. The rights and authorities granted by the 1945 Constitution to the People's Legislative Assembly among others are to make laws [Article 20 Paragraph (1), legislative function, budgetary function and supervisory function [Article 20A Paragraph (1)], the right of interpellation, the right of enquiry and the right to express opinion [Article 20A Paragraph (2)] and the right to raise a question, to submit a proposal and opinion... [Article 20A Paragraph (4)] in addition to the rights explicitly granted to the members of the People's Legislative Assembly, then the rights that are not explicitly granted to the members shall constitute constitutional rights that are automatically

possessed and exercised by the members so that the rights and authorities of the People's Legislative Assembly as an institution and organ with multiple positions can be exercised.

3. Because in fact the constitutional rights and authorities of the members of the People's Legislative Assembly are granted by the constitution, then Article 51 Paragraph (1) of the Constitutional Court Law concerning the issue of legal standing shall be interpreted in such a way that such interpretation is made in the context of enforcing the constitution that contains the rights and authorities of the member of the People's Legislative Assembly, and not to the contrary.
4. As an individual member of the People's Legislative Assembly as well as a position (*ambt*) that is not individual, an elected member of the People's Legislative Assembly as a representation of the voters that consist of individual citizens shall be granted with constitutional rights and authorities for the interest and protection of the represented people, in the context of protecting the rights and freedom of the people as individuals as well as the rights and the livelihood of the public collectively as guaranteed by the 1945 Constitution.
5. The shift as a democratic state following the amendment to the 1945 Constitution from **parliamentary supremacy** as reflected by Article 1 Paragraph (2) of the 1945 Constitution prior to the amendment that reads, *"Sovereignty shall be in the hands of the people, and shall be fully exercised*

*by the People's Consultative Assembly*", towards **constitutional supremacy** as reflected in Article 1 Paragraph (2) after the amendment which reads "*Sovereignty shall be in the hands of the people and shall be exercised in accordance with the Constitution*", has been followed by the granting of authority to the Constitutional Court to conduct judicial review of the said law against the 1945 Constitution.

6. In substance, constitutional democracy is a democracy that is carried out in accordance with the principle of constitutionalism where the government is limited by constitution that is also recognized in democracy based on parliamentary supremacy. However, in a different way, constitutional democracy no longer relies on the authority of the state that is based on the people and the politics shall be decided by elected representatives. Other parts of democracy that consist of particular fundamental values in the form of individual rights and collective rights guaranteed by the constitution are treated as constitutional boundaries that must be complied with by the legislators. The implication that arises and becomes the duty of each member of the People's Legislative Assembly in such a system is the constitutional obligations and rights to keep the majority in the People's Legislative Assembly within the stipulated constitutional bounds.
7. The constitutional right and authority of the members of the People's Legislative Assembly are clearly formulated and granted in the 1945 Constitution, and Article 51 Paragraph (1) of the Constitutional Court Law



regulates the Petitioners' legal standing, both as individual Indonesian citizens, who have the position as members of People's Legislative Assembly and who represent the rights and interests of a group of people as their constituency, and as the state institution in the position of People's Legislative Assembly member in the organization with multiple positions; Therefore, every limitation, reduction and complete elimination of constitutional rights of the members of People's Legislative Assembly referred to in the 1945 Constitution shall, by the application of law, fulfill both the criteria of Article 51 Paragraph (1) of the Constitutional Court Law and the legal standing criteria explained elaborately in the permanent decisions of the Court.

8. The Constitutional Court is appointed as the agency having the authority to conduct Judicial Review of laws, following the Hans Kelsen model which is dominantly followed in Europe, and a comparative study is necessary in interpreting the application of Article 51 Paragraph (1) of the Constitutional Court Law. Almost equally, the legal standing in judicial review conducted within the jurisdictions of Constitutional Courts jurisdiction in Europe, is in the first place to state institutions either executive, minority in the legislative and the judicative branches, in the form of referral from the public judicature to the Constitutional Court. Only then could the legal standing be granted to a person or individual in concrete-norm control, with tight requirements, in which based on the subsidiary principles, the Constitutional Court shall have a role only after all of the available legal process have been exhausted. Viewed from the characteristic, weight and content of examination, the

granting of legal standing to the Petitioners with different qualifications will also determine the achievement of the goal of checks and balance mechanism effectively.

9. Even if there are provisions of law and the rules of procedure of the People's Legislative Assembly regarding the people authorized to represent the People's Legislative Assembly in the court as regulated in Article 22 Paragraph (1) sub-paragraph f of Law Number 22 Year 2003 regarding The Organizational Structure and Status of the People's Consultative Assembly (MPR), the Peoples Legislative Assembly (DPR), the People's Representative Council (DPD), and the Regional People's Legislative Assembly (DPRD) and Article 27 sub-article f of the Rules of procedure of the People's Legislative Assembly of the Republic of Indonesia, the duty and authority of the Leaders to represent the People's Legislative Assembly in the court shall be in the context as Plaintiff and Defendant in front of ordinary court, and as the agency that provides a statement in front of the Constitutional Court in judicial review cases. Because the People's Legislative Assembly is the law making state institution in democratic mechanism that is obliged to give a statement before the Constitutional Court in the judicial review cases, the provision cannot be used to interpret that a member of the People's Legislative Assembly who obtains his/her right and authority from the 1945 Constitution, does not have the legal standing to file a petition for judicial review before the Constitutional Court, because it has become the right and authority as well as the obligation of the member of the People's Legislative Assembly with a view

to keeping the constitutional bounds in formulating laws, in order to prevent the majority or political compromise that from occurring outside the constitutional bounds. The statement to the effect that the members of the People's Legislative Assembly have the right to propose Draft Law amendment in a legislative review mechanism which is more appropriate, although it is true that it becomes the right of the member of the People's Legislative Assembly, it is a different institution, that its utilization, compared to the judicial review, will be based on the balance of political power, so that the rational choice to reach the equally constitutional goal is not closed;

10. However, some questions remain, whether the members of the People's Legislative Assembly who have approved a Draft Law into a law are also granted with the standing, and whether there is a particularly required minimum number for granting the standing to the members of the People's Legislative Assembly as the individual persons in such position. In our opinion, the member who has approved the raft Law into law, does not have any ground to file a petition for judicial review of the law that he/she has approved, because s/he is also bound by the consensus provided, and if it is not the case, the legal uncertainty will occur. Although a particular minimum number as the legal standing requirement for the members of the People's Legislative Assembly can provide a rationalization on the weight of importance of the constitutionality test of the norm petitioned, In parallel with the content of Article 51 Paragraph (1) of the Constitutional Court Law that also grants the standing to individual persons, a member of People's

Legislative Assembly who files a petition for judicial review of a law against the 1945 Constitution shall not affect the validity of such petition as long as any violation of constitutional bounds can be evidenced.

Based on all of the aforementioned explanation, we are of the opinion that the Court should decide that the Petitioners have legal standing to file such petition and to consider the Principal Issue of the Case as explained as follows;

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

The Substance of the Oil and Natural Gas Law petitioned for review is Article 11 Paragraph (2) of Law Number 22 Year 2001 which reads as follows, *“Every cooperation contract that has been signed should be notified in writing to the People’s Legislative Assembly of the Republic of Indonesia”*. The provision is deemed contrary to the following articles:

1. Article 11 Paragraph (2);
2. Article 20 Paragraph (1);
3. Article 33 Paragraph (3) and Paragraph (4) of the 1945 Constitution.

With respect to the matter we are of the following opinion:

1. Although Article 11 Paragraph (2) of the 1945 Constitution states, *“other international agreements which bring an extensive and fundamental impact on the life of the people related to state financial burden, and/or requiring*

*amendments or formulation of laws, must obtain the approval of the People's Legislative Assembly*", we can agree to the opinion of the government and expert presented that such international agreements are the ones defined in Articles 1 and 2 of Vienna Convention Year 1969 regarding the Law of Treaties and Article 2 Paragraph (1) sub-paragraph a of Vienna Convention Year 1986 regarding the International Treaties. Therefore, the Cooperation Contract as referred to in Article 11 Paragraph (2) of the Oil and Natural Gas Law, do not belong to the category of International Treaties which becomes the scope of Article 11 of the 1945 Constitution, and hence the petition of the Petitioners, as long as it is related to such case, is not sufficiently grounded.

2. However, the substance of Article 11 Paragraph (2) is related to the Article 20A Paragraph (1) of the 1945 Constitution, which actually emphasizes on the importance supervision to be conducted by the People's Legislative Assembly on government actions which bring an extensive and fundamental impact on the life of the people related to state financial burden, especially that is related to Article 33 Paragraph (3) regarding the natural resources, which shall be controlled by state and shall be used for the greatest prosperity of the people. The natural resources, which become nonrenewable potential in the socio-economic life of the state and nation, which shall be used for the greatest prosperity of the people, and which is the collective possession of people, shall be reviewed in the laid down by the Constitutional Court as the interpretation of Article 33 Paragraph (3) of the 1945 Constitution, in Decision Number 01-02-022/PUU-I/ 2003, as follows:

*“...by viewing the 1945 Constitution as the system concerned, thus the interpretation of “controlled by the state” in Article 33 of the 1945 Constitution contains a higher or broader interpretation than ownership in the civil law conception. The conception of control by the state is a public legal conception which is related to the principle of the sovereignty of the people in the 1945 Constitution, in the field of politics (political democracy) and economy (economic democracy). In the people’s sovereignty principle, the people are the ones recognized as the source, owner and the holder of the highest power in living as a state, in accordance with the doctrine of “from the people, by the people and for the people”. In the interpretation of the highest power, the interpretation of public ownership by the people collectively is also included. Whereas the land and water and the natural resources contained within the legal territory of the state are essentially owned by the people collectively as mandated to the state to control them in order to be used for the greatest prosperity of people. Therefore, Article 33 Paragraph (3) provides that, “Land and water and natural resources contained therein shall be controlled by the state and shall be used for the greatest prosperity of people.”*

*“...the phrase “controlled by the state” must be interpreted to include the interpretation of control by the state in the broad sense which is based on the conception of the sovereignty of the Indonesian people over all of the resources consisting of the “land and water and natural resources*

*contained therein". Included in it is the interpretation of the collective public ownership by the people of the resources concerned. The people collectively are constructed by the 1945 Constitution as giving the mandate to the state to make policy (beleid) and perform the administration (bestuursdad), regulation (regelendaad), management (beheersdaad) and... the function of oversight by the state (toezichthoudensdaad) is carried out by the state **in the context of supervising and controlling so that the exercise of control by the state upon vital branches of production which affect the livelihood of many people will be performed for the greatest prosperity of the people."***

3. It is the experience of Countries in the world, both developed countries and especially developing countries, that with respect to contracts of oil and mineral resources business in general, as disclosed by result of researches of the world economists, that very often a country does not gain full value from its natural resources since it depends on government apparatus and private contractors who have other objectives, namely to maximise their own benefits as much as possible and in turn means to lessen the total revenues that should be paid to the Government. It is told that the major challenge faced by each Government is to find a solution as to how to cooperate with actors outside the Government, whose main objective is radically different from the Government's, and how the Government should cooperate with private

sectors to maximize the total revenues from its country's natural resources (by Joseph E Stiglitz, in *Escaping The Resource Curse*, 2007, page 28).

4. The owners should be cautious, since in general, the prospective fraud is very apparent and big, and can occur during each transaction stage. The risk in dealing with a complex contract is that an oil company understands the real market value of a contract more than the Government. The empirical experiences of developed countries as well as developing countries, if related to the testimony given by the expert presented by the Petitioners have proved it necessary to have a self-fortification in exploiting the natural resources in competition with private entrepreneurs who usually possess better capacity in negotiations and contract drafting, so that the mandate of Article 33 Paragraph (3) of the 1945 Constitution can be achieved through effective implementation of the supervisory function by the (members of the) People's Legislative Assembly.
5. The question is whether the method regulated in Article 11 Paragraph (2) of the Oil & Gas Law as "a supervision method" in the context of optimizing the natural resources for the greatest prosperity of the people, as mandated in Article 20A Paragraph (1) and Article 33 Paragraph (3) of the 1945 Constitution, the interpretation of which has been formulated by the Constitutional Court in its decisions, has been considered appropriate and in accordance with to the mandate of the constitution.



- A mere written notification to the People's Legislative Assembly (DPR) of the already signed Cooperation Agreement in Oil and Gas would appear to have denied the people's participation as the collective owners of the natural resources, in *toezichthoudensdaad* function aimed at supervising and controlling so that the implementation of the State authority on the said natural resources is really carried out for the greatest prosperity of the people. For the reason that every agreement implies a potential deviation in each transaction stage and due to the fact that there is no sufficient information in relation to the fundamental aspects in contract of work or production sharing contract as well as the cooperation agreement in Oil and Gas (Migas) field, if it is carried out only through a written notification to the People's Legislative Assembly as provided for in Article 11 Paragraph (2) of the Oil & Gas Law, the said article shall therefore have been inconsistent with Article 20A and Article 33 Paragraph (3) of the 1945 Constitution.
6. The testimony of the Expert presented by the Government regarding the supervision conducted, whether it is more effective before or after the signing of agreement, which states that such an issue will depend on the Natural Resources' competitive potential of other countries, is, in our opinion, irrelevant, due to the non-renewable nature of oil and gas and due to the demand of oil and gas bigger than supply which is even limited. Therefore, we have to be cautious in exploiting Natural Resources (SDA) and to insist that all processes should be seriously supervised so that the restricted chance to

make use of such resources in funding the development for the greatest prosperity of the people shall not disappear so easily. Therefore, the principle that should be complied with together, by taking into account the timely decision making as well as legal certainty required in investment activities, we still refer to the need for transparency with respect to the terms of the proposed contracts, that pertains to an essential issue in guaranteeing the obtainment of a just and reasonable portion for the State, by taking into account the realistic investment repayment stage if compared to the obligations and risks faced by investors.

7. The supervision mechanism by the People's Legislative Assembly (DPR) in the Work Contract of other mining sector as regulated in Paragraph (3), Article 10 of Law Number 11 Year 1967 which states that the said Work Contract shall be effective **after the consultation** with the People's Legislative Assembly, if it pertains to mined materials, chemical elements, minerals, ores, and any kinds of stones including precious stones, as natural deposits.

Such mechanism that is more in line with the mandate of Article 20A and Article 33 Paragraph (3) of the 1945 Constitution, refers clearly to the people's sovereignty as the collective owners for materializing the greatest prosperity of the people, and should obviously be applied as a standard in line with the intention of Article 20A in relation to Article 33 Paragraph (3) in the understanding that has been formulated by the Court itself;

Based on the whole description set out above, we are of the opinion that Article 11 Paragraph (2) of the Oil & Gas Law is contradictory to Article 20A and Article 33 Paragraph (3) of the 1945 Constitution, and therefore, the Constitutional Court should obviously grant a part of the petition of the Petitioners by declaring that Article 11 Paragraph (2) of the said Oil and Gas Law no longer has any binding legal effect.

**SUBSTITUTE REGISTRAR ,**

**signed.**

**Cholidin Nasir**