



DECISION

Number 10/PUU-VI/2008

FOR THE SAKE OF JUSTICE UNDER THE ONE ALMIGHTY GOD

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA

[1.1] Examining, hearing, and deciding upon constitutional cases at the first and final level, has passed a decision in the case of petition for judicial review of Law Number 10 Year 2008 concerning General Elections of the Members of the People's Legislative Assembly, the Regional Representative Council and the Regional People's Legislative Assembly, against the Constitution of the State of the Republic of Indonesia Year 1945, filed by:

- [1.2] **A. The Regional Representative Council of the Republic of Indonesia**, having its address at Jalan Gatot Subroto Number 6, Senayan, Central Jakarta 10270, based on Special Power of Attorney dated April 3, 2008, hereinafter referred to as **PETITIONER I (DPD)**;
- B. Individual members of the Regional Representative Council of the Republic of Indonesia**, hereinafter referred to as **PETITIONER II (DPD Members)**, which consist of:

1. **Dra. Hj. Mediati Hafni Hanum, S.H.**, a DPD Member, Member Number B-04, Electoral District of Nanggroe Aceh Darussalam Province, having her address at Jalan Gatot Subroto Number 6 Jakarta, based on Special Power of Attorney dated April 4, 2008;
2. **Lundu Panjaitan, S.H.**, a DPD Member, Member Number BA-7, Electoral District of North Sumatera Province, having his address at Jalan Gatot Subroto Number 6 Jakarta, based on Special Power of Attorney dated April 4, 2008;
3. **Dr. Mochtar Naim**, a DPD Member, Member Number B-12, Electoral District of West Sumatera Province, having his address at Jalan Gatot Subroto Number 6 Jakarta, based on Special Power of Attorney dated April 4, 2008;
4. **Drs. H. Soemardhi Thaher**, a DPD Member, Member Number B-13, Electoral District of Riau Province, having his address at Jalan Gatot Subroto Number 6 Jakarta, based on Special Power of Attorney dated April 4, 2008;
5. **Muhammad Nasir**, a DPD Member, Member Number B-19, Electoral District of Jambi Province, having his address at Jalan Gatot Subroto Number 6 Jakarta, based on Special Power of Attorney dated April 4, 2008;

6. **Ir. Ruslan**, a DPD Member, Member Number B-24, Electoral District of South Sumatera Province, having his address at Jalan Gatot Subroto Number 6 Jakarta, based on Special Power of Attorney dated April 4, 2008;
7. **Muspani, S.H.**, a DPD Member, Member Number B-27, Electoral District of Bengkulu Province, having his address at Jalan Gatot Subroto Number 6 Jakarta, based on Special Power of Attorney dated April 4, 2008;
8. **Hariyanti Syafrin, S.H.**, a DPD Member, Member Number B-30, Electoral District of Lampung Province, having her address at Jalan Gatot Subroto Number 6 Jakarta, based on Special Power of Attorney dated April 4, 2008;
9. **Fajar Fairy S.H.**, a DPD Member, Member Number B-35, Electoral District of Bangka Belitung Province, having his address at Jalan Gatot Subroto Number 6 Jakarta, based on Special Power of Attorney dated April 4, 2008;
10. **Benny Horas Panjaitan**, a DPD Member, Member Number B-39, Electoral District of Riau Archipelago Province, having his address at Jalan Gatot Subroto Number 6 Jakarta, based on Special Power of Attorney dated April 4, 2008;

11. **Biem Triani Benjamin**, a DPD Member, Member Number B-43, Electoral District of DKI Jakarta Province, having his address at Jalan Gatot Subroto Number 6 Jakarta, based on Special Power of Attorney dated April 4, 2008;
12. **KH. Sofyan Yahya M.A.**, a DPD Member, Member Number B-48, Electoral District of West Java Province, having his address at Jalan Gatot Subroto Number 6 Jakarta, based on Special Power of Attorney dated April 4, 2008;
13. **Drs. Sudharto, M.A.**, a DPD Member, Member Number B-51, Electoral District of Central Java Province, having his address at Jalan Gatot Subroto Number 6 Jakarta, based on Special Power of Attorney dated April 3, 2008;
14. **Drs. Ali Warsito**, a DPD Member, Member Number B-54, Electoral District of Jogjakarta Special Province, having his address at Jalan Gatot Subroto Number 6 Jakarta, based on Special Power of Attorney dated April 4, 2008;
15. **KH. A. Mujib Imron S.H.**, a DPD Member, Member Number B-58, Electoral District of East Java Province, having his address at Jalan Gatot Subroto Number 6 Jakarta, based on Special Power of Attorney dated April 4, 2008;

16. **R. Renny Pudjiati**, a DPD Member, Member Number BA-64, Electoral District of Banten Province, having her address at Jalan Gatot Subroto Number 6 Jakarta, based on Special Power of Attorney dated April 4, 2008;
17. **I Wayan Sudirta, S.H.**, a DPD Member, Member Number B-65, Electoral District of Bali Province, having his address at Jalan Gatot Subroto Number 6 Jakarta, based on Special Power of Attorney dated April 4, 2008;
18. **H. Lalu Abd. Muhyi Abidin, S.Ag.**, a DPD Member, Member Number B-72, Electoral District of Nusa Tenggara Barat Province, having his address at Jalan Gatot Subroto Number 6 Jakarta, based on Special Power of Attorney dated April 4, 2008;
19. **Joseph Bona Manggo**, a DPD Member, Member Number B-75, Electoral District of Nusa Tenggara Timur Province, having his address at Jalan Gatot Subroto Number 6 Jakarta, based on Special Power of Attorney dated April 4, 2008;
20. **Sri Kadarwati**, a DPD Member, Member Number B-79, Electoral District of West Kalimantan Province, having her

address at Jalan Gatot Subroto Number 6 Jakarta, based on Special Power of Attorney dated April 2, 2008;

21. **Prof. KMA. M. Usop, M.A.**, a DPD Member, Member Number B-82, Electoral District of Central Kalimantan Province, having his address at Jalan Gatot Subroto Number 6 Jakarta, based on Special Power of Attorney dated April 4, 2008;
22. **Drs. H. Muhamad Ramli**, a DPD Member, Member Number B-88, Electoral District of South Kalimantan Province, having his address at Jalan Gatot Subroto Number 6 Jakarta, based on Special Power of Attorney dated April 4, 2008;
23. **Drs. Nursyamsa Hadis**, a DPD Member, Member Number B-89, Electoral District of East Kalimantan Province, having his address at Jalan Gatot Subroto Number 6 Jakarta, based on Special Power of Attorney dated April 2, 2008;
24. **Marhany Victor Poly Pua**, a DPD Member, Member Number B-93, Electoral District of North Sulawesi Province, having his address at Jalan Gatot Subroto Number 6 Jakarta, based on Special Power of Attorney dated April 4, 2008;

25. **Drs. Roger Tobigo**, a DPD Member, Member Number B-98, Electoral District of Central Sulawesi Province, having his address at Jalan Gatot Subroto Number 6 Jakarta, based on Special Power of Attorney dated April 4, 2008;
26. **Ir. Abdul Aziz Qahar M.**, a DPD Member, Member Number B-102, Electoral District of South Sulawesi Province, having his address at Jalan Gatot Subroto Number 6 Jakarta, based on Special Power of Attorney dated April 4, 2008;
27. **Drs. Pariama Mbyo, S.H.**, a DPD Member, Member Number BA-108, Electoral District of Southeast Sulawesi Province, having his address at Jalan Gatot Subroto Number 6 Jakarta, based on Special Power of Attorney dated April 4, 2008;
28. **Prof. Dr. H. Nani Tuloli**, a DPD Member, Member Number B-110, Electoral District of Gorontalo Province, having his address at Jalan Gatot Subroto Number 6 Jakarta, based on Special Power of Attorney dated April 4, 2008;
29. **Midin B. L., S.H.**, a DPD Member, Member Number B-115, Electoral District of Maluku Province, having his address at Jalan Gatot Subroto Number 6 Jakarta, based on Special Power of Attorney dated April 4, 2008;

30. **Ishak Pamumbu Lambe**, a DPD Member, Member Number B-103, Electoral District of South Sulawesi Province, having his address at Jalan Gatot Subroto Number 6 Jakarta, based on Special Power of Attorney dated April 4, 2008;
31. **Anthony Charles Sunarjo**, a DPD Member, Member Number B-117, Electoral District of North Maluku Province, having his address at Jalan Gatot Subroto Number 6 Jakarta, based on Special Power of Attorney dated April 4, 2008;
32. **Tonny Tesar**, a DPD Member a, Member Number B-126, Electoral District of Papua Province, having his address at Jalan Gatot Subroto Number 6 Jakarta, based on Special Power of Attorney dated April 4, 2008;
33. **Drs. Wahidin Ismail**, a DPD Member, Member Number B-124, Electoral District of West Papua Province, having his address at Jalan Gatot Subroto Number 6 Jakarta, based on Special Power of Attorney dated April 4, 2008;

C. Individual Indonesian citizens who have big concern for the General Elections, Indonesian Parliament, and the channeling of regional aspirations, hereinafter referred to as **PETITIONER III**, which consist of:

1. **Hadar Nafis Gumay**, Executive Director of **Yayasan Pusat Reformasi Pemilu [Centre for Electoral Reform ("CETRO")]**, having his address at Jalan Hang Jebat VIII Number 1 Jakarta 12120, based on Special Power of Attorney dated April 21, 2008;
 2. **Dr. Saafroedin Bahar**, Head of Experts Board of the **National Secretariat For the Protection of Constitutional Rights of Customary Law Communities**, having his address at Jalan Diponegoro Number 39 Pekanbaru, Riau, based on Special Power of Attorney dated April 21, 2008;
 3. **Sulastio**, General Chairperson of **Indonesian Parliamentary Center ("IPC")**, having his address at Jalan Teuku Cik Di Tiro Number 37 A Pav, Jakarta 10310, based on Special Power of Attorney dated April 21, 2008;
 4. **Sebastianus KM Salang**, Coordinator of **Indonesian Parliamentary Social Concern Forum ("FORMAPPI")**, having his address at Jalan Matraman Raya Number 32-B, Jakarta Timur, based on Special Power of Attorney dated April 21, 2008;
- D. Individuals residing in certain Provinces**, hereinafter referred to as **PETITIONER IV (Regional Citizens)**, which consist of:

1. **Hariyono S.P.**, having his address at Jalan Radial Number 1321, Neighbourhood Association (RT) 020/006 Village/Sub-District 24 Ilir, *Bukit Kecil* District, Palembang Municipality, South Sumatera Province, based on Special Power of Attorney dated April 2, 2008;
2. **Drs. Welky Karauwan M.Si.**, having his address at Walian Lingkungan X Sub-District, Tomohon Selatan District, Tomohon Municipality, North Sulawesi Province, based on Special Power of Attorney dated April 2, 2008;
3. **Hartono**, having his address at Jalan Kamboja RT/RW 03/IV, Mariyai Hamlet, Aimas District, Sorong Regency, West Papua Province based on Special Power of Attorney dated April 2, 2008;
4. **Ahmad Wali S.H.**, having his address at Jalan Uram Number 34 Perumnas, TL. Rimbo Lama Sub-District/Village, Curup District, Rejang Lebong Regency, Bengkulu Province based on Special Power of Attorney dated April 2, 2008;
5. **TB. A. Oman Jahid Sulman, SC.**, having his address at Jalan KH. TB. A. Khatib Number 45, RT/RW (Neighborhood/Citizens Association) 04/05, Cipare Sub-

District/Village, Serang District, Banten Province, based on Special Power of Attorney dated April 2, 2008;

6. **Abdul Salim Ali Siregar**, having his address at Jalan WR. Supratman Number 046, RT/RW 008/001, Kandang Limun Sub-District, Muara Bangkahulu District, Bengkulu Municipality, Bengkulu Province, based on Special Power of Attorney dated April 2, 2008;
7. **Musriadi**, having his address at Jalan Merdeka Number 19, Lancang Garam Village/Sub-District, Banda Sakti District, Lhokseumawe Municipality, Nangroe Aceh Darussalam Province, based on Special Power of Attorney dated April 2, 2008;
8. **Zulfikar**, having his address at Lingkungan Rukun, Blang Asan Village/Sub-district, Sigli District Municipality, Pidie Regency, Nangroe Aceh Darussalam Province, based on Special Power of Attorney dated April 2, 2008;
9. **Karno Miko Sergye Rumondor**, having his address at Kairagi Dua Lingkungan VIII Sub-district, RW 008, Mapanget District, Manado Municipality, North Sulawesi Province, based on Special Power of Attorney dated April 2, 2008;

10. **Marhendi WH.**, having his address at Lekat Village Municipality, Kerkap District, Bengkulu Utara Regency, Bengkulu Province, based on Special Power of Attorney dated April 2, 2008;
11. **Fauzan Azima SH.**, having his address at Jalan Batin Tikal Number 23, RT/RW 003/III, Karya Makmur Village/Sub-District, Pemali District, Bangka Regency, Bangka Belitung Archipelago Province, based on Special Power of Attorney dated April 2, 2008;
12. **H.A. Syafei**, having his address at Jalan Gatot Subroto Number 3, RT/RW 04/05, Karang Mekar Sub-District, Cimahi Tengah District, Cimahi Municipality, West Java Province, based on Special Power of Attorney dated April 2, 2008;
13. **Natanael Mok**, having the address at Yayasan Village, Morotai Selatan District, based on Special Power of Attorney dated April 2, 2008;

Petitioner I until Petitioner IV based on Special Powers of Attorney dated April 2, 2008; April 3, 2008; April 4, 2008 ; and April 21, 2008, hereinafter grant the power of attorney to 1) Dr. Todung Mulya Lubis, S.H., LL.M., 2) Trimoelja D. Soerjadi, S.H., 3) Dr. Maqdir Ismail, S.H., LL.M., 4) Bambang Widjojanto, S.H., M.H., 5) Alexander Lay, S.H., LL.M., 6) B. Cyndy Panjaitan, S.H. to act for and

on behalf of Petitioner I until Petitioner IV, domiciled in Lubis, Santosa & Maulana Law Offices, with its address at Mayapada Tower, 5th floor, Jalan Jenderal Sudirman Kav. 28, Jakarta 12920;

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

[1.3] Having read the petition of the Petitioners;

Having heard the statement of the Petitioners;

Having heard and read the written statement of the Government;

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

Having examined the evidence;

Having heard and read the written statements of the experts of the Petitioners and the Government;

Having read the written conclusions of the Petitioners and the Government as well as the expert of the Petitioners, Drs. Arbi Sanit;

3. LEGAL CONSIDERATIONS

[3.1] Considering whereas the purpose and objective of the Petitioners' petition are concerned with judicial review of Law Number 10 Year 2008 regarding General Elections of the Members of the People's Legislative Assembly, the Regional Representative Council and the Regional People's

Legislative Assembly (State Gazette of the Republic of Indonesia Year 2008 Number 51, Supplement to State Gazette of the Republic of Indonesia Number 4836, hereinafter referred to as Law 10/2008), against the Constitution of the State of the Republic of Indonesia Year 1945 (hereinafter referred to as the 1945 Constitution).

[3.2] Considering whereas prior to examining the principal issue of the petition, the Court shall first take the following matters into account:

- a. The authority of the Constitutional Court (hereinafter referred to as the Court) to examine, hear, and decide upon the *a quo* petition;
- b. The legal standing of the Petitioners to file the *a quo* petition;

Authority of the Court

[3.3] Considering whereas pursuant to Article 24C Paragraph (1) of the 1945 Constitution, one of the Court authorities is to hear at the first and final level the decision of which shall be final in conducting Judicial Review of a Law against the Constitution.

[3.4] Considering whereas the *a quo* petition is regarding judicial review of Law 10/2008 against the 1945 Constitution, and therefore the Court has the authority to examine, hear, and decide upon such petition;

Legal Standing of the Petitioners

[3.5] Considering whereas pursuant to Article 51 Paragraph (1) along with Elucidation of Law Number 24 Year 2003 regarding the Constitutional Court (State Gazette of the Republic of Indonesia Year 2003 Number 98, Supplement to State Gazette of the Republic of Indonesia Number 4316, hereinafter referred to as the CC Law), the parties that can file a petition for judicial review against the 1945 Constitution shall be the parties claiming that their constitutional rights and/or authorities granted by the 1945 Constitution are impaired by the coming into effect of a law, namely:

- a. an individual Indonesian citizen (including a group of people with a common interest);
- b. a customary law community unit insofar as it is still in existence and in accordance with the development of the communities and the principle of Unitary State of the Republic of Indonesia regulated by Law;
- c. a public and private legal entity; or
- d. a state institution;

Thus, the Petitioners in the judicial review against the 1945 Constitution have to specify and prove first:

- a. their legal standing as Petitioners as intended by Article 51 Paragraph (1) of the CC Law;

- b. the existence of impairment of constitutional rights and/or authorities granted by the 1945 Constitution, due to the coming into effect of a Law being petitioned for review

[3.6] Considering also whereas following Decision Number 006/PUU-III/2005 and Decision Number 11/PUU-V/2007, along with subsequent decisions, the Court has been of the opinion that the impairment of constitutional rights and/or authorities as intended by Article 51 Paragraph (1) of the CC Law, has to meet five criteria, as follows:

- a. there are constitutional rights and/or authorities granted by the 1945 Constitution;
- b. such constitutional rights and/or authorities are impaired by the coming into effect of a law petitioned for review;
- c. the impairment of constitutional rights and/or authorities is specific and actual in nature, or at least potential in nature which according to logical reasoning will take place for sure;
- d. there is a causal relationship (*causal verband*) between the impairment of constitutional rights and/or authorities and the coming into effect of the law petitioned for review;
- e. if such petition is granted, the impairment of such constitutional rights and/or authorities argued will not or does not occur any longer.

[3.7] Considering whereas in the *a quo* petition, the Petitioners are:

- a. The Regional Representative Council (DPD) in the position as a state institution, hereinafter referred to as Petitioner I;
- b. Individual DPD members as many as 33 persons claiming to be individual Indonesian citizens, hereinafter referred to as Petitioner II;
- c. Individual citizens of Indonesia who has big concern for the General Elections, Indonesian Parliament, and the channeling of regional aspirations, namely: Hadar Navis Gumay (Executive Director of “Cetro”), Dr. Saafroedin Bahar (Head of Experts Board of National Secretariat For The Protection of Constitutional Rights of Customary Law Communities), Sulastio (Head of Indonesian Parliamentary Center, abbreviated to IPC), and Sebastianus KM Salang (Coordinator of Indonesian Parliamentary Social Concern Forum, abbreviated to FORMAPPI), hereinafter referred to as Petitioner III;
- d. Individual citizens of Indonesia as many as about 13 persons who reside in certain provinces (regional citizens), hereinafter referred to as Petitioner IV;

[3.8] Considering whereas Petitioner I, Petitioner II, Petitioner III, and Petitioner IV have argued their legal standing by specifying their qualifications as Petitioners along with their constitutional rights and/or authorities which are

deemed to have been impaired by the coming into effect of Article 12 and Article 67 of Law 10/2008, as follows:

[3.8.1] Arguments of Petitioner I on Legal Standing

a. Petitioner I declares itself as a state institution Petitioner as intended by Article 51 Paragraph (1) Sub-Paragraph d of the CC Law;

b. Petitioner I has constitutional authority granted by Article 22D Paragraph (1), Paragraph (2), and Paragraph (3) of the 1945 Constitution, as follows:

(1) *The Regional Representative Council can propose to the People's Legislative Assembly bills related to regional autonomy, relationship between the centre and regions, formation and expansion and merger of regions, management of natural resources and other economic resources, as well as bills related to the financial balance between the center and regions.*

(2) *The Regional Representative Council shall take part in the discussion of bills related to regional autonomy; relationship between the centre and regions; formation, expansion and merger of regions; management of natural resources and other economic resources, and the financial balance between the center and regions; and shall give considerations to the People's Legislative Assembly on bills related to state revenues and expenditures budget and bills related to taxes, education and religion.*

(3) *The Regional Representative Council can oversee the implementation of laws concerning: regional autonomy, formation, expansion and merger of regions, relationship between the center and regions, management of natural resources and other economic resources, implementation of the state revenues and expenditures budget, taxes, education, and religion, and shall present the results of such oversight to the People's Legislative Assembly for its consideration to be followed up.*

From those provisions in Article 22D Paragraphs (1), (2), and (3) of the 1945 Constitution, in the opinion of Petitioner I it can be concluded that the constitutional authorities of DPD in the legislation, budgeting, consideration and supervision sectors, are always related to the regional interests and aspirations, or in other words, intended for striving for regional interests and aspirations in the political decision-making at the central level;

- c. According to Petitioner I, the aforementioned constitutional authorities have potentially been impaired by the coming into effect of Article 12 and Article 67 of Law 10/2008, because both articles do not include domicile requirement and non-political party requirement for member candidates of DPD as instructed by Article 22C Paragraph (1) of the 1945 Constitution, which reads, *"Members of the Regional Representative Council shall be elected from every province through general elections."* and Article 22E

Paragraph (4) of the 1945 Constitution, which reads, “*Participants of general elections for electing members of the Regional Representative Council shall be individuals*”, with the following argumentations:

- The absence of domicile requirement for member candidates of DPD as intended by Article 22C Paragraph (1) of the 1945 Constitution has allowed a candidate from a province to participate in and win an election of DPD members in another province although he/she does not know about the region and his/her capability in fighting for the region’s aspirations and interests is doubted. According to Petitioner I, that matter has clearly impaired the constitutional right of Petitioner I, namely because: (i) DPD members who do not really know their regions will not serve their function optimally in sustaining DPD as a state institution to fight for regional aspirations and interests; (ii) such DPD members cannot be guaranteed of their partiality for the regions they represent in decision-making or legislation process; and (iii) there is no guarantee as to the quick and easy decision-making process related to a region due to the lack of understanding or knowledge of the region;
- The absence of non-political party requirement is contradictory to Article 22E Paragraph (4) of the 1945 Constitution, because it enables a member or administrator of a political party to participate

in and win the DPD Members election. In the opinion of Petitioner I, based on logical reasoning, a DPD Member coming from a certain political party will surely prioritize the interests or platform of the political party instead of the regional interests. This is added with the fact that most political parties in Indonesia are still centralistic, with their decision-making being still dependent on the central managements of the political parties. Such matter will surely impair the constitutional authority of DPD as a state institution;

[3.8.2] Arguments of Petitioner II on Legal Standing

- a. Petitioner II argue that the DPD members who file the petition are acting as individual Indonesian citizen Petitioners or a group of people with a common interest;
- b. Petitioner II argue that they have the constitutional right given by Article 22C Paragraph (1) of the 1945 Constitution, which states, "*Members of the Regional Representative Council shall be elected from every province through general elections*". In the opinion of Petitioner II, Article 22C Paragraph (1) of the 1945 Constitution implicitly gives constitutional right to Indonesian citizens domiciled in certain provinces to be chosen as DPD members of the respective provinces;

- c. According to Petitioner II, their constitutional right mentioned above has been impaired by the coming into effect of Article 12 and Article 67 of Law 10/2008, because:
- (i) The *a quo* article does not require that a prospective member of DPD candidate has to be domiciled in the province where the prospective candidate nominates himself. Thus, the absence of domicile requirement will allow the participation in an election for DPD member candidates of a province of the people who do not come from the said province. Such matter, according to Petitioner II, has surely impaired its constitutional right to nominate itself as a DPD member of the respective province;
 - (ii) The *a quo* article does not require the non-political party requirement for prospective candidate member of DPD, whereas according to Article 22E Paragraph (4) of the 1945 Constitution, participants in General Elections of DPD members shall be individuals, which means that Article 22E Paragraph (4) of the 1945 Constitution gives constitutional right to Indonesian citizens who are not members or administrators of a political party, to be chosen as DPD members. According to Petitioner II, the absence of non-political party requirement allows candidates from political parties to compete with individual candidates in the election of DPD members, which have the potential to impair the constitutional right

of Petitioner II, because the competition becomes unfair, taking into account that a candidate from a political party is sustained by a political party organization that has been established until districts and villages, whereas an individual candidate only depends on personal network;

- d. Petitioner II also argue that their constitutional right in the form of guarantee for a fair General Elections given by Article 22E Paragraph (1) of the 1945 Constitution, which reads, "*General Elections shall be held in a direct, public, free, secret, honest and fair manner once in every five years*" is impaired by the absence of non-political party requirement. In the same way, the right to the guaranteed legal certainty of just laws given by Article 28D Paragraph (1) of the 1945 Constitution, which reads, "*Every person shall have the right to the recognition, the guarantee, the protection and the legal certainty of just laws as well as equal treatment before the law*" is potentially impaired by the absence of non-political party requirement for DPD member candidates;
- e. According to Petitioner II, the absence of domicile requirement also impairs their constitutional right given by Article 22C Paragraph (2) of the 1945 Constitution, which reads, "*The total number of members of the Regional Representative Council from each province shall be equal and the total number of members of the Regional Representative Council shall not be more than one-third of the total number of members of the People's*

Legislative Assembly". Thus, according to Petitioner II, it would be impossible for a General Election to be considered fair if the DPD member candidates who will represent the province come from other provinces, which creates the possibility that a province is not substantially represented in the DPD institution if the DPD members come from other provinces;

[3.8.3] Arguments of Petitioner III on Legal Standing

1. Petitioner III argue that they are individual Indonesian Petitioners, including a group of people with a common interest, as intended in Article 51 Paragraph (1) Sub-Paragraph a of the CC Law along with its elucidations;
2. According to Petitioner III, they are people who have been publicly known as being active and concerned about General Elections-related issues, performance of the parliament, quality of public representation in the parliament, and channeling of regional aspirations, comprising the following persons:
 - i. Hadar Navis Gumay (number 1) is the Executive Director of Cetro, who has the interest in the efforts of electoral reform, with a view to a democratic, direct, public, free, secret, honest and fair General Elections as mandated by Article 22E Paragraph (1) of the 1945

Constitution, so that the General Elections produce a parliament with people's sovereignty;

- ii. Dr. Saafroedin Bahar (number 2), Head of Experts Board of the National Secretariat For the Protection of Constitutional Rights of Customary Law Communities, who has the interest in the channeling of aspirations from customary law communities as part of regional community aspirations by the election of the suitable regional representatives in the DPD, so that the aspirations and rights of customary law communities as guaranteed by Article 18B Paragraph (2) and Article 28I Paragraph (3) of the 1945 Constitution are protected;
- iii. Sulastio (number 3) is the Chairperson of IPC, who has the interest in the implementation of a democratic, direct, public, free, secret, honest and fair General Elections as mandated by Article 22E Paragraph (1) of the 1945 Constitution, so that the General Elections produce a parliament which is able to represent the public interest properly;
- iv. Sebastianus KM Salang (number 4) is the Coordinator of the Indonesian Parliamentary Social Concern Forum (FORMAPPI), who has the interest in the implementation of a democratic, direct, public, free, secret, honest and fair General Elections as mandated

by Article 22E Paragraph (1) of the 1945 Constitution, so that the General Elections produce a functional and effective parliament;

[3.8.4] Arguments of Petitioner IV on Legal Standing

1. Petitioner IV are regional citizens who argue themselves to be individual Indonesian citizen Petitioners as intended in Article 51 Paragraph (1) Sub-Paragraph a of the CC Law along with its Elucidation;
2. According to Petitioner IV, as regional citizens who reside in their own province and who are not members of any political party, they consider that the coming into effect of Article 12 and Article 67 of Law 10/2008 has potentially impaired the constitutional rights of Petitioner IV as regulated in Article 22C Paragraph (1), Article 22E Paragraph (1) and Paragraph (4), and Article 28D Paragraph (1) of the 1945 Constitution, with the same argumentation conveyed by Petitioner II;

[3.9] Considering whereas according to the Court, the arguments of Petitioner I, Petitioner II, Petitioner III, and Petitioner IV on the legal standing as specified above cannot be separated from the arguments of the Petitioners on the constitutionality of Article 12 and Article 67 of Law 10/2008, which do not include domicile and non-political party requirements for individuals intending to nominate themselves as DPD member in the General Elections. For that reason, the matter of legal standing of the Petitioners shall be considered together with the principal issue of the petition.

Principal Issue of the Petition

[3.10] Considering whereas in the principal issue of the petition, the Petitioners request the Court to review the constitutionality of Article 12 and Article 67 of Law 10/2008 which do not include domicile and non-political party requirements for DPD member candidates in the General Elections, because in the opinion of the Petitioners, the absence of domicile and non-political party requirements in Article 12 and Article 67 of Law 10/2008 is contradictory to the 1945 Constitution, with the following argumentations:

- a. Whereas the Petitioners argue the Article 22C Paragraph (1) of the 1945 Constitution , which reads, “*Members of the Regional Representative Council shall be elected from every province through general elections*” contains a constitutional norm that DPD members shall be selected from among the citizens domiciled in their own provinces (domicile requirement). Whereas Article 22E Paragraph (4) of the 1945 Constitution, which reads, “*Participants of general elections for electing members of the Regional Representative Council shall be individuals*” contains a constitutional norm that DPD members shall be selected from among non-political party individuals (non-political party requirement). Whereas aside from that, according to the Petitioners, the *raison d’etre* of the restriction in the form of non-political party requirement is for the purpose of neutrality of regional representatives through DPD, in the same way as the *raison d’etre* of the restriction towards members of TNI/Polri (The Indonesian

- National Army/National Police), civil servants (PNS), et cetera on becoming DPD member candidates which is also made to keep the neutrality (*vide* Article 12 Sub-Articles k and m of Law 10/2008);
- b. Whereas the Petitioners also compare the provision of Article 63 of Law Number 12 Year 2003 regarding the General Elections of DPR, DPD, and DPRD members (hereinafter referred to as Law 12/2003, Exhibit P-2) and Academic Script as well as Early Draft Law of the 2008 General Elections, which were prepared by the Government (Exhibit P-3) which indicate the domicile and non-political party requirements (meaning the administrators of political party) to become DPD member candidates. However in Article 12 and Article 67 of Law 10/2008, precisely the domicile and non-political party requirements are eliminated (Exhibit P-1);
 - c. Whereas according to the Petitioners, the elimination of the domicile and non-political party requirements in essence constitute an implicit constitutional norm conducted intentionally based on motive for gaining power from certain party (Exhibit P-4). Such matter constitutes a negation of the existence of constitutional norm and renders Law 10/2008 legally flawed;
 - d. Whereas according to the Petitioners, the absence of domicile requirement in Article 12 and Article 67 of Law 10/2008 is contradictory to Article 22C Paragraph (1) of the 1945 Constitution, because the phrase “*elected from every province*” contains a meaning or interpretation that the

DPD member candidates must have their domicile in the respective provinces. Such interpretation is made by the law makers of Law 12/2003 and also in the Government's version of Draft Law on General Elections. The absence of those domicile and non-political party requirements is also contradictory to the community's aspiration (Exhibit P-5);

- e. Whereas according to the Petitioners, the importance of domicile requirement for DPD member candidates has also become the opinion of various Indonesian experts on state constitution of Indonesia (Exhibits P-6, P-7, P-8, and P-9), which means that whether from semantic interpretation or contextual interpretation by referring to main idea of DPD establishment, domicile requirement is an vitally important element for DPD member candidates. For that reason, according to the Petitioners, the absence of domicile requirement in Article 12 and Article 67 of Law 10/2008 has to be declared contradictory to Article 22C Paragraph (1) of the 1945 Constitution;
- f. Whereas according to the Petitioners, non-political party requirement for DPD member candidates can be interpreted systematically from the provisions indicated in Article 22E Paragraph (3) of the 1945 Constitution "*Participants of general elections for electing members of the People's Legislative Assembly and the Regional Representative Council shall be political parties*" and Article 22E Paragraph (4) of the 1945 Constitution that "*Participants of general elections for electing members of the*

- Regional Representative Council shall be individuals.*” Such matter in the Petitioner’s opinion is not discriminatory to Indonesian citizens from political parties, because Article 22E Paragraph (3) of the 1945 Constitution has given the chance only to those from political parties to become DPR and DPRD members. Thus, it is logical to interpret Article 22E Paragraph (4) of the 1945 Constitution as a provision which gives a chance only to individual Indonesian citizens who are not from any political party (whether as members or administrators) to become DPD members;
- g. According to the Petitioners, Article 22E of the 1945 Constitution has been fair enough in regulating that DPD members shall be selected from individuals (non-political party), whereas DPR and DPRD members shall be selected from political parties. Such constitutional norm is also supposed to be further regulated in Law 10/2008, instead of being eliminated. Whereas, the fourth paragraph of Law 10/2008 has emphasized that “... *to accommodate the diverse regional aspiration, according to the provision of Article 22C of the Constitution of the State of Republic of Indonesia Year 1945, the Regional Representative Council (DPD) is established, with its members being selected from individuals who meet the requirements in General Elections...*”;
- h. According to the Petitioners, the absence of non-Political party requirement in Article 12 and Article 67 of Law 10/2008 is a denial and/or a violation of Article 22E Paragraph (4) of the 1945 Constitution, thus it

has to be declared contradictory to the 1945 Constitution, because the principle of representative democracy in Indonesia according to the 1945 Constitution is represented by DPR which brings national interest embodied in the purpose of each Political Party and by DPD which is a representation of individuals who bring the aspiration from every region they represent in the context of national interest;

- i. Such perspective, according to the Petitioners, is supported by the opinion of the experts of State Constitution of Indonesia (Exhibits P-8, P-9, P-10, P-11, and P-12). Whereas the Petitioners are fully aware of the opinion that the DPD members coming from Political Parties are not certainly unable to represent the regional interest/aspiration and that many democratic states have their Senate members coming from Political parties, yet it is more because of their different political culture and socio-cultural context (Exhibits P-12C, P-12D, P-12E);
- j. Whereas the Petitioners realize that this petition for judicial review of Law 10/2008 is concerned with the absence of norm in Article 12 and Article 67 of Law 10/2008 which renders the *a quo* article unconstitutional, whereas in common practice, a judicial review is aimed at a norm considered unconstitutional. However, according to the Petitioners, basically the mandate of the 1945 Constitution in the form of the Court's authority to review a law against the Constitution is not limited to only review of the existence of an unconstitutional norm, but includes the review on the

absence of norm which is supposed to exist according to the mandate of the Constitution, *in casu* the absence of norm of domicile and non-political party requirements in Article 12 and Article 67 of Law 10/2008 which should have existed according to the mandate of Article 22C Paragraph (1) and Article 22E Paragraph (4) of the 1945 Constitution;

k. According to the foregoing, the Petitioners file several alternatives of *Petitum* as follows:

- (i) To grant the request of the Petitioners by declaring Article 12 and Article 67 of Law 10/2008 contradictory to Article 22C Paragraph (1) and Article 22E Paragraph (4) of the 1945 Constitution, so they do not have any binding legal force. Then to avoid a legal vacuum for the smoothness of the 2009 General election, the Court shall request the President to issue a Government Regulation in Lieu of Law or the General Elections Commission (KPU) to issue a KPU Regulation which stipulate domicile and non-political party regulations for DPD member candidates; or
- (ii) To declare that Article 12 and Article 67 of Law 10/2008 are applicable as being conditionally constitutional, which means that Article 12 Sub-Article (c) of Law 10/2008 shall deemed to be read as referring to having been domiciled in the relevant province for at least 3 (three) years consecutively which is counted until the date of candidate nomination or having lived for 10 years since the age of

17 in the relevant province, and Article 67 of Law 10/2008 shall be deemed to be read as referring the Resident Identity Card of Indonesian citizen from the relevant province. Aside from that, Article 12 Sub-Article c of Law 10/2008 also has to be interpreted as referring to individual citizens of the Republic of Indonesia who are not members or administrators of a political party;

- (iii) or if not interpreted as such, Article 12 and Article 67 of Law 10/2008 have to be declared contradictory to Article 22C Paragraph (1) and Article 22E Paragraph (4) of the 1945 Constitution (conditionally unconstitutional);

[3.11] Considering whereas to support their arguments, the Petitioners have presented written evidence (Exhibits P-1 through P-18) which were already authorized in the hearing on April 15, 2008. Aside from that, the Petitioners have also presented witnesses and experts who have conveyed their statements under oath, as completely described Facts of the Case part of this Decision, which are principally as follows:

[3.11.1] Statement of Witness of the Petitioners, Drs. Progo Nurdjaman

In the Plenary Meeting on May 13, 2008 the witness stated that when he was one of Government representatives in the discussion of Draft Law of General Election of DPR, DPD, and DPRD members which later on became Law 10/2008, acknowledged and confirmed that the Draft Law from the

Government included provisions regarding domicile and non-political party requirements for DPD member candidates. The witness stated that the domicile and non-political party requirements did not come up in Article 12 and Article 67 of Law 10/2008, but the witness did not know the reason, because the witness was already pensioned off and no longer became a Government representative in the discussion of the Draft Law on General Elections;

[3.11.2] Statement of Expert of the Petitioners, Drs. Arbi Sanit

The expert as a political science expert in the Plenary Meeting on May 13, 2008 basically stated the following:

- The expert reviews the basic matter of DPD petition in this case from the perspective of political parties which dominate and influence the law makers in producing the DPP-related articles being problematicized. According to the expert, that matter is caused by the current tendency of political parties that desire to dominate and monopolize the state or state affairs, whether vertically in state institutions of national and regional nature, or horizontally, in state institutions of the same level. Such monopoly and domination of political parties in the expert's opinion have even reduced the presidential government system into a tendency to the direction of a parliamentary system;
- In relation to the parliament, according to the expert, following the amendment to the 1945 Constitution there have been basically two

bodies, namely DPR and DPD, yet the DPD has been granted with minimum authority only, the authority which is actually not as a legislative council, but only as an institution which assists the DPR. Moreover, now, through the General Election Law (Law 10/2008), DPD is about to be entered and dominated again by political parties through the articles that are being reviewed, thus the DPR, in this case the political parties, are conducting power centralization, and not sharing the power based on the 'checks and balances' principle;

- According to the expert, the roots of the difficult problems that our country is facing at this moment have been caused by monopoly by political parties which causes the presidential system marked by the 1945 Constitution to practically change into a parliamentary system due to the birth of a multiparty system with chaotic party condition. For that reason, for the sake of our commitment to the party, because a democracy without party is not a democracy, then the political parties have to be rearranged, not from the inside by the party internal elements which are already corrupted, but from the outside, namely by the middle class and intellectual community through political pressures. In the expert's opinion, currently there are three effective institutions which can fix the political parties from the outside, namely the Corruption Eradication Commission (KPK) and the Audit Board (BPK), to encourage the parties to be more honest, and the Constitutional Court through interpretation in judicial review of laws against the 1945 Constitution;

- The expert through his written conclusion also states that Law 10/2008 which does not stipulate the domicile and non-political party requirement for DPD member candidates which in essence is a Constitutional norm is contradictory to the 1945 Constitution, because not only has it harmed independent leaders from the local community in the province and the DPD members resulting from the 2004 General Elections by reducing their chance to be elected as DPD member candidates through the 2009 General Election, it has degraded the DPD institution as well. Therefore, the expert is expecting the objectivity and neutrality of judicial interpretation by the Constitutional Court to be able to save the reform from the mistake of legislation interpretation of Constitution by DPR;

[3.11.3] Statement of Expert of the Petitioners, Dr. John Pieris, S.H., M.S.

At the Plenary Meeting on May 13, 2008, the expert conveyed his statement which is principally as follows:

- According to the expert, etymologically based on the second edition of *Kamus Besar Bahasa Indonesia*, the phrase “*from every province*” in the formulation of Article 22C Paragraph (1) of the 1945 Constitution, which reads, “*Members of the Regional Representative Council shall be elected from every province through general elections*” shows the place or space and origin, namely the place to stay, shelter, reside, and place of domicile. In other words, it could be emphasized that the meaning is having

domicile in the nomination of DPD members at the province of origin, not from other provinces. This requirement for administrative permanent domicile from the region represented is also adhered to by the United States and Thailand. The understanding of 'elected from every province' contains the meaning of being nominated and elected from the province where the candidate is domiciled, which is a different matter if the phrase 'elected from every province' has the meaning of being elected in every province but the candidate does not have to be among those domiciled in that province;

- According to the expert, the phrase 'elected from every province' based on representative theory means representing the area, which from the substantial-hermeneutical view, the area representation have to be filled or represented by people domiciled in that area, who have broad and in-depth knowledge of the condition, situation, and the community character as well as the problems in that region.
- According to the expert, the nature of representation of DPD members is 'rational representation', which rationally means representing the province in which the related persons are domiciled, and also that they are not representatives of political parties (political representation), which is the domain of representation in DPR and DPRD;

- The phrase “*individuals*” in the formulation of Article 22E Paragraph (4) refers to persons or independent, non-partisan individuals from a entity, including Political party, Civil Service (PNS), and TNI/Polri member;

[3.11.4] Statement of Expert of the Petitioners, Sry Satriya Tjatur Wisnu Sasangka

As a linguist, the expert conveyed his understanding from a linguistic perspective on the formulation of Article 22C Paragraph (1) of the 1945 Constitution, “*Members of the Regional Representative Council shall be elected from every province through general elections*” and Article 22E Paragraph (4) of the 1945 Constitution, “*Participants of general elections for electing members of the Regional Representative Council shall be individuals*”, as follows:

- The word “from” is a preposition which conveys the meaning of ‘origin’, while the word “every” on the phrase “every province” conveys the meaning of each province. Therefore, the understanding of Article 22C Paragraph (1) from a linguistic perspective is that the DPD members have to be selected from the candidates coming from and domiciled in the province they represent, in order to be representatives of that regions;
- Regarding the understanding of the formulation of Article 22E Paragraph (4), the expert is of the opinion that the people elect individuals, not party candidates, to become DPD members, because the place for party

candidates is in DPR as regulated in Article 22E Paragraph (3) of the 1945 Constitution;

[3.11.5] Statement of Expert of the Petitioners, Denny Indrayana, S.H, LL.M, Ph.D.

At the Plenary Meeting on June 10, 2008, the expert conveyed a statement that in the essence declared the following six matters:

1. According to what the expert understands and in line with the original intent of Article 22C Paragraphs (1) and (2) and Article 22E Paragraph (4) of the 1945 Constitution, the meaning of the Regional Representative Council in the 1945 Constitution is regional representatives, then it would be absurd if the regional representatives do not reside in the relevant region, which is different from the political representation of DPR and functional representation of Societal Group in the People Consultative Assembly (MPR) before the Amendment to the 1945 Constitution. Therefore, DPD member candidates shall be required to have their domicile in the represented province and to be individuals who do not come from any political party;
2. According to the expert, the provincial domicile requirement and the non-political party individual requirement for DPD member candidates are the original intent of Law 12/2003, which is in accordance with the original

intent of Article 22C Paragraphs (1) and (2) and Article 22E Paragraphs (4) of the 1945 Constitution;

3. Whereas the legislation of Law of Law 10/2008 has intentionally eliminated the domicile in province requirement and non-political party individual requirement for DPD membership;
4. Whereas the radical change of interpretation of the amendment to the 1945 Constitution in the form of elimination of the provincial domicile requirement and the non-political party individual requirement for DPD member candidates in Law 10/2008 is a form of “improper purposes”;
5. Whereas the absence of the provincial domicile requirement and the non-political party individual requirement for DPD membership has to be declared not in conformity with, not contradictory (*in contradiction*) to the 1945 Constitution, because the Law 10/2008 can only be declared in accordance with the 1945 Constitution if it includes that missing norm;
6. According to the expert, the absence of the provincial domicile requirement and the non-political party individual requirement (not explicitly written) in Law 10/2008 have to be deemed as the norm itself, thus the Court has the authority to declare that the absence of the intended norm is not in conformity with the 1945 Constitution;

[3.11.6] Statement of Expert of the Petitioners, Drs. Thomas Aquino Legowo, M.A.

The expert has given his statement which is in essence as follows:

- According to the expert, the enactment of Law 10/2008 is an improvement, since besides correcting the weakness in former law namely Law 12/2003, it also formulates several new provisions which have never been applied to the previous General Elections, while it also nullifies several old provisions in Law 12/2003. The decision to add or nullify certain provisions is an effort which can improve and complete a certain legislation. Even so, according to the expert, it is still possible that an addition or nullification of several provisions can divert from or change the meaning of the basic principle and thought which exists and develops in the 1945 Constitution, which is the basis for of formulation of laws and regulations. The question is why Law 10/2008 no longer applies the provisions regarding the domicile and the non-political party requirements for DPD member candidates. This is a matter that has never been explained officially;
- However, according to the expert, apart from the existence or absence of the explanation, the nullification of the two provisions have made it possible for DPD membership to be open for elected candidates who are not domiciled in the represented region and who are the administrators of political parties. The issue is whether such possibility is in line with the spirit of the basic principle and thought which motivated the establishment of DPD in the amendment process of the 1945 Constitution in 1999 –

2001 and 2002. If we look back to the debating process leading to the DPD establishment in MPR meetings, several notes can be concluded which are directly or indirectly related to the two requirements for DPD member candidates, namely:

- i. DPD is a representative board which substitutes the societal groups to channel regional aspirations to prevent disintegration in the nation. Therefore, DPD is a territorial representative, in this case the province, to accommodate regional aspirations in national politics process, and thus DPD members have to give their full concentration as regional representatives;
- ii. DPD as a regional representative board has to be distinguished from DPR, which is a representative board which represents the people's aspirations, so that in this basic principle, DPD is not allowed to surpass DPR, whether in terms of the number of its members or the extent of its authority. The argumentation for this is that the number of regions is always smaller than the number of citizens, and thus the number of DPD members is determined to be no more than one third of the number of DPR members, and the scope is limited to the affairs related to the regions;
- iii. DPD as a regional representation must consist of people who are selected through general elections in each region. This principle means that the DPD members are people officially chosen by local-

regional citizens to represent the respective regions, and thus the DPD members do not represent any other entity aside from the region, such as mass organizations, religious communities or political parties;

- According to the expert, that spirit of the basic principle and thought has clearly emphasized that DPD members are people who know, recognize, and understand the problems of the regions they represent. Indeed, Article 22C Paragraph (1) of the 1945 Constitution does not explicitly state that DPD members have to come from and have their domicile in the province they represent; however the phrase *“Members of the Regional Representative Council shall be elected from every province ...”* would have no other meaning than that the DPD members shall not come from other provinces, so it reflects the domicile principle;

[3.11.7] Statement of Expert of the Petitioners, Dr. Indra Jaya Piliang

In his statement at the hearing on June 10, 2008, titled “From Democracy to Particracy, From People Sovereignty to Party Sovereignty”, the expert declared matters which in essence are as follows:

- DPD is a representative of areas in Indonesia which have so many varieties, with each nature and characteristics, whether in ethnography, religion, and others that reflect varieties (diversity), something cannot be represented by political parties. Therefore, DPR and DPD in the

representation system in Indonesia are two different identities. DPR is a representative of citizens, whereas DPD is a regional representative;

- According to the expert, the 1945 Constitution amendment adopts the contra-hegemony principle, that is aligning the constitution before the amendment which created authoritarianism, such as for example, when the President is no longer elected by MPR, the authority shifts to the legislative board which is divided into two; one is DPR which as citizens' representative, the other one is DPD as regional representatives. According to the expert, the difference between DPR and DPD is not only a functional difference, but in essence is a substantial difference, namely that regional affairs are explicitly the affairs of DPD, not DPR. Therefore, if DPD membership is filled with people from political parties, then the centralization or hegemony of state authority by political party will obtain space; if before the constitutional amendment the authority was centered on individuals namely on Soekarno and Soeharto, it will be turned into the political parties;
- According to the expert, the domicile issue is in essence concerned with the identity of a region, for example the identity of Melanesian race in the Special Autonomy of Papua who does not originate from Asia, but from the Pacific Ocean, also for Aceh which adheres to Islamic Sharia. The consequences are unimaginable if there is no domicile requirement for DPD member candidates; Papuan people might not be represented by a

person from a Papuan ethnic group, and Acehnese People might not be represented by an Acehnese, thus the nature of the diverse Indonesia will be destroyed. In such context, the domicile consideration might be considered primordialistic, but it a constitutional primordialism. Thus the domicile requirement is a very important principle that has to be fulfilled by DPD, and because in Indonesia, domicile is associated with KTP (Resident Identity Card), not the birth certificate and location of study, therefore the KTP is the evidence of domicile requirement;

- Based on the foregoing principles, thus by eliminating the domicile and non-political party requirement for DPD member candidates, what occurs is no longer a democratic principle, but a particratic principles, where the sovereignty is in the hands of Parties that will cause Indonesia to be trapped within into a permanent transition process;

[3.11.8] Statement of Expert of the Petitioners, Hestu Cipto Handoyo, S.H., M.Hum.

The expert has given his statement entitled “The Absence of synchronization of Domicile and Non Political Party Norms for prospective DPD member candidates from the Constitutional Perspective”, which principally describes as follows:

- According to the expert, Article 22C Paragraph (1) of the 1945 Constitution, which reads, “*Members of the Regional Representative*

Council shall be elected from every province through general elections” still creates two interpretation; *first*, ‘every province’ can be interpreted as a government organization structure in the context of territorial decentralization, and *second*, ‘every province’ can be interpreted as an electoral district as regulated in Law 10/2008. In this matter the expert is of the opinion that the norm included in Article 22C Paragraph (1) of the 1945 Constitution is closely related to the norm included in Article 18 Paragraph (1) of the 1945 Constitution which emphasizes that “*The Unitary State of the Republic of Indonesia shall be divided into provincial regions and these provincial regions shall be divided into regencies and municipalities, whereby each province, regency and municipality shall have a regional government regulated by law.*” Therefore, the phrase ‘from every province’ in Article 22C Paragraph (1) of the 1945 Constitution shall be interpreted as referring to province in the sense of territorial decentralization as intended by Article 18 Paragraph (1) of the 1945 Constitution, so that the norm of domicile in the province for DPD member candidates is a constitutional norm, which, if eliminated from Law 10/2008, means violating the constitution;

- The expert is also of the opinion that as to the norm contained in Article 22E Paragraph (4) of the 1945 Constitution, which reads “*Participants of general elections for electing members of the Regional Representative Council shall be individuals*”, the interpretation is that the word “individuals” refers to independent individuals who are not bound by the

interests of a certain group or political affiliation. This means that constitutionally, the requirement for DPD member candidates to be non-Political party individuals, being the same with other requirements such as having the position as public accountant, advocate, lawyer, notary, et cetera;

[3.11.9] Statement of Expert of the Petitioners, M. Fajrul Falaakh, S.H., M.Sc.

At the Plenary Meeting on June 10, 2008, the expert gave his statement which is principally as follows:

- Whereas the representation of multiple regions is not a new concept in the Constitution of Indonesia, because before the Amendment to the 1945 Constitution, we had a provision that MPR consisted of DPR members along with regional representatives and groups. The Elucidation of the 1945 Constitution regarding that matter declared that such formulation is intended for all regions to have representatives in the Assembly, so that the assembly could really be deemed as a manifestation of the people. Furthermore, we have once experienced that in the recruitment of regional representatives; the governor automatically became a regional representative;
- According to the expert, following the Amendment to the 1945 Constitution, regional representation has been institutionalized as DPD

- which in the 1945 Constitution has been included its several constitutional provisions, namely that DPD members are selected from every province, with the total number of DPD members being not more than the one third of the number of DPR members, and DPD members shall be selected from individual candidates. Thus, there is a constitutional norm for the General Elections of DPD members, namely that the place of origin of the member candidate shall be a province, not other country, not village, regency or municipality and not the capital city of the province either. Article 22C Paragraph (2) of the 1945 Constitution provides that the total number of DPD members from every province shall be the same, which means that the “equality of regional representation” principle is followed. Article 22C Paragraph (1) and Paragraph (2) of the 1945 Constitution also contains an implicit constitutional norm, namely that every province has the right to representation in DPD and DPD members shall come and originate from the province;
- Furthermore, the expert is of the opinion that the provision of Article 22E Paragraph (4) of the 1945 Constitution, “*Participants of general elections for electing members of the Regional Representative Council shall be individuals*”, can be said to be contradictory to the provision of Article 22E Paragraph (3) that “*Participants of general elections for electing members of the People’s Representative Assembly and the People’s Representative Assembly shall be political parties.*” That provision emphasizes that the legal subject for DPR and DPRD shall be the Political Party (in law

science it is called entities as the legal subject) and the legal subject for DPD shall be individuals (in law science it is called individuals as the legal subject). Therefore, according to the expert, it is clear that individuals for DPD member candidates are not from Political Party, as clear as the provision that DPR and DPRD member candidates shall be from Political Parties;

[3.12] Considering whereas the People's Legislative Assembly of the Republic of Indonesia (DPR RI) has given its oral and written statements as completely described in the Facts of Case part of this Decision, which principally describe as follows:

[3.12.1] Statement of DPR at the Plenary Meeting dated May 13, 2008

At the Plenary Meeting dated May 13, 2008 DPR, which was represented by Pataniari Siahaan and Lukman Hakim Saefuddin, principally described as follows:

- According to DPR, DPD as Petitioner I as a state institution indeed qualifies as a Petitioner in judicial review of law against the 1945 Constitution as intended by Article 51 Paragraph (1) of the CC Law and DPD indeed has the constitutional authority as intended by Article 22D Paragraphs (1), (2), and (3) of the 1945 Constitution. However, the constitutional authority of DPD has nothing to do with the provision of Article 12 and Article 67 of Law 10/2008, because that provision in Article

22D came into effect after the DPD was established, whereas Article 12 and Article 67 contain the requirements to become DPD members, so that the respective provisions will not impair the constitutional authority of DPD, and thus Petitioner I does not have the legal standing. DPR is also of the opinion that DPD members as individuals also do not have the legal standing, because as individual Indonesian citizens, DPD members are not impaired by the coming into effect of Article 12 and Article 67 of Law 10/2008; they still have right and are free to nominate themselves as DPD members in General Elections. Similarly, according to DPR, Petitioner III also do not have the legal standing because Petitioner III have no direct interest with the requirements for DPD member candidates included in Article 12 and Article 67 of Law 10/2008. In the same way, Petitioner IV, which are individual regional citizens, despite their having the right to file a judicial review of Law 10/2008 and the constitutional right given by the 1945 Constitution, yet according to DPR, Petitioner IV do not have the legal standing either, because the provisions of Article 12 and Article 67 of Law 10/2008 do not impair the constitutional right of Petitioner IV, and Petitioner IV are not hindered from exercising their right to nominate themselves as DPD members in General Elections;

- According to DPR, what is petitioned by the Petitioners in the principal issue of their petition is the absence of domicile and non-Political party requirements in Article 12 and Article 67 of Law 10/2008 which they consider contradictory to Article 22C Paragraph (1) and Article 22E

- Paragraph (4) of the 1945 Constitution. Thus, basically, what is argued by the Petitioners is not the material content in the form of norms contained in a law, but a formulation of a phrase which according to the Petitioners should have been included in Article 67 of Law 10/2008. If that is the case, then normatively, Article 12 and Article 67 of Law 10/2008 actually do not violate or contradict Article 22C Paragraph (1) and Article 22E Paragraph (4) of the 1945 Constitution. Whereas, Article 51 Paragraph (3) of the CC Law requires the Petitioners to describe clearly the Article, Paragraph, and/or part of law the substance of which is being petitioned for judicial review as it is considered contradictory to the 1945 Constitution. In their petition, actually the Petitioners realize that fact, then it is supposedly that the Attorney of the Petitioners as part of law enforcer should have complied with the provisions of Article 51 Paragraph (3) of the CC Law and what has been practiced by the Constitutional Court all this time;
- According to DPR, is it questioned that in the case for the *a quo* petition which does not describe the article, paragraph, and/or part of law from Law 10/2008, considered contradictory to the 1945 Constitution, as it is only concerned with the absence of norms of domicile and non-political party requirements in Law 10/2008, while suddenly in the *petitum* the Petitioners request that Article 12 and Article 67 of Law 10/2008 be declared contradictory to the 1945 Constitution and not having any binding legal force. Whereas, the absence of a norm is not a norm which has any binding legal force;

[3.12.2] Supplementary Statement of DPR on the Hearing of June 10, 2008

In the Court hearing on June 10, 2008, DPR which was represented by Ferry Mursyand Baland, Agun Gunanjar Sudarsa, and Prof. Dr. Wila Chandrawila, conveyed supplementary statement which is principally as follows:

- According to DPR, in democratic general elections, it is the constituent that shall determine their representatives in DPD, not the law. Thus, even though there are no domicile and non-political party requirements, there are still some stages to become DPD members, namely to gather support and most importantly to be selected by the people in that province, because the right to give support and the right to vote are still in the hands of the people;
- According to DPR, the domicile requirement for DPD member candidates, is not explicitly included in Article 22C Paragraph (1) of the 1945 Constitution, and the meaning that the phrase “from every province” contains shall be that the DPD member candidates have to come from and have to be domiciled in the represented province is an interpretation of the Petitioners themselves. Whereas, such provision can also be interpreted in such a way that every province has to be represented, there shall not be one or more province not being represented in DPD;

- According to DPR, the word “individuals” in Article 22E Paragraph (4) of the 1945 Constitution means that the nomination is not through Political Party, even though the respective individuals are political party members;
- The Arguments of the Petitioners which make a comparison with Law 12/2003 and Draft Law from the Government, is that DPR considers that with respect to a judicial review of the constitutionality of a law, the parameter of the review shall be the 1945 Constitution, not a law, let alone a Draft Law;

[3.13] Considering whereas the Government which was represented by the Minister of Home Affairs, Mardiyanto and Minister of Law and Human Rights Affairs, Andi Matalatta, presented its oral and written statements at the Plenary Meeting dated June 10, 2008, as completely described in the Facts of the Case part of this Decision, which principally state as follows:

- In general, the Government declares that the establishment of DPD through General Elections is conducted based on the principle of the equal right and standing of every citizen in exercising their rights to be nominated, so that DPD member candidates are not required to have their domicile in the province of their electoral districts and are not limited according based on their background or political status (Political Party or non-Political Party). This is line with the principle of unity of regions and equality of legal standing of citizens in the Unitary State of the Republic of Indonesia;

- Regarding the legal standing of the Petitioners, the Government questions who is actually impaired by the coming into effect of Article 12 and Article 67 of Law 10/2008. According to the Government, Petitioner I has made a mistake and has been inaccurate in construing the impairment of rights and/or constitutional authority by the coming into effect of Law 10/2008, because in reality, until the present, Petitioner I still can perform its duty, function, and authority as regulated in Article 22D of the 1945 Constitution, or Article 32 through Article 51 of Law Number 22 Year 2003 regarding the Organizational Structure and Position of MPR, DPR, DPD, and DPRD members. In other words, the constitutional rights and/or authorities of Petitioner I have not been reduced, hindered, or disturbed at all by the coming into effect of Law 10/2008. Similarly with Petitioner II, the provisions of Article 12 and Article 67 of Law 10/2008 do not have any relationship with the constitutional right of Petitioner II because that provisions are only related to the requirements for becoming DPD member candidates and do not reduced any of the constitutional rights of DPD members. The Government is also of the opinion that the provisions of Article 12 and Article 67 of Law 10/2008 are not related at all to the interest of Petitioner III who claim themselves as individual Indonesian citizens, publicly known as being active and concerned with issues regarding the General Elections, performance of the parliament, quality of public representation in the parliament, and channeling of regional aspirations. With respect to the legal standing of Petitioner IV, the

Government is of the opinion that Article 12 and Article 67 of Law 10/2008 do not reduce the constitutional right of Petitioner IV to nominate themselves as DPD members. Therefore, the Government is of the opinion that Petitioner I, Petitioner II, Petitioner III, or Petitioner IV do not meet the legal standing requirements to file a petition for judicial review of Article 12 and Article 67 of Law 10/2008;

- Regarding the elimination of constitutional norm in Law 10/2008, it is indeed true that in Law 10/2008, domicile requirement for DPD member candidates is not included, yet according to the Government such matter is not an elimination of a constitutional norm. The reason is that the provision of Article 22C Paragraph (1) of the 1945 Constitution can be interpreted in several dimensions, *first*, the phrase “from every province” is interpreted as electoral district of General Elections for DPD members, as adhered to by Law 10/2008 and also by Law 12/2003; *second*, there is no explanation in Article 22C Paragraph (1) of the 1945 Constitution that the DPD member candidates from an electoral district of a certain province have to be bound by the domicile requirement in the electoral district of the relevant province. The regulation in Law 12/2003 and the Draft Law on General Elections from the Government are only one of the interpretation alternatives on the mandate of Article 22C Paragraph (1) and Article 22E of the 1945 Constitution, there are still other alternatives as provided by Law 10/2008. Such matter is a law politics, resulting from the agreement

between DPR and the Government, so it is not contradictory to the 1945 Constitution;

- The Government is also of the opinion that it is indeed true that Law 10/2008 does not contain non-Political party requirement for DPD members, yet the Government does not in agree with the Petitioners that such matter is an elimination of a constitutional norm. The reason is that, according to Government, the provision of Article 22E Paragraph (4) of the 1945 Constitution that the Participants in the general elections of DPD members are individuals, cannot be immediately interpreted in such a way that political party member citizens are not allowed to become DPD member candidates. Besides, such regulation does not reduce the individual rights of non-Political party citizens;
- The Government is of the opinion that the perspective of the Petitioners regarding the domicile and non-Political party requirements which will place DPD to really become a regional representation, carrying the regional aspirations and free from any political parties platform is only an opinion of the Petitioners which is still of speculative nature and which may not be true in reality;

[3.14] Considering whereas the Government has presented an expert, that is Prof. Dr. Zuand Arif Fakrulloh, S.H., who gave an oral and written statements at the Plenary Meeting on June 10, 2008, as completely described in the Facts of the Case part of this Decision, which principally state as follows:

- The expert has conducted a legal analysis concerning the relationship between Law 10/2008 and Article 22C Paragraph (1) and Article 22E Paragraph (4) of the 1945 Constitution with the interpreting method and approach from the Legal Institution and Norm Science. According to the expert, with such method and approach, DPD has been formed in the context arranging the Indonesian parliamentary structure to become 2 chambers (bicameral), consisting of DPR and DPD. Philosophically, the bicameral model is expected to represent the people's interest completely and comprehensively, in which DPR is expected to reflect the political representation and DPD to reflect regional representation. This means that DPR members as political representatives are selected through Political Party channel, whereas DPD members as regional representatives are selected through individual candidates not through Political Parties and are representatives from every province;
- Based on such philosophy, DPD members as regional representatives are obligated to voice regional interests. Whereas the meaning of 'selected from every province' is that every province shall have a representative in DPD, in this context the province is an electoral district (*dapil*). DPD members are obligated to voice regional interests nationally through national policies, not for the interest of their own region. Thus, the expert is of the opinion that in this context, the domicile requirement for DPD members is irrelevant, because the duty of DPD is not to fight for their

regions, but cumulatively for regions in Indonesia through national policies;

- According to the expert, the absence of non-Political party requirement in relation to Article 22E Paragraph (4) of the 1945 Constitution in fact reflects the “equality before the law” principle in the qualification of individual legal subjects as DPD member candidates. The making of the norm of non-Political party requirement actually reduces the essence of the spirit in the word “individuals” which in principle can come from anywhere;
- Concerning the petition for judicial review of the absence of norm in Law 10/2008, *in casu* the absence of non-Political party requirement and domicile requirement for DPD member candidates, thus according to the expert, in the event that they are not in norms of law, such matter cannot be filed for judicial review, because the object is not yet formed;

[3.15] Considering whereas the Petitioners have submitted a written conclusion dated June 20, 2008, which principally states that, besides being not in agreement with the statement of DPR and the Government whether concerning the legal standing of the Petitioners and the Principal Issue of The Petition, the Petitioners remain consistent with their opinion;

[3.16] Considering whereas DPR in the afternoon of June 10, 2008, conveyed its oral conclusion which principally stated that it remained consistent with its opinion it had conveyed previously;

[3.17] Considering whereas the Government has submitted its written conclusion dated June 19, 2008 which principally states that, beside responding to the statement of the Petitioners, the expert, and witness, also requesting to the Court to declare that the Petitioners do not have a legal standing and to reject the principal issue of their petition;

Court's Opinion

[3.18] Considering whereas the Court has carefully considered the content of the petition, written statement and conclusion of the Petitioners, written evidence and statements of the witnesses and experts of the Petitioners, statement of DPR, as well as statement and conclusion of the Government along with the statements from the experts of the Government. However, before stating its opinion regarding the legal standing of the Petitioners and the principal issue of the Petitioners' petition, the Court needs to first convey its opinion regarding the constitutional design of DPD to provide an accurate perspective or view concerning DPD as a constitutional organ as intended by the 1945 Constitution.

[3.18.1] Constitutional design of DPD in the 1945 Constitution

Considering whereas the constitutional design of DPD in the 1945 Constitution can be understood from the original intent and original meaning in the formulation of Article 22C of the 1945 Constitution, as reflected in the minutes of Assembly meeting which were then crystallized in materials to be made into a book titled *Guidelines on the Dissemination of the Constitution of the State of the Republic of Indonesia Year 1945: Background, Process and Result of the Amendment to the Constitution of the State of the Republic of Indonesia Year 1945*, published by the Secretariat General of the People's Consultative Assembly of the Republic of Indonesia (MPR RI) Year 2003. The content of the book was also included in a book titled *Manual of the Dissemination of the Constitution of the State of the Republic of Indonesia Year 1945: according to the Order of Chapters, Articles, and Paragraphs* published by the Secretariat General of MPR RI Year 2006.

The Court uses those two books as references not only because that they were published by an official institution of MPR, but also because their substantive content has been widely disseminated to be understood by the general public. In addition to that, the substantive content of the two books have of course also been a crystallization of opinions of MPR Factions. Whereas the principal issues of the constitutional design of DPD are as follows:

- a. Amendment to the formulation of Article 2 Paragraph (1) of the 1945 Constitution in the original script, which reads, "*The People's Consultative Assembly shall consist of members of the People's Legislative Assembly and delegates from the regions and groups, in accordance with the*

- regulations stipulated by law*” into a new formulation, which reads, “*The People’s Consultative Assembly shall consist of members of the People’s Legislative Assembly and members of the Regional Representative Council who are selected through general elections and regulated further with law*”, was decided through voting with 475 supporting votes while 122 votes chose another alternative (to include the delegates from groups), and 3 abstain votes. With that amendment to such provisions, MPR consists of **members of DPR and members of DPD, not DPR institutions and DPD institutions**, all of whom being elected by the people in General Elections in accordance with the principle of election-based representative democracy or “representation by election” (*vide* Secretariat General of MPR RI, 2006);
- b. The Amendment to the 1945 Constitution gave birth to a new institution in the state constitution structure of Indonesia namely DPD whose existence has supported and strengthened the representative system of DPR in Indonesia. **DPR is a representative institution based on the political aspirations and views of people as sovereignty holders, whereas DPD is a representative institution serving as the channel for diverse regional aspirations. The existence of DPD institution is an effort to accommodate the regional representation principle** (*vide* Secretariat General of MPR RI, 2003: 180 and Secretariat General of MPR RI, 2006: 93);

c. The representative system adopted by Indonesia is a typical system of Indonesia because it was formed as an actualization of the needs, interests, as well as challenges of the nation and state of Indonesia. The existence of DPD in the state constitution structure in Indonesia is intended:

- 1) to strengthen the bond among regions in the forum of the Unitary State of the Republic of Indonesia and to affirm the national unity of all regions;
- 2) to increase the aggregation and accommodation of regional aspirations and interests in the formulation of national policies in relation to the state and region;
- 3) to encourage the acceleration of democracy, development, and progress of regions in harmony and balance.

Therefore, the existence of regions as intended in Article 18 Paragraph (1) and regional autonomy as intended in Article 18 Paragraph (5) operates in accordance with regional diversity in the context of the progress of the nation and state (*vide* Secretariat General of MPR RI, 2003: 80 and 2006: 93);

d. DPD has functions limited to the sectors of legislation, budgeting, monitoring, and consideration. The functions of DPD are closely related to the system of mutual monitoring and mutual balance in the state

constitution system of Indonesia, (*vide* Secretariat General of MPR RI, 2003:181 and 2006: 94), as regulated in Article 22D Paragraph (1), (2), and (3) of the 1945 Constitution:

- 1) To be able to propose to DPR Draft Laws **in relation to regional autonomy, the relationship between the central government and regional governments, establishment and division as well as merger of regions, management of natural resources and other economic resources, as well as those related to the balanced finance of the central government and regional governments;**
- 2) to join the discussion of Draft Laws **which are related to regional autonomy, establishment, division and merger of regions, relationship between the central government and regional governments, management of natural resources and other economic resources, as well as the balanced finance of the central government and regional governments; as well as to provide considerations to DPR, regarding Draft Law on the State Revenues and Expenditures Budget (APBN) and Draft Laws which are related to tax, education, and religion;**
- 3) to be able to conduct **monitoring on the implementation of laws regarding regional autonomy, establishment, division and merger of regions, relationship between the central**

government and regional governments, management of natural resources and other economic resources, implementation of the State Revenues and Expenditures Budget, tax, education, and religion, as well as to submit the monitoring results to DPR as a consideration materials to be followed-up;

- e. Whereas DPD member candidates are recruited through election in every province through General Elections [Article 22C Paragraph (1) of the 1945 Constitution]; DPD members from every province has the same number [Article 22C Paragraph (2) of the 1945 Constitution], and the General Election participants to elect the DPD members are individuals [Article 22E Paragraph (4) of the 1945 Constitution];
- f. Therefore, it can be concluded that the constitutional design of DPD as a constitutional organ is as follows:
 - 1) DPD is a regional representation (territorial representation) which brings and fights for regional aspirations and interests in the framework of national interest, as a counterbalance based on the “checks and balances” principle towards DPR which is a political representation from the political aspirations and interests of political parties in the framework of national interest;
 - 2) The existence of DPR and DPD in the state constitution system of Indonesia with all of their members becoming MPR members does

not mean that the representation system of Indonesia follows a bicameral representation system, but rather reflects the uniquely Indonesian representation system;

- 3) Even though the constitutional authority of DPD is limited, yet all its authorities in the legislation, budgeting, consideration and monitoring sectors as regulated in Article 22D of the 1945 Constitution are related and orientated towards the regional interest which have to be defended nationally according to postulate of balance between national interest and regional interest;
- 4) Whereas as the regional representation from each of the provinces, DPD members are elected through General Elections from every province in the same number, based on nomination of individuals, not through Parties, as the participants in the General Elections;

The Court's Opinion Regarding the Legal Standing of the Petitioners

[3.18.2] Considering whereas regarding the legal standing of the Petitioners in the *a quo* petition, it has been conveyed in paragraph [3.8] that the Petitioners have argued that they have the legal standing, whereas the DPR and Government conclude as described in paragraph [3.12] and paragraph [3.13] that the Petitioners do not have the legal standing. Regarding this matter about the legal standing of the Petitioners, there are two different opinions among the Constitutional Court Justices each with the following argumentations:

[3.18.2.1] Regarding the Legal Standing of Petitioner I

- a. There are 5 (five) Constitutional Court Justices who, by referring to the constitutional design of DPD as a state institution and constitutional organ as conveyed in **[3.18.1]**, are of the opinion that Petitioner I have the legal standing, based on the following grounds:
 - i. Whereas the DPD meets the qualification requirement as a state institution petitioner as intended in Article 51 Paragraph (1) Sub-Paragraph d of the CC Law;
 - ii. Whereas the DPD has constitutional authority given by Article 22D Paragraph (1), Paragraph (2), and Paragraph (3) of the 1945 Constitution as argued. In the constitutional authority of DPD it is intended that, in line with the constitutional design of DPD as described in paragraph **[3.18.1]** above, the DPD implicitly has the constitutional right to fight for the regional aspirations and interests. Thus, the DPD as a constitutional organ, in order to function optimally in implementing its constitutional authority also has rights and is supposed to gain empowering among others by the requirements for the recruitment of its member candidates, such as for example through the domicile requirement in the regions they represent and the non-political party requirement for DPD member candidates as individual participants in the General Elections;

- iii. Whereas the constitutional rights and/or authorities of DPD have potentially been impaired by the coming into effect of Article 12 and Article 67 of Law 10/2008 which do not contain the domicile and non-political party requirements for DPD member candidates;
- iv. Whereas the impairment of constitutional rights and/or authorities of DPD as a state institution has a causal relationship with Law 10/2008 which being petitioned for judicial review, and if the request is granted then the impairment of constitutional rights and/or authorities as argued, it is certain that the impairment will not or will never happen again;
- v. Whereas accordingly, DPD as a state institution and moreover as a constitutional organ, is supposedly the most proper party to act as a Petitioner for judicial review of law which is related to and which will affect the *raison d'être* of its existence along with its constitutional authority as the channel for regional aspirations and interests. Therefore, it is understandable that if in various countries that have Constitutional Court, commonly the constitutional rights and/or authorities to file for a judicial review of the constitutionality of a law are given mostly to the state institutions or constitutional organs. In addition to that, in the practice of the Court during these five years, the state institutions are always given the position as the directly related parties with the same rights as the Petitioner, in the

event that a law which is petitioned for constitutionality test is related to and has effect on the existence of that state institution. That practical reality implicitly indicates that a state institution as constitutional organ is the most proper party to be involved if the constitutionality of a law related to “itself” is questioned by another party, whether by a common individual citizen or another state institution. This is even more so in the event that a state institution as constitutional organ is acting as a Petitioner for constitutionality review of a law which greatly affects the essence of its existence given by the constitution. Therefore, *mutatis mutandis* it is very proper for that state institution, *in casu* DPD, to have the legal standing to file a petition for judicial review of a law which affects its institution, *in casu* the constitutionality of Law 10/2008;

- b. Whereas there are (four) Constitutional Court Justices who conclude that Petitioner I does not have the legal standing based on the perspective that the constitutional authority of DPD given by Article 22D of the 1945 Constitution is not impaired by the coming into effect of Article 12 and Article 67 of Law 10/2008, because the provisions included in Article 12 and Article 67 of Law 10/2008 are the requirements and procedures to become DPD member candidates, so that it is related to the matter of the “right to be a candidate” and not a matter of DPD authority. Furthermore, the perspective which denies the legal standing of Petitioner I can be seen in the Dissenting Opinion of the related justices;

[3.18.2.2] Regarding the Legal Standing of Petitioner II

Whereas regarding the legal standing of Petitioner II, 5 (five) Constitutional Court Justices conclude that Petitioner II have the legal standing, for reason that based on the perspective that as DPD members, the existence and standing cannot be separated from the constitutional design of DPD. Besides, the granting of that legal standing is also based on arguments which are in line with the arguments of Petitioner II. However, 4 (four) Constitutional Court Justices conclude that the constitutional right of Petitioner II to nominate themselves as DPD members through General Elections have not been impaired due to the coming into effect of Article 12 and Article 67 of Law 10/2008. Furthermore, the denial of the legal standing of Petitioner II is conveyed in the Dissenting Opinion part of this Decision;

[3.18.2.3] Regarding the Legal Standing of Petitioner III

Regarding the legal standing of this Petitioner III, 3 (three) Constitutional Court Justices conclude that Petitioner III have the legal standing, for the reason that all this time the Court has given the legal standing to the Petitioners for constitutional review of law to societal groups such as Non-Government Organizations (NGOs), associations, foundations, mass organizations, et cetera which are concerned about matters related to the law petitioned for review, as long as such concern is reflected in the related articles of association and rules of association. However, 6 (six) Constitutional Court Justices conclude that

Petitioner III do not have the legal standing, because their constitutional right as observers, advocates, and motivators for the reform of General Elections and parliament have not been harmed by the coming into effect of Law 10/2008 petitioned for review;

[3.18.2.4] Regarding the Legal Standing of Petitioner IV

Regarding the legal standing of Petitioner IV, 4 (four) Constitutional Court Justices declare that Petitioner IV have the legal standing, for the reason that as Indonesian citizens domiciled in each of their provinces, Petitioner IV have an interest with respect to the DPD member candidates' being required to be domiciled in each of their provinces and to be non-political party candidates, so that their commitment to the region they represent is big enough and also that Petitioner IV do not compete with individuals from other provinces or individuals who are political party members. Whereas 5 (five) Constitutional Court Justices declare that Petitioner IV do not have the legal standing, because their constitutional right to become DPD member candidates is not impaired or reduced by the coming into effect of Article 12 and Article 67 of Law 10/2008, while the matter of competition is in fact proper and sound in democracy;

[3.18.3] Considering whereas based on the description in paragraph **[3.18.2]** above, the Court concludes that Petitioner I (DPD) and Petitioner II (DPD members) have complied with the legal standing requirement to file the *a quo* petition. Due to the fact that most of the Petitioners have the legal standing, thus the Court shall further consider the Principal Issue of the Petition;

The Court's Opinion Regarding the Principal Issue of the Petition

[3.19] Considering whereas the principal issue of the Petitioner's petition is concerned with the constitutionality of Article 12 of Law 10/2008 which does not include the domicile and non-political party requirements for DPD member candidates, as well as Article 67 of Law 10/2008 which does not include the provision regarding the necessity for Resident Identity Card (KTP) in the province they are going to represent and evidence of non-political party statement for the complete requirement for DPD member candidates. Therefore, the matter petitioned for review by the Petitioners is the absence of norm of domicile and non-political party requirements in Article 12 and Article 67 of Law 10/2008, not the norm which is formulated explicitly in certain articles, paragraphs, or parts of a law;

[3.20] Considering whereas based on Article 51 Paragraph (3) Sub-Paragraph b of the CC Law, the petitioner in the petition for judicial review of law against the 1945 Constitution has to describe clearly the "*a. ...; b. Substantive content in paragraph, Article, and/or part of law deemed to be contradictory to the Constitution of the State of the Republic of Indonesia Year 1945*". Therefore, in relation to the *a quo* petition, the matter is **whether the absence of a norm which according to the Petitioner is supposed to be in a law, *in casu* the absence of domicile and non-political party requirements which are supposed to be included in Law 0/2008 can be regarded as the substantive**

content in the paragraph, article, and/or part of the relevant law, so that its constitutionality can be petitioned for review;

[3.21] Considering whereas the Petitioners in their petition are aware of the matter as mentioned in paragraph [3.10] as a dilemmatic matter, so that the *petitum* filed by the Petitioners also has an alternative nature. Even though the arguments of the Petitioners are supported by the experts presented, however they have been denied by the DPR and the Government along with the experts presented by the Government;

[3.22] Considering whereas according to the Court, there are three things that have to be considered regarding the principal issue of the Petitioners' petition, namely:

- *First*, whether the domicile requirement for DPD member candidates is a constitutional norm implicitly attached to Article 22C Paragraphs (1) and (2) of the 1945 Constitution, so that it becomes an absolute requirement for DPD member candidates and is supposed to be included in Article 12 and Article 67 of Law 10/2008, just because such norm has once been included in Law 12/2003 and also included in the 2008 Draft Law on General Elections of the Government's version;
- *Second*, whether the non-political party requirement for DPD member candidates is a constitutional norm implicitly attached to Article 22E Paragraph (4) of the 1945 Constitution, so that it becomes an absolute requirement for DPD member candidates and is supposed to be included

in Article 12 and Article 67 of Law 10/2008, just because such norm has once been included in Law 12/2003 and also included in the 2008 Draft Law on General Elections of the Government's version;

- *Third*, if the answer to the first and second matters is yes and correct, a petition for constitutionality review can be filed as to whether a constitutional norm should have been included in Law 10/2008;

[3.23] Considering whereas with respect to the *first* matter, according to perspective of constitutional design of DPD in the 1945 Constitution as described in paragraph **[3.18.1]**, the Court concludes that the domicile requirement in the represented province for DPD member candidates is a constitutional norm implicitly attached to the provisions of Article 22C Paragraph (1) , which reads, “*Members of the Regional Representative Council shall be elected from every province through general elections*” and Article 22C Paragraph (2) , which reads, “*The total number of members of the Regional Representative Council from each province shall be equal and the total number of members of the Regional Representative Council shall not be more than one-third of the total number of members of the People’s Legislative Assembly*”. Therefore, that implicit constitutional norm is supposed to be included as a norm explicitly formulated in Article 12 and Article 67 of Law 10/2008 as a requirement for DPD member candidates. As a result, Article 12 and Article 67 of Law 10/2008 which do not explicitly include such provisions, have to be considered unconstitutional;

[3.24] Considering whereas with respect to the *Second* matter, based on perspective of constitutional design of DPD in the 1945 Constitution as described in paragraph **[3.18.1]**, the Court concludes that the non-political party requirement for DPD member candidates is not a constitutional norm implicitly attached to Article 22E Paragraph (4) of the 1945 Constitution, which reads, “*Participants of general elections for electing members of the Regional Representative Council shall be individuals.*” The content of the norm included in Article 22E Paragraph (4) of the 1945 Constitution is that to nominate themselves as DPD member candidates, individuals have to ‘nominate’ themselves as General Elections participants, not nominated by political parties. It is different from that of DPR member candidates, where individuals who want to become DPR members have to be nominated by political parties which are participants in the General Elections [*vide* Article 22E Paragraph (3) of the 1945 Constitution]. In Law 12/2003 and Draft Law on General Elections of the Government’s version which is made a reference by the Petitioners, there is also no ‘non-political party’ term, but rather only not an administrator of a political party being mentioned. Similarly, in the history of practice in Indonesia during the 1949 Constitution era of RIS (Federal Republic of Indonesia) and the re-adoption of the 1945 Constitution, there has never been a non-political party requirement for RIS Senate and Societal Group membership. Whereas in some other countries, as a comparison, the implementation of such non-political party requirement is also different from one another and its existence is not an absolute. Moreover, in their development, political parties in Indonesia also have opened themselves by

recruiting individuals who are not members or cadres of those political parties to be nominated to become DPR and DPRD members. Therefore, the non-political party requirement DPD member candidates is not a constitutional norm implicitly attached to the term “individuals” in Article 22E Paragraph (4) of the 1945 Constitution, thus it is not an absolute that such requirement must be included in Article 12 and Article 67 of Law 10/2008, as being included previously in Law 12/2003, or is of a facultative nature;

[3.25] Considering whereas with respect to the *third* matter, namely the absence of a constitutional norm implicitly attached to an Article of constitution, *in casu* the requirement to have their domicile in the represented province for DPD member candidates, as implicitly attached to Article 22C Paragraph (1) and (2) of the 1945 Constitution, the Court is of the opinion that in the event that pursuant to Article 51 Paragraph (3) Sub-Paragraph b of the CC Law, it is indeed impossible to file a petition for judicial review of such article. The reason is that such petition will be deemed obscure (*obscuur libel*), unclear, which will cause the petition cannot be accepted as determined in Article 56 Paragraph (1) of the CC Law. However, the Court can also declare that an article, paragraph, and/or part of law which does not contain a constitutional norm implicitly attached to an article of constitution that is supposedly derived explicitly in the formulation of such article, paragraph, and/or part of law, can be declared “conditionally constitutional” or “conditionally unconstitutional”;

[3.26] Considering whereas with respect to the principal issue of the *a quo* petition, there are three possible alternatives for the Court's decision, namely as follows:

- a. in the event that the petition for the constitutionality review of Article 12 and Article 67 of Law 10/2008 is deemed obscure or unclear leading to the decision that the petition cannot be accepted, then it is still open for other parties to file a petition for judicial review of norms which are explicitly included in Article 12 and Article 67 of Law 10/2008;
- b. in the event that Article 12 and Article 67 of Law 10/2008 are declared "conditionally constitutional" with the implication that the decision declares "the petition is rejected", while the statement which is not in line with the spirit of (implicitly attached to) the 1945 Constitution only included in the legal considerations, so that it does not affect the coming into effect of Article 12 and Article 67 of Law 10/2008, except when the law maker or KPU (General Elections Commission) follows up the legal considerations of the Court by making regulations which accommodate the legal considerations of the Court;
- c. in the event that Article 12 and Article 67 of Law 10/2008 are declared "conditionally unconstitutional", with the implication that the decision declares "the petition is granted", which means that all the provisions included in Article 12 and Article 67 of Law 10/2008 are declared contradictory to the 1945 Constitution and do not have any binding legal

force (including for instance, the requirements for Indonesian citizens being God-fearing, physically and mentally healthy, et cetera).

[3.27] Considering whereas based on the foregoing description of the petition, in the principal issue of the *a quo* petition, the Petitioners have offered possible alternatives of the *petitum* for the Court's decision being requested, namely as follows:

1. To declare that Article 12 and Article 67 Law Number 10 Year 2008 concerning General Elections of the Members of the People's Legislative Assembly, the Regional Representative Council and the Regional People's Legislative Assembly are **contradictory to** the 1945 Constitution, **particularly Article 22C Paragraph (1) and Article 22E Paragraph (4)**; and to declare that Article 12 and Article 67 Law Number 10 Year 2008 concerning General Elections of the Members of the People's Legislative Assembly, the Regional Representative Council and the Regional People's Legislative Assembly **do not have any binding legal force together with all the legal consequences thereof**;
2. At the very least to declare that Article 12 and Article 67 Law Number 10 Year 2008 concerning General Elections of the Members of the People's Legislative Assembly **are contradictory to** the 1945 Constitution, **particularly Article 22C Paragraph (1) and Article 22E Paragraph (4) insofar as they do not contain** the requirements to be domiciled in the relevant province and not being a member and/or administrator of a

- political party. At the very least the Court is to declare that Article 12 and Article 67 Law Number 10 Year 2008 concerning General Elections of the Members of the People's Legislative Assembly, the Regional Representative Council and the Regional People's Legislative Assembly **do not have any binding legal force together with all the legal consequences thereof insofar as they do not contain** the requirement to be domiciled in the relevant province and not being a member and/or administrator of a political party.
3. To declare that Article 12 Sub-Article (c) Law Number 10 Year 2008 concerning General Elections of the Members of the People's Legislative Assembly, the Regional Representative Council and the Regional People's Legislative Assembly is **contradictory to** the 1945 Constitution, **particularly Article 22C Paragraph (1) and Article 22E Paragraph (4)**, and declare that Article 12 Sub-Article (c) Law Number 10 Year 2008 concerning General Elections of the Members of the People's Legislative Assembly, the Regional Representative Council and the Regional People's Legislative Assembly **does not have any binding legal force along with all the legal consequences thereof**; or
 4. **At the very least** to declare that Article 12 Sub-Article (c) Law Number 10 Year 2008 concerning General Elections of the Members of the People's Legislative Assembly, the Regional Representative Council and the Regional People's Legislative Assembly is **contradictory to** the 1945

Constitution, **particularly Article 22C Paragraph (1) and Article 22E Paragraph (4) insofar as it does not contain** the requirement to be domiciled in the relevant province and not being a member and/or administrator of a political party; At the very least to declare that Article 12 Sub-Article (c) Law Number 10 Year 2008 concerning General Elections of the Members of the People's Legislative Assembly, the Regional Representative Council and the Regional People's Legislative Assembly **does not have any binding legal force together with all the legal consequences thereof insofar it does not containing** requirement to domicile in the respective province and not a member and/or administrator of a political party.

[3.28] Considering whereas based on the issues described in paragraphs [3.26] and [3.27] above, the Court is of the opinion that Article 12 Sub-Article c and Article 67 of Law 10/2008 are "conditionally constitutional", which means that Article 12 Sub-Article c and Article 67 are not contradictory to the 1945 Constitution insofar as they are construed as having included the required domicile in the province.

4. CONCLUSION

Based on the foregoing issues described above, the Court is of the conclusion that:

[4.1] Petitioner I and Petitioner II have the legal standing to file the *a quo* petition, whereas Petitioner III and Petitioner IV do not have the legal standing;

[4.2] The “domicile in the province” requirement for DPD member candidates is a constitutional norm which is implicitly attached to Article 22C Paragraph (1) of the 1945 Constitution, and thus it is supposed to be included as a formulation of an explicit norm in Article 12 and Article 67 of Law 10/2008;

[4.3] The “non administrator and/or member of political party” requirement for DPD member candidates is not a constitutional norm implicitly attached to Article 22E Paragraph (4) of the 1945 Constitution, thus it is not a requirement for DPD member candidates which has to be included in Article 12 and Article 67 of Law 10/2008;

[4.4] Article 12 and Article 67 of Law 10/2008 are “conditionally constitutional”, and therefore the *a quo* articles have to be read/interpreted as having included the requirement of domicile in the represented province for DPD member candidates;

5. DECISION

In view of Article 56 and Article 57 of Law Number 24 Year 2003 regarding the Constitutional Court (State Gazette of the Republic of Indonesia Year 2003 Number 98, Supplement to State Gazette of the Republic of Indonesia Number 4316).

Passing the Decision:

To grant the petition of Petitioner I (DPD) and Petitioner II (DPD members) in particular;

To declare that Article 12 Sub-Article Law Number 10 Year 2008 concerning General Elections of the Members of the People's Legislative Assembly, the Regional Representative Council and the Regional People's Legislative Assembly (State Gazette of the Republic of Indonesia Year 2008 Number 51, Supplement to State Gazette of the Republic of Indonesia Number 4277), remain constitutional based on the Constitution of the State of the Republic of Indonesia Year 1945, insofar as containing the requirement of being domiciled in the represented province;

To declare that Article 12 Sub-Article Law Number 10 Year 2008 concerning General Elections of the Members of the People's Legislative Assembly, the Regional Representative Council and the Regional People's Legislative Assembly (State Gazette of the Republic of Indonesia Year 2008 Number 51, Supplement to State Gazette of the Republic of Indonesia Number 4277), still have a binding legal force, insofar as containing the requirement of being domiciled in the represented province;

To reject the petition of Petitioner I and Petitioner II for the rest

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

To order the proper inclusion of this Decision in the Official Gazette of the Republic of Indonesia;

Hence this decision was made in the Consultative Meeting of nine Constitutional Court Justices, namely **Jimly Asshiddiqie** as Chairperson and concurrent Member, H. Abdul Mukthie Fadjar, Maruarar Siahaan, H.M. Arsyad Sanusi, Soedarsono, H. Harjono, H.A.S. Natabaya, I Dewa Gede Palguna, and Moh. Mahfud MD, respectively as Members, on Wednesday, June 25, 2008, and was pronounced in the Plenary Session of the Constitutional Court open for public on this day, Tuesday, July 1, 2008, by us, **Jimly Asshiddiqie** as Chairperson and concurrent Member, H. Abdul Mukthie Fadjar, Maruarar Siahaan, H.M. Arsyad Sanusi, Soedarsono, H. Harjono, H.A.S. Natabaya, I Dewa Gede Palguna, and Moh. Mahfud MD, respectively as Members, assisted by Cholidin Nasir as Substitute Registrar in the presence of the Petitioners and their Attorneys, the Government/its Attorney, and the People's Legislative Assembly/its Attorney;

CHIEF JUSTICE,

Sgd.

Jimly Asshiddiqie

JUSTICES

Sgd.

H. Abdul Mukthie Fadjar

Sgd.

Maruarar Siahaan

Sgd.

H.M. Arsyad Sanusi

Sgd.

H. Muhamad Alim

Sgd.

H. Harjono

Sgd.

H.A.S. Natabaya

Sgd.

I Dewa Gede Palguna

Sgd.

Moh. Mahfud MD

6. DISSENTING OPINIONS

Whereas with respect to the abovementioned decision of the Court, four Constitutional Court Justices, namely H.A.S. Natabaya, I Dewa Gede Palguna, Moh. Mahfud MD and H. Harjono have the following dissenting opinions:

[6.1] Dissenting Opinions of Constitutional Justices H.A.S. Natabaya, I Dewa Gede Palguna, and Moh. Mahfud MD.

In any petition filed as judicial review of law against the 1945 Constitution, the Constitutional Court needs to first take the following matters into account prior to examining the principal issue of the case:

1. whether or not the Court has the authority to examine, hear, and decide upon the petition;
2. Whether or not the Parties filing such petition have the legal standing to act as the Petitioners.

The *a quo* petition is the petition for judicial review of law, *in casu* Law Number 10 Year 2008 (General Election Law) against the 1945 Constitution. Accordingly, with regard to the first matter, in accordance with the provision of Article 24C Paragraph (1) of the 1945 Constitution *juncto* Article 10 Paragraph (1) sub-paragraph a of Law Number 24 Year 2003 regarding the Constitutional Court (the CC law), the Constitutional Court has the authority to examine, hear, and decide upon the petition. However, with regard to the second matter, namely whether or not the Parties in the *a quo* petition have the legal standing to act as the Petitioners, we have a dissenting opinion from that of the majority of Constitutional Justices.

The Petitioners have argued that their right and/or constitutional rights have been impaired by the coming into effect of the provisions of Articles 12 and 67 of the General Election Law. The two provisions respectively read as follows:

- Article 12:

The requirements as intended in Article 11 Paragraph (2) are as follows:

- a. *Indonesian Citizen who is already 21 (twenty one) years old or above;*
- b. *Believing in the One Almighty God;*
- c. *Living within the territory of the Unitary State of the Republic of Indonesia;;*
- d. *Having competence in speaking, reading, and writing in Indonesian Language;*
- e. *Finishing education at least at the level of Senior High School, Islamic High School, Vocational High School, Vocational Islamic High School, or others of the same level;*
- f. *Having faith in the Five Principles of national Ideology (Pancasila) as the basic principles of the state, the 1945 Constitution of the Republic of Indonesia, as well as the goals of the August 17, 1945 proclamation;*
- g. *Never been sentenced to a criminal punishment of imprisonment by a court decision having permanent legal force for committing a criminal act punishable with imprisonment of 5 years or more;*
- h. *Physically and mentally healthy;*
- i. *Registered as a voter;*
- j. *Willing to work full time;*
- k. *Resigning as civil servant, member of National Army of the Republic of Indonesia, member of Republic of Indonesia State Police, managing board of a state-owned enterprise, regional*

government-owned enterprise, as well as other enterprises whose budget is sourced from state finance, declared by an irrevocable resignation letter;;

- l. Willing to stop practicing as public accountant, advocate, notary, Land Deed Official, or supplying goods and services in respect of state finance or performing other works which may result in conflict of interest with the duty, authority, and right as a member of the Regional Representative Council pursuant to laws and regulations;*
 - m. Willing not to serve concurrently as another state official, managing board of state-owned enterprise, and regional government-owned enterprise, as well as other enterprises whose budget is sourced from state finance;*
 - n. Nominating himself/herself only in 1 (one) representative body;*
 - o. Nominating himself/herself only in 1 (one) electoral district; and*
 - p. Gaining support at least from the voters of the electoral district concerned.*
- Article 67:
 - (1) *An individual who meets the requirements as intended in Article 12 and Article 13 can register himself/herself to the General Election Commission as a Regional Representative Council (DPD) member candidate through Provincial General Election Commission.*

(2) *The fulfillment of administrative requirements for DPD member candidate as intended in Paragraph (1) shall be evidenced by the following documents:*

- a. *Resident Identity Card of Indonesian citizen;*
- b. *Proof of graduation in the form of diploma, certificate of study completion, syhadah, or other statement letters legalized by education unit or higher education program;*
- c. *Statement letter of Police record regarding the non-existence of involvement in any criminal case from local State Police of the Republic of Indonesia ;*
- d. *Statement letter regarding physical and mental health;*
- e. *Proof of registration as a voter;*
- f. *Statement letter regarding willingness to work full time signed upon a duly stamped letter;*
- g. *Statement letter regarding the willingness to stop practicing as public accountant, advocate, notary, Land Deed Official, of supplying goods and services in respect to state finance or performing other works which may result in conflict of interest with the duty, authority, and right as the member of the Regional Representative Council signed upon a duly stamped letter;*
- h. *Irrevocable letter of resignation as civil servant, member of National Army of the Republic of Indonesia, member of*

Republic of Indonesia State Police, managing board of state-owned enterprise and/or regional government-owned enterprise, as well as other enterprises whose budget is sourced from State Revenues and Expenditures Budget; State Budget and/or Regional Revenues and Expenditures Budget; and

- i. Statement letter regarding the willingness to nominate himself/herself only for 1 (one) representative body signed upon a duly stamped letter.*

The substance regulated in Article 12 and Article 67 of the General Election Law contains the requirements for an individual to nominate himself/herself or to be nominated as DPD member candidate. Accordingly, this is concerned with his/her constitutional right to be a candidate. Thus, the next question is whether or not their right/ constitutional right have been impaired by the coming into effect of Article 12 and Article 67 of the aforementioned General Election Law. In this respect, pursuant to the construction of Article 51 Paragraph (1) of the CC Law, constituting a part of the procedural law in the petition for judicial review of law against the 1945 Constitution, we are of the opinion that:

- a) Article 51 Paragraph (1) of the CC Law declares that the parties who may become Petitioners in the judicial review of a law against the 1945 Constitution shall be the parties who deem that their rights and/or

constitutional authorities have been impaired by the coming into effect of a law. The intended parties shall be (a) individual Indonesian citizens, including groups of people having a common interest; (b) customary community units insofar as they are still in existence and in accordance with community development and the principle of the Unitary State of the Republic of Indonesia as regulated by law; (c) Public or private legal entities; and (d) state institutions.

- b) Petitioner (1) qualify itself as a state institution, *c.q.* DPD; Petitioner (2) qualify themselves as individual DPD members; Petitioner (3) qualify themselves as individual Indonesian citizens (having great concern for general election, Indonesian parliament, and channeling of regional aspirations); Petitioner (4) qualify themselves as individuals living in certain provinces. The next question is **whether or not** in such qualification the Petitioners' constitutional rights and/or authorities have been **impaired** by the coming into effect of Article 12 and Article 67 of the General Election Law whose formulation has been described before.
- c) As stated in the foregoing, the provisions included in Article 12 and Article 67 of the General Election Law regulates the requirements for each **individual** to be a participant of General Election of DPD members. In other words, those two provisions are related to the right to be a DPD member candidate. Accordingly, in the event that the said two provisions of the General Election Law are deemed to have impaired the

constitutional right of a party, then the parties that are likely to be harmed in becoming DPD member candidates shall be **individuals**. This means that, if related to the provision of Article 51 Paragraph (1) of the CC Law, the parties that are likely to be harmed by the coming into effect of Article 12 and Article 67 of the General Election Law shall be **individuals**, such articles do not impair constitutional right of customary community unit, legal entity, or state institution for it is impossible that the last three parties mentioned nominate themselves for DPD membership.

- d) According to reasoning in the aforementioned letter c), the Constitutional Court needs to consider the possibility of impairment of the constitutional rights of the four petitioners in the *a quo* petition namely those qualifying themselves as individual Indonesian citizens, in this case, Petitioner (2), Petitioner (3), and Petitioner (4).

- e) With due observance of the formulation of Article 12 and Article 67 of the General Election Law petitioned for judicial review, not any part thereof can be said to have impaired, hindered, or removed the individual right of Indonesian citizens, either as DPD members [Petitioner (2)], individual Indonesian citizens having great concern for general elections, Indonesian Parliament, or channeling of regional aspirations [Petitioner (3)], or individual Indonesian citizens living in several provinces [Petitioner (4)]. The absence of requirement “to be domiciled in the relevant province” and “not being a member and/or administrator of a political party” in the

requirement for becoming a DPD member in Article 12 and Article 67 of the General Election Law does not deny, hinder, or remove the right to be candidate for Petitioner (2), Petitioner (3), and Petitioner (4).

- f) Based on the foregoing description, we are of the opinion that the right and/or constitutional rights' of the Petitioners are not impaired by the coming into effect of Article 12 and Article 67 of the General Election Law, so that the *a quo* petition must be declared **unacceptable** (*niet ontvankelijk verklaard*).

In addition to the abovementioned reasons, according to us, the *a quo* petition must be declared unacceptable based on the following considerations:

- 1) Article 51 Paragraph (3) Sub-Paragraph b of the CC Law requires the Petitioners to clearly describe the substantive content of the paragraph, article, and/or a part of the deemed to be contradictory to the 1945 Constitution in the petition for judicial review of a law against the 1945 Constitution. It is obligatory to meet the provisions of the aforementioned Article 51 Paragraph (3) Sub-Paragraph b since pursuant to Article 56 Paragraph (3) of the CC Law, in the event that the Court grants the petition, then the Court must state explicitly the substantive content of Article, paragraph, and/or part of the law which is contradictory to the 1945 Constitution. As a further consequence, according to Article 57 Paragraph (1) of the CC Law, the substantive content of the paragraph, article, and/or part of the law which is contradictory to the 1945 Constitution must be

declared as not having any binding legal force. It means that the provision to be declared “contradictory to the 1945 Constitution” and “not having any binding legal force” must concretely exist. Meanwhile, in the *a quo* petition, the substance of the Petitioners’ petition has been to ask the Constitutional Court to add the provision in articles of law, *in casu* Article 12 and Article 67 of the General Election Law, a matter which is not likely to be performed by Court, which is a negative legislator because the matter is the legislative authority of positive legislature. Consequently, the constitutional issue of the *a quo* petition is in fact the legislative review, not judicial review. In the event that the said Petitioners’ petition is granted, it will not only push the Court to act *ultra vires*, but will also constitute a poor precedent in political practice in the future. It is because, as it is known, the decision of the Court is final and binding. Accordingly, the Court justifies itself to add certain contents to a provision of law, which means that the Court has denied its essence as negative legislator, then in the future the Court has no reason to reject similar petitions, so thereby the Court has metamorphosed into positive legislator. It will also remove the Court’s essence as a true court and change it into political institution.

- 2) This explanation does not necessarily mean that we have a different opinion with regard to the substance of the idea required by the Petitioners. The reason is that, apart from whether or not it is constitutional, the absence of those two required substances as the required substantive content of the requirement for being DPR member

candidates could in fact benefit certain political subjects who take advantage from the absence of the two requirements; however the Court as true court is bound by procedural law. Meanwhile, the suggestion for adding certain substance to a legal norm is supposedly to be filed to the legislative authority, and the Court is indeed not the legislative authority. As it is known, Article 51 of the CC law is a part of procedural law which cannot be disregarded by the Constitutional Court Justices, *in casu* Constitutional Judges. It is because the function of procedural law is to maintain substantive law, in this case the 1945 Constitution. Therefore, as an analogy, in criminal procedural law, Jerome H. Scholmick said that “*criminal procedure, by contrast, is intended to control authorities, not the criminals*”. It is also the reason of the existence of idiom that if the Court simply disregards the procedural law which it must comply with, such act would mean that the Court has “cut its own flesh” (*het snijdt aan het eigen vlees*);

- 3) Even if the Petitioners’ assumption is true in that the requirements “to be domiciled in the relevant province” and “not being member and/or administrator of a political party” supposedly constitute a part of Article 12 and 67 of General Election law, the Court still cannot declare that Article 12 and Article 67 of General Election law are contradictory to the 1945 Constitution since those two requirements are not included in Article 12 and Article 67 of General Election law. Because, If so, it means that the Court states that the requirements mentioned in sub-articles a through p of

Article 12 (namely the requirements stating that it must be “Indonesian Citizen who is already 21 (twenty one) years old or above”, “believing in the One Almighty God, and etc) and the requirements as mentioned in sub-articles a through i of Article 67 (namely the requirement for having “Resident Identity Card of Indonesian citizen”, statement letter regarding physical and mental health”, and etc.) are unconstitutional. It is indeed a misleading reasoning.

- 4) Even if the Petitioners’ assumption is true in that the requirement “to be domiciled in the relevant province” and “not being member and/or administrator of a political party” supposedly constitute a part of Article 12 and 67 of the General Election Law, then the maximum way to be implemented by the Court, without violating procedural law, is to declare that the provisions in the said two articles of the General Election law is conditionally constitutional. However, it is not likely to be performed by the Court due to the two following matters:
 - o *First*, to be declared conditionally constitutional, the provisions to be declared conditionally constitutional must constitute part of the reviewed provisions, while in the *a quo* case such provisions do not exist, so the petition becomes obscure (*obscuur*). This is because Article 56 Paragraph (3) of the CC Law states that, “*in the event that the petition is granted as intended in Paragraph (2), the Constitutional Court states shall explicitly the substantive content of*

the paragraph, article, and/or part of law which are contradictory to the 1945 Constitution". Therefore, the next question will be which part that is contradictory to the 1945 Constitution (since it is not included in the provision of the law being reviewed).

- In relation to the provision of the aforementioned Article 56 Paragraph (3) of the CC Law, Article 57 Paragraph (1) of the CC Law states that, "the Constitutional Court's decision whose ruling states that the substantive content of the paragraph, article, and/or a part of law which are contradictory to the 1945 Constitution has no binding legal force". Thus, a question arises as to which substantive content is to be declared as having no binding legal force by the Court because such substantive content is not existent or not included in the provision of law petitioned for review.

[6.2] Dissenting Opinion of Constitutional Court Justice H. Harjono

Petitioner I, II, III, and IV argue that the right and/or constitutional authority which is impaired by Article 12 *juncto* Article 67 of Law 10/2008 shall be the right and/or authority granted by the 1945 Constitution:

1. Petitioner I; Article 22D Paragraphs (1), (2), and (3), Article 23 Paragraph (2), Article 23E Paragraph (2), Article 23F Paragraph (1) of the 1945 Constitution; For the following reasons: (a) DPD membership can be won by the candidate from other province who does not know that region, (b)

such member's capability in fighting for the region's aspiration and interest is doubted, (c) a DPD Member who come from a certain political party will prioritize the interests or platform of the political party instead of the regional interests, (d) The effectiveness of DPD member involved in Political Party in fighting for regional aspiration is doubted. Such matter shall impair the constitutional authority of Petitioner I.

2. Petitioner II; Article 22C Paragraph (1) of the 1945 Constitution, with the argumentation that, this article granting constitutional right to Petitioner II domiciled in certain provinces to be elected as DPD members of the relevant provinces. With the coming into effect of Article 12 *juncto* Article 67 of Law 10/2008, Petitioner II domiciled in the relevant province have been clearly harmed to nominate themselves as DPD members. Article 22E Paragraph (4) of the 1945 Constitution, with argumentation that the rights of Petitioners II are denied, and unfair competition occurs between Petitioner II who only depend on personal network and members of political parties supported by organizations. Article 22E Paragraph (1) of the 1945 Constitution, because the right of Petitioners on the fair legal certainty and general election is impaired. Article 22C Paragraph (2) of the 1945 Constitution, as to how can a general election is considered fair if the DPD member candidates who will represent a province come from another province.

3. Petitioner III; Article 22E Paragraph (1), Article 18B Paragraph (2), Article 28I Paragraph (3) of the 1945 Constitution because Petitioners have interest toward the holding of a democratic general election as well as the improvement of Indonesian parliament quality.
4. Petitioner IV; Article 22C Paragraph (1), Article 22E Paragraph (1), Article 22E Paragraph (4), Article 28D Paragraph (1) of the 1945 Constitution with the argumentation that, Article 12 *juncto* Article 67 of Law 10/2008 do not guarantee the partiality of DPD members due to the lack of sufficient knowledge and recognition regarding the region.

Legal Opinion

The Petitioners meet requirements as legal subjects with constitutional right and/or authority to file a petition for judicial review of law as stipulated by Article 51 of the CC Law.

However, the question is whether the right and/or the authority of the petitioners granted or guaranteed by the Constitution has been impaired by the coming into effect of Article 12 and 67 of Law 10/2008. The relationship between the impairment of constitutional rights and/or authorities and Articles of Law 10/2008 shall be a causal relationship ("*causal verband*") and the coming into effect of the law petitioned for review shall be the sole cause of such impairment. In the event that this sole cause is removed, such impairment never occurs. The impairment suffered by the Petitioners shall be the impairment

caused by Articles of law petitioned for review, and not because the said articles can have an effect on such constitutional right and/or authority. A matter is said to have influence in the event that the relationship between the said matter and the influenced object is an alternative relationship which may:

- (a) have positive influence only;
- (b) have negative influence only;
- (c) have positive and negative influences all at once

In addition to that, the occurrence of positive, negative, or both influences on the influenced object may occur for reasons not limited to that certain matter, but another certain matter may also result in similar impact.

I am of the opinion that the worry of Petitioner I regarding the existence of the matters worried to be occurring in DPD in relation to such matter and articles petitioned for review is not *causal verband* relationship since it may also occur without the existence of the articles petitioned for review. On the contrary, a better circumstance may occur with the coming into effect of the articles petitioned for review. The existing relationship between articles petitioned for review and the circumstances argued by Petitioner I is only at the level of “may influence”. The matters worried by Petitioner I relate to the capability and performance of DPD which is worried to be influenced by the articles petitioned for review. Decreased capability and performance of DPD do not have a direct relationship with the articles petitioned for review, but it relates to quality of DPD member candidates basically owned by the individual of candidate, and it is not solely related to the origin of the candidate. Therefore, the worry of Petitioner I

that is also likely to be other Petitioners' worry is that the articles petitioned for review will decrease the quality or performance of DPD since the relationship is limited to "may influence" level whose statistic chance is equal to "may not influence" and it does not constitute a *causal verband* relationship.

In their arguments, the Petitioners also state that articles petitioned for judicial review are detrimental to regional interest, but they do not clearly describe what exactly the regional interest and how the relationship between the Petitioners and the said regional interest are. By ensuring the regional interest concerned as well as the relationship between such regional interest and the Petitioners, the impairment caused by articles petitioned against such regional interest could be identified. Basically, in the event that the regional interest is found, such interest must be differentiated from national interest. The issue is whether the regional interest intended by the Petitioners constitutes an interest of regional government. Regional interest in the first definition is indeed different from the regional interest in the second definition. In addition to that, in relation to the regional interest to be fought for by the Petitioners, the issue is whether the representative system adhered to by the 1945 Constitution indeed divides explicitly which regional interests to be fully delegated especially for Petitioner I and Petitioner II so that in the event that there is disturbance against such regional interest, Petitioner I and Petitioner II shall fight for it. The 1945 Constitution accommodates people's aspirations in the representative system by institutionalizing it into DPR, Provincial DPRD and Regency and Municipal DPRD. Provincial and municipality DPRD constitute representative bodies of the

regional government in relation to the autonomy granted to the relevant region. Meanwhile, through the direct selection of the regional head, the position of the regional head and the constituent is the relationship between the entrusting and entrusted parties. In this relationship, the regional head also has representative value from those who vote for him. The representative in the sense of the relationship between the entrusting and entrusted parties is not represented in the forum whose institution name uses the word of “representative” as like the Regional House of Representative (DPRD), but the regional head himself is also the representative of those who vote for him.

Regional aspirations represented in regional interest in our representative system are channeled through provincial DPRD, regency and municipality DPRD, as well as the regional head. Accordingly, DPD and its members are not the only one forum used to represent regional interest. The political party whose representatives will acquire the seat in DPR membership will also become the representation of regional representatives. The system of the 1945 Constitution does not divide certain channeling of aspirations to be performed by certain representative bodies. It is different from United States that clearly divides the authority between the Senate and the House of Representatives. The authority of Senate as the representative of the sovereign state is reflected from certain authority it possesses, namely in the establishment of international agreements it must obtain approval from the Senate, not the Congress or the House of Representatives to make it valid and having a binding effect. Such matter is conditioned since the Senate is the representative of the

state, and the establishment of international agreement is related to state sovereignty, so it is neither Congress nor House of Representative, but the Senate that has the right for it.

The House of Representatives whose members consist of the representatives of political parties is not positioned as the representative of the central government, but the representative of national government. The position of DPR representing the national government is not confronted *vis a vis* with regional government. Political party still needs a basis in regions, even the existence of a political party is determined in regions, political parties and regions are inseparable. To participate in the general elections, political parties are required to have their managing board and members in the regions so that the political parties and the regions are inseparable. DPR members come from the province-based electoral districts, so that if a political party wants to obtain a representative from a certain electoral district, it must obtain sufficient voters and must foster a closer relationship with the people in the region and fight for their aspirations to acquire their votes.

The existence of DPD whose authority is related to the region is not intended to draw a dichotomy where regional affairs become DPD affairs, whereas DPR is separated from regional affairs; let alone to position them in a *vis a vis* opposition in the matter of regional interest. In principle, DPD authority related to regional affair is to extend participation and transparency which lay the

foundation for a representative democratic system by adding the role of DPD constitutionally and not to draw a dichotomy, let alone to position it *vis a vis* DPR. Based on the foregoing description, with regard to the Petitioners' arguments related to articles petitioned for judicial review in the *a quo* case, it can be concluded that; (a) The *a quo* Articles do not have a relationship of a *causal verband* nature with regard to matters that are worried to be happening but only have a relationship at the possibility level of "may have a negative influence" as worried by the Petitioners, which could also be positive influence; (b) the Petitioners cannot give a certain definition regarding the regional interests that constitute the rights and/or authorities of the Petitioners, and consequently, the impairment of regional interest that will be suffered by the Petitioners cannot be determined either.

In addition to the arguments regarding the regional interest that has been discussed above, the Petitioners also argue that the articles petitioned for review shall impair the constitutional right of individual, namely the right to compete in a fair general election and injustice will occur in the event that there is a candidate elected from outside the province, besides that it is contradictory to Article 28I Paragraph (3) and Article 28D Paragraph (1) of the 1945 Constitution. Article 22E Paragraph (4) of the 1945 Constitution states that the participant of General election to select DPD members shall be individuals. The important aspect from such formulation is that it shall be individuals and not political parties that will nominate DPD member candidates. Therefore, insofar as the party that registers it is individual, then there is not any provision of the 1945 Constitution

that is violated. Since members of Political Party are allowed to participate in the General Election of DPD members, then there is an assumption that the number of candidates entering the competition in such general election will increase. Among the petitioners, the increasing number of candidates who participate in the general elections will give direct impact on Petitioner II in the event that the parties concerned still desire to continue their membership status. Meanwhile, the right and/or authority of Petitioner I as an institution is not affected. Petitioner III and Petitioner IV do not clarify their positions as to whether or not they desire to nominate themselves as DPD members. Insofar as Petitioner III and Petitioner IV have based the arguments of their petition on regional interest, what is meant regional interest must be defined.

The impact suffered by Petitioner II is not related to the constitutionality of the articles petitioned for review since the increasing number of candidates will not remove the constitutional right of Petitioner II to nominate themselves, but on the contrary it will add to the quality of democracy since the increased number of candidates may be the alternatives for the voters.

The bond between the candidates and the domicile in the relevant province cannot be used as the measure to determine the commitment of individuals for the province represented by them. It is possible that parties living outside the region exactly have great concern for the region. Region-based organizations existing in the capital city are usually mobilized by regional people who really care about their region but staying in the capital city. In the event that

the voters trust them, as proven by the fact that they are elected in a General Election, such matter is returned to the voters themselves who cast the votes. Democracy is not only has an administrative aspect but it also respects the right of voters and takes the acceptability aspect of a candidate into account.

Considering the matters described above, the Court should have rejected the Petitioners' petition.

SUBSTITUTE REGISTRAR,

Sgd.

Cholidin Nasir