EXCERPT FROM DECISION OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA

Decision Number 5/PUU-VIII/2010 Concerning Judicial Review of Law Number 11 Year 2008 concerning Electronic Information and Transactions under the 1945 Constitution of the State of the Republic of Indonesia

DECISION

Number 5/PUU-VIII/2010

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 levels has passed a decision in the case of Petition for Judicial Review of Law Number 11 Year 2008 concerning Electronic Information and Transactions under the 1945 Constitution of the State of the Republic of Indonesia, filed by:

[1.2] 1. N a m e : **Anggara, S.H.**

Place, and date of birth : Surabaya, October 23, 1979

Occupation : Advocate/Program Director of the Institute for Criminal Justice Reform

Religion : Islam

Citizenship : Indonesia

	Address	:	Jalan Anggrek Bilan II Blok F/13 Bumi Serpong Damai, Serpong Tangerang Selatan

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

2.	N a m e	:	**Supriyadi Widodo Eddyono, S.H.**
	Place and date of birth	:	Medan, September 9, 1976
	Occupation	:	Advocate
	Religion	:	Islam
	Citizenship	:	Indonesia
	Address	:	Jalan Teratai XV Blok Q Number 6 Tanjung Barat Indah Jagakarsa, South Jakarta

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

3.	N a m e	:	**Wahyudi, S.H.**
	Place, date of birth	:	Kebumen, 1 December 1984;
	Occupation	:	Researcher
	Religion	:	Islam
	Citizenship	:	Indonesia
	Address	:	Cipinang Asem RT 004 RW 009 Kebon Pala Makasar, East Jakarta

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

The abovementioned Petitioners, hereinafter referred to as ------- **The**

Petitioners;

[1.3] Having read the petition of the Petitioners;

Having heard the statement of the Petitioners;

Having heard the written statement of the Government;

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

Having read the *Ad Informandum* statement of the expert of the Petitioners;

Having read the conclusion of the Petitioners;

Having examined the evidence filed by the Petitioners;

2. FACTS OF THE CASE

And so forth

3. LEGAL CONSIDERATIONS

[3.1] Whereas the purpose and objective of the petition of the Petitioners is related to material review of Law Number 11 Year 2008 concerning Electronic Information and Transactions (State Gazette of the Republic of Indonesia Year 2008 Number 58, Supplement to the State Gazette of the Republic of Indonesia Number 4843, hereinafter referred to as Law 11/2008) under the 1945 Constitution of the State of The Republic of Indonesia (hereinafter referred to as

the 1945 Constitution);

[3.2] Whereas that before considering the Substance of the Petition, the Constitutional Court (hereinafter referred to as the Court) will first consider the following matters:

a. Authority of the Court to examine, hear and decide upon the petition *a quo;*

b. legal standing of the Petitioners;

Authority of the Court

[3.3] Whereas based on Article 24C paragraph (1) of the 1945 Constitution which is confirmed in Article 10 paragraph (1) of Law Number 24 Year 2003 concerning the Constitutional Court (the State Gazette of the Republic of Indonesia Year 2003 Number 98, Supplement to the State Gazette of the Republic of Indonesia Number 4316, hereinafter referred to as the Constitutional Court Law) *juncto* Article 29 paragraph (1) sub-paragraph a of Law Number 48 Year 2009 concerning Judicial Power (the State Gazette of the Republic of Indonesia Year 2009 Number 157, Supplement to the State Gazette of the Republic of Indonesia Number 5076), one of the authority of the Constitutional Court is to review the Law against the Constitution.

[3.4] Whereas the petition of the Petitioners is to review Law Number 11 Year 2008 concerning Electronic Information and Transactions under the 1945 Constitution, so that the Court has the authority to examine, hear and decide

upon petition *a quo*;

Legal standing of the Petitioners

[3.5] Whereas based on Article 51 paragraph (1) of Law of the Constitutional Court, parties which may act as petitioners in reviewing a Law under the 1945 Constitution shall be those considering that their rights and/or constitutional authority have been impaired by the coming into effect of the Law petitioned for review, namely:

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

Accordingly, in judicial review of Law under the 1945 Constitution, the Petitioners must explain and first substantiate:

a. Their qualification as Petitioners as intended in Article 51 paragraph (1) of the Constitutional Court Law;
b. Whether or not there is any impairment of constitutional right and/or authority granted by the 1945 Constitutional as a result of the coming into effect of the law being petitioned for review;

The Petitioners in their petition *a quo* shall respectively qualify themselves as Indonesian citizens. Accordingly, based on the provision of Article 51 paragraph (1) of the Constitutional Court Law, the Petitioners can file a review of Law under the 1945 Constitution;

[3.6] In addition, considering that the Petitioners must meet the qualification as mentioned above, the Petitioners must also describe clearly the constitutional rights and/or authority impaired by the coming into effect of the Law. Following Decision Number 006/PUUIII/ 2005 dated 31 May 2005 and Decision Number 11/PUU-V/2007 dated 20 September 2007, as well as subsequent decisions, the Court is of the opinion that the impairment of constitutional rights and/or authority as intended in Article 51 paragraph (1) of the Constitutional Court Law must meet five requirements, namely:

a. the existence of constitutional rights and/or authority of the Petitioners granted by the 1945 Constitution;
b. the petitioners consider that such constitutional rights and/or authority have been impaired by the coming into effect of the law petitioned for review;
c. the impairment of such constitutional rights and/or authority must be specific and actual or at least potential in nature which, pursuant to logical reasoning, can be assured of occurring;
d. there is a causal relationship (*causal verband*) between the intended impairment and the coming into effect of Law petitioned for review;

e. the possibility that with the granting of the Petitioner's petition, the impairment of such constitutional rights and/or authority argued, will not or will no longer occur;

[3.7] Whereas the Petitioners in their petition *a quo*, petition for review of Article 31 paragraph (4) of Law 11/2008 declaring that, *"Further provision concerning Interception procedures as intended in paragraph (3) shall be regulated with a Government Regulation ".* According to the Petitioners, the provision of the article *a quo* has the potential to violate the constitutional rights of the Petitioners, since the constitutional rights and or authority of Petitioner I and Petitioner II as Advocates have been protected in order to perform their professions freely and independently, as provided for in Article 19 paragraph (2) of Law Number 18 Year 2003 concerning Advocates, which states that," Advocates shall have the right to confidentiality of their relationship with their clients, including the protection of their files and documents against confiscation or examination and **protection from interception** against electronic communication of the advocates". Petitioner I and Petitioner II in performing such profession develop communication with their clients, which communication may not be intercepted. Petitioner III in the petition *a quo* has the profession as a researcher of Human Rights (HAM) and Democracy, where in performing such activities, Petitioner III is required to relate to and/or seek various sources, both directly and indirectly. In the process of seeking the intended sources, Petitioner III needs to communicate through various means of communication in order to look for, acquire, obtain, own, save, continue, the research which will be published to the public at large.

Based on the reason of the Petitioners, the Court is of the opinion that the Petitioners, as Indonesian citizens, have the profession as an advocate and a researcher are potentially impaired by the provision of the article *a quo*. Therefore, according to the Court, the Petitioners have legal standing to file the petition for review of Law 11/2008 under the 1945 Constitution;

[3.8] Whereas since the Court has authority to examine, hear, and decide upon the petition *a quo*, and the Petitioners have the legal standing, the Court shall subsequently consider the substance of the petition;

Substance of the Petition

[3.9] Whereas the Petitioners argue that the provision of Article 31 paragraph (4) of Law 11/2008 stating that, "*Further provision concerning Interception procedures as intended in paragraph (3) shall be regulated with a Government Regulation",* is inconsistent with Article 28G paragraph (1) and Article 28J paragraph (2) of the 1945 Constitution for the following reasons:

a. Interception regulated with a Government Regulation as mandated in Article 31 paragraph (4) of Law 11/2008 is not in accordance with the protection of the Petitioner's human rights because the regulation of interception in the Government Regulation fails to sufficiently accommodate the articulation of regulation concerning interception. Based on the provision of Article 10 of Law Number 10 Year 2004 concerning the Formulation of Laws and Regulations, the substantive contents of a Government Regulation contain the content for enforcing a Law, thus, the

substantive contents regulated in the Government Regulation may not deviate from the contents regulated in the Law concerned. Furthermore, according to the Petitioners, based on Attachment to Law Number 10 Year 2004, in number 90, it is provided that Government Regulation may not regulate penal code, also including the provisions on investigation. Accordingly, according to the Petitioners, the interception regulation set forth in the Government Regulation does not protect, but rather it violates the constitutional rights of citizens;

. b. Article 31 paragraph (4) of Law 11/2008 has created a threat of fear to do or not to do something, particularly, for the Petitioners in performing their work activities and fear for general citizens. Such provision is not in accordance with Article 32 of Law Number 39 Year 1999 concerning Human Rights and Law Number 12 Year 2005 which have provided the guarantee and protection for every Individuals in regard to their confidentiality to communicate. Notwithstanding the privacy right of the citizens, the interception will be faced directly by individual privacy right which is exercised under the Law [*vide* Article 28J paragraph (2) of the 1945 Constitution] and not under a Government Regulation;

c. The provision of Article 31 paragraph (4) of Law 11/2008 has the potential to be misused by governmental power and law enforcement apparatuses since the regulation of interception in institution's internal regulations, namely Ministerial Regulation, Government Regulation, will not be able to

accommodate all the correct provisions articulation concerning law of interception. Principally, the act of interception is prohibited In Indonesia, except for certain objectives the implementation of which is highly restricted by Law in the measure of law enforcement. Basically, such restriction is intended to guarantee the right to personal protection or security or privacy right against any arbitrary attack against privacy right;

d. At least, there are nine Laws which provide authority of interception in Indonesia for law enforcement institutions in various manners, among other things: (i) Chapter XXVII of WvS concerning Malversation, (ii) Law Number 5 Year 1997 concerning Psychotropic substances, (iii) Law Number 31 Year 1999 concerning Eradication of Criminal Acts of Corruption, (iv) Law Number 36 Year 1999 concerning Telecommunication, (v) Government Regulation in Lieu of Law Number 1 Year 20002 concerning Eradication of Criminal Acts of Terrorism , (vi) Law Number 18 Year 2003 concerning Advocates, (vii) Law Number 21 Year 2007 concerning Eradication of Criminal Acts of Human Trafficking; (viii) Law Number 11 Year 2008 concerning Electronic Information and Transactions, and (ix) Law Number 35 Year 2009 concerning Narcotics. In addition, there are two Government Regulations and one Ministerial Regulation which also regulate interception, namely: (i) Government Regulation Number 19 Year 2000 concerning Joint Team for the Eradication of Criminal Acts of Corruption, (ii) Government Regulation Number 52 Year 2000 concerning Providers of Telecommunication

Services, and (iii) Ministerial Regulation on information and communication Number 11 Year 2006 concerning Information Interception techniques. The variety of laws and regulations governing interception has weaknesses, where the procedure of interception in one law is likely to be totally different from the procedure of interception in other laws. As such, the provision of interception in a regulation is likely to be contrary to or inconsistent with other regulations. The absence of a sole regulation concerning procedural law and/or procedure of interception has resulted in a threat for the privacy rights of the Petitioners, among other communities of modern constitutional countries in the world;

e. Based on the reason, the petitioners are of the opinion that the criminal procedure code must be renewed, particularly Law Number 8 Year 1981 concerning Criminal Procedure Code in providing regulation on interception for strengthening and protecting more on privacy rights security from the attacks or interference or arbitrary actions of law enforcement apparatuses. The restriction of the petitioner's privacy rights will only be permitted to the extent of law enforcement interest determined by Law, as stipulated in the Decision of the Constitutional Court Case Number 006/PUU-I/2003 and Number 012-016-019/PUU-IV/2006;

[3.10] Whereas in order to support the arguments of the petition *a quo*, the Petitioners has presented documentary/written evidence marked as Exhibit P-1 up to Exhibit P-4 and submitted their *ad informandum* statements of the experts,

Ifdhal Kasim and **Mohammad Fajrul Falaakh** which are principally, as follows:

1. Ifdhal Kasim

- Interception by law enforcement apparatuses continues to become controversial as it is considered to be an invasion of the citizens' privacy rights. However, interception is also helpful as one of the methods for investigation. Interception constitutes an accurate alternative in criminal investigation for the rising of criminal mode as well as serious crime, and interception is a prevention and detection equipment of crime;

- Article 31 paragraph (1), paragraph (2), and paragraph (3) of Law 11/2008 specifically prohibit arbitrary interception and the interception is only in the interest of law enforcement process;

- In the treasure of human rights law, there are two categories of human rights, namely non *derogable* rights and *derogable* rights. Based on the provision of Article 4 of International Covenant on Civil and Political Rights whereas human rights may not be restricted in any circumstance, namely right to existence, right to be free from torture and cruel, right not to be enslaved, right not to be penalized due to failure to meet civil liability, right not to be penalized based on retroactive law, right to be recognized as legal subject, and freedom of religion. According to the expert, right to

have personal conversation includes in the category of *derogable* rights or the right of which the exercise and implementation may be restricted;

- Right of privacy reflects the concept of individual freedom as creatures governing themselves insofar as it will not violate other people's right of freedom. Right of privacy may be restricted to the extent of the existence of other party's interest, being in certain circumstance, and it is stated that such intervention will not be conducted arbitrarily or by violating the law. Right of privacy may be extended in a house, family, and communication relationship. Generally, personal communication relationship is under secret surveillance and censor of communication of convicts or prisoners;

- The state is required to guarantee effective protection of personal data since the state and commercial organization are in a position which is easy to exploit personal data resulting in a threat to the privacy rights of individuals. Principally, Interception or secret surveillance may be considered as an attack against the protection of privacy rights; therefore, such practice must be regulated by Law and not governed by regulations under the Law since it is a restriction of human rights, particularly privacy rights. Restriction of human rights with the Law has been in accordance with the provision of Article 28J paragraph (2) of the 1945 Constitution;

- Interception for the state apparatuses in various countries around the world shall be performed in the conditions and prerequisites, namely: (i) the existence of a clear legitimate authority based on Law providing permission for interception (including, clear purposes and objectives), (ii) the existence of a definite time period security for interception, (iii) restriction for the handling of interception results material, (iv) restriction concerning people who may have access for interception and other restrictions;

2. Mohammad Fajrul Falaakh

- In the event that Article 31 paragraph (3) of Law 11/2008 allows an interception to be performed in the context of law enforcement at the requests of police, prosecution, and/or other law enforcement institutions as set forth by virtue of Law, the exception to the prohibition of such interception still contains danger;

- In the event that Article 31 paragraph (3) of Law 11/2008 is interpreted to have permitted an interception, "*upon the request of police, prosecution and so forth*.....", such provision shall be dangerous since it does not specify the limits, in terms of whether or not the upholders of law is permitted by Law to perform, instruct as well as request for interception. Such granting of authority is too general, without limit, and prone to the misapplication;

- Article 28J paragraph (2) of the 1945 Constitution has determined that the restriction on human rights must be regulated in Law, with the sole purpose to ensure the recognition as well as respects for the rights and freedom of others and to meet fair demands in accordance with the considerations of morality, religion values, security, and public order in a democratic society. Accordingly, the granting of authority for interception must be accompanied by explanation concerning the possible achievement of the objectives;

o Law concerning interception must set up a clear regulation, concerning: (i) authority to perform, instruct as well as request for interception, (ii) specific objectives of interception, (iii) category of certain legal subject authorizing interception, (iv) superior's authorization, or permission of the judge which is required prior to the performance of interception by the officers, (v) how to intercept,(vii) supervision for interception, (viii) the use of interception results;

- Article 31 paragraph (4) of Law 11/2008 may not be justified, since Article 31 paragraph (3) of Law *a quo* does not permit an interception, and the entire Law 11/2008 also does not regulate for the procedure of interception which set forth further in Government Regulation. Therefore, according to experts, Article 31 paragraph (3) and paragraph (4) of Law 11/2008 are inconsistent with the

1945 Constitution since they fail to provide the clarity as well as certainty of regulation for interception. In addition, Article 31 paragraph (3) and paragraph (4) of Law 11/2008 are also inconsistent with Article 22A of the 1945 Constitution which requires the formation of Law to be in line with the procedures based on Law Number 10/2004, particularly, concerning pattern of norms in law;

[3.11] Whereas the Government in the hearing on April 5, 2010 presented oral statements which are principally describing the following matters:

- Formation of Article 31 paragraph (4) of Law 11/2008 has been in accordance with Article 10 as well as Article 39 paragraph (1) of Law Number 10 Year 2004 concerning the Formulation of Laws and Regulations;

- Government Regulation as intended in Article 31 paragraph (4) of Law 11/2008 has not come into effect until today, therefore, the Petitioners' petition *a quo* is premature. In the event that such government regulation has come into effect, the Supreme Court shall be authorized to examine the Government Regulation;

- Provision of Article 31 paragraphs (1), (2), and (3) of Law 11/2008 has clearly regulated interception prohibitions and restriction which constitute the implementation of human rights protection realization as mandated by

Article 28G paragraph (1) and Article 28J paragraph (2) of the 1945 Constitution, so that the understanding of Article 31 paragraph (4) of Law 11/2008 must also be related to Article 31 paragraphs (1), (2), and (3) of Law 11/2008;

- Protection of human rights as set forth in Article 28G paragraph (1) has been fulfilled with the provision of Article 31 paragraphs (1), (2), and (3) of Law 11/2008, however, the provision of Article 31 paragraph (4) of Law *a quo* only constitute an administrative technical arrangement, since the process of interception needs the regulation on the implementation techniques in the form of Government Regulation;

- Based on the statement above, the Government is of the opinion that the provision of Article 31 paragraph (4) of Law 11/2008 is not inconsistent with Article 28G paragraph (1) and Article 28J paragraph (2) of the 1945 Constitution and does not impair the constitutional right and/or authority of the Petitioners;

[3.12] Whereas the People's Legislative Assembly presented written statement received at the Clerk's Office of the Court on April 16, 2010 which is principally describing the following matters:

- Government Regulation as mandated by Article 31 paragraph (4) of Law 11/2008 does not regulate the matter of interception substance, instead regulates technically on interception procedure which is used in the

context of law enforcement as mandated by Article 31 paragraph (3) of Law 11/2008, therefore, the Government Regulation is not inconsistent with interception as set forth in Article 12 paragraph (1) sub-paragraph a of Law Number 30 Year 2002 concerning Corruption Eradication Commission;

- Government Regulation as mandated by Article 31 paragraph (4) of Law 11/2008 is performed in the context of law enforcement by the police, prosecutor, and/or other law enforcement institutions, so that the law enforcement shall not become arbitrary and always in accordance with the protection of privacy, confidentiality, smooth running of public service, integrity of data or completeness of data in line with the provision of laws and regulations;

- Provision of Article 31 paragraph (4) of Law 11/2008 is not intended to limit the rights and freedom of each person as referred to in Article 28J paragraph (2) of the 1945 Constitution, since Article 31 paragraphs (1), (2), and (3) of Law *a quo* have regulated interception prohibitions and restrictions as the implementation of Article 28G paragraph (1) and Article 28J paragraph (2) of the 1945 Constitution;

- Article 31 paragraph (4) of Law 11/2008 has been arranged in accordance with the provision of Law Number 10 Year 2004 concerning the Formulations of Laws and Regulations;

- If the substance of Government Regulation governing the interception procedures as mandated by Article 31 paragraph (4) of Law 11/2008 is inconsistent with Law, it shall accordingly constitute the authority of the Supreme Court in order to assess the validity of intended Government Regulation;

Opinion of the Court

[3.13] Whereas the true interception is an unlawful act since the interception constitutes an action violating other's privacy and therefore, it violates the Human Rights (HAM). In its development, interception has been used frequently to assist certain legal proceedings, such as investigation of criminal cases in disclosing terrorism criminal acts, corruption and drugs. This permitted interception is also known as lawful interception;

Activities and authority of interception constitute a very sensitive matter, because in one side, it is a restriction of Human Rights, and in addition, it has the aspect of legal interest. Therefore, regulation concerning the legality of interception must be made and formulated in a proper manner according to the 1945 Constitution;

[3.14] Whereas the Petitioners asked the Court to revoke Article 31 paragraph (4) of Law 11/2008 stating that, "*Further provision concerning Interception procedures as intended in paragraph (3) shall be regulated with a Government Regulation*". The petitioner argued that the provision *a quo* is inconsistent with

the constitution Article 28G paragraph (1) and Article 28J paragraph (2) of the 1945 Constitution;

Whereas the Petitioners argued that the provision of interception procedure should not be regulated further in Government Regulation; instead, it must be regulated through Law. The petitioner is of the opinion that the restrictions on Human Rights may only be conducted by using a formula regulating the Law. Interception arrangement in Government Regulation is inadequate to accommodate articulation arrangement concerning interception;

Whereas the Petitioners also argued that the interception by legal apparatuses or the state official institutions continues to become controversial since it is a practice of invasion of the citizens' privacy rights, including privacy of personal life, family life as well as correspondence. The vagueness of the regulation on interception will potentially lead to misuse with an impact of violating the Human Rights of the Petitioners as well as the general community;

Whereas interception is a means of detection as well as prevention of crime which are likely to harm the human rights, if it is positioned on inappropriate law due to weak regulation as well as formulation of regulation;

Whereas since interception constitutes violation of human rights, it is duly reasonable for the state to breach the privacy rights of the citizens, therefore, the state must breach them in the form of Law and not Government Regulation. Divergence of Human Rights as expressly stated in Article 28J paragraph (2) of

the 1945 Constitution, may only be performed through Law and not in the form of Government Regulation;

Whereas regulating sensitive issue, such as interception must be placed within the framework of Law, in particular, Criminal Law Procedure since the law regulating interception performed by the state institutions must be emphasized more on the protection of individual privacy rights and/or Indonesian citizens;

[3.15] Whereas the Court having heard and read the statement of the People's Legislative Assembly (DPR RI) arguing that article *a quo* may not be separated from the previous article, namely Article 31 paragraph (3) of Law 11/2008 stating that interception may only be performed in the context of law enforcement by the Police, Prosecutor, and/or other law enforcement institutions stipulated by Law;

Whereas the existence of Government Regulation as mandated by Article 31 paragraph (4) of Law 11/2008 is not inconsistent with the 1945 Constitution since the substance in article *a quo* only mandates the preparation of interception procedures. Provisions concerning interception have been previously made in numbers of Laws, namely among other things:

1. Article 12 paragraph (1) sub-paragraph a of Law Number 30 Year 2002 concerning Corruption Eradication Commission stating that, "*In performing the duties of examination, investigation, and prosecution as intended in Article 6 sub-article c, Corruption Eradication Commission is authorized to intercept as well as record conversations.*"

2. Article 42 paragraphs (2) and (3) of Law Number 36 Year 1999 concerning Telecommunication, stating that:

Paragraph (2):

For the requirements of criminal justice process, administrator of telecommunication services may record information sent and or accepted by administrator of communication services as well as provide necessary information on:

a. *written request of the Attorney General and or the Chief of the Police of the Republic of Indonesia for certain criminal act;*
b. *investigator's request for certain criminal acts in accordance with the applicable Laws;*

Paragraph (3):

“Provision concerning request and provision of information recording procedures as intended in paragraph (2) is regulated in Government Regulation."

3. Article 43 of Law Number 36 Year 1999 concerning Telecommunication, stating that:

“The provision of information recording by the administrator of telecommunication services to the user of telecommunication services as intended in Article 41 and for the interest of criminal justice process as

intended in Article 42 paragraph (2) shall not constitute violation against Article 40;"

Whereas the abovementioned articles in Law have provided legal umbrella for the drafting of Government Regulation. Substance of Government Regulation concerning interception procedure shall not contradict to the Law, since Government Regulation constitutes a rule which is a description of Law, so that the existence of Government Regulation shall not be in contradiction with the 1945 Constitution;

[3.16] Whereas interception of information shall include one of communication intelligence activities, namely an activity of recording/listening with/or without installing additional tools/instrument in the telecommunication network to obtain information, either silently or unreservedly;

Whereas, therefore, to avoid arbitrariness and disturbing the peace in the administration of the state, the government must regulate interception activities. Information of interception regulations have been issued by the Government of Indonesia, among other things:

- Law Number 35 Year 2009 concerning Narcotics (State Gazette of the Republic of Indonesia Year 2009 Number 143, State Gazette of the Republic of Indonesia Year 2009 Number 5062);

- Law Number 36 Year 1999 concerning Telecommunication (State Gazette of the Republic of Indonesia Year 1999 Number 154, State Gazette of the

Republic of Indonesia Number 3881);

- Law Number 30 Year 2002 concerning Corruption Eradication Commission (State Gazette of the Republic of Indonesia Year 2002 Number 137, Supplement to State Gazette of the Republic of Indonesia Number 4250);

- Law Number 11 Year 2008 concerning Electronic Information and Transactions (State Gazette of the Republic of Indonesia Year 2008 Number 58, Supplement to State Gazette of the Republic of Indonesia Number 4843);

- Law Number 15 Year 2003 concerning Stipulation of Government Regulation in Lieu of Law Number 1 Year 2002 Concerning Eradication of Criminal Acts of Terrorism, Becoming Law (State Gazette of the Republic of Indonesia Year 2003 Number 45, Supplement to State Gazette of the Republic of Indonesia Number 4284);

- Minister Regulation Number 01/P/M.KOMINFO/03/2008 concerning Information Recording for the Interest of Defense and Security of the State.

Whereas based on several abovementioned laws and regulations, there are regulations, as follows:

- *Firstly*, Article 40 of Law Number 36 Year 1999 concerning

Telecommunication stating that any person is prohibited to perform interception activities for information which is transmitted through telecommunication network in any form intended in the article, shall constitute lawful interception activities. Article 41 states that,"...*communication provider is required to record the use of telecommunication facilities by the user of telecommunication services*..." In addition to the law enforcement institution, there are other institutions which are entitled as well as required to conduct information recording. Furthermore, in Article 42 paragraph (1) states that," *the Providers of telecommunication services shall be required to keep the confidentiality of information which is sent and or accepted by the customer of telecommunication services through telecommunication network and or telecommunication services provided by them*." if the company providing telecommunication violates the provision contained in the article, namely disclosing the information in regard to their customers, the company shall subject to sanction of imprisonment or a fine in the amount of two hundred million rupiah;

- *Second*, Article 30 of Law Number 11 Year 2008 concerning Electronic Information and Transactions regulating on the restriction of accessing computer and/or electronic system which belongs to others for the purpose of in any manner stealing their information/electronic document, both without right or against the law. The complete Article 31 paragraph (1) states that," *Any person who is intentionally and without right or*

against the law performing interception or intercepting Electronic Information in others' Computer and/or certain Electronic System, *(2) Any person who is intentionally and without right or against the law performing interception on the transmission of Electronic Information and/or Electronic Documents which are public, from, to, and in a Computer and/or others' certain Electronic System, either does not cause the change in any manner or causing change, removal, and/or termination of Electronic Information and/or Electronic Documents being transmitted, (3) Except interception as intended in paragraphs (1) and (2), interception which are performed in the context of law enforcement at the request of the police, prosecutor, and/or other law enforcement institutions determined based on law, (4) Further provision concerning interception procedures as intended in paragraph (3) shall be regulated by Government Regulation";*

- *Third*, Article 12 paragraph (1) of Law Number 30 Year 2002 concerning Corruption Eradication Commission states that, "*In performing the duties of examination, investigation, and prosecution as intended in Article 6 sub-article c, Corruption Eradication Commission is authorized to perform interception and record conversations*";

- *Fourth*, Law Number 35 Year 2009 concerning Narcotics states that National Narcotics Board (*Badan Narkotik Nasional*/BNN) Investigator permits to perform an interception, either under permission of the court and without the permission of the chairman of the court first. Interception

under the permission of the chairman of the court, namely, if there is sufficient preliminary evidence and within the period of time which is not more than three months as from the date the investigator received the letter for interception, whereas without prior permission of the chairman of the court in case of emergency and afterwards the permission of the Chairman of the Court within the period of time which is not more than one of the twenty-four hour (*vide* Article 75, Article 77, and Article 78 of Law 35/2009);

- *Fifth*, Article 31 of Law Number 15 Year 2003 concerning Government Regulation Stipulation in Lieu of Law Number 1 Year 2002 concerning Eradication of Terrorism Criminal Act, becoming a Law allowing interception of information provided that the permission from the district court is obtained and within the given time which is not more than a year;

- *Sixth*, Minister Regulation Number 01/P/M.KOMINFO/03/2008 concerning Information on Recording for the Benefits of the Defense and Security of the State regulating in regard to technical provision of interception, procedure of interception which aims to benefit the state, having regard to the ethics and confidentiality of information;

[3.17] Whereas there are numbers of definition concerning interception, among other things:

a) Article 31 of Law Number 11 Year 2008 concerning Electronic Information

and Transactions which defines "Interception or wiretapping" as an activity to listen to, record, redirect, hamper and/or note Electronic Information transmission and/or Electronic Documents which are not public, either using wired network communication or wireless network, such as electromagnetic transmitter or radio frequency;

b) Article 40 of Law Number 36 Year 1999 concerning Telecommunication, the definition of interception shall be an activity of installing tools or additional equipments to telecommunication network ,for the purpose of obtaining unauthorized information. Basically, information owned by a person shall be of its privacy right which must be protected; therefore, the interception must be prohibited;

c) Article 1 sub-article 19 of Law Number 35 Year 2009 concerning Narcotics, stating that an Interception shall be an activity or series of activities of examination or investigation by intercepting conversation, message, information, and/or communication network which is performed through telephone and/or other electronic communication tools;

Whereas from the third definition, it may be concluded that interception shall include three aspects, among other things: a) inhibition of information or information recording process, b) unlawful activities and therefore, it must be prohibited, c) it may only be performed by the authorized Police Officer Investigator;

[3.18] Whereas the Court is of the opinion that there has not been any comprehensive regulation concerning interception until today. This matter indicates that regulations concerning interception still spread in several Laws with various mechanism and procedures. There is no standard regulation concerning interception, therefore deviations may occur in the implementation;

Whereas, the mechanism which must be taken into account from this interception is the interception which may be performed by an individual on behalf of institution having authority provided by Law. In this matter, interception limitation is applicable so that there will not be any violation of privacy or citizens' human rights;

Whereas in intercepting, there is principle of *velox et exactus* which means that the intercepted information must contain current and accurate information. In this matter, interception must contain special interest which is performed quickly and accurately. In such condition, there is an urgency of an interception, however, it must be performed continuously in accordance with the provision of regulations, so that there will not be violation of an arbitrary for other's rights of privacy;

[3.19] Whereas there is regulation concerning interception in several countries which is regulated in Criminal Code, namely in United State, the Netherlands and Canada, whereas in Indonesia, the regulation concerning interception has spread in several laws and regulations;

Whereas, in the principle, comprehensive and appropriate regulations are required to control several authorities which spread in several Laws. This synchronization may only be performed by a regulation which of the same level as Law and not as Government Regulation;

[3.20] Whereas the Court is of the opinion that there are three legal issues which become the issue in this case. The three legal issues shall be, follows:

a. Rights of Privacy: the Petitioners argued that interception constitutes a form of Human Rights violation of which the right guaranteed by the 1945 Constitution;

b. Regulation form: the Petitioners stated that article *a quo* permits further regulation of interception in Government Regulation to be inappropriate, since it must be regulated in Law as mandated by Article 28J paragraph (2) of the 1945 Constitution, for such matter includes in the Human Rights limitation which may only be performed by Law.

c. Practical Aspect: Whereas the condition of law building and enforcement in Indonesia is still unstable and is likely to be weak and even chaotic, therefore, the existence of article *a quo* may be misused to violate other's Human Rights;

[3.21] Considering on the legal issue above, the Court is of the opinion that the interception constitutes a form violation in regard to rights of privacy which is inconsistent with the 1945 Constitution. Rights of privacy is a part of human

rights which may be limited (derogable rights), however, limitation on this rights of privacy may only be performed by Law, as the provision of Article 28J paragraph (2) of the 1945 Constitution;

Whereas the Court found that several Law have authorized and regulated on interception, however, the regulation has not provided clearer procedures concerning interception. For example, concerning the procedure for authorizing interception limitation and the one who have the rights to intercept. This matter is not regulated clearly in several Laws yet;

Whereas the validity of interception as one of examination and investigation authority has helped legal process facilitating the law enforcement apparatuses to disclose criminal act. However, the authority of law enforcement apparatuses must also be limited so that the misapplication of authority will not occur;

Whereas, the Petitioners stated that divergence of interception is not likely to occur, but to ensure the openness and legality of the interception, itself. The Court is of the opinion that the procedure of interception must be regulated in Law. This matter occurs since the regulation concerning interception is still highly dependent on the respective policies of institution until today;

[3.22] Whereas the Court is of the same opinion as the *ad informandum* statements of Ifdhal Kasim and Mohammad Fajrul Falaakh. As for basic information, **Ifdhal Kasim** states that the mechanism of interception in various

worldwide countries is performed with the requirements of: (i) the existence of official authority as designated in Law for the provision of interception permission, (ii) guarantee for certain period of time to perform interception, (iii) restriction for handling of interception results, iv) restriction concerning people who may access interception. As for basic information, Mohammad Fajrul Falaakh states that Law concerning interception should have regulated clearly in regard to: (i) authority perform, instruct as well as request for interception, (ii) specific purpose of interception, (iii) category of legal subject authorized to perform interception, (iv) the existence of permission from the superior or prior permission from justice before performing interception, (v) procedures of interception, (vii) supervision on interception, (viii) the use of interception results. According to the expert, Article 31 paragraph (4) of Law 11/2008 is not justified since Article 31 paragraph (3) of Law *a quo* does not allow the existence of interception. In addition, the entire Law 11/2008 also does not regulate the procedures of interception which is further regulated in Government Regulation. Therefore, according to the experts, Article 31 paragraph (3) and paragraph (4) of Law 11/2008 is inconsistent with the 1945 Constitution since it does not provide clarity and certainty of regulation concerning interception;

[3.23] Whereas the Court assess that it is necessary to have a specific Law regulating general interception until the procedure of interception for each authorized institution. This law is highly needed since there has been no synchronous regulation concerning interception until today, so that it will not generally impair the constitutional rights of the citizens;

Whereas Government Regulation may not regulate the restriction of human rights. The form of Government Regulation shall only constitute administrative regulation and have no authority to accommodate the restriction on Human Rights;

Whereas the regulation for interception procedures with Government Regulation is in accordance with delegated legislation of which the formulation of Government Regulation is substantively made to implement Law (vide Article 10 of Law Number 10 Year 2004 concerning Formulation of Laws and Regulations). In addition, systematically, Article 31 paragraph (4) of Law *a quo* refers to paragraph (3) which basically requires the existence of Law regulating interception which has not been made until today, therefore, it can be said that Article 31 paragraph (4) of Law *a quo* delegates matter which has not been regulated. A regulation which is of low hierarchy shall constitute a derivation or derivative regulation from the regulations which are of high hierarchy and may only regulate the operational technical substance of regulation which is above it, whereas in the case *a quo*, there has not been any provision regulating requirements and procedures of interception as set forth in Article 31 paragraph (3) of Law *a quo*;

[3.24] Whereas in line with the abovementioned legal judgment, the Court, in Decision Number 006/PUU-I/2003 dated March 30, 2004 considers that, “Rights of privacy is not a part of rights which may not be reduced in any circumstance (non-derogable rights), therefore, the state can make a restriction for exercising

such rights by using law as regulated in Article 28J paragraph (2) of the Constitution of the State of the Republic of Indonesia". Furthermore, the Court also considers that," For avoiding the possibility of authority misapplication in regard to interception and recording, the Constitutional Court is of the opinion that It is necessary to determine set of regulations regulating requirements as well as procedures of interception and the intended recording".

Related to interception regulation, through Decision Number 012-016-019/PUU-IV/2006, dated December 19, 2006, the Court expressly stated and reminded that legal consideration on Decision Number 006/PUU-I/2003 dated March 30, 2004 states that the restriction through interception must be regulated by Law in order to avoid the misapplication of authority violating human rights. In the legal consideration of decision *a quo*, it is stated that:

"*The Court considers it necessary to be mindful of the content of legal consideration of the Court in the Decision Number 006/PUU-I/2003 since interception and conversation recording constitute a restriction of human rights, of which such restriction may only be performed by law, as determined in Article 28J paragraph (2)of the 1945 Constitution. The Law intended must subsequently be formulated, among other things, the one who is authorized to issue the interception order and recording may issue them, after achieving sufficient preliminary evidence, Indicating that such interception and conversation recording is to improve the evidence or even the interception and conversation recording must be performed to look for sufficient evidence. According to the*

order in Article 28J paragraph (2) of the 1945 Constitution, such matters must be regulated in law in order to avoid the misapplication of authority which violates the human rights."

[3.25] Considering, based on series of the Court's opinion above, in its relation to one another, concerning the Petitioner's argument on Article 31 paragraph (4) of Law 11/2008 as appropriate and reasonable according to the law;

4. CONCLUSION

Based on the assessment of all the facts and laws as described above, the Court concludes that:

[4.1] The Court has authority to examine, hear, and decide upon the case *a quo*;

[4.2] The Petitioners have legal standing in order to act as petitioners in the case *a quo*;

[4.3] Arguments of the Petitioners are appropriate and legally found.

5. ORDERS OF DECISION

Based on the 1945 Constitution of the State of the Republic of Indonesia and in view of Article 56 paragraph (2) and (3) as well as Article 57 paragraph (1) and paragraph (3) of Law Number 24 Year 2003 concerning the Constitutional Court (the State Gazette of the Republic of Indonesia Year 2003 Number 98,

Supplement to State Gazette of the Republic of Indonesia Number 4316).

To hear,

- Granting the petition of the Petitioners in its entirety;
- Declaring Article 31 paragraph (4) of Law Number 11 Year 2008 concerning Electronic Information and Transactions (the State Gazette of the Republic of Indonesia Year 2008 Number 58, Supplement to the State Gazette of the Republic of Indonesia Number 4843) inconsistent with the 1945 Constitution of the State of the Republic of Indonesia;
- Declaring that Article 31 paragraph (4) of Law Number 11 Year 2008 concerning Electronic Information and Transactions (the State Gazette of the Republic of Indonesia Year 2008 Number 58, Supplement to the State Gazette of the Republic of Indonesia Number 4843) has no binding legal force;
- Ordering the promulgation of this decision properly in the Official Gazette of the Republic of Indonesia.

In witness whereof, this decided was made in the Consultative Meeting of Justices by nine Justices of the Constitutional Court, namely Moh. Mahfud MD, as Chairperson and concurrent Member, M. Arsyad Sanusi, Harjono, Achmad Sodiki, Maria Farida Indrati, M. Akil Mochtar, Muhammad Alim, Ahmad Fadlil Sumadi, and Hamdan Zoelva, respectively as Members on Wednesday, the

twenty-forth of February two thousand and eleven and was pronounced in the Plenary Session open for the public on Thursday dated the twenty-fourth of February two thousand and eleven by seven Constitutional Court Justices, namely Moh. Mahfud MD, as the Chairperson and concurrent Member, Harjono, Achmad Sodiki, M. Akil Mochtar, Muhammad Alim, Ahmad Fadlil Sumadi, and Hamdan Zoelva respectively as Members, assisted by Sunardi as Substitute Registrar, in the presence of the Petitioners/their Attorneys, Government or its representative and the People's Legislative Assembly or its representative.

CHIEF JUSTICE,

Moh. Mahfud MD.

MEMBERS,

M. Arsyad Sanusi

Harjono

Achmad Sodiki

Maria Farida Indrati

M. Akil Mochtar

Muhammad Alim

Ahmad Fadlil Sumadi

Hamdan Zoelva

SUBSTITUTE REGISTRAR,

sgd.

Sunardi

The Copy of this Decision is valid and in accordance with the original published to the public based on Article 14 of Law Number 24 Year 2003 regarding the Constitutional Court.

Jakarta, 24 February 2011

Registrar,

Kasianur Sidauruk