DECISION

Number 001/PUU-IV/2006

FOR THE SAKE OF JUSTICE UNDER THE ONE ALMIGHTY GOD

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA

Examining, hearing and deciding upon constitutional cases at the first and final level, has passed a decision in the case of petition for judicial review of a law against the Constitution of the State of the Republic of Indonesia Year 1945, filed by:

1.	Name	:	Drs. H. Badrul Kamal, MM;
	Place and Date of Birth/Age	:	Bogor, December 20, 1945;
	Religion	:	Islam;
	Occupation	:	Retired Civil Servant
	Address	:	Sector Anggrek III No.1 Depok;
	ID Card No.	:	32.77.73.1011/00108/73000519;
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2.	Name	:	KH. Syihabuddin Ahmad, BA;
	Place and Date of Birth/Age	:	Bogor, December 7, 1949;
	Religion	:	Islam;
	Occupation	:	Teacher;

Address	:	Jl. Alamanda No.17 Kp. Areman Rt. 08/07 Tugu, Cimanggis, Depok;
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In this matter granting power of attorney to Alberth M. Sagala and Muhyar Nugraha, SH., Advocates under the Legal and Advocacy Team of Badrul Kamal and KH. Shyihabudin Achmad, BA, with their office at Kota Kembang Depok Raya Sector Anggrek block A1 number 1 Depok, Tel. 021-9240960 Mobile No: 0811142469 and 0811113169, based on a special power of attorney dated January 2, 2006 each acting for and on his own behalf and/or jointly as a candidate pair of Mayor and Vice Mayor of Depok City, participants in the 2005 Regional Head Election of Depok City;

Hereinafter referred to as **Petitioners**;

Having read the petition of the Petitioners;

Having heard the statement of the Petitioners;

Having heard the statement of the General Election Commission of Depok City represented by its attorney considered legal by the Court;

Having read the written statement of the General Election Commission of Depok City represented by its attorney considered legal by the Court;

Having heard the statement of the Related Party of the Regional Head Election Monitoring Committee of Depok City;

Having heard the statement of the Related Parties of the candidate pair Nur Mahmudi Ismail and Yuyun Wirasaputra or the representing attorney;

Having examined the evidence;

Having heard and read the statements and written statements of experts presented by the Petitioners;

Having heard and read the statements and written statements of experts presented by the Related Parties of the candidate pair, Nur Mahmudi Ismail and Yuyun Wirasaputra;

LEGAL CONSIDERATIONS

Considering whereas the purpose and objective of the petition of the Petitioners are as described above;

Considering whereas prior to giving further consideration on the authorities of the Constitutional Court (hereinafter referred to as the Court) and the legal standing of the Petitioners in the *a quo* petition, the Court shall first take the following matters into account:

- Whereas the *a quo* petition has been administratively complete as intended in Article 29, Article 31 Paragraph (1) Sub-Paragraph a, and Paragraph (2) of

the Law of the Republic of Indonesia Number 24 Year 2003 concerning the Constitutional Court (hereinafter referred to as the Constitutional Court Law), hence the petition was recorded in the Constitutional Case Registration Book (BRPK) in accordance with Article 32 Paragraph (3) of the Constitutional Court Law;

- Whereas pursuant to Article 16 Paragraph (1) of Law Number 4 Year 2004 concerning Judicial Power that the court must not reject to hear a case, or to examine, hear, and decide upon the petition, the Court must hold a hearing in the context of a honest and fair hearing process (*processual fairness, een goede process);*

- Whereas in examining a petition, the issue of authority of the Court often overlaps with the issue of legal standing of the Petitioners, hence the two issues can be determined upon examining their mutual relationship or even upon examining their relationship to the principal issue of the case;

Considering whereas based on the aforementioned description, the Court shall hold a hearing to hear and give opportunities to the parties to prove the truth of their arguments;

Considering whereas prior to entering the principal issue of the case, the Court needs to first take the following matters into account:

1. Whether the Court has the authority to examine, hear, and decide upon the petition filed as argued by the Petitioners;

2. Whether the Petitioners have the legal standing to file the *a quo* petition as argued*;*

With respect to the foregoing two matters, the Court is of the following opinion:

1. Authority of the Court

Considering whereas pursuant to the provision of Article 24C Paragraph (1) and Paragraph (2) of the Constitution of the State of the Republic of Indonesia Year 1945 (hereinafter referred to as the 1945 Constitution) and Article 10 Paragraph (1) and Paragraph (2) of the Constitutional Court Law *juncto* Article 12 Paragraph (1) and Paragraph (2) of the Law of the Republic of Indonesia Number 4 Year 2004 concerning Judicial Power (State Gazette of the Republic of Indonesia Year 2004 Number 8, Supplement to State Gazette of the Republic of Indonesia Number 4358, hereinafter referred to as the Judicial Power Law), the Court shall have the following authorities:

a. to conduct judicial review of laws against the 1945 Constitution;

b. to decide upon disputes on the authorities of state institutions whose authorities are granted by the 1945 Constitution;

c. to decide upon the dissolution of political parties;

d. decide upon disputes concerning the results of general elections; and

e. to be obligated to give decisions on the opinion of the People's Legislative Assembly that the President and/or Vice President are alleged to have violated the law in the form of betrayal of the state, corruption, bribery, other serious crimes, or disgraceful actions, and/or to no longer quality as President and/or Vice President.

Considering whereas the petition of the Petitioners, as mentioned in the principal issue titled **"Petition for Judicial Review of a Law against the 1945 Constitution"**; while in fact, the content is concerning the Petitioners' objection to the Decision of the Supreme Court Number 01 PK/Pilkada/2005 argued to be contradictory to Law Number 32 Year 2004 concerning Regional Government (hereinafter referred to as the Regional Government Law) *juncto* Government Regulation Number 6 Year 2005 concerning Election, Legalization of Appointment, and Dismissal of Head of Region and Vice Head of Region (hereinafter referred to as Government Regulation Number 6 Year 2005) *juncto* Regulation of the Supreme Court of the Republic of Indonesia Number 02 Year 2005 Concerning Procedures in Filing an Objection to The Stipulation of the Results of Regional Head Election and Vice Regional Head Election of The Provincial General Election Commission and Regency/City General Election Commission (hereinafter referred to as Supreme Court Regulation No. 02 Year 2005);

Considering whereas the Petitioners argued that Decision of the Supreme Court No. 01 PK/Pilkada/2005 which subsequently became a jurisprudence is

equal to or stronger than law, hence its existence must be acknowledged and it must be given the Status as a law, and thus, Decision of the Supreme Court No. 01 PK/Pilkada/2005 must be examined and decided by the Court, in both substantive and formal review, and be declared contradictory to Article 24 of the 1945 Constitution and be declared as having no binding legal effect;

Considering whereas to support their arguments, in addition to presenting the written evidence (Exhibits P1 through P5), the Petitioners also presented 3 (three) Experts who gave their statements under oath which are principally as follows:

i. Prof. Dr. Muhammad Ryaas Rasyid, M.A. In his opinion, in the United States, *judicial review* can be filed against both laws or decisions which are deemed by the injured party to be contradictory to the Constitution, hence it is possible for a common citizen to file for *judicial review* of the application of a law or a decision deemed contradictory to the higher provision namely the Constitution. But the expert declared that he did not know whether such assumption is applicable in Indonesia. Concerning the *legal standing,* the expert is of the opinion that the Petitioners have the *legal standing,* while concerning the principal case, the meaning of final and binding decision should refer to the definition of final and binding where there are no more legal measures as regulated in the Constitutional Court Law;

ii. Prof. H. Soehino, S.H. stated that the Court has the authority and the Petitioners have the *legal standing,* without giving further reasons therefor.

However, in his additional written statement the expert stated that jurisprudence is not included in the order of laws and regulations because it is not a law or regulation, although substantially jurisprudence has the legal effect which is equal to the legal effect of a law;

iii. Dr. I Gede Panca Astawa, S.H. stated that the Court has the authority in *judicial review.* The problem is how the Court understands the meaning of *judicial review*, whether only for conducting review of laws against the Constitution, or to understand it in a wider sense, as stated by Ryaas Rasyid concerning the judicial review as followed in the United States. In fact to the expert, the Court must go further, namely by giving the interpretation of laws, including the interpretation of various terms in law that become controversy among the public, such as the meaning of “a final and binding decision” which must be declared accomplished, regardless of whether or not the Decision of the High Court is fair;

Considering whereas the Petitioners also added the written statements of experts Agun Gunanjar and Ida Fauziah which shall not, however, be considered any further by the Court because their statements pertain to the principal case or to the background of formulation of Article 106 Paragraph (7) of the Regional Government Law and not concerning the authority of the Court and the legal standing Petitioners;

Considering also whereas the Related Parties of the General Election Commission of Depok City have given their statement and written statement that

basically rejected the Petitioners' arguments and stated that the Court has no authority in hearing the *a quo* petition*,* and that the Petitioners have no *legal standing.* The complete statement of the General Election Commission of Depok City is described in as the Principal Issue of the Case and in addition, the General Election Commission of Depok City also presented the written statement of Prof. Dr. RM. Sudikno Mertokusumo, S.H. which is principally as follows:

- a Law is a product of a legislative institution which is abstract/general in nature, generally applicable in terms of time, general in terms of place, and general in terms of people, while a court decision is concrete and individual in nature which only binds the related parties;

- In the order of law sources, the position of a law is higher than a court decision;

- There are only 3 legal measures against a court decision namely appeal, cassation, and case review; a judicial review can not be conducted on a court decision*;*

Considering whereas the Related Party of the Regional Election Monitoring Committee of Depok City presented its statement and written statement as completely described in the principal issue of the case, which principally support the Petitioners' arguments;

Considering also whereas the Related Parties, Nur Mahmudi Ismail and Yuyun Wirasaputra through their attorney-in-fact gave their statement and written

statement as completely described in the principal issue of the case, which principally rejected the Petitioners' arguments, and requested that the Court declare that it does not have the authority to hear the *a quo* petition and that the Petitioners do not have the *legal standing.* In addition, the related parties also presented 2 (two) experts who gave their statement under oath and an expert who gave his written statement as follows:

1. Topo Santoso, S.H., M.H. gave his statement under oath which basically stated that jurisprudence is not the same as law, because jurisprudence contains special legal norms and has an individual characteristic with respect to a particular case, while law is general, especially if referring to an authentic interpretation as spelled out in Law No. 10 Year 2004 Concerning Formulation of Laws and Regulations and the Constitutional Court Law, and therefore it is clear that jurisprudence is not the same as law;

2. Denny Indrayana, S.H., LL.M., Ph.D who gave his statement under oath which also basically stated that jurisprudence is not the same as law, either from the viewpoint of positive legal provisions or from the viewpoint of doctrine. In fact, according to the expert it is premature to declare that Decision of the Supreme Court Number 01 PK/Pilkada/2005 is a jurisprudence because the Decision of the Supreme Court does not automatically become a permanent jurisprudence. According to the expert the Court does not have the authority over the *a quo* petition. The complete statement of the expert is described in the principal issue of the case;

3. Prof. Dr. Philipus M. Hadjon, S.H. gave his written statement as completely described in the principal issue of the case, which, however, basically stated that by using a conceptual approach, a law in accordance with the 1945 Constitution is a product of the legislative authority of the People's Legislative Assembly with juridical characteristic which is abstract-general in nature, while a Decision of the Supreme Court is within the domain of *judicial decision* which is concrete-individual in nature, hence law cannot be seen as equal to a Decision of the Supreme Court. In addition, the expert also used a comparative approach by quoting the provision of *Article 93 of Section (2)* of the German Constitution which states that "*The Federal Constitutional Court shall also rule on any other cases referred to by federal legislation".* Thus, according to the expert, judicial review of Decision of the Supreme Court Number 01 PK/Pilkada/2005 is not under the authority of the Court;

Considering whereas with respect to the foregoing Petitioners' arguments, statements of the Related Parties, statements of the experts, and evidence, the Court is of the following opinion:

a. Whereas the petition of the Petitioners is basically intended for conducting judicial review of law against the 1945 Constitution, by building a legal construction as if Decision of the Supreme Court Number 01 PK/PILKADA/2005 were jurisprudence and jurisprudence were equal to or even higher than law;

b. Whereas judicial review of a Decision of the Supreme Court is not the constitutional authority of the Court as referred to in Article 24C Paragraph (1) and Paragraph (2) of the 1945 Constitution *juncto* the Judicial Power Law *juncto* the Constitutional Court Law;

c. Whereas simply treating a Decision of the Supreme Court and jurisprudence as equal and also treating jurisprudence and law as equal is incorrect, because:

- both in formal and substantive sense, a law is not the same as jurisprudence. A Decision of the Supreme Court is a judicial decision (*een judicieele vonnis*), which belongs to the category of individual and concrete norms that are not binding in general (*erga omnes*), but which only bind parties (*inter-partes*). A Decision of the Supreme Court or jurisprudence is not a legislation which belongs to the category of general and abstract norms. Both types of legal norms cannot be treated as equal although both are sources of law in formal sense.

- besides, not all Decisions of the Supreme Court are continuously followed by the next court decisions (*constante jurisprudentie)* and become permanent jurisprudence (*vaste jurisprudentie).* Even if they become permanent jurisprudence – *quod non* – they do not become the object of authorities of the Court to conduct review in the meaning of Article 24C Paragraph (1) of the 1945 Constitution;

- concerning review of law against the Constitution as intended by the 1945 Constitution, the Court is of the opinion that the review must be placed in the context of *check and balances* system because there is separation of power in the 1945 Constitution, and the Court is only granted the authority to conduct review of legislative product in the form of law, and it is not intended to review the product of judicial power in this matter the Supreme Court;

- meanwhile, "law" in the context of review of law against the 1945 Constitution shall refer to law as intended in Article 20 of the 1945 Constitution and Article 1 Sub-Article 3 of Law Number 10 Year 2004 concerning Formulation of Laws and Regulations, namely "*Laws and Regulations shall be formulated by the People's Legislative Assembly with a joint approval with the President".* This is supported by the provisions of Article 51 Paragraph (3), Article 56 Paragraph (4) and Paragraph (5), and Article 57 Paragraph (1) and Paragraph (2) of the Constitutional Court Law.

d. Whereas based on the consideration as related to in items a, b, and c above, the petition of Petitioners is outside the scope of authority (*onbevoegheid des rechters*) of the Court.

2. Legal standing of the Petitioners

Considering whereas Article 51 of the Constitutional Court Law has determined matters related to the Petitioners and petition for judicial review of a law against the 1945 Constitution as follows:

(1) *Petitioners shall be parties who deem that their constitutional rights and/or authorities have been impaired by the coming into effect of a law, namely:*

a. *individual Indonesian citizens;*

b. *customary law community units insofar as they are still in existence and in accordance with the development of the community and the principle of Unitary State of the Republic of Indonesia regulated in law;*

c. *public or private legal entities; or*

d. *state institutions.*

(2) *Petitioners must clearly describe in their petition their constitutional rights and/or authorities as intended in Paragraph (1).*

(3) *In the petition as intended in Paragraph (2), the Petitioners must describe clearly that:*

a. *The formulation of law does not meet the provisions pursuant the Constitution of the State of the Republic of Indonesia Year 1945; and/or*

b. *The substance in the paragraphs, articles, and/or parts of law deemed to be contradictory to the Constitution of the Republic of Indonesia Year 1945.*

Considering also whereas according to the jurisprudence of the Court, the impairment due to the coming into effect of a law pursuant to Article 51 Paragraph (1) of the Constitutional Court Law must meet 5 (five) criteria, as follows:

a. The Petitioners must have constitutional rights and/or authorities granted by the 1945 Constitution;

b. The Petitioners believe that their constitutional rights and/or authorities have been impaired by the coming into effect of a law being petitioned for review;

c. the impairment of such 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 such constitutional rights and/or authorities and the law being petitioned for review;

e. if the petition is granted, it is expected that, the impairment of such constitutional rights argued will not or does not occur any longer;

Considering whereas the petition of Petitioners does not meet the provisions mentioned in Article 51 of the Constitutional Court Law *juncto* jurisprudence of the Court, because:

a. although the Petitioners can be qualified as individual Indonesian citizens, the Petitioners did not explain their constitutional rights granted by the 1945 Constitution, which have been impaired by the coming into effect of the law petitioned for review;

b. whereas even if there were impairment encountered by the Petitioners in the *a quo* case, such impairment was not caused by the coming into effect of a law provision, but *prima facie,* as argued by the Petitioners, by the application of the law;

c. whereas the provisions of Article 51 Paragraph (3), Article 56 Paragraph (4) and Paragraph (5), and Article 57 Paragraph (1) and Paragraph (2) of the Constitutional Court Law affirm to a greater extent that law reviewed against the 1945 Constitution refers to law as intended by the 1945 Constitution as described above, so as to support items a and b above. The Court is of the opinion that the Petitioners do not meet the criteria as Petitioners in the case of judicial review of law;

Considering whereas therefore, the Court considers that the Petitioners do not have the legal standing as Petitioners;

Considering whereas from the description of the foregoing two matters, the Court is of the opinion that the *a quo* petition is not under the authority of the Court and that the Petitioners do not have the legal standing, hence the petition of the Petitioners can not be accepted *(niet ontvankelijk verklaard)*. Thus, the Court does not need to consider the *a quo* petition any further;

In view of Article 56 Paragraph (1) of the Law of the Republic of Indonesia Number 24 Year 2003 concerning the Constitutional Court (State Gazette of the Republic of Indonesia Year 2003 Number 94, Supplement to State Gazette of the Republic of Indonesia Number 4316);

PASSING THE DECISION

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

Dissenting Opinions

With respect to the aforementioned decision, Constitutional Court Justices Soedarsono, S.H. and Maruarar Siahaan, S.H. gave dissenting opinions as follows:

Constitutional Court Justice Soedarsono, S.H.

I. Authority of the Constitutional Court

Whereas Article 24C Paragraph (1) of the Constitution of the State of the Republic of Indonesia Year 1945 (hereinafter referred to as the 1945 Constitution), which among other things is further described in Article 10 Paragraph (1) Sub-Paragraph a of the Law of the Republic of Indonesia Number 24 Year 2003 concerning the Constitutional Court (hereinafter referred to as the Constitutional Court Law) provides that, “the Constitutional Court shall have the authority to hear at the first and final level, the decision of which shall be final to:

a. conduct judicial review of a law against the Constitution of the State of the Republic of Indonesia Year 1945;”

Whereas part eight of the Constitutional Court Law concerning judicial review of a law against the Constitution in Article 51 Paragraph (1) Sub-Paragraph a provides that, “Petitioners shall be parties who deem that their constitutions rights and/or authorities are impaired by the coming into effect of a law namely:

a. individual Indonesian citizens;”

Since the foregoing Article refers to “individual constitutional rights” as fundamental rights, constitutional impairment here must be interpreted broadly; not only due to the coming into effect of law but also due to court decision that impair a person’s constitutional rights, because both are binding and must be complied with.

Whereas with such interpretation, the *a quo* Article can accommodate constitutional complaints on violations of constitutional rights of citizens.

Whereas the Constitutional Court (hereinafter referred to as the Court) as a state institution that functions to handle certain cases in state administration in the context of maintaining a responsible implementation of the constitution in accordance with the aspiration of the people and the goals of democracy; must have the authority to hear cases of violations of constitutional rights of citizens either due to the coming into effect of a law or due to court decisions which are contradictory to the Constitution of the State of the Republic of Indonesia Year 1945.

Whereas in their petition the Petitioners raised an objection to Decision of the Supreme Court (hereinafter referred to as the Supreme Court) Number 01 PK/PILKADA/2005 dated December 16, 2005 because it is deemed contradictory to the 1945 Constitution.

Whereas with the foregoing considerations, I am of the opinion that the Court has the authority to hear the *a quo* petition.

II. Legal Standing of the Petitioners

Whereas the provisions of Article 51 of the Constitutional Court Law mention:

(1) Petitioners shall be parties who deem that their constitutional rights are impaired by the coming into effect of a law, namely:

a. individual Indonesian citizens;

b. customary law community units insofar as they are still in existence and in accordance with the development of the community and the principle of Unitary State of the Republic of Indonesia as regulated in law;

c. public or private legal entities; or

d. state institutions.

(2) Petitioners must clearly describe in their petition their constitutional rights and/or authorities as intended in Paragraph (1).”

Whereas the Court in the legal consideration of Decisions in Case No. 006/PUU-III/2005 and Case No. 010/PUU-III/2005 determined 5 (five) criteria of constitutional impairment due to the coming into effect of a law as intended in Article 51 Paragraph (1) the Constitutional Court Law, namely:

a. the Petitioners must have constitutional rights and/or authorities granted by the 1945 Constitution;

b. the Petitioners believe that their constitutional rights and/or authorities have been impaired by the coming into effect of a law petitioned for review;

c. the impairment of such 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 such constitutional rights and/or authorities and the law petitioned for review;

e. if the petition is granted, it is expected that, the impairment of such constitutional rights and/or authorities argued will not or does not occur any longer;

Whereas the Petitioners are individual Indonesian citizens, as proved by the evidential documents attached to the petition in the forms of photocopies of Resident ID cards of Indonesian citizens issued by the Government of Depok City legalized in the hearing.

Whereas the Petitioners deemed that their constitutional rights are impaired by the issue of Decision of the Supreme Court Number 01 PK/PILKADA/2005 dated December 16, 2005 which cancelled Decision of the High Court of West Java in Bandung Number 01/PILKADA/2005/PT.BDG dated August 4, 2005 which is final and binding, which created the reason for the Petitioners as candidate pairs of mayor and Vice Mayor of Depok in favor of whom the Decision of the High Court of West Java concerned was passed, not to be inaugurated as Mayor and Vice Mayor of Depok.

Whereas the citizens' right to become Mayor and Vice Mayor constitutes a constitutional right guaranteed by Article 28D Paragraph (3) of the 1945 Constitution which mentions, "Every citizen shall have the right to obtain equal opportunities in government."

Hence the Petitioners have the legal standing to file the *a quo* petition.

III. Principal Issue of the Petition

The petition of the Petitioners and explanations given in the hearing have basic intentions as follows:

- Whereas the Petitioners are a candidate pair of mayor and Vice Mayor of Depok City participating in the Election of Regional Head and Vice Head (Pilkada) of Depok City Year 2005 with serial number 3 (three), who by Decision of the High Court of West Java in Bandung Number 01/PILKADA/2005/PT.BDG dated August 4, 2005 were declared as the first winner with 269,551 votes.

- Whereas the Decision of the High Court of West Java concerned was cancelled by the Supreme Court by its decision number 01 PK/PILKADA/2005 dated December 16, 2005, thus creating a reason for the Petitioners not to be inaugurated as Mayor and Vice Mayor of Depok.

- Whereas the *a quo* Decision of the Supreme Court originating from the thought of Gustav Radbruch which prioritizes justice over legal certainty, as

considered by the Petitioners, should not have ignored the Law of the Republic of Indonesia Number 32 Year 2004 concerning Regional Government (hereinafter referred to as the Regional Government Law) that originates from the 1945 Constitution. The provision of Article 106 Paragraph (7) of the Regional Government Law provides that, “(7) Decision of the High Court as intended in Paragraph (6) shall be final”, and the elucidation of Article 106 Paragraph (7) explains, “Decision of the High Court which shall be final in this provision shall be Decision of the High Court that has obtained permanent legal effect and can no longer be subject to legal measures.”

- Whereas at the time the Decision of the Supreme Court becomes jurisprudence, its power and position is equal to law or higher than law by appointing/referring to the jurisprudence and ignoring law.

- Whereas at the time the Decision of the Supreme Court becomes a jurisprudence with equal position to law it shall be within the scope of duties of the Court to review it against the 1945 Constitution; pursuant to the provision of Article 24 Paragraph (1) of the 1945 Constitution which reads, “Judicial Power shall be an independent authority to organize judiciary to enforce law and justice.”

- Whereas based on such description, the Petitioners requested the Court to examine and pass decision declaring that the Decision of the Supreme Court Number 01 PK/PILKADA/2005 dated December 16, 2005 is contradictory to

Article 24 of the 1945 Constitution *juncto* Article 106 of the Regional Government Law, hence it must be declared as having no binding legal effect.

Whereas since the Court has the authority to hear this case, I am of the opinion that the Court should not examine the substance of Decision of the Supreme Court Number 01 PK/PILKADA/2005 but the Court must examine and hear whether in the Decision of the Supreme Court *a quo* there are violations constitutional rights of a citizen *in casu* violations of the constitutional rights of the Petitioners, hence the Decision of the Supreme Court is contradictory to the 1945 Constitution.

Whereas the provisions of Article 106 of the Regional Government Law are as follows:

“ (1) Objection to the stipulation of results of Election of Regional Head and Vice Head can only be filed by the candidate pair to the Supreme Court within no later than 3 (three) days after the stipulation of results of Election of Regional Head and Vice Head.

(2) The objection as intended in Paragraph (1) shall only concern the results of voting that influence the election of the candidate pair.

(3) The filing of an objection to the Supreme Court as intended in Paragraph (1) shall be sent to the High Court for Provincial Election of Regional Head and Vice Head and to the district court for Regency/City Election of Regional Head and Vice Head.

(4) The Supreme Court shall decide upon dispute on votes calculation results as intended in Paragraph (1) and Paragraph (2) by no later than 14 (fourteen) days as from the objection is received by the District Court/High Court/ Supreme Court.

(5) The Decision of the Supreme Court as intended in Paragraph (4) shall be final and binding.

(6) In implementing its authority as intended in Paragraph (1) the Supreme Court can delegate to the High Court to decide upon the dispute on votes calculation results of Regency/City Election of Regional Head and Vice Head.

(7) The Decision of the High Court as intended in Paragraph (6) shall be final."

The elucidation of Article 106 of Regional Government Law, mentions, "Paragraph (1); self-explanatory; Paragraph (2) ;self-explanatory;

Paragraph (3) in the event that there is no district court in the region, the objection can be filed to the Regional People's Legislative Assembly (DPRD);

Paragraph (4); self-explanatory; Paragraph (5); self-explanatory; Paragraph (6); self-explanatory;

Paragraph (7) Decision of the High Court which is final in this provision shall be Decision of the High Court that has obtained a permanent legal effect and can no longer be subject to legal measures.

Whereas despite the inconsistency in the formulation of Article 106 Paragraph (5) of Regional Government Law which mentions that Decision of the Supreme Court shall be final and binding, while Paragraph (7) mentions that Decision of the High Court shall be final, I am of the opinion that such inconsistency does not create legal uncertainty because the elucidation refers to Decision of the High Court which has obtained a permanent legal effect and can no longer be subject to legal measures;

Whereas pursuant to the provisions of Article 106 of the Regional Government Law and elucidation thereof it can be understood as follows:

- Whereas the authority to hear objection to the stipulation of results of Election of Regional Head and Vice Head shall be the attributive authority of the Supreme Court. The authority to hear **"can"** be delegated to the High Court to decide upon disputes on votes calculation results of regency/city Election of Regional Head and Vice Head;

Thus, the delegation of authority is not imperative in nature, because the Supreme Court can hear by itself to decide upon the dispute of votes calculation results of regency/city Election of Regional Head and Vice Head;

Whereas from the evidential documents provided in the forms of Copy of Decision of the High Court of West Java in Bandung Number 01/PILKADA/2005/PT.BDG dated August 4, 2005 and Copy of Decision of the Supreme Court Number 01 PK/PILKADA/2005 dated December 16, 2005, the

High Court of West Java in Bandung in deciding upon the *a quo* dispute referred to the evidence related to the technicalities in organizing the election, upon which neither the Supreme Court nor the High Court, as the recipient of delegated authority to decide the dispute of votes calculation results of the Election of Regional Head and Vice Head, had the authority to examine and device; as intended in the foregoing provision of Article 106 of the Regional Government Law;

Whereas the constitutional rights argued by the Petitioners to be obtained from Decision of the High Court of West Java that declared that the Petitioners as candidate pair got the majority of votes in the Regional Head Election of Depok City Year 2005 and had the right to become Mayor and Vice Mayor of Depok — was cancelled as well —. Because the constitutional rights were obtained from Decision of the High Court of West Java which in hearing the *a quo* dispute did not exercise its authority as intended by Article 106 of the Regional Government Law. The Supreme Court as the delegating party can certainly hear by itself the dispute of votes calculation results of the Regional Head Election of Depok City Year 2005 in accordance with the authority granted by the provision of Article 106 of the *a quo* Regional Government Law.

Based on the aforementioned considerations, Decision of the Supreme Court Number 01 PK/PILKADA/2005 dated December 16, 2005 is not contradictory to the 1945 Constitution. Hence, the petition of the Petitioners is groundless and must therefore be rejected.

Constitutional Justice Maruarar Siahaan, S.H.

The first question to answer is that with the analogy described by the petitioners is it true that the position of Decision of the Supreme Court as jurisprudence is equal to Law, and hence such decision shall be subject to the authority of the Constitutional Court to conduct review?

Decision of the Supreme Court cannot always be said as jurisprudence. It is said so if the Decision of the Supreme Court concerning a certain legal matter has been permanently referred to in such a way that it becomes an applicable law. However, apart from the fact that the *a quo* Decision of the Supreme Court has not become a jurisprudence, because it is only a legal opinion of MA related to the meaning of final and binding decision, which opens the way for judicial review in the *a quo* case, and which actually still constitutes *res judicata*, namely a decision that has been stipulated by the authorized judge and accepted as an evidence of truth for the case of Regional Head Election of Depok. In the hierarchy of laws and regulations in Law 10 Year 2004, jurisprudence is not included as a legislation in a formal hierarchy. Since Article 24C of the 1945 Constitution and Article 10 of Law 24 Year 2004 mentions formally that what is reviewed shall be Law, and therefore, had the Decision of the Supreme Court ignored a Law, *prima facie* it would not have been under the competence of the Constitutional Court. However, it has become a serious matter now, if such matter happens, as stated by the Petitioners, wouldn’t such case became a complaint regarding the action of state institutions considered contradictory to the

Constitution, while it is actually a *constitutional complaint* of citizens for the violations of the 1945 Constitution, in which there should be an institution to examine and hear it? We believe that as one of the efforts to guard the Constitution, it should be a part of authorities of the Constitutional Court as also accepted in the majority jurisdiction of Constitutional Courts of other countries, as a mechanism of Constitution that requires the review of constitutionality of adjudicating acts in the event that other measures have been exhausted. This becomes urgent, in the event of misinterpretation in enforcing its competence, because the Regional Head Election Law that becomes the basis has given the interpretation of what is intended by final and binding decision, although the elucidation explains it as no longer subject to legal measures, while it must be also admitted that the delegation of constitutional authorities to hear and decide the responsibility which is very personal and which requires the personal and individual accountability, is unconstitutional as provided for by Law 32 Year 2004. Original jurisdiction can be delegated in a hearing process insofar as it is only related to *fact finding* or examination on the principal case, and not delegating the considerations and decision making, not to mention passing decisions with a final binding effect. What is allowed in the event of violations of Law in exercising such judicial authority, is not giving a possibility for judicial review but taking over the case process by examining and deciding as *judex factie* conducting the process from the beginning. The argument for this matter is based on Article 106 Paragraph (5) which stipulates that the authority to conduct the examination, hearing, and decision of the Supreme Court in regional head election dispute as

original jurisdiction, with final and binding decisions, is not an appealable jurisdiction. Such constitutional jurisdiction, particularly deciding and hearing based on Confidence and conscience based on minimum evidence cannot be possibly delegated to a lower judiciary, because the authority to decide and hear demands individual and personal accountability that cannot be transferred or delegated. Article 106 Paragraph (6) of Law 32/2004 which opens a possibility for the Supreme Court to delegate the authority to examine, decide, hear to the High Court is a violation to the Constitution pursuant to Article 24A Paragraph (1) first sentence of the 1945 Constitution, viewed *a contrario*, either by the legislators or the Supreme Court, because the Supreme Court should also interpret the term **'can'**, as a discretion that must be valued in a constitutional and prioritized way in *Samenspanning* among Justice, Certainty, and Benefit of the law whereas the priority is stipulated based on the demand of public interest according to time, situation, condition and location. Therefore there is a reason to evaluate it from the view-point of individual *constitutional complaint*, which actually has a sufficient legal basis based on the constitutional principles of the 1945 Constitution. The description of petition either in the Petition No. 001/PUU-IV/2006 or Petition 002/SKLN-IV/2006, in our opinion is for the Petitioners to find a channel for constitutional complaints considered to have impaired them.

The authority of the Constitutional Court to examine and declare that executive, legislative and judicative (MA) actions are void does not imply superiority of the Constitutional Court, but occurs as a consequence of principle that *Indonesia is a Constitutional State*, whose legislation hierarchy places the 1945 Constitution as

the highest law and hence it becomes the basic law with the formulation of state power structure based on the principle of separation of power and mechanism of checks and balances. This formulates a principle that every action/rule of all authorities delegated by the Constitution must not be contradictory to the basic rights and Constitution itself, with the legal consequence that the action or rule is “void by law” because it is contradictory to the Constitution. No actions of state institutions contradictory to the Constitution can become legal. Denial of this matter will strengthen a condition that vice principal is bigger than principal, or servant is higher than master (Alexander Hamilton, **The Federalist Papers** no. 78 page 467).

Interpretation of the Constitution as basic law is a normal and unique duty of the Constitutional Court. Hence, it is up to them to decide the meaning or the decide the meaning of certain actions performed by state bodies or institutions. If there are irreconcilable differences, the Constitutional Court that has legitimate duties, must decide that the higher one must be prioritized. In other words, the Constitution must be prioritized, and the aspiration or will of the people must be prioritized over those of the representatives. The Constitutional Court shall base decisions on the basic law. The main function of the Constitutional Court is to guard the 1945 Constitution through decisions on cases filed to it, to make interpretations, as a necessary and regular function, even the most unique function of the Constitutional Court, because the Constitutional Court must give legal effect to the basic law established by people. Constitutional meaning must be lifted to a higher level of generality and the application of the more general

principle is adjusted to the condition of every period that demands new solutions. Interpretation is a specification of what is general and broad of the Constitution. Modern interpretation must seek optimum suitability based on creativity within the limits deemed consistent with Constitution, without always referring to the intention of drafters of the Constitution, because of the condition and progress of potential and invisible condition at the time of drafting. The Constitutional Court must also see its duties in the context of transforming political conflicts into constitutional dialogues. As stated below:

> By transforming political conflicts into constitutional dialogues, Court can reduce the threat to Democracy and allow it to grow. To display this important role of contributing to democratic stability and deliberation, Court must develop their own power over time. (Tom Ginsburg, **Judicial Review in New Democracies, CC in Asian Countries**, 2003, page 247)

The duties of a Government established by people, in accordance with the 1945 Constitution are to protect the entire Indonesian nation and the entire Indonesian native land, and in order to advance general welfare, to develop the intellectual life of the nation, and to partake in implementing world order, in one State of the Republic of Indonesia based on people sovereignty and Pancasila. Clear provisions of the 1945 Constitution, or the Preamble of the Constitution, which form a number of general principles, will become a touchstone that must be used by the Constitutional Court in performing their main functions to enforce the Constitution and the principles of Constitutional State, in the context of

guaranteeing responsible implementation of the Constitution according to people's will. Due to such main duties and functions of the Constitutional Court, the authorities of the Constitutional Court as regulated in Article 24C of the 1945 Constitution and Article 10 Paragraph (1) of Law 24 year 2003 concerning the Constitutional Court, must be interpreted in the spirit of the preamble and principles of protection of the Constitution that can be derived from the 1945 Constitution, hence complaints or suits for the attitude, treatment and decision of every State institution receiving the mandate from the Constitution, argued to have impaired basic rights and principles mentioned in the Constitution must be subject to review, conducted by the State institution either in accordance with or in violation of people's will formulated in the Constitution, **for the servant not to be higher than the master**. Therefore, we see that individual constitutional complaint like the *a quo* petition is an extraordinary legal measure that must be made available for persons/individuals to defend their constitutional rights, but also for the purpose of maintaining the Law (State Administration) objectively through interpretation in its development.

Article 24C of the 1945 Constitution and Article 10 Paragraph (1) of Law No. 24/2003 *juncto* Article 51 Paragraph (1) of Law 24/2003, which give legal standing to individuals who petition for the review of constitutionality of laws, must actually be interpreted so as to include review of actions of State institutions performing the law that violate basic rights which later cause Constitutional impairment to individuals and communities, because the legal standing for individuals to review law is not often found in the Constitutions or laws

concerning Constitutional Court in many countries in the world, giving legal standing to individuals to sue violations of basic rights regulated by the Constitution, as complained to have been conducted by executive, legislative and judicative state institutions.

Accordingly, we are of the opinion that the authorities of the Constitutional Court in Article 24C of the 1945 Constitution and Article 10 Paragraph (1) of Law 24 Year 2003 and Article 51 Paragraph (1) of Law 24/2003, are authorities that are open to possible development, insofar as they are still within the limits that are the main duties of the Constitutional Court, and therefore the petition of the petitioners — although formulated as a review of law by considering that the Decision of the Supreme Court *a quo* as a jurisprudence is equal to Law — in fact, which is filed by the Petitioners as an effort to meet the competence criteria of the Constitutional Court while the Decision of the Supreme Court argued by the Petitioners to be contradictory to basic rights recognized in the 1945 Constitution, actually constitutes a *constitutional complaint*, being admitted as one of the authorities of Constitutional Court in Germany and Korea and many Constitutional Courts of ex Communist countries under the Soviet Union. In our opinion with full confidence as a result of correct interpretation (*comparative study interpretation*), the choice of the drafters of amendments to the 1945 Constitution that form a Constitutional Court separately from the Supreme Court, having the authority to conduct *judicial review*, logically also contains a consequence that Decision of the Supreme Court as a judicative authority can be reviewed against the 1945 Constitution by the Constitutional Court, as an equal

institution and in the context of horizontal functional supervision and not hierarchically vertical supervision. If it is not the intention of the drafters of amendments to the 1945 Constitution, it should have been selected the United States model and not Continental European model, which grants the authority to a judicial power organ separate from the Supreme Court; and if it is not the intent of the drafters of amendments to the 1945 Constitution, such consequence is inevitable. Thus, in our opinion, the petition of the *a quo* Petitioners shall be the authority of the Constitutional Court, in which the substance or principal case should be examined, considered and decided by the Constitutional Court, because the legal standing of the petitioners in such category of petition is entirely fulfilled in terms of constitutional rights of the Petitioners.

However, although we are of the opinion that the petition of the Petitioners is included as one of the authorities of the Constitutional Court, from the evidence obtained insofar as concerning the substance, the Supreme Court in its decision did not violate the *basic rights* of the Petitioners in the Regional Head Election dispute acknowledged and respected by the 1945 Constitution.

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Hence this decision was made in the Consultative Meeting of 9 (nine) Constitutional Court Justices on this day Wednesday, January 25, 2006 and was pronounced in the Plenary Session of the Constitutional Court open for public on this day, by us Prof. Dr. Jimly Asshiddiqie, S.H. as the Chairperson and concurrent Member, Prof. Dr. H.M. Laica Marzuki, S.H., Prof. H.A.S. Natabaya,

S.H., LL.M., Prof. H. A. Mukthie Fadjar, S.H. M.S., H. Achmad Roestandi, S.H., Dr. Harjono, S.H., M.C.L., I Dewa Gede Palguna, S.H., M.H., Maruarar Siahaan, S.H., and Soedarsono, S.H., respectively as Members, assisted by Sunardi, S.H., as Substitute Registrar and in the presence of the Petitioners/their Attorneys, the Regional General Election Commission of Depok City, the Regional Head Election Monitoring Committee of Depok City, the Related Parties and their attorneys, and Government representatives.

CHIEF JUSTICE,

Prof. Dr. Jimly Asshiddiqie S.H.

JUSTICES

Prof. Dr. H. M Laica Marzuki, S.H. **Prof.. H.A.S Natabaya.S.H. LLM**

Prof. H. Abdul Mukthie Fadjar, S.H. M.S. **H. Achmad Roestandi, S.H.**

Dr. Harjono, S.H., M.CL. **I Dewa Gede Palguna, S.H., M.H.**

Maruarar Siahaan, S.H. **Soedarsono, S.H.**

SUBSTITUTE REGISTRAR

Sunardi, S.H.