



DECISION

Number 008/PUU-IV/2006

FOR THE SAKE OF JUSTICE UNDER THE ONE ALMIGHTY GOD

CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA

Examining, hearing, and deciding upon constitutional cases at the first and final level, has passed a decision in a case of petition for judicial review of Article 85 Paragraph (1) Sub-Paragraph c of the Law of the Republic of Indonesia Number 22 Year 2003 concerning the Organizational Structure And Status of the People's Consultative Assembly, the People's Legislative Assembly, the Regional Representative Council, and the Regional People's Legislative Assembly and Article 12 Sub-Article b of Law Number 31 Year 2002 concerning Political parties against the Constitution of the State of the Republic of Indonesia Year 1945, filed by:

Name : Djoko Edhi Soetjipto Abdurahman;
Occupation : Member of the People's Legislative Assembly/the People's Consultative Assembly of the Republic of Indonesia (A-173) - the National Mandate Party Faction–Commission III–Laws and Regulations, Human Rights & Security, People's Legislative

Assembly of the Republic of Indonesia, Nusantara
Building 1, 19th Floor, Room 1924;

Address : Jalan Jend. Gatot Subroto, Senayan, Central Jakarta
and or Complex of the People's Legislative Assembly
of the Republic of Indonesia members Block C-2/213,
Kalibata, South Jakarta.

In this matter by virtue of a power of attorney as most recently amended on May
8, 2006 and July 17, 2006 granting the power to:

1. DR. Eggi Sudjana,SH.,Msi; ("LAW FIRM EGGI SUDJANA & PARTNERS")
2. Welliam Suharto,SH; ("LAW FIRM EGGI SUDJANA & PARTNERS ")
3. Weadya Absari,SH; ("LAW FIRM EGGI SUDJANA & PARTNERS")
4. Hasraidi,SH; ("LAW FIRM EGGI SUDJANA & PARTNERS ")
5. AH.Wakil Kamal,SH; ("MADZLUM VILLAGE ADVOCACY TEAM")
6. Baginda Siregar, SH; ("MADZLUM VILLAGE ADVOCACY TEAM ")

Advocates and Legal Consultant of LAW FIRM EGGI SUDJANA & PARTNERS,
domiciled at Wisma Kuningan Mansion, Jalan Perintis No. 16, Mega Kuningan,

South Jakarta and Advocates under “MADZLUM VILLAGE ADVOCACY TEAM”, with their address at jalan Arus No. 21, Dewi Sartika, Cawang, East Jakarta 13630, in this matter acting both individually and jointly;

Hereinafter referred to as.....Petitioner;

Having read the petition of the Petitioner;

Having heard the statement of the Petitioner;

Having heard the statement of the People’s Legislative Assembly of the Republic of Indonesia;

Having heard the statement of the Government;

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

Having read the written statements of Witnesses and Experts of the Petitioner;

Having read the written statement of the People’s Legislative Assembly of the Republic of Indonesia;

Having read the written statement of the Government;

Having read the conclusion of the Petitioner;

Having examined the evidence of the Petitioner;

LEGAL CONSIDERATIONS

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

Considering whereas there are 3 (three) issues that must be considered by the Constitutional Court (hereinafter referred to as the Court), namely:

1. The authority of the Court to examine, hear, and decide upon the petition filed by the Petitioner,
2. The legal standing of Petitioner to file the *a quo* petition,
3. The principal issue of the petition concerning the constitutionality of the law petitioned for judicial review by the Petitioner;

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

1. Authority of the Court

Considering whereas pursuant to the provision of Article 24C Paragraph (1) of the Constitution of the Republic of Indonesia Year 1945 (hereinafter referred to as the 1945 Constitution) the Court shall be authorized among other things to hear at the first and final level the decision of which shall be final to conduct review of laws against the Constitution. Such provision is reaffirmed in Article 10 Paragraph (1) of the Law of the Republic of Indonesia

Number 24 Year 2003 concerning Constitutional Court (State Gazette of the Republic of Indonesia Year 2003 Number 98, Supplement to State Gazette of the Republic of Indonesia Number 4316, hereinafter referred to as the Constitutional Court Law) and Article 12 Paragraph (1) 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);

Considering whereas the petition of the Petitioner pertains to the review of the Law of the Republic of Indonesia Number 22 Year 2003 on the Organizational Structure And Status of the People's Consultative Assembly, the People's Legislative Assembly, the Regional Representative Council, and the Regional People's Legislative Assembly (State Gazette of the Republic of Indonesia Year 2003 Number 92, Supplement to State Gazette of the Republic of Indonesia Number 4310, hereinafter referred to as the Structure and Status Law), and the Law of the Republic of Indonesia Number 31 Year 2002 concerning Political Parties (State Gazette of the Republic of Indonesia Year 2003 Number 138, Supplement to State Gazette of the Republic of Indonesia Number 4251, hereinafter referred to as the Political Party Law), and hence the Court has the authority to examine, hear, and decide upon *a quo* the petition for review of the *a quo* Law against the Constitution;

2. Legal standing of the Petitioner

Considering whereas Article 51 Paragraph (1) of the Constitutional Court Law provides that Petitioners in a review of law against the 1945 Constitution shall be those who deem that their constitutional rights and/or authorities are impaired by the coming into effect of a law, namely:

- a. *Individual Indonesian citizens (including group of people having a common interest);*
- 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 by law;*
- c. *Public or private legal entities; or*
- d. *State institutions.*

Considering whereas the Petitioner is an individual Indonesian citizen who is a member of the People's Legislative Assembly (People's Legislative Assembly) having interest related to the petition for the review of the *a quo* Law, and hence the Petitioner has met the qualifications as intended in the provision of Article 51 Paragraph (1) Sub-Paragraph a of the Constitutional Court Law;

Considering whereas since the pronouncement of Decision Number 006/PUU-III/2005, the Court has determined 5 (five) criteria of constitutional impairment as intended in Article 51 Paragraph (1) of the Constitutional Court Law, as follows:

- a. The Petitioner must have constitutional rights and/or authorities granted by the 1945 Constitution;
- b. Such constitutional rights and/or authorities are deemed to have been impaired by the coming into effect of the law petitioned for review;
- c. Such impairment of constitutional rights and/or authorities is specific and actual in nature, at least potential in nature which according to logical reasoning will take place for sure;
- d. There is a causal relationship (*causal verband*) between the impairment of constitutional rights and/or authorities and the 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;

Considering whereas the Petitioner is an individual Indonesian citizen who, when filing the petition, was still a member of the Indonesian People's Legislative Assembly from the National Mandate Party Fraction elected through the 2004 general elections process (Exhibit P-3), and that when the hearing process of the Court to examine the *a quo* petition was underway, the Petitioner had been dismissed from the membership of the People's Legislative Assembly pursuant to Article 85 Paragraph (1) Sub-Paragraph c of the Structure and Status Law (Exhibit P-12);

Considering whereas the Petitioner argues that such dismissal violates the constitutional rights of the Petitioner granted by the 1945 Constitution

as mentioned in Article 22 Paragraph (1) and Paragraph (2), Article 28C Paragraph (2), Article 28D Paragraph (1), and Paragraph (2) of the 1945 Constitution;

Considering whereas beside Article 85 Paragraph (1) Sub-Paragraph c of the Structure and Status Law, the Petitioner also filed a petition for Judicial review of Article 12 Sub-Article b of the Political Party Law argued to be contradictory to the constitutional rights of the Petitioner as guaranteed by Article 22 Paragraph (1) and Paragraph (2), Article 28C Paragraph (2), Article 28D Paragraph (1) and Paragraph (2) of the 1945 Constitution;

Considering whereas with respect to the legal standing of the Petitioner, the Court is of the following opinion:

- a. the Petitioner qualifies as an individual Indonesian citizen,
- b. Petitioner has argued to have constitutional rights guaranteed by the 1945 Constitution being impaired by the Structure and Status Law and the Political Party Law, while the fact is that the membership of the Petitioner has been terminated pursuant to Article 85 Paragraph (1) Sub-Paragraph c of the Structure and Status Law and Article 12 Sub-Article b of the Political Party Law.

Thus the Court is of the opinion that the Petitioner has met the provisions concerning the criteria of *the legal standing* to file the *a quo* petition.

3. Principal Issue of the Petition

Considering whereas in the principal issue of his petition the Petitioner argued that Article 85 Paragraph (1) Sub-Paragraph c of the Structure and Status Law and Article 12 Sub-Article b of the Political Party Law are contradictory to the constitutional rights of the Petitioner as guaranteed by the 1945 Constitution. The two articles read as follows:

- 1) Article 85 Paragraph (1) Sub-Paragraph c of the Structure and Status Law, *“A member of the People’s Legislative Assembly (DPR) shall temporarily quit because:*
 - a. ...;
 - b. ...;
 - c. *being proposed by the related political party.”*

- 2) Article 12 Sub-Article b of the Political Party Law, *“A member of a political party who becomes a member of the people’s legislative assembly can be dismissed from his/her membership at the people’s legislative assembly if:*
 - a. ...
 - b. He/she is dismissed from the membership of the related political party for violating the articles of associations and by-laws; or
 - c. ...”;

Considering whereas the Petitioner argued that the provision of Article 85 Paragraph (1) Sub-Paragraph c of the Structure and Status Law, and

Article 12 Sub-Article b of the Political Party Law are contradictory to the constitutional rights of the Petitioner granted by the 1945 Constitution namely:

- 1) Article 22E Paragraph (1) which reads, *“General election shall be conducted in a direct, public, free, confidential, honest and fair manner once in every five years.”*
- 2) Article 22E Paragraph (2) which reads, *“General election shall be organized to elect the members of the People’s Legislative Assembly, the Regional Representative Council, the President and Vice President, and the Regional People’s Legislative Assembly.”*
- 3) Article 28C Paragraph (2) which reads, *“Every person shall have the right to advance himself/herself in striving for his/her rights collectively to develop his society, nation, and state.”*
- 4) Article 28D Paragraph (1) which reads, *“Every person shall have the right to the recognition, the guarantee, the protection, and the legal certainty of just laws as well as equal treatment before the law.”*
- 5) Article 28D Paragraph (2) which reads, *“Every person shall have the right to work and to receive fair and proper remuneration and treatment in work relationship”;*

Considering whereas in addition to the foregoing provisions, the Petitioner also based his petition on Article 27 Paragraph (1), Article 28I Paragraph (2) of the 1945 Constitution as follows:

- 1) Article 27 Paragraph (1) reads, *“Without exception, all citizens shall have an equal position before the law and government and shall be obligated to uphold such law and government “.*
- 2) Article 28I Paragraph (2) reads, *“Every person shall have the right to be free from discriminatory treatment on any basis whatsoever and shall have the right to obtain protection against any such discriminatory treatment“;*

Considering whereas Petitioner also argued in his petition the bases which are anti discriminatory in nature as mentioned in *Article 21 of the Universal Declaration of Human Rights* which states as follows:

- (1) *Everyone has the right to take part in the government of his country, directly or through freely chosen representatives;*
- (2) *Everyone has the right of equal access to public service in his country;*
- (3) *The will of people shall be the basis of authority of government; this will shall be expressed in periodic and genuine elections which shall be universal and equal suffrage and shall be held by secret vote by equivalent free voting procedure;*

Considering, in substance, the Petitioner argued that the termination by a political party of the membership in the People’s Legislative Assembly of a person who has been elected through the general election, is contradictory to the person’s constitutional rights guaranteed by the provisions of the Constitution and is also contradictory to the *Universal Declaration of Human Rights* as mentioned above. A political party’s right to terminate a person’s

membership in the People's Legislative Assembly is commonly known as recall right. The Petitioner is of the opinion that Article 85 Paragraph (1) Sub-Paragraph c of the Structure and Status Law *juncto* Article 12 Sub-Article b of the Political Party Law have the potential to cause every member of the People's Legislative Assembly to be recalled from his/her position by his/her party, and that it has been encountered by the Petitioner, and has caused the Petitioner to be unable to properly implement his obligations to voice the aspiration and messages of the constituents and has hampered the duties and functions of the Petitioner as a member of the People's Legislative Assembly;

Considering whereas to support his arguments, the Petitioner presented 4 (four) experts namely:

1. Prof. Dr. Harun Alrasid, S.H.,
 2. Drs. Arbi Sanit,
 3. Prof. Dr. Mahfud M.D., S.H., M.Si.,
 4. Denny Indrayana, S.H., LL.M., Ph.D.,
- and a witness namely Dr. Ir. Sri Bintang Pamungkas.

1. Expert Opinion of Prof. Dr. Harun Alrasid, S.H.

In his oral statement and written statement, as completely set out in the foregoing principal case, it was stated that there is a provision in Article 18 of the Structure and Status Law that the term of office of members of the People's Legislative Assembly shall be five years and shall end at the time when the new members of the People's Legislative Assembly take their

official oath. In addition, he also referred to the opinion of Bung Hatta, as published in Kompas Daily on March 1, 1973, which once criticized the recall right and requested that the People's Legislative Assembly revoked such recall right, and regretted that law experts did nothing when a *recall* was processed in the People's Legislative Assembly;

2. Expert Opinion of Drs. Arbi Sanit

The expert gave an opinion based on his expertise in the hearing and in writing as completely described in the principal case. With regard to the recall right, the expert stated that the recall right is closely related to the authoritarian power system or authoritarian regime. In a constitutional democratic political system, the authority of parties' to recall parliament members from their factions is not recognized. In addition, the expert also described the history of the recall right in Indonesia. During the reform period recall right was abolished but then reactivated with the enactment of the Structure and Status Law namely by its Article 85 Paragraph (1) Sub-Paragraph c. With regard to the recall right following the amendment to the Constitution, the expert is of the opinion that the perspective of political and governmental science shows that the recall right is irrelevant to the democratic process conducted through reform. In the era after the amendment to the Constitution, it is a must to abolish the exercise of the recall right by political parties in the People's Legislative Assembly. However, due to its extensive complication, a comprehensive realization

thereof will need the amendment to the Constitution to ensure the application of *horizontal checks and balances* system of state authorities;

3. Expert Opinion of Prof. Dr. Mahfud M.D. , S.H. , M.Si.

In the expert's statement, as completely set out in the principal case, it is stated that based on his expertise (law politics), Article 22B of the 1945 Constitution states that the dismissal of members of People's Legislative Assembly is regulated by law. Meanwhile, the 1945 Constitution does not specify the types of standards as the basis for such dismissal but leaves them to law. Because of its transparent nature in leaving the issue to law, the Constitutional Court can only decide whether or not such law is contradictory to the mandate of the 1945 Constitution. The problem encountered by the Petitioner is not a conflict between a law and the 1945 Constitution but rather a conflict of perhaps the Articles of Associations and by laws (hereinafter referred to as AD/ART) against a law, and that, according to the expert there are no direct constitutional rights;

4. Expert Opinion of Denny Indrayana, S.H., LL.M., Ph.D.

The Expert gave his opinion in the hearing and his written statement as completely set out in the principal case. Prior to giving his opinion, the expert described the history and development of recall right in the provisions of Indonesian laws and regulations. In his comparative study with other countries the expert found that some countries recognize *recall*,

which is, however, not only intended for the parliament members but also for other public officials. The reasons for recall are *incapacity* and *misbehavior*. Beside the *recall* that can be conducted by a political party or by constituents, there is also dismissal through “*removal*” process namely the dismissal mechanism conducted by the parliament itself. Besides, there is also dismissal mechanism through disqualification process based on certain reasons. The expert is of the opinion that in Indonesia recall is confused with Interim Replacement (PAW). PAW is broader than *recall* and covers all mechanisms of replacement of parliament members before the end of their term of office. *Recall* is only one of the mechanisms of PAW. The mechanisms of PAW may vary, through decisions in the parliamentary institution itself, through decision of the Supreme Court (such as Australia), and particularly for *recall*, the suitable mechanism is through petition by the constituents. The expert is of the opinion that the mechanism of *recall* not by the people must be avoided, because it will create an unclear representation system. If *recall* is conducted by a party, loyalty is then developed to the party and not to the people. Furthermore, the expert stated that based on the concepts of *constitutional importance* and *constitutional morality* the domination of party in the *recall* system must be rejected especially because it will create a political configuration which tends to be *corrupt*;

Statement of witness Dr. Ir. Sri Bintang Pamungkas

The oral statement and written statement of the witness have been completely described in the principal case. As someone who has encountered recall from his membership in the People's Legislative Assembly, the witness explained the background of his *recall*. Beside describing matters concerning his testimony, the witness also gave his personal opinion concerning recall right, democratization, reform, political party, and amendment to the Constitution;

Statement of the People's Legislative Assembly

Considering whereas the People's Legislative Assembly through its attorney-in-fact, beside giving its statement in the hearing, also gave its written statement as completely described in the principal case. The dismissal of members of political parties from the membership in the People's Legislative Assembly if the members concerned state resignation or are dismissed from the members of the related political parties if they have violated the AD/ART, is intended to reinforce the authority of the related political parties. The objective of *recall* arrangement based on the proposal of a political party is not based on the excessive and unlimited domination of the political party, but it must be in the context of objectivity and law. Recall right is not only owned by a political party, but through a monitoring by which *recall* is conducted more comprehensively, internally by the political party and externally by the constituents, which in turn is expected to improve the performance, accountability, and integrity of people's representatives;

Statement of the Government

Considering whereas in its oral statement and written statement as completely mentioned in the principal case, the government stated that a political party is a very important component in living as a nation and a state, which principally reflects citizens' right to associate, to assemble, and to express opinions. A citizen who chooses and joins a certain political party will voluntarily obey, be bound by, and agree with the AD/ART of the related political party. Every member of the People's Legislative Assembly who represents a political party must have a good integrity as well, and in turn must give accountability for the extent of his commitment and performance. A member of the People's Legislative Assembly is nominated by a certain party, and hence he is a representation of the political party in the People's Legislative Assembly. In the context of enforcing its authority and integrity, a political party can propose to the Chairperson of People's Legislative Assembly to dismiss (*recall*) a member of the political party who is a member of the People's Legislative Assembly, because the related person is deemed to have violated the AD/ART. *Recall* institution is aimed at exercising control on the members of political parties who become the members of the People's Legislative Assembly and such recall is not contradictory to the Constitution;

Considering whereas upon considering the foregoing matters, prior to further considering on the principal case of the *a quo* petition, the Court must first take the following matters into account;

Considering whereas democracy can run properly if freedom and equality among citizens are guaranteed. The most fundamental right among such freedoms that must be guaranteed is the freedom to express opinions and the freedom of association and assembly. The two freedoms are interdependent and inseparable from each other. The freedom to express opinions will be paralyzed if there is no guaranty for everyone to assemble and to associate. On the contrary, the freedom to assemble and to associate will be meaningless if the freedom to express opinions is not guaranteed;

The freedom to express opinions and the freedom to assemble and to associate have been guaranteed both in the constitutions of democratic countries in the world, and in various instruments of international law. A political party is one of the forms of organization as of a forum for implementing the freedom to express opinions and the right to assemble and to associate. In a democratic country a political party plays the roles (functions), among other things, as a mutually connecting facility between the government and the people, as the main agent in aggregating many interests, as the vanguard in making fundamental changes in the country, as a place to recruit prospective political leaders, as a facility for political education, and as an institution that mobilizes voters to participate in the general election and to cast their votes. For the crucial roles in the political system, the presence of a political party as a **political infrastructure** is indispensable in a democratic country, and hence it must always be empowered to be able to carry out its roles and functions appropriately;

Considering whereas the intention to empower political parties has been reflected in the Amendment to the 1945 Constitution with the stipulation of various provisions in relation to political parties, such as Article 6A Paragraph (2), Article 8 Paragraph (3), and Article 22E Paragraph (3). One of the efforts in the context of empowering political parties is the granting of rights or authorities to political parties to impose actions in enforcing discipline to their members, for the members to behave and act without violating, not to mention contradicting, their AD/ARTas well as policies, and work programs outlined by the related political parties. This is a logical consequence for a person who becomes a member of a political party organization. The enforcement of party discipline is very important in realizing the party's work program offered by the political party in general election campaigns. In addition, party discipline is much needed in developing and stabilizing a party's tradition;

If a political party is not given the authority to impose sanctions (actions) to its members who violate the AD/ART and policies of the party, the members will be free to behave out of control. For example, after a member is elected as a legislative member, he will become a "moving cadre" by moving to or joining another party or even forming a new party without having to be afraid of the risk of sanction of dismissal from the membership of the political party followed by a proposal from the related political party for an interim replacement (PAW). In fact, it is the political party that has made him/her a legislative member. Such "moving cadre" will usually argue that upon becoming a legislative member, he/she feels to represent the people directly and no longer to represent the political party.

Thus, in his/her opinion, the obligation to fight for the policies and programs of political party ends when he becomes a legislative member and is replaced by the obligation to represent the people's interest;

The Court is of the opinion that it is inappropriate to juxtapose the policies and work programs of a political party with public interest, because the policies and work programs of political party are actually an aggregation various public interests conducted by the political party of. As a political infrastructure, a political party functions to fight for the aggregated interests of the people. If there are different policies between one political party and another in deciding the *platform*, such difference is caused by the difference based on ideology held by each political party, or the difference in putting the emphasis of interest fought for by each political party as it is normal in democracy. The policies and work programs of a political party offered during the campaigns before the General Elections must be executed by the political party through the legislative members who are elected through party nomination. If the elected members subsequently deviate from the policies of a political party, it is normal and proportional if the political party dismisses them from the membership in the related party followed by the proposal for an interim replacement (PAW), as regulated in Article 85 Paragraph (1) Sub-Paragraph c and Elucidation of the Structure and Status Law *juncto* Article 12 Sub-Article b of the Political Party Law. A political party must be protected from the actions of its cadres who deviate from the agreed platform and who are undisciplined. Party discipline must be enforced to create *cohesiveness* in the party, so that the party can perform its functions and develop

its tradition properly. Party discipline, including necessary actions, must be understood, respected, and enforced by all members of the party. This is due to the fact that, although the party is initially formed based on consensus among individuals (members) so as to **seem** as a private legal relationship, a **political party as a political infrastructure functions in the public legal relationship (administration structure)**. A person's becoming a member of a political party is a voluntary choice of a general offer from a political party to the public. Hence, when someone becomes a member of a political party, it means that he is voluntarily (*vrijwillige*) willing to obey all rules and policies of the political party, including the voluntary willingness to accept sanctions if his/her subsequent action is contradictory to the rules and policies outlined by the political party as described above;

Considering whereas, as described above, a political party must be protected from pragmatic behavior the party cadres who use the political party only as a **vehicle** or a **stepping stone** to become legislative members, arranged in the rhetoric "*fighting for people's aspiration, no longer the aspiration of the nominating political party*". On the contrary, members who have been elected as legislative members must also be protected from arbitrary actions of (the administrators of) political parties that may impose sanctions to their members based on *like or dislike* arranged in the rhetoric "*violating the rules and policies outlined by the party*". To protect party members from such improper actions, every political party must provide a forum and formulate its own internal mechanism in its AD/ART to accommodate both needs above in a balanced, fair,

and not arbitrary manner. Even if there are many members who are dissatisfied with the forum, and the mechanism, or decision of the political party, it is possible for the members concerned to take legal measures through the court (*vide* Article 16 of the Political Party Law). Substantially, the whole process above, in the *a quo* Law, has met the principles of *due process of law*, as explained in another part of this consideration of the Court;

Considering whereas the petition of the Petitioner basically concerns the issue of constitutionality of provisions in the Structure and Status Law and the Political Party Law with regard to the mechanism of interim replacement (PAW), which is referred to by Petitioner as the *recall* by a political party of its members in the People's Legislative Assembly. This issue is provided for in Article 85 Paragraph (1) Sub-Paragraph c of the Structure and Status Law and Article 12 Sub-Article b of the Political Party Law;

Considering whereas in deciding upon the *a quo* case the Court refers to the provisions of the 1945 Constitution as the basis for conducting judicial review of laws as one of its authorities. In its position as a judicial institution that enforces the constitution, the Court can make an interpretation of the provisions in the constitution, if it is required to be able to give a concrete decision on the review of a law, which is much needed when what is written in the constitution needs interpretation or if any content of the constitution causes multi-interpretation. The Court is not in the position to include matters that are clearly not selected by the makers of the Constitution as a system or part of the system

of the stipulated Constitution, because it will become the full authority of the Constitution makers. The weaknesses of the system stipulated or selected by the Constitution in the state administration does not give the Court the right or authority to make any amendment through its decisions because it is clearly the authority of the Constitution makers;

Considering whereas with respect to the Petitioner's argument stating that Article 85 Paragraph (1) Sub-Paragraph c of the Structure and Status Law and Article 12 Sub-Article b of the Political Party Law are contradictory to Article 22E Paragraph (1), Article 22E Paragraph (2), and Article 28C Paragraph (2) of the 1945 Constitution, the Court is of the opinion that such argument is groundless. Article 22E Paragraph (1) and Paragraph (2) of the 1945 Constitution contains norms on the principles, periodization, and objective of the general elections, namely to elect members of the People's Legislative Assembly, the Regional Representative Council, the Regional People's Legislative Assembly, the President, and the Vice President. In relation to Article 85 Paragraph (1) Sub-Paragraph c of the Structure and Status Law and Article 12 Sub-Article b of the Political Party Law, one of the points of contact between them is the provision that the general elections shall be organized once every five years or the provision concerning the periodization for organizing the general elections. The Court is of the opinion that stating that the general elections shall be held once every five years does not mean that during the period of five years, replacement of the members of the People's Legislative Assembly, the Regional Representative Council, the Regional People's Legislative Assembly, or the

President and Vice President elected in the general elections is impossible at all. Although the President and Vice President are elected for a period of five years, the 1945 Constitution also stipulates the requirements and procedures that allow the president and/or Vice President to quit before the end of his/her term of office, as regulated in Article 7B, and Article 7C of the 1945 Constitution. Article 22B of the 1945 Constitution states that a Member of the People's Legislative Assembly can be dismissed from his/her position, pursuant to the requirements and procedures regulated by law. Pursuant to the two provisions of the 1945 Constitution, the Court is of the opinion that such matter has been clear and hence further interpretation is not necessary. Practices in other countries that are different from the 1945 Constitution, which do not recognize recall or dismissal of a person from the membership in a representative institution or parliament before the end of his/her term of office, do not constitute a solid foundation to decide that it must be adopted in Indonesian state administration system. Such practices must be accepted as a variety of systems that can be chosen, and only indicate a difference in pattern and not a constitutional necessity. As a matter of choice, a system has not only advantages but also disadvantages compared to other systems, including in deciding whether or not the recall right should be activated. The disadvantages and advantages of a system are not only inherent in the system concerned but also dependent on the environment where the system is applied;

Considering whereas the Petitioner also referred to Article 28C Paragraph (2) of the 1945 Constitution as the basis for the review of Article 85 Paragraph (1)

Sub-Paragraph c of the Structure and Status Law and Article 12 Sub-Article b of the Political Party Law. With respect to the Petitioner's argument, the Court is of the opinion that there is no point of contact or correlation between Article 28C Paragraph (2) of the 1945 Constitution and the two articles petitioned for review by the Petitioner. The existence of Article 85 Paragraph (1) Sub-Paragraph c of the Structure and Status Law, and Article 12 Sub-Article b of the Political Party Law does not eliminate the right of every person guaranteed by Article 28C Paragraph (2) of the 1945 Constitution. The right to fight collectively to develop the society, nation and state shall not be defined as the right for everyone to become a member of the People's Legislative Assembly or to continuously become a member of the People's Legislative Assembly. The People's Legislative Assembly is a representative institution in the state administration system established by the 1945 Constitution. Interpreting Article 28C Paragraph (2) of the 1945 Constitution as providing for the right to become a member of the People's Legislative Assembly will in fact narrow the meaning of Article 28C Paragraph (2), because such right is only owned by few people, namely a number of members of the People's Legislative Assembly. Article 28C Paragraph (2) is intended to give the right to everyone to be free with other people (collectively) to develop the society, nation, and state. Thus, the Petitioner's argument stating that Article 85 Paragraph (1) Sub-Paragraph c of the Structure and Status Law and Article 12 Sub-Article b of the Political Party Law are contradictory to Article 28C Paragraph (2) of the 1945 Constitution is groundless because the Petitioner does not lose his right to advance himself in striving for

his right collectively to develop the society, nation and state as guaranteed by Article 28C Paragraph (2) of the 1945 Constitution;

Considering, the Petitioner also argued that Article 85 Paragraph (1) Sub-Paragraph c of the Structure and Status Law and Article 12 Sub-Article b of the Political Party Law are contradictory to Article 28D Paragraph (1) of the 1945 Constitution, for which the Petitioner had to be recalled from the membership of the People's Legislative Assembly by the nominating party. The Court is of the opinion that the right guaranteed by Article 28D Paragraph (1) of the 1945 Constitution is not intended to guarantee that a person who has taken any position cannot be dismissed merely for the reason of guaranteeing and protecting legal certainty. The intended legal certainty is a fair legal certainty and equal treatment before law. The provision of Article 85 Paragraph (1) Sub-Paragraph c of the Structure and Status Law applies not only to the Petitioner, but also to every member of the People's Legislative Assembly. Therefore, such provision does not contain any discriminatory element. The fact that it had been only the Petitioner which was imposed by such regulation by the nominating party, is not an issue of constitutionality but an issue of application of Article 85 Paragraph (1) Sub-Paragraph c of the Structure and Status Law and Article 12 Sub-Article b of the Political Party Law. If the Petitioner deems to have been harmed by the application of such provision, the Petitioner can take available legal measures and mechanisms for the impairment encountered by the Petitioner (*vide* Article 16 of the Political Party Law, as described above), not by filing the petition for judicial review of the *a quo* Law;

Considering, the Petitioner also argued that Article 85 Paragraph (1) Sub-Paragraph c of the Structure and Status Law and Article 12 Sub-Article b of the Political Party Law are contradictory to Article 28D Paragraph (2) of the 1945 Constitution. The Court is of the opinion that the point of contact or correlation between Article 28D Paragraph (2) of the 1945 Constitution and the Petitioner's right is that the Petitioner was dismissed from the membership of the People's Legislative Assembly based on Article 85 Paragraph (1) Sub-Paragraph c of the Structure and Status Law and Article 12 Sub-Article b of the Political Party Law, hence it can be interpreted as impairing the right to work in accordance with Article 28D Paragraph (2) of the 1945 Constitution. In fact, the provision of Article 28D Paragraph (2) of the 1945 Constitution is a provision concerning economic rights. Meanwhile, the main issue in the *a quo* petition pertains to civil and political rights. However, even if we relate it to the right to work as argued by the Petitioner, it does not have to be interpreted in such a way that someone who got a job cannot be dismissed from his/her job. If the membership in the People's Legislative Assembly is considered as an "**occupation**", as the Petitioner believes, the dismissal from the "**occupation**", in this matter due to dismissal from the membership of a political party resulting in the dismissal of the Petitioner from his membership in the People's Legislative Assembly, is not contradictory to Article 28D Paragraph (2) of the 1945 Constitution insofar as it is conducted based on reasons and through fair, rational and legal procedures. What is prohibited by Article 28D Paragraph (2) of the 1945 Constitution is when a provision of law absolutely eliminates a person's right to work. Furthermore, the

Petitioner's position as a member of the People's Legislative Assembly is not synonymous with the meaning of "work " as intended in Article 28D Paragraph (2) of the 1945 Constitution. This is because, the Petitioner as a member of the People's Legislative Assembly performs constitutional duties in a state institution and does not work in the general sense. The Court is of the opinion that the termination of financial rights of the Petitioner as a member of the People's Legislative Assembly prior to the issuance of a Presidential Decree concerning his membership replacement in the People's Legislative Assembly is not directly related to the phrase "... and to receive fair proper remuneration as well as equal in work relationship" as intended in Article 28D Paragraph (2) of the 1945 Constitution, because the Petitioner's status is not under a work relationship;

Considering whereas in the hearing the Petitioner as well as the experts expressed the opinion that the so-called recall right of a party on the legal basis of Article 85 Paragraph (1) Sub-Paragraph c of the Structure and Status Law and Article 12 Sub-Article b of the Political Party Law is contradictory to the principles of democracy and constitutes a totalitarian system, and hence the recall right of a party must be cancelled;

With respect to the Petitioner's argument, the Court is of the following opinion: The principles of democracy as the basis for state governance has a solid foundation in the 1945 Constitution, namely in the fourth paragraph of the Preamble of the 1945 Constitution and Article 1 Paragraph (2) of the 1945 Constitution.

The fourth Paragraph of Preamble to the 1945 Constitution reads, "... established within the structure of the State of the Republic of Indonesia **with the sovereignty of the people** based upon ..."

Article 1 Paragraph (2) reads, "Sovereignty shall be in the hands of the people and implemented in accordance with the Constitution".

The provisions in the foregoing two excerpts show that Indonesia is a democratic state because it holds the principle of people's sovereignty. In addition, Article 1 Paragraph (3) reads, "*The State of Indonesia is a constitutional state*".

Therefore, the foregoing principles of democracy or people's sovereignty must be implemented based on law in accordance with the 1945 Constitution. It has been a fact that although many countries in the world have followed the democratic government system, such principles of each state's government mechanism are implemented through different procedures or ways. One of the characteristics of a democratic government is the existence of general elections to fill state positions especially in the representative institution or parliament. For countries adopting a parliamentary system, a general election is organized only to fill the parliamentary membership while executive positions are not filled through a direct general election but through election conducted by the representative institution. This is different from the presidential system where both parliamentary and executive memberships are filled out through general elections. However, the two differences are differences in pattern, because there are a number of countries that do not fully follow the two patterns. Hence, there is not any correlation between the presidential system and recall right. Difference in pattern

cannot be made as the standard to state that one pattern is more democratic than other patterns. In the implementation of a modern democracy political parties play a major role and it can be ascertained that there is no modern democratic country without political parties. The 1945 Constitution stipulates a major role for political parties in democracy implementation. This is reflected by the connection between the procedures of democracy implementation and political parties, which does not automatically reduce the democratic value. The mechanism of *recall* of a person's membership in the parliament by the nominating political party, cannot be automatically referred to as an undemocratic mechanism. In fact, because a parliament member is constructed as a people's representative, for the sake of accountability towards the represented people, the mechanism of dismissal prior to the end of the term of office or the so-called recall right is highly relevant, as the people can still control their representatives. The issue of who executes the recall is a technical matter that is closely related to the general election system, in accordance with Article 22E Paragraph (3) of the 1945 Constitution. A law does not automatically become undemocratic and in this way unconstitutional just because it contains a provision concerning *recall*. *Recall* is still a part of democratic mechanism if the regulation on *recall* is a logical consequence of the choice of system followed by the constitution. In an election system where voters directly vote for a person's name as a representative, it is logical that the recall is executed by the voters, for example through the mechanism of petition. Whereas in an election system conducted by electing political parties as regulated in the 1945 Constitution, in the event of

election of members of the People's Legislative Assembly and the Regional People's Legislative Assembly, it is also logical that the *recall* is executed by the nominating party;

Hence, the recall right is principally not contradictory to democracy, as argued by the Petitioner, but it is intended for maintaining the relationship between the constituents and the representatives. In representative democracy practices, variations in the exercise of recall right may occur. It does not eliminate the meaning of representative democracy system. If in practice any **deviation of application** of the recall right happens, nothing is wrong with the system, hence the system is not to be sacrificed but rather, the practices should be improved;

Considering, the Petitioner also argued that Article 85 Paragraph (1) Sub-Paragraph c of the Structure and Status Law and Article 12 Sub-Article b of the Political Party Law are contradictory to Article 27 Paragraph (1) and Article 28 Paragraph (2) of the 1945 Constitution. The Court is of the opinion that the Petitioner's argument is groundless because the existence of Article 85 Paragraph (1) Sub-Paragraph c of the Structure and Status Law and Article 12 Sub-Article b of the Political Party Law does not in any way eliminate the Petitioner's right as guaranteed by Article 27 Paragraph (1) of the 1945 Constitution. The dismissal of the Petitioner from the membership of the People's Legislative Assembly due to the proposal from the political party he represented as a result of the dismissal of the Petitioner from the membership of the nominating party, is not because the Petitioner has been deprived of his

constitutional rights. As described above, the Petitioner as a member of a political party had agreed with the AD/ART of the political party. If the Petitioner deemed that his rights have been impaired, the legal action therefor shall not be taken by filing a petition for Judicial review of the Structure and Status Law and the Political Party Law to the Constitutional Court. The Petitioner's right guaranteed by Article 28I Paragraph (2) of the 1945 Constitution is not violated either by the existence of Article 85 Paragraph (1) Sub-Paragraph c of the Structure and Status Law or by Article 12 Sub-Article b of the Political Party Law;

Considering whereas in his petition the Petitioner also argued about anti discriminatory principles found in *Article 21 of the Universal Declaration of Human Rights*. With respect to the Petitioner's argument, although the Court does not directly refer its opinion to the provisions in the *Universal Declaration of Human Rights*, the Court deems it necessary to explain the legal status and binding force of the *Universal Declaration of Human Rights*. It should be understood that the *Universal Declaration of Human Rights* is only a "statement of ideals" hence it has no binding legal effect directly. However, the substance of *Article 21 of the Universal Declaration of Human Rights* have been regulated in the Law of the Republic of Indonesia Number 12 Year 2003 concerning General Elections, namely among others, as follows:

- Article 1 Sub-Article 1 which reads, "*General election, hereinafter referred to as General Election is an implementing instrument of people's sovereignty*"

within the Unitary State of the Republic of Indonesia based on Pancasila and the 1945 Constitution of the State of the Republic of Indonesia.”

- Article 1 Sub-Article 8 which reads, *“Voters are citizens who are at least 17 (seventeen) years of age or who are/have been married.”*
- Article 2 which reads, *“General elections shall be organized based on the principles of directness, public participation, freedom, confidentiality, honesty, and fairness.”*

Considering further whereas the Elucidation of the provision of Article 85 Paragraph (1) Sub-Paragraph c of the Structure and Status Law, the formulation of which is as quoted above, refers to Article 12 Sub-Article b of the Political Party Law which is also petitioned for review by the Petitioner, in this matter particularly Article 12 Sub-Article b. By following the Petitioner’s way of thinking, and by comparing the two provisions of the Laws petitioned for review by the Petitioner, it is apparent that the constitutionality of the provision of Article 85 Paragraph (1) Sub-Paragraph c of the Structure and Status Law depends on the constitutionality of Article 12 Sub-Article b of the Political Party Law. Hence, if it is proved that Article 12 Sub-Article b of the Political Party Law is contradictory to the 1945 Constitution, Article 85 Paragraph (1) Sub-Paragraph c of the Structure and Status Law shall be contradictory to the 1945 Constitution. Thus, the Court must first assess the constitutionality of Article 12 Sub-Article b of the Political Party Law;

Considering whereas Article 12 Sub-Paragraph b of the Political Party Law which reads, *“A member of a political party who becomes a member of a representative institution can be dismissed from the representative institution if: a. ...; b. dismissed from the membership of the related political party because he violates the articles of association and by-laws ...”*, is not an independent provision. Such provision is related to other provisions of the Political Party Law namely provisions concerning the rights of political parties, as regulated in Article 8 of the Political Party Law which, among other things, states that a political party shall have the right to propose an interim replacement of its members in the people’s representative institution in accordance with laws and regulations (vide Article 8 Sub-Article f of the Political Party Law) and shall also have right to dismiss its members in the people’s representative institution in accordance with laws and regulations (vide Article 8 Sub-Article g of the Political Party Law). It has been explained in the foregoing consideration that such rights of a political party have been created as a consequence of the requirement for every citizen who wants to be a member of a political party to “agree with the articles of association and by-laws of the party” [vide Article 10 Paragraph (2) of the Political Party Law]. Thus, when a citizen has become a member of a political party – which means that the person concerned has accepted the requirement “to agree with the articles of association and by-laws of the party” as intended in Article 10 Paragraph (2) of the Political Party Law – as a further consequence, the law subsequently imposes the obligation to the person concerned to comply

with the articles of association and by-laws of the party [vide Article 11 Paragraph (3) of Political Party Law];

Considering whereas therefore, the actual issue in the case of “interim dismissal of the Petitioner as a member of the People’s Legislative Assembly due to the proposal from his own political party”, being referred to by the Petitioner as *recall*, is whether the process of proposing the interim dismissal of the Petitioner has been in accordance with the provisions of laws and regulations, as intended in Article 8 Sub-Paragraph f or Article 8 Sub-Article g of the Political Party Law. Thus, the problem is not an issue of constitutionality of legal norms but rather, an issue of application or implementation of legal norms, *in casu* the Political Party Law. Since the problem is an issue of application or implementation of legal norms, if the Petitioner in the *a quo* case deems that he has been arbitrarily treated by his party, it shall be the District Court, and not the Constitutional Court, which is competent to hear the case (*vide* Article 16 of the Political Party Law);

Considering whereas with the foregoing consideration, in connection with the *a quo* petition, if a person is dismissed from the membership of a political party for violating the articles of association and by-laws of the party, which subsequently results in a proposal for the person’s interim dismissal as a member of the People’s Legislative Assembly, and this is deemed to be contradictory to the 1945 Constitution, the Court must therefore review the articles of association and by-laws of the party concerned against the 1945

Constitution. In fact, the Court has no such authority. The only circumstances where the Court can constitutionally examine the articles of association and by-laws of a political party is in the event of exercising the authority to decide over dissolution of political parties the petition of which shall be filed by the Government, not in the event of exercising the authority to review a law against the Constitution;

Considering whereas the constitutional basis for the existence of political parties and their rights as regulated in the Political Party Law, shall be the 1945 Constitution which truly gives a significant role to political parties as reflected in Article 22E Paragraph (3), Article 6A Paragraph (2), Article 8 Paragraph (3) of the 1945 Constitution.

- Article 22E Paragraph (3) of the 1945 Constitution states, “*Participants of general elections to elect members of the People’s Legislative Assembly and members of the regional People’s Legislative Assembly shall be **political parties***”;
- Article 6A Paragraph (2) of the 1945 Constitution states, “*Candidate pair for President and Vice President shall be proposed by a **political party** or a **coalition of political parties** participating in the general elections prior to the implementation of general elections*”;
- Article 8 Paragraph (3) of the 1945 Constitution states, “*If the President and Vice President pass away, resign from office, are dismissed, or are no longer capable of performing their obligations during the term of office at the same*

*time, the caretakers of presidential duties shall be the Minister of Foreign Affairs, the Minister of Home Affairs, and the Minister of Defense jointly. By no later than thirty days thereafter, the People's Consultative Assembly shall hold a session to elect a President and a Vice President out of two pairs of Presidential and Vice Presidential Candidates proposed by a **political party** or a **coalition of political parties** whose Presidential and Vice Presidential candidates obtained the first and the second highest number of votes in the previous general elections, up to the expiration of their term of office”.*

With respect to the foregoing three provisions it is obvious that the constitution gives a significant role to political parties in the Indonesian state administration system in accordance with the 1945 Constitution. The aforementioned provisions are further described in various interrelated laws, especially the Law of the Republic of Indonesia Number 31 Year 2002 concerning Political parties; the Law of the Republic of Indonesia Number 12 Year 2003 concerning General Elections; the Law of the Republic of Indonesia Number 22 Year 2003 concerning the Organizational Structure And Status of the People's Consultative Assembly, the People's Legislative Assembly, the Regional Representative Council, and the Regional People's Legislative Assembly; as well as the Law of the Republic of Indonesia Number 23 Year 2003 concerning General Elections of President and Vice President. Therefore, in connection with the *a quo* petition, it is difficult to find a constitutional justification if on the one hand – in accordance with the provisions of the 1945 Constitution – political parties are admitted as participants in general elections to elect the members of the People's Legislative

Assembly and the Regional People's Legislative Assembly [Article 22E Paragraph (3) of the 1945 Constitution], while on the other hand denying the right of a political party to dismiss their members who violate the articles of association and by-laws of the party (Article 12 Sub-Article b of the Political Party Law) and the right to propose interim dismissal of their members from the membership in the People's Legislative Assembly [Article 85 Paragraph (1) Sub-Paragraph c of the Structure and Status Law].

In other words, the reason for a person's interim dismissal from the membership of the People's Legislative Assembly because of the proposal of his party, as regulated in Article 85 Paragraph (1) Sub-Paragraph c of the Structure and Status Law, is a consequence of the recognition of the party's right to propose for interim replacement of its members and the right to dismiss its members from people's representative institutions in accordance with laws and regulations, as regulated in Article 8 Sub-Articles f and g *juncto* Article 12 of the Political Party Law. Meanwhile, the acquisition of such rights by a political party is a consequence of the provisions of the 1945 Constitution that give a significant role to political parties in the state administration system pursuant to the 1945 Constitution, particularly Article 22E Paragraph (3);

Considering whereas, based on the above description, it is evident that there is no reason for stating that the provision of Article 12 Sub-Article b of the Political Party Law is contradictory to Article 28D Paragraph (1) of the 1945 Constitution concerning right to legal certainty guaranty. In fact, this provision of

Article 12 Sub-Article b provides legal certainty for a person's interim dismissal from the membership in the People's Legislative Assembly upon the proposal from his party, as regulated in Article 85 Paragraph (1) Sub-Paragraph c of the Structure and Status Law. Also, there is no legal reason for stating that Article 12 Sub-Article b of the Political Party Law is contradictory to Article 22E Paragraphs (1) and (2) of the 1945 Constitution which does not contain any provisions on constitutional rights. In addition, there is no legal reason for reviewing the constitutionality of Article 12 Sub-Article b of the Political Party Law against Article 28D Paragraph (2) of the 1945 Constitution, concerning economic rights while the legal issue of the *a quo* petition is the legal issue within the domain of civil and political rights. As described in the foregoing consideration, the substantiation of unconstitutionality of Article 12 of the Political Party Law is required for establishing the unconstitutionality of Article 85 Paragraph (1) Sub-Paragraph c of the Structure and Status Law, and hence, since the unconstitutionality of Article 12 Sub-Article b of the Political Party Law is not substantiated, the Petitioner's arguments on the unconstitutionality of Article 85 Paragraph (1) Sub-Paragraph c of the Structure and Status Law shall, *mutatis mutandis*, be disqualified;

Considering whereas based on the above mentioned considerations, the Court is the opinion that the Petitioner's arguments are groundless and hence the petition of the Petitioner must be rejected in its entirety;

In view of Article 56 Paragraph (5) 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 98, Supplement to State Gazette of the Republic of Indonesia Number 4316).

PASSING THE DECISION

To declare that the petition of Petitioner is rejected in its entirety.

*** **

Hence this decision was made in the Consultative Meeting of 9 (nine) Constitutional Court Justices on Thursday, September 21, 2006, and was pronounced in the Plenary Session of the Constitutional Court open for public on this day Thursday, September 28, 2006, by us Prof. Dr. Jimly Asshiddiqie, S.H., as the Chairperson and concurrent Member, Dr. Harjono, S.H., M.C.L., Prof. H. A. Mukthie Fadjar, S.H. M.S., Maruarar Siahaan, S.H., Prof. Dr. H. M. Laica Marzuki, S.H., Prof. H. A. S. Natabaya, S.H., LL.M., H. Achmad Roestandi, S.H., I Dewa Gede Palguna, S.H., M.H., and Soedarsono, S.H., respectively as Members, assisted by Eddy Purwanto, S.H., as Substitute Registrar and in the presence of the Petitioner/his Attorneys, the Government/its Attorney, and the People's Legislative Assembly/its Attorney;

CHIEF JUSTICE,

Signed

Prof. Dr. Jimly Asshiddiqie, S.H.

JUSTICES,

Signed

Signed

Dr. Harjono, S.H., MCL. Prof. H. A. Mukthie Fadjar, S.H. ,M.S.

Signed

Signed

Maruarar Siahaan, S.H. Prof. Dr. H. M. Laica Marzuki, S.H.

Signed

Signed

Prof. H. A. S. Natabaya, S.H. , LL.M. H. Achmad Roestandi, S.H.

Signed

Signed

I Dewa Gede Palguna, S.H., M.H. Soedarsono, S.H.

Meanwhile with respect to the aforementioned decision, 4 (four) Constitutional Court Justices have dissenting opinions:

1. Prof. Abdul Mukthie Fadjar, S.H., M.S.
2. Maruarar Siahaan, S.H.
3. Prof. Dr. Jimly Asshiddiqie, S.H.
4. Prof. Dr. H. M. Laica Marzuki, S.H.

DISSENTING OPINIONS

Constitutional Court Justice Prof. Abdul Mukthie Fadjar, S.H., M.S.

The principal issue of the Petitioner's petition is the matter of constitutionality of Article 85 Paragraph (1) Sub-Paragraph c of the Structure and Status Law and Article 12 Sub-Article b of Political Party Law, hence the fundamental question to answer is as follows : "Is the proposal for dismissal by a political party of its members in the representative institutions, namely the People's Consultative Assembly, the People's Legislative Assembly, and the regional People's Legislative Assembly (commonly known as Recall right) contradictory to the 1945 Constitution?"

With respect to such fundamental issue I am of the following opinion:

- a. Article 22B of the 1945 Constitution reads "*Members of the People's Legislative Assembly can be removed from office, the conditions and procedures of which shall be regulated in law*". Thus, since the formulation is "regulated in law", not "by law", the regulation on the conditions and procedures for the dismissal of members of the People's Legislative Assembly shall not be in a special law, but sufficiently mentioned in law related to the membership of people's representative institutions namely, as it has been common since the New Order up to the present, the regulation mentioned in the Structure and Status Law in the chapter, part, or article regarding interim replacement, namely the Law of the Republic of Indonesia Number 16 Year 1969 *juncto* the Law of the Republic of Indonesia Number 5

Year 1975 *juncto* the Law of the Republic of Indonesia Number 2 Year 1985 (hereinafter referred to as the 1969 Structure and Status Law), the Law of the Republic of Indonesia Number 4 Year 1999 (hereinafter referred to as the 1999 Structure and Status Law), and the Law of the Republic of Indonesia Number 22 Year 2004 (hereinafter referred to as the 2004 Structure and Status Law);

- b. The regulation of dismissal of members of the People's Legislative Assembly in the Structure and Status Law in the history of Indonesian State Administration since the New Order up to now has encountered ups and downs, as follows:

- 1) In the New Order period, although in the 1945 Constitution there is no provision that the members of the People's Legislative Assembly can be replaced, it turned out that the members of the People's Legislative Assembly could be replaced as referred to in Article 13 *juncto* Article 4 and Article 5 of the 1969 Structure and Status Law, even "*recall right*" was recognized, as mentioned in Article 43 Paragraph (1) thereof which reads, "*The right to replace Delegation/Representative of Organizations participating in the General Election in the People's Consultative/Representative Bodies shall be with the relevant Organizations participating in the General Elections, and such right shall be exercised after prior consultation with the Chairpersons of the relevant People's Consultative/Representative Bodies*";

The Law concerning Political party and Functional Group (*Golongan Karya*) (Law of the Republic of Indonesia Number 3 Year 1975 *juncto* Law of the Republic of Indonesia Number 3 Year 1985) contained no provision concerning the right of Political Parties/Functional Group (*Golkar*) to replace their members in the People's Legislative Assembly.

- 2) During the early reform period, when there was the spirit of change towards greater level of democratization and respect for human rights, when the 1945 Constitution did not provide that members of the People's Legislative Assembly can be replaced, the replacement of members of the People's Legislative Assembly was mentioned in Article 14 *juncto* Article 42 of the 1999 Structure and Status Law and "recall right" by political parties participating in General Election was not recognized. The Law of the Republic of Indonesia Number 2 Year 1999 concerning Political Parties contained no provision giving the right to political parties to replace their members from the seats at the people's representative assembly.
- 3) During the period following the Amendment to the 1945 Constitution which contains a provision in Article 22B (Second Amendment, Year 2000), the replacement of members of the People's Legislative Assembly was mentioned in Chapter VII on Interim Replacement, Articles 85, 86, and 87 of the 2004 Structure and Status Law, and

Article 85 Paragraph (1) Sub-Paragraph c and Elucidation thereof actually recognizes “*recall right*” by Political Parties for the reasons as referred to in to Article 12 of the Political Party Law;

- c. With regard to the election system, in the General Elections of the New Order (1971-1997) that followed a purely proportional general election system, “*recall right*” was recognized, in General Election 1999 that also followed the pure proportional system “*recall right*” was not recognized, while in the 2004 General Election that followed a proportional General Election system with an open candidate list (with district nuances/semi district) “*recall right*” was reactivated;
- d. In connection with governance system, recall right is commonly followed in countries having a parliamentary system, while in a presidential system recall right is not commonly followed;
- e. The aforementioned description also indicates that *legal policy* on recall right is highly influenced by *political will* of political super-structure (the government and the People’s Legislative Assembly) and political infra-structure (political parties) which is not always suitable to the principle of people’s sovereignty and the principle that members of the People’s Legislative Assembly are people’s representatives, not party representatives.
- f. There is indeed an impression as if so long as the recruitment system for members of the People’s Legislative Assembly still gives a big role to political

parties (general elections with purely proportional or semi proportional system), *recall right* by political parties of their members in the People's Legislative Assembly is still highly inevitable. It is strengthened by an often-used argument that the 1945 Constitution seems to give an extremely big role to political parties, either in the election of members of the People's Legislative Assembly and the Regional People's Legislative Assembly [*vide* Article 22E Paragraph (3) of the 1945 Constitution], or in the election of President and Vice President [*vide* Article 6A Paragraph (2) and Article 8 Paragraph (3) of the 1945 Constitution], even political parties almost seem to be quasi state institutions. Or in other words, Indonesian democracy in accordance with the post-amendment 1945 Constitution is a democracy by political parties;

- g. However, the special treatment that the post-Amendment 1945 Constitution seems to give to political parties does not mean that political parties may negate people's sovereignty as the fundamental principle of Indonesian state administration system. It must be understood that it has been due to the fact that in the past (New Order) the role of political parties was degraded by the state and people's sovereignty shifted into state sovereignty/state rulers' sovereignty.
- h. Therefore, the shift should not have been a shift from state/government sovereignty to political party sovereignty, but that sovereignty must be returned to the people. Consequently, dismissal of members of the People's

Legislative Assembly as intended in Article 22B of the 1945 Constitution and its regulation in law must be based solely on violations by the relevant members of People's Legislative Assembly of the law or code of ethics and code of conduct as people's representatives, not necessarily due to *recalling* by their principal political party. *Recalling* by political parties of their members in the representative bodies due to any violation of the AD/ART (Article 12 Sub-Article b of the Political Party Law) does not guarantee the principle of *due process of law* which constitutes one of the principles of a constitutional state, because it can be a subjective view of political party leaders which is difficult for the public to control. *Recalling* can still be objective and acceptable if it is based on Article 12 Sub-Article a of the Political Party Law (resigning from a political party or joining another political party) and on Article 12 Sub-Article c of the Political Party Law (violating laws and regulations).

- i. As a comparison, the nomination of the President and Vice President to be elected directly by the people [Article 6A Paragraph (1) of the 1945 Constitution] by a political party or a coalition of political parties [Article 6A Paragraph (2) of the 1945 Constitution] does not mean that the nominating political party may or has the right to *recall* the elected President and vice President. The President and Vice President elected in the direct election shall be the President and Vice President of all Indonesian People, not the President and Vice President of the political party nominating them as a candidate pair. Similarly, the members of the People's Legislative Assembly elected in the general election and initially nominated by political parties, after

the election, shall become the representatives of Indonesian people, not representatives of political parties. In other words, the People's Legislative Assembly must not shift to Party Legislative Assembly.

- j. Accordingly, to develop a sound democracy system and party system, *recall right* by political parties towards their members in representative bodies based on subjective reason as referred to in Article 85 Paragraph (1) Sub-Paragraph c of the Structure and Status Law *juncto* Article 12 Sub-Article b of the Political Party Law should be eliminated, which means that the petition of Petitioner is sufficiently grounded to be granted.

Constitutional Court Justices Maruarar Siahaan, S.H. and Prof. Dr. Jimly Asshiddiqie, S.H.

I

Legal Relationship Between Members of the People's Legislative Assembly and Political Parties, Constituents And State Institution (People's Legislative Assembly)

A candidate member of the People's Legislative Assembly recruited by a political party as participant in the general election to become a member of the People's Legislative Assembly, upon being elected by the constituents and taking the official oath as a member of the People's Legislative Assembly, has a legal relationship, not only with the political party recruiting and nominating him in the general election, but also that the choice of the constituents, as confirmed by the inauguration and taking of oath as a member of the People's Legislative

Assembly has created a new legal relationship beside that between the nominating political party and the elected candidate concerned. The new legal relationship arises between the member of the People's Legislative Assembly and the constituents and between the member of the People's Legislative Assembly and the state (institution) of the People's Legislative Assembly. Such legal relationship has created rights and obligations that are protected by the constitution and law, in the context of providing guaranty to the related person in performing the roles entrusted to him, either by the party or the constituents.

Regardless of the substance of the legal relationship between the constituents and the elected member of the People's Legislative Assembly, either as the representative of the constituents or the holder of people's mandate, the election and political party system that creates a legal relationship between a political party and its members assigned in the People's Legislative Assembly in the legal regime of the general election, can no longer absolutely set aside a legal relationship between the member of the People's Legislative Assembly and the constituents and the state through the state institution of the People's Legislative Assembly that complies with public law (constitution), in his position as a state official, which regulates his constitutional position and authorities legislative, budgetary and oversight functions with a series of rights in performing such functions, such as the right of interpellation, the right of inquiry, the right to express opinions, the right to raise questions, to submit proposal and opinions as well as the right of immunity. Such an issue can also be seen clearly in the

substance of oath of a member of the People's Legislative Assembly, which contains the determination to:

- a. perform the obligations as a member of the People's Legislative Assembly as properly and fairly as possible;
- b. firmly hold the *Pancasila* and enforce the 1945 Constitution of the State of the Republic of Indonesia;
- c. enforce a democratic life and dedicate to the nation and state;
- d. fight for people's aspiration to achieve national goals for the interest of the nation and the Unitary State of the Republic of Indonesia.

It is admitted that such public legal relationship must consider legal relationship that exists between a political party and the member of People's Legislative Assembly nominated by the Party. However, the legal relationship between the member and his party is in the spirit of and regulated in the law of civil nature (*privaatrechtelijk*).

Article 1, Article 2, and Article 3 of the Political Party Law clearly state that a political party is a political organization which is established by a group of citizens of the Republic of Indonesia voluntarily, consisting of at least 50 (fifty) persons who are no less than 21 (twenty-one) years of age, under a notary deed. The Notary Deed of Establishment of a political party shall include articles of association and by-laws completed with the executive board of national level, registered with the Department of Justice, to be legalized as a legal entity if it meets the required criteria. Therefore, although the recruitment

and nomination of a member to become a member of the People's Legislative Assembly has the legal, moral and discipline of organization dimensions that cannot be denied, the field of law that regulates such relationship aspect insofar as it is concerning members who have been legalized and have had their oath taken as members of the People's Legislative Assembly, must be seen in the spirit of the constitution which is the highest law as the basis in arranging the law as the implementation of such constitution, insofar as it is concerning members of political parties elected as members of the People's Legislative Assembly. The system of legal rules that binds the legal relationship concerned arises exclusively, because the position of members of the People's Legislative Assembly upon being in the state organizational structure as a state institution, in connection with other organs, shall be subject to and shall be bound by the legal rules of the constitution.

Such arrangement must therefore be based on the principles in Article 1 Paragraph (2) which states that sovereignty shall be in the people's hands and shall be exercised in accordance with the Constitution, and Article 1 Paragraph (3) which states that Indonesia shall be a constitutional state, putting forward that Indonesia is a country based on *constitutional democracy* and *demokratisce rechtsstaat*, in which the constitution is admitted as the highest law which serves as the basis for legitimacy of subordinate laws and regulations, and that the law-making process must always involve the people. Therefore, the legal relationship between members of political parties who become members of the People's Legislative Assembly and the nominating political parties, must be

seen proportionally by placing the role of public law in its proper place. The legal relationship aspect between the candidate members of the People's Legislative Assembly and the nominating political parties is private in nature (*privaatrechtelijk*), so that its focus has shifted to a legal relationship which is public law in nature, as the relevant persons are elected and legalized and have their oath taken as members of the People's Legislative Assembly.

II

RECALLING OF MEMBERS OF THE PEOPLE'S LEGISLATIVE ASSEMBLY BY PARTIES

The consequence of compliance with the regulation of the relationship between political parties and members of People's Legislative Assembly representing the parties but who have been elected and who have had their oath taken, to the public law (constitution), will also result in the practice of *recalling* by political parties of their members in the People's Legislative Assembly, either for the reason of party discipline or for the reason of violations of articles of association/by-laws, conducted by the parties in compliance with not only the private law of AD/ART of the party but also with public law. Therefore, what is referred to in Article 12 Sub-Article b of the Political Party Law as, "dismissed from the membership of a political party due to violating articles of association and by-laws", as supported in Article 85 Paragraph (1) Sub-Paragraph c of the Structure and Status Law, which states "a member's interim dismissal; upon the proposal from the related political party", has actually allowed private law (*privaatrechtelijk*) to set aside the public law in the constitutional issue

of relationship between People's Representatives and the constituents and the state institutions granted with the authorities by the 1945 Constitution. Without the intention of eliminating the roles of political parties with regard to the members of the People's Legislative Assembly in performing their constitutional duties, namely the legislative, oversight and budgetary functions or in expressing the aspiration of the constituents, such roles must not be performed without limitations. Limitations identified by placing the role of constitutional law as public law which also regulate such roles, must, to the greatest extent, allow the representatives to fulfill their oath in performing their obligations as fairly as possible, by firmly holding on to Pancasila and the 1945 Constitution as well as prevailing laws and regulations, in enforcing democracy for the sake of national goals and the interest of the nation and the Unitary State of the Republic of Indonesia. The role of political parties as participants in general elections of members of the People's Legislative Assembly and members of the Regional People's Legislative Assembly, as stipulated in Article 22E Paragraph (3) of the 1945 Constitution, justifies and legalizes constitutionally that a member of a certain political party who becomes a member of the People's Legislative Assembly declares his resignation from the membership of his nominating political party whose dismissal from the People's Legislative Assembly is to be proposed. However, the reason presented by a political party for proposing the withdrawal of its member from the People's Legislative Assembly which violates the AD/ART of the Political party cannot be automatically justified without going through a *due process of law* in the mechanism of law that can examine the

adequacy of such reason. Such mechanism, in public law, is a guaranty that must be enforced to develop a sound democratic process, which is not hampered by the absolute authority of parties, which may have temporary interest that is not in line with public interest struggled for by the members of the People's Legislative Assembly through their functions in exercising their constitutional authorities in a sound and responsible manner. We must prevent the shift from something that should be regulated in public law to the regulation which is only private in nature (*privaatrechtelijk*) in Article 12 Sub-Article b of the Political Party Law that grants an authority to a political party to recall its members from the membership in the People's Legislative Assembly without any examination, the provision of which is later adopted in Article 85 Paragraph (1) c of the Structure and Status Law. The recalling of members of the People's Legislative Assembly merely based on violations of the party's AD/ART which is private law in nature, Constitutes a denial of the nature of the legal relationship between the members of the People's Legislative Assembly and the constituents and the state (institution), which should be subject to public law (the constitution). This shift is a process of *verprivaatrechtelijking van het publieke recht*, while it should have been *verpubliekerechtelijking van het privaat recht* which occurs or which is conducted, particularly in the regulation of the point of contact between political parties and state institutions, which is regulated by constitutional law, which allows the process of democracy to grow under the guardianship of the law (constitution).

The constitutional regulation in Article 1 Paragraph (2) which provides that Indonesia is a constitutional state (*rechtsstaat/rule of law*), is a very general conception that needs further a description to be used as the standard for a review. Both *rechtsstaat* and *rule of law*, with some variants, universally and generally recognize the existence of the following elements: (i) recognition and protection of Human Rights, (ii) legality, and (iii) independence of the judiciary. In addition to the required public law foundation as a reason for dismissing a member of the People's Legislative Assembly, who is dismissed by a Party from party membership due to of violations of its AD/ART which is civil in nature, the principles and values contained in the concept of constitutional state that will adequately guard the process of democracy, requires balance between the rights and obligations of members of the People's Legislative Assembly in performing their constitutional authorities based on public law which regulates the status and authorities of the members of the People's Legislative Assembly as state officials, without intervention or intimidation from authorities of party leaders for any reasons which are not valid by law. Such mechanism of *due process of law* is needed to avoid arbitrary actions that jeopardize the implementation and growth of a constitutional and sound democracy.

Thus, although the existence of political parties needs to should be strengthened in developing a democratic life, especially in relation to their position as participants in general elections based on a proportional system with open candidate list, which recruit candidate members of the People's Legislative Assembly who are expected to be loyal to the parties and their policies, such

party authority still needs control by law so as to proportionally limit the implication of intervention through *recall* mechanism of the parties which are outside state institutions and the government against the state institutions whose authorities are granted by the 1945 Constitution. Without such guaranty, although the members of the People's Legislative Assembly take the oath that they will dedicate themselves as people's representatives appropriately, to firmly hold on to Pancasila and the 1945 Constitution, to enforce a democratic life and dedicate themselves to the country and nation as well as to fight for people's aspiration for the sake of interest of the nation and the Unitary State of the Republic of Indonesia, the anxiety about *recall* may at anytime cause legislative members to be in doubt to disclose the truth in exercising their constitutional authorities and in this way position themselves to dedicate to the party's orientation made by the party's elites. While in fact, in every general election, parties always state their commitment to fight for and prioritize on the interest and prosperity of the people at large, which actually can be demanded and evaluated by the constituents. The legal relationship aspect to the constituents also demands that recall right must be exercised in compliance with the mechanism of *due process of law*, to ensure guaranteed legal protection and fair legal certainty as well as sense of security and protection from threat of fear to do or not to do something which is a human right as referred of in Article 28D Paragraph (1) and Article 28G Paragraph (1) and other articles concerning protection of human rights in the 1945 Constitution, which also constitute their basic obligations. Thus, the requirements and procedures for the *recall* of members of the People's Legislative Assembly by

their supporting political parties must be regulated more harmoniously as a part of public law which is a further description of constitutional rules in the 1945 Constitution, and not merely a part of private law (*privaatrechtelijk*) based on the articles of association and by-laws of political parties, as confirmed in the Law of the Republic of Indonesia concerning Political Party and the Structure and Status Law, in an unconstitutional way.

III

However, by stating that recalling is contradictory to the 1945 Constitution and has no longer legal binding effect, shall the absence of provision concerning *recalling* make it impossible for a member of the People's Legislative Assembly to be dismissed for the reason that the person concerned has been dismissed from the membership in his political party? A person's dismissal from his membership in a political party can be made as one of the reasons for dismissing him from the membership of the People's Legislative Assembly, provided that 2 (two) requirements are fulfilled. First, the dismissal process of the person concerned from the political party must be executed based on "*due process of law*" in accordance with laws and regulations. Second, the People's Legislative Assembly itself as a state institution must play a role in making a decision dismissing him from the membership of the People's Legislative Assembly based on the principle of "*due process of law*" in accordance with laws and regulations as well. This mean that there must be a definite legal mechanism in the People's Legislative Assembly to make a decision concerning the matter, and hence the dismissal decision made by the political party is not absolute and

automatic in nature. Illegal and arbitrary dismissal by a political party cannot be made as the basis for the People's Legislative Assembly to take any further action namely to dismiss a people's representative from his membership in the People's Legislative Assembly.

Thus, a person who has been dismissed from the membership in his political party can be dismissed from the membership in the People's Legislative Assembly if there are procedures which fulfill the required principle of *due process of law* both in the political party internally or in the People's Legislative Assembly internally. Before the Political Party Law and the Structure and Status Law include clear provisions on the two procedures concerned, the provisions concerning *recalling* as the reason for dismissing a member of the People's Legislative Assembly shall be constitutionally unjustifiable.

Based on such considerations, Article 12 Sub-Article b of Law Number 31 Year 2002 concerning Political parties and Article 85 Paragraph (1) Sub-Paragraph c of Law Number 22 Year 2003 concerning the Organizational Structure And Status of the People's Consultative Assembly, the People's Legislative Assembly, the Regional Representative Council and the Regional People's Legislative Assembly, in our opinion are contradictory to the 1945 Constitution of the State of the Republic of Indonesia, and the Court should declare them as having no binding legal effect.

Constitutional Court Justice Prof. Dr.HM.Laica Marzuki, S.H.

The Petitioner Djoko Edhi Sutjipto Abdurrahman, member of the People's Legislative Assembly/People's Consultative Assembly of the Republic of Indonesia (A-173) from the National Mandate Party (PAN) Faction filed a petition for judicial review of Article 85 Paragraph (1) Sub-Paragraph c of Law Number 22 Year 2003 concerning the Organizational Structure And Status of the People's Consultative Assembly, the People's Legislative Assembly, the Regional Representative Council, and the Regional People's Legislative Assembly (hereinafter referred to as the Structure and Status Law) because they are deemed contradictory to Article 22E Paragraphs (1) and (2), Article 28C Paragraph (2), Article 28D Paragraphs (1) and (2) of the 1945 Constitution of the Republic of Indonesia (hereinafter referred to as the 1945 Constitution).

Article 85 Paragraph (1) of the Structure and Status Law reads:

Members of the People's Legislative Assembly shall quit temporarily due to:

- a. passing away;*
- b. resignation from the membership on own request in writing;*
- c. proposal from the related political party.*

Observing the meaning of phrase "... *proposal from the related political party*" in Article 85 Paragraph (1) Sub-Paragraph c of the Structure and Status Law as one of the reasons of for interim dismissal of a member of the People's Legislative Assembly, such phrase has no other meaning than *recall*. The use of *recall* in the parliament (*recall legislation*) is the right of a political party, commonly referred to as *recall recht*.

J.J.A. Thamassen (ed), in *Democratie, Theorie en Praktijk* (Alphen aan den Rijn, Brussel, Samson Uitgeverij, 1981) page 156, defines *recall recht*: *het recht van een politieke partij om een via haar kandidaten lijst gekozen parlamentslid terug te reopen* (= recall right is the right of a political party to withdraw a parliament member elected through the list of candidates it proposes), as quoted by expert Harun Alrasid in his statement in the hearing.

When a *recall* is deemed as the right of a political party to withdraw its members in the parliament, at the same time it must have the meaning that not all political parties have such recall right. Recall right is not an inherent right which is attached to every political party. Not all countries apply recall right of political parties in their parliamentary system. Article 71 of *Grondwet* of the Netherlands guarantees *parlementaire onschendbaarheid* for the members of *de Staten Generaal* [*Dutch constitutional law does not provide for the recall of members of the States General. George Thomas Kurian (ed), 1998:II, 409*]. The members of *Bundestag* in Germany cannot be recalled either [*Members of the Bundestag who resign their seats are replaced by the next candidate on the appropriate state party list. Recalls by the electorate are not possible. George Thomas Kurian (ed.), 1998:I, 279*].

In general, *recall (recall legislation)* is exercised in countries that follow a *direct democratic device system*, such as the states of America (*the state or Oregon and local governments*), America and eight cantons in Switzerland (N. Jayapalan, 2000: 102, 103). In those countries that follow the

direct democracy device system, citizens participate in the decision making in government administration directly without intermediaries, by using the instruments of referendum, initiative and *recall* of their representatives.

In this respect, the 1945 Constitution does not expressly grant recall right to political parties to withdraw party members who are elected as members of the People's Legislative Assembly (DPR) and/or members of the People's Consultative Assembly (MPR). Recall right (*recall recht*) was not at all proposed by the founding fathers in the meetings of the Investigating Body of the Efforts of Preparation for Indonesian Independence/Indonesian Independence Preparation Committee (BPUPKI/PPKI) when discussing the constitution. It was not proposed in the sessions of People's Consultative Assembly either, while making amendments to the 1945 Constitution. Recall right (*recall recht*) is not included in the *constitutional rights given* to political parties.

Since recall right is regulated in law (in *de wet geregeld*), recall right can always be reviewed based on its conformity with or contradiction to the Constitution.

Recall was once conducted, as it was never applied at all, during the application of the 1945 Constitution. Law Number 16 Year 1969 concerning Organizational Structure And Status of the People's Consultative Assembly, the People's Legislative Assembly, and the People's Legislative Council refers to *recall right (recall recht)* as the right to replace, as set forth in Article 43 Paragraph (1), which reads, "*The right to replace Delegation/Representative of*

Organizations participating in the General Election in the People's Consultative/Representative Bodies shall be with the relevant Organizations participating in the General Elections, and such right shall be exercised after prior consultation with the Chairpersons of the relevant People's Consultative/Representative Bodies”.

In Law Number 4 Year 1999 (replacing Law Number 14 Year 1969), the right replace owned by political parties participating in the General Election is no longer applied.

In Law Number 22 Year 2003 (The Structure and Status Law that replaces Law Number 4 Year 1999), interim replacement, with regard to *recall legislation* is applied again, pursuant to Article 85 Paragraph (1), Sub-Paragraph c.

Juridische vraagstuk: Is Article 85 Paragraph (1) Sub-Paragraph c of the Structure and Status Law that stipulates *recall* contradictory to the 1945 Constitution? Is it true that *recall legislation* is contradictory to Article 22E Paragraphs (1) and (2), Article 28C Paragraph (2), Article 28D Paragraphs (1) and (2) of the 1945 Constitution?

The provision of Article 85 Paragraph (1) Sub-Paragraph c of the Structure and Status Law –which is petitioned for review by the Petitioner – stipulates that a member of the People's Legislative Assembly shall be temporarily dismissed by the political party of the legislative member concerned.

A political party shall use recall right (*recall recht*) to withdraw its members elected as the members of the People's Legislative Assembly, based on the nomination of such political party in the general election.

Recall legislation is not commonly applied in the parliaments of countries that follow a presidential government, the members of which are elected according to district system or single member constituency. The exercise of recall right (*recall recht*) by political parties against their members in the parliament tends to make the related political parties dominant over their members, so that the legislative members prioritize the interest of their parties rather than the aspiration of the people at large (constituents). The legislative members concerned are afraid of *recall* action that may at any time be imposed on them. The parliament becomes not *solid* and unstable, as it is controlled by the external elites of political parties.

In this respect, it is not appropriate to apply recall right (*recall recht*) in the parliaments of countries with presidential system, where members come from many parties (multiparty), such as the Republic of Indonesia.

In general, although there are no big parties, the legislative members still depend on their political parties that can *recall* them at any time when they do not obey the will of the elites of the parties.

Recall gives a strong position to party leaders. A legislative member who is recalled by his party of course cannot propose himself to fight for

his right collectively in performing his constitutional duties in the People's Legislative Assembly, as intended in Article 28C Paragraph (2) of the 1945 Constitution.

Recall makes a legislative member unable to obtain legal recognition, guaranty, protection, and certainty, as well as fair treatment in performing his constitutional duties as a member of the People's Legislative Assembly, as guaranteed by the constitution, pursuant to Article 28D Paragraphs (1) and (2) of the 1945 Constitution.

The members of the People's Legislative Assembly elected in the 2004 General Election should not be recalled by the nominating political parties, because the legislative members have been elected based on a proportional system with open candidate list, pursuant to Article 6 Paragraph (1) of Law Number 12 Year 2003 concerning General Elections of Members of the People's Legislative Assembly, the Regional Representative Council, and the Regional People's Legislative Assembly. Pursuant to Article 84 Paragraph (1) of Law Number 12 Year 2003, the voting for the General Election of members of the People's Legislative Assembly, Provincial People's Legislative Assembly, and Regency/City People's Legislative Council shall be conducted by punching one of the symbols of Political Parties participating in the General Elections and punching one of the candidate names below the symbol of Political parties participating in the General Elections on the ballot. When a candidate gets significant number of votes although his name is at the bottom of the list, such

candidate is declared to be elected as a member of the People's Legislative Assembly representing his nominating party. Based on the mechanism of the proportional election system with open candidate list, the political party participating in the General Elections of such candidate cannot cancel or change the voting results obtained by the candidate.

Members of People's Legislative Assembly elected based on a proportional representation system integrated with a list system (open candidate list system) do not need to be afraid of *recall* because they have been called to struggle for their constituents, mainly those in regions, to bridge the people's aspiration in general, as Miriam Budiardjo said(1994: 310). Members of political parties elected based on a proportional system with open candidate list – based on the constitution – cannot be recalled by their parties. Recalling the legislative members concerned means denying or negating the election results votes of the people at large as the sovereignty holder. Members of the People's Legislative Assembly who represent the people at large, according to their name: Members of the People's Legislative Assembly, are basically statesmen. They must not be merely just the extension of their parties.

Manuel Luis Quezon (1878-1944), the first President of the Philippines (1935-1944), who during his life once held the position of Chairman of Senate of the Philippines (1916-1935), said, "*My loyalty to my party ends, where my loyalty to my country begins*"

The Constitution should protect the elected members of the People's Legislative Assembly from *recall*, based on the proportional election system with open candidates. *Constitutie moet de kastanje uit het vuur halen voor Djoko Edhi Sutjipto Abdurrahman.*

Based to the foregoing considerations, it shall be reasonable to grant the petition for judicial review filed by the Petitioner, to declare that Article 85 Paragraph (1) Sub--Paragraph c of Law Number 22 Year 2003 concerning the Organizational Structure and Status of the People's Consultative Assembly, the People's Legislative Assembly, the Regional Representative Council and the Regional People's Legislative Assembly is contradictory to Article 28C Paragraph (2), Article 28D Paragraphs (1) and (2) of the 1945 Constitution, and to declare that it has no binding legal effect.

SUBSTITUTE REGISTRAR

Signed

Eddy Purwanto, S.H.