



DECISION

Number 44/PHPU.D-VI/2008

FOR THE SAKE OF JUSTICE UNDER THE ONE ALMIGHTY GOD

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA

[1.1] Examining, hearing, and deciding upon constitutional cases at the first and final level, has passed a decision in the case of Dispute over the Results of General Election of the Regional Head and the Deputy Regional Head of Timor Tengah Selatan Regency, filed by:

- [1.2] 1. Name : **Drs. Daniel A. Banunaek, M.A.**
- Place/date of birth : Put'ain, December 26, 1940.
- Religion : Protestant
- Occupation : Regent of Timor Tengah Selatan.
- Address : Jalan Buni Number 1 RT 001/RW 01
SoE Sub-district, SoE District, Timor
Tengah Selatan Regency.
- Identification Card : 24.0408.261240.300
2. Name : **Drs. Alexander Nakamnanu**
- Place/date of birth : Oelete, February 22, 1950.
- Religion : Protestant

Occupation : Retired Civil Servant
 Address : Jalan Diponegoro Number 14 RT
 006/RW 003, Taubeno District, SoE
 Municipality District, Timor Tengah
 Selatan Regency.

In this matter granting the power of attorney to: 1) Ropaun Rambe, 2) Bill Nope, S.H., 3) Melkisedek C. Talan, S.H. 4) Paskalina Alwidin, B.Sc., S.H., M.H., 5) Ivam Andri, S. H., and 6) Halim Yeverson Rambe, S.H. all of whom are Advocates having their office at the RAMBE & Partners Law Firm at Jalan Dan Mogot Number 19C Grogol, West Jakarta, acting for and behalf of the Authorizer, both jointly and severally under Special Powers of Attorney dated November 1, 2008 and November 24, 2008;

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

Against:

[1.3] Name : The General Elections Commission of Timor Tengah
 Selatan Regency;
 Address : Jalan W.CH Oematan, SoE City, Timor Tengah
 Selatan Regency;

In this matter granting the power of attorney to **Philipus Fernandez, S.H.**, Advocate, having his office at Jalan Eltari II Liliba, Kupang Municipality, East Nusa Tenggara, acting for and behalf of the Authorizer, both jointly

and severally under a Special Power of Attorney Number 070-FER/Sks/UM/XI/2008 dated November 24, 2008;

Hereinafter referred to as ----- **the Respondent;**

[1.4] Having read the Petitioners' petition;

Having heard the Petitioners' statement;

Having heard the statement and having read the Written Response of the Respondent, namely the General Elections Commission of Timor Tengah Selatan Regency;

Having examined carefully the evidence and witnesses of the Petitioners and the Respondent;

Having read the written conclusions of the Petitioners and the Respondent;

3. LEGAL CONSIDERATIONS

[3.1] Considering whereas the principal issue of the Petitioners' petition is an objection to the Results of General Election of the Regional Head and the Deputy Regional Head (*Pemilukada*) of Timor Tengah Selatan Regency based on the Stipulation of the General Elections Commission of Timor Tengah Selatan Regency Number 46 regarding the Stipulation of Elected Candidate Pair of the Regional Head and the Deputy Regional Head of Timor Tengah Selatan Regency for 2008 dated SoE, October 30, 2008;

[3.2] Considering whereas prior to examining the principal issue of the case, the Constitutional Court (hereinafter referred to as the Court) shall first consider the following matters:

1. the Court's authority to examine, hear, and decide upon the *a quo* petition;
2. the Petitioners' legal standing to file the *a quo* petition;
3. the time limit for filing the petition of objection.

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

Authority of the Court

[3.3] Considering whereas based on the provision of Article 24C paragraph (1) of the 1945 Constitution of the State of the Republic of Indonesia (hereinafter referred to the 1945 Constitution) and Article 10 paragraph (1) sub-

paragraph d of Law Number 24 Year 2003 regarding the Constitutional Court (State Gazette of the Republic of Indonesia Year 2003 Number 98, Supplement to the State Gazette of the Republic of Indonesia Number 4316, hereinafter referred to as the Constitutional Court Law) *junctis* Article 12 paragraph (1) subparagraph d of Law Number 4 Year 2004 regarding Judicial Power, and Law Number 12 Year 2003 regarding the Second Amendment to Law Number 32 Year 2004 regarding Regional Government, one of the constitutional authorities of the Court is to decide upon disputes over general elections results;

Initially, based on the provision of Article 106 paragraph (1) and paragraph (2) of Law Number 32 Year 2004 regarding Regional Government (State Gazette of the Republic of Indonesia Year 2004 Number 125, Supplement to the State Gazette of the Republic of Indonesia Number 4437), objections related to vote count results affecting the election of a candidate pair was to be filed to the Supreme Court. Such authority of the Supreme Court was also included in Article 94 of Government Regulation Number 6 Year 2005 regarding Election, Legalization of Appointment and Dismissal of Regional Head and Deputy Regional Head;

Article 1 sub-article 4 of Law Number 22 Year 2007 regarding General Elections Organizer (State Gazette of the Republic of Indonesia Year 2007 Number 59, Supplement to the State Gazette of the Republic of Indonesia Number 4721) stipulates that, "*General Elections of Regional Heads and Deputy Regional Heads shall be general elections to directly elect the regional heads*

and deputy regional heads within the Unitary State of the Republic of Indonesia under Pancasila and the 1945 Constitution of the Republic of Indonesia”;

Article 236C of Law Number 12 Year 2008 regarding Second Amendment to Law Number 32 Year 2004 regarding Regional Government stipulates, “*The handling of disputes over the vote count results of the election of regional heads by the Supreme Court shall be delegated to the Constitutional Court no later than 18 (eighteen) months following the promulgation of this Law*”;

On October 29, 2008, the Chief Justice of the Supreme Court and the Chief Justice of the Constitutional Court jointly signed the Minutes of Delegation of Authority to Adjudicate, as the implementation of Article 236C of Law Number 12 Year 2008 above.

[3.4] Considering whereas the Petitioners’ petition concerns with the dispute over the vote count results of the General Election of Regional Heads, namely the General Election of Regional Heads of Timor Tengah Selatan Regency with the Minutes of Recapitulation of Vote Count Result of the General Election of Regional Head and Deputy Regional Head of Timor Tengah Selatan Regency dated October 30, 2008, and hence the Court has authority to examine, hear, and decide upon the *a quo* petition;

Legal standing of the Petitioners

[3.5] Considering whereas Article 106 paragraph (1) of Law Number 32 Year 2004 regarding Regional Government, Articles 3 and 4 of Constitutional

Court Regulation Number 15 Year 2008 regarding Guidelines for Proceedings in the Dispute over the Results of General Elections of Regional Heads (hereinafter referred to as PMK 15/2008), provide for, among other things, the following matters:

- a. The Petitioners shall be a Candidate Pair of the Regional Head and the Deputy Regional Head;
- b. the Petition may only be filed against the stipulation of the vote count results of the General Election of Regional Heads affecting the determination of candidate pairs qualified to participate in the second round General Election of Regional Heads or the election of a candidate pair as the Regional Head and the Deputy Regional Head.

[3.6] Considering whereas with regard to the legal standing of the Petitioners, the Court, based on the provision of Article 106 paragraph (1) of Law Number 32 Year 2004 regarding Regional Government, the Court shall consider Articles 3 and 4 of PMK 15/2008 as intended in paragraph **[3.5]** as follows:

- whereas the Petitioners are the Candidate Pair of Regent and Deputy Regent of Timor Tengah Selatan Regency who have been determined by the Respondent to be in candidacy number 1 in accordance with the Decision of the General Elections Commission of Timor Tengah Selatan Regency Number 39 Year 2008 regarding the Drawing of Candidacy

- Number of the Candidate Pairs of Regional Head and Deputy Regional Head of Timor Tengah Selatan Regency Year 2008;
- whereas the petition filed by the Petitioners is an objection to the Decision of the General Elections Commission of Timor Tengah Selatan Regency Number 46 Year 2008 dated SoE, October 29, 2008 regarding the Recapitulation of Vote Count Results of the General Election of Regional Head and Deputy Regional Head of Timor Tengah Selatan Regency. The objection concerned has been due to the stipulation that the Petitioners only acquired 65,500 votes, while the Candidate Pair with Candidacy Number 5 acquired 66,871 votes;
 - whereas according to the Petitioners, the Result of Vote Count Recapitulation conducted by the Respondent mentioned above occurred because the calculation was conducted based on mistake and violation committed by the Respondent, namely among other things that the Respondent could not maintain its neutrality since one of the Members of the General Elections Commission of Timor Tengah Selatan Regency is the wife of one of the Candidate Pairs; C1-KWK Model which as the Petitioners' right was not provided; inflation of the number of ballots accepted in the Voting Stations; and inflation of the number of voters' data in the Voting Stations as well as the deflation of valid votes based on DA1-KWK. The Petitioners request the Court to declare void by law the Minutes of the General Elections Commission of Timor Tengah Selatan Regency

- Number 143/KPU-TTS/X/2008 regarding the Stipulation of the Elected Candidate Pair of Regional Head and Deputy Regional Head in the 2008 General Election of Regional Head and Deputy Regional Head of Timor Tengah Selatan Regency;
- Based on the foregoing matters, the Court is of the opinion that the Petitioners have met the requirements for legal standing to file for the *a quo* petition.

Time Limit for Filing the Petition

[3.7] Considering whereas Minutes Number 143/KPU-TTS/X/2008 regarding the Stipulation of the Elected Candidate Pair of Regional Head and Deputy Regional Head of Timor Tengah Selatan Regency Year 2008 was made on October 30, 2008, while the Petitioners' petition of objection to the stipulation of the Respondent was filed to SoE District Court on November 3, 2008, and subsequently the Head of SoE District Court sent the case dossier of the General Election of Regional Heads of Timor Tengah Selatan Regency with letter Number W.26.U/1277/H1. 01.10/X/2008 dated Kupang, November 17, 2008, which was received at the Registrar's Office of the Court on Friday, November 21, 2008 based on the Deed of Petition Dossier Receipt Number 93/PAN.MK/XI/2008 as subsequently registered on November 24, 2008 with Number 44/PHPU.D-VI/2008;

[3.8] Considering whereas Article 5 of PMK 15/2008 stipulates that “*Petitions may only be filed by no later than 3 (three) working days after the Respondent determines the vote count results of the General Election of Regional Heads in the region concerned*”, hence the Petitioners’ petition was still filed within the time limit determined;

[3.9] Considering whereas based on the foregoing evaluation of facts and laws in paragraph [3.6], the Court is of the opinion that the Petitioners have legal standing to file the *a quo* petition in accordance with the terms stipulated in Article 106 paragraph (1) of Law Number 32 Year 2004, Articles 3 and 4 of PMK 15/2008, and that the Petitioners’ petition has been filed within the time limit determined in Article 5 of PMK 15/2008;

[3.10] Considering whereas since the Court has authority to examine, hear, and decide upon the *a quo* petition and the Petitioners have legal standing to file the petition, and that the petition has been filed within the time limit determined, the Court shall further consider the principal issue of the petition.

Principal issue of the petition

[3.11] Considering whereas in their petition, the Petitioners completely set out in the facts of the case part principally argue as follows:

[3.11.1] Whereas the Petitioners are the Candidate Pair of Regent and Deputy Regent in the General Election of Regional Head and Deputy Regional

Head of Timor Tengah Selatan Regency for the 2008-2013 Period with Candidacy Number 1 based on the Stipulation of the General Elections Commission of Timor Tengah Selatan Regency Number 39 Year 2008 regarding the Drawing of Candidacy Numbers of Pairs of the Regional Head and the Deputy Regional Head in the 2008 General Election of Regional Head and Deputy Regional Head of Timor Tengah Selatan Regency;

[3.11.2] Whereas the Petitioners have an objection to the Stipulation of the General Elections Commission of Timor Tengah Selatan Regency Number 143/KPU-TTS/X/2008 regarding the Stipulation of the Elected Candidate Pair of Regional Head and Deputy Regional Head in the 2008 General Election of Regional Head and Deputy Regional Head of Timor Tengah Selatan Regency dated October 30, 2008, since the result of the calculation conducted by the Respondent has been erroneous or that at least there has been an error in conducting the recapitulation of vote count results, with the following details:

- The Candidate Pair of Regent and Deputy Regent with Candidacy Number 1 in the name of **Drs. Danial A. Banunaek, M. A.** and **Drs. Alexander Nakamnanu** acquired 65,500 votes;
- The Candidate Pair of Regent and Deputy Regent with Candidacy Number 5, **Ir. Paulus Viktor Roland Mella, M. Si** and **Drs. Benny Litelnoni, S.H., M.Si**, acquired 66,871 votes;

[3.11.3] Whereas the mistake and error occurred due to several matters, namely, among other things, as follows:

1. Inflation of the number of ballots received in the Voting Stations according to DA1-KWK during the voting;
2. Inflation of the number of Voters' data in the Voting Stations (DA1-KWK Model) during the voting;
3. Reduction of valid votes based on DA1-KWK;
4. The Petitioners' witnesses from all of the Voting Stations totaling 730 persons only received and signed 204 Minutes and Certificates of Vote Count Results, so the Petitioners' witnesses did not sign 526 Minutes and Certificates of Vote Count Result even though the Petitioners' witnesses have requested for such minutes and certificates as their right and the obligation of the Respondent (the General Elections Commission of Timor Tengah Selatan Regency) based on Decision of the General Elections Commission of Timor Tengah Selatan Regency Number 12 Year 2008 regarding the Technical Guidelines on the Procedure for the Implementation of Voting and Vote Count in Voting Stations in the 2008 General Election of Regional Head and Deputy Regional Head of Timor Tengah Selatan Regency;

Whereas the correct vote count results according to the Petitioners are as follows:

- The Candidate Pair of Regent and Deputy Regent of Timor Tengah Selatan Regency with Candidacy Number 1, **Drs. Daniel A. Banunaek, M.A.** and **Drs. Alexander Nakamnanu**, acquired 65,500 votes;
- The Candidate Pair of Regent and Deputy Regent of Timor Tengah Selatan Regency with Candidacy Number 5, **Ir. Paulus Viktor Roland Mella, M. Si** and **Drs. Benny Litelnoni, S.H., M.Si**, acquired 65,384 votes;

[3.12] Considering whereas to support the arguments of their petition, the Petitioners have presented written evidence or writing marked as Exhibit P-1 through Exhibit P-43 legalized in the hearing on December 4, 2008, as well as eight witnesses who have provided statements under oath at the Court hearing on December 3, 2008, respectively in the name of 1) Louisa Nitbani Fanggidae, 2) Yoksan D.K. Banu, 3) Charles Adolf Kause, S.T., 4) Maxentius S. Kause, S.E., 5) Johanes Banunaek, S.H., 6) Gustav Nubuasa, S.Pt., 7) Adam Misa, 8) Susi Apriani E Nitbani;

[3.13] Considering whereas the Respondent has provided written statement submitted in the hearing on November 27, 2008 as completely included in the Facts of the Case part, which principally states as follows:

In the Exception:

1. Whereas the filing of objection by the Petitioners has exceeded the time limit determined in Chapter III Article 5 paragraph (1) and paragraph (2) of the Constitutional Court Regulation Number 15 Year 2008 regarding Guidelines for Proceedings in the Dispute over the Results of the General Elections of Regional Heads because the Plenary Meeting for the Stipulation of Elected Candidate of the General Election of Regional Heads of Timor Tengah Selatan Regency has been in accordance with Decision of the Respondent Number 46 Year 2008 dated October 30, 2008. Hence, the Petitioners' objection does not fulfill the requirement and must be declared unacceptable;

2. Whereas in their revised petition, the Petitioners confirm that their petition has been intended as an objection to the Stipulation of Vote Count Result of the 2008 General Election of Regional Head and Deputy Regional Head of Timor Tengah Selatan Regency, in accordance with Minutes Number 143/KPU/TTS/X/2008 dated October 30, 2008. Therefore, it is evident that the Petitioners did not file any objection to Decision of the Respondent Number 46 Year 2008 dated October 30, 2008 stipulating **Ir. Paulus Viktor Roland Mella, M.Si** and **Drs. Benny Alexander Litelnoni, S.H., M.Si** as the Elected Regional Head and Deputy Regional Head of Timor Tengah Selatan Regency for 2008. Hence, the Petitioners' objection must be declared unacceptable;

3. Whereas before the Petitioners' petition was heard, the following facts were revealed:
 - a. The Power of Attorney to attend the hearing signed by the Petitioners and the Attorneys dated November 1, 2008 which was registered in the Registrar's Office of SoE District Court on November 3, 2008 under registry Number 19/SK/PDT/2008/PN.SoE;
 - b. Whereas it was evident that the petition of objection to the Vote Count Result of the General Election of Regional Heads of Timor Tengah Selatan Regency dated October 30, 2008 filed by the Petitioners through their Attorneys was dated November 3, 2008 and registered at SoE District Court of Timor Tengah Selatan Regency on November 3, 2008 and this matter has been confirmed based on the Letter of the Head of SoE District Court Number W26-U4/529 UM.02.02/X/2008 dated November 4, 2008, which principally explained that SoE District Court on Wednesday, November 3, 2008 received a petition of Objection to Vote Count filed by one of the Candidate Pairs of the General Election of Regional Heads of Timor Tengah Selatan Regency known as *Damai* package (evidence enclosed);
 - c. whereas it was evident that the Panel of Judges of Kupang High Court heard the *a quo* case on November 12, 2008 with the agenda of the reading of the petition of objection of the Petitioners and

subsequently the hearing was postponed until November 17, 2008 with the agenda of Exception and response from the Respondent;

- d. whereas it was evident that when the hearing was opened on November 17, 2008, the Panel of Judges of Kupang High Court suddenly discontinued the case hearing without any decision or stipulation, even though the hearing had been opened and continued;
- e. whereas therefore, the misdirected filing of the Petitioners' objection to Kupang High Court is contradictory to the Provision of Article 236C of Law Number 12 Year 2008 regarding the Second Amendment to Law Number 32 Year 2004 regarding Regional Government, and then Article 5 paragraph (1) and paragraph (2) of Constitutional Court Regulation Number 15 Year 2008 regarding Guidelines for the Proceedings in the Dispute over the Results of General Elections of Regional Heads, and Minutes of Delegation of Authority to Adjudicate dated October 29, 2008 which was jointly signed by the Chief Justice of the Supreme Court and Chief Justice of the Constitutional Court. Hence, the petition of Objection to the Vote Count Result of the General Election of Regional Heads of Timor Tengah Selatan Regency filed by the Petitioners to Kupang High Court was supposed to be decided upon by Kupang High Court, with the decision declaring that such objection could not be

accepted since November 1, 2008, as the authority to adjudicate this case has become the authority of the Constitutional Court and not of the Supreme Court *c.q.* the Panel of Judges of Kupang High Court, and thus it is proper and appropriate for the Petitioners' objection in the *a quo* case to be rejected or to be declared unacceptable;

4. Whereas the reasons for the Petitioners' objection in the *a quo* case as from point 3 through point 15 is principally identified in the Petitioners' description regarding the existence of inflation of the number of voters in the List of Permanent Voters which became the ground for mistakes on the vote count of the General Election of Regional Heads by the Respondent, while in subsequent points of the objection concerned, the Petitioners do not expressly describe the matters as intended in Article 6 paragraph (2) subparagraph b and also those intended in Article 4 of PMK 15/2008. Hence, it is proper and appropriate for the Petitioners' objection in the *a quo* case to be declared unacceptable;
5. Whereas the Petitioners' objection in point 2 through point 4 is related to the position of a Member of the General Elections Commission of Timor Tengah Selatan Regency in the name of **Ir. Rambu Atanau Mella** who is the wife of the Candidate Pair with Candidacy Number 5 *in casu* **Ir. Paulus Viktor Roland Mella, M.Si**, so the neutrality is highly dubious. According to the Respondent, such objection is not included in or does not constitute an object of dispute in the case of dispute over the results of General Election

of Regional Heads as intended in Article 4 of PMK 15/2008. Hence, it is proper for such objection to be declared unacceptable;

In the Principal Issue of the Case

1. Whereas Decision of the Respondent Number 46 Year 2008 dated October 30, 2008 regarding the Stipulation of the Elected Candidate Pair of Regent and Deputy Regent of Timor Tengah Selatan Regency for 2008 determining **Ir. Paulus Viktor Roland Mella, M. Si** and **Drs. Benny Alexander Litelnoni, S.H., M.Si** has been valid by law;
2. Whereas the Respondent as the organizer of the General Election of Regional Heads of Timor Tengah Selatan Regency has consistently followed the principles of independence, honesty, fairness, legal certainty, rules of procedure in the implementation of general elections, public interest, transparency, proportionality, professionalism, accountability, efficiency and effectiveness, so that the matters conveyed by the Petitioners in their petition are not true;
3. Whereas the argument of the Petitioners stating that the Respondent has conducted inflation of List of Permanent Voters is not true. Distribution of Voter Cards to the voters has conformed to the List of Permanent Voters as many as 251,296 persons distributed in 730 Voting Stations in the area of Timor Tengah Selatan Regency. The Used Ballots with valid votes were

218,189, and the Used Ballots containing invalid votes were 4,924 (evidence enclosed);

4. Whereas the distribution of ballots as many as 257,578 sheets to 730 Voting Stations distributed throughout Timor Tengah Selatan Regency was based on the provision of Article 75 paragraph (1), paragraph (2) and paragraph (3) of Government Regulation Number 6 Year 2005 regarding Election, Legalization of Appointment and Dismissal of Regional Head and Deputy Regional Head;
5. Whereas 223,113 voters exercised their right to vote and 28,183 voters did not exercise their right to vote ;
6. Whereas the objection and protest raised by the Success Team of the Candidate Pair have been responded to and explained by the Respondent in order for the objection and protest concerning the vote count recapitulation to be recorded under the objection column available for that purpose, but the Petitioners have never done it so that the objection column concerned is always zero or that there has never been any objection;
7. With regard to the argument of the Petitioners stating that not all of the Petitioners' witnesses were given the Minutes and Certificates of Vote Count Results (C1-KWK Model and Attachment of C1-KWK Model) in 526 Voting Stations from the total 730 Voting Stations, the Respondent asserts the following matters:

- a. whereas with Letter Number 168/KPU-TTS/X/2008 dated October 8, 2008 addressed to the Candidate Pairs of Regional Head and Deputy Regional Head of Timor Tengah Selatan Regency, the Respondent has given information concerning attendance, rights and obligations of the witnesses as well as confirmation on the ballots declared valid;
- b. whereas the Minutes and Certificates of Vote Count Results (C1-KWK Model and Attachment of C1-KWK Model) were given to the witnesses who were present and who submitted the Letter of Mandate to the Head of Voting Organizer Group (KPPS) and who were obligated to attend the whole voting event up to the completion of vote count in each Voting Station, since the Minutes and Certificates of Vote Count Results (C1-KWK Model and Attachment of C1-KWK Model) are state documents provided to the witnesses as described above;
- c. whereas if the Petitioners' witnesses did not receive the Minutes and Certificates of Vote Count Results (C1-KWK Model and Attachment of C1-KWK Model), this was because the Petitioners' witnesses concerned were not present or did not attend the voting activity until it finished in most of the existing Voting Stations and the absence of the Petitioners' witnesses or Candidate Pairs is not the mistake of the General Elections Commission of Timor Tengah Selatan

Regency *in casu* the Respondent, since all the witnesses concerned have been invited and notified in accordance with the elucidation of the foregoing procedure of technical guidelines for voting and vote count and the presence of witnesses according to the provision of Article 86 paragraph (1) of Government Regulation Number 6 Year 2005 is not an obligation, so that even without the presence of witnesses, the vote count recapitulation can be carried out and can be valid according to laws and regulations. Whereas referring to the provision of Article 86 paragraph (6) of Government Regulation Number 6 Year 2005 concerned, in the event the Minutes are not signed by the witnesses of the candidate pairs and there is no objection being filed, the minutes shall be declared valid;

- d. whereas hence, the argument of the Petitioners stating that the Respondent has intentionally changed the vote count results in the Voting Stations on the C1-KWK Model and Attachment of C1-KWK Model so that it has impaired the Petitioners is not true, and from the foregoing description it is actually reflected that the Petitioners do not understand the provisions on the process of implementation of the General Election of Regional Heads;
8. Whereas with regard to the arguments of the Petitioners in point 6 and point 7, such objection is not legally grounded and shall be rejected or set aside entirely, for the reason that:

- a. such petition is contradictory to the provision of Article 6 paragraph (2) sub-paragraph b of PMK 15/2008;
- b. whereas in the context of the Recapitulation of Vote Count Result of the General Election of Regional Heads of Timor Tengah Selatan Regency, the Respondent has issued invitations to all Candidate Pairs of the General Election of Regional Heads of Timor Tengah Selatan Regency, including the Petitioners through Letter Number 175/KPU/TTS/X/2008 dated October 28, 2008 and it was evident that during the Plenary Meeting for the Recapitulation of Vote Count Result and Plenary Meeting for the Stipulation of the Elected Candidates in the General Election of Regional Heads on October 30, 2008 only the witnesses of the Candidate Pair with Candidacy Number 5 were present;
- c. Whereas the form of Statement of Objection of DB2-KWK Model dated October 29, 2008 was not filled by witnesses of the Candidate Pairs, including the witnesses of the Petitioners. Hence, in accordance with the provision of Article 86 paragraph (6) of Government Regulation Number 6 Year 2005 concerned, in the event the Minutes as intended in paragraph (5) were not signed by witnesses of the candidate pairs and they did not file any objection, the minutes shall be declared valid;

9. Whereas with regard to the arguments of the Petitioners in point 11 through point 15 that the Petitioners has made a formula to look for inflation of the number of ballots, the formula to look for inflation of the Number of Voters and formula to look for Deflation of valid votes, the Respondent has given the following response:
- a. whereas based on the provisions of Article 86, Article 87, Article 88, Article 89, Article 90, Article 91, Article 92, Article 93, Article 94, Article 95, and Article 96 of Law Number 32 Year 2004 regarding Regional Government as amended with Law Number 8 Year 2005, as well as provisions in Article 70, Article 71, Article 72, Article 73, Article 74, Article 75, Article 76, Article 77, Article 78, Article 79, Article 80, Article 81, Article 82, and Article 83 of Government Regulation Number 6 Year 2005 regarding Election, Legalization of Appointment and Dismissal of Regional Head and Deputy Regional Head as most recently amended with Government Regulation Number 25 Year 2007, regulating the matters with respect to Voting and Vote Count in Voting Stations;
 - b. whereas based on the provision of Article 10 paragraph (3) subparagraph c of Law Number 22 Year 2007 regarding General Election Organizer stating that the duty and authority of the regency General Elections Commission is to prepare and stipulate technical

Guidelines for each phase of the organization of the General Election of Regional Heads;

- c. whereas based on the provisions mentioned in points 1 and 2 above, the Respondent as the Organizer of the General Elections at Timor Tengah Selatan Regency Level has made Decision Number 12 Year 2008 dated June 11, 2008 regarding Technical Guidelines on the Procedure for the Implementation of Voting and Vote Count in Voting Stations in the 2008 General Election of Regional Heads of Timor Tengah Selatan Regency and Technical Guidelines for the Voting and Vote Count of the 2008 General Election of Regional Heads of Timor Tengah Selatan Regency, which contain the formula to find out the validity of the filling of C1-KWK or formula to find out the validity of vote count results, and such matter has been in accordance with the provision of Article 4 of PMK 15/2008;
- d. whereas therefore, with regard to the formula to look for Inflation of the Number of Ballots, formula to look for Inflation of the Number of Voters and formula to look for Deflation of Valid Votes by the Petitioners, the Respondent has given the following responses:
 - 1) whereas the formulas are the Petitioners' own version that were made without clear and standard legal grounds;

- 2) whereas the Petitioners are not organizers of the General Election of Regional Heads in Timor Tengah Selatan Regency;
 - 3) whereas since the vote count formulas are not correct and are not legally grounded, all the vote count results of the Petitioners' version in their petition shall become invalid, incorrect, and must be set aside by the Court;
 - 4) whereas such formulas were solely made by the Petitioners to influence the vote count results by the Respondent which have been correct and accurate, and hence such formulas must be set aside and rejected by the Court;
10. Whereas with regard to the position of **Ir. Rambu Atanau Mella** in the General Elections Commission of Timor Tengah Selatan Regency who is the wife of one of the Candidate Pairs, **Ir. Paulus Viktor Roland Mella, M. Si** argued to have made the neutrality to be highly dubious, the Respondent has given the following responses:
- a. whereas such objection is not included in the object of dispute as intended in Article 4 of PMK 15/2008. Hence, it is proper for the objection to be declared unacceptable as confirmed in Article 13 paragraph (3) sub-paragraph a of PMK 15/2008;

- b. whereas objection to such matter is highly subjective, since it is not proportional and objective in the context of legal education and enlightenment;
 - c. whereas it is the legal right and political right of every Citizen of the Republic of Indonesia to become member of the General Elections Commission or regional head candidate as guaranteed by the 1945 Constitution;
11. Whereas the Plenary meeting of the General Elections Commission of Timor Tengah Selatan Regency has been correct and proper with regard to the Stipulation of Vote Count Results of the General Election of Regional Heads as set forth in Minutes Number 143/KPU-TTS/X/2008 regarding Stipulation of the Elected Candidate Pair of Regional Head and Deputy Regional Head of Timor Tengah Selatan Regency Year 2008 with vote count result for the respective Candidate Pairs as follows:
- a. Candidate Pair of **Drs. Daniel A. Banunaek, M. A.** and **Drs. Alexander Nakamnanu** acquired 65,500 or 30.02 % votes;
 - b. Candidate Pair of **Ir. Johanes Oematan, M.Si** and **Drs. Thomas Lakapu** acquired 37,898 or 17.37 % votes;
 - c. Candidate Pair of **Drs. Pieter R. Lobo, M. Si** and **Drs. Godlief E. Tobe** acquired 38,478 or 17.64 % votes;

- d. Candidate Pair of **Drs. Junus E. Year** and **Drs. Carolus Nubatonis** acquired 9,432 or 4.32 % votes;
 - e. Candidate Pair of **Ir. Paulus Viktor Roland Mella, M.Si** and **Drs. Benny Litelnoni, S.H., M.Si** acquired 66,871 or 30.65 % votes;
12. Whereas Decision of the Respondent Number 46 Year 2008 dated October 30, 2008 has been correct and proper in stipulating **Ir. Paulus Viktor Roland Mella, M.Si** and **Drs. Benny Alexander Litelnoni, S.H., M.Si** as the Elected Regional Head and Deputy Regional Head of Timor Tengah Selatan Regency for 2008;

[3.14] Considering whereas to support their arguments, the Respondent has presented written evidence marked as Exhibit T-1 through Exhibit T-76 as completely described in the Facts of the Case part and seven witnesses who gave their statements under oath on December 13, 2008;

Opinion of the Court

Regarding the Exception

[3.15] Considering whereas in the statement or response of the Respondent with regard to the Exception, prior to examining the Principal Issue of the Petition, the Court must first consider the following matters.

[3.15.1] Considering whereas the Response of the Respondent in the Exception is as follows:

1. With regard to the time limit, the Stipulation of the Elected Candidate Pair of Regent and Deputy Regent was stipulated by the Respondent on October 30, 2008, while the Petitioners' petition was received at the Registrar's Office of the Court on November 24, 2008 as Deed of Petition Dossier Receipt Number 94/PAN.MK/2008, which means that 24 days had elapsed;
2. In their revised petition the Petitioners raised an objection to the Vote Count Results of the General Election of Regional Heads of Timor Tengah Selatan Regency stipulated by the Respondent, without filing any objection to the Decision of the General Elections Commission of Timor Tengah Selatan Regency Number 46 Year 2008 regarding the Stipulation of the Elected Candidate Pair of Regional Head and Deputy Regional Head of Timor Tengah Selatan Regency for 2008;
3. Prior to the Court hearing, there were legal facts as follows:
 - (i) A Special Power of Attorney dated November 1, 2008 was registered in the Registrar's Office of SoE District Court on November 3, 2008;
 - (ii) It was evident that the petition of objection to the Recapitulation of Vote Count Result was dated November 3, 2008 and was received at the Registrar's Office of SoE District Court on November 3, 2008;
 - (iii) Kupang High Court already heard the *a quo* case on November 12, 2008 with the agenda of the reading of the petition of objection to the

Result of Vote Count Recapitulation of the General Election of Regional Heads of Timor Tengah Selatan Regency;

- (iv) On November 17, 2008, Kupang High Court suddenly discontinued the hearing without any decision or stipulation, even though the hearing had been opened and continued;
 - (v) The misdirected filing of objection to Kupang High Court is contradictory to Article 236C of Law Number 12 Year 2008 regarding the Second Amendment to Law Number 32 Year 2004 regarding Regional Government, Article 5 paragraph (1) and paragraph (2) of Constitutional Court Regulation Number 15 Year 2008, and Minutes dated October 29, 2008 regarding Delegation of Authority to Adjudicate from the Supreme Court to the Constitutional Court, so that the Petitioners' petition to Kupang High Court should have been decided upon by Kupang High Court with decision declaring that such objection could not be accepted.
4. Whereas the reasons for the filing of objection describe the existence of inflation of the number of the List of Permanent Voters which became the ground for the mistake in the vote count of the General Election of Regional Heads by the Respondent and describe the matters as intended in Article 6 paragraph (1) sub-paragraph b and Article 4 of PMK 15/2008 regarding the object of dispute in the General Election of Regional Heads. Hence, it is proper that the Petitioners' objection cannot be accepted;

5. In the opinion of the Respondent, the Petitioners' objection in relation to the position of **Ir. Rambli Atanau Mella** in the General Elections Commission of Timor Tengah Selatan Regency whose neutrality is doubted, such matter is not included within the object of dispute in the General Election of Regional Heads as intended in Article 4 of PMK 15/2008. Hence, it is proper that such objection cannot be accepted.

[3.15.2] Considering whereas the objection, insofar as it is concerned with the time limit of the filing of the petition, the Court refers to the consideration included in the foregoing paragraph **[3.9]** assessing that the Petitioners' petition of objection in the *a quo* case was filed within the determined time limit. The reason of the Respondent for filing of objection to Kupang High Court through SoE District Court is still valid by law since the delegation of the authority to adjudicate from the Supreme Court came into effect as of November 1, 2008, while the Petitioners' objection to Kupang High Court was filed by the Petitioners on November 3, 2008, which was the first business day in November 2008, so the legal action in such transitional period was still justifiable under the law, as the Chairperson of Kupang High Court subsequently delivered the dossier of the *a quo* case to the Constitutional Court with Letter Number W.26.U/127/H1.01/10/XI/2008 dated November 17, 2008 concerning the delivery of case dossier of the General Election of Regional Heads of Timor Tengah Selatan Regency. Based on the foregoing consideration, the

Respondent's Exception, insofar as related to the time limit of the filing of objection, must be set aside;

[3.15.3] Considering whereas insofar as concerning the rest of the Respondent's exception, namely the legal facts in the form of Special Power of Attorney of the Petitioners to their attorneys dated November 1, 2008 and received at the Registrar's Office of SoE District Court on November 3, 2008, the examination of the *a quo* case by Kupang High Court, discontinuation of the examination of the *a quo* case by Kupang High Court and the absence of Decision of Kupang High Court which was supposed to pass a decision that the *a quo* case could not be accepted since November 1, 2008, are irrelevant to be considered by the Court, since in judicially, the filing of petition has been conducted according to the stipulated regulation so that it must be deemed valid by law and the Court has no authority to assess the duty and function of other Judicial Agencies. Whereas item 7 and item 8 of the Respondent's exception are closely related to the principal issue of the petition, and thus the exception will be considered jointly with the principal issue of the case;

[3.16] Considering whereas based on the legal facts, whether the Petitioners' statements, Respondent's statements, statements of the Petitioners' Witnesses, statements of the Respondent's Witnesses, and Conclusions of the Petitioners and Respondent, the Court found legal facts, both acknowledged by the parties and those becoming the legal dispute between the parties, as described below:

[3.16.1] whereas in the hearing there were irrefutable legal facts and arguments of the Petitioners' petition by the Respondent, hence the legal facts concerned have become law for the Petitioners and the Respondent and do not need to be proven further, namely the following legal facts:

1. Decision of the General Election Commission of Timor Tengah Selatan Regency Number 39 Year 2008 regarding the Drawing of Candidacy Number of the Candidate Pairs of Regional Head and Deputy Regional Head in the 2008 General Election of Regional Head and Deputy Regional Head of Timor Tengah Selatan Regency dated September 20, 2008 (Exhibit P-4);
2. Recapitulation of the Number of Registered Voters for the 2008 General Election of Regional Head and Deputy Regional Head of Timor Tengah Selatan Regency by the General Election Commission of Timor Tengah Selatan Regency (Exhibit P-3 and Exhibit T-38);
3. The sawing of Ballot Box in Amanuban Selatan District.

[3.16.2] Whereas besides the legal facts and matters acknowledged by the parties, there were also legal facts or matters in the hearing that became legal dispute by the parties as follows:

1. The non-provision of the C1-KWK Model to 526 Voting Stations from the 730 Voting Stations spread in 32 districts in Timor Tengah Selatan Regency;
2. Inflation of the voters' data from the Voting Stations;
3. Inflation of the number of ballots.

Whereas according to the Petitioners, the non-provision of the C1-KWK Model to 526 Voting Stations from the 730 Voting Stations spread in 32 districts in Timor Tengah Selatan Regency has caused the Petitioners' witnesses to only receive and sign 204 Minutes and Certificates of Vote Count Results from the 730 Minutes and Certificates of Vote Count Results spread in 32 districts, in line with the statements of eight witnesses of the Petitioners, namely Louisa Nitbani Fanggalda, Yoksan D.K. Banu, Susi Apriani E. Nitbani, Charles Adolf Kause, S.T., Maxentius S. Kause, S. E., Johanes Banunaek, S. H., and Gustav Nubuasa, S. Pt., conveyed in the hearing;

Whereas on the contrary, the Respondent refuted the argument of the Petitioners, by stating that the Respondent has provided information concerning attendance, rights and obligations of witnesses, as well as confirmation with regard to the ballots declared as valid by letter Number 168/KPU-TTS/X/2008 dated October 8, 2008. If the Petitioners' witnesses did not receive Minutes and Certificates of Vote Count Results (the C-KWK Model and Attachment of the C1-KWK Model), this is due to the fact that the Petitioners'

witnesses were not present or did not follow the voting activity until finish in most of the Voting Stations. And the absence of the Petitioners' witnesses or Candidate Pairs is not the mistake of the General Election Commission of Timor Tengah Selatan Regency *in casu* the Respondent;

Whereas according to the Petitioners, there has been inflation of the voters' data from the Voting Stations (the DA1-KWK Model) by presenting data on the number of voters exercising their voting right as many as 221,712; voters who did not exercise their voting right as many as 28,751; and voters from other Voting Stations as many as 232, so the total number was 252,783 which means that there is still a difference of 1,487 of the number of ballots to be distributed to all Voting Stations (*vide* attachment of Petitioners' petition received by the Registrar's Office of the Court on December 1, 2008);

Whereas the Petitioners also argued concerning the inflation of the number of ballots received in the Voting Stations in accordance with the DA1-KWK in the General Election of Regional Heads, based on the reason that the number of ballots to be distributed to all Voting Stations was 257,578 sheets obtained from the number of the List of Permanent Voters stipulated by the Respondent on September 14, 2008 as many as 251,296 sheets added with 2.5 % (two and a half percent), so that from the addition of damaged ballots of 326 sheets; unused ballots of 38,510 sheets; valid votes of 218,596 sheets; and invalid votes of 5,119 sheets making a total number of 262,551 sheets, there is a difference of 4,973

sheets from 257,578 sheets (*vide* attachment of the Petitioners' petition received by the Registrar's Office of the Court on December 1, 2008);

Whereas on the contrary, the Respondent explains: (1) the formulas to look for inflation of the voters' data and the use of ballots are the Petitioners' version made without clear legal grounds; (2) the Petitioners are not organizers of the General Election of Regional Heads of Timor Tengah Selatan Regency; (3) since the formulas do not have clear legal ground, the Petitioners are of the opinion that the vote count results become invalid and incorrect; and (4) the formula was made to influence the vote count results conducted by the Respondent (*vide* item 4 of Respondent's exception/response);

[3.17] Considering whereas based on the foregoing legal dispute of the parties, which become the legal assessment of the Court in answering the essence of the principal legal issue of the Petitioners concerning whether or not the Decision of the General Election Commission of Timor Tengah Selatan Regency and the Recapitulation of Vote Count Results of the General Election of Regional Heads of Timor Tengah Selatan Regency contains validity and/or judicial flaw, the Court will provide opinion and legal assessment as follows:

[3.17.1] The non-provision of the C1-KWK Model to 526 Voting Stations from the 730 Voting Stations spread in 32 districts in Timor Tengah Selatan Regency was related to the refutation presented by the Respondent stating that the organization of the General Election of Regional Heads of Timor Tengah Selatan Regency has been implemented by consistently following the principle of

independence, honesty, justice, legal certainty, rules of procedure in the implementation of general election, public interest, transparency, proportionality, professionalism, accountability, efficiency, and effectiveness, as well as supported by the statements of seven witnesses presented by the Respondent. According to the Court, the provisions concerning the distribution of the C1-KWK Model form to witnesses of the Candidate Pairs was regulated inconsistently in various laws and regulations, as provided for respectively in:

- Article 96 paragraph (10) of Law Number 32 Year 2004 regarding Regional Government which reads, *“The Voting Organizer Group shall provide 1 (one) exemplar of copy of minutes and certificate of vote count results to the attending witnesses of the candidate pairs and shall post 1 (one) exemplar of certificate of the vote count results at public place,”*
- Article 84 paragraph (6) of Government Regulation Number 6 Year 2005 regarding Election, Legalization of Appointment and Dismissal of Regional Head and Deputy Regional Head which reads, *“The Voting Committee (PPS) shall provide 1 (one) exemplar of copy of the minutes and certificate of recapitulation of the vote count results in the Voting Committee as intended in paragraph (5), to the attending witnesses of the candidate pairs and shall post 1 (one) exemplar of certificate of the vote count results at public place”*
- Article 46 paragraph (1) of the General Election Commission Regulation Number 09 Year 2007 regarding Guidelines on the Procedure for the

Implementation of Voting and Vote Count of the General Election of Regional Head and Deputy Regional Head at the Voting Station which reads, *“The Voting Organizer Group shall provide copies of the Minutes (the C-KWK Model) and Certificate of Vote Count Results (Attachment of the C1-KWK Model), to the attending witnesses of the respective candidates, Field General Election Supervisory Committee, and District Election Committee (PPK) through the Voting Committee as many as 1 (one) copy respectively as well as posting 1 (one) copy of the Attachment of the C1-KWK Model at public place.*

[3.17.2] Considering whereas based on the foregoing provisions, the Court is of the opinion that the Voting Organizer Group must give the C1-KWK Model form to each witness of the Candidate Pairs. Otherwise, such matter will have implication and may cause any deviation in the vote count process;

[3.17.3] Considering that the implication of the *a quo* law has highly affected the Vote Recapitulation Results at the subsequent levels, and the failure to fulfill the obligation to give the C1-KWK Model form to witnesses of the Candidate Pairs may result in the invalidity of the results of vote count recapitulation conducted by organizer of the General Election of Regional Heads;

[3.17.4] Considering whereas regardless of the foregoing opinion of the Court, based on the legal facts disclosed in the hearing in the form of statements from the Petitioners' witnesses, namely : Louisa Nitbani Fanggidae, Yoksan D.K. Banu, Susi Apriani E. Nitbani, Charles Adolf Kause, S.T., Maxentius S. Kause,

S.E., Johanes Banunaek, S.H., and Gustav Nubuasa, S.Pt. stating that they did not receive the C1-KWK Model form, the same thing also happened to the witnesses of other Candidate Pairs beside the Candidate Pair with Candidacy Number 5. The witnesses have requested such form to the Voting Organizer Group, but they were not given any. The Respondent's refutation which was considered to be highly normative cannot nullify the existence of violation to the principles of general elections which are direct, public, free, secret, honest, and just as set forth in Article 22E paragraph (1) of the 1945 Constitution;

[3.18] Considering whereas with regard to the existence of inflation of voters' data from the Voting Stations and the existence of inflation of the number of ballots, the Court will provide one legal assessment concerning the two foregoing matters, since both of them are related to one another, it is also the same with the formula of voters' data calculation and ballot calculation;

Whereas based on Exhibit T-1 through Exhibit T-32, as well as Exhibit P-8 through Exhibit P-39, some facts were discovered in the form of changes, namely addition and reduction of the number of ballots in a number of districts as follows:

1. In Mollo Selatan District, the number of used ballots in the DB1-KWK Model constitutes the total number of valid ballots in the DA1-KWK Model form which respectively written as many as 7,654 (*vide* Attachment 1 the DB1-KWK Model and Exhibit T-1);

2. In Mollo Utara District, the number of used ballots after carefully counted was supposed to be 11,788 sheets, but the Recapitulation of Voters Number, Voting Stations, and Ballots indicated as many as 11,773 (Attachment 1 the DB1-KWK Model);
3. In Mollo Barat District, the number of used ballots in the DB1-KWK Model was written as many as 4,077, after being counted carefully, it was supposed to be 4,082;
4. In Mollo Tengah District, the DB1-KWK Model indicated the number of used ballots of 3,694, after being counted carefully, it was only 3,684;
5. In Tobu District, the number of used ballots written in the DB1-KWK constitutes the number of valid votes in DA1-KWK which respectively written as many as 5,131;
6. In Nunbena District, the DB1-KWK Model indicated the number of used ballots as many as 3,086, after being counted carefully, it was only 3,081;
7. In SoE Municipality District, the form/model used was not the standard form/model provided by the Regency/Municipality General Election Commission and it did not include Attachment 2 of the DA1-KWK Model letter B, and the number of used ballots in the DB1-KWK Model was written to be 18,536, after being counted carefully, it was only 18,447;

8. In Amanuban Barat District, the number of used ballots written in the DB1-KWK Model was as many as **1,230**, after being counted carefully, it was supposed to be **10,230**;
9. In Batu Putih District, the total final number of valid votes was not included in the Attachment 2 of the DA1-KWK Model, and the number of used ballots was written to be 6,127, after being counted carefully, it was supposed to be 6,137;
10. In Amanuban Selatan District, the total final number of valid votes was not included in Attachment 2 of the DA1-KWK Model, and the number of used ballots in the DB1-KWK Model was written to be **1,170**, after being counted carefully, it was supposed to be **11,820**;
11. In Koalin District, the number of used ballots indicated in the DB1-KWK was 9,485, after being counted carefully, it was supposed to be 9,501;
12. In Kolbanu District, the total final number of valid votes was not included in Attachment 2 of the DA1-KWK Model, and then the number of invalid votes was written as many as 241, after carefully counted it was supposed to be 237, it was also the case with the number of used ballots in the DB1-KWK Model which was written as many as 9.835, after being counted carefully, it was supposed to amount to 10,025;
13. In Kuanfatu District, the form used was not the standard form provided by the General Election Commission, and the number of used ballots in the

- DB1-KWK Model was written to be **9,392**, after being counted carefully, it only amounted to **9,329**;
14. In Amanatun Selatan District, there was no total final number of valid votes in the DA1-KWK model, and the number of used ballots in the DB1-KWK Model was written to be **9,140**, after being counted carefully, it only amounted to **9,136**;
 15. In Noebana District, the form was incomplete and both initial number and final number were not indicated, and it did not include invalid ballots, however the DB1-KWK Model indicated the number of used ballots as many as **2,584**;
 16. In Toianas District, the number of used ballots in the DB1-KWK Model was written as many as **6,094**, after being counted carefully, it was supposed to amount to **6,121**;
 17. In Amanuban Tengah District, the number of used ballots in the DB1-KWK Model was written as many as **7,702**, after being counted carefully, it was supposed to amount to **7,938**;
 18. In Amanuban Timur District, the number of used ballots in the DB1-KWK Model was written as many as **8,246**, after being counted carefully, it only amounted to **8,227**;

19. In Amanatun Utara District, the number of used ballots in the DB1-KWK Model was written as many as **8,366**, after being counted carefully, it was supposed to amount to **8,542**;

Whereas in addition to the legal facts described above, the Court also discovered legal facts in the form of erroneous vote count conducted by the Respondent based on Exhibit P-8 through Exhibit P-39 concerning the number of valid votes acquired by the respective Candidate Pairs, namely as follows:

1. Vote count results acquired by the respective Candidate Pairs according to the Respondent (*vide* Exhibit T-35) are as follows:
 - a. Candidate Pair with Candidacy Number 1 acquired as many as 65,500 votes;
 - b. Candidate Pair with Candidacy Number 2 acquired as many as 37,898 votes;
 - c. Candidate Pair with Candidacy Number 3 acquired as many as 38,488 votes;
 - d. Candidate Pair with Candidacy Number 4 acquired as many as 9,432 votes; and
 - e. Candidate Pair with Candidacy Number 5 acquired as many as 66,871 votes.

2. In the vote count results conducted by the Respondent there were mistakes of vote count respectively as follows, in Kolbano District based on Attachment 1 of the DA1-KWK and Exhibit T-14, it was written 2,406 for the Candidate Pair with Candidacy Number 1 and in Mollo Barat District the vote count based on Exhibit T-4 was 406, meanwhile there has been mistake indicated in the Exhibit T-4 concerned, in which the addition result was 4,003, after carefully reviewed it was supposed to be as many as 4,008 votes. Subsequently, careful review and verification on Exhibit P-18 and Exhibit P-25 proved that the Petitioners' calculation was correct, so that in Kolbano District the Petitioners acquired 2,409 votes and in Mollo Barat District the Petitioners acquired 401 votes.

3. Whereas the Court is of the opinion that the vote count results acquired by the respective Candidate Pairs according to the DA-KWK Model, are as follows:
 - a. Candidate Pair with Candidacy Number 1 acquired as many as **65,498** votes;

 - b. Candidate Pair with Candidacy Number 2 acquired as many as **37,898** votes;

 - c. Candidate Pair with Candidacy Number 3 acquired as many as **38,488** votes;

- d. Candidate Pair with Candidacy Number 4 acquired as many as **9,432** votes; and
- e. Candidate Pair with Candidacy Number 5 acquired as many as **66,871** votes.

Hence, the valid votes acquired by all Candidate Pairs were as many as 218,187 votes;

- 4. Whereas in Exhibit P-10 the vote acquisition of the Petitioners was written as many as 2,198, while in Exhibit T-31 the valid votes of the Petitioners was written as many as 2,918, after being reviewed and counted carefully, the vote acquisition of the Petitioners was 2,178;
- 5. Exhibit P-18 in the DA1-KWK Model, the valid votes of the Petitioners was written as many as 2,409, while in the Recapitulation of Vote Count Results at the Regional General Election Commission Level (Attachment 2 of the DB1-KWK Model) it was written as many as 2,406, after being counted carefully, the correct number was 2,409;
- 6. In Mollo Barat District, the valid votes of the Petitioners based on DA1-KWK was written as many as 401 (Exhibit P-25), while the Recapitulation of Vote Count Result at the Regional General Election Commission Level (Attachment 2 of the DB1-KWK Model) indicated a total number of 406;

Whereas the Court also found written evidence, both presented by the Respondent and by the Petitioners, which has become complete evidence concerning the violations occurred in 19 districts against the provisions of laws and regulations of the General Election of Regional Heads of Timor Tengah Selatan Regency. The Court is of the opinion that such violations constitute serious and significant violations affecting the final result of vote acquisition for each candidate pair;

Whereas there has been a difference in the number of damaged ballots between Attachment 2 of the DA1-KWK Model and the Record of the Implementation of Recapitulation of Vote Count Results of the General Election of Regional Heads (the DA1-KWK Model). The Respondent answered that such difference was due to mistake in data transfer. In the hearing held on December 3, 2008 the Respondent could not also present the evidence of the number of remaining damaged ballots;

Whereas with regard to the alleged violations concerned, the Petitioners have made report to the General Election Supervisory Committee of Timor Tengah Selatan Regency by forwarding Letter Number 37/TIMPILKADA/GK/TTS/X/2008 dated October 27, 2008 concerning the Report of Deviation in the Organization of Election of Regent and Deputy Regent of Timor Tengah Selatan Regency. With regard to such letter, the General Election Supervisory Committee followed-up by forwarding a letter to the Respondent Number Panwaslu 270/Kab.TTS/03/29/X/2008 dated October 28, 2008. The Letter

from the General Election Supervisory Committee was responded by the Respondent by holding a Plenary Meeting on October 29, 2008 which principally stipulated that the 231 witnesses presented by Candidate Pair with Candidacy Number 1 received C1-KWK Model and Attachment of C1-KWK forms, meanwhile the Respondent could not follow-up matter regarding the 520 Voting Stations that did not receive the C1-KWK Model and Attachment of C1-KWK forms, since it was not accompanied with clear legal evidence. The Court is of the opinion that there has been legal offence in the organization of the General Election of Regional Heads conducted by the Respondent;

Whereas the Court also needs to provide legal assessment to the arguments of the Petitioners stating that the presence of **Ir. Rambu Atanua Mella** in the General Election Commission of Timor Tengah Selatan Regency is doubted in terms of her neutrality, since the person concerned is the wife of one of the Candidate Pairs, namely **Ir. Paulus Viktor Roland Mella, M.Si** who is the Candidate Pair with Candidacy Number 5. The Respondent is of the opinion that such objection is not included in the object of dispute over the *a quo* case. The Court is of the opinion that the Petitioners could not present evidence regarding the non-neutrality of the person concerned that may affect the independence of the General Election Commission of Timor Tengah Selatan Regency and moreover, **Ir. Rambu Atanua Mella** has shown her good faith by presenting a request for exemption from duty to the Head of the General Election Commission of Timor Tengah Selatan Regency (*vide* Exhibit T-75 and Exhibit T-76), hence the objection of the *a quo* Petitioners must be disregarded;

[3.19] Considering whereas based on the legal facts described above, it was evident that the Recapitulation of Vote Count Results of the General Election of Regional Heads in Timor Tengah Selatan Regency was based on data that does not mutually show accuracy and validity highly affecting the final vote acquisition of the respective Candidate Pairs, so that the Court has confidence that the number of vote acquisition of each Candidate Pair must be inaccurate and invalid;

[3.20] Considering whereas in deciding upon the dispute over the results of the General Election of Regional Heads, the Court must not only recount the actual vote count of the voting, but it must also probe to discover legal facts and justice by assessing and adjudicating the disputed vote count results, because if it is only a mathematical count, it can actually be conducted again by the Provincial/Regency/Municipality General Election Commission itself under the supervision of the General Election Supervisory Committee and/or police apparatus. The Court understands that even though the law stipulates that the matters which can be adjudicated by the Court is the vote count results, the violations causing the disputed vote count results must also be considered in order to uphold such law and justice. This is in accordance with the provisions of Article 24 paragraph (1) of the 1945 Constitution which reads, "*Judicial power shall be an independent power to **organize judicial administration to uphold law and justice***" and Article 28D paragraph (1) of the 1945 Constitution which reads, "*Every person shall have the right to the recognition, the guarantee, the*

protection and the legal certainty of just laws". Furthermore, the two provisions of the 1945 Constitution concerned are set forth in Article 45 paragraph (1) of the Constitutional Court Law which reads, *"The Constitutional Court shall decide upon case based on the 1945 Constitution of the State of the Republic of Indonesia in accordance with the evidence and conviction of justices"*. In addition, the decision of judicature, including the Court, shall be made with the principle of *"For the Sake of Justice Based upon Belief in the One and Only God"*;

Whereas based on legal facts in the hearing, there were evidently serious, significant, and irresponsible violations in several districts by way of making changes, namely by adding and reducing the numbers of vote acquisition of certain Candidate Pairs affecting the final results of vote acquisition of other Candidate Pairs. With regard to the difference in the number of ballots being changed, the Court cannot predict to which Candidate Pair such number of changed votes is addressed, therefore a revision is required through the Court's decision, namely the re-voting of vote count results in the districts to be determined below and to exclude them from the total calculation results. If the Court decides that the vote count results in the districts concerned (excluded) from the final count, there will be injustice decision, since it means that the votes of people from the districts concerned as part of the holder of sovereignty will be disregarded. Hence, for the sake of just and legally grounded democracy, the Court is of the opinion that re-voting must be conducted in certain districts and vote recounting must be conducted in other certain districts;

[3.21] Considering whereas from the districts where re-voting and/or vote recounting must be conducted, the Court is of the opinion that re-voting must be conducted in two districts, namely Amanuban Barat District and Amanuban Selatan District since as stated by the witnesses, there have been serious, significant and irresponsible violations with regard to the unsuccessful attempt to open the ballot box and the request to open ballot box in order to count for the recapitulation at the District Polling Committee level, but the box was not opened even though the recapitulation result was still read out. Such matters have made the Court confidence that there was inaccuracy in the recapitulation results since such count was not supported with data. In addition, there has been substantial difference of vote acquisition between the calculation conducted by the Respondent (DA1-KWK and/or DB1-KWK) and that of the Court as presented in the Table below;

**VALID VOTES FOR THE CANDIDATE PAIR WITH CANDIDACY NUMBER 1
AND CANDIDACY NUMBER 5**

NO	DISTRICT	Respondent's Version		Court's Version	
		CANDIDACY	CANDIDACY	CANDIDACY	CANDIDACY
		NO. 1	NO. 5	NO. 1	NO. 5
1	Amanatun Selatan	3947	1746	3947	1746
2	Kokbaun	1220	60	1220	60
3	Amanatun Utara	5643	442	6383	442
4	Toianas	4539	169	4539	169
5	Boking	1618	564	1618	564

6	Kotolin	2066	1460	2066	1460
7	Nunkolo	3074	1630	3074	1630
8	Amanuban Timur	2696	1940	2696	1940
9	Kualin	3485	2399	3485	2399
10	Kuanfatu	2727	3189	2727	3189
11	Kolbano	2406	3307	2409	3307
12	Amanuban Tengah	2245	1965	2245	1965
13	Kie	4911	3036	4911	3036
14	Oenino	1493	1569	1493	1569
15	Mollo Selatan	555	6083	555	6083
16	Mollo Utara	620	3409	620	3409
17	Fatumnasi	126	1938	126	1938
18	Molo Barat	406	1488	406	1488
19	Soe Municipality	3359	6566	3359	6566
20	Amanuban Selatan	2774	2784	2774	2784
21	Polen	710	4783	710	4783
22	Batu Putih	1299	1570	1299	1570
23	Amanuban Barat	3032	3346	3032	3346
24	Noebeba	1086	1376	1086	1376
25	Satian	1895	280	1895	280
26	Fatukopa	2109	239	2109	239
27	Faut Molo	1327	991	1327	991
28	Tobu	234	2691	234	2691
29	Mollo Tengah	416	1842	416	1842
30	Noebena	1289	141	1289	141
31	Nunbena	149	1621	149	1621
32	Kuatnana	2044	2247	2044	2247

	TOTAL	65500	66871	66243	66871
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The foregoing data has increased the Court's conviction on the compulsory re-voting due to the structured violation;

[3.22] Considering whereas the order to conduct re-voting and vote recounting as will be stated in the decision below must also consider the level of difficulty and the period with regard to the stages of Legislative and Presidential General Elections in 2009. By considering the agenda of such national activities, the Court will order the re-voting as soon as possible by taking into account the ability of the General Election Commission of Timor Tengah Selatan Regency and all organizer apparatus of the General Election of Regional Heads to conduct the re-voting in direct, public, free, secret, honest, and fair manner, as well as by preventing possible violations adversely affecting the democratization process in Indonesia;

[3.23] Considering whereas even though Article 233 paragraphs (2) and (3) of Law Number 12 Year 2008 regarding the Second Amendment to Law Number 32 Year 2004 regarding Regional Government, provide that the organization of the General Election of Regional Heads must be completed by the end of 2008, the Court confirms that the *a quo* re-voting and/or vote recounting do not constitute new General Election of Regional Heads but a continuation of the General Election of Regional Heads that have been conducted previously, so that the organization of re-voting and/or vote recounting in the early 2009 cannot be deemed contradictory to the provisions of the

aforementioned law, moreover this is an order set forth in the decision of the Court.

4. CONCLUSION

Based on the entire assessment of facts and laws, the Court concludes as follows:

- [4.1] The Respondent's Exception is not appropriate according to law;
- [4.2] Even though the *posita* and *petitum* of the Petitioners are inconsistent, in fact they did not file subsidiary lawsuit (*ex aequo et bono*), but it is formally and materially proven that there have been serious, significant, and structured violations contradictory to the constitution and provisions of other laws and regulations affecting the vote acquisition of the Candidate Pairs of Regional Head and Deputy Regional Head of Timor Tengah Selatan Regency;
- [4.3] The serious, significant, and structured violations were proven valid and convincing, hence the Decision of the General Election Commission of Timor Tengah Selatan Regency regarding the Recapitulation of Vote Count Results of the General Election of Regional Heads of Timor Tengah Selatan Regency must be declared null and void and not having binding legal effect insofar as it is concerned the voting results in: (1) Mollo Selatan District; (2)

Mollo Utara District; (3) Mollo Barat District; (4) Mollo Tengah District; (5) Tobu District; (6) Nunbena District; (7) SoE Municipality District; (8) Amanuban Barat District; (9) Batu Putih District; (10) Amanuban Selatan District; (11) Koalin District; (12) Kolbanu District; (13) Kuanfatu District; (14) Amanatun Selatan District; (15) Neobana District; (16) Toianas District; (17) Amanuban Tengah District; (18) Amanuban Timur District; and (19) Amanatun Utara District;

[4.4] There have been serious, significant, and structured violations injuring the constitution, democracy, and rights of citizens [*vide* Article 18 paragraph (4) and Article 22E paragraph (1) of the 1945 Constitution], as well as other laws and regulations, the violations of which are not permitted to occur in the constitutional state of the Republic of Indonesia;

[4.5] In adjudicating the case of the General Election of Regional Heads in general, *in casu* the General Election of Regional Heads of Timor Tengah Selatan Regency, the Court does not only refer to the formal object of dispute over the General Election of Regional Heads *an sich* as set forth in Article 4 of PMK 15/2008, but the Court must probe and discover legal truth and justice in accordance with the evidence and conviction of the justices;

[4.6] In the effort to realize the procedural and substantive justice, as well as the principle of benefit for the sake of the supremacy of constitution, law, and democracy, the Court has assessed all statements presented by the parties, documentary evidence, and witnesses in the hearing in accordance with the duty and function of the Court as the guard of constitution and democracy, as well as protector of human rights;

[4.7] Based on item [4.1] up to and including item [4.6], the Court orders re-voting and vote recounting in several districts to be mentioned in this decision **for the five Candidate Pairs**;

[4.8] The Court orders the General Election Commission of East Nusa Tenggara Province and the Supervisory Committee of the General Election of Regional Heads of East Nusa Tenggara to supervise the re-voting and/or vote recounting in accordance with their authority so that the principle and spirit of the General Election of Regional Heads which are direct, public, free, secret, honest, and fair can be enforced;

5. DECISION

In view of the Articles of the 1945 Constitution of the State of the Republic of Indonesia, Law Number 24 Year 2003 and Law Number 12 Year 2008 *junctis* Law Number 4 Year 2004 regarding Judicial Power, Law Number 32 Year

2004 regarding Regional Government as most recently amended with Law Number 12 Year 2008 regarding the Second Amendment to Law Number 32 Year 2004 regarding Regional Government,

Passing the Decision,

In the Exception:

To declare that the Respondent's Exception cannot be accepted.

In the Principal Issue of the Case:

- To grant the Petitioners' in part;
- To nullify and declare as not legally binding the Decision of the General Election Commission of Timor Tengah Selatan Regency Number 46 Year 2008 regarding the Stipulation of the Elected Candidate Pair of Regional Head and Deputy Regional Head of Timor Tengah Selatan Regency and the Recapitulation of Vote Count Result of the 2008 General Election of Regional Head and Deputy Regional Head of Timor Tengah Selatan Regency insofar as it is related to the recapitulation of vote count results in: (1) Mollo Selatan District; (2) Mollo Utara District; (3) Mollo Barat District; (4) Mollo Tengah District; (5) Tobu District; (6) Nunbena District; (7) SoE Municipality District; (8) Amanuban Barat District; (9) Batu Putih District; (10) Amanuban Selatan District; (11) Koalin District; (12) Kolbanu District; (13) Kuanfatu District; (14) Amanatun Selatan District; (15)

- Neobana District; (16) Toianas District; (17) Amanuban Tengah District; (18) Amanuban Timur District; and (19) Amanatun Utara District;
- To order the General Election Commission of Timor Tengah Selatan Regency to conduct **re-voting** of the General Election of Regional Head and Deputy Regional Head of Timor Tengah Selatan Regency **for the five Candidate Pairs** in:
 - (1) Amanuban Barat District; and
 - (2) Amanuban Selatan Districtby no later than 45 (forty-five) days as of the pronouncement of this decision;
 - To order the General Election Commission of Timor Tengah Selatan Regency to conduct **re-voting** of the General Election of Regional Head and Deputy Regional Head of Timor Tengah Selatan Regency **for the five Candidate Pairs** in:
 - (1) Mollo Selatan District;
 - (2) Mollo Utara District;
 - (3) Mollo Barat District;
 - (4) Mollo Tengah District;
 - (5) Tobu District;
 - (6) Nunbena District;
 - (7) SoE Municipality District;

- (8) Batu Putih District;
- (9) Koalin District;
- (10) Kolbanu District;
- (11) Kuanfatu District;
- (12) Amanatun Selatan District;
- (13) Neobana District;
- (14) Toianas District;
- (15) Amanuban Tengah District;
- (16) Amanuban Timur District; and
- (17) Amanatun Utara District

by no later than 30 (thirty) days as of the pronouncement of this decision;

- To reject the other and the rest of Petitioners' petition.

Hence the decision was made in the Plenary Consultative Meeting of eight Constitutional Court Justices on Wednesday, the tenth of December two thousand and eight and was pronounced in a Plenary Hearing open for public on Thursday, the eleventh of December two thousand and eight by us, Constitutional Court Justices, namely Moh. Mahfud MD, as the Chairperson and concurrent Member, M. Arsyad Sanusi, M. Akil Mochtar, Maria Farida Indrati, Abdul Mukthie Fadjar, Maruarar Siahaan, Achmad Sodiki, and Muhammad Alim, respectively as Members and assisted by Makhfud as Substitute Registrar, in the presence of the Petitioners and/or their Attorneys and the Respondent and/or its Attorneys.

CHIEF JUSTICE,

Sgd.

Moh. Mahfud MD

JUSTICES,

Sgd.

M. Arsyad Sanusi

Sgd.

M. Akil Mochtar

Sgd.

Maria Farida Indrati

Sgd.

Abdul Mukthie Fadjar

Sgd.

Maruarar Siahaan

Sgd.

Achmad Sodiki

Sgd.

Muhammad Alim

SUBSTITUTE REGISTRAR,

Sgd.

Makhfud