



**NUMBER 14-17/PUU-V/2007**

**FOR THE SAKE OF JUSTICE UNDER THE ONE ALMIGHTY GOD**

**THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA**

**[1.1]** Examining, hearing and deciding upon constitutional cases at the first and final level, has passed a Decision in the case of petition for judicial review of Law Number 23 Year 2003 concerning the General Election of President and Vice President, Law Number 24 Year 2003 concerning the Constitutional Court, Law Number 5 Year 2004 concerning Amendment to Law Number 14 Year 1985 concerning the Supreme Court, Law Number 32 Year 2004 concerning the Regional Government, and Law Number 15 Year 2006 concerning the State Audit Board against the 1945 Constitution of the State of the Republic of Indonesia filed by:

**[1.2]** **H. Muhlis Matu**, occupation: entrepreneur/Member of the Regional People's Legislative Assembly of Takalar Regency, having his address at Jalan Jenderal S. Sukawati, Pattallasang, Takalar, South Sulawesi, based on a special power of attorney dated April 17, 2007, granting power of attorney to Januardi S. Haribowo, S.H., Bayu Prasetyo, S.H., M.H., Erni Rasyid, S.H, Kartini Amir, S.H, M.H, and Ahmad Waluya, S.H, all of them being advocates associated in the "Team of Advocates for H. Muhlis Matu", either

collectively or individually acting for and on behalf of the Petitioner, having their address at Jalan Jenderal Sudirman Kav.25 South Jakarta 12920, hereinafter referred to as ----- **Petitioner I;**

(1) **Henry Yosodiningrat, S.H.**, occupation: Advocate, having his address at Jalan Margasatwa Raya Number 888 HY, Pondok Labu, South Jakarta;  
**(2) Budiman Sudjatmiko, M.Sc., M.Phil.**, occupation: Management of the Central Executive Board of the Indonesian Democratic Party of Struggle (*DPP PDI Perjuangan*), having his address in Jalan Percetakan Negara VI/17 RT.008 RW.003 Rawasari, Cempaka Putih, Central Jakarta; **(3) Ahmad Taufik**, occupation: Journalist, having his address in Jalan Kebon Pala I Number 79B, RT.004/RW.013, Kebon Melati Sub-District, Tanah Abang, Central Jakarta; by virtue of special powers of attorney respectively dated May 1, 2007, May 29, 2007, and May 30, 2007, granting power of attorney to: Nur Ismanto, S.H., M.Si; Zairin Harahap, S.H., M.Si Ahmad Khairun H, S.H., M.Hum; Ari Yusuf Amir, S.H., M.H ; Sugito, S.H, all of them being Advocates/Legal Consultants having their legal domicile at the Centre for Human Rights Studies of the Indonesian Islamic University (*PUSHAM-UII*), with its address at Jalan Jeruklegi RT.13/RW.35 Gang Bakung Number 517A Banguntapan, Bantul, Special Region of Yogyakarta, in this matter acting individually and jointly, hereinafter referred to as ----- **Petitioner II;**

**[1.3]** Having read the petition of Petitioner I and Petitioner II;

Having heard the statements of Petitioner I and Petitioner II;

Having heard and read the written statement of the Government;

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

Having heard and read the written statements of Petitioner I and  
Petitioner II;

Having read the conclusion of the Petitioner I and Petitioner II;

Having examined the evidence presented by Petitioner I and  
Petitioner II;

**[1.4]** Whereas because the substance of Petition Number 14/PUU-V/2007 filed by Petitioner I and Petition Number 17/PUU-V/2007 filed by Petitioner II is the same, the Consultative Meeting of Justices dated December 3, 2007 decided to merge the decision of the two petitions in one decision document, as set forth in the Stipulation of the Chief Justice of the Constitutional Court dated December 3, 2007, which stipulation has been notified to the parties.

### **3. LEGAL CONSIDERATIONS**

**[3.1]** Considering whereas, as described in the Facts of the Case part of this Decision, the purpose and objective of the *a quo* petition are as follows:

- Petitioner I has petitioned for judicial review of Article 58 Sub-Article f of Law Number 32 Year 2004 concerning the 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, hereinafter referred to as the Regional Government Law) against the 1945 Constitution of the State of the Republic of Indonesia, hereinafter referred to as the 1945 Constitution;

- Petitioner II has petitioned for judicial review of Article 6 Sub-Article t Law Number 23 Year 2003 concerning the General Election of President and Vice President (State Gazette of the Republic of Indonesia Year 2003 Number 93, Supplement to the State Gazette of the Republic of Indonesia Number 4311, hereinafter referred to as the Presidential Election Law), Article 16 Paragraph (1) Sub-Paragraph d of Law Number 24 Year 2003 concerning 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), Article 7 Paragraph (2) Sub-Paragraph d of Law Number 5 Year 2004 concerning the Amendment to Law Number 14 Year 1985 concerning the Supreme Court (State Gazette of the Republic of Indonesia Year 2004 Number 9, Supplement to the State Gazette of the Republic of Indonesia Number 4359, hereinafter referred to as the Supreme Court Law), Article 58 Sub-Article f of Law Number 32 Year 2004 concerning the 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, hereinafter referred to as the

Regional Government Law), Article 13 Sub-Article g of Law Number 15 Year 2006 concerning the State Audit Board (State Gazette of the Republic of Indonesia Year 2006 Number 85, Supplement to the State Gazette of the Republic of Indonesia Number 4654, hereinafter referred to as State Audit Board Law) against the 1945 Constitution;

**[3.2]** Considering whereas prior to considering the Principal Issue of the Petition, the Constitutional Court (hereinafter referred to as the Court) shall first take the following matters into account.

1. Whether the Court has the authority to examine, hear and decide upon the *a quo* petition;
2. Whether the Petitioners have the legal standing to file the *a quo* petition to the Constitutional Court;

In respect of the foregoing two issues, 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 and Article 10 Paragraph (1) Sub-Paragraph a of Law Number 24 Year 2003 concerning the Constitutional Court (hereinafter referred to as the Constitutional Court Law), the Court has the

authority, among others, to hear at the first and final level, the decision of which shall be final, to conduct judicial review of laws against the Constitution;

**[3.4]** Considering whereas, as described in paragraph [3.1] above, the *a quo* petition is a petition for judicial review against the 1945 Constitution, so that the Court has the authority to examine, hear, and decide upon the *a quo* petition;

### **LEGAL STANDING OF THE PETITIONERS**

**[3.5]** Considering, based on Article 51 Paragraph (1) of the Constitutional Court Law, a person or a party to get recognition of his/her legal standing as Petitioner before the Court in a petition for judicial review against the 1945 Constitution shall be a person or party who deems that his/her constitutional rights and/or authorities are impaired by the coming into effect of a law, namely:

- a. individual Indonesian citizens;
- b. units of customary law communities insofar as they are still in existence and in accordance with the development of the community and the principle of the Unitary State of the Republic of Indonesia as provided for in law;
- c. public or private legal entities; or
- d. state institutions.

Therefore in order for a person or a party to qualify as a Petitioner in a petition for a judicial review against the 1945 Constitution, pursuant to the provision of Article 51 Paragraph (1) of the Constitutional Court Law, that party must explain:

- a. the person's/party's qualification in the petition, whether as an individual Indonesian citizen, a unit of customary law community, a public or private legal entity, or a state institution;
- b. the impairment of the party's constitutional rights and/or authorities due to the coming into effect of the law petitioned for judicial review;

**[3.6]** Considering, as it has become the Court's opinion up to now, for the existence of impairment of constitutional rights and/or authorities to be established, the following requirements must be met:

- a. the Petitioner must have constitutional rights granted by the 1945 Constitution;
- b. the Petitioner believes that such constitutional rights have been impaired by the coming into effect of the law petitioned for review;
- c. the impairment of such constitutional rights and/or authorities shall be specific and actual in nature or at least potential in nature which, pursuant to logical reasoning, will take place for sure;

- d. there is a causal relationship (*causal verband*) between the impairment of such constitutional rights and/or authorities and the law petitioned for review;
- e. If the petition is granted, it is expected that, the impairment of constitutional rights and/or authorities argued will not or does not occur any longer;

**[3.7]** Considering, based on the description of the provision of Article 51 Paragraph (1) of the Constitutional Court Law and the requirements of constitutional rights and/or authorities impairment as described above, the Court will subsequently consider the Petitioners' legal standing in accordance with the Petitioners' description in the Petition and the submitted evidence;

**[3.8]** Considering whereas in their respective petitions, Petitioner I and Petitioner II basically explain their qualifications as follows:

- **Petitioner I**

- a) Whereas Petitioner I explains his qualification as an individual Indonesian citizen and that he was once punished by imprisonment based on a final and binding court decision for committing a criminal act punishable by imprisonment of 5 (five) years or more;
- b) Whereas Petitioner I intends to run for the region deputy head but has been hindered by the requirement in Article 58 Sub-Article f of



the Regional Government Law which stipulates that in order for a person to become a candidate for region head and region deputy head, the person must fulfill the requirement of that he has never been punished by imprisonment based on a final and binding court decision for committing a criminal act punishable by imprisonment of 5 (five) years or more;

- c) Whereas based on the facts as described in paragraph b) above, Petitioner I deems that his constitutional rights as regulated in Article 27 Paragraph (1), Article 28D Paragraph (1), and Article 28I Paragraph (2) of the 1945 Constitution have been impaired;

Based on the description in paragraphs a) up to c) above, the Court is of the opinion that Petitioner I has met the qualification in Article 51 Paragraph (1) of the Constitutional Court Law and the requirement of constitutional rights impairment as has been the Court's opinion up to now. Therefore, Petitioner I has the legal standing to act as Petitioner in the judicial review of Article 58 Sub-Article f of the Regional Government Law against the 1945 Constitution;

- **Petitioner II**

- a) Whereas Petitioner II consisting of Henry Yosodiningrat, S.H., Budiman Sudjatmiko, M.Sc, M.Phil, and Ahmad Taufik, explain their qualification as Indonesian individual citizens;

- b) Whereas each of Petitioner II was once punished by imprisonment based on a final and binding court decision for committing a criminal act punishable by imprisonment of 5 (five) years or more, namely:
- Petitioner Henry Yosodiningrat, S.H. was once punished by imprisonment for omission that had caused the death of another person (Exhibit P-24);
  - Petitioner Budiman Sudjatmiko, M.Sc., M.Phil. was once punished with imprisonment on the charge of committing a criminal act of subversion (Exhibit P-25);
  - Petitioner Ahmad Taufik was once punished by imprisonment on the charge of committing a criminal act of contempt of the Government of the Republic of Indonesia (Exhibit P-26);
- c) Whereas based on the description in paragraphs a) and b) above, the existence of the requirement of *“has never been punished by imprisonment based on a final and binding court decision for committing a criminal act punishable by a maximum imprisonment of 5 (five) years or more”* as regulated in Article 58 Sub-Article f of the Regional Government Law, Article 6 Sub-Article t of the Presidential Election Law, Article 16 Paragraph (1) Sub-Paragraph d of the Constitutional Court Law, Article 7 Paragraph (2) Sub-

Paragraph d of the Supreme Court Law, and Article 13 Sub-Article g of the State Audit Board Law, then:

- Although Petitioner Henry Yosodiningrat, S.H. has fulfilled other requirements to become a candidate for a region head and region deputy head, or to become a candidate for President/Vice President, or to become a candidate for Constitutional Court Justice, or to become a candidate for Supreme Court Justice, or to become a candidate for a Member of the State Audit Board, according to logical reasoning, the concerned petitioner has a potential to suffer constitutional right impairment due to the requirement in paragraph c) above;
  
- Although Petitioner Budiman Sudjatmiko, M.Sc., M.Phil, has fulfilled other requirements to become a candidate for a region head and region deputy head, or to become a candidate for President/Vice President, or to become a candidate for Constitutional Court Justice, or to become a candidate for Supreme Court Justice, or to become a candidate for a Member of the State Audit Board, according to logical reasoning, the concerned petitioner has a potential to suffer constitutional right impairment due to the requirement in paragraph c) above;

- Although Petitioner Ahmad Taufik has fulfilled other requirements to become a candidate for a region head and region deputy head, or to become a candidate for President/Vice President, or to become a candidate for Constitutional Court Justice, or to become a candidate for Supreme Court Justice, or to become a candidate for a Member of the State Audit Board, according to logical reasoning, the concerned petitioner has a potential to suffer constitutional right impairment due to the requirement in paragraph c) above;

Based on the description of the qualification of Petitioner II in paragraphs a) up to c) above, the Court is of the opinion that:

- Petitioner Henry Yosodiningrat, S.H. has the legal standing to act as Petitioner in the judicial review of Article 58 Sub-Article f of the Regional Government Law, Article 6 Sub-Article t of the Presidential Election Law, Article 16 Paragraph (1) Sub-Paragraph d of the Constitutional Court Law, Article 7 Paragraph (2) Sub-Paragraph d of the Supreme Court Law, and Article 13 Sub-Article g of the State Audit Board Law;
- Petitioner Budiman Sudjatmiko, M.Sc., M.Phil has the legal standing to act as Petitioner in the judicial review of Article 58 Sub-

Article f of the Regional Government Law, Article 6 Sub-Article t of the Presidential Election Law, and Article 13 Sub-Article g of the State Audit Board Law;

- Petitioner Ahmad Taufik has the legal standing to act as Petitioner in the judicial review of Article 58 Sub-Article f of the Regional Government Law, Article 6 Sub-Article t of the Presidential Election Law, and Article 13 Sub-Article g of the State Audit Board Law;

### **PRINCIPAL ISSUE OF THE PETITION**

**[3.9]** Considering whereas the principal issue in the two *a quo* petition is the requirement of “*has never been punished by imprisonment based on a final and binding court decision for committing a criminal act punishable by a maximum imprisonment of 5 (five) years or more*” to become:

- Region Head and Region Deputy Head [Article 58 Sub-Article f of the Regional Government Law],
- President and Vice President [Article 6 Sub-Article t of the Presidential Election Law],
- Constitutional Court Justice [Article 16 Paragraph (1) Sub-Paragraph d of the Constitutional Court Law],
- Supreme Court Justice [Article 7 Paragraph (2) Sub-Paragraph d of the Supreme Court Law], and

- Member of the State Audit Board [Article 13 Sub-Article g of the State Audit Board Law]

The Petitioners deem the existence of such requirement contrary to:

- Article 27 Paragraph (1), Article 28D Paragraph (1), and Article 28I Paragraph (2) of the 1945 Constitution as argued by Petitioner I;
- Article 27 Paragraph (1), 28C Paragraph (2), Article 28D Paragraph (1), Article 28D Paragraph (3) and Article 28I Paragraph (5) of the 1945 Constitution as argued by Petitioner II;

**[3.12]** Considering whereas in order to support his arguments, Petitioner I has submitted written evidence (Exhibit P-1 up to Exhibit P-15) and presented an expert, namely Dr. Chairul Huda, S.H., M.H. Similarly, in addition to submitting written evidence (Exhibit P-1 up to Exhibit P-26), Petitioner II also has presented experts, namely Ifdal Kasim, S.H and Dr. Mudzakkir, S.H., M.H. The statements of the experts presented by Petitioner I as well as Petitioner II were heard respectively in the hearing on July 19, 2007 and November 1, 2007, as completely described in the Facts of the Case part of this decision, which basically explain the following matters:

Statement of the Expert presented by Petitioner I, **Dr. Chairul Huda, S.H., M.H.**

- Whereas the Regional Government Law contains a weakness, because the formulation does not reach and does not give an equal treatment to persons who have committed criminal acts. *First*, a person who has committed a

criminal act punishable by imprisonment of less than five years or other lighter kind of criminal punishment. *Second*, it does not reach a person who commits a criminal act punishable by a criminal sanction that is more severe than imprisonment, such as death sentence. This has a weakness that can cause danger because from the point of view of criminal law, they are in fact more disgraceful in the eyes of the society, but they are not reached by this regulation. According to the expert, this constitutes discrimination.

- Whereas it is of course reasonable that for an institution to show its image, requirements are needed. However, those requirements are not related to something that is still debatable. This formulation is debatable, if it is related to a person who has never committed a criminal act but has been punished by imprisonment, fine and so on. For example, Bung Karno was so often punished by criminal sanctions but then became a President, the Vice Speaker of the People's Consultative Assembly, AM Fatwa, was once punished by imprisonment. The issue is whether every person who has once been punished by imprisonment or other criminal sentences shall be deprived of their constitutional rights. With regard to this matter, the existence of a requirement is indirectly related to effort in creating the image of an institution.
- Whereas *mala in se* and *mala prohibita* are needed in connection with criminal policy in determining whether an act is a criminal act or not. *Mala in*

*se* or *mala prohibita* is needed particularly in connection with various legal systems which are not based on laws and regulations related to their criminal law. In the common law system which is not based on regulations, a criminal act is determined because that act is *mala in se* or *mala prohibita*.

- In criminal law, the existence of exclusion of criminal punishment reasons outside the laws has been accepted as a general opinion. In this case, the fulfillment of an obligation arising from unwritten laws, including customary law, can serve as a justification. A justification is a reason that can remove the tortuous nature of a criminal act, which may arise if there are two conflicting legal interests where one of them has been fulfilled or that one of them has not been fulfilled because of being forced by the circumstance, or the non-compliance of criminal law norm in order to fulfill a higher norm of criminal law. The fulfillment of customary duty can be regarded as a legal interest other than compliance with criminal law norms, so that its fulfillment in general can be regarded as a justification. With regard to issue of whether “*siri*” is a customary duty or customary law, is not the expert’s capacity to answer, because the expert is not an expert in customary law.
- Whereas criminal sanction cannot describe the level of disgrace of a person who commits a criminal act, in view of the fact that the sanction shall function as the maximum limit of criminal punishment where the judge can impose criminal punishment between general minimum as the minimum



limit up to the particular maximum which is to be imposed on the concerned criminal act.

Statement of the Expert presented by Petitioner II, **Ildal Kasim, S.H**

- Whereas upon expiration of the punishment period, the limitation of the right and freedom of the person who has served the punishment shall also terminate. Therefore, the person's status as one who has served a sentence or as a convict does not prevent the person to regain or to obtain his/her human rights and freedom as guaranteed in the 1945 Constitution;
- Whereas by resuming the role as a free and responsible citizen or member of the society, the person who has served a sentence can once again use his/her political rights as any other ordinary citizen. The intended political rights among other things are (i) the right to promote themselves in striving for their rights collectively for building their society, nation, and state [Article 28C Paragraph (2) of the 1945 Constitution]; (ii) the right to fair recognition, guarantee, protection and legal certainty as well as equal treatment before the law [Article 28D Paragraph (1) of the 1945 Constitution]; and (iii) the right to obtain equal opportunities in government administration [Article 28D Paragraph (3) of the 1945 Constitution]. In addition to the political rights, the person also regains his/her legal rights as a citizen, namely "*All citizens shall have equal status before the law and government administration and shall be obligated to*

*uphold such law and government administration, without exception”*  
[Article 27 Paragraph (1) of the 1945 Constitution].

- Whereas according to the expert, the meaning of the limitation as provided for in Article 6 Sub-Article t of the Presidential Election Law, Article 16 Paragraph (1) Sub-Paragraph d of the Constitutional Court Law, Article 7 Paragraph (2) Sub-Paragraph d of the Supreme Court Law, Article 58 Sub-Article f of the Regional Government Law, Article 13 Sub-Article g of the State Audit Board Law is not in line with the meaning of the limitation as intended by Article 28J Paragraph (2) of the 1945 Constitution which reads: *” In exercising their right and freedom, every person must submit to the restrictions stipulated in laws and regulations with the sole purpose to guarantee the recognition of and the respect for other people's rights and freedom and fulfill fair demand in accordance with the considerations of morality, religious values, security, and public order in a democratic society”*;
- Whereas according to the expert, Article 6 Sub-Article t of the Presidential Election Law, Article 16 Paragraph (1) Sub-Paragraph d of the Constitutional Court Law, Article 7 Paragraph (2) Sub-Paragraph d of the Supreme Court Law, Article 58 Sub-Article f of the Regional Government Law, Article 13 Sub-Article g of the State Audit Board Law, all of which regulate one of the requirements that a person *”has never been punished by imprisonment based on a final and binding court decision for*

*committing a criminal act punishable by a maximum imprisonment of 5 (five) years or more*", is in material respect contrary to the 1945 Constitution, in particular Article 27 Paragraph (1), Article 28C Paragraph (2), Article 28D Paragraph (1), Article 28D Paragraph (3), and Article 28I Paragraph (5). Moreover this requirement applies generally without distinguishing the type of the committed criminal acts. This reason further confirms that such administrative requirement has violated the citizens' substantive rights which are guaranteed in the 1945 Constitution.

Statement of the Expert of Petitioner II **Dr. Mudzakkir, S.H., M.H**

- Whereas criminal law and criminal sanction shall apply to a person as from the person's being declared as a suspect up to being declared as a convict and up to the time when the convict has completed/finished serving his/her criminal punishment imposed by the Judge;
- Whereas according to criminal law doctrine, a person who has performed or served a criminal punishment shall become an ordinary person and recovers his/her legal rights as previously (prior to becoming a convict), except if the judge decides otherwise by imposing additional criminal punishment;
- Criminal acts punishable by imprisonment of 5 (five) years or more show that the legislators do not consider deeply the meaning of criminal sanction of imprisonment of 5 (five) years or more in criminal law. The

criminal sanction of imprisonment of 5 (five) years or more must be understood according to criminal law science, because the approach of criminal law science will ensure a comprehensive understanding;

- Whereas it is improper to measure a person's morality (whether or not he has morals) solely with the instrument of committing a criminal act and being once punished by a criminal sanction of imprisonment of 5 (five) years or more. The reason is that a person's morality is a part of the person's personality that cannot be judged based on past conduct, and that the present conduct is more important;
- Whereas the existence of the norm that provides for the requirement that a person "*has never been punished by imprisonment based on a final and binding court decision for committing a criminal act punishable by imprisonment of 5 (five) years or more*", can create legal uncertainty to every person who has been punished by imprisonment for committing a criminal act punishable by imprisonment of 5 (five) years or more and that the stipulation of a requirement which is applied to all criminal acts without distinguishing the relevance and quality of the criminal acts, and also the perpetrator's inner attitude, is clearly contrary to constitutional rights of the former convict and is not synchronous with the criminal punishment philosophy and the policy of criminal punishment imposition in criminal law;

- Whereas the stipulation of the requirement as set forth in Article 6 Sub-Article t of the Presidential Election Law, Article 16 Paragraph (1) Sub-Paragraph d of the Constitutional Court Law, Article 7 Paragraph (2) Sub-Paragraph d of the Supreme Court Law, Article 58 Sub-Article f of the Regional Government Law, Article 13 Sub-Article g of the State Audit Board Law which equalizes the sanction of five years or more for all criminal acts of whatever type and of whatever mistake can take away the constitutional rights of a person who has once been punished by imprisonment by the court who has finished serving the imprisonment, to obtain equal opportunity in government administration, guarantee, protection and legal certainty as well as equal treatment before the law;

**[3.13]** Considering whereas the Court has heard and accepted the written statements of the People's Legislative Assembly as well as of the Government, with regard to the Petition filed by Petitioner I and by Petitioner II, as completely described in the Facts of the Case part of this decision, which basically explain the following:

**Statement of the People's Legislative Assembly (DPR)**

- Whereas it is true that the 1945 Constitution has guaranteed the citizens' constitutional rights as argued by the Petitioners, but that guarantee is fundamental and universal in nature. It means that it is applicable to every person with equal status in the sense of being flawless according to the

- law (the person has never been punished by imprisonment based on a final and binding decision) so that the person's moral integrity is maintained;
- This is understandable because the application of those articles is also constitutionally restricted based on Article 28J Paragraph (2) of the 1945 Constitution which reads, *"In exercising their right and freedom, every person must submit to the restrictions stipulated in laws and regulations with the sole purpose to guarantee the recognition of and the respect for other people's rights and freedom and fulfill fair demand in accordance with the considerations of morality, religious values, security, and public order in a democratic society"*.
  - Whereas the provisions as provided for in Article 6 Sub-Article t of the Presidential Election Law, Article 16 Paragraph (1) Sub-Paragraph d of the Constitutional Court Law, Article 7 Paragraph (2) Sub-Paragraph d of the Supreme Court Law, Article 58 Sub-Article f of the Regional Government Law and Article 13 Sub-Article g of the State Audit Board Law, and other laws and regulations are the provisions on proper moral integrity standard requirements (the comprehensive morality standards of the past, present and the future while holding public office) in relation to the appointment and/or dismissal of a person from an office especially particular public offices (President, Vice President, Constitutional Court Justice, Supreme Court Justice, Member of the People's Legislative

Assembly, Judge, Member of the General Elections Commission, Member of the State Audit Board, and Member of the Judicial Commission).

- Whereas in the context of providing legal protection/guarantee of the rights or interest of the public as intended in point 3, the state is granted with constitutional authority/right [Article 28J Paragraph (2) of the 1945 Constitution) to restrict the implementation of individual rights and freedom (as intended by the Petitioners in their petition) for the sake of public's interest and right to have a leader whose moral integrity is well-maintained, which is specified/regulated/stipulated by the law, as provided for in Article 6 Sub-Article t of the Presidential Election Law, Article 16 Paragraph (1) Sub-Paragraph d of the Constitutional Court Law, Article 7 Paragraph (2) Sub-Paragraph d of the Supreme Court Law, Article 58 Sub-Article f of the Regional Government Law and Article 13 Sub-Article g of the State Audit Board Law.
- Whereas the existence of such requirement is also intended as a preventive measure for a person who intends to make himself/herself a candidate for a public office in the future to always keep his/her behaviour and acts away from disgraceful acts which can result in his/her being imposed by criminal punishment, especially in the middle of a situation where most of the Indonesian people are still holding primordial values where only good and trusted people can be followed as role models and example. The provision of having never been punished by imprisonment

for committing a criminal act punishable by a maximum imprisonment of 5 (five) years or more is also aimed at allowing public offices to be held by the people who are clean both from the personality aspect as well as their “*track record*” aspect who are required in the era of reform that has for a long time desired *good corporate governance* by the best public officials who have been elected. Therefore, let alone prospective public officials, incumbent public officials can in fact be deposed, recalled or dismissed as well if the officials concerned are punished by imprisonment based on a final and binding court decision for committing a criminal act punishable by imprisonment of 5 (five) years or more.

- Whereas in addition to that, the existence of a requirement that a person “*has never been punished by imprisonment based on a final and binding court decision for committing a criminal act punishable by a maximum imprisonment of 5 (five) years or more*” is only intended to ensure that an elected region head eventually is not a person who has a background that is not quite praiseworthy because the person has committed a criminal act for which he/she has been punished by a severe criminal sanction, namely imprisonment of 5 (five) years or more, so that his/her personal integrity is well-maintained.

#### **Statement of the Government**

- Whereas the requirement that a person has never been punished by imprisonment based on a final and binding court decision for committing a



criminal act punishable by imprisonment of 5 (five) years or more is a proper standard requirement for every person who intends to become a particular official or to serve a particular office. The *a quo* provision is solely intended to encompass good prospective leaders who have such proper integrity and moral capacity that in turn they can gain trust from the society and the environment so that integrity and stability of leadership can be realized in the future.

- Whereas a law is a form of manifestation of implementation of the mandate of the constitution (the 1945 Constitution), which among other things has mandated that one of the duties of the state is to maintain the in living as a nation (between the people and the state administrators). This is in line with the objective of the state as spelled out in the Preamble to the 1945 Constitution, namely to "*...protect the entire Indonesian nation and the entire Indonesian motherland, and in order to promote general welfare, to develop the intellectual life of the nation, and to partake in implementing world order based upon independence, eternal peace and social justice*".
- Whereas the restriction set out in the *a quo* provisions is a form of protection of public interest performed by the state.
- Whereas the state has the right to make a performance regarding particular requirements to be able to take or to fill in a particular office both a political office and public office.

- Whereas if carefully and diligently studied, almost all of the requirements to take or to fill in particular offices are solely set to get a leadership with a good and flawless track record.
- Whereas the *a quo* provision is already in line with the provision of Article 28J Paragraph (2) of the 1945 Constitution which stipulates that in exercising their right and freedom, every person must submit to the restrictions stipulated in laws and regulations with the sole purpose to guarantee the recognition of and the respect for other people's rights and freedom and fulfill fair demand in accordance with the considerations of morality, religious values, security, and public order in a democratic society.
- Whereas Article 6 Sub-Article t of the Presidential Election Law, Article 16 Paragraph (1) Sub-Paragraph d of the Constitutional Court Law, Article 7 Paragraph (2) Sub-Paragraph d of the Supreme Court Law, Article 58 Sub-Article f of the Regional Government Law, and Article 13 Sub-Article g of the State Audit Law do not impair the constitutional rights and/or authority of Petitioner I and Petitioner II and therefore they are not contrary to Article 27 Paragraph (1), Article 28C Paragraph (2), Article 28D Paragraphs (1) and (3), and Article 28I paragraph (5) of the 1945 Constitution.

## **OPINION OF THE COURT**

**[3.14]** Considering whereas after carefully studying the petition of Petitioner I and Petitioner II, presented evidence, documentary/written evidence as well as the statement of the experts, the statement of the People's Legislative Assembly, and the statement of the Government, subsequently the Court will state its opinion on the principal issue of the petition, namely the issue of constitutionality of the provisions of Article 58 Sub-Article f of the Regional Government Law, Article 6 Sub-Article t of the Presidential Election Law, Article 16 Paragraph (1) Sub-Paragraph d of the Constitutional Court Law, Article 7 Paragraph (2) Sub-Paragraph d of the Supreme Court Law, and Article 13 Sub-Article g of the State Audit Board Law. The provisions in those articles basically regulate the same matter, namely that to hold a public office (*in casu* the Region Head and the Region Deputy Head, President and Vice President, Constitutional Court Justice, Supreme Court Justice, and Member of the State Audit Board) it is required that the person *"has never been punished by imprisonment based on a final and binding court decision for committing a criminal act punishable by a maximum imprisonment of 5 (five) years or more"*.

**[3.15]** Considering whereas the arguments presented by Petitioner I and Petitioner II in arguing about the unconstitutionality of Article 58 Sub-Article f of the Regional Government Law, Article 6 Sub-Article t of the Presidential Election Law, Article 16 Paragraph (1) Sub-Paragraph d of the Constitutional Court Law, Article 7 Paragraph (2) Sub-Paragraph d of the Supreme Court Law, and Article 13 Sub-Article g of the State Audit Board Law are as follows:

- i. Whereas Petitioner I as well as Petitioner II have argued that the substance of Article 58 Sub-Article f of the Regional Government Law, Article 6 Sub-Article t of the Presidential Election Law, Article 16 Paragraph (1) Sub-Paragraph d of the Constitutional Court Law, Article 7 Paragraph (2) Sub-Paragraph d of the Supreme Court Law, Article 58 Sub-Article f of the Regional Government Law and Article 13 Sub-Article g of the State Audit Board Law are contrary to Article 27 Paragraph (1) of the 1945 Constitution which stipulates that *“All citizens shall have equal status before the law and government administration and shall be obligated to uphold such law and government administration, without exception”*.

According to Petitioner I, the provision of Article 27 Paragraph (1) of the 1945 Constitution contains the recognition, guarantee, protection and certainty of just laws in the 1945 Constitution, so that after the Petitioner had served the punishment, the Petitioner came back to be a free person having the same and equal rights and opportunities with other Indonesian citizens in law as well as in government administration, in respect of election of candidates for a region head and region deputy head. Meanwhile, Petitioner II presents an argument that the provisions in Article 58 Sub-Article f of the Regional Government Law, Article 6 Sub-Article t of the Presidential Election Law, Article 16 Paragraph (1) Sub-Paragraph d of the Constitutional Court Law, Article 7 Paragraph (2) of the Supreme

Court Law, Article 13 Sub-Article g of the State Audit Board Law have restricted Petitioner II in nominating themselves for the offices as mentioned in those articles, so that the provisions are contrary to Article 27 Paragraph (1) of the 1945 Constitution that provides a guarantee to every citizen who has equal position before the law and in government administration without discrimination.

With regard to that argument, the Court is of the opinion that every public office or every office in the government administration in a broad sense, which fulfillment is done by election or in other manner, requires the people's trust. In other words, public office is a trust-based office (*vertrouwenlijk-ambt*). Therefore, every candidate for a public official must fulfill particular requirements so that ultimately an official who is really clean, commanding, and honest and who has high moral integrity can be obtained. Such requirements, except if the 1945 Constitution itself so provides, are under authority of the legislators (the People's Legislative Assembly and the President) to determine in accordance with the need that becomes a demand for the public office concerned and also with due observance of provision of Article 28J Paragraph (2) of the 1945 Constitution.

Meanwhile, with regard to public office, the fulfillment of which is made through election by the people, the Court is of the opinion that such matter cannot be left completely to the people without any requirement

whatsoever and solely based for the reason that it is the people who would bear the risk of their choice. The reason is that such office must be held by a person of high quality and integrity. The nomination of a person to fill in a public office without discrimination as intended by Article 27 Paragraph (1) of the 1945 Constitution does not mean that the state may not regulate or stipulate the requirements, to the extent that such regulation and/or requirement is an objective demand required by an office or activity of a particular government administration and provided that the regulation and/or requirement is not discriminatory in the sense of distinguishing people based on religion, race, tribe, language, sex, political belief, and other certain social status. Thus, it must be understood that such regulation and/or requirement shall serve as a mechanism which allows the election to be implemented in a fair and trustworthy manner. The matter can be justified by Article 28J Paragraph (2) of the 1945 Constitution which reads as follows: *"In exercising their right and freedom, every person must submit to the restrictions stipulated in laws and regulations with the sole purpose to guarantee the recognition of and the respect for other people's rights and freedom and fulfill fair demand in accordance with the considerations of morality, religious values, security, and public order in a democratic society"*.

As explained above, every public office demands trust from the society, one of the criteria of which is the existence of a certain moral standard made as a requirement. It is true that according to one of the theories of

- criminal punishment, after serving his/her criminal punishment, a person shall become a free person. However, it must also be admitted that generally, the most actual criterion to judge a person's moral quality is whether or not that person has committed a criminal act as substantiated by a final and binding court decision, although it is true that not all of criminal acts can be said as disgraceful acts, as experienced by Bung Karno (the first President of the Republic of Indonesia) or A.M. Fatwa (now Vice Speaker of the People's Consultative Assembly) referred to who have been made as reference by Petitioner I, which will be considered separately in another section of this decision
- ii. Petitioner I has argued that Article 58 Sub-Article f of the Regional Government Law is contrary to Article 28 Paragraph (3) of the 1945 Constitution which stipulates that *"Every citizen shall have the right to obtain equal opportunities in government administration"* because, according to Petitioner I, the provision of Article 28 Paragraph (3) of the 1945 Constitution contains an understanding that every citizen has the right to become a region head. Therefore, it is irrelevant if an attempted murder which was caused by *siri'* issue in the Bugis-Makassar people's culture which involved self-respect, good reputation and dignity of the clan of the Petitioner, is used as a constraint to his nomination himself as a candidate for a region head and/or region deputy head.

With regard to this argument, the Court is of the opinion that as repeatedly reaffirmed in its decisions, that regulation and stipulation of requirement by a state through a law regarding the fulfillment of the citizens' right to obtain equal opportunity in government administration do not necessarily mean that such regulation and requirement are contrary to the 1945 Constitution since the regulation and/or that requirement is an objective demand required by an activity in the government administration (*vide* Decision Number 19/PUU-V/2007) which is performed within the limits justified by the provision of Article 28J Paragraph (2) of the 1945 Constitution.

In addition to that, by still respecting the culture of *siri'* which lives in the Bugis-Makassar society, using the reason to fulfill the customary duty, in this case, *siri'*, as a justification to excuse the tortuous nature of a criminal act (*straf rechtsvaardigingsgrond*), has not been recognized in the Indonesian criminal law up to now. Such a reason may become a part of the judge's consideration to lighten a criminal punishment but not to abolish the tortuous nature (*wederrechtelijkheid*) of a criminally punishable act. In other words, the existence of a cultural conflict between a customary obligation (in this case *siri'*) and the applicable accountability system of the criminal law cannot be accepted if it is generally considered as a justification outside the law (*buitenwettelijk rechtsvaardigingsgrond*). This matter must be judged and decided by a judge in a decision of a court examining and deciding upon such case *in*



*concreto*. If a conflict occurs between a customary duty and criminal law, the matter must be judged based on prevailing provisions of criminal law which are applied in a concrete case. A customary duty no longer can be made as a justification (*rechtsvaardigingsgrond*), although concretely it can be considered by the judge in evaluating the criminal responsibility to impose punishment.

- iii. Petitioner I has argued that Article 58 Sub-Article f of the Regional Government Law is contrary to Article 28I Paragraph (2) of the 1945 Constitution which stipulates that "*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*". The reason is that, according to Petitioner I, the provision of Article 28I Paragraph (2) of the 1945 Constitution contains an understanding that by the applicability of the provision of Article 58 Sub-Article f of the Regional Government Law, Petitioner I has been discriminated against and has lost equal opportunity in government administration, and also in obtaining unequal treatment before the law and in government administration.

With regard to this argument, the Court is of the opinion that the definition of discrimination which has been universally accepted as something that is prohibited in the context of human rights protection shall be "*every restriction, harassment, or excision which directly or indirectly is based on religion, tribe, race, ethnic, group, faction, social status, economic status,*

- sex, language, political belief, which results in reduction, deviation, or abolishment of recognition, implementation, or exercise of human rights and basic freedom in life individually as well as collectively in the field of politics, economy, law, social, cultural and other life aspects*". [vide Article 1 number 3 of Law Number 39 Year 1999 concerning Human Rights and Article 2 Paragraph (1) International Covenant on Civil and Political Rights]. By such definition of discrimination, the Court does not find any element of discrimination in the formulation of Article 58 Sub-Article f of the Regional Government Law as one of the requirements which applies generally to every Indonesian citizen who wants to nominate him/herself as a region head or region deputy head.
- iv. Petitioner II has argued that Article 6 Sub-Article t of the Presidential Election Law, Article 16 Paragraph (1) Sub-Paragraph d of the Constitutional Court Law, Article 7 Paragraph (2) Sub-Paragraph d of the Supreme Court Law, Article 58 Sub-Article f of the Regional Government Law, and Article 13 Sub-Article g of the State Audit Board Law are contrary to Article 28C Paragraph (2) of the 1945 Constitution which stipulates that "*Every person shall have the right to promote themselves in striving for their rights collectively for building their society, nation, and state*" because, according to Petitioner II, such provision turns off civil rights, restricts the right to political participation and the legal rights of a former convict, especially Petitioner II, to be able to strive for their right to

develop the society, nation and the state through a formal route of government administration.

With regard to this argument, the Court has stated its opinion as specified in Decision Number 15/PUU-V/2007 which basically states that the rights provided for in Article 28C Paragraph (2) of the 1945 Constitution are known to be a part of the rights to develop themselves which comprise among other things the right to the fulfillment of basic needs, the right to education, the right to obtain benefit from science and technology, arts, and culture, etc. Meanwhile, the substance of the right which is questioned by Petitioner II in this connection is the right to participate in government administration as part of civil and political rights, so that it is irrelevant to base a constitutionality review on the right to develop themselves (*vide* further Decision Number 15/PUU-V/2007).

- v. Petitioner II has argued that Article 6 Sub-Article t of the Presidential Election Law, Article 16 Paragraph (1) Sub-Paragraph d of the Constitutional Court Law, Article 7 Paragraph (2) Sub-Paragraph d of the Supreme Court Law, Article 58 Sub-Article f of the Regional Government Law, and Article 13 Sub-Article g of the State Audit Board Law are contrary to Article 28D Paragraph (1) of the 1945 Constitution which reads as follows: *“Every person shall have the right to fair recognition, guarantee, protection and legal certainty as well as equal treatment before the law”* because, according to Petitioner II, such provisions do not grant

recognition, guarantee, protection and legal certainty as well as equal treatment before the law to former convicts, including Petitioner II, who have the right to formally channel their political aspiration in government administration and the law by eliminating their civil rights and treating them with discrimination and also differently from other citizens who have never been imprisonment for committing a criminal act punishable by imprisonment of 5 (five) years or more.

With regard to this argument, the Court is of the opinion that the right to fair recognition, guarantee, protection, and legal certainty as well as equal treatment before the law in Article 28D Paragraph (1) of the 1945 Constitution is not directly connected with the opportunity to take a public office or the right to participate in government administration, but more in the context of implementing the principle of due process of democratic law in a state. As already known, in every state that claims itself a democratic rule of law state, there are three important principles adhered to, namely supremacy of law, equality before the law, and due process of law, which serve as the basic principles of the relationship between the citizens and the state and the relationships among the citizens. This means that Petitioner II's argument can only be considered for acceptance if there is a legal norm within the context of due process of law that has caused Petitioner II not to obtain fair legal certainty and be treated differently from other Indonesian citizen having the same status as Petitioner II.

- vi. Petitioner II has argued that Article 6 Sub-Article t of the Presidential Election Law, Article 16 Paragraph (1) Sub-Paragraph d of the Constitutional Court Law, Article 7 Paragraph (2) Sub-Paragraph d of the Supreme Court Law, Article 58 Sub-Article f of the Regional Government Law and Article 13 Sub-Article g of the State Audit Board Law are contrary to Article 28D Paragraph (3) of the 1945 Constitution which reads “*Every citizen shall have the right to obtain equal opportunities in government administration*” because, according to Petitioner II, such provisions are discriminatory as the form and system of recruitment and discriminate Petitioner II with other citizens by eliminating the rights of Petitioner II and not giving equal opportunity in government administration.

With regard to this argument, the Court is of the opinion that the fulfillment of the right to equal opportunity in government administration does not eliminate the authority of the state to govern and to determine the requirements, especially when such “equal opportunity in government administration” involves the fulfillment of a public office that needs public trust. As described in the consideration in paragraph i above, one of the generally accepted objective criteria to fulfill the public trust requirement involves moral credibility of the person who nominates him/herself to take the intended public office, and the most concrete criterion to evaluate the moral credibility is based on whether or not the person has once been punished by a criminal sanction based on a final and binding court decision. Therefore, it is not appropriate to deem such requirement as a

requirement that prevents the right of a citizen to obtain equal opportunity in government administration or to deem it as being discriminatory in the context as described in paragraph **iii** above.

- vii. Petitioner II has argued that Article 6 Sub-Article t of the Presidential Election Law, Article 16 Paragraph (1) Sub-Paragraph d of the Constitutional Court Law, Article 7 Paragraph (2) Sub-Paragraph d of the Supreme Court Law, Article 58 Sub-Article f of the Regional Government Law and Article 13 Sub-Article g of the State Audit Board Law are contrary to Article 28I Paragraph (5) of the 1945 Constitution which reads: "*To enforce and protect human rights in accordance with the principle of a democratic constitutional state, the exercise of human rights shall be guaranteed, stipulated and set forth in laws and regulations*" because, according to Petitioner II, such provisions are not part of a regulation that guarantees the implementation of human rights as adopted by a democratic state such as Indonesia. The reason is that in addition to being discriminatory, the articles in such laws also eliminate the civil rights of Petitioner II throughout their life which basically are part of the human rights of every citizen without exception.

With regard to this argument, the Court is of the opinion that Article 6 Sub-Article t of the Presidential Election Law, Article 16 Paragraph (1) Sub-Paragraph d of the Constitutional Court Law, Article 7 Paragraph (2) Sub-Paragraph d of the Supreme Court Law, Article 58 Sub-Article f of the

Regional Government Law and Article 13 Sub-Article g of the State Audit Board Law are not relevant to be contrasted to Article 28I Paragraph (5) of the 1945 Constitution. The reason is that Article 28I Paragraph (5) of the 1945 Constitution is a provision that contains a constitutional mandate that the enforcement and protection of human rights in a democratic rule of law state will be governed in laws and regulations. This means that Article 28I Paragraph (5) of the 1945 does not contain particular constitutional substance as a basis to review the constitutionality of a legal norm. Therefore, it is inappropriate to use Article 28I Paragraph (5) of the 1945 Constitution to evaluate the constitutionality of the requirement that a person *"has never been punished by imprisonment based on a final and binding court decision for committing a criminal act punishable by imprisonment of 5 (five) years or more"* as stipulated in Article 6 Sub-Article t of the Presidential Election Law, Article 16 Paragraph (1) Sub-Paragraph d of the Constitutional Court Law, Article 7 Paragraph (2) Sub-Paragraph d of the Supreme Court Law, Article 58 Sub-Article f of the Regional Government Law and Article 13 Sub-Article g of the State Audit Board Law.

**[3.16]** Considering whereas prior to coming to the conclusion which states the Court's opinion on the *a quo* petition, the Court deems it necessary to consider the following matters as well:

- 1) Whereas as described in the preceding considerations, every public office demands public trust. Therefore, it has been a generally accepted practice that there is a particular moral standard required from every person who takes an office in the government administration. It has also been described that, generally, one of such moral standards is that a person has never been imprisoned. However, a person may be imposed with criminal punishment not solely because the person has committed a criminal act with an element of deliberate intent (*dolus*), both in crimes and misdemeanors, but also because of negligence (*culpa*), in this case small negligence (*culpa levis*). In such negligence, there is actually no element of bad intent (*mens rea*). Therefore, a person imposed with a criminal punishment because of the person's negligence, basically is not a bad person, so that if the requirement that a person "*has never been punished by imprisonment based on a final and binding court decision for committing a criminal act punishable by a maximum imprisonment of 5 (five) years or more*", as specified in Article 6 Sub-Article t of the Presidential Election Law, Article 16 Paragraph (1) Sub-Paragraph d of the Constitutional Court Law, Article 7 Paragraph (2) Sub-Paragraph d of the Supreme Court Law, Article 58 Sub-Article f of the Regional Government Law and Article 13 Sub-Article g of the State Audit Board Law, is interpreted in such a way that it also includes criminal acts occurring because of negligence, then such interpretation is actually not fully in line with the objective of that requirement, namely to determine a



- moral standard of a general nature for a person who wants to take a public office. The reason is that a criminal punishment to a person for an act of negligence actually does not reflect a criminal morality on that person but solely because of that person's negligence, in this case a negligence that results in an act subject to criminal punishment. In other words, if the requirement that a person *"has never been punished by imprisonment based on a final and binding court decision for committing a criminal act punishable by a maximum imprisonment of 5 (five) years or more"* is determined as a moral standard for a person who wants to take a public office, then such requirement can only be accepted if the intended person is a person who has been imprisoned because he/she is proven to have committed an act deliberately although he/she knew that such act could be subject to an imprisonment sanction of five years or more.
- 2) Whereas, furthermore, if the requirement specified in Article 6 Sub-Article t of the Presidential Election Law, Article 16 Paragraph (1) Sub-Paragraph d of the Constitutional Court Law, Article 7 Paragraph (2) Sub-Paragraph d of the Supreme Court Law, Article 58 Sub-Article f of the Regional Government Law and Article 13 Sub-Article g of the State Audit Board Law is textually read, then the requirement that reads, *"has never been punished by imprisonment based on a final and binding court decision for committing a criminal act punishable by a maximum imprisonment of 5 (five) years or more"* will also cover criminal acts or crimes due to political reasons. In this regard, crimes due to political reasons shall be limited to

acts that are actually expression of political opinion or attitude (*politieke overtuiging*) guaranteed in a democratic rule of law state but which the positive prevailing laws at that time formulated as criminal acts solely because of different political opinion adhered to by the incumbent regime. Whereas, it has been a universally accepted opinion that a political crime in the meaning as described above is not a crime in a general sense of the term.

Therefore, if the formulation of Article 6 Sub-Article t of the Presidential Election Law, Article 16 Paragraph (1) Sub-Paragraph d of the Constitutional Court Law, Article 7 Paragraph (2) Sub-Paragraph d of the Supreme Court Law, Article 58 Sub-Article f of the Regional Government Law and Article 13 Sub-Article g of the State Audit Board Law is interpreted in such a way that it includes political crimes in the abovementioned meaning as well, then such formulation clearly contains a discriminatory element in the definition as it has become the Court's opinion to date. If that is the case, then it means that such provision has created discriminatory treatment based on political opinion adhered to by a person, something which is contrary to the 1945 Constitution. (*vide* Decision Number 011-017/PUU-I/2003)

- 3) Whereas, therefore, Article 6 Sub-Article t of the Presidential Election Law, Article 16 Paragraph (1) Sub-Paragraph d of the Constitutional Court Law, Article 7 Paragraph (2) Sub-Paragraph d of the Supreme Court Law,

Article 58 Sub-Article f of the Regional Government Law and Article 13 Sub-Article g of the State Audit Board Law can be regarded as fulfilling the objective demand for determining requirement to take a public office and hence it is constitutional **only if**:

- a. The formulation in Article 6 Sub-Article t of the Presidential Election Law, Article 16 Paragraph (1) Sub-Paragraph d of the Constitutional Court Law, Article 7 Paragraph (2) Sub-Paragraph d of the Supreme Court Law, Article 58 Sub-Article f of the Regional Government Law and Article 13 Sub-Article g of the State Audit Board Law does not include criminal acts that result from small negligence (*culpa levis*), although the criminal sanction is 5 (five) years or more;
  - b. The formulation in Article 6 Sub-Article t of the Presidential Election Law, Article 16 Paragraph (1) Sub-Paragraph d of the Constitutional Court Law, Article 7 Paragraph (2) Sub-Paragraph d of the Supreme Court Law, Article 58 Sub-Article f of the Regional Government Law and Article 13 Sub-Article g of the State Audit Board Law does not include political crimes [in the sense as described in consideration number 2) above].
- 4) Whereas, however, the difficulties faced in connection with the consideration in number 3) above is, on one hand, that the requirement as specified in Article 6 Sub-Article t of the Presidential Election Law, Article

16 Paragraph (1) Sub-Paragraph d of the Constitutional Court Law, Article 7 Paragraph (2) Sub-Paragraph d of the Supreme Court Law, Article 58 Sub-Article f of the Regional Government Law and Article 13 Sub-Article g of the State Audit Board Law is an objective demand necessary to fulfill a public office provided that it is interpreted in such a way that it does not to include the two matters intended in paragraphs a) and b) of the consideration in number 3) above, while on the other hand, the Court is bound by the provision of Article 56 of the Constitutional Court Law that stipulates 3 (three) possible verdicts only, namely “the petition is declared unacceptable” (namely if the Petitioner or the petition does not meet the qualification), “the petition is declared granted” (namely if the petition is grounded), or “the petition is declared rejected” (namely if the petition is groundless). Whereas by holding the considerations in numbers 1) through 3) above, the *a quo* case cannot be categorized in one of the three possible verdicts. Therefore, the only way is to declare in the Legal Consideration of this decision that Article 6 Sub-Article t of the Presidential Election Law, Article 16 Paragraph (1) Sub-Paragraph d of the Constitutional Court Law, Article 7 Paragraph (2) Sub-Paragraph d of the Supreme Court Law, Article 58 Sub-Article f of the Regional Government Law and Article 13 Sub-Article g of the State Audit Board Law are “conditionally constitutional”. The intended requirements are as described in paragraphs a and b of the consideration number 3) above. In other

words, it is more appropriate to resolve the issue as expected by the *a quo* Petitioner through legislative review process by the legislators.

- 5) Whereas in connection with the considerations in numbers 1) through 4) above, the Court is of the opinion that it is important for the legislators to pay attention seriously to the harmony of a law both internally as well as externally, and also horizontally with various laws that contain the requirements of particular public offices. In this regard, in view of the special character in particular public offices, not every public offices' requirements can just be determined by using general norm formulation. Therefore, it is necessary to distinguish the requirements between:
- a. Elected officials and appointed officials.
  - b. Public offices in field of executive of service nature and public offices in the field of legislative having the nature of channeling the people's aspiration.
  - c. Public offices that due to their duties require a very high level of trust, such as judges and other law enforcement institutions as well as officials who manage the state finance and other offices.
- 6) The careful formulation of specific requirements for a public office is also needed to prevent a situation where different requirements are determined with regard to public offices that basically have the same characteristic. Such situation can create lack of legal protection (*rechtsonbescherming*)

to a particular faction or group of people that in turn will create legal uncertainty (*rechtsonzekerheid*) that can impair the constitutional right of such faction or group of people.

#### 4. CONCLUSION

Based on the whole description above, the Court has come to the following conclusion:

**[4.1]** Whereas it is evident that the provision requiring that a person “*has never been punished by imprisonment based on a final and binding court decision for committing a criminal act punishable by a maximum imprisonment of 5 (five) years or more*”, as provided for in Article 6 Sub-Article t of the Presidential Election Law, Article 16 Paragraph (1) Sub-Paragraph d of the Constitutional Court Law, Article 7 Paragraph (2) Sub-Paragraph d of the Supreme Court Law, Article 58 Sub-Article f of the Regional Government Law and Article 13 Sub-Article g of the State Audit Board Law is not contrary to the 1945 Constitution insofar as such provision is not to be interpreted in such a way that it includes criminal acts resulting from small negligence (*culpa levis*) and criminal acts due to particular political reasons and also by considering particular offices’ characteristics that require different requirements as described above;

**[4.2]** Whereas Article 6 Sub-Article t of the Presidential Election Law, Article 16 Paragraph (1) Sub-Paragraph d of the Constitutional Court Law, Article 7 Paragraph (2) Sub-Paragraph d of the Supreme Court Law, Article 58 Sub-

Article f of the Regional Government Law and Article 13 Sub-Article g of the State Audit Board Law are not contrary to the 1945 Constitution and therefore the *a quo* petition is not sufficiently grounded and hence it must be declared rejected;

## 5. VERDICT

In view of Article 56 Paragraph (5) of Law Number 24 Year 2003 concerning the Constitutional Court (State Gazette of the Republic of Indonesia Year 2003 Number 98, Supplement to the State Gazette of Indonesia Number 4316);

### Passing the Decision:

**To declare that the petition of Petitioner I and Petitioner II is rejected;**

Hence the decision was made in the Consultative Meeting attended by nine Constitutional Court Justices on Friday, December 7, 2007 and was pronounced in the Plenary Session of the Constitutional Court open for public on this day, Tuesday, December 11, 2007 by us, Jimly Asshiddiqie as the Chairperson and concurrent Member, Soedarsono, Maruarar Siahaan, H.A.S. Natabaya, I Dewa Gede Palguna, H.M. Laica Marzuki, H. Achmad Roestandi, H. Harjono and H.A. Mukthie Fadjar, respectively as Members, assisted by Eddy Purwanto and Ida Ria Tambunan as Substitute Registrar and in the presence of the Petitioner/their attorneys-in-fact, the Government or its representative, the People's Legislative Assembly or its representative.

**CHIEF JUSTICE,**

**sgd.**

**Jimly Asshiddiqie**

**JUSTICES,**

**sgd.**

**Soedarsono**

**sgd.**

**Maruarar Siahaan**

**sgd.**

**H.A.S Natabaya**

**sgd.**

**I Dewa Gede Palguna**

**sgd.**

**H.M. Laica Marzuki**

**sgd.**

**H. Achmad Roestandi**

**sgd.**

**H. Harjono**

**sgd.**

**H. Abdul Mukthie Fadjar**

## **6. DISSENTING OPINION**

With regard to the above mentioned Court decision, one Constitutional Court Justice has a dissenting opinion, namely: **Constitutional Court Justice Abdul Mukthie Fadjar**, as follows:

1. The principal issue of the Petitioner's petition Number 14/PUU-V/2007 is a constitutionality review of Article 58 Sub-Article f of Law Number 32 Year



- 2004 concerning the Regional Government (the Regional Government Law) requiring that a candidate of a region head and/or a region deputy head “*has never been punished by imprisonment based on a final and binding court decision for committing a criminal act punishable by a maximum imprisonment of 5 (five) years or more*”, because it is deemed contrary to Article 27 Paragraph (1), Article 28D Paragraph (3), and Article 28I Paragraph (2) of the 1945 Constitution.
2. Whereas at a glance, the provision of Article 58 Sub-Article f of the Regional Government Law does not seem contrary to the 1945 Constitution, because according to Article 28J Paragraph (2) the human rights that have become the Petitioner’s constitutional rights can be restricted by laws and regulations “*with the sole purpose to guarantee the recognition of and the respect for other people’s rights and freedom and fulfill fair demand in accordance with the considerations of morality, religious values, security, and public order in a democratic society.*” Based on the arguments of the Government and the People’s Legislative Assembly, as well as the considerations of the Court, moral considerations for the sake of credibility of a region head and/or a region deputy head are highly prioritized.
  3. However, in my opinion such moral considerations and “for the sake of credibility” are still hypothetical, and will in fact create legal uncertainty and unfairness that resulting from inconsistency of the legislators in

formulating similar clause as requirement to take public office in this country, then “what seems to be constitutional” in fact becomes unconstitutional. The inconsistency of the legislators can be concluded from the formulation in some of the following laws and regulations:

- a. The formulation that a person “*has never been punished by imprisonment based on a final and binding court decision for committing a criminal act punishable by a maximum imprisonment of 5 (five) years or more*”, as specified in Article 6 Sub-Article t of Law Number 23 Year 2003 concerning the requirements for a candidate of the President and Vice President, Article 58 Sub-Article f of the Regional Government Law, Article 23 Paragraph (2) Sub-Paragraph a of the Constitutional Court Law);
- b. The formulation that a person “*is not currently serving an imprisonment based on a final and binding court decision for committing a criminal act punishable by imprisonment of 5 (five) years or more*”, as provided for in Article 60 paragraph I of Law Number 12 Year 2003 concerning the requirements of candidate for members of the People’s Legislative Assembly, the Regional Representative Council, and the Regional People’s Legislative Assembly);
- c. The formulation that a person “*is not imposed with criminal punishment for guilty of committing crimes*” as a requirement for members of the National Commission for Human Rights as

stipulated in Article 85 Paragraph (2) Sub-Paragraph d of Law Number 39 Year 1999 concerning Human Rights;

- d. The formulation of Article 12 Sub-Article g of Law Number 21 Year 2001 concerning the Special Autonomy for the Papua Province which reads "*The person who can become a Governor or Deputy Governor shall be an Indonesian citizen with the requirements that the person a. ...; b. ...; c. ...; d. ...; e. ...; f. ...; g. has never been imprisonment for committing a criminal act, except for political reasons*";
  - e. There is no provision regarding the requirement of a person's having been punished by criminal sanction, for example, the requirement to become chairperson of Commission for Corruption Eradication (Law Number 30 Year 2002 concerning the Corruption Eradication Commission), requirement to become Member of Board of Governors of Bank Indonesia (Law Number 3 Year 2004 concerning Bank Indonesia), requirement to become Member of the Indonesian Broadcasting Commission (Law Number 30 Year 2003 concerning Broadcasting).
4. As a result of the inconsistency or perhaps the use of moral double standard, the Petitioner (Muhlis Mutu) can become a member of the Regional People's Legislative Assembly of Takalar Regency, but ironically, the people's representative just cannot become a candidate of region head and/or region deputy head. Thus, does this mean that the

moral standard of a member of the People's Legislative Assembly, the Regional Representative Council, and the Regional People's Legislative Assembly is lower than the moral standard of a candidate of a region head and/or region deputy head? We do not find any rational or logical argument from the legislators concerning the use of this moral double standard, because the formal elucidation of the law reads "self explanatory". The question is whether the legislators in fact expect the morality and credibility of the members of the People's Legislative Assembly, the Regional Representative Council and the Regional People's Legislative Assembly to be less than those of the President and/or the Vice President and the region head and/or the region deputy head.

5. The inconsistency and the use of the moral double standard will create unfairness and legal uncertainty, namely that the law containing such substance is contrary to the constitution [*vide* Article 28D Paragraph (1) of the 1945 Constitution].
6. Moreover, the issue of the right of election, including in election of region head, revocation of the right of election, both the active right of election (the right to elect) and passive right of election (the right to be elected), is subject to a universal principle, namely that the revocation of the right of election must be carried out by a court based on a decision that has a final and binding effect (*vide* Court Decision Number 011-017/PUU-I/2003).

Please also see the provision of Article 12 Paragraph h of Law on the Special Autonomy of Papua: “*who’s right of election is not being revoked based on a final and binding court decision*”).

7. Whereas in addition to the fact that the Petitioners have never had their rights revoked by the court, basically by serving the punishment for a criminal act that the Petitioners have committed, they have experienced a process of “*purgation*” and “*re-purification*”, so that it is appropriate if the Petitioners are not treated as guilty and sinful throughout their life.
8. Therefore, the Court should have granted the Petitioners’ petition, as a learning effort so that the legislators become more precise and careful, and also not ambivalent in formulating a law. Because, if not, they will perpetuate “*unfairness and legal uncertainty*”. As long as such formulation is still varied, it is advisable to have a kind of “*moratorium*” to render it inapplicable.
9. Although the focus of this dissenting opinion is addressed towards Case Number 14/PUU-V/2007, all of the arguments apply *mutatis mutandis* to Case Number 17/PUU-V/2007, particularly regarding the requirements for elected public officials (President/Vice President, Region Head/Vice Region Head, Members of the People’s Legislative Assembly/the Regional Representative Council/ the Regional People’s Legislative Assembly).

**SUBSTITUTE REGISTRARS,**

**sgd.**

**Eddy Purwanto**

**sgd.**

**Ida Ria Tambunan**