



DECISION

NUMBER 26/SKLN-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 with respect to Dispute on the Authorities of State Institutions whose Authorities are Granted by the 1945 Constitution of the State of the Republic of Indonesia, filed by:

- [1.2]
1. **The Independent Election Commission of the Southeast Aceh Regency Level**, having its address at Jalan Pahlawan Number 28A Kutacane, chaired by H. Rasitoe Desky, as **Petitioner I**;
 2. **The Regional People's Legislative Assembly of Southeast Aceh Regency**, having its address at Jalan Jenderal Ahmad Yani, Kutacane, Southeast Aceh, chaired by H. Umuruddin Desky, S.Sos., as **Petitioner II**;

Based on Special Power of Attorneys Number 276/SK.IX/2007 dated 24 September 2007, and Number 278/SK.IX/2007 dated 24 September 2007 authorizing Dr. (Jur) O.C. Kaligis, Dr. Andi Muhammad Asrun, S.H., M.H., Y. B. Purwaning M. Yanuar, S.H., MCL, CN., Rico Pandeirot, S.H., LL.M., Afrian Bondjol, S.H., LL.M., Narisqa, S.H., M.H., Rachmawati, S.H., M.H., Doni Sianipar, S.H., Gusti Made Kartika, S.H., Nathalie Elizabeth, S.H., M.H., Ingrid Paat, S.H., Ramadi R. Nurima, S.H., Aldila Chereta Warganda, S.H., Syafardi, S.H., all of them being advocates of the office of O.C. Kaligis & Associates, having their address at Jalan Majapahit Number 18-20, Kompleks Majapahit Permai Blok B-123, Central Jakarta, acting for and on behalf of the **Independent Election Commission of the Southeast Aceh Regency Level and the Regional People's Legislative Assembly of Southeast Aceh Regency**, with the authorizing parties electing their legal domicile at the aforementioned office of O. C. Kaligis & Associates; Hereinafter referred as **the Petitioners**;

Against:

1. **The Independent Election Commission of the Nanggroe Aceh Darussalam Province Level**, having its address at T. Nyak Arif, Banda Aceh, based on a Special Power of Attorney Number 2089/KIP/XII/2007, dated December 7, 2007, authorizing M. Jafar, SH., M.Hum., (Head of the Independent Election Commission of the Nanggroe Aceh Darussalam Province Level), Zainal Abidin, SH., Msi (Member of the Independent Election Commission of the

Nanggroe Aceh Darussalam Province Level), Miftah M, SH., (Head of the Legal Sub-Section of the Independent Election Commission of the Nanggroe Aceh Darussalam Province Level), and Zaini Djalil, SH (Advocate). Hereinafter referred as **Respondent I**;

2. **Governor of Nanggroe Aceh Darussalam Province**, having his address at T. Nyak Arif Number 219, Banda Aceh, based on a Special Power of Attorney Number 09/KUASA/2007 dated 5 November 2007, authorizing H, Husni Bahri TOB, SH., MM., M.Hum., (Nanggroe Aceh Darussalam Regional Secretary), Zainun Irawan, SH., M.Hum., (Head of the Legal Aid and Documentation Section of the Law and Public Relations Bureau of the Nanggroe Aceh Darussalam Province Region Secretariat), Sabaruddin (Head of the Legal Dispute Sub-Section of the Law and Public Relations Bureau of the Nanggroe Aceh Darussalam Province Region Secretariat), Sulaiman, SH., M.Hum (Head of the Traditional Law Development Sub-Section of the Law and Public Relations Bureau of the Nanggroe Aceh Darussalam Province Region Secretariat), Zaini Djalil ,SH, (Advocate). Hereinafter referred as **Respondent II**;
3. **President of the Republic of Indonesia c.q. Minister of Home Affairs of the Republic of Indonesia**, with his address at the State Secretary Office on Jalan Veteran Number 16, Jakarta; Hereinafter referred as **Respondent III**;

[1.3] Having read the petition of the Petitioners;

Having heard the statement of the Petitioners;

Having heard and read the written statement of Respondent I;

Having heard and read the written statement of Respondent II;

Having read the written statement of Respondent III;

Having heard and read the written statement of the Directly Related Party namely the Regent and Vice Regent of the Southeast Aceh Regency;

Having examined the evidence presented by the Petitioners, Respondent I, and Respondent II;

Having read the written concluding opinions of the Petitioners, Respondent I, Respondent II, and the Directly Related Parties namely the Regent and Vice Regent of Southeast Aceh Regency;

3. LEGAL CONSIDERATIONS

[3.1] Considering whereas the purpose and objective of the *a quo* petition are as described above;

[3.2] Considering whereas there are three legal issues to be considered by the Constitutional Court (hereinafter referred as the Court) in this case, namely

the issue of the Court's authority, the issue of legal standing of the Petitioners, and the principal issue of the Petition;

Authority of the Court and Legal Standing of the Petitioners

[3.3] Considering whereas in their Petition, the Petitioners argue about the following matters:

- a. Whereas a dispute on the authorities of state institutions has occurred between Petitioner I, the Independent Election Commission (KIP) of Southeast Aceh Regency, Petitioner II, the Regional People's Legislative Assembly of Southeast Aceh Regency (DPRK), against Respondent I, the Independent Election Commission (KIP) of the Nanggroe Aceh Darussalam (NAD) Province Level, Respondent II, the Governor of NAD Province, Respondent III, the President of the Republic of Indonesia *c.q.* the Minister of Home Affairs of the Republic of Indonesia. The Petitioners argue that the disputing parties are state institutions whose authorities are granted by the 1945 Constitution. The dispute of authority has occurred because the authority of Petitioner I to hold Regional Head Elections in the territory of Southeast Aceh Regency while it has commenced the Plenary Meeting for vote count of the 2006 Regional Head Elections (Pilkada) namely the election of the Regent/Vice Regent of Southeast Aceh Regency, has been disrupted as a result of continuous demonstrations leading to anarchic acts, staged by the supporters of one of the

- candidates, causing the delayed vote count of the Southeast Aceh Regency KIP plenary meeting process;
- b. Whereas after the NAD Province KIP (Petitioner I) intervened by requesting the NAD Regional Police Chief (Kapolda) to order the cessation of the vote count of the Southeast Aceh Regent/Vice Regent Election, and then Head of Sub-Regional Police (Kapolres) District 108 of Southeast Aceh Regency suggested that the recapitulation process be held in Banda Aceh, and then the NAD Province KIP (Respondent I) issued a Minutes of the Recapitulated Vote Count Results of the Southeast Aceh Regent/Vice Regent Election, stipulating Ir. Hasanuddin B., M.M. and Drs. H. Syamsul Bahri as the elected Regent/Vice Regent candidates of Southeast Aceh Regency. The stipulation was rejected by Petitioner II because Petitioner I had stipulated in the Minutes of the Recapitulated Vote Court Results of the Southeast Aceh Regent/Vice Regent Election that the winners were H. Armen Desky and H.M. Salim Fakhry, who had been approved and proposed by Petitioner II to Respondent III through Respondent II to be appointed as Southeast Aceh Regent/Vice Regent;
- c. Whereas without the proposal from Petitioner II, the Southeast Aceh DPRK, Respondent II, the Governor of NAD province, sent a letter to the Minister of Home Affairs (Respondent III) to stipulate Ir. H Burhanuddin B., M.M. and Drs. H. Syamsul Bahri respectively as Regent and Vice Regent

of Southeast Aceh Regency, despite the fact that such proposal was the authority of the Southeast Aceh DPRK.

[3.4] Considering whereas the Petitioners argue about the occurrence of the dispute of authority between Petitioner I and Respondent I, because the party having the authority to stipulate and issue the Minutes of the Recapitulated Vote Court Results of the Southeast Aceh Regent/Vice Regent Election should have be Petitioner I, but that such authority had been taken over by Respondent I, and the proposal for the appointment and stipulation of the elected Regent/Vice Regent as the Southeast Aceh Regent/Vice Regent, which was supposed to be the authority of Petitioner II, had been taken over by Respondent II. Therefore the Approval of the Appointment of the Southeast Aceh Region Heads in the name of Ir. Hasanuddin B., M.M. and Drs. H. Syamsul Bahri, respectively as Southeast Aceh Regency Regent/Vice Regent has been illegitimate

[3.5] Considering whereas the authority of the Court and the legal standing of the Petitioners are interconnected, then in a *prima facie* manner, the Court has not been in position to establish the authority as well as the legal standing of the Petitioners based on the arguments set forth by the Petitioners. Therefore, both the authority of the Court and the legal standing of the Petitioners will be considered together with the principal issue of the Petition;

Principal Issue of the Petition

[3.6] Considering whereas to the arguments of the petition, the Respondents have given their response, as completely set out in the Facts of the Case part, each of them principally stating the following:

[3.6.1] Respondent I, Nanggroe Aceh Darussalam Province Level Independent Election Commission, explains:

- Whereas in the process of filing a petition of Dispute on the Authorities of state Institutions whose Authorities are granted by the 1945 Constitution, several requirements have to be met, *firstly*, the Petitioner must be a state institution; *secondly*, the said state institution must be named and contained in the 1945 Constitution; *thirdly*, the said state institution must have an authority; *fourthly*, the said authority must be derived from or granted by the 1945 Constitution; *fifthly*, the Petitioner must have a direct interest in the authority granted by the 1945 Constitution;
- Whereas Article 2 Paragraph (1) of Constitutional Court Regulation Number 08/PMK/2006 regarding Guidelines on the Proceedings in Disputes on Constitutional Authorities of State Institutions reads, ““State institutions which can be Petitioners or Respondents in cases of disputes of constitutional authorities of state institutions, are:
 - a. The People’s Legislative Assembly (DPR);
 - b. The Regional Representatives Council (DPD);
 - c. The People’s Consultative Assembly (MPR);

- d. The President;
 - e. The State Audit Agency (BPK);
 - f. The Regional Government (Pemda); or
 - g. Other state institutions whose authorities are granted by the 1945 Constitution;
- Whereas based on such conditions and reasons, the Independent election Commissions (Petitioner I and Respondent I) are not state institutions whose authorities are granted by the 1945 constitution. Both the name and authority of the Independent Election Committee are not stated in the 1945 Constitution. Article 22E Paragraph (5) of the 1945 Constitution only provides that, “General elections shall be organized by a national, permanent and independent commission for general elections.” The KIP is neither national nor permanent, and is only *ad hoc* in nature.” Article 11 Paragraph (7) of Nanggroe Aceh Darussalam Province Qanun Number 3 Year 2005 regarding the Amendment to Nanggroe Aceh Darussalam Province Qanun reads, “ *Regency/Municipal Independent Election Commission shall be established at the latest 6 (six) months prior to the commencement of voting began and shall end 3 (three) months after the inauguration of the Regent/Vice Regent and Mayor/Vice Mayor in the relevant area*”. The provincial Independent Election Commission (KIP) shall also end 3 (three) months after the inauguration of all Regents/Vice Regents and Mayors/Vice Mayors in the Nanggroe Aceh Darussalam Province;

- Whereas the KIP in existence when Law Number 11 Year 2006 regarding Aceh Government was enacted and which organized the Regional Head Election in NAD Province was the one established based on Law Number 18 Year 2001 regarding Special Autonomy for the Aceh Special Region Province as the Nanggroe Aceh Darussalam Province and NAD Province Qanun Number 2 Year 2004 as amended with NAD Province Qanun Number 3 Year 2005;
- The Regional People's Legislative Assembly of the Southeast Aceh Regency as Petitioner II is not a state institution whose authority is granted by the 1945 Constitution either, but rather its authority has been granted through Law Number 18 Year 2001 regarding Special Autonomy for the Aceh Special Region Province as the Nanggroe Aceh Darussalam Province, Law Number 32 Year 2004 regarding Regional Government, Law Number 11 Year 2006 regarding Aceh Government and other legislations;
- Based on NAD Province KIP Decision Number 10 Year 2007 dated May 11, 2007, the head and member of the Southeast Aceh Regency KIP have been dismissed , so that it is very irrational for Petitioner I to act on behalf of the Southeast Aceh Regency KIP, but that the legality of its establishment and actions are based on KPU Decision Number 381 Year 2003 regarding the Appointment of Southeast Aceh Regency KPU Members;

- Whereas the elections of Governor/Vice Governor, Regents/Vice Regents, and Mayors/Vice Mayors in NAD Province as regulated in Law Number 18 Year 2001, Law Number 32 Year 2004, and Law Number 11 Year 2006, do not fall under the category of general elections, and therefore the Constitutional Court does not have the authority to settle disputes over Pilkada results;
- Whereas KIP has the obligation to timely implement all stages of the Pilkada and must use their legal authority, and within 14 days after the vote it shall count the votes and send the vote count results based the minutes report to the Regency/Municipal DPRD. That obligation was not carried out, instead the Petitioner cancelled the voting of the Southeast Aceh Regent/Vice Regent Election dated 11 December 2006 for the reason of violations in the Pilkada stages, and carried out a repeat voting, which is not recognized in Pilkada;
- Whereas due to the findings of violations committed by Petitioner I, NAD Province KIP established an Ethics Council which later punished the Southeast Aceh KIP for violations of the ethics and rules of procedures, after which NAD Province KIP took over all duties and obligations of the Southeast Aceh KIP to complete all delayed stages of the Pilkada, and Respondent I recapitulated the vote count results of the Southeast Aceh Regency Election based on the official vote count recapitulation results from the District Election Committee, and stipulated that the candidate pair

of Ir. H. Hasanuddin B., MM., and Drs H. Syamsul Bahri acquired the majority vote;

- Whereas based on the arguments above, the *subjectum litis* and *objectum litis* requirements have not been met therefore the Court has no authority to examine, hear, and decide on the Petition and therefore the *a quo* petition must be declared unacceptable, or to refuse the petition of Petitioner I because Respondent I has the authority to recapitulate the vote count results of the Southeast Aceh Regent/Vice Regent Election.

[3.6.2] Respondent II, the Governor of Nanggroe Aceh Darussalam Province.

- The Petitioners and the Respondents are not state institutions whose authorities are granted by the 1945 Constitution of the State of the Republic of Indonesia;
- Whereas the matter of authority to propose for the approval of the appointment of Region Heads, whether for provincial regions or reGENCY/municipal regions is part of the substance or mandate of the legislations regulating the Regional Government and Regional Legislation/Qanun, as stipulated in Law Number 11 Year 2006 regarding the Aceh Government and Qanun Number 2 Year 2004 regarding Governor/Vice Governor, Regent/Vice Regent, and Mayor/Vice Mayor Elections in NAD Province;

- Whereas based on Article 24C Paragraph (1) of the 1945 Constitution and Article 61 of Law Number 24 Year 2003, the Constitutional Court only has the authority to adjudicate disputes on the authorities of state institutions whose authorities are granted by the 1945 Constitution, and therefore the Petitioner's Petition cannot be accepted;
- In relation to the principal issue of the petition:
 - Respondent II did not take over the authority of Petitioner II, because there has been a violation of the authority of Pilkada implementation by Petitioner I and Petitioner II, so that the normal procedures stipulated in the qanun and legislation could not be implemented, which forced Respondent I and Respondent II to continue with the delayed Pilkada stages;
 - Pursuant to NAD Province Qanun Number 2 Year 2004, the District Election Committee (PPK) shall conduct the vote count, while the authority of Petitioner I shall be to recapitulate the results of the vote count done by the PPK.

[3.6.3] Respondent III, the Minister of Home Affairs of the Republic of Indonesia.

- Whereas the Petitioners have no interest regarding the authority in dispute because the Petitioners are acting on behalf of state institutions, namely

- the Southeast Aceh Regency Level Independent Election Commission and the Regional People's Legislative Assembly of Southeast Aceh Regency, despite the fact that there are several requirements to be met, *firstly*, the Petitioner must be a state institution; *secondly*, the said state institution must be named and contained in the 1945 Constitution; *thirdly*, the said state institution must have an authority; *fourthly*, the said authority must be derived from or granted by the 1945 Constitution; *fifthly*, the Petitioner must have a direct interest in the authority granted by the 1945 Constitution;
- Whereas the Regional People's Legislative Assembly of the Southeast Aceh Regency, is not a state institution whose authority is granted by 1945 Constitution, but through Law Number 32 Year 2004 regarding Regional Government, and Government Regulation Number 6 Year 2005 regarding the Election, Approval, Appointment, and Dismissal of Region Heads and Vice Regional Heads;
 - The authority in dispute is concerned with the authority of Respondent III in inaugurating and ratifying the proposal of elected Regent/Vice Regent pair from Petitioner II through Respondent II, where the said proposal has been in accordance with the vote count recapitulation by Respondent I. Respondent III as a state institution has done the right thing in appointing and ratifying the Southeast Aceh Regent and Vice Regent in accordance with the laws;

- Whereas the taking over of Petitioner I's authority by Respondent I has been in accordance with the applicable regulations, because Petitioner was unable to carry out its duties and functions as the organizer of the Southeast Aceh Regional Head Election. The Southeast Aceh Regency Level Independent Election Commission is not explicitly stipulated in the 1945 Constitution, therefore, constitutionally the proposal for approval of the Southeast Aceh Regent and Vice Regent for the term of office of 2007-2012 has been in accordance with the laws.

[3.6.4] Related Party, the Approved/Inaugurated Regent

- Whereas based on the Decision of the Minister of Home Affairs Number 131.11-347 Year 2007, the Related Party had been inaugurated and had carried out their duties as Regent and Vice Regent of the Southeast Aceh Regency, and therefore they have a legal interest to defend the Respondents' decision in the *a quo* case;
- Whereas the Southeast Aceh Regency Independent Election Commission was established by Respondent I with the Decision of the Nanggroe Aceh Darussalam Province Independent Election Commission Number 15 Year 2005 dated July 16, 2005, and therefore the Petitioners' argument which based Petitioner I's authority on General Election Commission Decision Number 381 Year 2003 regarding the Appointment of the Southeast Aceh Regency General Election Commission Members is wrong and mistaken,

because in the *a quo* case the Petitioner is acting for and on behalf of Southeast the Aceh Regency General Election Commission, while in fact the Decision appointing the members of the Southeast Aceh Regency General Election Commission cannot be used as the basis therefor;

- Whereas Petitioner I, the Southeast Aceh KIP, did not carry out its duty to execute the Recapitulation of Vote Court Results of the Regency Level Southeast Aceh Regent/Vice-Regent Election and stipulate and declare the Elected Regent/Vice Regent, but rather, it collaborated with Petitioner II, the Regional People's Legislative Assembly of the Southeast Aceh Regency, to try sabotage the accomplished Pilkada by issuing Decision Number 270/488/XII/2006 dated December 22, 2006 which was subsequently revised with Decision Number 270/494/XII/2006 with the purpose of conducting a repeat Pilkada;
- Whereas the aforementioned repeat Pilkada planned by the Petitioners was not approved by the Minister of Home Affairs as stated in his letter Number 131.11/427/SJ dated 26 February 2007 to the Governor of Nanggroe Aceh Darussalam Province, which affirmed that, there would be no repeat Pilkada, and that KIP had the obligation to promptly carry out the Pilkada stages, and for the DPRK and Southeast Aceh KIP not to violate the provisions of the legislations.

[3.7] Considering whereas in order to support their petition, the Petitioners have presented written evidence marked as Exhibits P1 through P17, and

Evidence Attachments 1 through 44, and experts and witnesses, who have given their statements as completely set out in the Facts of the Case part, which in essence are as follows:

[3.7.1] Expert of the Petitioners, Prof. Dr. M. Ryaas Rasyid.

- Whereas the issue of whether DPRD is a state institution or not, is still being debated today, but if we refer to constitution, then Article 18 of the 1945 Constitution states that DPRD is a part of the Regional Government and a legislative institution with its own authority, even though its authority is not stated in the constitution, as it is further elaborated in the Regional Government Law;
- Whereas the expert has learned in this case, that the principal issue is the Provincial KIP Decision to dismiss all the members of the Regency KIP and to take over all of the responsibilities to count votes and the authority to announce Pilkada results to the Provincial level. The question is whether the KIP has the authority to take over; it might have replaced all the members, and let the Regency KIP recount based on laws and qanun; if the reference is Law Number 22 Year 2007, it can be referred to one level upwards to be resolved, but what happened was not a vote dispute;
- Whereas the Respondent itself explicitly states that the Provincial KIP and Regency KIP are not KPUs, while Law Number 22 Year 2007 refers to the Provincial KPI **as** KPU. Therefore, such logic is hard to accept. The

Proposing process aside from the stipulation of the final recap should have been announced by the regency KIP with new members if there is proof that the dismissal is required, and the Provincial KPU has no clear authority to announce the recap results, let alone to stipulate the elected candidate and recommend him to the Governor. According to Law Number 32 Year 2004 which is also adopted by NAD in the Qanun, it is the DPRD which shall give the recommendation to the Minister of Home Affairs;

- Whereas the expert is of the opinion that it is a bit strange for the Minister of Home Affairs to process the governor's proposal without recommendation from the DPRD. In other words, the regency autonomy has been elevated to the level of provincial authority. This matter could be a debatable focus, because there are procedures not complied with, but the Decision has been issued as if the situation was normal. The expert does not say that it is defective, but there are deviations in the procedure of issuing the decision to appoint the current Regent. The expert is of the opinion that from the Government process aspect there is something unnatural or unable to be explained by normal logic, which is why the expert is of the opinion that this falls in the category of dispute on the authorities of state institutions, while as to whether the Petitioner is really a representation of a state institution, the expert returns the matter to the judgment of the Court;

- Whereas the expert wishes to state that what the Respondents did exceeded their authority and constituted a deviation because it should not have been taken over directly, because if the Regency KIP members fulfilled the requirements to be dismissed, the normal step would be to replace them, not to take over the authority as if the Regency KIP was virtually non-existent.

[3.7.2] Expert of the Petitioners, Ferry Mursyidan Baldan.

- Whereas according to the expert, the principle being developed in the Republic of Indonesia is legal certainty, including when Law Number 11 Year 2006 regarding Aceh Government was drafted. Despite the existence of special regulations, there is a *lex specialis* given not available in other legislations for the level of Aceh Province; Paragraph 4 of the General Elucidation of Law Number 11 Year 2006 is the evidence of legal certainty, therefore when the process which is also called a dispute today occurred, it appears as though the expert has been presented in relation to a vote result dispute, while the expert has been presented not in that position;
- Whereas the expert only explains that the KIP or KPU does not have any authority whatsoever under Law Number 22 Year 2007 to take over. Law Number 32 Year 2004, Law Number 11 Year 2006 and Law Number 22 Year 2007 affirm that each level has full authority on their respective areas of work. When an election process is carried out from the voting station

- (TPS) to the District Election Committee (PPK) and PPK continues it to the KPU, then there should be institutional regulations so that the process must be done through a plenary meeting, and the plenary meeting shall be the highest decision making agency;
- Whereas the spirit built in Law Number 32 Year 2004 is a clear picture that the whole general election dispute process has an immediate resolution. When in the vote count process there is a challenge or objection it is immediately corrected if proven true, and in the vote count process, each party's witnesses has the authority to raise objections, and there are no grounds whatsoever for matters in the nature of vote count, to be taken over;
 - Whereas Law Number 11 Year 2006 strengthens the KIP to prevent it from being shaken, because if so, the reality is that KIP can be dissolved and we can establish a KPU as the implementer of the law, but considering the delayed Pilkada due to the current situation, the KIP is left as it is. There is no single thing that affirms how such specialty has given KIP a special treatment, but that it is equal with Regency/Municipal KPUs and Provincial KPUs in other regions in terms of authority and vote count obligations; Whereas Pilkada regulations are specially made to perpetuate peace through a political integration process by the existence of independent candidates;

- Whereas it must be proven and protected together that the specialty given shall not be used arbitrarily, and the expert states that the taking over of authority has no legal basis and is incompatible with the spirit created in reconstructing the existing democracy, and that is not a reflection of what it was when Law Number 11 Year 2006 was drafted. Even the conflict resolution in this matter is not a resolution in an election context, but when the implementation of such specialty causes a contradiction of authority, because in essence special autonomy does not eliminate the basic values of autonomy in Regency/Municipal or province, but that for Aceh a separate format has been developed as a whole;
- Whereas therefore, the Aceh KIP is affirmed as a part of the KPU, it does not have to use the KPU name as a part of respect because they have been used to it. KIP membership is stipulated as having 7 members while in other provinces there are only 5 members. We must see it with such perspective, and should never create loopholes to act arbitrarily on any basis whatsoever because we have built the specialty in Aceh for peace.

[3.7.3] Expert of the Petitioners, Prof.Dr. Anna Erliyana SH., M.H.

- Whereas according to the provisions of Articles 3, 4, 5, 7C, 17, 20, 20A, 21, 22D, 24, 24A, 24B, 24C, 7B, 23E, 23G and 22E Article (5) of the 1945 Constitution, state institutions are institutions mentioned in the 1945 Constitution, having attributive authority or a division of state authority stipulated in the constitution and having no extension. However, the 1945

- Constitution only regulates fundamental matters, and with several amendment stages already made it is evident that the 1945 Constitution is very open for legal development through implied interpretation;
- Whereas the expert sees from the point of view of the State Administration Law (HAN) theory, where in the concept of HAN, such institutions are included in the group of heteronomic state institutions while the executive, in this matter the President and the Ministers who are also explicitly stated in the 1945 Constitution as the main subject of state administration law, these institutions are included in the autonomous HAN classification. Therefore, in the development of the welfare constitutional state concept, this executive domain is where most state institutions are established whether through Laws, Government Regulations in lieu of Laws, Government Regulations, or Presidential Decrees;
 - Article 22E of the 1945 Constitution does not include Pilkada in the regime of *Pemilu* (General Elections, and neither does Law Number 32 Year 2004 regarding Regional Government. However, in Law Number 22 Year 2007, the substance is treated as the same with General Elections;
 - The Southeast Aceh Regent/Vice Regent Election was held on December 11, 2006. In the concept of HAN there is one principle which must be held by the judge, namely the *ex nunc* principle, which means the judge may not use a regulation issued after the occurrence of a legal event as a tool to analyze the said event;

- The authority of KIP is not lost; members can be replaced for example with interim replacements or when the concerned members suffer from a protracted illness, or pass away. Such events do not eliminate the authority of a state institution. The authority of a state institution shall be eliminated when the institution is dissolved;
- Whereas it is unjustifiable for the Governor to a proposal which is not a proposal from the DPRD to the President *c.q.* The Minister of Home Affairs because several principles of exercising authority must be considered, *firstly*, the *rechtmatigheid* principle, namely that an action must be fair and proper, and generally does not break any laws; *secondly*, the legality principle (*wetmatigheid*), namely that each action must have a legal basis or legislation as the basis for the action, *thirdly*, the discretion principle, and *fourthly*, the good governance principles.

[3.7.4] Witness of the Petitioners, Amirinsyah.

- Whereas in the matter of recapitulation conducted by the Southeast Aceh Regency KIP at that time, as far as the Supervisory Committee (Panwas) knows and as far as the supervision conducted in Southeast Aceh Regency by the Panwas, the Southeast Aceh Regency KIP did not fully use the recapitulation issued by the PPK due to a bribery case regarding the recapitulation conducted by the PPK. This matter has been filed to the investigators but to date it seems that the case has been frozen;

- Whereas in the recapitulation issued by the Southeast Aceh Regency KIP through the plenary meeting in the Southeast Aceh Regency KIP Office, the winner was the pair of H. Armen Desky and M. Salim Fakhry, in accordance with the counts in the districts even though not considering the recapitulation issued by the PPK as a result of the said bribery case;
- Whereas as far as the witness knows, the authority of the Southeast Aceh Regency KIP was taken over by the NAD Province KIP, after the Southeast Aceh Regency KIP issued the announcement, even though afterwards the witness knew that the termination date of the Southeast Aceh Regency KIP was retroactive;
- Whereas when the Southeast Aceh Regency KIP announced the recapitulation results on 14 May 2007 and submitted the results to the Regional People's Legislative Assembly of the Southeast Aceh Regency, and the People's Legislative Assembly of the Southeast Aceh Regency immediately held a meeting and forwarded the results to the NAD Province Governor, but the witness does not know whether the Governor accepted or rejected the results;
- Whereas in relation to the temporary recapitulation as ordered by the NAD Province Supervisory Committee (Panwas), the Southeast Aceh Regency Panwas as from the beginning of the campaign stage had to report everyday to the NAD Province Panwas, therefore the report received a

temporary report, because the Panwas has no authority to announce temporary recapitulation reports except for reporting purposes to the province, and that is the reason why it is called a temporary report.

[3.7.5] Witness of the Petitioners, M. Yusri Rangkuti.

- Whereas as far as the observation and supervision of the Southeast Aceh Regency Panwas as the Pilkada supervisory institution working in synergy with the Southeast Aceh Regency KIP, the Southeast Aceh Regent/Vice Regent Election had actually been conducted in line with regulations;
- Whereas the Southeast Aceh KIP as the organizer had received extraordinary pressure from various parties in its effort to complete the Pilkada stages in a timely manner and as a partner institution, the Southeast Aceh Election Supervisory Committee (Panwaslih) continuously gave constructive advices to find the best solution;
- Whereas it is true that the Southeast Aceh KIP issued Decision Letter Number 489 Year 2006 dated 25 December 2006, and not Decision Letter Number 488 Year 2006 regarding the plan to conduct repeat voting with improvements in several stages, and not a repeat Pilkada as many parties usually stated. The said Decision Letter was issued after hearing the aspirations of various segments of the Southeast Aceh community during the open plenary meeting of the Southeast Aceh DPRK;

- Whereas as an independent and impartial Pilkada supervisory institution, the Southeast Aceh Regency Panwaslih also recommended a repeat voting after analyzing the actual situation, which could result in a horizontal conflict if not handled wisely. It is regrettable that the NAD KIP and Panwas has no responsibility and wisdom and it even seemingly ignores the situation in Southeast Aceh which is increasingly out of control, compared to the superfluous pressure from the NAD KIP by sending a message to the Aceh Kapolda when the case was related to the political interests of candidate Hasanuddin B.;
- Whereas as far as the Panwas' supervision, the act of the Southeast Aceh Regency KIP in relation to the opening of several ballot boxes in several TPS has been in line with procedure, and it is not true that there was a repeat vote count as alleged by various parties, except to test objections from the witnesses; on the contrary, according to the witness' observation, it was the NAD KIP delegation who had involved itself in the candidates' conflict of interest, by walking out from the vote count plenary meeting before it finished without any clear reason, and it is the NAD KIP which had delayed the Southeast Aceh Regency Election stages by conducting superfluous intervention therefore reducing the authority of the Southeast Aceh Regency KIP as an organizer;
- Whereas the witness objects to the attendance of a Southeast Aceh Regency Panwaslih member in the Vote count Recapitulation Plenary

Meeting held by the NAD Province KIP, because the attendance of the said person was not approved through a Panwas plenary meeting and the Southeast Aceh Regency Panwaslih Head assignment letter, and therefore such attendance is considered illegal;

- Whereas the witness is of the opinion that the taking over of the Southeast Aceh Regency KIP duties and authority reflected a wrong procedure and a disorganized administration system in NAD Province KIP because the Termination Decision was dated May 11, 2007, and even if it was justified by law, it was delivered through facsimile only on 15 May 2007, and delivered to the Southeast Aceh DPRK Secretariat and not to the concerned party. It seemed that the Decision was made hastily upon being informed that the Southeast Aceh Election stages were completed on May 14, 2007. To anticipate this, it was designed as if the letter had existed since May 11, 2007. This assessment is given because the Southeast Aceh Regency Panwaslih never received a copy of the said Termination Decision;

[3.7.6] Witness of the Petitioners, Usman.

- Whereas on December 16, 2006 at 10.30 when the witness was working on the field, he received an SMS from Saidi Amran, the former Babul Rahmah PPK Head, asking the witness to attend a meeting at the Southeast Aceh Regency KIP office, but the witness did not found Saidi Amran there;

- Whereas the witness then asked about his whereabouts, and the witness explains that at the time Saidi Amran was in Café Mandala, and when the witness went there several PPK Heads were already present;
- Whereas Ahmat Irwansyah, PPK Head, Babul Makmur opened the discussion by stating the intention and the purpose of the meeting which was to make a recapitulation as a guideline for each District in the Southeast Aceh Regency, and he said that a safe place for creating the recapitulation was in Lawe Dua Village, in the house of Sahidan Pinem. But once they got there, one of the PPK Heads said that the place was not safe enough, and Ahmad Irwansyah then offered Hotel Eka Jaya. Upon arriving in the hotel, we immediately went into the rooms, and soon after we had lunch, which was brought in by the Hasanuddin B's Success Team, and the witness saw that they were being guarded by the Hasanuddin B's Success Team. After lunch, we had a break for a while, and then Saidi Amran, Jamidin and Ahmat Irwansyah started making the recap, where at first the witness was confused, because they made the recap without being based on model C KWK form either from the TPS or the District. At that time, the witness fell asleep due to fatigue, and after they finished making the recap, they woke the witness up to type the said recap at a computer rental, and afterwards it was signed by the PPK Heads in the hotel;

- Whereas after it was completed and all of the PPK heads left the hotel, the witness asked who took care of the hotel charge; Ahmad Irwansyah said “relax, everything has been taken care of”. Afterwards the witness was brought to the house of Hasanuddin B and then they had a chat and afterwards Jamidin, the Sepadan PPK Head gave a copy of the Recap to Hasanuddin B, and he said “ if inaugurated as the Southeast Aceh Regent, then all District Heads will be replaced”;
- Whereas a moment before going home, the witness saw Hasanuddin B went inside a room and came out with money in the amount of Rp.8,000,000.- which was then given to Ahmat Irwansyah with a message to divide it with his friends. Afterwards we returned to Hotel Eka Jaya, and when we arrived, Ahmat Irwansyah divided the money so that each of us received Rp.1,000,000.
- Whereas on December 17, 2006 the witness saw that the recapitulation made in Hotel Eka Jaya had spread throughout Southeast Aceh, troubling the community and increasing the political escalation. The witness realized that as a member of the PPK he had broken the rules, because he had no authority to conduct and announce the Temporary Southeast Aceh Regent Election Recapitulation, as such duties are the duties and authority of the Southeast Aceh KIP. For that reasons, the witness reported to the Southeast Aceh Panwas that the witness had been given money in the amount of Rp.1,000,000,- by Hasanuddin B to make the said

- recapitulation, and handed over money in the amount of Rp.1,000,000,- as evidence to the Panwaslih, and the witness also filed a report to the Southeast Aceh Police, but up to the present day there has not been any further actions based on that report;
- Whereas after the witness reported the PPK Head bribery to the Southeast Aceh Regency Panwas and the Police, the witness was intimidated and hunted by the Hasanuddin B's Success Team and one day the witness was captured and asked to sign a statement that the witness never received any money from any candidate, and afterwards the witness was forced to leave Southeast Aceh because he did not want to be a victim of the atrocities committed by Hasanuddin B, who had beaten black and blue another candidate's success team. That event was reported to the Police but no actions were taken;
 - Whereas there were events experienced by PPK members in Southeast Aceh where almost all PPK members were visited by Harun Al Rasyid who acted on behalf of Pilkada observer and the said person always intimidated and scared the PPK members to prevent them from attending the invitation for vote count plenary meeting in Kutacane Stadium;
 - Whereas based on the witness' observation, the Southeast Aceh Regency KIP had tried hard to protect and carry out their duties in line with provisions thereon, and that the witness was always invited for discussions in every event they held, and even on an occasion, the

Southeast Aceh Regency KIP showed the shortcomings and weaknesses of the recapitulation made by the PPK and asked the PPK to correct them according to the provisions thereon.

[3.8] Considering whereas Respondent I has presented written evidence marked TI-1 through TI-32, and Respondent II has presented written evidence marked TII-1 through TII-31, while Respondent III has not presented any written evidence, witnesses, or experts. Respondent I and Respondent II have presented their respective experts and witnesses, who have given their statements as completely set out in the Facts of the Case, which in essence are as follows:

[3.8.1] Expert of Respondent I, Abdullah Saleh, SH.

- Whereas the witness had from the beginning participated in drafting the Special Autonomy Draft Law in Aceh which was then brought to Jakarta to be discussed in the DPR with the Government, which eventually became Law Number 18 Year 2001, and it was until the law came into effect of that law that Aceh was given the authority to conduct a direct Regional Head election;
- Whereas afterwards a Qanun was designed as a regulation for the implementation of direct Regional Head Election, stipulated in Qanun Number 2 Year 2004 further supplemented by Qanun Number 3 Year 2005;

- Whereas at that time the KPUD did not have the authority to organize Pilkada yet, and in Law Number 18 Year 2001 it is called an Independent Election Commission (KIP). When further regulations regarding Pilkada were set out in the Qanun, and matters which had not been regulated in laws and qanuns were further delegated to the authority KIP to regulate, so that the KIP established in Aceh, in addition to organizing the Pilkada, is also authorized to regulate matters stipulated in the Qanun;
- There were conflicts between the KIP and the KPUD, and a solution was tried where in the Regency/Municipal level all KPUD members were *ex-officio* KIP members, as formulated in the amendment to Qanun Number 2 Year 2004 into Qanun Number 3 Year 2005, and its nature was intended only for the interest of organizing the Pilkada, and stipulated to end three months after the inauguration of the elected Regent, so that its nature was temporary, not permanent;
- In Law Number 11 Year 2006, specifically concerning the Pilkada institution in Aceh there is a transitional article. Article 261 Paragraph (3) reads, "*Governor/Vice Governor, Regent/Vice Regent, and Mayor/Vice Mayor elections for the first time following the approval of this law shall be organized by the existing Aceh KIP and Regency/Municipal KIP*". In addition, Article 265 states that, "*The existing KIP when this law comes into effect shall continue its task until the end of its term*";

- In the process of organizing Pilkada in the Southeast Aceh Regency, and after such a long crisis period, there was only one meeting in the Aceh Governor's office. In that meeting, the Aceh KIP reported to the expert who represented the Aceh DPR on the condition in Southeast Aceh, because the Aceh DPR is supposed to supervise the KIP's work, and the KIP is responsible to the Aceh DPR; the said report stated that the Pilkada could not be completed anymore. And there were members of the Southeast Aceh Regency KIP who had broken the code of conduct, and there were those who had been brought to court for forgery of several general elections documents, and the NAD Province KIP also reported that it would terminate the Southeast Aceh Regency KIP;
- Whereas the terminated Southeast Aceh Regency KIP then held a meeting in Medan, North Sumatera and made a decision on the vote count results, while the NAD Province KIP stated that the Southeast Aceh Regency KIP had already been terminated.

[3.8.2] Expert of Respondent II, Denny Indrayana, SH., LL.M., Ph.D.

- Whereas according to the expert, there are three problems, *firstly*, whether the problem set forth in this case is a dispute on the authorities of state institutions or a Pilkada dispute; *Secondly*, whether the dispute is a dispute on the authorities of state institutions which is the *objectum litis* of the Constitutional Court, or whether the authorities of the said state

institutions were granted by the Constitution, in this matter the *subjectum litis*.

- Whereas on the first issue, the expert is in the opinion that even though formatted as a petition of dispute on the authorities of State Institutions, the real essence is a Regional Head Election dispute. The main indicator can be seen in the fact that the final result would be to conclude who has actually won the Pilkada, who actually has the right to be the Southeast Aceh Regent/Vice Regent.
- The expert is of the opinion that, the authority of the supreme Court to resolve Pilkada disputes can be interpreted based on Article 24A Paragraph (1) of the 1945 Constitution which on its final section states that the Supreme court shall have other authorities as provided by law, with its nature being different from that of the Constitutional Court which does not have such *autonomous clause authority*; However, there is a constitutional problem we all understand, namely that Pilkada should be categorized under General Elections regime. The Constitutional Court itself in one of the cases examined is of the opinion that Regional Head Elections shall belong to the regime of general elections. However the matter is merely an *ius constituendum*, meaning that in the future it is better for Pilkada disputes to be handled by the Constitutional Court. For with the current legal *ius constitutum* or *ius operatum* it cannot be resolved anywhere else except in the Supreme Court;

- Whereas even if this dispute was filed as a dispute on the authorities of state institutions, whether the said authority was granted by the 1945 Constitution, the expert is of the opinion, that this dispute of authority is not a dispute on the authority granted by the Constitution, but authority granted by a law;
- Whereas as to the issue of whether the Petitioners and the Respondents are state institutions, yes they are state institutions. For a dispute to be brought to the Constitutional Court the disputing party must not only be a state institution, but must also be considered as a constitutional organ. A Constitutional organ is a state organ whose function and existence are stipulated in the Constitution, and not all of the Petitioners and Respondents present are constitutional organs. There are three authorities considered in dispute, *firstly*, the vote count result dispute, *secondly*, the dispute on who has the authority to propose the Regent/Vice Regent, and *thirdly*, who may ratify the appointment. All the three are not included in the constitution, but they are located in the Aceh Government Law or the Regional Government Law for other provinces, and the Constitutional Court in its Decision Number 04/SKLN-IV/2006 explicitly states that disputes of authority where the said authority is granted by a law shall not be the authority of the Court. Likewise Decision in case Number 27/SKLN-IV/2006 on Poso Case, states that the matters of

Regional Head proposal and appointment are not the authority of the Court;

- Whereas the other matters which the expert wishes to point out are, *firstly*, the confusion of the election regime and the government regime. The election regime is finished upon the inauguration, which means that up to the inauguration, the KPUD shall be authorized to stipulate Region Heads, the winner of Regional Head Elections, and other matters which are parts of the election regime. But once the inauguration is done, the election regime shall no longer exist, it is replaced by the government regime, and therefore the KPUD can not ask for the termination of a Regional Head who had already been inaugurated. That is already a part of the government regime; therefore if a termination is needed, it must be done through an impeachment process. Likewise, in the existing case, the legal fact is that the Regent/Vice Regent had already been inaugurated, therefore it has entered the government regime and shall no longer be a part of the election regime;

[3.8.3] Expert of Respondent II, Mohammad Daud Yoesoef, SH., MH.

- Whereas the philosophy of the establishment of KIP is inseparable from the formulation of the Special Autonomy Law, and it is related to the Central Government's political interests at that time to accommodate the Acehese people's demands especially in the framework of conflict resolution to create just peace;

- Whereas Acehnese people do not consider the LPU independent because they represent Political Parties and has not come from the independent community. Therefore, to uphold true democracy, we wish that candidate Regional Heads are proposed not by Political Parties but that the nomination shall also be open to individuals who have the capabilities and the requirements;
- Whereas the Pilkada has been successfully executed in an orderly and peaceful manner in all regions or regencies/municipalities in Aceh, except in Southeast Aceh which has left some problems unsettled. The expert is of the opinion that the problems have occurred because of two reasons, *firstly*, the problem of the number of votes. *Secondly*, the problem of the termination of the Southeast Aceh Regency KIP members by the NAD Province KIP. The expert is of the opinion that the KIP is an institution that is not national in nature, but is specific for Aceh that has been granted with authority to organize Regional Head Elections. Since the KIP is not an independent national institution, it is therefore not a state institution as intended by the 1945 Constitution.
- Whereas in relation to the NAD Pilkada, the Southeast Aceh Regency KIP members are KPU members who are *ex officio* KIP members, while the termination is concerned with their function in the KIP, their status as KPUD members shall remain. As KIP members, they have made mistakes and thus they have been terminated, while as KPUD members there has

not been any assessment and it is impossible for NAD Province KIP to immediately replace them as KPUD members, because the procedures therefore are stipulated in the Qanun.

[3.8.4] Expert of Respondent II, Taqwadin, S.H., S.E., M.S.

- Whereas in 2000 when the conflict was reaching its peak, the general election was not successfully implemented, while according to the regulation effective at the time the Regional Head was elected by members of the DPRD, while in fact most DPRD Members were not the result of a good and secure general election. There were several places where the general election only had 30-40% voter turnout, there were even places where the election was not held, and therefore there was a discourse among the Acehnese community to hold a *Pilsung* (*Pemilihan Langsung* or Direct election). Such discourse was then included in Law Number 18 Year 2001, and that law was created with TAP MPR Number IV/MPR/1998 and TAP MPR Number IV/MPR/2000, both stating that in the spirit of conflict resolution, Aceh shall be granted a special autonomy, which was then affirmed by law;
- Whereas Law Number 18 Year 2001 states that Region Head election for Aceh shall be done through a direct election, and not through the DPRD Members, and individual candidates are allowed. For that purpose, an independent institution is needed and thus the KIP was established. At that time, there was no KPU yet, the KPU existed based on a subsequent

regulation, so that normatively the idea of the KIP existed earlier compared to that of the KPU based on Law Number 12 Year 2003. Thus there are different portions for the KIP and the KPU, different main duties and functions. The KIP is specifically authorized to hold the elections of Governor/Vice Governor, Regent/Vice Regent, Mayor/Vice Mayor, whereas the KPU shall have the authority to hold the elections of President/Vice President, DPR, DPD, and DPRD;

- Whereas the Governor, aside from being the Regional Head, is also in the capacity as an extension of the Central Government, and the expert is of the opinion, that it is correct that the governor forwarded the Regent/Vice Regent Appointment proposal; whereas the expert is of the opinion that the *a quo* dispute is not concerned with a dispute on the authorities of state institutions, but more with the Pilkada dispute regime.

[3.8.5] Witness of Respondent II, Ir. Harun Al Rasyid.

- Whereas the Southeast Aceh Regent and Vice Regent Pilkada was held at the same time with the Governor Pilkada and the elections in 19 other regencies/municipalities, and as the basis for his observation, the witness refers to *firstly*, Law Number 11 Year 2006, Qanun Number 7 Year 2006. *Secondly*, KIP Decisions Number 42 and Number 43, and the last is the schedule issued by the KIP;

- Whereas during the preparation and up to the voting on December 11, 2006, the witness did not see any problems, and there are no objections. The recapitulation results in the PPK were submitted to the Southeast Aceh Regency KIP in December 16, 2006, and as far as the witness knows, the Southeast Aceh Regency KIP did not carry out the next stage namely to recapitulate the PPK results, and only carried out the governor recapitulation, while the regent/vice regent election result recapitulation was not carried out;
- Whereas on March 23, 2007 the Southeast Aceh Regency KIP held a plenary meeting in Wacani Stadium, but there they did not conduct the recapitulation, but opened the ballot boxes, but their act was immediately stopped. Afterwards, they continued by holding a second plenary meeting also in the Stadium in April 2007, but this time they did not conduct the recapitulation either but opened the ballot boxes, which was then stopped by the authorities;
- Whereas due to the accumulation of those matters the NAD KIP terminated the Southeast Aceh Regency KIP on May 11, 2007, and afterwards the core team of the NAD KIP and the Panwas met in Banda Aceh to find a solution. The witness then heard that the stage would be continued at the latest until June 20, 2007, and on June 11, 2007 the NAD KIP held the recapitulation stage in *Gedung Serba Guna* attended by the Panwas, public figures, journalists, observers, the NAD KIP itself, and the

Southeast Aceh Regency Government. It was then stipulated that candidate pair Number 4, namely Ir. Hasanuddin B, M.M., and Drs. H. Syamsul Bahri won, and several days later the NAD KIP sent a letter to the Regional People's Legislative Assembly of the Southeast Aceh Regency to propose the winners;

- Whereas afterwards, the NAD KIP sent a letter to the DPRK to propose but there was no reply, and on September 1, 2007 the Governor of NAD Province on behalf of the President of the Republic of Indonesia inaugurated and had the oath of the pair of Ir Hasanuddin B, M.M., and Drs. H. Syamsul Bahri taken as Southeast Aceh Regent for the term of 2007-2012;
- During the preparation stage the witness did not see any problems, up to the voting stage on December 11, 2006. During the voting and vote count in the TPS there were no problems and there were no objections from any parties, and it then continued to the district stage, namely the recapitulation results from the TPS results set out in the NAD forum. Up to this point there were no problems. The recapitulation results in the PPK were submitted to the Southeast Aceh KIP but as far as the witness knows, the Southeast Aceh KIP did not conduct the next stage, namely not conducting the recapitulation of the results from the PPK for regent/vice regent, and only conducting the recapitulation for the governor election.

[3.8.6] Witness of Respondent II, Ahmat Irwansyah.

- Whereas after the witness was inaugurated as PPK Head in February, 2006, the witness immediately carried out his duties properly as scheduled by the Southeast Aceh Regency KIP. In essence, the Southeast Aceh Regency Pilkada had no problems up to the D-Day on December 11, 2006. The problem happened after the ballot boxes arrived in the district, namely on the second day after December 11, 2006 when the witness was preparing to invite the candidate's witnesses, a member of the Regional People's Legislative Assembly of the Southeast Aceh Regency named Intan and Babul Makmur District Head named Ahmad Rusdi to meet the witness in his office, and they disclosed that they would like the witness to negotiate to change the recapitulation or to inflate the votes in the witness' district to increase the votes for candidate pair number one namely H. Armen Desky and M. Salim Fakhry. Afterwards, at the night of December 12, 2006, Erdarina, one of the Southeast Aceh Regency KIP Members, also came to ask the witness again to change or inflate the votes for pair number 1;
- Whereas at the night of December 13, 2006 before recapitulating the votes in the district level, the witness was asked again to negotiate in the house of one of his members named Romi, in Lawiperbunga. In the resulting negotiation, the said member asked for one million (rupiahs) for each vote, but Mrs. Intan, a Southeast Aceh Regency DPR Member, also

one of the members of the victory team for candidate number one, namely H. Armen Desky and M. Salim Fakhry could only afford 700 million for 1000 votes;

- Whereas on December 13, 2006 the witness held the District level vote count attended by the 4 candidates' witnesses, the District Panwas, public figures, and the community. After finishing the vote count the process then continued with the recapitulation in the district level, where the Police guarded the witness' ballot boxes. Afterwards at dusk on December 13, 2006, the ballot boxes and the recapitulation minutes were sent to the Southeast Aceh Regency KIP with a clear delivery and receipt with no alterations whatsoever;
- Whereas at night on December 13, 2006, the witness and 3 other PPK Heads were visited and picked up by Mrs. Erdarina and Mr. Dedi Mulyadi, Southeast Aceh Regency KIP Members, to negotiate on changing the recapitulation results, but on that matter the witness refused to change the said recapitulation. However, to neutralize the situation so that nothing untoward would happen, the witness and the other 3 PPK Heads said "okay". But after returning to the inn, the witness and the other 3 PPK Heads thought that if changes were made then we would destroy our nation. That thought was then told to Usman, the Lawei Alas PPK Head (Petitioners' witness);

- Whereas the 9 PPK Heads never made any changes in the recapitulation; what they did was making a statement of the Heads of the PPK and such act was voluntary; to the effect that the recapitulation results were in accordance with the results from each PPK Head and from seeing the observation board in the KIP regarding the votes which had been announced.

[3.8.7] Witness of Respondent II, Saidi Amran.

- Whereas as the PPK Head he had finished all the stages as tasked by the Southeast Aceh Regency KIP, up to December 11, 2006 or the voting date, the situation was still safe, all ballot boxes and other documents from the TPS to the district where the witness served as the PPK Head were transferred smoothly;
- Whereas afterwards on December 12, 2006, a plenary meeting to count the recapitulation results the of votes from each district attended by all of the candidates who had authorized the witness, and the Panwaslih members, the District Panwas member, and several public figures, there were no objection notes or responses from all of the candidate's witnesses at that time. After the recapitulation was finished, escorted by several officers from the Babul Rahmah Police Sector, the witness delivered the boxes directly to the Southeast Aceh Regency KIP along with other documents and handed over all of the logistics to the Southeast Aceh Regency KIP with a receipt;

- Whereas like witness Ahmat Irwansyah, the witness was also found by Mrs. Erdarina and Mr. Dedi Mulyadi, a Southeast Aceh Regency KIP Member, to negotiate on changing the recapitulation, but the witness refused it;
- Whereas the recapitulation made and typed by witness Usman was a copy of the recapitulation already forwarded to the Southeast Aceh Regency KIP, in view of the clandestine meeting asking us to change the said recapitulation.

[3.8.8] Witness of Respondent II, Andi Railan Bangko MD.,S.T.

- Whereas the governor/vice governor, regent/vice regent elections were done at the same time, and during the elections there were no disturbances and everything went smoothly, safely, and in an orderly manner as signified by the all the TPS vote count results being with the witness, and there were no objections from the candidate witnesses and all gave their signature in every TPS;
- Whereas after the vote count recapitulation results from the TPS were with the witness, the witness then conducted the recapitulation with four members of the witness, which finished on December 12, 2006 and with no objections from the witnesses, and afterwards the recapitulation was made in five copies given, *firstly*, to the Southeast Aceh Regency KIP. *Secondly*, to the witnesses. *Thirdly*, to the District Panwaslih, *Fourthly*,

prepared for the Provincial KIP that would forward it to the Regency KIP, and the fifth would be for archive;

- Whereas on December 12, 2006 in the Darul Hasanah District after finishing the recapitulation, the ballot boxes and all of the Pilkada voting instruments, were handed over by the witness to the Southeast Aceh Regency KIP Secretariat. Afterwards from December 19, to December 20, 2006, was scheduled for the recapitulation of vote counts. The witness was then invited to recapitulate the vote counts in the governor level, and the recapitulation finished on the very day, December 20, 2006. After the recapitulation, we were told by a Southeast Aceh Regency KIP Member not to go home right away, to attend a plenary meeting to prepare the Southeast Aceh Regency level recapitulation the next day; it turned out that after finishing the governor level recapitulation, the said meeting was not to prepare the Regency level recapitulation, but the Southeast Aceh Regency KIP Head and Members asked us to sign a recommendation for a repeat Pilkada, and at that night, the witness saw that the letter already existed, but the writer was not the witness, and because the witness felt that the meeting was wrong, the witness immediately left that plenary meeting;
- Whereas afterwards on December 22, 2006 the Southeast Aceh Regency KIP issued three controversial letters; one of them was Decision Number 70/488/XII/2006 with one of its points stating, “based on the plenary

meeting for a repeat vote count based on the results of the PPK recommendation plenary meeting”, while we never held any such plenary recapitulation for the repeat vote count in the TPS. In all of the 28 TPS within the witness’ territory, everything went fine, smoothly, and in an orderly manner. On December 23, 2006 the witness and six other PPK Heads issued a denial statement to the effect that they had never held such a PPK Plenary meeting;

- Whereas on December 23 to 25, 2006, the witness was invited to attend the vote count plenary meeting in the Stadium which was dismissed by the Police, because the Southeast Aceh Regency KIP was considered violating the law or regulations by opening the ballot boxes and repeating the count. The witness received an invitation again for April 2 to 7, 2007, but it turned out that the ballot boxes were opened again and it was then stopped by the Police;
- Whereas based on the violations by the Southeast Aceh Regency KIP, then on May 11, 2007 the Southeast Aceh Regency KIP was terminated by the NAD Province KIP, and afterwards the witness received the Southeast Aceh Regency KIP Decision, which issued a vote count recapitulation that gave the victory to a candidate, and the witness saw that the recapitulation he made had been altered and that the witness did not know who had altered it;

[3.8.9] Witness of Respondent I, Rahmat Fadil SP.

- Whereas the witness is a member of the NAD Province Panwas, and at the onset of the problem in Southeast Aceh, the witness watched and observed for ten days after the voting in all Southeast Aceh TPS, and the Southeast Aceh KIP did not finish the process, which means they did not count the votes in the Regency level. That was the first violation by the Southeast Aceh Regency KIP which had failed to accomplish its duties, because if security was the reason, there should be a statement by the Police, which at that time we did not receive.
- Whereas according to the witness there is no reason to stop the vote count in the regency level, even the President himself cannot stop it. As a result, the process became protracted for months; therefore the NAD Province KIP coordinated with several parties including the Regional Executive Conference (Muspida) and also asked the Panwas. In the middle of the attempt to find a solution, the Southeast Aceh KIP suddenly declared the repeat voting statement, while as far as the witness knows according to regulations, that cannot be justified, because it is not the authority of Regency KIP in this case the Southeast Aceh KIP to do so;
- Because this was a violation, the NAD Province Panwas then sent a letter to the NAD Province KIP, and the NAD Province KIP then demanded the establishment of an Ethics Council, and the Ethics council coordinated with the KIP, Muspida, and Panwas, to find a solution. Meanwhile, demonstrations occurred there. While a solution had not been met, on

May 11, 2007 the NAD Province KIP terminated the Southeast Aceh Regency KIP and afterwards the NAD Province KIP continued the delayed stage. Whereas NAD Province KIP Decision Number 11 Year 2007 regarding the Implementation of Regent/Vice Regent Election Stage stipulates that if the Organizer of Regent/Vice Regent Election stage cannot continue its duties, it can be continued by the organizer of the level above it. Such decision by the NAD Province KIP can be justified according to the Qanun.

- Whereas after being terminated in May 11, 2007, we heard that the Southeast Aceh Regency KIP would unilaterally announce their the results, while to count or conduct recapitulation in the regency/municipal level there are procedures stipulated by the witness and by the KIP Decision, among other things, to create new stage schedule, and then to invite the witnesses, and so on;
- Whereas afterwards, the NAD Province KIP as far as the witness knows, continued the delayed stage, and then pursuant to procedures, the NAD created a new schedule which was sent to the Panwas, and then on June 11, 2007, the Pilkada results were stipulated by the NAD Province KIP, and when attending that forum we also invited the Panwas from the Southeast Aceh Regency. The recapitulation by the NAD Province KIP was attended by witnesses and the press, and after the stipulation, the

NAD Province KIP gave the chance to file objections, but we did not receive any objections afterwards.

Opinion of the Court

[3.9] Considering whereas pursuant to Article 24C Paragraph (1) of the 1945 Constitution, the Court is authorized to pass decisions on the first and final level, among others, to pass decision on disputes on the authorities of state institutions whose authorities are granted by the 1945 Constitution, therefore in respect of the *a quo* Petition, the following issues what must be considered first:

- (i) Whether the dispute between the parties is a dispute on the authorities granted by the 1945 Constitution (*objectum litis*), and
- (ii) Whether the Petitioners are state institutions whose authorities are granted by the 1945 Constitution.

[3.10] Considering Whereas in passing the decision regarding disputes on the authorities of state institutions in the *a quo* Petition, the Court shall be guided by the considerations of the Court in Case Number 04/SKLN-IV/2006 which states, among other things, as follows, “...whereas the phrase “state institutions” in Article 24C Paragraph (1) of the 1945 Constitution must be closely related to and must not be separated from the phrase “whose authorities are granted by the Constitution”. With the formulation of clause “state institutions whose authorities are granted by the Constitution”, there is an implicit recognition that there are “state institutions whose authorities are not granted by the Constitution”. Therefore, the definition of state institutions must be understood as a general

genus that can distinguish "state institutions whose authorities are granted by the Constitution" from "state institutions whose authorities are not granted by the Constitution.

[3.11] Considering whereas the foregoing consideration and Constitutional Court Regulation Number 08/PMK/2006 regarding Guidelines on the Proceedings in Disputes on Constitutional Authorities of State Institutions whose Authorities are Granted by the 1945 Constitution state that State institutions which can be Petitioner or Respondent in cases of disputes of constitutional authorities of state institutions, are:

- (a) The People's Legislative Assembly [DPR],
- (b) The Regional Representatives Council [DPD],
- (c) The People's Consultative Assembly [MPR],
- (d) The President,
- (e) The State Audit Agency (BPK),
- (f) The Regional Government [Pemda] and
- (g) Other state institutions whose authorities are granted by the 1945 Constitution;

Meanwhile, the Independent Election Commission (KIP), both the Southeast Aceh Regency KIP and the NAD Province KIP, based on Law Number 11 Year 2006 *juncto* Qanun Number 2 Year 2004 as amended by Qanun Number 3 Year 2005 and Qanun Number 7 Year 2006 "shall be granted authority by the law to organize general elections of President/Vice President, the People's

Legislative Assembly Members, DPRA/DPRK Members, and elections of Governor/Vice Governor, Regent/Vice Regent, and Mayor/Vice Mayor". Therefore, it can be determined that both the NAD Province KIP and the Southeast Aceh Regency KIP, are not state institutions as intended by Article 24C Paragraph (1) of the 1945 Constitution, Article 61 Paragraph (1) Law Number 24 Year 2003 regarding the Constitutional Court (hereinafter referred as the Constitutional Court Law), and Article 2 Paragraph (1) of Constitutional Court Regulation Number 08/PMK/2006;

[3.12] Considering whereas the establishment of the NAD Province KIP and the Southeast Aceh Regency KIP is related to conflict resolution in the Aceh Province. Based on TAP MPR Number IV/MPR/1999 and TAP MPR Number IV/MPR/2000, in the spirit of conflict resolution, Aceh is stipulated as a special autonomy region, as further affirmed by Law Number 18 Year 2001 which grants authority to hold Regional Head direct elections, the implementation of which has been delegated to the KIP. Meanwhile, as part of the national General Elections implementation, based on Law Number 12 Year 2003 the provincial/regency/municipal KPU have been established. Then with Law Number 32 Year 2004 regarding Regional Government, the provincial/regency/municipal KPU shall be stipulated as the Regional General Elections commission (KPUD) that has the duty to organize Regional Head Elections (Pilkada). To avoid dualism, all KPUD members in the regency/municipal level shall become *ex officio* as KIP members. That matter is stipulated in Article 226 Paragraph (3) Sub-Paragraph e of Law Number 32 Year

2004 which reads, “Independent Election Commission members from the element of the General Elections Commission of the Republic of Indonesia shall be filled by the Head and members of the Nanggroe Aceh Darussalam Province Regional General Elections Commission”. This regulation is further elaborated in Qanun Number 2 Year 2004, as emended by Qanun Number 3 Year 2005 and Qanun Number 7 Year 2006.

With respect thereto, Article 261 Paragraph (3) of Law Number 11 Year 2006 regarding Aceh Government stipulates that “*Governor/Vice Governor, Regent/Vice Regent, and Mayor/Vice Mayor elections for the first time following the approval of this law shall be organized by the existing Aceh KIP and Regency/Municipal KIP*”. While Article 265 reads, “*The KIP existing when this law comes into effect shall continue its task until the end of its term* “. Therefore, the authority of KIP shall be given by Law Number 11 Year 2006 regarding Aceh Government, and therefore the provincial/regency/municipal KIP is not a state institution whose authority is granted by the 1945 Constitution and not a national and permanent institution either, as it is exists only in NAD Province. Meanwhile, pursuant to Article 265 Law Number 11 Year 2006 *juncto* Article 11 Paragraph (7) of NAD Province Qanun Number 3 Year 2005, the term of the KIP existing when Law Number 11 Year 2006 was approved would end three months following the inauguration of the Regent/Vice Regent;

[3.13] Considering whereas apart from the disagreement or dispute in relation to the legality of the elected candidate’s stipulation or the appointment

proposal of the said elected candidates by the Minister of Home Affairs on behalf of the President of the Republic of Indonesia, such *ad hoc* state institution is not a state institution intended by Article 24C Paragraph (1) of the 1945 Constitution, Article 61 of the Constitutional Court Law, and PMK Number 08/PMK/2006. It is true that Article 22E of the 1945 Constitution reads that general elections shall be organized by a national, permanent, and independent general elections commissions, and therefore the provincial/regency/municipal KPU shall be part of the KPU, but the existence of KIP when Law Number 11 Year 2006 was approved, was only related to the duty to organize provincial/regency/municipal Regional Head elections in NAD, which in carrying out its duty the membership shall consist of all provincial/regency/municipal KPU members added with two public figures;

[3.14] Considering whereas with such considerations and reasons it can be stipulated that the authority of KIP to organize Regional Head Elections with all available stages, from the election planning, participant registration, voting, vote count, and stipulation the vote count results, is not the *objectum litis* under the jurisdiction of the Court. Even if without any reason and legal grounds, the NAD Province KIP took over the stages of election implementation as the Southeast Aceh Regency KIP could not do that or because the Head and members of the Southeast Aceh Regency KIP were terminated, such dispute of authority would not fall under the authority of the Court;

[3.15] Considering whereas at that time, the Southeast Aceh DPRK together with the Region Head as the Regional Government has the authority to regulate and implement Governance issues in exercising the autonomy in the broadest sense of the term, therefore having the authority to stipulate Regional Regulations and other regulations in exercising such autonomy. The issue is whether with this fact the Southeast Aceh DPRK shall become a state institution intended as the *subjectum litis* of dispute of authority before the Court. To address the issue, the Court refers to Decision Number 027/SKLN-IV/2006 which reads, "...the authority to propose for the appointment of the head of region for regencies shall be the substance the regulation of which is delegated to the law by the 1945 Constitution." The 1945 Constitution only provides guidance and affirmation to legislators that in formulating laws which regulate the regional government, the legislators must focus their attention on the following matters:

- i. Whereas the provincial, regency, and municipal governments shall regulate and administer their own governmental affairs in accordance with the principle of autonomy and duty of assistance [Article 18 Paragraph (2)];
- ii. Whereas the regional governments shall exercise autonomy to the broadest possible extent, with the exception of governmental affairs determined by law as affairs of the Central Government [Article 18 Paragraph (5)]
- iii. Whereas Governors, Regents and Mayors as the respective heads of provincial, regency, and municipal governments shall be elected democratically [Article 18 Paragraph (4)];

- iv. Whereas in order to exercise autonomy and conduct duty of assistance, the regional government has the right to make regional regulations and other regulations
- v. Whereas meanwhile, the phrase "in law" in Article 18 Paragraph (7) of the 1945 Constitution shall refer to the law regulating the regional government as intended by the provision in Paragraph (1) of Article 18 of the 1945 Constitution.

Therefore, judging from both the *objectum litis* and *subjectum litis*, the dispute of authority filed by Petitioner II is not a dispute on the authorities of state institutions as intended by Article 24C Paragraph (1) of the 1945 Constitution *juncto* Article 10 Paragraph (1) Sub-Paragraph b of the Constitutional Court Law;

[3.16] Considering whereas the principal issue in a dispute on the authorities of state institutions is a matter of authority, where there must be a close relationship between the essence of the disputed authority and the state institution which exercises that authority, namely whether the authority granted by the 1945 Constitution to the said state institution has been taken over, obstructed, or reduced by the actions, decisions, or policies of another state institution in the course of exercising their authority which is also claimed to have been granted by the 1945 Constitution. However, it is clear to the Court that both Petitioner II and Respondent II have respectively relied on the authority granted by Law Number 32 Year 2004 regarding Regional Government and Law Number 11 Year 2006, Therefore the disputed authority being the *objectum litis* between

Petitioner II, Respondent II and Respondent III in the *a quo* case, is not an authority regulated and granted by the 1945 Constitution to each party, and therefore not a dispute of authority which became the duty of the court to examine, hear, and decide;

[3.17] Considering whereas for the aforementioned reasons, in considering whether the Petitioner has the legal standing to file a petition and whether the *a quo* Petition shall fall under the authority of the Court to examine, both matters are inseparable. By using the standards and criteria described above, Petitioners I and II do not meet the legal standing requirements and the also the dispute of authority being petitioned is not the authority of the Court;

[3.18] Considering whereas, by examining the matters disclosed during the hearing and apart from the unfulfilled *subjectum litis* and *objectum litis* requirements in the *a quo* petition, but in view of the large amount of cases on Pilkada-related disputes in various regions which are very potential to be misunderstood as disputes on the authorities of state institutions and submitted to the Court, the Court considers that it is important for all concerned parties to have the wisdom and to act quickly and responsively on all reports of violations in the implementation of Pilkada, whether administrative or criminal in nature, so that the people will not lose faith in the exercise of democracy and the government which would cause a disruption to the development agenda for the interest of the people.

4. CONCLUSION

Based on the whole description above, the Court concludes that:

- Both from the *objectum litis* and *subjectum litis* requirements, the Petitioners' petition is not within the scope of authority of the Court to examine, hear, and decide.
- The Petitioners do not have the legal standing to file the *a quo* petition.
- The Petitioners' Petition does not meet the requirements stipulated by Article 61 of the Constitutional Court Law, thus the petition must be declared unacceptable.

5. RULINGS

In view of Article 64 Paragraph (1) of the Law of the Republic of Indonesia 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);

Passing the Decision:

To declare that the petition of the Petitioners cannot be accepted (*niet ontvankelijk verklaard*).

Hence the Decision was passed in the Consultative Meeting attended by 9 (nine) Constitutional Court Justices on Thursday, 6 March 2008, and was pronounced in the Plenary Meeting open for public on this day, Tuesday, March 11, 2008, by the eight of us as Constitutional Court Justices, namely, Jimly

Asshiddiqie as Chairperson and concurrent Member, Maruarar Siahaan, H. Abdul Mukthie Fadjar, Soedarsono, H.M. Laica Marzuki, H. Achmad Roestandi, H. Harjono, and I Dewa Gede Palguna, respectively as Members assisted by Cholidin Nasir as the Substitute Registrar and attended by the Petitioners/their Attorney-in-fact, Respondent I, Respondent II, and Respondent III, and the Directly Related Party namely the Southeast Aceh Regent/Vice Regent or its representative;

CHIEF JUSTICE,

signed

Jimly Asshiddiqie

JUSTICES,

signed

Maruarar Siahaan

signed

H. Abdul Mukthie Fadjar

signed

Soedarsono

signed

H.M. Laica Marzuki

signed

H. Achmad Roestandi

signed

H. Harjono

signed

I Dewa Gede Palguna

SUBSTITUTE REGISTRAR,

signed

Cholidin Nasir