



## **DECISION**

**Number 019-020/PUU-III/2005**

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

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

Examining, hearing, and deciding upon constitutional cases at the first and final level, has passed a decision in the case of petition for judicial review of the Law of the Republic of Indonesia Number 39 Year 2004 concerning Placement and Protection of Indonesian Migrant Workers (hereinafter referred to as the PPTKI Law) against the Constitution of the Republic of Indonesia Year 1945 (hereinafter referred to as the 1945 Constitution) filed by;

**I. Petitioners in Case 019/PUU-III/2005**

- 1. Indonesian Workers Service Companies' Association (APJATI)**, based in Jakarta, with its address at Jl. Buncit Raya N0.126 Duren Tiga Mampang Prapatan, South Jakarta, in this matter represented by **HUSEIN A. ALAYDRUS**, and **Ir. H. MOH. IDRIS LAENA** in their capacity as General Chairperson and Secretary General;

2. **Asia Pacific Placement Service Association (AJASPAC)**, based in Jakarta, with its address at Balai Pustaka Timur 3<sup>rd</sup> Fl., Block EI, Rawamangun, East Jakarta, in this matter represented by **KRH.H. ANUNG SUDARTO**, and **ALI BIRHAM** in their capacity as General Chairperson and Secretary General;
  
3. **Indonesian Workers Service Entrepreneurs' Association (HIMSATAKI)**, based in Jakarta, with its address at Jl. Condet Raya No.27, East Jakarta, in this matter represented by **YUNUS YAMANI** and **RIZAL PANGGABEAN** in their capacity as General Chairperson and Secretary General ;

All of whom gave power of attorney to **Sangap Sidauruk, S.H, Harison Malau, S.H,** and **Ferry Simanjuntak,S.H,** Advocates/Legal Consultants, based on a Special Power of Attorney dated January 7, 2005, and choosing their legal domicile at Jl. Raya Jenderal Basuki Rachmat No. 21 East Jakarta 13410;

## **II. Petitioners in Case Number 020/PUU-III/2005**

Name	:	<b>SOEKITJO J.G</b>
Place and Date of Birth	:	Gorontalo, October 10, 1948
Religion	:	Islam
Occupation/title	:	General Chairperson of Indonesia Manpower Watch (IMW) Foundation
Citizenship	:	Indonesian Citizen

Address : Jln. Masjid Albarkah No. 10 RT. 007/03  
Tebet, South Jakarta 12860

Name : **DICKY R. HIDAYAT**

Place and Date of Birth : Gorontalo, December 5, 1972

Religion : Islam

Occupation/title : General Vice Chairperson of Indonesia  
Manpower Watch (IMW) Foundation

Citizenship : Indonesian Citizen

Name : **KEVIN GIOVANNI ABAY**

Place and Date of Birth : Jakarta, February 4, 1976

Religion : Islam

Occupation/title : General Secretary of Indonesia  
Manpower Watch (IMW) Foundation

Citizenship : Indonesian Citizen

Each acting on behalf of IMW Foundation and for the interest of Indonesian Migrant Workers (“TKI”) - /Indonesian Migrant Workers Service Agency (“**PJTKI**”);

Hereinafter referred to as the **Petitioners**;

Having read the petition of the Petitioners;

Having heard the statements of the Petitioners;

Having heard the statement of the Government;

Having read the written statements of the Government and the People's Legislative Assembly of the Republic of Indonesia;

Having heard the statements of Witnesses of the Petitioners;

Having heard the statements of Experts presented by the Petitioners and Experts from the Government;

Having examined the evidence;

### **LEGAL CONSIDERATIONS**

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

Considering whereas prior to entering the principal issue of the case, the Constitutional Court (hereinafter referred to as the Court) needs to first take the following matters into account:

1. Whether the Court has the authority to examine, hear, and decide upon the petition for judicial review of the on Law of the Republic of Indonesia Number 39 Year 2004 concerning Placement and Protection of Indonesian Migrant Workers (State Gazette of the Republic of Indonesia Year 2004 Number 133 and Supplement to State Gazette of the Republic of Indonesia Number 4445, hereinafter referred to as the PPTKI Law);

2. Whether the Petitioners have the legal standing to file the petition for judicial review of the PPTKI Law against the Constitution of the Republic of Indonesia Year 1945 (hereinafter referred to as the 1945 Constitution);

In respect of the foregoing two issues, the Court is of the following opinion:

1. **AUTHORITY OF THE COURT**

Considering whereas pursuant to the provision of Article 24C Paragraph (1) of the 1945 Constitution, Article 10 Paragraph (1) of Law Number 24 Year 2003 concerning the Constitutional Court (hereinafter referred to as the Constitutional Court Law), the Court shall have the authority to hear at the first and final level the decision of which shall be final, in conducting judicial review of a Law against the 1945 Constitution;

Considering whereas the Petitioners' petition pertains to judicial review of a Law, *in casu the* PPTKI Law, hence the Court is of the opinion that the review shall be under the authority of the Court, and the Court has the authority to examine, hear, and decide upon the petition of the Petitioners;

2. **LEGAL STANDING OF THE PETITIONERS**

Considering whereas pursuant to the provision of Article 51 Paragraph (1) of the Constitutional Court Law and Elucidation thereof,

Petitioners in the judicial review of a Law against the 1945 Constitution shall be parties that deem that their constitutional rights and/or authorities are impaired by the coming into effect of a Law, namely: (a) individual Indonesian Citizens (including group of people having a common interest); (b) customary law community units insofar as they are still in existence and in accordance with the development of the communities and the principles of the Unitary State of the Republic of Indonesia as regulated in Law; (c) public or private legal entities; or (d) state institutions;

Considering whereas based on the jurisprudence of the Court, the impairment of constitutional rights of the Petitioners as intended in Article 51 Paragraph (1) of the Constitutional Court Law must meet 5 (five) criteria, namely:

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

- e. If the Petition is granted it is expected that the impairment of constitutional rights of the Petitioners will not or does not occur any longer;

Considering whereas the Petitioners in the petition for judicial review of the PPTKI Law consist of 2 (two) groups of Petitioners according to the case numbers, as follows:

- A. Petitioners in Case Number 019/PUU-III/2005 are Indonesian Workers Service Companies' Association (APJATI), Asia Pacific Placement Service Association (AJASPAC), and Indonesian Workers Entrepreneurs' Association (HIMSATAKI);
- B. Petitioners in Case Number 020/PUU-III/2005 are Soekitjo J.G., Dicky R. Hidayat, and Kevin Giovanni Abay, as General Chairperson, General Vice Chairperson, and General Secretary of Indonesia Manpower Watch (IMW) Foundation, each acting on behalf of IMW Foundation and for the interest of Indonesian Migrant Workers (TKI) and Indonesian Migrant Workers Service Agencies (PJTKI);

**A. Case Number 019/PUU-III/2005**

Considering whereas in their petition the Petitioners declared themselves as public legal entities registered as social organizations in the Department of Home Affairs, while in fact, the Petitioners are associations of various legal entity companies whose business activity is sending

Indonesian Workers to other countries, as indicated in the articles of association of the Petitioners attached to the petition. On the aforementioned basis, the Petitioners considered that the PPTKI Law, particularly Article 13 Paragraph (1) Sub-Paragraphs b and c, Article 14 Paragraphs (1) and (2) Sub-Paragraphs b and d, Article 18 Paragraph (1) Sub-Paragraph b, Article 20 Paragraphs (1) and (2), Article 35 Sub-Paragraph d, Article 46, Article 69 Paragraph (1), Article 75 Paragraph (3), Article 82, Article 103 Paragraph (1) Sub-Paragraph e, Article 104 Paragraph (1), and Article 107 Paragraph (1), contains the substance that limits, hampers, eliminates, and discriminates the rights and or interest of the Petitioners in performing their duties mainly and not limited to the fulfillment of administrative requirements, recruitment, placement, and post placement of prospective Indonesian Workers and or Indonesian Workers, has impaired the constitutional rights of the Petitioners as regulated in Article 27 Paragraph (2), Article 28D Paragraphs (1) and (2), Article 28H Paragraph (2), and Article 28I Paragraphs (2) and (4) of the 1945 Constitution;

With respect to the foregoing arguments in the petition of the Petitioners, the Court is of the following opinion:

Considering whereas concerning the legal entity status of the Petitioners, the Court in earlier decisions, deemed that apart from the inability to prove whether the aforementioned Petitioners have the status



of legal entity or not, based on the articles of association of each association that file the petition, it transpired that the objective of those associations is public interest advocacy which include the substance in the *a quo* petition;

Considering whereas the Articles of Association of Indonesian Workers Entrepreneurs Association (APJATI) mention that the objective of the association concerned among other things shall be *"to provide advocacy protection to Companies and Indonesian Workers (TKI) for the sake of realizing a sense of security in business and work"*. Accordingly, the Court is of opinion that the Petitioner (APJATI) in Case Number 019/PUU-III/2005 has the capacity as Petitioner;

Considering further whether the Petitioners encounter constitutional impairment due to the coming into effect of the PPTKI Law, the truth of the Petitioners' claim that the impairment encountered by the Petitioners is special and actual in nature, or at least potential in nature because it directly impairs the interest of the Petitioners as entrepreneurs and that such impairment has a causal relationship (*causal verband*) with the coming into effect of the *a quo* Law must be considered further, however, the Court is of the opinion that insofar as deciding the legal standing, the Petitioners' claim is adequately grounded. Thus, the Petitioners have met the provision of Article 51 of the Constitutional Court Law and the above

mentioned five criteria of constitutional impairment. Hence, the Petitioners have the legal standing as Petitioners in the *a quo* petition;

**B. Case Number 020/PUU-III/2005**

With respect to the Petitioners of Case Number 020/PUU-III/2005, the Court is of the following opinion:

Considering whereas in their petition the Petitioners argued to act for and on behalf of Indonesia Manpower Watch Foundation, which was established based on Deed of Establishment Number 11, dated October 10, 2005, Notary Yulida Desmartiny, S.H. in Jakarta (**Exhibit P-9**), the registration of which, according to the statement of the Notary concerned, is being processed in the Department of Law and Human Rights (**Exhibit P-10**);

Considering whereas from the aforementioned evidence filed by the Petitioners, it was found that such foundation had not been legalized as a private legal entity pursuant to the prevailing laws and regulations, in accordance with the provision of Article 51 Paragraph (1) Sub-Paragraph c of the Constitutional Court Law, and therefore the Petitioners in Case Number 020/PUU-III/2005 have no capacity as Petitioners. Unlike an association (*vereniging*) that has members, so that it can be categorized as a group of people having a common interest, a foundation (*stichting*) is a legal entity consisting of assets which are separated and allocated to

achieve a certain objective in social, religious, and humanity sectors, which does not have members. Thus, the Court is of the opinion that the Petitioners are not qualified to file the petition for judicial review of the PPTKI Law against the 1945 Constitution, and hence it must be declared that the Petitioners' petition can not be accepted (*niet ontvankelijk verklaard*);

Considering whereas since the Court has the authority to examine, hear, and decide upon the *a quo* Law, and the Petitioners in Case Number 019/PUU-III/2005 have the legal standing, the Court must consider further the principal issue of the case Number 019/PUU-III/2005;

### **3. PRINCIPAL ISSUE OF THE PETITION**

Considering whereas subsequently it is necessary to consider the arguments stated by the *a quo* Petitioners concerning the constitutionality of articles of the PPTKI Law petitioned for review against the 1945 Constitution, as follows:

- 1) Petitioner argued that Article 13 Paragraph (1) Sub-Paragraphs b and c of PPTKI Law which reads: *"To obtain SIPPTKI as intended in Article 12, a private executive agency for Indonesian Migrant Workers Placement must meet the following criteria:*

*Sub-Paragraph a : ...*

*Sub-Paragraph b : having paid up capital indicated in the deed of establishment of the company, namely the minimum of Rp.3,000,000,000.00 (three billion Rupiah);*

*Sub-Paragraph c : paying money to the bank as collateral in the form of deposit in the amount of Rp.500,000,000.00 (five hundred million Rupiah) in the state bank”;*

According to the Petitioners, such provisions do not facilitate or give any special treatment to obtain equal opportunities and benefits to achieve equality and justice, and economic system organized as a common endeavor based on the principles of family system organized as intended in Article 28H Paragraph (2) and Article 33 Paragraph (1) of the 1945 Constitution, but will become a “killing machine” for many businesses of Indonesian Migrant Workers placement. Thus, Indonesian Migrant Workers placement companies which do not have sufficient funds to meet the obligatory amount of deposit and paid up capital will close down their businesses resulting in employment termination by the related companies.

Considering whereas with respect to the Petitioners' arguments, the Court will give the following considerations:

- whereas actually the provisions of such articles are general rules applicable to all Private Executive Agencies for Indonesian Migrant Workers Placement, and such requirements are flexible in nature as provided for in Article 13 Paragraph (2) of the PPTKI Law. Such article, as it can be recognized from the General Elucidation of the PPTKI Law, is in fact intended for providing protection to Indonesian Migrant Workers against irresponsible acts of Private Executive Agencies for Indonesian Workers Placement. The related private institutions must have the ability in terms of commitment, professionalism, and economy, the ability to guarantee the protection of human rights of citizens who work overseas, as intended in Article 28D Paragraph (2) of the 1945 Constitution;
- whereas the provision of Article 13 Paragraph (1) Sub-Paragraphs b and c of the PPTKI Law for a Private Executive Agency for Indonesian Migrant Workers Placement, does not contain any causal relationship (*causal verband*) between paid up capital and deposit and the economy organized as a collective endeavor based on the principles of family system. Since the *a quo* article provides for the criteria that must be fulfilled by every private executive agency for Indonesian Migrant Workers Placement that intends to send Indonesian Workers

overseas, the *a quo* provision is not relevant to the issue of constitutionality;

2. The Petitioners argued that Article 14 Paragraphs (1) and (2) Sub-Paragraphs b and d of the PPTKI Law which read:

Paragraph (1) : *“The permit to execute the placement of Indonesian Workers overseas shall be given for the period of 5 (five) years and can be extended once in every 5 (five) years”.*

Paragraph (2) : *“The extension of permit as intended in Paragraph (1) can be granted to a private executive agency for Indonesian Migrant Workers-Placement which, beside meeting the requirements as intended in Article 13 Paragraph (1), must also meet the following requirements:*

- a. ...
- b. *having executed placement of at least 75% (seventy-five percent) of the placement plan when obtaining the SIPPTKI;*
- c. ...

- d. *having financial balance for the last 2 (two) years without encountering losses as audited by a public accountant”.*

According to the Petitioners, the aforementioned provisions are contradictory to Article 28D Paragraph (1) of the 1945 Constitution which reads: *“Every person shall have the right to the recognition, the guarantee, the protection, and the legal certainty of just laws as well as equal treatment before the law”* and Article 28H Paragraph (2) of the 1945 Constitution which reads: *“Every person shall have the right to obtain facilities and special treatment in obtaining equal opportunities and benefits for achieving equality and justice”*. The reason is that the provision concerning the validity period of permit for 5 (five) years and the extension requirement are extremely disproportionate to the amount of investment to spend, either investment due to the implementation of Article 13 Paragraph (1) Sub-Paragraphs b and c of the *a quo* Law concerning obligatory deposit and obligatory payment, as well as obligation to have training and education facilities and infrastructures as intended in the provision of Article 13 Paragraph (1) Sub-Paragraphs e and f of the PPTKI Law, and overseas representatives as in Article 20 Paragraph (2) of PPTKI Law, or investment due to company expansion, which means that there is legal uncertainty concerning licensing that will finally create doubts among entrepreneurs in investing;

In practice, according to the Petitioners, it is difficult to execute such provisions because the placement plan and financial balance prepared when obtaining the SIPPTKI can be different from the realization, considering that there are several factors beyond the capacity of executive agencies for Indonesian Migrant Workers Placement, such as among others: change of policy by prospective users, availability of prospective Indonesian Workers, frequent and unexpected amendments to implementing regulations, as well as competition with other countries, which often inflict losses on executive agencies for Indonesian Migrant Workers Placement in 1 (one) year or 2 (two) years of placement, although not to the extent that the companies stop operating their business as the losses in the first 1 (one) year or 2 (two) years have been anticipated in the long term prospect plan;

With respect to the Petitioners' argument, the Court gives the following considerations:

- whereas the provisions in **Article 14 Paragraph (1)** are related to licensing which belongs to the domain of state administrative law. In the event of any problem, it is the authority of the State Administrative Court. In addition, the licensing requirements, although being understandably a burden to private executive agencies for Indonesian Migrant Workers Placement, are the choice of policy of the Legislators which is irrelevant to the issue of constitutionality;



- whereas the requirements provided for in **Article 14 Paragraph (2) Sub-Paragraph b** are intended for enabling private companies as executive agencies to seriously make professional planning based on their ability and facts carefully and rationally estimated to be affecting the realization of the set plan. In addition, they are also intended as an effort to prevent speculative company establishments. Moreover, in relation to the business object which is the placement of Indonesian Migrant Workers who are actually human beings with all of their dignity and status, such requirements are another forms of protection efforts of the workers. The consideration of the Court concerning the choice of policy as intended in the above item shall also apply to the issue in this article;
  
- whereas the requirements provided for in **Article 14 Paragraph (2) Sub-Paragraph d of the PPTKI Law** concerning financial balance, are actually intended for providing legal certainty (*rechtszekerheid*), business certainty (*bedrijfszekerheid*), legal protection (*rechtsbescherming*) either to entrepreneurs, employers, prospective Indonesian Workers and or Indonesian Workers, or the government itself, which are related to one another and equally responsible for protecting Indonesian Workers comprehensively as a manifestation of a welfare state (*welvaartsstaat*). Thus, the provisions in the aforementioned article are not contradictory to the provisions in Article

28H Paragraph (2) and Article 28I Paragraph (2) of the 1945 Constitution;

- 3) The Petitioners argued that **Article 18 Paragraph (1) Sub-Paragraph b** of the *a quo* Law which reads: *“The Minister can revoke the SIPPTKI if a private executive agency for of Indonesian Migrant Workers placement:*
- a. ...
  - b. *does not perform its obligations and responsibilities and/or violates the prohibitions in the placement and protection of Indonesian Workers overseas as regulated in this law”.*

According to the Petitioners, the aforementioned provision is contradictory to Article 28I Paragraph (4) of the 1945 Constitution which reads: *“The protection, promotion, enforcement, and fulfillment of human rights shall be the responsibility of the state, particularly the government”*, on the ground that the provision of Article 18 Paragraph (1) Sub-Paragraph b of the PPTKI Law is a denial of the government’s responsibility in providing protection. In fact, there are no provisions concerning the implementing procedures or levels of sanctions proportional to the level of mistakes which have created discrimination in the implementation based on *likes or dislikes of the ruler*,

With respect to the Petitioners’ argument, the Court considers that there is no prohibition in the 1945 Constitution to from giving the authority

to a minister as a state administrative official (TUN) to grant or revoke a license. License revocation also constitutes a part of supervision system on irresponsible workers placement entrepreneurs. In respect of the Petitioners' concern about license revocation, the implementation of which according to the Petitioners can be discriminatory based on likes or dislikes factor, the Court is of the opinion that a legal measure with respect thereto has been available in the form of lawsuit to the state administrative court if in the implementation there are violations of law and principles of *due process of law*. Accordingly, the *a quo* provision is irrelevant to the issue of constitutionality;

- 4) The Petitioners argued that **Article 20 Paragraphs (1) and (2) of the PPTKI Law** is contradictory to Article 28H Paragraph (2). Article 20 Paragraphs (1) and (2) of the PPTKI Law reads as follows:

“Paragraph (1) : *To act on its behalf, a private executive agency for Indonesian Migrant Workers placement must have a representative in the country where Indonesian Workers are placed;*

Paragraph (2) : *The representative of a private executive agency for Indonesian Migrant Workers placement as intended in Paragraph (1), must have the legal entity status which is established based on laws and regulations in the destination country”.*

Whereas Article 28H Paragraph (2) of the 1945 Constitution reads: *“Every person shall have the right to obtain facilities and special treatment in obtaining equal opportunities and benefits for achieving equality and justice”* and Article 28I Paragraph (2) of the 1945 Constitution reads: *“Every person shall have the right to be free of discriminatory treatment on any basis whatsoever and shall have the right to obtain protection against any such discriminatory treatment”*;

According to the Petitioners, the reason for this is that the obligation to have a representative in the country where Indonesian Workers are placed is excessive because establishing or having a representative in other countries needs considerable fund allocation, which creates discrimination between the executive agencies for Indonesian Migrant Workers placement having sufficient capacity and those that have not. In addition, the establishment of a representative of an executive agency for Indonesian Migrant Workers placement in the destination country is not as easy as it is imagined due to the difference in applicable legal system;

With respect to the Petitioners’ argument, the Court is of the opinion that the obligation to have a representative in the country where Indonesian Migrant Workers work for a private executive agency for Indonesian Workers placement is a normal requirement which in fact facilitates the Petitioners in fulfilling their obligations or responsibilities determined by the *a quo* Law. The reason is that, in the event of a

problem affecting a worker placed by the Petitioners in a country, the Petitioners can demand the responsibility of its representative in such country under its responsibility. Indeed, even if such matter is not required by Law the private executive agency for Indonesian Migrant Workers placement itself should have required the matter for its representative in a country for the interest of the private executive agency for Indonesian Migrant Workers placement, including when the related country does not require such establishment of a representative. Moreover, the elucidation of the *a quo* article gives a facility that the establishment of representative concerned can be conducted jointly by several private executive agencies for Indonesian Migrant Workers placement;

Considering whereas Article 20 Paragraph (2) of the PPTKI Law requires the representative of private executing agencies for Indonesian Workers placement in the country where Indonesian Migrant Workers are placed to have a legal entity status pursuant to the laws and regulations in the destination country. The Legislators do not give specific legal considerations on why Article 20 Paragraph (2) of the PPTKI Law is needed. The elucidation of Article 20 Paragraph (2) only declares the provisions self-explanatory. The Government in its statement stated that such provision is made for the purpose of protecting Indonesian Migrant Workers in the related country, with the presence of a representative having a legal entity status. However, the Government did not explain further why the representative must have a legal entity status;

Considering whereas with the existence of Article 20 Paragraph (1) and (2) of the PPTKI Law, a private executive agency for Indonesian Migrant Workers placement must, either separately or jointly, establish a legal entity in the destination country, namely by establishing a new institution with legal entity status which is separated from the legal entity of the private executive agency for Indonesian Migrant Workers placement located in Indonesia merely as an overseas representative which does not conduct any other businesses;

The problem is why a private executive agency for Indonesian Migrant Workers placement must be required to perform such provision. Agreement between Indonesian Migrant Workers and private executive agencies for Indonesian Workers placement as regulated in Article 52 of the PPTKI Law shall be an agreement between legal subjects under Indonesian law, and hence in the event of any disputes between the Indonesian Workers and private executive agency for Indonesian Migrant Workers placement, the most suitable forum shall be Indonesia. The purpose of the PPTKI Law is to protect Indonesian Workers. The provisions in Article 85 of the PPTKI Law only accommodate the settlement of domestic disputes, while in fact, disputes occurring when the Indonesian Workers are abroad are important, because they pertain to the certainty of placement and the rights of Indonesian Workers;

Compared to the need to make regulations in Article 20 Paragraph (2), it is in fact more important to create provisions that guarantee the settlement of disputes between Private Executive Agencies for Indonesian Migrant Workers Placement and Indonesian Workers who are abroad in accordance with Indonesian law without having to bring the cases to Indonesia, as they can be sufficiently settled by Indonesian Government Officials in the country where the Indonesian Workers are placed. Such matter is not indicated in Article 85 of the PPTKI Law. The existence of representatives of Private Executive agencies for Indonesian Migrant Workers Placement in the country where Indonesian workers are placed will not be able to directly facilitate Indonesian Workers in the event of legal problems between the Indonesian Workers and Private Executive Agencies for Indonesian Workers Placement and will in fact create difficulties because the Indonesian Worker placement agreement has been made between the Indonesian Workers and Private Executive Agencies for Indonesian Migrant Workers Placement having the Indonesian legal entity status and not with a new legal entity established in accordance with the law of the destination country. Therefore, in the event of disputes between Indonesian Workers and Private Executive Agencies for Indonesian Migrant Workers Placement, the representatives of Private Executive Agencies for Indonesian Migrant Workers Placement having no legal entity status in the destination country are more appropriate because they directly represent Private Executive Agencies for Indonesian Migrant

Workers Placement in entering into agreements directly with the partners of Indonesian Workers;

The next problem is whether the representative having the legal entity status of the destination country will effectively represent Private Executive Agencies for Indonesian Migrant Workers Placement when dealing with Business Partners or Service Users of Indonesian Workers in the country where the Indonesian Workers are placed. The problem arising in the placement of Indonesian Workers are generally about the protection of Indonesian Workers after the placement in relation to wages, working hours, and other rights. The matters related to the rights of Indonesian Workers must become a part of an agreement between a Private Executive Agency for Indonesian Migrant Workers Placement and the business partners or service users as indicated in the placement cooperation agreement;

In the event of any violations of the rights of Indonesian Workers in the destination country by the service users, Private Executive Agencies for Indonesian Migrant Workers Placement shall be obligated to notify the business partners in the context of protecting the rights of Indonesian Workers. The placement of Indonesian Workers should not only be viewed from the viewpoint of the country of origin of Indonesian Workers, but also from the viewpoint of the country where the Indonesian Workers are placed. Legislators only impose the burden of protection of Indonesian



Workers to Private Executive Agencies for Indonesian Migrant Workers Placement while they should also impose the burden of protection of Indonesian Workers to business partners. The requirement for business partners to have representatives having Indonesian legal entity status is one of the ways to take. Therefore, in the event of violations of the rights of Indonesian Workers in the destination country the representatives of business partners in Indonesia can be imposed with the burden of responsibility;

Considering whereas based on the foregoing, the relevance of requirement for Private Executive Agencies for Indonesian Migrant Workers Placement to have legal entity status in the host country is apparently irrelevant because the representatives of Private Executive Agencies for Indonesian Migrant Workers Placement do not have to obtain legal entity status in order to perform their duties in the destination country;

Considering whereas pursuant to Article 28D Paragraph (1) of the 1945 Constitution, every person shall have the right to the recognition, the guarantee, the protection, and the certainty of just laws as well as equal treatment before the law;

Whereas the right to fair legal protection and certainty shall be granted to every person and the state must respect such right. The definition of such right is justifiable pursuant to Article 28J Paragraph (2) of

the 1945 Constitution. The imposition of burden to Private Executive Agencies for Indonesian Migrant Workers Placement to have the legal entity status in the country where Indonesian Workers are placed *prima facie* can be deemed contradictory to the right to obtain fair protection, because it will impose a heavy burden to placement service businesses overseas. However, it can be justified if there is a need to protect the rights of other people namely the Indonesian Workers;

In the foregoing description there is no relevance that the representatives of Private Executive Agencies for Indonesian Migrant Workers Placement must have the legal entity status of the destination country, unless the placement destination country of Indonesian Workers pursuant to the prevailing laws in the country concerned requires the representatives of Private Executive Agencies for Indonesian Migrant Workers Placement have the legal entity status. Thus, the Court is of the opinion that the provision of Article 20 Paragraph (2) of the PPTKI Law is not contradictory to the 1945 Constitution, insofar as it is understood as an obligation of representatives of Private Executive Agencies for Indonesian Migrant Workers Placement in the destination country to have legal entity status pursuant to the provisions of the laws and regulations of in the destination country. This means that, Article 20 Paragraph (2) of the PPTKI Law shall not apply to countries whose legal provisions do not require such matter. Hence, the constitutionality of Article 20 Paragraph (2) of the PPTKI Law shall be conditional (*conditionally constitutional*) that

in its implementation the destination country does require the representatives concerned to have legal entity status;

5. The Petitioners argued that **Article 46 of the PPTKI Law** which reads: *“Prospective Indonesian Workers who are attending education and training must not be employed”* is contradictory to Article 27 Paragraph (2) which reads: *“Every citizen shall have right to work and to a living befitting human being”*, and Article 28D Paragraph (2) of the 1945 Constitution which reads: *“Every person shall have the right to work and to receive fair and proper remuneration and the treatment in work relationships”*, and Article 28I Paragraph (2) of the 1945 Constitution which reads: *“Every person shall have the right to be free from discriminatory treatment on any basis whatsoever and shall have the right to obtain protection against any such discriminatory treatment”*.

This argument is based on the Petitioners’ reason that constitutional rights to obtain education and fair treatment and to be free from discriminatory treatment are not reflected in the provision of Article 46 the PPTKI Law. In fact, the provision can be deemed as restricting people’s freedom to work and to obtain fair treatment. Because, according to the Petitioners, insofar as the job does not interfere with the education and training schedule in progress, there is no reason to prohibit every person from working during the education period especially if the work is suitable to or supports the education or training in progress;

With respect to the Petitioners' argument, the Court is the opinion that the provision of Article 46 of the *a quo* Law is in fact needed to provide legal certainty and legal protection. This is because, in the education and training process concerned, the concentration of Indonesian Workers must not be distracted from the training. Moreover, such provision is intended to protect prospective Indonesian Workers from possible abuse in employing prospective Indonesian Workers in a way which violates the provisions of the Manpower Law with the excuse that the related prospective Indonesian Workers are under the education and training process. Such abuse will in turn harm the Indonesian Workers and customers using the service of the Indonesian Workers. Thus, the provision of Article 46 of the PPTKI Law is not contradictory to Article 27 Paragraph (2), Article 28D Paragraph (2), Article 28H Paragraph (2), and Article 28I Paragraph (4) of the 1945 Constitution;

6. The Petitioners argued that **Article 69 Paragraph (1) of the PPTKI Law** which reads "*A Private Executive Agency for Indonesian Migrant Workers Placement must involve Indonesian Workers who will be sent overseas in the final training before departure*" is contradictory to Article 28H Paragraph (2) of the 1945 Constitution, which reads "*Every person shall have the right to obtain facilities and special treatment in obtaining equal opportunities and benefits for achieving equality and justice*";

The argument is based on the Petitioners' reason that the implementation of "final training before departure (PAP)" has caused the addition of *chain of bureaucracy and less useful expenses*, because the materials in the PAP program can be included in an integrated in implementing education and training as regulated in Article 43 Paragraphs (1) and (2) of the PPTKI Law;

With respect to the Petitioners' arguments, the Court can understand that such provision may be aggravating to the Petitioners, but it is in fact needed to protect and give additional knowledge and skills to Indonesian Workers who will be sent overseas as an obligation for the Petitioners as private executive agencies for Indonesian Migrant Workers placement, and it is not related to the issue of constitutionality. Furthermore, sufficient knowledge and skills of the Indonesian Workers who are placed by the Petitioners will be advantageous for the Petitioners' business because of the increased trust from the Customers using the service of Indonesian Migrant Workers;

7. The Petitioners argued that **Article 75 Paragraph (3) of the PPTKI Law** which reads "*The Government can arrange the returning of Indonesian Workers*", is not in line with Article 75 Paragraph (1) of the PPTKI Law which reads "*The returning of Indonesian Workers from Destination Country until they arrive in their places of origin shall be the responsibility of executive agencies for Indonesian Migrant Workers placement*". Hence,

according to the Petitioners, such provision is contradictory to Article 28D Paragraph (1) of the 1945 Constitution, which reads *“Every person shall have the right to the recognition, the guarantee, the protection, and the legal certainty of just laws as well as equal treatment before the law”*. The reason therefor is that, with such provision, on the one hand, the executive agencies for Indonesian Migrant Workers placement are given the responsibility for returning Indonesian Workers home, while on the other hand the Government, pursuant to Article 75 Paragraph (3) of the PPTKI Law, in practice, handles the returning of Indonesian Workers directly without involving the executive agencies for Indonesian Migrant Workers placement. Due to the contradiction between Article 75 Paragraph (1) and Article 75 Paragraph (3) of the PPTKI Law, there is no legal certainty which therefore has impaired the constitutional rights of the Petitioners;

With respect to the Petitioners’ arguments, the Court is of the opinion that the authority given to the Government as regulated in Article 75 Paragraph (3) of the *a quo* Law shall be the authority to **regulate** (regulation) the implementation of which shall be further regulated by Ministerial Regulation. Meanwhile, the provision of Article 75 Paragraph (1) regulates the implementation of the **returning** of Indonesian Workers as the obligation and responsibility of the private executive agencies for Indonesian Migrant Workers placement. Moreover, the argument of the Petitioners is related to the implementation of a norm, and not to the issue of constitutionality of the norm;

8. The Petitioners argued that **Article 82** of the PPTKI Law, which reads “*A private executive agency for Indonesian Migrant Workers placement shall be responsible for providing protection to prospective Indonesian Workers/Indonesian Workers in accordance with the placement agreement*”, is contradictory to Article 28I Paragraph (2) of the 1945 Constitution, which reads “*Every person shall have the right to be free from discriminatory treatment on any basis whatsoever and shall have the right to obtain protection against any such discriminatory treatment*”, and contradictory to Article 28I Paragraph (4) of the 1945 Constitution which reads “*The protection, promotion, enforcement, and fulfillment of human rights shall be the responsibility of the state, particularly the government*”. This is, according to the Petitioners based on the reason that with the existence of Article 82 of the PPTKI Law the Government’s obligation as intended in Article 28I Paragraph (4) of the 1945 Constitution is then eliminated, and this constitutes a form of denial of the obligation of the state *c.q.* the Government to protect the citizens *in casu* Indonesian Workers;

With respect to the Petitioners’ argument, the Court is of the opinion that the provision of Article 82 of the PPTKI Law is not separate from the provision of Article 52 of the *a quo* Law, which regulates the rights and obligations of the users of Indonesian Workers, executive agencies for of Indonesian Workers placement and prospective

Indonesian Workers and or Indonesian Workers, one of which being as regulated in Article 82 of the PPTKI Law or in other words, the responsibility that must be taken by a private executive agency for Indonesian Migrant Workers placement has been previously regulated in the placement agreement of Indonesian Workers between prospective Indonesian Workers and or Indonesian Workers and the private executive agency for Indonesian Migrant Workers placement. Thus, the provision of Article 82 of the PPTKI Law is not contradictory to Article 28I Paragraph (4) of the 1945 Constitution;

9. The Petitioners argued that **Article 103 Paragraph (1) Sub-Paragraph e** of the PPTKI Law which reads *“Shall be imposed with the minimum imprisonment of 1 (one) year and the maximum imprisonment 5 of (five) years and/or the minimum penalty of Rp1,000,000,000.00 (one billion Rupiah) and the maximum penalty of Rp5,000,000,000.00 (five billion Rupiah), any person who: ... e) Places Indonesian Workers who do not meet health and psychological requirements as intended in Article 50”* is contradictory to Article 28D Paragraph (1) of the 1945 Constitution, which reads *“Every person shall have the right the recognition, the guarantee, the protection, and the legal certainty of just laws as well as equal treatment before the law”*, and contradictory to Article 28I Paragraph (2) of the 1945 Constitution which reads *“Every person shall have the right to be free from discriminatory treatment on any basis whatsoever and shall*



*have the right to obtain protection against any such discriminatory treatment”;*

This is, according to the Petitioners based on the reason that in the provision of Article 49 of the *a quo* Law, health check on Indonesian Workers shall be conducted by health facilities appointed by the government, while in practice, when Indonesian Workers arrive in the destination country there is another health check as the prevailing acceptance procedure in such country. All too often, the results are different from the results of health check in Indonesia. According to the Petitioners, the penal sanctions regulated in Article 103 Paragraph (1) Sub-Paragraph e of the PPTKI Law, can be imposed to Petitioners while the mistake is not committed by the Petitioners;

With respect to the Petitioners’ argument, the Court is of the opinion that the Petitioners’ argument is related to the problem of law application practices on location, not to an issue of constitutionality;

10. The Petitioners argued that **Article 103 Paragraph (1) of the PPTKI Law** which reads *“Shall be imposed with imprisonment 1 (one) year and the maximum imprisonment of 5 (five) years and/or the minimum penalty of Rp1,000,000,000.00 (one billion Rupiah) and the maximum penalty of Rp5,000,000,000.00 (five billion Rupiah), **any person** who,...:”*, and Article 104 Paragraph (1) of the PPTKI Law which reads *“Shall be imposed with the minimum imprisonment of 1 (one) month and the maximum*

*imprisonment of 1 (one) year and/or the minimum penalty of Rp100,000,000.00 (one hundred million Rupiah) and the maximum penalty of Rp1,000,000,000.00 (one billion Rupiah), **any person who...***”, are contradictory to Article 28D Paragraph (1) of the 1945 Constitution, which reads *“Every person shall have the right to the recognition the guarantee , the protection and the legal certainty of just laws as well as equal treatment before the law”*.

This is, according to the Petitioners based on the reason that the existence of provision that imposes penal sanctions to “any person” as provided for in Article 103 and Article 104 of the PPTKI Law, in which the articles are intended to the obligations/requirements that must be performed by private executive agencies for Indonesian Migrant Workers placement as legal entities, and not individuals, which creates legal uncertainty and which is contradictory to human rights for everyone working in the Legal Entities of Private Executive Agencies for Indonesian Migrant Workers Placement. Therefore, according to the Petitioners, such matter contradicts Article 28D Paragraph (1) of the 1945 Constitution;

With respect to the Petitioners’ argument, the Court is of the opinion that the term “any person” shall apply to anyone who violates the provisions of the PPTKI Law, either individuals including groups of people (*natuurlijk persoon*) or legal entities (*rechtspersoon*). Concerning the Petitioners’ argument, the penal provisions regulated in Article 103 and

Article 104 of the PPTKI Law shall apply to anyone violating the provisions of the *a quo* articles. Thus, the Petitioners' argument stating that such matter creates legal uncertainty is groundless;

11. The Petitioners argued that **Article 107 Paragraph (1) of the PPTKI Law** which reads "*A private executive agency for Indonesian Migrant Workers placement that have had Indonesian Worker placement license overseas prior to the coming into effect of this Law*" is obligated to adjust to the requirements regulated in this Law by no later than 2 (two) years as from the coming into effect of this Law is not in accordance with Article 109 of the PPTKI Law which reads "*This Law shall come into effect as from the date of its enactment. For public recognition, this Law shall be promulgated by its placement in the State Gazette of the Republic of Indonesia*", and hence it is contradictory to Article 28D Paragraph (1) of the 1945 Constitution, which reads "*Every person shall have the right to the recognition, the guarantee, the protection, and the **legal certainty** of just laws as well as equal treatment before the law*". The reason therefore, according to the Petitioners, is that Article 107 Paragraph (1) of the PPTKI Law gives a time frame for **adjustment to requirements** of 2 (two) years, while, the Department of Manpower and Transmigration, the Police Force of the Republic of Indonesia and some Regional Governments interpret the term "requirements" in Article 107 Paragraph (1) of the PPTKI Law subjectively only to certain articles concerning the purpose of Article 109 which states that PPTKI Law shall come into effect as from the date of its

enactment (October 18, 2004), while every term “requirements” in the PPTKI Law constitutes an inseparable part in its enactment or implementation as intended in Article 107 Paragraph (1). The direct effect of different opinions concerning the implementation of “requirements” in Article 107 Paragraph (1) in relation to Article 109 is legal uncertainty which impairs the constitutional rights of the Petitioners;

With respect to the Petitioners’ argument, the Court is of the opinion that the provision of Article 107 Paragraph (1) is a transitional provision which in fact creates legal certainty to executive agencies for Indonesian Migrant Workers placement that have obtained the license prior to the coming into effect of the PPTKI Law. Thus, the Petitioners’ argument in relation to the *a quo* article is groundless;

Considering whereas based on the above description of considerations, the petition of the Petitioners in relation to Article 13 Paragraph (1) Sub-Paragraphs b and c, Article 14 Paragraphs (1) and (2) Sub-Paragraphs b and d, Article 18 Paragraph (1) Sub-Paragraph b, Article 20 Paragraphs (1) and (2), Article 46, Article 69 Paragraph (2), Article 75 Paragraph (3), Article 82, Article 103 Paragraph (1) Sub-Paragraph e, Article 104 Paragraph (1), and Article 107 Paragraph (1) of the PPTKI Law has not been sufficiently grounded and hence the petition of Petitioners must be declared rejected;

- 12) The Petitioners argued that **Article 35 Sub-Paragraph d of the PPTKI Law** which reads, “*The recruitment of prospective Indonesian Workers by*

*a private executive agency for Indonesian Workers Migrant placement must be conducted for prospective Indonesian Workers who have met the following requirements ... d) having the minimum educational background of Junior High School (SLTP) graduate or similar level*” is contradictory to Article 28H Paragraph (2) of the 1945 Constitution which reads, “*Every person shall have the right to obtain facilities and special treatment in obtaining equal opportunities and benefits for achieving equality and justice*”. According to the Petitioner, the provision of Article 35 Sub-Paragraph d of the PPTKI Law concerning limitation of *educational level* causes an effect in which a person who is sufficiently mature cannot be sent by the Petitioners to work overseas if he/she does not meet the *educational level* requirement (SLTP). In fact, according to the Petitioner, there are still many of Indonesian Workers who are not graduates from Junior High School (SLTP) or based on statistical fact, only 62% are Elementary School graduates or similar level;

With respect to the Petitioners’ arguments, the Court is of the opinion that human rights acknowledge rights which are important to human life. It can be said that among others, the right to live, the right to preserve life and living are very important human rights. Such right to live is so important that Article 28I Paragraph (1) of the 1945 Constitution affirms the right to live as one of the rights that cannot be diminished under any circumstances. The implementation of the right to live must be supported by a guarantee of the right to work and to receive fair and

proper remuneration and fair treatment in work relationship as intended in Article 28D Paragraph (2) of the 1945 Constitution. The reason is that the guarantee of other rights is worthless if the living fate of human beings is insecure due to the inability to preserve their life and livelihood. To preserve their life and livelihood, human beings must fulfill their basic needs, and one of the ways is by working. Thus, the right to work is directly related to the right to make a living and is closely related to the right to preserve life and livelihood and certainly the right to live a physically and mentally prosperous life. Such rights are not only owned by a group of people, who due to certain reason are advantaged in getting jobs, but those rights are also owned by every person without discrimination. The fact that certain jobs require certain specific requirements shall not be interpreted as eliminating a person's right to work.

However, if some jobs do not require certain criteria, but the legislators impose criteria irrelevant to the available jobs, it is important to review whether it will not close the opportunities for a certain group of citizens to get the jobs as they do not meet the criteria required by the Law and whether it will not eliminate a person's constitutional right to work. The provisions concerning *educational level* requirements for a person who will work overseas, as set forth in Article 35 Sub-Paragraph d of the PPTKI Law, must also be viewed from the viewpoint that there is a guarantee of the right to work in accordance with Article 27 Paragraph (2) which is

closely related to Article 28A, particularly the right to life, Article 28H Paragraph (1) concerning the right to live a physically and mentally prosperous life in the 1945 Constitution. The provision of Article 28J Paragraph (2) of the 1945 Constitution states that in exercising his/her rights and freedom, every person must be subject to the restrictions stipulated in laws and regulations for the sole purpose of guaranteeing the recognition of and the respect for the rights and freedom of other people and to fulfill fair demands in accordance with the considerations of morality, religious values, security, and public order in a democratic society;

Article 35 Sub-Paragraph d of the PPTKI Law petitioned for review by the Petitioners is one of the “obligatory” criteria for prospective Indonesian Workers to be recruited by private executive agency for Indonesian Migrant Workers placement, namely that prospective Indonesian Workers shall at least graduate from Junior High School (SLTP) or similar level, in addition to other requirements as follows: (a) being at least 18 (eighteen) years of age except for Indonesian Workers who will be hired by individual employers namely, being at least 21 (twenty-one) years of age; (b) being physically and mentally healthy; (c) not being pregnant for female prospective workers. The criteria of certain age is appropriate to avoid underage exploitation practices, as well as the criteria of being physically and mentally healthy, and the prohibition against pregnant person is intended for protecting the health the expected

child and the mother. Such prohibition can be accepted because it is aimed at protecting job seekers who should be protected based on morality, law and humanity. A mature person needs a job to fulfill his or his family's needs regardless of whether the person graduates from Junior High School or not. If the person does not get a job, surely he will not be able to fulfill his needs properly and his rights to preserve his life and livelihood will be impaired, especially the right to live a prosperous life;

The court must consider whether the limitation of education level as indicated in Article 35 Sub-Article d of the PPTKI Law is necessary since it is pursuant to Article 28J Paragraph (2) of the 1945 Constitution. The Court is of the opinion that the limitation of education level (SLTP) can only be justified if the work requirements mention such matter. The limitation of education level beyond the occupational requirements as mentioned in Article 35 Sub-Article d of the PPTKI Law in fact has no justifying ground (*rechtsvaardigingsgrond*) in accordance with Article 28J Paragraph (2) of the 1945 Constitution to guarantee the recognition of and the respect for the rights and freedom of other people, and not being contradictory to the fair demands in accordance with the considerations religious values as well as, not disturbing security and public order. Accordingly, the limitation of education level of SLTP indicated in the articles of the PPTKI Law is contradictory to a person's right to work as guaranteed by Article 27 Paragraph (2), the right to preserve life and livelihood pursuant to Article 28A, and the right to live a prosperous life



pursuant to Article 28H Paragraph (1) of the 1945 Constitution. Furthermore, the education level criteria in Article 35 Sub-Paragraph d of the PPTKI Law becomes irrelevant if it is related to the constitutional obligation of the Government to finance basic education pursuant to Article 31 Paragraph (2) of the 1945 Constitution, which if only it had been fulfilled by the Government, the Indonesian labor force would have achieved the minimum educational level of Junior High School (SLTP);

Considering whereas accordingly, the Petitioners' argument insofar as concerning Article 35 Sub-Article d of the PPTKI Law is sufficiently grounded, and therefore it must be granted. However, with respect to the aforementioned considerations, Constitutional Court Justice I Dewa Gede Palguna is of the opinion that actually there are neither constitutional rights nor interests of the Petitioners in this respect because the education level criteria are imposed to prospective Indonesian Workers. Hence, even if it is deemed that such provision is unconstitutional, while actually there is not any, the parties having the legal standing to file the petition for review of educational level criteria as provided for in the *a quo* article shall be prospective Indonesian Workers, not the Petitioners. Thus, it should be declared that the Petitioners' argument insofar as concerning the matter can not be accepted (*niet ontvankelijk verklaard*);

Considering, based on the description in the aforementioned considerations, the Court is of the following opinion:

- The Petitioners in Case 020/PUU-III/2005 have been proved not to have the legal standing, hence it must be declared that the petition of the *a quo* Petitioners can not be accepted (*niet ontvankelijk verklaard*);
- The Petition of the Petitioners in Case 019/PUU-III/2005 concerning Article 13 Paragraph (1) Sub-Paragraphs b and c, Article 14 Paragraphs (1) and (2) Sub-Paragraphs b and d, Article 18 Paragraph (1) Sub-Paragraph b, Article 20 Paragraphs (1) and (2), Article 46, Article 69 Paragraph (2), Article 75 Paragraph (3), Article 82, Article 103 Paragraph (1) Sub-Paragraph e, Article 104 Paragraph (1), and Article 107 Paragraph (1) of the PPTKI Law is not sufficiently grounded, and hence the petition of the Petitioners insofar as concerning those articles must be rejected;
- Meanwhile, the petition of the Petitioners in Case 019/PUU-III/2005 insofar as concerning Article 35 Sub-Paragraph d of the PPTKI Law has been sufficiently grounded because the article is proved to be contradictory to the 1945 Constitution, and hence their petition must be granted.

In view of Article 56 Paragraphs (1), (2), (3), and (5), Article 57 Paragraphs (1) and (3) of the Law of the Republic of Indonesia Number 24 Year 2003 concerning the Constitutional Court (State Gazette of the

Republic of Indonesia Year 2003 Number 98, Supplement to State Gazette of the Republic of Indonesia Number 4316).

**PASSING THE DECISION:**

- To declare that the petition of the Petitioners in Case Number 020/PUU-III/2005 can not be accepted (*niet ontvankelijk verklaard*);
- To declare that the petition of the Petitioners in Case Number 019/PUU-III/2005, shall be granted partly;
- To declare that Article 35 Sub-Paragraph d of the Law of the Republic of Indonesia Number 39 Year 2004 concerning Placement and Protection of Indonesian Migrant Workers (State Gazette of the Republic of Indonesia Year 2004 Number 133 and Supplement to State Gazette of the Republic of Indonesia Number 4445) is contradictory to the Constitution of the Republic of Indonesia Year 1945;
- To declare that Article 35 Sub-Article d of the Law of the Republic of Indonesia Number 39 Year 2004 concerning Placement and Protection of Indonesian Migrant Workers (State Gazette of the Republic of Indonesia Year 2004 Number 133 and Supplement to State Gazette of the Republic of Indonesia Number 4445) has no binding legal effect;

- To instruct the inclusion of this decision in the Official Gazette of the Republic of Indonesia appropriately;
- To declare that the remaining petition of Petitioners in Case Number 019/PUU-III/2005 is rejected;

Hence this decision was made in the Plenary Consultative Meeting of 9 (nine) Constitutional Court Justices on Monday, March 27, 2006, and was pronounced in the Plenary Session of Constitutional Court open for public on this day Tuesday, March 28, 2006, by us Prof. Dr. Jimly Asshiddiqie, S.H., as the Chairperson and concurrent Member, Prof. Dr. H.M. Laica Marzuki, S.H., Soedarsono, S.H., Dr. Harjono, S.H., M.C.L., Prof. H. A. Mukthie Fadjar, S.H. M.S., I Dewa Gede Palguna, S.H., M.H., Maruarar Siahaan, S.H., and H. Achmad Roestandi, S.H., respectively as Members, assisted by Cholidin Nasir, S.H., as Substitute Registrar in the presence of Petitioners and their Attorneys, the Government, the People's Legislative Assembly/their Attorneys.

**CHIEF JUSTICE,**

signed

**Prof. Dr. Jimly Asshiddiqie S.H.  
JUSTICES**

signed

**Prof. Dr. H. M. Laica Marzuki, S.H**

Signed

**Soedarsono, S.H.**

signed

**Dr. Harjono, S.H., M.CL.,**

Signed

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

signed

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

Signed

**Maruarar Siahaan, S.H.**

signed

**H. Achmad Roestandi, S.H.**

### **DISSENTING OPINIONS**

With respect to the aforementioned decision of the Court which grants the petition of the Petitioners, 2 (two) Constitutional Court Justices have the following dissenting opinions:

**Constitutional Court Justice Prof. H.A.S. Natabaya, S.H., LL.M.**

The Petitioners argued that the provision of Article 35 Sub-Article d of the PPTKI Law is contradictory to Article 27 Paragraph (2), Article 28D Paragraph (2), and Article 28I Paragraph (2) of the Constitution of the State of the Republic of Indonesia Year 1945, hence according to the Petitioners such articles must be declared as having no binding legal effect;

If we observe Article 35 Sub-Article d which reads: *” The recruitment of prospective Indonesian Migrant Workers by a private executive agency for Indonesian Workers placement must be conducted for prospective Indonesian Workers who have met the following requirements:*

- a. *being at least 18 (eighteen) years of age except for Indonesian Workers who will be employed by individual employers, namely being at least 21 (twenty-one) years of age;*
- b. *being physically and mentally healthy;*
- c. *not being pregnant for female prospective workers; and*
- d. *having the minimum education background of Junior High School (SLTP) graduate or similar level.”*

Article 35 Sub-Article d of Law Number 39 Year 2004 according to the Petitioner is contradictory to Article 27 Paragraph (2) of the Constitution of the Republic of Indonesia Year 1945 which reads: *“Every citizen shall have the right to work and to a living befitting human beings”;*

Article 28D Paragraph (2) of the Constitution of the State of the Republic of Indonesia Year 1945: *“Every person shall have to right to work and to receive fair and proper remuneration and treatment in work relationship”;*

Article 28I Paragraph (2) of the Constitution of the State of the Republic of Indonesia reads: *“Every person shall have the right to be free from*

*discriminatory treatment on any basis whatsoever and shall have the right to obtain protection against any such discriminatory treatment”;*

It is a *prima facie* fact that by using simple logic it is obvious that there is no relationship of legal interest (*rechtsbelangen*), between the Petitioners as private executive agencies for Indonesian Migrant Workers placement and prospective Indonesian Workers who have the minimum education background of Junior High School (SLTP) or similar level. Moreover, the regulation concerning the educational level criteria for prospective Indonesian Workers, does not have any relationship at all to the constitutional rights of the Petitioners so as to impair such constitutional rights;

The next issue is whether Article 35 Sub-Article d of the PPTKI Law has impaired the constitutional rights of the Petitioners granted by Article 27 Paragraph (2) of the Constitution of the State of the Republic of Indonesia Year 1945. If we carefully observe, the provision of Article 27 Paragraph (2) of the Constitution of the State of the Republic of Indonesia Year 1945 is under Chapter X concerning Citizens and Residents, and hence the legal position of Petitioners as Private Executive Agencies for Indonesian Migrant Workers Placement cannot be qualified as Citizens or Residents, hence the legal position of the Petitioners has nothing to do with Article 27 Paragraph (2) of the 1945 Constitution;

Whereas the Petitioners also stated that Article 35 Sub-Article d of the PPTKI Law has impaired their constitutional rights granted by Article 28D Paragraph (2) which is basically concerning "the right to work". To further

understand the “right to work principle” granted by Article 28D Paragraph (2) of the 1945 Constitution, we had better carefully study Article 23 Paragraph (1) of The Universal Declaration of Human Rights which is a reference for every country in regulating Human Rights in relation to “the right to work”;

### *Article 23*

*“1. Everyone has the right to work, to free choice of employment, to just and favorable conditions of work and to protection against unemployment”;*

Whereas, it should be noted that the provisions on human rights in the Universal Declaration of Human Rights have inspired many countries to include articles on human rights in their constitutions, including Indonesia, particularly after the amendments to the 1945 Constitution. To know what is intended by “right to work” we had better study the history (*Travaux Preparatoires*) of Article 23 Paragraph (1), particularly the “*Right to Work*”. In the final version of Article 23 of UDHR the “right to work” must be confined in economic sense, and should be construed not as the right of individual but rather as the responsibility of the state to give individuals free access to the labor market, see The Universal Declaration of Human Rights; A Common Standard of Achievement, Martinus Nijhoff Publishers, 1999;

Accordingly, the right to work must be viewed as an economic right and not as a civil right, although it indirectly imposes economic burden to the state;



From the foregoing description it is obvious that the interest of Petitioners has nothing to do with the right to work of the Petitioners, and the “right to work” is not a civil right attached to the individual but rather an economic right;

Finally, Petitioner argued that Article 35 sub-Article d of the PPTKI Law has also impaired the constitutional rights of the Petitioners, because Article 35 Sub-Article d of the PPTKI Law is discriminatory in nature and contradictory to Article 28I Paragraph (2) of the 1945 Constitution;

To see whether the provision of Article 35 Sub-Article d of the PPTKI Law is discriminatory in nature or not, we must first know what is intended by “discriminatory” in the scope of law concerning human rights (*Human Rights Law*);

Article 1 Paragraph (3) of Law Number 39 Year 1999 concerning Human Rights reads :*“Discrimination shall be every limitation, harassment, or isolation either directly or indirectly based on human differences on the ground of **religion, nationality, race, ethnicity, social status category, economic status, sex, language, belief, politics**, which results in the reduction, deviation or abolition, acknowledgement, implementation or application of human rights and basic freedom in individual or collective life in the fields of politics, economy, law, social, cultural and other aspects of life”;*

The foregoing provision concerning discrimination prohibition is also regulated in the International Covenant on Civil and Political Rights that has been

ratified by the Government of the Republic of Indonesia with Law Number 11 Year 2005. Article 2 of the International Covenant of Civil and Political Rights reads: *“Each State Party to the present Covenant undertakes to respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as **race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status**”*;

With due observance of the aforementioned 2 (two) provisions, the definition of discrimination must be defined as every limitation, harassment, or exclusion based on classification of human beings based on **religion, race, colour, sex, language, political opinion**;

In respect of the above description Article 35 Sub-Article d of the PPTKI Law does not contain any discriminatory element at all, as intended in Article 28I Paragraph (2) of the 1945 Constitution;

In respect of the aforementioned reasons, the Petitioners' argument that Article 35 Sub-Article d of the PPTKI Law is contradictory to Article 27 Paragraph (2), Article 28D Paragraph (2), and Article 28I Paragraph (2) of the 1945 Constitution is groundless and hence the Decision of the Constitutional Court insofar as concerning Article 35 Sub-Article d of the PPTKI Law must declare to reject the petition;

**Constitutional Court Justice H. Achmad Roestand, S.H.**

I have a different opinion from the decision of the Court, particularly concerning Article 35 Sub-Article d of the *a quo* Law which reads :

*“Having minimum educational background of Junior High School (SLTP) graduate or similar level”;*

On the one hand, it is admitted that the biggest part of labor force in Indonesia have educational background lower than Junior High School or similar level, hence the provision of Article 35 Sub-Article d of the *a quo* Law may hamper them from getting overseas jobs. On the other hand, it is an inevitable fact that most Indonesian Workers outside the country have to do “physical” jobs that are highly vulnerable to various exploitative and inhumane actions because of their low educational background;

Such disturbing condition of Indonesian Workers must be improved, so that Indonesian Migrant Workers will get more dignity. The method, for example, is by requiring Junior High School graduates or similar level for those who will become migrant workers;

Such requirement may be deemed as a restriction for prospective Indonesian Workers who have not graduated from Junior High School and as an obstacle for private executive agencies for Indonesian Migrant Workers placement, but such restriction or obstacle are within the domain of policy with the following explanation;

Article 35 Sub-Article d of the *a quo* Law is not contradictory to Article 28H Paragraph (2) which reads, “*Every person shall have the right to obtain the facilities and special treatment in obtaining equal opportunities and benefits for achieving equality and justice*”;

The criteria of Junior High School graduate mentioned in Article 35 Sub-Article d of the *a quo* Law shall apply to every person. Therefore, there is no discrimination in Article 35 Sub-Article d of the *a quo* Law. If there is different treatment to Junior High School graduates and non Junior High School graduates, it is indeed based on the principle of justice that gives “*different treatment to different matter*”. Meanwhile, as stated by Roscoe Pound, law does not only take the role in achieving certainty and justice, but also as a tool of social engineering. The criteria of Junior High School graduate will motivate community members, particularly those who want to become prospective Indonesian Migrant Workers overseas, to perform the obligation to attend basic education as intended in Article 31 Paragraph (2) of the 1945 Constitution and to improve their skills. Accordingly, such requirement does not constitute an issue of constitutionality, but a choice of policy of the legislators (the People’s Legislative Assembly and the President);

In determining the policy of Indonesian Worker placement abroad, the legislators are faced with various courses of actions. In every alternative there are certainly advantages and disadvantages, there are benefits and losses. The authority to make the choice is in the hand of the legislators. Although the Court

can give considerations it does not have the authority to decide upon it. Thus, Article 35 Sub-Article d of the *a quo* Law is not contradictory to the 1945 Constitution, and hence the petition of Petitioners concerning Article 35 Sub-Article d of the *a quo* Law must be rejected.

**SUBSTITUTE REGISTRAR,**

signed

**Cholidin Nasir, S.H.**