DECISION

Number 65/PUU-IX/2011

FOR THE SAKE OF JUSTICE AND UNDER THE ONE ALMIGHTY GOD

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA

[1.1] Hearing constitutional cases at the first and final levels, has passed a decision in the case of petition for Judicial Review of Law Number 8 Year 1981 concerning the Criminal Procedure Code against the 1945 Constitution of the State of the Republic of Indonesia filed by:

[1.2]

Name	:	**Tjetje Iskandar**
Place and date of birth	:	Jakarta, August 02, 1965
Nationality	:	Indonesia
Occupation	:	Civil Servant (Member of the National Police of the Republic of Indonesia)
Address	:	Jalan Bukit Indah Block B3 Number 13, Neighborhood Ward (RT) 02 Neighborhood Block (RW) 05, Sarua Sub-District, Ciputat District, Tangerang

Regency

By virtue of Special Power of Attorney dated September 8, 2011, authorizing Albert Nadeak, SH, Garri O Pandiangan, SH and Henry Apriando Nadeak, SH who are Advocates and Legal Consultants associated with ALBERT BAGINDA & PARTNERS Law Firm at Jalan RS. Fatmawati Number 50 Block A Number 11, South Jakarta 12440;

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

[1.3] Having read the petition of the Petitioner;

Having heard the statement of the Petitioner;

Having heard the verbal statement of the Government;

Having heard and read the written statement of the expert of the Petitioner;

Having examined the evidence submitted by the Petitioner;

Having read the conclusion of the Petitioner;

2. FACTS OF THE CASE

[2.1] Whereas the Petitioner filed a petition dated September 16, 2011 received at the Registrar's Office of the Constitutional Court (hereinafter referred to as the "Registrar's Office of the Court") on September 16, 2011, by virtue of Deed of

Petition Dossier Receipt Number 327/PAN.MK/2011 registered in Constitutional Case Registration Book Number 65/PUU-IX/2011 on September 26, 2011, with the revised a petition dated October 18, 2011 received at the Registrar's Office of the Court on October 18, 2011, explaining the matters as follows:

I. Authority of the Constitutional Court

1. Whereas Article 24 paragraph (2) of the 1945 Constitution (hereinafter referred to as the 1945 Constitution) states that:

   "*Judicial power shall be exercised by a Supreme Court and its Inferior Courts, in the jurisdictions of general courts, the religious affair courts, the military tribunal, the state administration courts, and by a Constitutional Court.*";

2. Whereas Article 24C paragraph (1) of the 1945 Constitution, Article 10 paragraph (1) sub-paragraph a of Law 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, hereinafter referred to as the Constitutional Court Law) and Article 2 paragraph (1) sub-paragraph a of Law Number 48 Year 2009 concerning Judicial Power (State Gazette of the Republic of Indonesia Year 2009 Number 157, Supplement to State Gazette of the Republic of Indonesia Number 5076), states that "*The Constitutional Court shall have authority to hear cases at the first and final levels the decisions*

of which shall be final, in conducting judicial review of laws under the 1945 Constitution;"

II. Legal Standing of the Petitioner

1. Whereas Article 51 paragraph (1) of the Constitutional Court Law (Exhibit P-1) along with its elucidation states that, "*The Petitioners shall be the parties considering that their constitutional rights and/or authorities are impaired by coming into effect of a Law, namely: a. Individual Indonesian citizens; b. customary community units insofar as they are still in existence and in line with the development of the communities and the principle of the Unitary State of the Republic of Indonesia as regulated in law; c. public or private legal entities; or d. state institutions"*;

   Whereas the Petitioner, Tjetje Iskandar, has "*Authorized*" Albert Nadeak, SH *Cs* at Albert Baginda & Partners Law Firm domiciled in FATMAWATI FESTIVAL, at Jalan RS. Fatmawati Number 50 Block A Number 11, South Jakarta 12440 to file a petition for "*substantive review*" to the Constitutional Court since "*the Petitioner's Rights and Authorities*" have been impaired by the coming into effect of Article 83 paragraphs (1) and (2) of Law Number 8 Year 1981 concerning the Criminal Procedure Code (hereinafter referred to as the "KUHAP") Article 83 paragraph (2) of which has restricted the Petitioner's right to file an Appeal to the High Court;

2. Whereas subsequently, in its Decision Number 006/PUU-III/2005 and

Decision Number 111/PUU-V/2007, the Constitutional Court has determined 5 (*five*) requirements of impairment of constitutional rights and/or authorities as intended in Article 51 paragraph (1) of the Constitutional Court Law, as follows:

a. the Petitioner has constitutional rights and/or authorities granted by the 1945 Constitution. Whereas the rights and authorities are found in three articles of the 1945 Constitution, namely Article 27 paragraph (1), Article 28D paragraph (1) and Article 28I paragraph (2);

b. the constitutional rights and authorities are deemed to have been impaired by the coming into effect of the Law petitioned for review. Whereas the Petitioner's constitutional rights and/or authorities have been impaired by the coming into effect of Article 83 paragraphs (1) and (2) of KUHAP which reads as follows:

(1) "*No appeals may be lodged with respect to a judgment in pretrial decision in matters as intended in Article 79, Article 80 and Article 81*";

(2) "A judgment in pretrial review which rules that the termination of an investigation or prosecution was illegal shall be excluded from the provision of Paragraph (1), for which purpose a final judgment of the high court in the

jurisdiction concerned may be requested";

c. The rights and/or authorities must be specific and actual or at least the impairment is likely to occur based on reasonable logic. Whereas the Petitioner's rights and/or authorities have been clearly violated by only being given the right discriminately, namely that the investigator/public prosecutor is given the right to Appeal (*vide Article 83 paragraph (2) of KUHAP*), while the Petitioner is not given the right to Appeal (*in fact, the right to appeal pursuant to Article 83 paragraph (1) of KUHAP is not granted at all*). Meanwhile, as to Article 83 paragraph (2), there is "exclusiveness" as an exclusion given to the investigator/public prosecutor if with review ruling that the termination of investigation or persecution was illegal, a final judgment may be requested to the High Court. This means that on the contrary, if the judgment in pretrial review rules that the termination of investigation or prosecution was "legal", the Petitioner in pretrial review may not request for a final decision (Appeal) to the High Court;

d. there is a causal relationship (*causal verband*) between the intended impairment and the coming into effect of the Law petitioned for review. It is clear that the impairment experienced by the Petitioner has a "*causal verband*" because the Pretrial Judges at the South Jakarta District Court have been clearly unfair unjust

and not objective in considering this case that we may describe as follows:

1) Based on the Results of Examination in the Criminal Research Laboratory of the Headquarters of the National Police of the Republic of Indonesia Number Lab: 2547/DTF/2001 dated October 3, 2001, it has been clearly concluded that "*signature counterfeiting is proven*" in the case;

However, the investigation into the case was terminated with the issuance of the Stipulation Letter Pol. Number S.Tap/20-B-UPI/VII/2002/Pidum dated July 4, 2002 deciding and stipulating that the investigation on the criminal act by suspects, Herman Iskandar and Ir. Willy Iskandar, was terminated as of July 4, 2002 due to insufficient evidence (Exhibit P-4) for the alleged Criminal Act.

2) a. Subsequently, in the consideration and decision of the Pretrial Judges of the South Jakarta District Court, the termination of the case was declared "*legal*";

Accordingly, it is inconsistent with the Results of Examination in the Criminal Research Laboratory of the Headquarters of the National Police of the

Republic of Indonesia Number Lab: 2547/DTF/2001 dated October 3, 2001 which has clearly concluded "*signature counterfeiting*" is proven, while according to the Stipulation Letter, the investigation has been terminated by the investigator due to "*insufficient evidence*". However, in the consideration/decision of the Pretrial Judges, "*the case is terminated*" for the reason of expiration (*veryard*);

b. Likewise, in the consideration of Pretrial Judges of the South Jakarta District Court, there was miscalculation of the "*veryard*" (expiration) of the case;

3) The dictum of the decision of Pretrial Judges of the South Jakarta District Court was made on the basis "*veryard*" or "*expiration*" of the case. Meanwhile, the subject matter in the termination of investigation by the investigator of the National Police of the Republic of Indonesia based on Stipulation Letter Pol. Number ShyTap/20-B-UpI/VII/2002IPidum dated July 4, 2002 was that the criminal act of signature counterfeiting was "*not proven*";

4) On that basis, it is necessary to give an opportunity to the Pretrial Review Petitioner to file an "Appeal" for a higher court (the High Court) to assess and decide upon the case

justly and objectively;

e. it is likely that with the granting of the petition, the constitutional impairment will not or will no longer occur.

1) On that basis, it would not be enough or just to only rely on the conclusion/considerations of the Judges of the Court of First Instance because it is not objective so that the consideration of a higher court is required in order to assess the considerations and decision of the Pretrial Judges of the South Jakarta District Court justly and objectively;

2) Whereas there shall be no discrimination to every person's constitutional rights and human rights/people's constitutional rights.

Accordingly, it is likely that false, unjust considerations which are not objective consideration which may impair the constitutional rights of the Petitioner or other parties will not or will no longer occur in the future;

3. Whereas as an Individual Indonesian citizen, as evidenced by Resident Identity Card (KTP) having her profession as an Advocate, the Petitioner has met the qualification of legal standing and has the interest to exercise the right of judicial review as referred to in the provision of Article 51 paragraph (1) sub-paragraph a of the Constitutional Court Law in relation

to the violation due to the coming into effect of the provision in Article 83 paragraphs (1) and (2) of the Criminal Procedure Code (KUHAP) (Exhibit P-2);

4. Whereas several Articles in the 1945 Constitution provide for constitutional rights of the Petitioner being violated due to the coming into effect of Article 83 paragraphs (1) and (2) of the KUHAP are as follows:

   - Article 27 paragraph (1) reads that, "*All citizens shall have equal position before the law and government and shall be obligated to uphold the law and government without exception*" (Exhibit P-3a);

   - Article 28D paragraph (1) reads that, "*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*" (Exhibit P-3b);

   - Article 28I paragraph (2) reads that, "*Every person shall have the right to be free from discriminatory treatment on any basis whatsoever and shall have the right to obtain protection against any such discriminatory treatment*" (Exhibit P-3c);

5. Whereas by the coming into effect of the provision in Article 83 paragraph (1) of the KUHAP, "*No appeals may be lodged with respect to a judgment in pretrial review in matters as intended in Article 79, Article 80 and Article 81*";

The pretrial decision of the South Jakarta District Court in Case Number 27/PID/PRAP/2011/PN.JKTSEL dated August 23, 2011 as intended in Article 83 paragraph (2) of the KUHAP stating that, "*A judgment in pretrial review which rules that the termination of an investigation or prosecution was illegal shall be excluded from the provision of Paragraph (1), for which purpose a final judgment of the high court in the jurisdiction concerned may be requested*" has become a discriminatory rule/provision for the pretrial review petitioner in relation to the decision of the District Court declaring "the termination of investigation into that case legal";

Since the pretrial review petitioner has been declared to be the losing party, pursuant to provision of Article 83 paragraph (1) of the KUHAP, "The petitioner's right is denied or she may not take any measure of appeal" in respect of the decision declaring the termination of investigation into the case legal. In relation to that matter, however, there is an exclusion, namely a special right or "privilege" which is only granted to the investigator or public prosecutor;

Accordingly, this caused impairment to the pretrial review Petitioner, namely that the impairment has taken away the constitutional rights as well as human rights of the Petitioner. The Petitioner's right to Appeal has been paralyzed and extinguished by Article 83 paragraph (2) of the KUHAP while the Respondent/Investigator is granted the right to Appeal so that it inconsistent with the 1945 Constitution;

6. Whereas this Article *a quo* (Article 83 paragraph (2) of the KUHAP) petitioned for review has resulted in “discrimination” because the pretrial review Petitioner has not been not permitted/allowed to take any legal measure (appeal) to a higher level under provision of Article 83 paragraph (1) of the KUHAP;

7. However, to the Investigator/Public Prosecutor pursuant to Article 83 paragraph (2) of the KUHAP, “*the investigator/public prosecutor (as the Respondent in the Pretrial Review at District Court level) is granted a special right/privilege, namely the right to appeal to the High Court” (to request for a final judgment to the High Court within the jurisdiction concerned) in the event that “the termination of the investigation or prosecution”* is declared “illegal” by the Pretrial review Judges of the Court of First Instance;

This means that with respect to every case terminated by the Investigator/Public Prosecutor (as Pretrial Review Respondent, if a decision of a District Court declares the “*Termination Illegal*”, the Investigator/Public Prosecutor may file an Appeal to the High Court pursuant to Article 83 paragraph (2) of the KUHAP while Article 83 paragraph (1) states that every Pretrial Review Petitioner may not file an Appeal at all. However, the aforementioned Article 83 paragraph (2) of the KUHAP “*excludes*” the Respondent/Investigator/Public Prosecutor being given the same right to appeal to the High Court. This is, of course,

"Discriminatory" based on the Article *a quo* (Article 83 paragraph (1) if related to Article 83 paragraph (2) of the KUHAP);

III. Substance of the Petition

1. Whereas the matters conveyed in the authority of the Constitutional Court and the Legal Standing of the Petitioner as described above constitute an inseparable part of the Substance of the Petition;

2. The history of colonialism has proven that the formulation and enactment of the Criminal Procedure Law (*Het Herziene Indonesisch Reglement*/HIR) were merely intended for the interest of Dutch colonialist. Therefore, based on such considerations, it must be replaced by the KUHAP. The KUHAP is has been produced for and by the government of the Republic of Indonesia to replace the HIR;

3. Therefore, the application of the system of Criminal Procedure Code based on the KUHAP must be really adjusted to the human rights and constitutional rights in an independent nation no longer being a colonized nation. Thus, the enactment and application of the law must be a system of norms which must be proven and staked, namely in how a nation regulates just/assured exercise of the rights to be implemented, especially when it is concerned with law enforcement, the imposition of sanctions and the making of

decisions on:

- whether a criminal act has occurred,

- whether or not a person can be declared guilty for committing a criminal act,

- how the law is imposed.

There must be a clear difference between the application/enactment of the HIR as the Criminal Procedure Law at the time of its formulation and when it has been replaced by the KUHAP. It is no longer relevant if its contents, form and enactment/application still maintain striking and shocking discrimination since those matters have seized the constitutional rights/human rights of every person;

Although the purpose and objective of the formulation of this Criminal Procedure Code have set/applied, the provisions in Article 83 paragraphs (1) and (2) of the KUHAP are still found:

(1) "*No appeals may be lodged with respect to a judgment in pretrial review in matters as intended in Article 79, Article 80 and Article 81*";

(2) "*A judgment in pretrial review which rules that the termination of an investigation or prosecution was illegal*

shall be excluded from the provision of Paragraph (1), for which purpose a final judgment of the high court in the jurisdiction concerned may be requested";

Whereas the purpose and objective of the revocation/replacement of the HIR by the KUHAP are to prevent/eliminate and/or remove discrimination by enacting this new law of procedure; To prevent/avoid the unjust application of power and unjust partiality by the rulers/government to the people, among fellow citizens and among justice seekers;

This also has encouraged the revision/improvement/amendment of the 1945 Constitution for 4 times with a view to protecting and ensuring the protection of the enforcement of the constitutional rights/human rights of Indonesian citizens. Accordingly, it fulfills the hope and aspiration for the protection of constitutional rights and human rights of every person as confirmed in the articles of the 1945 Constitution:

- Article 27 paragraph (1) which reads, "*All citizens shall have equal position before the law and government and shall be obligated to uphold the law and government without exception*";

- Article 28D paragraph (1) which reads, "*Every person shall have the right to the recognition, the guarantee, the protection and the legal certainty of just laws as well as equal treatment before the law*";

- Article 28I paragraph (2) 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*";

The articles found in the 1945 Constitution clearly confirm that the absolute respect for/protection of the human rights of each citizen and member of the global community as the human rights which must be upheld;

Therefore, it is reasonable, proper and appropriate that Article 83 of the KUHAP is no longer appropriate to be maintained as it has extinguished and paralyzed the rights granted by the aforementioned three articles of the 1945 Constitution.

This is because Article 83 of the KUHAP has impaired and has been inconsistent with the Petitioner's constitutional rights and human rights;

In paragraph (1), a sentence shall be made to confirm that these three articles originally contain the same rights, namely that [both parties] may not file an appeal to a pretrial review decision pertaining to the legality of termination of an investigation or detention as set out in Articles 79, 80 and 81 of the KUHAP. However, in Article 83 paragraph (2) of the KUHAP, there an "*exclusion*" given, being the privilege of the investigator. This exclusion that is clearly discriminatory. This means that there is an

"*exclusion*", namely: In the event of a judge's decision in pretrial review case ruling that "*the termination of an investigation or prosecution was illegal*", a final decision can be requested (by the investigator/Public Prosecutor) to the High Court within the jurisdiction concerned. Meanwhile, if according to the assessment in the considerations and decision of the pretrial review judge, the termination (by the investigator) is legal; the opportunity for the Petitioner to file an appeal is closed pursuant to Article 83 paragraphs (1) and (2) of the KUHAP;

4. Notwithstanding the discrimination, the Petitioner insisted on bringing it to pretrial review to the South Jakarta District Court on July 18, 2011 pertaining to the issuance of Stipulation Letter Pol. Number S.Tap/20-B-Upl/VII/2002/Pidum dated July 4, 2002 concerning the Termination of Investigation (Exhibit P-4) issued by the Investigation Corps of the National Police of the Republic of Indonesia *cq* the Directorate General of Criminal Investigation *cq* the Director of General Criminal Investigation of the Headquarters of the National Police of the Republic of Indonesia, Brigadier-General Drs. Aryanto Sutadi, M.Sc as the Investigator (as the Respondent in Pretrial Review);

5. Based on Decision of the Pretrial Review Judges Number 27/PID/PRAP/2011/PN.JKT.SEL dated August 23, 2011 (Exhibit P-5), the Pretrial Review Judges of the South Jakarta District Court has passed a decision with the injunction as follows:

PASSING THE DECISION

- Rejecting the petition of the Pretrial Review Petitioner in its entirety;

- Sentencing the Pretrial Review Petitioner to pay case fee fine of Rp2,000.- (Two Thousand Rupiah).

With the decision of Pretrial Review Judges rejecting the petition of the Pretrial Review Petitioner, "*The Termination of Case Investigation is declared legal*" indirectly by the South Jakarta District Court.

6. a.) However, Although Article 83 paragraph (2) of the KUHAP has hampered/paralyzed, prohibited/closed the right of the Petitioner to appeal, "the Petitioner still exercised" her right to Appeal by filing the Deed of Appeal Petition Number 84/Akta.Pid/2011/PN.Jak.Sel dated August 26, 2011 (Exhibit P-6) and submitted a Memorandum of Appeal on September 9, 2011 (Exhibit P-7a) as stated in the Receipt of the Memorandum of Criminal Appeal dated September 9, 2011 (Exhibit P-7b) to Decision Number 27/PID/PRAP/2011/PN.JAK.SEL dated August 23, 2011 of the South Jakarta District Court. Although Article 83 paragraph (2) of the KUHAP states that only the investigator (the Respondent in pretrial review) is granted right to appeal to the High Court (*for which purpose a final judgment of the high court in the jurisdiction concerned may be requested*) in the event that the Court declares

the termination of investigation into the case "*illegal*";

b.) In addition to the fact that the Petitioner's right has been paralyzed/reduced and also considering that the time period for Appeal is limited to only 2 (two) weeks, in the event that an appeal and the Memorandum of Appeal are not submitted within the time period as provided for in Law, the period for Appeal will expire and the right to Appeal should will be closed. Therefore, all legal remedies should have ended/terminated in the event of demand for equal rights to the law applicable in the rule of law state of the Republic of Indonesia. Although the Law prohibits it, the prohibition is discriminatory or inconsistent with the provisions of Article 27 paragraph (1), Article 28D paragraph (1) and Article 28I paragraph (2) of the 1945 Constitution, and therefore the Petitioner has insisted on filing an Appeal for a pretrial review decision;

c.) Whereas our petition is not exaggerated as the Supreme Court also used to grant a legal measure of Judicial Review (hereinafter referred to as "PK") filed by a Public Prosecutor by decision Number 55PK/Pid/1996 in the case of Muchtar Pakpahan, in which Article 263 of the KUHAP clearly states that the person entitled to file a PK petition shall be the Defendant or his Heir;

In its legal consideration, the Panel of Justices of the Supreme Court used Article 263 of the KUHAP and Article 21 of Law Number 14 Year 1970

which has been replaced by Law Number 48 Year 2009 concerning Judicial Power by interpreting that the interested parties in a criminal case are the Public Prosecutor and the Convict as the parties that may file a legal measure of PK petition. In fact, such interpretation is not allowed since the elucidation of the provision of Article 21 of Law Number 14 Year 1970 which has been currently replaced by Law Number 48 Year 2009 concerning Judicial Power explains that the interested parties shall be the Defendant or his Heir. However, a legal measure (in the form of the PK) taken by the Public Prosecutor was granted by the Supreme Court although the interested parties were the condemned and his heir;

7. Whereas Article 83 paragraph (2) of the KUHAP is extremely discriminatory and ironic. As generally known, discrimination constitutes injustice which is a threat to justice anywhere and anytime;

Accordingly, such condition results in “discrimination before the law”, especially as Article 83 paragraph (2) of the KUHAP is expressly inconsistent with the following Articles of the 1945 Constitution:

- Article 27 paragraph (1) which reads, “*All citizens shall have equal position before the law and government and shall be obligated to uphold the law and government without exception*”;

- Article 28D paragraph (1) which reads, “*Every person shall have the right to the recognition, the guarantee, the protection and the*

legal certainty of just laws as well as equal treatment before the law";

- Article 28I paragraph (2) 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*";

8. By the granting of our petition, we may recover from constitutional impairment suffered by us and all citizens and even all justice seekers as Petitioners as guaranteed by the 1945 Constitution, namely the "right to be treated equal before the law and to be free from such discriminatory treatment";

Accordingly, there will be no longer any discrimination/difference of constitutional rights of all persons in taking a legal measure (of Appeal) by a party (as a pretrial review Petitioner) harmed as stated in Article 83 paragraph (2) of the KUHAP;

Therefore, "right to be recognized as an individual before the law in taking legal measures in a pretrial case" constitutes every Indonesian citizen's constitutional right as well as human right which cannot be reduced under any condition and situation;

9. Whereas in the event that provision of Article 83 of the KUHAP is not revoked, the abuse of power will continue to happen/be committed by the

investigators of the National Police of the Republic of Indonesia and the uncontrolled system of power for and/or with the purpose/objective of extinguishing/paralyzing the constitutional rights or human rights of justice seekers will be continue to be incurred/occur. Accordingly, the mandate given by the 1945 Constitution will not be properly achieved and realized;

10. Therefore, Article 83 of the KUHAP must be absolutely eliminated by revocation so that the constitutional rights and human rights of all parties are not impaired;

11. Whereas according to the nature the construction of criminal procedure law in relation to the settlement of criminal cases, the Law obligates/requires the investigator and public prosecutor to handle/settle cases in an integrated rather than individual/unilateral manner as stated in Article 14 sub-articles a and b, Article 110, Article 138, Article 139 and Article 30 paragraph (1) sub-paragraph e of Law Number 16 Year 2004 concerning the Prosecutor's Office of the Republic of Indonesia which, in sub-paragraph d, states that the Prosecutor's Office has duties and authorities: to complete certain case dossiers, for which purpose it may make additions to the dossier before being forwarded to the court, implemented in coordination with the investigator. In substance, the investigator (the National Police of the Republic of Indonesia) cannot terminate the investigation into the case one-sidedly, independently or unilaterally, namely by the National Police of the Republic of Indonesia

only. And if this happens now in Indonesia, “it is illegal”;

12. For the provisions/regulations and legal measure of filing an Appeal in a criminal case to be also related to pretrial cases, other chapters/articles in the KUHAP shall also be referred to in accordance with the limitations deemed necessary. In addition, to take account of the constitutional rights and human rights of every person as justice seekers, the parties shall be granted the same rights or that it shall continue to be consistent with the existing procedural process in the KUHAP and other Laws;

13. Pertaining to Article 83 paragraphs (1) and (2) of the KUHAP petitioned for replacement/revision/amendment, it must be observed that the same right to Appeal of justice seekers is guaranteed and the constitutional rights and human rights of every person are protected as well. Furthermore, there is currently doubt among justice seekers when observing/evaluating the quality, credibility and integrity of law enforcers during the process of handling cases from the past to the present time which has shown a grave/negative and distressing trend which is increasingly alarming/dangerous to the constitutional rights/human rights of every person;

IV. Petition

Based on matters described above, the Petitioner hereby requests the Panel of Justices of the Constitutional Court as the highest guardian and

interpreter of the Constitution to please hear the petition of the Petitioner with the injunctions of decision as follows:

1. Accepting and granting the petition of the Petitioner;

2. Declaring that the Petitioner has constitutional rights and/or authorities impaired by the coming into effect of Article 83 paragraphs (1) and (2) of the KUHAP because it is inconsistent with Article 27 paragraph (1), Article 28D paragraph (1) and Article 28I paragraph (2) of the 1945 Constitution;

3. Declaring Article 83 paragraphs (1) and (2) of the KUHAP inconsistent with Article 27 paragraph (1), Article 28D paragraph (1) and Article 28I paragraph (2) of the 1945 Constitution;

4. Declaring that Article 83 of the KUHAP has no binding legal force along with all its legal consequences;

5. Ordering this decision to be properly included in the Official Gazette.

Or

In the event that the Panel of Justices of the Constitutional Court is of a different opinion, it is requested for the decision to be passed according to what is equitable and good (*ex aequo et bono*).

[2.2] Whereas to prove her arguments, the Petitioner has submitted written evidence marked as Exhibit P-1 up to Exhibit P-7, as follows:

1. Exhibit P-1 : Photocopy of Law Number 24 Year 2003 concerning the Constitutional Court;

2. Exhibit P-2 : Photocopy of Law Number 8 Year 1981 concerning the Criminal Procedure Code;

3. Exhibit P-3a : Photocopy of Article 27 paragraph (1) of the 1945 Constitution;

4 Exhibit P-3b : Photocopy of Article 28D paragraph (1) of the 1945 Constitution;

5. Exhibit P-3c : Photocopy of Article 28I paragraph (2) of the 1945 Constitution;

6. Exhibit P-4 : Photocopy of Stipulation Letter Pol. Number S.Tap/20-B-UpI/VII/2002/Pidum dated July 4, 2002 concerning the Termination of Investigation issued by the Investigation Corps of the National Police of the Republic of Indonesia *cq* the Directorate General of General Criminal Investigation *cq* the Director of General Criminal Investigation of the Headquarters of the National Police of the Republic of Indonesia,

Brigadier-General Drs. Aryanto Sutadi, M.Sc as the Investigator;

7. Exhibit P-5 : Photocopy of pretrial review Decision of the South Jakarta District Court in Case Number 27/PID/PRAP/2011/PN.JKTSEL dated August 23, 2011;

8. Exhibit P-6 : Photocopy of Deed of Appeal Petition Number 84/Akta.Pid/2011/PN.Jak.Sel dated August 26, 2011;

9. Exhibit P-7a : Photocopy of Receipt of the Memorandum of Criminal Appeal dated September 9, 2011 issued by the Registrar's Office of the South Jakarta District Court;

10. Exhibit P-7b : Photocopy of Memorandum of Appeal dated September 9, 2011 filed by the Attorney of Tjetje Iskandar (Albert Baginda & Partners Law Firm).

[2.3] Whereas to prove her arguments, the Petitioner has appointed 1 (one) expert presenting his verbal statement under oath at the hearing on August 10, 2011 and giving his statement received in the Registrar's Office on December 5, 2011 describing as follows:

Expert, Prof. Dr. Andi Hamzah, SH.

1. Article 80 of the KUHAP is inconsistent with the Indonesian system of

criminal procedure law. Pursuant to this article, whether or not the termination of investigation and prosecution is legal can be brought to pretrial review. Objection to the termination of investigation is actually not a judge but public prosecutor's business. Under the KUHAP, an investigator must inform the commencement of investigation to the public prosecutor. It is even different in other countries, such as the Netherlands (the historical source of Indonesian criminal and civil procedure laws), France, etc, where such notification is given by a letter (Investigation Warrant/SPDP) while in other countries a telephone call is sufficient. In France (Public Prosecutor's Office of Paris district), the on-duty prosecutor receives notification about the commencement of investigation by phone and gives guidelines directly). Hence, the logic is if the public prosecutor is notified about the commencement of investigation, he will also be notified about the termination of investigation. In the event that an interested party, such as a victim or a party harmed by such offence objects to the termination of investigation, he/she should report, by giving reasons and evidence, and request the public prosecutor (if in Europe) to continue the investigation rather than to bring it to pretrial review;

Moreover, under the provision that the termination of prosecution by a public prosecutor can also be brought to pretrial review while Indonesia follows opportunity principle, which globally means that: "*the public prosecutor may decide conditionally or unconditionally to make prosecution to court or not*". The conditional termination of prosecution is

called *transaction out of the court,* which in general context is called *restorative justice*;

2. Article 83 paragraphs (1) and (2) of the KUHAP states that: “No appeals may be lodged with respect to a judgment in pretrial review in matters as intended in Article 79, Article 80 and Article 81” (paragraph 1); “A judgment in pretrial review which rules that the termination of an investigation or prosecution was illegal shall be excluded from the provision of Paragraph (1), for which purpose a final judgment of the high court in the jurisdiction concerned may be requested (paragraph 2). If the article is interpreted *a’ contrario*, it means that if a pretrial review decision rules that the termination of investigation is legal, an appeal cannot be filed (by an interested party). If so interpreted, injustice occurs, which means that if an investigator “insists” on terminating an investigation, he may file an appeal to the high court while if the pretrial review decision rules that the termination of investigation is legal, the interested party (the harmed party of the victim of the offence) may not request for an appeal;

Actually, criminal law and criminal procedure law do not recognize *a’ contrario* interpretation (it is only recognized in civil law);

D. Hazewinkel-Suringa, the most famous expert in criminal law (*penalist*) in the Netherlands, whose book became a standard textbook in law faculties in Indonesia in 1950s) suggests that there are 15 types of legal interpretations (while other scholars only specify six types), namely:

1. *Anticipatory interpretation* (*anticiperende interpretatie*), which Prof. Oemar Seno Adji calls *futuristic interpretation*. A Law during being in the process of revocation in the People's Legislative Assembly (DPR) is interpreted to be no longer applicable. This happened in the subversion case of Bintang Pamungkas. The case was terminated when the Subversion Law was being in the process of revocation in the People's Legislative Assembly (DPR);

2. Creative interpretation (*creatieve interpretatie*);

3. Doctrinary interpretation (*doctrinaire interpretatie*);

4. Dogmatic interpretation (*dogmatische interpretatie*);

5. Functional interpretation (*functionele interpretatie*);

6. Grammatical interpretation (*grammaticale interpretatie*);

7. Harmonization interpretation (*harmoniserende interpretatie*);

8. Historical interpretation (*historische interpretatie*);

9. Rational interpretation (*rationale interpretatie*);

10. Comparative law interpretation (*rechtsvergelijkende interpretatie*);

11. Sociological interpretation (*sociologische interpretatie*);

12. Systematic interpretation (*systematische interpretatie*);

13. Teleological interpretation (*teleologische interpretatie*);

14. Traditional interpretation (*traditionalistische interpretatie*);

15. Legislative history interpretation (*wetshistorische interpretatie*),

(D. Hazewinkel-Suringa, *Inleiding tot de studie van het Nederlandse strafrecht, voortgezet door* J. Remmelink, 1989, page 857).

A' contrario Interpretation is not mentioned at all.

Specifically in interpreting Article 83 of the KUHAP, rational and systematic interpretations should be used. The provisions of the (criminal) Law must be mutually harmonious , consistent and coherent especially with higher provisions (of the Constitution). In a rational interpretation, a formulation of a Law must make sense. In a systematical interpretation, the (criminal procedure) law constitutes a single system, without any formulations beyond the system. Thus, for the sake of justice, it should be interpreted that both the investigators/police and the interested parties may file an appeal to a pretrial review decision concerning the legality of the termination of investigation. An example of the implementation of harmonized interpretation: Article 221 of the KUHAP states that that a person hiding a criminal having a blood relationship or relationship by marring up to the third level shall not be penalized. Thus, hiding a

brother/sister-in-law (with second level relationship by marriage) is not penalized. Under customary law, in the event of divorce, the divorced person is no longer a brother/sister-in-law. Thus, hiding one's ex brother/sister-in-law who has committed a crime shall be penalized. Meanwhile, BW (*Burgerlijk Wetboek*) states that, a divorce does not remove a relationship by marriage. If a person subject to the BW is divorced, the brother/sister of his/her ex husband/wife is still the person's bother/sister-in-law. Thus, if his/her ex-brother/sister-in-law (who is legally still his/her brother/sister-in-law) is hidden, he/she shall not be penalized. It is unfair if a Chinese subject to the BW is not penalized while a Javanese subject to customary law is penalized. Therefore, both of them should not be penalized to be just, harmonious and rational (making sense);

Furthermore, if Nadeak, SH. (legal advisor filing the petition for constitutionality review of Article 83 of the KUHAP) is true that the pretrial review judge declared that the termination of investigation by the investigators/police was legal since the case of signature counterfeiting has expired (*verjaard*), pursuant to ex Article 263 of the Criminal Code, the signature counterfeiting including counterfeiting of documents shall be imposed with a criminal sanction of imprisonment of six years. Thus, under Article 78 paragraph (1) sub-paragraph 3 of the Criminal Code, *verjaard* (expiry) is 12 years as of the termination of investigation. If that is the reason of the pretrial review judge, Dutch people would call it an

acrobatic decision. Such decision is a blunder or foolish mistake. Accordingly, it can be appealed to the high court;

3. According to the expert, People's Legislative Assembly/the Government has no intention to formulate an unjust Law (Article 83 of the KUHAP), but that it is a wording error. The expression "*to stipulate the illegality of the termination of investigation*" should have been "*to stipulated whether the termination of investigation is legal or not*";

4. Unfortunately, the Draft KUHAP which has removed contradictions in the KUHAP which was formulated for 10 years (1999-2009) and which was submitted by the Team to Minister Andi Mattalatta and sent to the State Secretariat in 2009 but not yet sent to the People's Legislative Assembly, was taken back and neglected by Minister Patrialis Akbar for two years. The opportunity to reform criminal legislation and criminal procedure has become useless.

[2.4] Whereas with respect to the Petitioner's petition, the Government presented its verbal statement at the hearing on November 17, 2011, principally describing the following matters:

Legal Standing of the Petitioner

In relation to the legal standing of the Petitioner, the Government fully leaves the issue to the Panel of Justices of the Constitutional Court to consider and assess whether or not the Petitioner has legal standing to file a petition for

Judicial Review of Article 83 paragraphs (1) and (2) of the Criminal Procedure Code (hereinafter referred to as the “KUHAP”).

Statement of the Government

With regard to the Petitioner’s argument that Article 83 paragraphs (1) and (2) of the KUHAP is inconsistent with provisions of Article 27 paragraph (1), Article 28D paragraph (1) and Article 28E paragraph (2) of the 1945 Constitution, the Government has given the following statements:

1. The KUHAP allows the judicial institution to examine and deciding upon legality or illegality of an arrest, detention, termination of investigation or prosecution. The pretrial review is filed to District Court. The purpose of this provision is to guarantee the implementation, arrest, detention, termination of investigation or prosecution conducted pursuant to the laws and regulations.

2. Article 83 paragraph (2) of the KUHAP is concerned with whether or not the termination of investigation or prosecution is legal or not, which can be appealed as a control over the mechanism of the procedure law enforcement by an investigator with respect to the termination of prosecution or by a public prosecutor with respect to the termination of investigation, rather than as an authority to interfere with each institution’s affairs. Therefore, this right is granted in a limited manner to an investigator or a public prosecutor, not to a suspect or a third party;

3. In addition to that, the purpose of Article 38 paragraph (1) of the KUHAP is not to weaken the motivation of justice seekers but to realize a speedy procedure and legal certainty within a relatively short period. This is because under Article 83 paragraph (2), the process of appeal in the high court is the last and final resort and appeal to the Supreme Court is not recognized;

4. Whereas with regard to the Petitioner's right to file a petition for pretrial review to the South Jakarta District Court with respect to the termination of investigation as set out in Stipulation Letter Police Number S.Tab/20-B-UPL-VII/2001/Pidum dated July 4, 2011, the termination of investigation has been guaranteed by Article 80 of the KUHAP granting the right and authority to the Petitioner to request for examination on whether the termination of investigation is legal or not. According to the Government, the Petitioner must be in the category of a third party as one of the criteria to be able to file a petition for pretrial review. The elucidation of Article 80 of the KUHAP states that, "The examination to check the legality or illegality of the termination of a prosecution can be filed by an investigator or public prosecutor." The interested third party may file a petition for pretrial review to the head of the district court specifying the reasons therefore;

5. Whereas the decision of the South Jakarta District Court Number 27/PIT/PRAP/2011/PN Jakarta Selatan dated August 23, 2011 principally

states that termination of the investigation on the case has been in accordance with the procedure and is guaranteed by Law as set out in Article 80 of the KUHAP. This is in line with Article 27 paragraph (1), Article 28D paragraph (1) and Article 28I paragraph (2) of the 1945 Constitution;

6. Whereas since the Petitioner has raised an objection and taken a legal measure of appeal against the decision of the South Jakarta District Court *a quo* to the High Court with Deed of Appeal Petition Number 84/Akta.PIT/2011/PN Jakarta Selatan dated August 26, 2011 and Memorandum of Appeal ratified on September 9, 2011, the Petitioner has violated Article 27 paragraph (1), Article 28D paragraph (1) and Article 28I paragraph (2) of the 1945 Constitution because the implementation of criminal law on the one hand takes away a person's right while it protects a person.

7. Whereas with regard to the Petitioner's argument stating that "*the termination of investigation being declared legal by the South Jakarta District Court contains an error, especially in calculating the expiration period of the case,*" the Government suggests that it is not an issue implementation of Article 78 of the KUHAP rather than an issue of norm;

8. Whereas with regard to the substantiation of the legality or illegality of the termination of investigation in the case *a quo* by the Panel of Judges, valid reasons for the termination of investigation must be first reviewed, among

other things, insufficient evidence. This means that valid and sufficient evidence is not found. The instruments of evidence as referred to in Article 184 paragraph (1) of the KUHAP are witness statement, expert statement, documents, guidelines and defendant statement. With the failure to meet the requirements, such legal event shall be established not as a criminal act. It means that at the beginning, the investigators suggested that the legal event was a general criminal act but thereafter it was evidenced that it was actually not a criminal act. With regard to such matter, the investigators terminated the investigation. The investigators terminates the investigation by law as the legal event cannot be lawfully continued because, for example, the suspect demises, the suspect suffers from a mental illness, the case has been decided and has had permanent legal force, the case has expired. Whereas in several opportunities, there was no requirement being met out of such several reasons, and accordingly by its decision, the Panel of Judges declared that the termination of investigation conducted by the investigators or public prosecutors was legal. This constitutes the domain of implementation of a norm rather than a constitutionality issue of the coming into effect of a norm;

Based on the foregoing explanation, the Government requests the Panel of Judges of the Constitutional Court to pass the following decisions:

1. That the Petitioner does not have legal standing;

2. Rejecting the Petitioner's petition for judicial review in its entirety or at least declaring that the Petitioner's petition for judicial review cannot be accepted;

3. Accepting the statement of the Government in its entirety, declaring the provision of Article 83 paragraphs (1) and (2) of Law Number 8 Year 1981 concerning the Criminal Procedure Code inconsistent with the provisions of the 1945 Constitution of the State of the Republic of Indonesia.

[2.5] Whereas with regard to the petition of the Petitioner, the Constitutional Court summoned the People's Legislative Assembly (DPR) at the hearing on November 17, 2011, but the People's Legislative Assembly (DPR) was absent at the hearing and also it did not present any written statement;

[2.6] Whereas the Petitioner has submitted a written conclusion dated December 1, 2011 received at the Registrar's Office of the Court on the same date wherein the Petitioner principally sticks to its opinion.

[2.7] Whereas to shorten the description of this decision, all matters set out in the minutes of the court hearing have been included and shall constitute an inseparable part of this decision;

3. LEGAL CONSIDERATIONS

[3.1] Whereas that the purpose and objective of the Petitioner's petition are to

conduct judicial review of Article 83 paragraphs (1) and (2) of Law Number Year 1981 concerning the Criminal Procedure Code (State Gazette of Indonesia Year 1981 Number 76, Supplement to State Gazette of the Republic Indonesia Number 3209, hereinafter referred to as the “KUHAP”) under the 1945 Constitution of the State of the Republic of Indonesia (hereinafter referred to as the 1945 Constitution);

[3.2] Whereas prior to considering the substance of the petition, the Constitutional Court (hereinafter referred to as the “Court”) will first consider the following matters:

1. Authority of the Court to hear the petition *a quo*;

2. Legal standing of the Petitioner to act as Petitioner in the case *a quo*;

With respect to the aforementioned two matters, the Court is of the following opinion:

Authority of the Court

[3.3] Whereas Article 24C paragraph (1) of the 1945 Constitution, Article 10 paragraph (1) sub-paragraph a of Law Number 24 Year 2003 regarding the Constitutional Court, as amended by Law Number 8 Year 2011 regarding the Amendment to Law Number 24 Year 2003 regarding the Constitutional Court (State Gazette of the Republic of Indonesia Year 2011 Number 70, Supplement to the State Gazette of the Republic of Indonesia Number 5226, hereinafter

referred to as the Constitutional Court Law), and Article 29 paragraph (1) sub-paragraph a of Law Number 48 Year 2009 regarding Judicial Power (State Gazette of the Republic of Indonesia year 2009 Number 157, Supplement to the State Gazette of the Republic of Indonesia Number 5076), one of the authorities of the Constitutional Court is to conduct judicial review of Laws under the 1945 Constitution;

[3.4] Whereas the Petitioners' petition is concerned with judicial review of Law *in casu* the KUHAP under the 1945 Constitution, so that the Court has authority to hear the petition *a quo*;

Legal Standing of the Petitioners

[3.5] Whereas pursuant to Article 51 paragraph (1) of the Constitutional Court Law, the Petitioners in judicial review under the 1945 Constitution shall be those who consider that their constitutional rights and/or authorities have been impaired by the coming into effect of a Law namely:

a. individual Indonesian citizens (including groups of people having a common interest);

b. customary law community units insofar as they are still in existence and in line with the development of the communities and the principle of the Unitary State of the Republic of Indonesia as regulated in law;

c. public or private legal entities; or

d. state institutions.

Therefore, the Petitioners in judicial review under the 1945 Constitution must first explain and prove:

a. Their standing as Petitioners as intended in Article 51 paragraph (1) of the Constitutional Court Law;

b. Existence of impairment of constitutional rights and/or authority granted by the 1945 Constitution due to the coming into effect of the Law petitioned for judicial review;

[3.6] Whereas following its Decision Number 006/PUU-III/2005 dated May 31, 2005, Decision Number 11/PUU-V/2007 dated September 20, 2007 and the subsequent decisions, the court is of the opinion that impairment of constitutional rights and/or authorities as referred to in Article 51 paragraph (1) of the Constitutional Court Law must meet 5 requirements, namely:

a. existence of constitutional rights and/or authority of the Petitioners granted by the 1945 Constitution;

b. the Petitioners believe that such constitutional rights and/or authority have been impaired by the coming into effect of the law petitioned for judicial review;

c. the impairment of such constitutional rights and/or authority must be

specific and actual or at least potential in nature which, pursuant to logical reasoning, can be assured of occurring;

d. there is a causal relationship (*causal verband*) between the impairment of constitutional rights and/or authority of the Petitioners and the law petitioned for judicial review;

e. it is likely that with the granting of the Petitioners' petition, the impairment of such constitutional rights and/or authority argued by the Petitioners will not or will no longer occur.

[3.7] Whereas the Petitioner in the petition *a quo* qualifies herself an individual Indonesian citizen who considers that her constitutional rights are impaired by the coming into effect of Article 83 paragraphs (1) and (2) of the KUHAP;

Whereas on July 18, 2011 the Petitioner filed a petition for pretrial review to the South Jakarta District Court pertaining to the issuance of Stipulation Letter Pol. No.: S.Tap/20-B-Upl/VII/2002/Pidum concerning the Termination of Investigation dated July 4, 2002 (*vide* Exhibit P-4) issued by the Investigation Corps of the National Police of the Republic of Indonesia. With regard to the pretrial review petition, the South Jakarta District Court passed Decision Number 27/PID/PRAP/2011/PN.JKT.SEL dated August 23, 2011, the injunction of which principally rejected the Petitioner's pretrial review petition in its entirety (*vide* Exhibit P-5);

Article 83 paragraphs (1) and (2) of the KUHAP has impaired the

Petitioner's constitutional right since it has restricted the Petitioner's right to file an Appeal to High Court against the pretrial review decision of the South Jakarta District Court Number 27/PID/PRAP/2011/PN.JKT.SEL dated August 23, 2011. Although the article *a quo* does not grant the right to the Petitioner to file an appeal, however, the Petitioner has insisted on filing an appeal to the High Court in Jakarta on August 26, 2011 through the South Jakarta District Court with Deed of Appeal Petition Number 84/Akta Pid/2011/PN.Jak.Sel dated August 26, 2011 accompanied with Memorandum of Appeal dated September 9, 2011 (*vide* Exhibit P-6 and Exhibit P-7b);

[3.8] Whereas based on the description of legal standing of the Petitioner, the Court is of the opinion that there is a causal relationship (*causal verband*) between the intended impairment and the coming into effect of the Law petitioned for judicial review. According to reasonable logic, the Petitioner's constitutional right impairment is likely to occur, namely that the Petitioner's petition for appeal will be declared inadmissible by the High Court in Jakarta. Therefore, according to the Court, the Petitioner has legal standing to file the petition for judicial review of the article of the Law *a quo*;

[3.9] Whereas since the Court has authority to hear a petition *a quo* and the Petitioner has legal standing, the Court shall then consider the substance of the petition;

Substance of the Petition

[3.10] Whereas in the substance of the petition, the Petitioner files a petition for judicial review of Article 83 paragraphs (1) and (2) of the KUHAP stating that:

(1) "*No appeals may be lodged with respect to a judgment in pretrial review in matters as intended in Article 79, Article 80 and Article 81*";

(2) "*A judgment in pretrial decision which rules that the termination of an investigation or prosecution was illegal shall be excluded from the provision of Paragraph (1), for which purpose a final judgment of the high court in the jurisdiction concerned may be requested*";

which is inconsistent with Article 27 paragraph (1), Article 28D paragraph (1) and Article 28I paragraph (2) of the 1945 Constitution because it only grants the right to appeal a pretrial review decision ruling that an arrest or detention, the termination of investigation or prosecution and the indemnification and/or rehabilitation is illegal as well as not granting the right to appeal a pretrial review decision ruling that the termination of investigation or prosecution is illegal;

Whereas according to the Petitioner, Article 83 paragraph (1) of the KUHAP gives the same treatment for the Petitioner and the investigator or public prosecutor, by which they cannot file a petition for appeal to a pretrial decision. However, Article 83 paragraph (2) of the KUHAP provides an exclusion with regard to a pretrial review decision ruling that the termination of investigation or prosecution is illegal, by which the investigator or public prosecutor may file an appeal, so that according to the Petitioner, the article *a quo* is inconsistent with

Article 27 paragraph (1), Article 28D paragraph (1) and Article 28I paragraph (2) of the 1945 Constitution because of as giving a discriminatory treatment between Petitioner and the investigator and the public prosecutor;

Opinion of the Court

[3.11] Whereas after thoroughly examining the Petitioner's petition, documents or writings (exhibit P-1 up to exhibit P-7b), statement of expert presented by the Petitioner, verbal statement of the Government and the written conclusion of the Petitioner as described above, the Court considers as follows:

[3.12] Whereas before giving its opinion on the Petitioner's petition, the Court will describe the following matters:

- Whereas pretrial review is an element of Indonesian criminal judicature systems/Pretrial review was not recognized in the old criminal procedure law regulated in *Herziene Inlands he Reglement* (H.I.R). HIR used an *inquisitoir* system which placed a suspect or a defendant in an examination as an object, allowing the investigator to treat the suspect arbitrarily, so that since the first examination before the investigator, the suspect had been considered guilty *a priori*. The KUHAP has changed the system adopted by the HIR, namely by placing a suspect or a defendant in an examination no longer being an object but a subject, namely as a human being having worth, dignity and equal position before the law. One of the regulations on equal position before the law in the KUHAP is the

pretrial review system as one controlling the mechanism for potential arbitrary treatment by an investigator or a public prosecutor in conducting the arrest, search, seizure, investigation, prosecution termination of investigation and termination of prosecution, whether or not it is accompanied by indemnification and/or rehabilitation. The purpose and objective which should be achieved and protected in the pretrial review process are the enforcement of law and the protection of human rights as a suspect/defendant in the examination, investigation and prosecution. Therefore, the pretrial review system regulated in Article 77 up to Article 83 of the KUHAP is developed to horizontally supervise the suspect/defendant's rights in a preliminary examination (*vide* Elucidation of Article 80 of the KUHAP). The KUHAP is established to correct the previous legal practices, under HIR, which were not in line with the protection and enforcement of human rights. In addition to that, the KUHAP gives protection for a suspect/defendant's human rights and defends their interests in a legal process;

- Whereas any acts of force, such as imprisonment, search, seizure, detention and prosecution conducted in violation of laws and regulations, basically take away human rights, so that the existence of pretrial review is expected to ensure the implementation of criminal case examination consistently with the applicable laws and regulations. The purpose of supervision conducted by the district court as the first level judicial institution is to juridically control, assess, review and consider whether or

not the acts of force against a suspect/defendant used by an inquirer/investigator or public prosecutor are consistent with the KUHAP;

- Whereas a pretrial review petition is filed with a district court by a suspect/defendant, family or his/her attorney, investigator, public prosecutor and the interested third party. Pretrial examination by district court is a preliminary examination before the examination on the substance of the petition filed by the public prosecutor. The pretrial examination shall be conducted quickly and by no later than seven days in which the judge must have passed a decision. Pretrial review petition shall be null and void if the court has commenced the examination of the principal issues of the petition while the pretrial review petition has not been decided by the Court [*vide* Article 82 paragraph (1) sub-paragraphs c and d of the KUHAP].

[3.13] Whereas based on the foregoing, the Court is of the opinion that the KUHAP has regulated the examination of pretrial review petition quickly, namely by no later than three days upon the filling of the petition, with the single judge appointed to hear the pretrial review concerned should have to determined the hearing day [*vide* Article 82 paragraph (1) sub-paragraph a of the KUHAP] and by no later than seven days, the judge should have passed a decision [*vide* Article 82 paragraph (1) sub-paragraph c of the KUHAP]. The requirement of quicken the pretrial process is also followed by provision of Article 82 paragraph (1) sub-paragraph d of the KUHAP provided that if the examination of a case has

been commenced by a district court while the pretrial review petition has not been finished, the pretrial review shall be null and void. In addition to that, Article 83 paragraph (1) of the KUHAP provides that a pretrial review decision in matters as intended in Article 79, Article 80 and Article 81 of the KUHAP cannot be appealed;

[3.14] Whereas according to the Court, the pretrial review process is a quick proceeding so that it should not be appealed. However, Article 83 paragraph (2) of the KUHAP provides that, "*A judgment in pretrial review which rules that the termination of an investigation or prosecution was illegal shall be excluded from the provision of Paragraph (1), for which purpose a final judgment of the high court in the jurisdiction concerned may be requested*";

[3.15] Whereas Article 83 paragraph (2) of the KUHAP, according to the Court, is inconsistent with Article 27 paragraph (1), Article 28D paragraph (1) and Article 28I paragraph (2) of the 1945 Constitution because it fails to position citizens at an equal position before the law and the government and it fails to provide legal certainty of just laws. In other words, Article 83 paragraph (2) of the KUHAP gives a different treatment between the suspect/defendant and the investigator and public prosecutor in taking a legal measure against a pretrial review decision. Such provision is inconsistent with the philosophy of the judicial institution which, on the contrary, guarantees the suspect/defendant's rights in relation to their worth and dignity as human beings.

[3.16] Whereas according to the Court, there are two alternatives in giving equal

treatment between the suspect/defendant and the investigator and public prosecutor in Article 83 paragraph (2) of the KUHAP, namely: (1) to grant the right to the suspect/defendant to file an appeal; or (2) to remove the right of the investigator and public prosecutor to file an appeal. According to the Court, due to the philosophy of the establishment of a pretrial review institution as a speedy judicature, the equal treatment between the suspect/defendant and the investigator and public prosecutor shall be provided, then the granting of right to appeal to the investigator and public prosecutor as referred to in Article 83 paragraph (2) of the KUHAP is declared inconsistent with the 1945 Constitution. By eliminating the right to appeal for both parties, the constitutionality review of Article 83 paragraph (2) of the KUHAP has legal grounds while the Petitioner's petition concerning the constitutionality review of Article 83 paragraph (1) of the KUHAP is not reasonable by law;

4. CONCLUSION

Based on the assessment of the facts and laws as described above, the Court concludes that:

[4.1] The Court has authority to hear the Petitioners' petition;

[4.2] The Petitioner has legal standing to file the petition *a quo*;

[4.3] The substance of the Petitioners' petition has legal grounds.

Based on the 1945 Constitution of the State of the Republic of Indonesia,

Law Number 24 Year 2003 regarding the Constitutional Court as amended by Law Number 8 year 2011 regarding the Amendment to Law Number 24 Year 2003 regarding the Constitutional Court (State Gazette of the Republic of Indonesia Number 5226), Law Number 48 Year 2009 regarding Judicial Power (State Gazette of the Republic of Indonesia Year 2009 Number 157, Supplement to the State Gazette Number 5076).

5. DECISIONS

Passing the decision,

Declaring:

- To grant the Petitioner's petition partly;
- Article 83 paragraph (1) of Law Number 8 Year 1981 concerning the Criminal Procedure Code (State Gazette of Indonesia Year 1981 Number 76, Supplement to State Gazette of the Republic Indonesia Number 3209) inconsistent with the 1945 Constitution of the State of the Republic of Indonesia;
- That Article 83 paragraph (2) of Law Number 8 Year 1981 concerning the Criminal Procedure Code (State Gazette of Indonesia Year 1981 Number 76, Supplement to State Gazette of the Republic Indonesia Number 3209) has no binding legal force;
- To order the inclusion of this decision in the Official Gazette of the

Republic of Indonesia properly;

- To reject the remaining parts of the Petitioner's petition;

Hence this decision was made in the Consultative Meeting of Justices attended by nine Constitutional Court Justices, namely Moh. Mahfud MD., as Chairperson and concurrent Member, Achmad Sodiki, Hamdan Zoelva, M. Akil Mochtar, Ahmad Fadlil Sumadi, Anwar Usman, Harjono and Maria Farida Indrati, respectively as Members, on **Thursday, April the nineteenth, year two thousand and twelve** and was pronounced in the Plenary Session of the Constitutional Court open for the public on **Tuesday, May the first, year two thousand and twelve**, by eight Constitutional Court Justices namely Moh. Mahfud MD., as Chairperson and concurrent Member, Achmad Sodiki, Hamdan Zoelva, M. Akil Mochtar, Ahmad Fadlil Sumadi, Anwar Usman, Harjono and Maria Farida Indrati, respectively as Members, assisted by Sunardi as Substitute Registrar, in the presence of the Petitioner, the Government or its representative, and the People's Legislative Assembly or its representative.

CHIEF JUSTICE,

Sgd.

Moh. Mahfud MD.

JUSTICES,

Sgd.	**Sgd.**
Achmad Sodiki	**Hamdan Zoelva**
Sgd.	**Sgd.**
M. Akil Mochtar	**Anwar Usman**
Sgd.	**Sgd.**
Ahmad Fadlil Sumadi	**Harjono**

Sgd.

Maria Farida Indrati

Substitute Registrar

Sgd.

Sunardi