



DECISION

Number 102/PUU-VII/2009

FOR THE SAKE OF JUSTICE UNDER THE ONE ALMIGHTY GOD

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA

[1.1] Examining, hearing, and deciding upon constitutional cases at the first and final levels, has passed a decision in the case of petition for Judicial Review of Law Number 42 Year 2008 regarding the General Elections of the President and Vice President under the 1945 Constitution of the State of the Republic of Indonesia, filed by:

[1.2] Name : Refly Harun;
Address : Jalan Melati Number 164, Neighborhood
Unit/Neighborhood Association (RT/RW)
005/006, Kebon Jeruk, West Jakarta 11350;

As ----- **the First Petitioner;**

Name : Maheswara Prabandono;
Address : Peninggaran, Neighborhood Unit/
Neighborhood Association (RT/RW) 09/09,
Kebayoran Lama Utara Sub-district,
Kebayoran Lama District, South Jakarta;

As ----- **the Second Petitioner;**

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

- [1.3]** Having read the petition of the Petitioners;
Having heard the statements of the Petitioners;
Having examined the evidence.

3. LEGAL CONSIDERATIONS

[3.1] Whereas the purpose and objective of the Petitioners' petition are to review the constitutionality of Article 28 and Article 111 paragraph (1) of Law Number 42 Year 2008 regarding the General Elections of the President and Vice President (State Gazette of the Republic of Indonesia Year 2008 Number 176, Supplement to the State Gazette of the Republic of Indonesia Number 4924, hereinafter referred to as Law Number 42/2008) 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) must first consider the following issues:

1. Authority of the Court to examine, hear, and decide upon the *a quo* petition;
2. Legal standing of the Petitioners to file the *a quo* petition.

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

Authority of the Court

[3.3] Whereas according to Article 24C paragraph (1) of the 1945 Constitution and Article 10 paragraph (1) sub-paragraph a of Law Number 24 Year 2003 regarding the Constitutional Court (State Gazette of the Republic of Indonesia Year 2003 Number 98, Supplement to the State Gazette of the Republic of Indonesia Number 4316, hereinafter referred to as the Constitutional Court Law) *juncto* Article 12 paragraph (1) sub-paragraph a of Law Number 4 Year 2004 regarding Judicial Authority, the Court has authority to hear cases and conduct at the first and final levels, the result of which shall be final in nature, the judicial review of Laws under the 1945 Constitution;

[3.4] Whereas the Petitioners' petition is intended to review the constitutionality of the norms in Article 28 and Article 111 paragraph (1) of Law Number 42/2008 under the 1945 Constitution, which is within the authority of the Court, and therefore, the Court has authority to examine, hear, and decide upon the *a quo* petition.

Legal Standing of the Petitioners

[3.5] Whereas based on Article 51 paragraph (1) of the Constitutional Court Law along with its Elucidation, the parties that may file a petition for Judicial Review of a Law under the 1945 Constitution shall be those considering

that their constitutional rights and/or authority granted by the 1945 Constitution 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 groups 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;

Hence, in the judicial review of a law under the 1945 Constitution the Petitioners must first explain and substantiate the following:

- a. their qualification as petitioners as intended in Article 51 paragraph (1) of the Constitutional Court Law;
- b. whether or not there is any impairment of constitutional right and/or authority granted by the 1945 Constitution as a result of the coming into effect of the law being petitioned for review;

[3.6] Considering also that since the Court's Decision Number 006/PUU-III/2005 dated May 31, 2005 and Decision Number 11/PUU-V/2007 dated September 20, 2007 the Court is of the opinion that the impairment of constitutional rights and/or authority as intended in Article 51 paragraph (1) of the Constitutional Court Law must meet five requirements, namely:

- a. the existence of constitutional rights and/or authority of the Petitioners granted by the 1945 Constitution;
- b. the Petitioners consider that such constitutional rights and/or authority have been impaired by the coming into effect of the law petitioned for 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 review;
- e. the possibility that with the granting of the Petitioners' petition, the impairment of such constitutional rights and/or authority asserted by the Petitioners will not or will no longer occur;

[3.7] Whereas the Petitioners argue as follows:

The Petitioners have filed a petition for judicial review of Article 28 and Article 111 paragraph (1) of Law Number 42/2008, arguing that such provisions are inconsistent with the 1945 Constitution based principally on the reasons that the application of Article 28 and Article 111 paragraph (1) of Law Number 42/2008 has eliminated the right to vote of some citizens who have reached the age of 17 years and who are/have been married. In fact, the right to vote is the manifestation of equal opportunity in law and government as regulated in Article 27 paragraph (1) as well as Article 28D paragraph (1) and paragraph

(3) of the 1945 Constitution, which is also specifically provided for in Article 43 of Law Number 39 Year 1999 regarding Human Rights which reads, “*Every citizen shall have the right to be elected and to vote in the general elections based on equal rights through voting conducted in a direct, public, free, confidential, honest and just manner in accordance with the provisions of laws and regulations.*” The right to vote is also included in the International Covenant on Civil and Political Rights (ICCPR), which has been ratified by Indonesia by Law Number 12 Year 2005 regarding the Ratification of the International Covenant on Civil and Political Rights, State Gazette of the Republic of Indonesia Number 119 Year 2005, Supplement to the State Gazette of the Republic of Indonesia Number 4558, namely in Article 25;

According to the Court, the First Petitioner (Refly Harun) and the Second Petitioner (Maheswara Prabandono) are individual Indonesian citizens who have reached the age of 17 years and have been married (Exhibit P-2) and that during the General Elections of Members of the People’s Legislative Assembly (DPR), the Regional Representative Council (DPD), and the Regional People’s Legislative Assembly (DPRD) on April 9, 2009, the Petitioners could not cast their votes because they were not listed in the Permanent Voters’ Register (DPT) so that they could not exercise their right to vote as guaranteed by the 1945 Constitution. In this petition, the Petitioners’ right to vote in the General Elections of the President and Vice President may potentially be impaired because up to the opening of the hearing of the Court namely two days prior to the implementation of the General Elections of the President and Vice President it

turned out that the Petitioners had not obtained any certainty whether they could use their right to vote as they had not yet been informed whether they had been included in the Permanent Voters' Register and also they had not yet obtained Notice of Time and Place of Voting (the C 4 PPWP Form). Therefore, the described requirements of qualification and constitutional impairment have been fulfilled, and thus the Petitioners fulfill the legal standing requirement to file the *a quo* petition;

[3.8] Since the Court has authority to examine, hear, and decide upon the *a quo* case, and the Petitioners have legal standing to act as petitioners in the *a quo* petition as considered above, the Court shall now consider the Substance of the Petition.

Substance of the Petition

[3.9] Whereas the principal issue raised by the Petitioners is as follows:

- Article 28 and Article 111 paragraph (1) of Law Number 42/2008 have eliminated or will potentially eliminate the right to vote of the citizens who have reached the age of 17 year and/or who have been married. Meanwhile, the right to vote is guaranteed by the Constitution as set out by the Court in Decision Number 011-017/PUU-I/2003 dated February 24, 2004. The aforementioned decision mentions, among other things, as follows, "*Considering, whereas the citizens' constitutional right to vote and right to be a candidate is part of the constitutional right guaranteed by the*

Constitution, laws as well as international conventions, and hence the limitation, violation, elimination and nullification of the intended right shall constitute a violation of the citizens' human rights."

- The right to vote is a manifestation of the right to equal opportunity in law and government as regulated in Article 27 paragraph (1) as well as Article 28D paragraph (1) and paragraph (3) of the 1945 Constitution. Specifically, Law Number 39 Year 1999 regarding Human Rights regulates the right to vote as set forth in Article 43 which reads, *"Every citizen shall have the right to be elected and to vote in the general elections based on equal rights through voting conducted in a direct, public, free, confidential, honest, and just manner in accordance with the provisions of laws and regulations."* The right to vote is also included in the International Covenant on Civil and Political Rights (ICCPR) which has been ratified by Indonesia by Law Number 12 Year 2005 regarding the Ratification of the International Covenant on Civil and Political Rights namely in Article 25 of ICCPR which states that *"Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors."*

Therefore, according to the Petitioners, the provisions of Article 28 and Article 111 paragraph (1) of Law Number 42/2008, which require that in order to be able to vote citizens must be registered as voters or included in the DPT, have eliminated some citizens' constitutional right to vote and therefore they are inconsistent with Article 27 paragraph (1), Article 28D paragraph (1) and paragraph (3) of the 1945 Constitution;

[3.10] Whereas in order to support the arguments in their petition, the Petitioners present documents/written evidence marked as Exhibit P-1 and Exhibit P-2, but do not present any witnesses or experts;

Opinion of the Court

[3.11] Whereas prior to considering the substance of the principal issue of the petition, the Court needs to first formulate the main legal issue raised by Petitioners namely the right to vote, with respect to which their constitutional right has been impaired in the context of the General Elections of the President and Vice President. The reasons of the Petitioners are as follows:

- Article 28 and Article 111 of Law Number 42/2008 are inconsistent with Article 27 paragraph (1) and Article 28D paragraph (1) and paragraph (3) of the 1945 Constitution;
- The Petitioners have lost their right to participate in the 2009 General Elections;

[3.12] Whereas during the Hearing, the Court has found the following legal facts:

- The Petitioners have lost their right to vote in the General Elections of Members of the People's Legislative Assembly (DPR), the Regional Representative Council (DPD), and the Regional People's Legislative Assembly (DPRD) Year 2009 because they are not registered in the DPT;
- The Petitioners have not obtained any properly disseminated information regarding the DPT;
- The Petitioners have endeavored to participate in the General Elections by examining the DPT and invitations at their old addresses during the 2004 General Elections and at their current addresses, but they have not obtained any information or invitation to vote at the Voting Station (TPS);

Based on the foregoing legal facts, when considered in conjunction with the current conditions facing the General Elections of the President and Vice President, the main legal question for the Court to answer is whether Article 28 and Article 111 of Law Number 42/2008 are constitutional or unconstitutional in relation to the implementation of the general elections as applicable in Indonesia;

[3.13] Whereas in order to answer the foregoing legal question, the Court first refers to the Decision of the Constitutional Court Number 011-017/PUU-I/2003 dated February 24, 2004 which has affirmed that the citizens' constitutional rights to vote and right to be candidate are guaranteed by the

Constitution, the laws and international conventions, so that the limitation, violation, elimination, or nullification of such rights constitute violations of the citizens' human rights;

[3.14] Whereas the aforementioned Decision is based on the 1945 Constitution which expressly provides that *“Without exception, all citizens shall have an equal position before the law and in government and shall be obligated to uphold the law and government.”* [vide Article 27 paragraph (1)]. Article 28C paragraph (2) of the 1945 Constitution provides that, *“Every person shall have the right to improve him/herself in striving for his/her rights collectively for building his/her society, nation, and state”*. The 1945 Constitution also affirms that *“Every person shall have the right to the recognition, the guarantees, the protection and the legal certainty of just laws as well as equal treatment before the law”* [vide Article 28D paragraph (1)]. Furthermore it is also provided for that *“Every citizen shall have the right to obtain equal opportunities in government”* [vide Article 28D paragraph (3)] and Article 28I paragraph (2) which states 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 from any such discriminatory treatment”*.

[3.15] Whereas the above-mentioned matter is in line with Article 21 of the Universal Declaration of Human Rights (UDHR) which reads as follows:

- (1) *“Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.*

- (2) *Everyone has the right of equal access to public service in his country.*
- (3) *The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.*

Moreover, the provisions as intended in paragraph **[3.14]** are also in line with Article 25 of the International Covenant on Civil and Political Rights which has been ratified by Law Number 12 Year 2005 regarding the Ratification of the International Covenant on Civil and Political Rights as included in the State Gazette of the Republic of Indonesia Year 2005 Number 119, Supplement to the State Gazette of the Republic of Indonesia Number 4558, which reads:

“Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- a) *To take part in the conduct of public affairs, directly or through freely chosen representatives;*
- b) *To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;*
- c) *To have access, on general terms of equality, to public service in his country.”*

[3.16] Whereas Article 43 of Law Number 39 Year 1999 regarding Human Rights asserts as follows:

(1) *“Every citizen shall have the right to be elected and to vote in the general elections based on equal rights through voting conducted in a direct, public, free, confidential, honest and just manner in accordance with the provisions of laws and regulations.*

(2) *Every citizen shall have the right to participate in the government directly or through the representative that he/she elects in a free manner, in accordance with the manner provided for in laws and regulations.*

(3) *Every citizen can be appointed to every position in the government”.*

[3.17] Whereas Article 1 sub-article 21 of Law Number 42/2008 states that *“Voters shall be Indonesian Citizens who have reached the full age of 17 (seventeen) years or more or who is/has been married”.* Article 27 paragraph (1) of Law Number 42/2008 states that, *“Indonesian Citizens who, on the day of voting, have reached the full age of 17 (seventeen) years or more or who are/have been married shall have the right to vote”.*

[3.18] Whereas the citizens’ rights to vote as described above have been stipulated as human rights and constitutional rights of citizens so that the aforementioned constitutional rights shall not be hampered or impaired by various administrative provisions and procedures which make it difficult for citizens to exercise their right to vote;

[3.19] Whereas Article 27 paragraph (2) of Law Number 42/2008 reads *“Indonesian Citizens as intended in paragraph (1) shall be registered by the administrator of the General Elections of the President and Vice President in the Voters’ Register”* and Article 28 of Law Number 42/2008 states that *“In order to be able to exercise the right to vote, Indonesian Citizens as intended in Article 27 have to be registered as Voters”*. Similarly, Article 111 paragraph (1) of Law Number 42/2008 states that *“The voters that have the right to participate in the voting at the Voting Station (TPS) shall include: a. Voters registered in the Permanent Voters’ Register at the relevant Voting Station (TPS); and b. Voters registered in the Additional Voters’ Register”*. The aforementioned provisions constitute administrative provisions and procedures for a citizen to exercise his/her right to vote;

[3.20] Whereas the provisions requiring a citizen to be registered in the Permanent Voters’ Register (DPT) are more in the nature of administrative procedures and shall not negate substantive matters, namely the citizens’ right to vote in the General Elections. Therefore, the Court is of the opinion that it is necessary to find a solution to complement the existing Permanent Voters’ Register (DPT) so that citizens are not prevented from exercising their right to vote;

[3.21] Whereas it will be difficult for the General Election Commission (KPU) to rearrange the DPT through data updating in view of the increasingly limited time, while the use of a valid Resident’s Identity Card (KTP) or Passport

to exercise their right to vote for Indonesian Citizens who are not registered in the Permanent Voters' Register (DPT) constitutes the safest alternative for protecting every citizen's right to vote. In relation to the aforementioned matter, the Court considers that the use of valid Resident's Identity Card (KTP) or Passport to vote cannot be applied through a decision or a regulation of the General Election Commission (KPU); meanwhile, a form of Government Regulation in Lieu of Law also bears the risk of creating problems if in the future it will be nullified through legislative review during the discussion of the next session period of the People's Legislative Assembly;

Based on the foregoing considerations, thus the Court, for the sake of justice, legal certainty, and legal utility, passes a self-executing decision which can be directly applied by the General Election Commission (KPU) without requiring a Government Regulation in Lieu of Law in order to protect, guarantee, and fulfill the citizens' constitutional rights to exercise their right to vote;

[3.22] Whereas based on Article 28 paragraph (1) of Law Number 4 Year 2004 regarding Judicial Authority (State Gazette of the Republic of Indonesia Year 2004 Number 8, Supplement to the State Gazette of the Republic of Indonesia Number 4358), the Court shall be obligated to explore, follow, and understand the legal values and the sense of justice existing in the community. This is intended for court decisions to be in accordance with the law and the sense of justice of the community;

[3.23] Whereas prior to passing a Decision on the constitutionality of the articles petitioned for review, and in order that on the one hand no constitutional rights of citizens are impaired and, on the other hand, no applicable provisions of laws and regulations are violated, the Court needs to order the General Election Commission (KPU) to further regulate the technicalities of the implementation of the exercise of the right to vote of Indonesian Citizens not registered in the Permanent Voters' Register (DPT) with reference to the following guidelines:

1. Indonesian Citizens not yet registered in the Permanent Voters' Register can exercise their voting right by showing a valid Resident's Identity Card or passport for Indonesian Citizens overseas;
2. Resident's Identity Cards used by Indonesian citizens must be accompanied by a Family Card or similar document;
3. Indonesian citizens using valid Resident's Identity Cards may only exercise their voting right in Voting Stations (TPS) located within the Neighborhood Unit/Neighborhood Association (RT/RW) or by any other place of similar name in accordance with the address written on their Resident's Identity Card. In particular, those using passports at the Overseas Election Committee (PPLN) must obtain the approval and stipulation of the voting place from the local Overseas Election Committee (PPLN);
4. The Indonesian Citizens referred to in the preceding point 3 shall first have themselves registered at the local Voting Organizing Group (KPPS) before exercising their voting right;

5. Voting for Indonesian citizens who will exercise their voting right using Resident's Identity Cards or passports shall be conducted 1 (one) hour before the completion of voting in the local Voting Station (TPS) or Overseas Voting Station (TPS LN).

[3.24] Whereas with respect to the Petitioners' petition, the Court considers it unnecessary to hear the statements of the Government and the People's Legislative Assembly, because it is allowed under Article 54 of the Constitutional Court Law. Whereas the full text of Article 54 of the Constitutional Court Law is as follows: "*The Constitutional Court **may** require information and/or minutes of meeting with respect to the petition being examined from the People's Consultative Assembly, the People's Legislative Assembly, and/or the President*".

In addition, in view of the urgency of this case with the coming General Elections of the President and Vice President, then the need to immediately pass a decision on the same day of examination of the *a quo* case is allowed by the provision of Article 45 paragraph (9) of the Constitutional Court Law, which reads, "*The Constitutional Court may pass its decision on the same day or postpone it to be passed on another day which must be notified to the parties.*"

[3.25] Whereas based on the foregoing opinions and legal considerations in their mutual connection, the Court considers that the Petitioners' petition is based on sufficient legal grounds;

4. CONCLUSION

Based on the foregoing considerations regarding the facts and laws, the Court has come to the following conclusion:

- [4.1] The Court has authority to examine, hear, and decide upon the *a quo* petition;
- [4.2] The Petitioners have legal standing to file the *a quo* petition;
- [4.3] The Petitioners' petition with respect to Article 28 and Article 111 of Law Number 42 Year 2008 regarding the General Elections of the President and Vice President (State Gazette of the Republic of Indonesia Year 2008 Number 176, Supplement to the State Gazette of the Republic of Indonesia Number 4924) is based on sufficient legal grounds, but the Court considers that the Petitioners' petition is conditionally constitutional insofar as it does not eliminate the right to vote of the citizens not registered in the Permanent Voters' Register for the General Elections of the President and Vice President;
- [4.4] The requirements and procedures that must be fulfilled for Indonesian citizens not registered in the Permanent Voters' Register (DPT) and who will exercise their right to vote are mentioned in the decisions part of this Decision.

6. DECISIONS

In view of the 1945 Constitution of the State of the Republic of Indonesia and Law Number 24 Year 2003 regarding the Constitutional Court (State Gazette of the Republic of Indonesia Year 2003 Number 98, Supplement to the State Gazette of the Republic of Indonesia Number 4316);

Decides,

- To grant the Petitioners' petition in part;
- To declare that Article 28 and Article 111 of Law Number 42 Year 2008 regarding the General Elections of the President and Vice President (State Gazette of the Republic of Indonesia Year 2008 Number 176, Supplement to the State Gazette of the Republic of Indonesia Number 4924) are constitutional insofar as they are understood as including citizens not registered in the Permanent Voters' Register with the following requirements and in the following manner:
 1. In addition to the Indonesian Citizens registered in the Permanent Voters' Register (DPT), Indonesian Citizens not yet registered in the Permanent Voters' Register may exercise their voting right by showing a valid Resident's

Identity Card (KTP) or passport for Indonesian Citizens overseas;

2. Resident's Identity Cards used by Indonesian citizens must be accompanied by a Family Card or similar document;;
3. Indonesian citizens using valid Resident's Identity Cards may only exercise their voting right in Voting Stations (TPS) located within the Neighborhood Unit/Neighborhood Association (RT/RW) or by any other place of similar name in accordance with the address written on their Resident's Identity Card;
4. The Indonesian Citizens referred to in the preceding point 3 shall first have themselves registered at the local Voting Organizing Group (KPPS) before exercising their voting right;
5. Voting for Indonesian citizens who will exercise their voting right using Resident's Identity Cards or passports shall be conducted 1 (one) hour before the completion of voting in the local Voting Station (TPS) or Overseas Voting Station (TPS LN);

- To reject the remaining parts of the Petitioners' petition;
- To order this Decision be properly promulgated in the Official Gazette of the Republic of Indonesia.

Hence this decision was made in the Consultative Meeting attended by nine Constitutional Court Justices on Monday, July the sixth year two thousand and nine, and was pronounced in the Plenary Session of the Constitutional Court open for the public on the same day, Monday, July the sixth year two thousand and nine, by us Moh. Mahfud MD., as the Chairperson and concurrent Member, Abdul Mukthie Fadjar, Harjono, M. Arsyad Sanusi, Achmad Sodiki, Maria Farida Indrati, Maruarar Siahaan, M. Akil Mochtar, and Muhammad Alim, respectively as Members and assisted by the Cholidin Nasir as the Substitute Registrar, in the presence of the Petitioners, and the Government or its representative.

CHIEF JUSTICE,

Sgd.

Moh. Mahfud MD.

JUSTICES,

Sgd.

Abdul Mukthie Fadjar

Sgd.

Harjono

Sgd.

M. Arsyad Sanusi

Sgd.

Achmad Sodiki

Sgd.

Maria Farida Indrati

Sgd.

Maruarar Siahaan

Sgd.

M. Akil Mochtar

Sgd.

Muhammad Alim

Substitute Registrar,

Sgd.

Cholidin Nasir