



DECISION

NUMBER 22-24/PUU-VI/2008

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 hereby passed a decision in the case of Petition for Judicial Review of Law Number 10 Year 2008 regarding 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) under the 1945 Constitution of the State of the Republic of Indonesia, filed by:

[1.2] I. **Petitioner in Case Number 22/PUU-VI/2008**

Name : **MUHAMMAD SHOLEH, S.H;**
Place/Date of Birth : Sidoarjo, October 2, 1976;
Religion : Islam;
Citizenship : Indonesian;
Address : Jalan Magersari Number 82 Krian,
Sidoarjo, East Java.

Based on Special Power of Attorney dated August 20, 2008 having granted the power of attorney to Lujianto, S.H. and Iwan Prahara, S.H., both of whom are Advocates at the SHOLEH & *PARTNER* Law Office, having its address at Jalan Raya Dukuh Kupang Number 7, Surabaya, to act for and on behalf of the Authorizer, either individually or jointly; Hereinafter referred to as ----- **FIRST PETITIONER;**

II. Petitioners in Case Number 24/PUU-VI/2008

1. Name : **SUTJIPTO, S.H., M.Kn;**
Place/Date of Birth : Magetan, October 5, 1950;
Address : Menara Sudirman Building
18th Floor Jalan Jenderal
Sudirman Kav. 60, Jakarta
12190

2. Name : **SEPTI NOTARIANA, S.H.,
M.Kn;**
Place/Date of Birth : Teluk Betung, September 24,
1980;
Address : Jalan Zainal Abidin Pagar
Alam 30 Kedaton, Bandar
Lampung 35142;

3. Name : **JOSE DIMA SATRIA, S.H.,
M.Kn;**

Place/Date of Birth : Semarang, 14 April 1980;

Address : Spondol Bumi Indah J-15,
Sumurbroto Banyumanik,
Semarang;

Each of them choosing their legal domicile at the Notary Office of Sutjipto, S.H., at Menara Sudirman Building 18th Floor, Jalan Jenderal Sudirman Kav. 60, South Jakarta;

Hereinafter referred to as ----- **SECOND
PETITIONER;**

[1.3] Having read the petition of the Petitioners;
Having heard the statements of the Petitioners;
Having read the written statement of the People's Legislative Assembly;
Having heard and read the written statement of the Government;
Having heard and read the written statement of the Interested Party, the National Commission Against Violence Toward Women;
Having heard and read the written statement of the Interested Party, the General Election Commission;
Having examined the evidence presented by the Petitioners;

Having read the conclusion of the Government;

3. LEGAL CONSIDERATIONS

[3.1] Whereas the main legal issue of the Petitioners' petition is concerned with the substantive review of Article 55 paragraph (2), Article 205 paragraph (4), paragraph (5), paragraph (6), and paragraph (7), and Article 214 sub-article a, sub-article b, sub-article c sub-article d, and sub-article e of Law Number 10 Year 2008 regarding the General Elections of Members of the People's Legislative Assembly, Regional Representative Council, and the Regional People's Legislative Assembly (State Gazette of the Republic of Indonesia Year 2008 Number 51, Supplement to the State Gazette of the Republic of Indonesia Number 4836, hereinafter referred to as Law Number 10/2008) 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) shall first consider:

- a. authority of the Court to examine, hear, and decide upon the *a quo* petition;
- b. legal standing of the Petitioners to file the *a quo* petition;

Authority of the Court

[3.3] Whereas based on the provisions of Article 24C paragraph (1) of the 1945 Constitution, one of the constitutional authorities of the Court is 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 Constitution;

[3.4] Whereas the *a quo* petition is concerned with the judicial review of law under the 1945 Constitution, *in casu* Law Number 10/2008 under the 1945 Constitution, the Court therefore 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 Law Number 24 Year 2003 regarding the Constitutional Court and its elucidation (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), parties who may file a petition for the judicial review of laws under the 1945 Constitution shall be those who believe 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 based on the description of the provisions of Article 51 paragraph (1) of the Constitutional Court Law and the criteria for the impairment of constitutional rights and/or authority as described above, the Court will now consider the Petitioners' legal standing according to the Petitioners' description in their petitions along with relevant evidence, as follows:

- **First Petitioner**, who clarifies his standing in the *a quo* petition as an individual Indonesian citizen, candidate for the Regional People's Legislative Assembly for Electoral District I Surabaya-Sidoarjo, argues that Article 55 paragraph (2) of Law Number 10/2008 which reads, "*In the list*

of prospective candidates as referred to in paragraph (1), there shall be at least 1 (one) female prospective candidate in every 3 (three) prospective candidates” is inconsistent with the 1945 Constitution since it has impaired the Petitioner’s constitutional rights as regulated in:

- a. Article 27 paragraph (1), “*Without exception, all citizens shall have an equal position before the law and government and shall be obligated to uphold the law and government*”;
- b. Article 28D paragraph (1), “*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*”;
- c. Article 28I paragraph (2), “*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*”, so as to impair the Petitioner’s constitutional rights for the reason that Article 55 paragraph (2) is not line with the spirit of reform, and the Petitioner feels discriminated by the *a quo* article, since female legislative members obtain low priorities for candidacy numbers and therefore hinder the election of Petitioner as a legislative member;

Furthermore regarding Article 214 sub-article a, sub-article b, sub-article c, sub-article d, and sub-article e of Law Number 10/2008 which reads “*The*

designation of elected candidates for the DPR, Provincial DPRD, and regency/municipality DPRD from political parties participating in general elections shall be based on the seats acquired by the political parties participating in a general election in an electoral district, in accordance with the following provisions:

- a. the elected candidates for the DPR, Provincial DPRD, and regency/municipality DPRD shall be determined based on candidates acquiring minimum votes of 30% (thirty percent) of the Voter's Denominator (BPP);*
- b. in the event that the number of candidates meeting the provisions of sub-article a exceeds the number of seats acquired by a political party participating in the general election, the seats shall be allocated to candidates with smaller candidacy numbers among the candidates meeting the requirement of a minimum 30% (thirty percent) of BPP;*
- c. In the event that there are two or more candidates meeting the provisions of sub-article a with an equal number of votes, the seats shall be allocated to candidates with smaller candidacy number among the candidates meeting the provision of a minimum 30% (thirty percent) of BPP, except for candidates acquiring votes equal to 100% (one hundred percent) of BPP;*

- d. *In the event that the number of candidates meeting the provisions of sub-article a is less than the number of seats acquired by a political party participating in the general election, the undistributed seats shall be allocated to candidates based on candidacy number;*
- e. *in the event where there are no candidates acquiring the minimum votes of 30% (thirty percent) of the BPP, the elected candidates shall be determined based on candidacy number”.*

Therefore, the spirit of the article has deviated from that of a fair and just general election, since even if First Petitioner is elected by the people, his rights will be rendered ineffective by the *a quo* article, so that if the votes acquired by the Petitioner do not reach 30% (thirty percent) of BPP, they become useless. The Petitioner provides the reason that the spirit of the *a quo* article has deviated from fair and just general elections, since the votes will become useless if they do not reach 30% (thirty percent) of the BPP.

[3.8] Whereas based on the foregoing description, since First Petitioner (Muhammad Sholeh, S.H.) potentially may not be elected as a member of DPRD, the Court is of the opinion that the First Petitioner (Muhammad Sholeh, S.H.) has legal standing as Petitioner in the *a quo* petition;

- The Second Petitioners (Sutjipto, S.H., M.Kn, Septi Notariana, S.H., M.Kn and Jose Dima Satria, S.H., M.Kn), as have been described in the

Substance of the Case section, may be considered as a group of Indonesian citizens with similar interests. The Second Petitioners (Sutjipto, S.H., M.Kn, Septi Notariana, S.H., M.Kn and Jose Dima Satria, S.H., M.Kn) argue that they have been harmed by the coming into effect of the *a quo* articles, since if the vote acquisition or remaining votes in the aforementioned electoral district is fewer than 50% (fifty percent) of BPP, the votes will be transferred to the province so that the Second Petitioners (Sutjipto, S.H., M.Kn, Septi Notariana, S.H., M.Kn and Jose Dima Satria, S.H., M.Kn) will not be guaranteed to acquire seats in the DPR and the votes acquired by the candidates for the DPR selected by those votes in one electoral district, may be transferred to other DPR member candidates in other electoral districts since the votes acquired or remaining are fewer than 50% (fifty percent) of the BPP;

[3.9] Whereas based on the foregoing description, since the Second Petitioners (Sutjipto, S.H., M.Kn and Septi Notariana, S.H., M.Kn) have the potential not to be elected as members of the DPR, Jose Dima Satria, S.H., M.Kn is, *mutatis mutandis*, also harmed, since the votes acquired by the candidates elected by those votes in one electoral district, the votes acquired or remaining votes of fewer than 50% (fifty percent) of BPP may be transferred to other DPRD candidates in other electoral districts. Therefore the Court is of the opinion that the Second Petitioners have legal standing as Petitioner in the *a quo* petition;

[3.10] Considering whereas the Court has authority to examine, hear and decide upon the *a quo* petition, and all of the Petitioners have legal standing to act as Petitioners, the Court therefore shall now consider the Substance of the Petition;

Substance of the Petition

[3.11] Whereas, upon reading the arguments presented by the Petitioners in their respective petitions and the Petitioners' statement in the hearing, as explained in the Substance of the Case, the legal issues to be considered and decided upon by the Court from both of the foregoing petitions are as follows:

- Whereas according to the First Petitioner (Muhammad Sholeh, S.H.), Article 55 paragraph (2) of Law Number 10/2008 which reads, "*In the list of candidates as referred to in paragraph (1), there shall be at least 1 (one) female candidate in every 3 (three) candidates*" is inconsistent with Article 27 paragraph (1), Article 28D paragraph (1) and paragraph (3), and Article 28I paragraph (2) of the 1945 Constitution, which reads in its entirety as follows:
 - Article 27 paragraph (1): "*Without exception, all citizens shall have an equal position before the law and government and shall be obligated to uphold the law and government*";

- Article 28D of the 1945 Constitution:

Paragraph (1) : *“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”;*

Paragraph (3) : *“Every citizen shall have the right to obtain equal opportunities in government”;*

- Article 28I paragraph (2): *“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”;*

- Whereas according to the First Petitioner (Muhammad Sholeh, S.H.) and the Second Petitioners (Sutjipto, S.H., M.Kn, Septi Notariana, S.H., M.Kn, and Jose Dima Satria, S.H., M.Kn) Article 214 sub-articles a, b, c, d and e of Law Number 10/2008 which reads, *“The determination of the elected candidates for the DPR, Provincial DPRD, and regency/municipality DPRD from political parties participating in general election shall be based on the seat acquisition of political parties participating in general election in an electoral district, in accordance with the following provisions:*

- a. *the elected candidates for the DPR, Provincial DPRD, and regency/municipality DPRD shall be determined based on candidates acquiring minimum votes of 30% (thirty percent) of BPP;*
- b. *in the event that the candidates meeting the provision of sub-article a exceed the number of seats acquired by a political party participating in the general election, the seats shall be allocated to those candidates with smaller candidacy number among the candidates meeting the minimum requirement of 30% (thirty percent) of BPP;*
- c. *In the event that there are two or more candidates meeting provision of sub-article a with equal vote acquisition, the designation of the elected candidate shall be allocated to the candidate with the smaller candidacy number among the candidates meeting the requirement of a minimum of 30% (thirty percent) of the Voter's Denominator (BPP), except for candidates acquiring votes of 100% (one hundred percent) of BPP;*
- d. *In the event that the number of candidates meeting the requirements of sub-article a is less than the number of seats acquired by a political party participating in the general election, undistributed seats shall be allocated to the candidates based on candidacy number;*

- e. *In the event that no candidate acquires minimum votes of 30 % (thirty percent) of BPP, the elected candidate shall be determined based on the candidacy number.”*

The spirit of the law has deviated from an honest and just general election since if First Petitioner is elected by the people, it would be evident that the Petitioners' rights were rendered ineffective by the *a quo* article, such that the votes acquired by the Petitioners will be useless if they do not reach 30% (thirty percent) of the BPP. According to First Petitioner (Muhammad Sholeh, S.H.), it is also inconsistent with Article 27 paragraph (1), Article 28D paragraph (1) and paragraph (3), Article 28I paragraph (2) of the 1945 Constitution as described above and according to the Second Petitioners (Sutjipto, S.H., M.Kn, Septi Notariana, S.H., M.Kn., and Jose Dima Satria, S.H., M.Kn), it is inconsistent with Article 6A paragraph (4), Article 27 paragraph (1), Article 28D paragraph (1) and Article 28E paragraph (2) of the 1945 Constitution. The aforementioned provisions of those articles read in their entirety as follows:

Article 6A paragraph (4): *“In the event that no candidate pair of President and Vice President is elected, the two candidate pairs acquiring the most and the second-most votes shall be directly chosen by the people and the pair acquiring the highest number of votes shall be inaugurated as President and Vice President”*

Article 28E paragraph (2): *“Every person shall be entitled to the right to hold a belief, to express his/her thoughts and views, in accordance with his/her conscience”*

- Whereas according to the Second Petitioners (Sutjipto, S.H., M.Kn, Septi Notariana, S.H., M.Kn., and Jose Dima Satria, S.H., M.Kn), Article 205 paragraphs (4), (5), (6) and (7) of Law Number 10/2008 are inconsistent with Article 22E paragraph (1) of the 1945 Constitution. The provisions of Article 205 paragraphs (4), (5), (6) and (7) of Law Number 10/2008 read as follows:

Paragraph (4) : *“In the event there are seats remaining, a second phase of calculation of seat acquisition shall be conducted by way of distributing the total undistributed remaining seats to Political Parties Participating in the General Election which acquire a minimum vote of 50% (fifty percent) of BPP of DPR;*

Paragraph (5) : *“In the event that there are still seats remaining after the second phase of calculation of seat acquisition, a third phase of calculation of seat acquisition shall be conducted by way of collecting all remaining votes of Political Parties Participating in the General Election in a province to determine the new BPP of DPR in the province concerned”;*

Paragraph (6) : *“The new BPP of DPR in the province concerned, as intended in paragraph (5), shall be determined by dividing the total remaining valid votes of all Political Parties Participating in the General Election by the total number of remaining seats;*

Paragraph (7) : *“The seats which are acquired by Political Party Participating in the General Election as intended in paragraph (5) shall be determined by way of giving the seats to political party reaching the new BPP of DPR in the province concerned.”*

The provision in the 1945 Constitution serving as the criterion is Article 22E paragraph (1) which reads, *“General elections shall be held in a direct, general, free, confidential, honest, and just manner once in every five years”;*

[3.12] Whereas to support the arguments of their petitions, the First Petitioner (Muhammad Sholeh, S.H.) has filed written evidence marked as Exhibit P-1 through Exhibit P-6 and the Second Petitioners (Sutjipto, S.H., M.Kn, Septi Notariana, S.H., M.Kn., and Jose Dima Satria, S.H., M.Kn) have filed written evidence marked as Exhibit P1 through Exhibit P-4;

[3.13] Whereas the Court has read the written statement of the People’s Legislative Assembly, heard verbal statement and read written statement of the

government, heard the oral statement and read the written statement of the Interested Party, the National Commission Against Violence Toward Women (National Commission on Women), as well as heard the statement of Interested Party, General Election Commission (KPU), as completely described in the Substance of the Case, which are principally as follows:

1. Written Statement of the People's Legislative Assembly in Case Number 22/PUU-VI/2008

a. Legal Standing of the Petitioners:

With respect to the petition for judicial review of the *a quo* law, the First Petitioner fails to meet the requirements as provided for in Article 51 paragraph (1) of the Constitutional Court Law and the limitations pursuant to Decisions of the Constitutional Court Number 006/PUU-III/2005 and Number 11/PUU-V/2007;

b. With respect to the Provisions of Article 55 paragraph (2) of Law Number 10/2008:

1) The constitutional basis for improving women's representation in political and government institutions with a minimum total of 30% (thirty percent) is reflected in Article 28H paragraph (2) of the 1945 Constitution which reads, "*Every person shall have the right to acquire facility and special treatment for obtaining equal opportunity and benefit*

in order to achieve equality and justice";

- 2) The provision of Article 55 paragraph (2) of Law Number 10/2008 must not be separated from the provision of Article 53 of the *a quo* law stating that, "*The list of prospective candidates as intended in Article 52 shall include a minimum of 30% (thirty percent) of women's representation*";
- 3) The provision of a minimum of 30% (thirty percent) of women's representation is the manifestation of policy on affirmative action (temporary special measures) for women in politics;
- 4) The stipulation of a quota of 30% (thirty percent) is based on the aspirations of community/women's organizations during the General Hearing of the Special Committee (*Pansus*) on the General Election Law, both those presented by organizations and by individuals concerned with women's issues;
- 5) The provision of Article 55 paragraph (2) of Law Number 10/2008 is not inconsistent with Article 27 paragraph (1), Article 28D paragraph (1) and paragraph (3) and Article 28I paragraph (2) of the 1945 Constitution as the *a quo* provision only provides guarantee of certainty in order that women's

votes can be accommodated with a quota of at least 30% (thirty percent) in the representative institutions;

c. With respect to the provisions of Article 214 sub-article a, sub-article b, sub-article c, sub-article d, and sub-article e of Law Number 10/2008:

- 1) The provisions of Article 214 sub-articles a, b, c, d, and e of Law Number 10/2008 are related to the General Election system formulated in Article 5 of Law Number 10/2008 by using an open-list proportional representation system;
- 2) The provisions of Article 214 sub-articles a, b, c, d, and e of Law Number 10/2008 contain the politics of transitional law between a limited open-list proportional representation system and a pure open-list proportional representation system. In the event that each political party has taken one step forward by applying a majority voting system, such matter will be left to the respective political parties to be decided in accordance with the internal rules of the political parties concerned;
- 3) In the process of discussing the Draft Law on General Elections in the Special Committee (*Pansus*), there was a spirit that although the General Election using a proportional

representation system is characterized by the existence of the sovereignty of political parties, it was realized that the voters' sovereignty should also be respected, and hence, the 30% (thirty percent) of BPP was given as an appreciation of the votes cast by the voters. This combination constitutes an effort to improve the existence of people's or voters' sovereignty in addition to political parties' sovereignty in designating legislative member candidates. Theoretically, this provision is not inconsistent; as a matter of fact, it has become a new variant in the General Election with a proportional representation system;

- 4) The use of an open-list proportional representation system is based upon the consideration that the proportional system is more compatible for a unitary and plural state as it also acknowledges minority votes;
- 5) The argument presented by the First Petitioner about the provisions of Article 214 of Law Number 10/2008 is that they are inconsistent with the 1945 Constitution, especially with Article 6A paragraph (4), Article 27 paragraph (1), Article 28E paragraph (2) related to the provisions regulating that the winner of the General Election must be based on majority votes, obtain just and non-discriminatory treatment.

This is groundless considering the mandate of the 1945 Constitution that the General Election including its system shall be set forth in a law;

Statement of the People's Legislative Assembly (DPR) in Case Number 24/PUU-VI/2008

a. With regard to Legal Standing

The Second Petitioners have no legal standing as Petitioner as a result of the existence or coming into being of an impairment of the constitutional rights of the Second Petitioners by the coming into effect of Law Number 10/2008;

b. With regard to the Provisions of Article 205 paragraph (4), paragraph (5), paragraph (6), and paragraph (7) of Law Number 10/2008

The provisions of Article 205 paragraph (4), paragraph (5), paragraph (6), and paragraph (7) set forth the method for determining the calculation of vote acquisition in the event that there are remaining seats from the results of the first, second, and third phases of the General election. The *a quo* provisions do not impair and/or eliminate at all the constitutional rights of the Second Petitioners to be elected as prospective legislative candidates since as mandated in the 1945 Constitution and the *a quo* General Election Law, the general election of the prospective legislative candidates is determined by the people. Accordingly, the Second Petitioners' not being elected as prospective legislative candidates is not

concerned with the issue of constitutionality of the *a quo* General Election Law;

- c. With regard to the Provisions of Article 214 sub-article a, sub-article b, sub-article c, sub-article d, and sub-article e of Law Number 10/2008

The provisions of Article 214 sub articles a, b, c, d, and e of Law Number 10/2008 do not impair the constitutional rights of the Second Petitioners, as the regulation of prospective legislative DPR candidates determined based on candidacy number is applied to all political parties participating in the General Election, while the stipulation of whether the Second Petitioners are ranked with a small or large number would be the sole authority of the leaders of political parties concerned. Accordingly, it is not relevant to the constitutionality of the *a quo* General Election law;

2. Statement of the Government

- a. With regard to Legal Standing of the Petitioners

The Petitioners do not have legal standing in the petition for judicial review of the *a quo* law because the Petitioners' petition is unclear and obscure (*obscuur libels*), especially in describing/explaining and constructing the occurrence of impairment of constitutional rights and/or authority with the coming into effect of the *a quo* law, since in fact, the presence of the Petitioners in exercising their constitutional rights as guaranteed by the constitution is not

interrupted, reduced, or impaired due to the coming into effect of the aforementioned provisions;

b. With regard to the Provisions of Article 55 paragraph (2) of Law Number 10/2008

1) The provisions of Article 55 paragraph (2) of Law Number 10/2008 are concerned with fulfilling the provisions of Article 53 of Law Number 10/2008 which states, "*The list of Prospective Candidates as intended in Article 52 shall include at least 30% (thirty percent) of women's representation*";

2) The provision regarding the regulation of a 30% (thirty percent) quota constitutes a manifestation and furtherance of an affirmative action policy (temporary special measures) for women in politics as applied in several countries, by applying the obligation of political parties to present woman legislative candidates;

3) The participation of women in politics and government must be encouraged, sought, and pursued through various laws and regulations, in the expectation of realizing equality and balance of women's representation in parliament;

c. The provisions of Article 205 paragraph (4), paragraph (5),

paragraph (6) and paragraph (7) of Law Number 10/2008

The provisions of Article 205 paragraph (4), paragraph (5), paragraph (6) and paragraph (7) of Law Number 10/2008 are related to regulating the determination of seat acquisition for political parties participating in General Elections; therefore, the *a quo* provision is not related at all to constitutionality issues, with regard to the coming into effect of the law petitioned for judicial review by the Petitioners, for the following reasons:

- 1) The *a quo* provisions are only applied to the stipulation of seat acquisition for political parties in provinces having more than 1 DPR Electoral District while with regard to provinces having 1 (one) Electoral District only, the seat acquisition for political parties will only be determined by way of distributing all of the seats in the relevant Electoral Districts based on the results of valid votes acquired by the political parties;
- 2) The philosophy of the arrangements of the *a quo* provision is that it is intended to obtain equal seat value acquired by the respective political parties, so as to realize justice with respect to seat value acquired by the political parties in line with the manifestation of the people's aspirations in an electoral district;

- 3) The remaining votes or vote acquisition of political parties fewer than 50% (fifty percent) of BPP are pooled at the provincial level, allowing the transfer of seat allocations among the electoral districts. However, as the system used in the General Election is a proportional system, therefore the transfer of seats among electoral districts has no effect since they remain in the one province;

- d. With regard to the provisions of Article 214 sub-article a, sub-article b, sub-article c, sub-article d and sub-article e of Law Number 10/2008
 - 1) The provisions of Article 214 sub-article a, sub-article b, sub-article c, sub-article d, and sub-article e are related to the General Election system formulated in Article 5 of Law Number 10/2008, which states that the General Election aimed at electing Members of DPR, Provincial DPRD, and Regency/Municipality DPRD shall be held by adopting an open-list proportional representation system;

 - 2) The formulation of Article 214 sub-articles a, b, c, d, and e of Law No 10/2008 contains the policy of a transitional law between a limited open-list

proportional representation system and a pure open-list proportional representation system (candidacy number or 100% of BPP being candidacy number or at least 30%, then it is expected to become a majority voting system in the next general election). In the event that each political party has taken one step forward by applying majority votes, such matter will be left to the respective political parties to decide in accordance with internal rules of the political parties concerned;

- 3) In the process of discussing the Draft Law on the General Election of Members of DPR, DPD, and DPRD in the *Pansus*, there was a spirit that although a General Election using a proportional representation system is characterised by the sovereignty of political parties, it is realized that the sovereignty of voters must also be respected, so the number 30% (thirty percent) from BPP is given as an appreciation of the votes cast by the voters. This combination is an effort to improve the existence of people's or voters' sovereignty in addition to the political parties' sovereignty to elect legislative candidates. Theoretically, this provision does not bear any

contradiction; in fact, it has become a new variant in a General Election with a proportional representation system;

- 4) The provisions of Article 214 sub-articles a, b, c, d, and e of Law No. 10/2008 have no relevance and cannot be considered inconsistent with the provisions of Article 6A of the 1945 Constitution, since both of the provisions concerned provide for different regimes. Article 6A of the 1945 Constitution regulates the election of President and Vice President as further provided for in the President and Vice President Election Law, whereas Article 214 sub-articles a, b, c, d, and e of Law No. 10/2008 regulates the election of legislative members. Hence, there is no reason for the Petitioners to consider Law No. 10/2008 inconsistent with Article 6A of the 1945 Constitution which provides for the Election of President and Vice President;

3. Statement of the National Commission Against Violence Toward Women (the National Commission on Women)

- a. Special treatment is a constitutional right guaranteed by the 1945 Constitution

- 1) Article 55 paragraph (2) of Law Number 10/2008 constitutes the constitutional order and mandate included in Article 28H paragraph (2) of the 1945 Constitution which states that *"Every person shall have the right to acquire facilities and special treatment in obtaining equal opportunities and benefits in order to achieve equality and justice"*;
- 2) The constitutional guarantee to receive facilities and special treatment in obtaining equal opportunities in the context of achieving equality and justice applies to every citizen, including women. Special treatment applies to citizens who have suffered inequality (discrimination), whether in terms of opportunities, access and impact;
- 3) Law Number 10/2008 is not the first and the only regulation concerning special treatment to obtain equal opportunities and benefits. Law Number 21 Year 1999 regarding Special Autonomy for Papua Province is also a confirmation of the mechanism of special treatment, which in that instance is for native Papuans. This special treatment is a form of positive discrimination as a correction of the discrimination they have suffered up to now;

- 4) Hence, Article 55 paragraph (2) and Article 214 sub-articles a, b, c, d, and e of Law No. 10/2008 are not inconsistent with the 1945 Constitution. In fact, they constitute the application of Indonesia's constitutional commitment itself;
- b. It is the obligation of the state to take temporary special measures for materializing substantive equality.
- 1) Whereas the arrangements with regard to the requirement for special treatment or affirmative action in the context of actualizing gender equality is the mandate of Law Number 7 Year 1984 regarding the Ratification of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). Ratification of an international convention demands the state parties integrate all the principles listed in the convention into their national law;
 - 2) Whereas CEDAW requires all state parties to provide instruments and to generate real results to promote the observance, fulfillment and protection of women's human rights, fulfill the due diligence; as well as to harmonize the convention into the domestic legal system. In addition, CEDAW also confirms the state's obligation to take steps, including affirmative action, as an instrument to address issues with regard to gender injustice suffered by women.

Article 4 paragraphs (1) and (2) of CEDAW require the state parties to eliminate the discrimination encountered currently or formerly by taking special measures. The special treatment as set forth in Article 55 of Law No. 10/2008 is a form of special treatment as mandated by CEDAW;

- 3) Whereas based on the foregoing considerations, the *a quo* Article with regard to special treatment for women in order to move toward equality and justice is done for the purposes of ensuring the aspirations of the 1945 Constitution are achieved;

c. Women's political role is still much smaller than men's

- 1) The comparison between the percentage of women and men in the parliamentary body from year to year has indicated the figures of how the women's participation in the political world (read: parliament) is very low. Even if political parties include women as legislative member candidates, not many woman candidates are positioned with favourable candidacy numbers;
- 2) The public opinion which states that the minimal involvement of women in the political world is due to women's reluctance to enter the political domain is inaccurate. Even if there is

reluctance, this is a result of gender-biased social construction, where women are perceived to be inappropriate to be in the political world, timid, unwilling and incapable to enter the political world. This construction constitutes a form of gender injustice itself. At the same time, men are in fact constructed as capable and appropriate to be on the political stage and involved in other public affairs;

4. Statement of the Interested Party, the General Election Commission (KPU)

- a. With regard to the provisions of Article 55 paragraph (2) of Law Number 10/2008
 - 1) In the context of the technical implications of implementing Article 55 paragraph (2) of Law Number 10/2008, the General Elections Commission Regulation Number 18 Year 2008 has set forth the Procedures for the Nomination of Members of DPR, DPD, Provincial DPRD, Regency/Municipality DPRD;
 - 2) Based on the *a quo* provision, KPU Regulation Number 18 Year 2008 regarding Procedures for the Nomination of Members of DPR, DPD, Provincial DPRD, Regency/Municipality DPRD, refers entirely to the points in

Article 55 paragraph (2). And so far, in stipulating the Fixed Candidate List on October 31, 2008 at all levels, whether at DPR, Provincial DPRD and Regency/Municipality DPRD, the General Elections Commission has consistently applied Article 55 paragraph (2) to the Fixed Candidate List. In fact in particular, the General Elections Commission has generally given even greater emphasis to the provision which states that if a political party does not fulfill the quota of 30% (thirty percent) women mandated by Article 55 paragraph (2) of Law Number 10/2008, no matter how few the minimum number of existing woman candidates are submitted by the political party from the minimal requirement for woman candidates concerned, women legislative candidates must be stipulated to be positioned at low candidacy numbers;

- 3) Since the provisions of law and the Regulation of the General Election Commission do not impose legal sanctions on a political party in the event that it submits less than 30% (thirty percent) woman candidates, and evidently only submits 1 woman candidate of a minimum requirement of 4, the Regulation of the General Election Commission Number 18 has confirmed that a woman candidate submitted under the provision, while 4 woman candidates are required, must

be positioned at the lowest candidacy number, namely that she be minimally positioned at candidacy number 3, rather than at candidacy number 6, number 9 or number 12.

- 4) Technically, there is no significant obstacle at the level of implementation by the General Election Commission. Out of 38 political parties participating in the General Elections, on average, overall all of them fulfilled the 33% figure for female representation. Out of 38 political parties, only four political parties had a quota below 33%, although their number was still close to 30%, namely around 27% through 29%. Therefore, it can be concluded that the 30% quota as mandated by the law has been almost fully implemented by the political parties participating in the General Elections.
- b. With regard to Article 205 paragraph (4), paragraph (5), paragraph (6) and paragraph (7) of Law Number 10/2008
- 1) With regard to Article 205 paragraph (4), (5), (6) and (7) of Law Number 10/2008, so far the Regulation of the General Election Commission is concerned, it is still being worked on by the General Election Commission;
 - 2) Whereas in relation to the implementation of Article 205 based on the results of discussion and debate held in the

KPU, the substance of Article 205, in the opinion of KPU, is relatively fairer compared with Law Number 12 Year 2003. Hence, KPU is of the opinion that in the event the remaining votes are transferred to the provincial level, the value of one seat to be determined by KPU would be more representative than the value of seats which are fully distributed in each Electoral District. It means that when a seat is transferred to the provincial level, in terms of quantity, the number of voters represented is indeed higher compared with the provision of the previous law *in casu* Law Number 12 Year 2003;

- 3) KPU plans that in making regulations, it will allocate the seats concerned to candidates from the Electoral District which obtains the most votes from the collected Electoral Districts. Such an approach leads to two assumptions, namely that the value of seat is higher compared with the previous value and the representation of the candidates with their constituents in the Electoral District concerned can be addressed with such an approach.
- c. With regard to Article 214 sub-article a, sub-article b, sub-article c, sub-article d and sub-article e of Law Number 10/2008
- 1) With regard to Article 214 sub-articles a, b, c, d and e of Law Number 10/2008, technically there is no significant issue in

the field, meaning that in the distribution of seat allocation for the elected candidates in Provincial DPRD and Regency/Municipality DPRD as set forth in Article 214 sub-articles a, b, c, d, including for People's Legislative Assembly, KPU consistently implements paragraph by paragraph of the articles concerned. Thus, so far in the draft of regulation under discussion in KPU, there is no particularly significant issue with respect to the implementation of Article 214 of Law Number 10/2008;

- 2) As to the relationship between Article 214 and Article 218 of Law Number 10/2008, there is no issue for KPU with regard to the substitution of a candidate elected by judicial technique, meaning that when there is a possibility that the relevant political party internally stipulates a majority voting system, then it is evident that this option indirectly finds a place in Article 218 of Law Number 10/2008, although the provisions regarding majority votes which are a result of the political party's internal agreement is not binding on the KPU;
- 3) Where the process of substituting the elected candidate occurs in accordance with Article 218 of Law Number 10/2008, in which only one of the four requirements must be

fulfilled, then the candidate can be substituted; namely if such person: *First*, dies; *Second*, resigns, as evidenced by a resignation letter submitted by the political party; *Third*, has criminal electoral sanctions imposed and *Fourth*, does not comply with the qualifications to become a candidate;

- 4) In the event that one of the four requirements is fulfilled, the political party will submit a letter to the KPU to conduct a substitution, and subsequently the KPU will conduct a verification. If it is evident that the candidate can be substituted, designation of substitute pursuant to Article 218 of Law Number 10/2008 is completely entrusted to the related political party, insofar as he/she is registered in that electoral district and still meets the criteria;
- 5) Based on the understanding of KPU, during the substitution of the elected candidate, candidacy number is no longer observed and the percentage of votes obtained during the election is no longer taken into account. Rather, it depends entirely on the political party whichever candidate is to be promoted, as long as the candidate is still from the same Electoral District and still meets the qualifications then that will be the candidate subsequently appointed by the KPU;

- 6) This perspective implicitly shows that when the political party promotes majority voting, the options open up. When the KPU makes a determination, its formulation does not refer to the issue of majority voting but to the fact that under Article 218, the candidate himself has appointed the substitute candidate;
- 7) Whereas based on the experience in 2004 and predictions of 2009, it will create a quite serious problem with respect to issues of political stability at the local level. Potential internal problems faced may create political issues for both the candidate to be replaced and the candidate to replace him/her. It means that judicially, legal certainty with regard to this matter is very clear, however it may be expected politically to create specific problems in the field;

Opinion of the Court

[3.14] Upon taking into account the statements of the Petitioner, the People's Legislative Assembly, the Interested Party, the National Commission for Women and the Interested Party, the General Election Commission, as described above as well as based on written evidence presented by the Petitioners, prior to considering the substance of the petition, the Court shall express its opinion on the articles petitioned for review in the *a quo* petition. The Court therefore considers it necessary to first affirm several matters, as follows:

In the life of every state declaring itself to be a democratic, constitutional state and a democratic state governed by the rule of law, there will always be a tug of war between two equally fundamental interests, namely the interest to formulate the law (legislation) in order to guarantee and ensure that legal system is functioning in the community, as well as to protect people's (public) interest, and the interest to maintain individual rights or liberty as an inherent element;

The consequences of establishing a democratic, constitutional state and a democratic state governed by the rule of law, as affirmed by Article 1 paragraphs (2) and (3) of the 1945 Constitution do not only imply that the process of establishing the state's law and its substantive contents (*in casu* the laws) must respect the principles of democracy, but also that the practice of democracy must comply with the principle of a constitutional state (*rechtsstaat*, rule of law) which positions the 1945 Constitution as the supreme law. Therefore, any law, both with regard to its formulation process and its substantive contents, may be reviewed under the Constitution as the supreme law;

The Court's authority to hear and decide upon a petition for judicial review of a law under the 1945 Constitution, as affirmed by Article 24C paragraph (1) of the 1945 Constitution, contains a mandate assigned by the Constitution to the Court to safeguard the Constitution. In this respect, the guardian of the Constitution refers to the Court, which must ensure that there is no law violating the constitutional rights of citizens solely for the reason of

establishing a legal system. However, on the other hand, the Court must also ensure that there would not be any circumstance in which the people's interests are set aside for the reason of protecting the constitutional rights of citizens;

Whereas therefore, all parties, particularly the Court, must adopt the stance that every law is constitutional (principle of constitutionality) until it is proven, through a judicial process before the Court, that the law in question is unconstitutional;

[3.15] Whereas subsequently, the Court shall convey its opinion with respect to the matters which form the substance of the Petitioners' petition, namely as follows:

[3.15.1] Article 55 Paragraph (2) of Law Number 10/2008 reads, "*In the list of prospective candidates as referred to in Paragraph (1), there shall be at least 1 (one) female prospective candidate in every 3 (three) prospective candidates.*"

The First Petitioner (Muhammad Sholeh, S.H.) argues that the *quo* Article 55 paragraph (2) is not in line with the notion of reform, reflects unequal status and treatment, injustice, legal uncertainty, and is discriminative in nature, and therefore it is inconsistent with Article 27 paragraph (1) of the 1945 Constitution, which reads, "*Without exception, all citizens shall have equal standing before the law and government and shall be obligated to uphold such law and government*", Article 28D paragraph (1), "*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 28D paragraph (3), “Every citizen shall have the right to obtain equal opportunities in government,” Article 28I paragraph (2), “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”.

With respect to the foregoing argument of the First Petitioner (Muhammad Sholeh), the Court of the following opinion:

- The provisions of Article 55 paragraph (2) of Law Number 10/2008, stating that in every three candidates, there must be at least one female candidate is enacted in the context of meeting the affirmative action for women in politics, as have been implemented by various other countries, namely by imposing an obligation on political parties to include female legislative candidates. This is a follow-up to the 1995 World Conference on Women in Beijing and various international conventions which have been ratified [Law Number 68 Year 1958, Law Number 7 Year 1984, Law Number 12 Year 1985 regarding Civil and Political Rights, Resolutions of the General Assembly of the Convention on the Elimination of All Forms of Discrimination Against Woman (CEDAW)];
- Affirmative action is also referred to as reverse discrimination, providing opportunity for women in order to establish gender equality on a level playing-field of men and women, although in fact, due to differences in the dynamics of historical development brought about by cultural reasons, the

involvement of women in the decision-making processes of national policies, in the field of law and in sociopolitical and economic development, women still play a relatively minor role. Presently, through population census, it is evident that the majority of Indonesian population consists of women, the aspect of gender interest deserves to be fairly considered in decisions on political, social, economic, legal and cultural issues;

- Whereas if the quota system for women is considered as reducing and limiting the constitutional rights of male legislative candidates, it does not necessarily imply that it is inconsistent with Article 28D paragraph (1) of the 1945 Constitution. Such limitation is justified by the Constitution, as provided in Article 28J paragraph (2) of the 1945 Constitution which reads, *“In exercising his/her right and freedom, every person must submit to the restrictions stipulated in law with the sole purpose to guarantee the recognition of and the respect for other persons’ rights and freedoms and fulfill fair demands in accordance with the considerations of morality, religious values, security, and public order in a democratic society”*. In fact, in Article 28H paragraph (2) of the 1945 Constitution, such special treatment is allowed. Article 28H paragraph (2) of the 1945 Constitution reads, *“Every person shall have the right to obtain facilities and **special treatment** in obtaining equal opportunities and benefits for achieving equality and justice.”* Nowadays, Indonesia’s commitment to human rights instruments relating to the elimination of all forms of discrimination against

women as well as the commitment to promote women in the political arena has been manifested in various ratifications and government policies;

- Whereas, the threshold of quota of 30% (thirty per cent) and the requirement to have at least one female candidate in every three legislative candidates for women and men is considered sufficient as an initial step towards providing an opportunity for women on one hand, while on the other hand it offers the opportunity for the public/voters to evaluate as well as to test the acceptability of women in entering the political arena not only because of their status as women, but also based on their capacity and capability as legislators, as well as their position in the Indonesian culture. The provision of a 30% (thirty per cent) quota and the requirement to have at least one female candidate in every three candidates is **positive discrimination** for the purposes of balancing the representation of women and men as legislators in the People's Legislative Assembly, the Regional Representative Council, and the Regional People's Legislative Assemblies for Provinces/Regencies/Municipalities. The provision of this 30% (thirty per cent) quota for female candidates is affirmed by Article 55 paragraph (2) of Law Number 10/2008 as a guarantee in providing greater opportunity for women to be elected in general elections;

- Whereas to improve women's status in politics does not entirely depend on legal aspects, but also the aspects of culture, capacity, closeness to the people, religion, and the degree of people's confidence in female legislative candidates, as well as increased awareness of women's political roles. In relation to the principle of Unity in Diversity (*Bhinneka Tunggal Ika*) in a pluralistic community like Indonesia, every choice made by each according to his/her respective knowledge and beliefs, must still be recognized despite of the differences among them;
- The Court's view, which is in line with the viewpoint of the Government and the People's Legislative Assembly stating that the policy of the target of a 30% (thirty per cent) quota for women and the requirement of having at least one female candidate in every three legislative candidates is a policy of affirmative action which is provisional in nature, in order to promote women's involvement in national policy decision-making processes through their participation in the formulation of laws;
- Based on the aforementioned legal view and evaluation, the Court is of the opinion that the provisions of Article 55 paragraph (2) of the Law Number 10/2008 are not inconsistent with the constitution, because the treatment of constitutional gender rights, insofar as it is not to be qualified as discriminatory, is understood to arrange fairly a matter which until now has not treated women unfairly;

[3.15.2] Article 205 paragraph (4), paragraph (5), paragraph (6) and paragraph (7) Law Number 10/2008 which reads as follows,

Paragraph (4) : *“In the event there are remaining seats, a second phase of calculation of seat acquisition shall be conducted by way of distributing the total undistributed remaining seats to Political Parties Participating in General Election which acquire a minimum vote of 50% (fifty percent) of the DPR BPP”;*

Paragraph (5) : *“In the event that there are still seats remaining after the second phase of calculation of seat acquisition, a third phase of calculation of seat acquisition shall be conducted by way of collecting all remaining votes of Political Parties Participating in the General Election at the provincial level to determine the new DPR BPP in the province concerned;*

Paragraph (6) : *“The new DPR BPP in the province concerned as intended in paragraph (5) shall be determined by dividing the total remaining valid votes of all Political Parties Participating in the*

General Election by the total number of remaining seats”;

Paragraph (7) : *”The seats which are acquired by Political Parties Participating in the General Election as intended in paragraph (5) shall be determined by way of giving the seats to political parties reaching the new DPR BPP in the province concerned”;*

The Second Petitioners (Sutjipto, S.H.,M.Kn, Septi Notariana, S.H.,M.Kn., and Jose Dima Satria, S.H.M.Kn), argue that Article 205 paragraphs (4), (5), (6) and (7) of Law Number 10/2008 are unfair and discriminatory because if the vote acquisition or the remaining votes in the Electoral District is less than 50% (fifty percent) of the BPP, the votes will be transferred to the province and the Second Petitioners will not be guaranteed to be allocated a seat in the DPR. Likewise, the constitutional rights of the Second Petitioners in their capacities as candidates and voters are also impaired because although the votes acquired by the candidates for the DPR chosen by them in an electoral district, the vote acquisition or the remaining votes of less than 50% (fifty percent) of BPP may be transferred to other DPR candidates in other electoral districts. The Second Petitioners also argue that the winner of the

General Election must be based on the majority of votes, obtain just treatment and without discrimination;

With respect to the foregoing argument of the Second Petitioners, according to the Court, the provisions of Article 205 paragraphs (4), (5), (6), and (7) of Law Number 10/2008 are related to the seat acquisition of political parties, rather than to the election of candidates. In so far as it is related to the issue in which the remaining votes collected from every electoral district (Dapil) are transferred to the provincial level, it is only conducted to determine new Voters' Denominator (BPP) which is also related to the seat acquisition of political parties. Accordingly, such argument is not related to the constitutionality because it is not inconsistent with Article 22E paragraph (1) and Article 28D paragraph (1) of the 1945 Constitution;

The Court is of the opinion that to determine which political parties acquire seats based on the new BPP as set forth in Article 205 paragraph (7) of the Law Number 10/2008 and to designate the elected candidates based on the new BPP, the process must be based upon majority voting, in accordance with the statement of the General Election Commission at the hearing, as included in the Substance of the *a quo* Case;

[3.15.3] Article 214 sub-paragraph a, sub-paragraph b, sub-paragraph c, sub-paragraph d, and sub-paragraph e of Law Number 10/2008 which reads, *“The determination of elected candidates for the DPR, Provincial DPRD, and regency/municipality DPRD from political parties participating in a general election shall be based on the seat acquisition of political parties participating in general election in an electoral district, in accordance with the following provisions:*

- a. *the elected candidates for the DPR, Provincial DPRD, and regency/municipality DPRD shall be determined based on candidates acquiring minimum votes of 30% (thirty percent) of BPP;*
- b. *in the event that the number of candidates meeting the provisions of sub-article a exceeds the number of seats acquired by a political party participating in the general election, seats shall be allocated to candidates with smaller candidacy number among the candidates meeting the requirement of a minimum 30% (thirty percent) of BPP;*
- c. *In the event that there are two or more candidates meeting the requirements of sub-article a by equal vote acquisition, the elected candidates shall be the candidates with smaller candidacy numbers among the candidates meeting the provisions of a minimum 30% (thirty percent) of the Voter’s Denominator (BPP), except for candidates acquiring votes equal to 100% (one hundred percent) of BPP;*

- d. *In the event that the number of candidates meeting provision of sub-article a is less than the number of seats acquired by a political party participating in the general election, undistributed seats shall be allocated to the candidates based on the candidacy number;*
- e. *In the event that no candidate acquires the minimum votes of 30 % (thirty percent) of BPP, the elected candidate shall be determined based on the candidacy number.”*

The First Petitioner argues that Article 214 sub-articles a, b, c, d, and e of Law 10/2008 has eliminated the meaning of recognition, protection guarantee, and legal certainty of just laws, as well as equal treatment for citizens before the law as mandated by Article 28D paragraph (1) of the 1945 Constitution since they have hampered and limited the Petitioner's right to be elected as a legislative candidate for the 2009-2014 period;

The Second Petitioners argue that Article 214 sub-articles a, b, c, d, and e of Law Number 10/2008 is inconsistent with the constitutional norms included in Article 6A paragraph (4), Article 27 paragraph (1), Article 28D paragraph (1), and Article 28E paragraph (2) of the 1945 Constitution because basically the winner of the general election must be based on majority voting, as well as obtain just and non-discriminatory treatment;

With respect to the arguments of the First Petitioner (Muhammad Sholeh, S.H.) and the Second Petitioners (Sutjipto, S.H.,M.M.Kn, Septi

Notariana, S.H.,M.M.Kn, and Jose Dima Satria, S.H.,M.M.Kn,) insofar as they are related to the constitutionality of Article 214 sub-articles a, b, c, d and e of Law Number 10/2008, the Court offers the following legal evaluation and opinion:

- Article 1 paragraph (2) of the 1945 Constitution states that sovereignty is in the hands of the people and exercised under the Constitution. This shows that the highest sovereignty is in the hands of the people, so that in various general election activities, the people directly elect whomever they want to. A large quantity of the people's votes indicates a high degree of political legitimacy obtained by a legislative or executive candidate, whereas on the contrary, a low number of votes shows the lack of political legitimacy of the candidates concerned;
- Whereas the sovereignty of the people constitutes a highly fundamental constitutional principle which not only gives the feature and spirit to the constitution determining the form of administration, but it may be also understood as constitutional morality giving colour and characteristics to all political laws. Even though it must be acknowledged that it is necessary to maintain a recruitment system for political leaders which is mainly operated by well-organized political parties, the recruitment method and procedure in the political and representative system adhered to must be clearly limited so that political parties may not violate the principle of popular sovereignty, which may be considered to be a very fundamental constitutional principle and may not be disregarded, because it is not only

the basic norm but more than that, it constitutes the constitutional morality for the entire life of the state and nation, whether in politics, socially, in economics, or law. This principle must be co-existent, must not prejudice but on the contrary must uphold human rights which form and become the basis for the status and the dignity of man;

- Whereas the main purpose of placing the sovereignty of the people as the fundamental principle of the constitution is to put it in such a way so that respect for and assessment of the voters' voting rights, which actualize the sovereignty of the people, does not become a problem which yields to changes arising from political controversy in the parliament, *in casu* by way of creating the power of the political parties to change the people's choice to that of the parties' executive board through candidacy numbers. The role played by the parties in the recruitment process ends with the selection of capable candidates in the interests of the people, because it is impossible for the people to comprehensively articulate the requirements for leadership candidates considered to be in accordance with the people's will except through political organizations which strive for the political rights and interests of the groups in the community. Therefore, the election of the legislative candidates must not shift from the sovereign decision of the people to that of the executive board of political parties, as the mandate of the constitution included in the Preamble to the 1945 Constitution which reads, "*And Indonesia's independence struggle movement has now reached a joyful moment, leading the people of*

*Indonesia safe and sound to the gateway of independence of the Indonesian State which is free, united, sovereign, just and prosperous.”...
“Furthermore in order to form a Government of the State of Indonesia which shall protect the entire Indonesian nation and the entire Indonesian native land, and in order to advance general welfare, to develop the intellectual life of the nation, and to partake in implementing a world order based upon independence, eternal peace, and social justice, Indonesia’s National Independence shall be enshrined in the Constitution of the Republic of Indonesia, established within the structure of the State of the Republic of Indonesia upon the principle of the sovereignty of the people ...”;*

- Whereas Article 22E paragraph (1) of the 1945 Constitution mandates that the administration of General Elections of higher quality with the participation of the people to the broadest possible extent under democratic, direct, general, free, confidential, fair and just principles, must become the main foundation in the implementation of the General Elections, to be developed and implemented by the General Election Law in a brief and simple manner, which is used to provide the basis for all phases of General Election implementation in an accountable manner. Accordingly, people as the main subject of the principle of people sovereignty, are not to be regarded merely as objects by the general election participants in their course to victory;

- Whereas the General Election to elect the members of DPR, provincial DPRD, and regency/municipality DPRD is held by adopting an open-list proportional representation system, in this manner the people's aspiration in electing their representatives as proposed by the political parties in the General Election, in accordance with their will and their aspirations, may be realized, namely the expectation that the elected candidates will not only prioritize the interest of the political parties, but they are also able to carry the aspirations of the voters. By adopting an open-list proportional representation system, the people freely elect and designate the legislative candidates to be elected, accordingly it will be simpler and easier to determine who has the right to be elected, namely the candidates acquiring the most votes and support from the people;
- Whereas granting the people the right to directly elect and determine their choice of DPR, provincial DPRD, and regency/municipality DPRD candidates based on a majority voting system in addition to facilitating the voters' task in determining their choices, also increases the level of fairness not only for the candidates for the DPR/DPRD, but also for the people in using their voting right, whether or not they join political parties participating in the General Election as members because the victory of a candidate to be elected no longer depends on the political parties participating in the General Election, but on the extent to which he/she receives the support of the people's votes. Accordingly, the political parties' internal conflicts that can influence the people may be reduced, all

of which is in accordance with the principles of just, fair and responsible General Elections;

- According to the Court, the provisions of Article 214 sub-articles a, b, c, d, and e of Law Number 10/2008 stipulating that the elected candidate is the candidate acquiring votes more than 30% (thirty percent) of the BPP, or positioned at smaller candidacy number, if there are no candidates acquiring votes of 30% (thirty percent) of the BPP, or positioned at a smaller candidacy number, if those acquiring votes of 30% (thirty percent) of the BPP are more than the proportional number of seats acquired by a political party participating in the General Election is unconstitutional. It is unconstitutional because it is inconsistent with the substantive meaning of the sovereignty of people as described above and qualified as inconsistent with the principle of justice as set forth in Article 28D paragraph (1) of the 1945 Constitution. It constitutes a violation of the sovereignty of people if the people's aspiration as reflected in their choice is disregarded in determining the legislative members. It would indeed violate the sovereignty of the people and fairness if there are two candidates acquiring an extremely different number of votes and the candidate acquiring the most votes is defeated by the candidate acquiring fewer votes because he/she obtained a position with a smaller candidacy number;

- Whereas viewed from the perspective of equality in political development, nowadays Indonesia adheres to a direct election system for the President and Vice President, Regional Representative Council, and Regional Heads and Deputy Heads, so that it will be also equally fair if the election of members of the People's Legislative Assembly and the Regional People's Legislative Assembly are also held directly for the purposes of electing a candidate without impairing the political rights of political parties, so that every legislative candidate may serve as a legislative member at any level, in accordance with their respective efforts and voter support;
- The foregoing matter would materially injure the sense of justice and violate the sovereignty of the people, because there is no perception or logic that could justify such a violation of justice and the people's aspirations, as the holder of the sovereignty of the people;
- Whereas the philosophy of every election of people to determine the winner is based on majority voting, therefore the elected candidate must also be designated based upon whoever are the legislative candidates acquiring the most votes in order, rather than on the smallest candidacy number stipulated. In other words, elections are **no longer permitted to use a double standard, namely using the candidacy number and the number of votes acquired by the respective legislative candidates.** To apply a provision which grants the right to be the elected candidate based on candidacy number means to suppress the people's right to cast

votes in an election in accordance with their choice and to put aside the level of political legitimacy of the elected candidate based on majority vote;

- Whereas with the recognition of equality and opportunity before the law as adopted in Article 27 paragraph (1) and Article 28 D paragraph (3) of the 1945 Constitution, it means that every legislative member candidate has equal status and opportunity before the law. The application of different legal provisions for two similar conditions is **as unfair** as applying one legal provision to two different conditions. According to the Court, the provisions of Article 214 of Law Number 10/2008 contain a double standard so that it may be considered as unfair as it applies different laws to similar conditions;

[3.16] Whereas while it is true that affirmative action is a policy which has been accepted by Indonesia, which originates from CEDAW, however because in the *a quo* petition the Court is presented with a choice between the principles provided for in the 1945 Constitution and policy demands based on CEDAW, the 1945 Constitution must be prioritized. In so far as it is related to the provisions of Article 28H paragraph (2) of the 1945 Constitution whereas “every person shall be entitled to obtain special treatment” the stipulation of a 30% (thirty percent) quota for woman candidates and one woman candidate from every three legislative candidates, the Court is of the opinion that it has met the provisions on special treatment;

[3.17] Whereas based on the consideration as described above, the Court is of the opinion that the arguments presented by Petitioners I and II, to the extent they are concerned with Article 214 sub-articles a, b, c, and e of Law Number 10/2008, have sufficient grounds;

[3.18] Whereas in so far as the Petitioners' argument that Article 205 paragraphs (4), (5), (6) and (7) of Law Number 10/2008 is inconsistent with Article 22E paragraph (1) and Article 28D paragraph (1) of the 1945 Constitution, the Court is of the opinion that the foregoing argument is not related to the constitutionality of the norms and therefore is not inconsistent with Article 22E paragraph (1) and Article 28D paragraph (1) of the 1945 Constitution;

[3.19] Whereas because the Petitioners' argument has sufficient grounds to the extent it is concerned with Article 214 sub-articles a, b, c, d, and e of Law Number 10/2008, the Petitioners' petition must be granted. Therefore, the foregoing Article does not have binding legal force, but nor does it create a legal vacuum, as even though there is no revision to the law or formulation of Government Regulation in Lieu of Law, the Court's decision is self executing in nature. The General Election Commission (KPU) along with its rank and file, based on the authority granted by Article 213 of Law Number 10/2008, may designate the elected candidate based on the Court's decision in this case.

4. CONCLUSION

Based on the entire evaluation on the facts and laws as described above, the Court has come to the following conclusion:

[4.1] Whereas Article 55 paragraph (2) of Law Number 10/2008 even though deemed to be of reverse discriminatory character, does not violate the Constitution because the *a quo* provision is formulated to lay an equally fair basis for men and women, and therefore, the Petitioners' petition is groundless;

[4.2] Whereas Article 205 paragraph (4), paragraph (5), paragraph (6) and paragraph (7) of Law 10/2008 are not inconsistent with Article 22E paragraph (1) and Article 28D paragraph (1) of the 1945 Constitution, and therefore, the Petitioners' petition is groundless;

[4.3] Whereas Article 214 sub-article a, sub-article b, sub-article c, sub-article d, and sub-article e of Law 10/2008 are inconsistent with Article 1 paragraph (2), Article 27 paragraph (1), Article 28D paragraph (1) and paragraph (3), and Article 28E paragraph (3) of the 1945 Constitution, and therefore, the Petitioners' petition has grounds and must be granted;

[4.4] Whereas technically and administratively, it is believed that the execution of the Court's decision will not create major obstacles since the Interested Party, General Election Commission at the Plenary Meeting of the Constitutional Court dated November 12, 2008 stated its readiness to execute

the Court's decision if it indeed has to designate legislative members based on majority voting.

5. DECISIONS

In view of Article 56 paragraph (1), paragraph (2), and paragraph (3) as well as Article 57 paragraph (1) and paragraph (3) of Law Number 24 Year 2003 on 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), thus based on the 1945 Constitution of the Republic of Indonesia,

Decides,

- To grant the petitions of the First Petitioner and the Second Petitioners in part;
- To declare that Article 214 sub-article a, sub-article b, sub-article c, sub-article d, and sub-article e of Law Number 10 Year 2008 regarding the General Election of Members of the People's Legislative Assembly, the Regional Representative Council, and the Regional People's Legislative Assembly (State Gazette of the Republic of Indonesia Year 2008 Number 51, Supplement to the State Gazette of the Republic of Indonesia Number 4836) is inconsistent with the 1945 Constitution of the State of the Republic of Indonesia;

- To declare that Article 214 sub-article a, sub-article b, sub-article c, sub-article d, and sub-article e of Law Number 10 Year 2008 regarding the General Election of Members of the People's Legislative Assembly, the Regional Representative Council, and the Regional People's Legislative Assembly (State Gazette of the Republic of Indonesia Year 2008 Number 51, Supplement to the State Gazette of the Republic of Indonesia Number 4836) does not have any legal effect;
- To reject the other and the remaining parts of the petitions of the First Petitioner and the Second Petitioners;
- To order the proper promulgation of this Decision in the Official Gazette of the Republic of Indonesia.

Thus this decision was passed at the Consultative Meeting of Justices by eight Constitutional Court Justices on Friday, the nineteenth of December year two thousand and eighth and was pronounced in the Plenary Session open for the Public on Tuesday the twenty-third of December year two thousand and eight by us, Constitutional Justices namely, Moh. Mahfud MD, as Chairperson and concurrent Member, M. Arsyad Sanusi, Achmad Sodiki, Muhammad Alim, Abdul Mukthie Fadjar, M. Akil Mochtar, Maria Farida Indrati, and Maruarar Siahaan respectively as Members, assisted by Makhfud as Substitute Registrar, in the presence of the Petitioners/their Attorneys, the Government or its representative, the People's Legislative Assembly or its representative, and the Interested Party, the National Commission Against

Violence Toward Women, as well as the Interested Party, the General Election Commission.

CHIEF JUSTICE,

Sgd.

Moh. Mahfud MD

JUSTICES,

Sgd.

M. Arsyad Sanusi

Sgd.

Achmad Sodiki

Sgd.

Muhammad Alim

Sgd.

td Abdul Mukthie Fadjar

Sgd.

M. Akil Mochtar

Sgd.

Maria Farida Indrati

Sgd.

Maruarar Siahaan

DISSENTING OPINION

With regard to the foregoing Court Decision, Constitutional Court Justice **Maria Farida Indrati** has a dissenting opinion as follows:

The issue regarding the women's quota is an issue which has to be fought for as a constitutional right in achieving equality, in the comprehensive development of the Indonesian nation. It is the obligation of the Government and for the legislators to regulate and implement such issue.

Why is a women's quota needed? The meeting of women's quota is based on the following argument (Hanna Pitkin, *The Concept of Representation*, 1967):

1. Women represent half of the population and have the right to half of the number of seats ("justice argument");
2. Women have different experience (biologically and socially) to the men which are represented ("experience argument"). In line with this argument, women can enter positions of power since they will be bound by different politics;
3. Women and men have conflicting interests, therefore men cannot represent women ("interest group argument");
4. Female politicians represent important role models to encourage other women to follow their footsteps. The main idea behind the electoral

gender quota is to recruit women to political institutions and ensure that women are not isolated from political life.

In paragraph **[4.1]** of the conclusion of its Decision, the Constitutional Court has stipulated that *“Article 55 paragraph (2) of Law Number 10/2008 even though deemed to be of reverse discriminatory character, does not violate the Constitution because the a quo provision is formulated to lay equally fair basis for men and women, therefore, the Petitioners’ petition is groundless”*. In my opinion, this conclusion **is not in line** with paragraph **[4.3]** which states that Article 214 sub-article a, sub-article b, sub-article c, sub-article d, and sub-article e of Law Number 10/2008 is inconsistent with the 1945 Constitution of the State of the Republic of Indonesia. This opinion is based on the reasoning described below;

With the enactment of Law Number 7 Year 1984 on the Ratification of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), as a state party the State of the Republic of Indonesia has the obligation to integrate all the principles included in the convention into national law;

To guarantee that of the implementation of regulations formulated from the said Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) is fulfilled, Law Number 10 Year 2008 on the General Election of Members of the People’s Legislative Assembly, the Regional Representative Assembly, and the Regional People’s Legislative Assembly has

stipulated in Article 53, Article 55 paragraph (2) and Article 214, the regulation of the women's quota, in the following terms:

Article 53 : *"The list of prospective candidates as intended in Article 52 shall include **a minimum of 30% (thirty percent) of women's representation.**"*

Article 55 :

Paragraph (1) : *"The names of candidates in the list of prospective candidates as referred to in Article 54 shall be prepared based on candidacy number."*

Paragraph (2) : *"In the list of prospective candidates as referred to in Paragraph (1), there shall be **at least 1 (one) female prospective candidate in every 3 (three) prospective candidates.**"*

Paragraph (3) : *"The list of prospective candidates as referred to in paragraph (1) shall be accompanied with the latest passport-sized photo."*

Article 214 : *"The designation of elected candidates for the DPR, Provincial DPRD, and regency/municipality DPRD from political parties participating in general election shall be based on the seat acquisition of political parties participating*

in general election in an electoral district, in accordance with the following provisions:

- a. the elected candidates for the DPR, Provincial DPRD, and regency/municipality DPRD shall be determined based on candidates acquiring minimum votes of 30% (thirty percent) of BPP;*
- b. in the event that the candidates meeting the provision of sub-article a exceed the number of seats acquired by a political party participating in the general election, the seats shall be allocated to candidates with a smaller candidacy number among the candidates meeting the provision of minimum 30% (thirty percent) of BPP;*
- c. In the event that there are two or more candidates meeting the provisions of sub-article a with equal vote acquisition, the seats shall be allocated to the candidates with smaller candidacy numbers among candidates meeting the provisions of a minimum 30% (thirty percent) of the Voter's Denominator (BPP), except for candidates acquiring votes of 100% (one hundred percent) of BPP;*

- d. *In the event that the number of candidates meeting provision of sub-article a is less than the number of seats acquired by a political party participating in the general election, undistributed seats shall be allocated to the candidates based on the candidacy number;*

- e. *In the event that no candidate acquires the minimum votes of 30 % (thirty percent) of BPP, the elected candidate shall be determined based on the candidacy number.*

The formulation of provisions in the aforementioned three articles is an affirmative action for women's representation that constitute an **"upstream-to-downstream"** design, that is, it **combines the protection in the party's internal mechanism (the nomination and placement in candidate list), and the party's external mechanism in the form of constituent support obtained by the candidates for the House (DPR and DPRD) through campaigns in the relevant electoral districts;**

The formulation of the provisions of Article 55 paragraph (2) of the *a quo* law **is actually the implementation** of the provisions of Article 53, which is hoped to be able to support vote acquisitions for women's representation. In addition, the designation of elected candidates as set forth in Article 214 of the *a quo* law is also an affirmative action to provide greater opportunity for female

candidates to be elected. Therefore, the stipulation of substitution by “**majority votes**” will cause inconsistency in such affirmative actions. The purpose of this affirmative action, which constitutes a temporary measure, is to encourage the increase in the number of women in the DPR, Provincial DPRD and regency/municipality DPRD, therefore, substituting it with “**majority votes**” is identical to nullifying such affirmative action. The affirmative action was formulated as an effort to prevent the implementation of the quota of 30% woman candidates in DPR, Province DPRD and regency/municipality DPRD from being a mere rhetoric, rather than serving as a real action supported by a proper system in each political party;

If the affirmative action stipulated in the law is substituted by “**majority votes**”, it is inconsistent with the mechanism built into the organization of the general elections in the *a quo* law, since the substitution is performed after the stipulation of the List of Candidates for the DPR, Province DPRD and regency/municipality DPRD, so that the mechanism of “**upstream-to-downstream**” design made to support affirmative action cannot be implemented. The use of majority voting should be arranged from the beginning of the organization of the General Elections (Designation of Candidates for the DPR, Province DPRD and regency/municipality DPRD) through the party’s democratic internal mechanism in the recruitment and placement in electoral districts (Dapil). The absence of a transparent, measured and democratic internal mechanism in political parties which cause the use of a majority voting system to only benefit a

small handful of people and not fulfill the principle of equity for all competing candidates for the DPR, Province DPRD and regency/municipality DPRD;

Although the use of a "**majority voting**" mechanism in general elections is in fact the best method for obtaining results in accordance with the aspirations of the voters and fulfills the principle of democracy, if it is not set forth in a comprehensive and integrated manner in a regulation (in this case, a law), the mechanism will indeed have a negative impact. Without a comprehensive and integrated regulation, the "**majority voting**" mechanism will only be used as a device to legalize political parties' internal strategies to obtain as many votes as possible by ignoring the candidates' competencies, the political parties' comprehensive internal reform, as well as the affirmative actions that have been jointly agreed upon;

The formulation in Article 53, Article 55, and Article 214 of Law 10/2008 is in fact an affirmative action based on the provision in Article 28H paragraph (2) of the 1945 Constitution and several articles in CEDAW which, among others, read as follows:

- Article 28H paragraph (2) of the 1945 Constitution stipulates that "*Every person shall have the right **to obtain facilities and special treatment** in obtaining equal opportunities and benefits for achieving equality and justice*";

- Article 4 paragraph (1) of CEDAW stipulates that, “**Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination** as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved”;
- Article 7 of CEDAW stipulates that “States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right:
 - (a) to vote in all elections and public referenda and to be eligible for election to all publicly elected bodies;
 - (b) to participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government;
 - (c) to participate in non-governmental organizations and associations concerned with the public and political life of the country.

General Recommendation Number 23 on Political and Public Life, Article 7 and Article 8 of CEDAW, Session 16 Year 1997 affirms:

“... Under article 4, the Convention encourages the use of temporary special measures in order to give full effect to articles 7 and 8. Where countries have developed effective temporary strategies in an attempt to achieve equality of participation, a wide range of measures has been implemented, including recruiting, financially assisting and training woman candidates, amending electoral procedures, developing campaigns directed at equal participation, setting numerical goals and quotas and targeting women for appointment to public positions such as the judiciary or other professional groups.”

Based on the legal and factual reasons described above, I conclude that Article 214 sub-article a, sub-article b, sub-article c, sub-article d, and sub-article e of Law Number 10 Year 2008 on the General Election of Members of the People’s Legislative Assembly, the Regional Representative Council, and the Regional People’s Legislative Assembly is not inconsistent with the 1945 Constitution of the State of the Republic of Indonesia.

SUBSTITUTE REGISTRAR,

Sgd.

Makhfud