



## DECISION

Number 9/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 10 Year 2008 regarding the General Elections of Members of the People's Legislative Assembly, the Regional Representative Council and the Regional People's Legislative Assembly under the 1945 Constitution of the State of the Republic of Indonesia, filed by:

[1.2] 1. Name : **Denny Yanuar Ali, Ph.D.**  
Occupation : General Chairperson of the Indonesian Association for Public Opinion Research and Executive Director of PT Lingkar Survei Indonesia;  
Address : Jalan Pemuda Number 70, Rawamangun, East Jakarta

2. Name : **Drs. Umar S. Bakry, M.A.**  
Occupation : Secretary General of the Indonesian Association for Public Opinion Research and Director of the National Survey Institute Foundation;  
Address : Pulomas Satu Office Building, Jalan Jenderal A. Yani Number 2, East Jakarta;

In this matter granting a power of attorney to **Dr. A. Muhammad Asrun, S.H., M.H., and Bachtiar Sitanggang, S.H.**, both being advocates of the “Muhammad Asrun and Partners (MAP) Law Firm”, having its address at PGRI Building, at Jalan Tanah Abang III Number 24, Central Jakarta by virtue of Special Power of Attorney dated February 9, 2009, to act either individually or jointly for and on behalf of the grantor;

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

- [1.3]** Having read the petition of the Petitioners;  
Having heard the statements of the Petitioners;  
Having heard and read the statements of the Government;  
Having read the statement of the People’s Legislative Assembly;  
Having heard the statements of the experts of the Petitioners;  
Having examined the evidence;  
Having read the conclusions of the Petitioners and the Government;

### 3. LEGAL CONSIDERATIONS

**[3.1]** Whereas the purpose and objective of the *a quo* petition are to conduct Judicial Review of Article 245 paragraph (2), paragraph (3), and paragraph (5), Article 282 and Article 307 of Law Number 10 Year 2008 regarding the General Elections of Members of the People's Legislative Assembly, the Regional Representative Council, and the Regional People's Legislative Assembly (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 the authority of the Court to examine, hear, and decide upon the *a quo* petition and the legal standing of the Petitioners;

#### **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 (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 decision of which shall be final in nature, judicial review of Laws under the 1945 Constitution;

**[3.4]** Whereas the Petitioners' petition is intended to review the constitutionality of the norms of Article 245 paragraph (2), paragraph (3), and paragraph (5), as well as Article 282, and Article 307 of Law Number 10/2008 under the 1945 Constitution, 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, the parties that can 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 are 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 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, as well as subsequent Decisions, 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 argued by the Petitioners will not or will no longer occur;

**[3.7]** Whereas the Petitioners argue that their constitutional rights granted by the 1945 Constitution have been specifically and actually impaired due to the coming into effect of the provisions of Article 245 paragraph (2), paragraph (3), and paragraph (5), as well as Article 282 and Article 307 of Law Number 10/2008.

- Article 245 paragraph (2) reads *"The results of a survey or poll shall not be announced during the cooling off period"*;
- Article 245 paragraph (3) reads *"The results of a quick count may only be announced not earlier than on the day following the day/date of voting"*;
- Article 245 paragraph (5) reads *"A violation of the provisions of paragraph (2), paragraph (3), and paragraph (4) constitutes a criminal act in the General Elections"*;
- Article 282 reads *"Every person announcing the results of a survey or poll during the cooling off period which may influence or which is aimed at influencing the Voters, shall be punished with a minimum imprisonment of 3 (three) months and a maximum imprisonment of 12 (twelve) months and a minimum fine of Rp.3,000,000.00 (three million rupiah) and a maximum fine of Rp.12,000,000.00 (twelve million rupiah)"*;

- Article 307 reads *“Every person or institution conducting a quick count and announcing the results of a quick count on the day/date voting shall be punished with a minimum imprisonment of 6 (six) months and a maximum imprisonment of 18 (eighteen) months and a minimum fine of Rp.6,000,000.00 (six million rupiah) and a maximum fine of Rp.18,000,000.00 (eighteen million rupiah)”*;

**[3.8]** Whereas with respect to the aforementioned articles, the Petitioners’ arguments are as follows:

**[3.8.1]** Whereas the recognition of the right of every citizen of the Republic of Indonesia to file a petition for Judicial Review of Law under the 1945 Constitution constitutes one of the indicators of advancement in living as a nation and a state. Judicial Review of Laws under the 1945 Constitution constitutes a manifestation of the constitutional guarantee of the exercise of the basic rights of every citizen as regulated in Article 24C of the 1945 Constitution;

**[3.8.2]** Whereas the prevailing law of criminal procedures states that only the persons having a legal interest, namely those who consider that their rights are violated by other people, can file a lawsuit (the principle of no lawsuit without legal interest, or *zonder belang geen rechtsingan*). The aforementioned principle means that only the persons having legal interest can file a lawsuit, including a petition. In its development, it has turned out that the aforementioned principle does not apply absolutely in relation to the recognition of the rights of other people or certain institutions to file a lawsuit, including the Petitioners, acting in

the name of public interest, which in the universal legal doctrine is known as “*organizational standing*” (*legal standing*), as stated in Article 51 paragraph (1) of the Constitutional Court Law.

**[3.8.3]** Whereas it turns out that the “*organizational standing*” (*legal standing*) is recognized not only in doctrines but has also been adopted in the laws and regulations in Indonesia, namely, among others, Law Number 18 Year 1999 regarding Consumer Protection, Law Number 23 Year 1997 regarding the Environment, Law Number 41 Year 1999 regarding Forestry, Law Number 18 Year 1999 regarding Industrial Services, and Law Number 20 Year 2003 regarding the National Education System, as well as Law Number 14 Year 2005 regarding Teachers and Lecturers. However, not all organizations can act on behalf of public interest but only the organizations fulfilling certain requirements as provided for in laws and regulations as well as jurisprudence, namely:

- a. The organization is in the form of a legal entity or foundation;
- b. The Articles of Association of the relevant organization expressly mention the objectives of its establishment;
- c. The organization has conducted its activities in accordance with its articles of association.

**[3.8.4]** Whereas with reference to the provisions of Article 244 subparagraph d of Law Number 10/2008, the Petitioners interpret that survey activists have the responsibility to increase the people’s political participation in general. Therefore, Law Number 10/2008 also gives the role to the community to



participate in advancing politics. With reference to Article 28C paragraph (2) of the 1945 Constitution, it can be said that the Petitioners have legal standing to struggle for the implementation of surveys as a part of the formation of citizens' political awareness. Therefore, all applicable laws and regulations shall not hinder the aspirations of the community and shall be in line with the ideal of the formulation of regulations namely to provide legal certainty and justice;

**[3.8.5]** Whereas the provisions of Article 245 paragraph (2), paragraph (3), and paragraph (5), as well as Article 282, and Article 307 of Law Number 10/2008 do not provide any sense of justice and legal certainty to public opinion research activists, including the Petitioners, because in addition to hindering the progress of public opinion research activities, the provisions of the *a quo* articles are also inconsistent with the principles of the 1945 Constitution which provide constitutional protection for citizens. The provisions of the *a quo* articles reduce the space for the implementation of public opinion research, which is an inseparable part of social, political, and economic activities of the Indonesian nation and are inconsistent with the aspirations of legal and political reform, which will impair the Petitioners' constitutional rights;

**[3.9]** Whereas based on the foregoing description, the Court is of the opinion that both as individual Indonesian citizens and as private legal entities, the Petitioners have been able to prove the impairment of their constitutional rights due to the coming into effect of the articles petitioned for review, so that in

the *a quo* petition, the Petitioners have, *prima facie*, fulfilled the legal standing requirements;

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

### **Substance of the Petition**

The provisions petitioned for review are Article 245 paragraph (2), paragraph (3) and paragraph (5) as well as Article 282 and Article 307 of Law Number 10/2008 under the 1945 Constitution (Exhibit P-2), with the following arguments:

1. The Petitioners petition for constitutional review of Law Number 10/2008 namely Article 245 paragraph (2) on the prohibition of the announcement of survey results during the cooling off period, because:
  - a. An opinion survey is intended not only for researching into the popularity of the contestants in the General Elections, but also for researching into the knowledge of the constituents of the procedures of general elections, which is useful for improving the quality of the general elections;
  - b. The following evidence of sample survey informs that many constituents do not know when the General Elections will take place (Exhibit P-3). Another evidence indicates a sample survey finding the information that the majority of constituents still do not

know that the current General Elections are no longer conducted by piercing the ballot but by putting a check mark (Exhibit P-3a). The results of this survey are very useful for the public, the participants in the General Elections, and the General Election Commission (KPU) as a feedback for improving the quality of General Elections;

- c. The closer the day of the General Elections, the publication of surveys on the procedures of the General election become increasingly needed, particularly for the public interest, participants in the General Elections, and the General Election Commission (KPU) in respect of the preparation and awareness of the constituents. Meanwhile, there is no evidence that the announcement of the results of a survey on the constituents' preparedness and awareness of the process and procedures of the General Elections harm the public or can create disorder;
  - d. The prohibition of the announcement of survey results on the cooling off day violates the freedom of the citizens to conduct research and to convey the results of their research.
1. The Petitioners petition for constitutional review of Article 245 paragraph (3) of Law Number 10/2008 regarding the prohibition of quick count publication on the General Election day because:
    - a. The quick calculation or quick count, as is the standard term, is indeed intended for identifying the results of general elections in a quick manner by using a sampling method. Because of this quick

manner, this method is called quick count, which is usually announced within two to five hours after the last Voting Station (TPS) is closed. It would not be called a quick count if it were prohibited from being announced quickly on the general election day and were only allowed to be announced on the following day;

- b. The prohibition of the announcement of the results of a quick count on the general election day is clearly uncivilized and contrary to the advance of science at a time when science has been able to lead to quick conclusions through statistics. The development of science should be appreciated instead of being restricted;
- c. In addition, it has never been claimed that a quick count was the official result of a general election. Moreover, the Indonesian public especially those abroad know that a quick count is a scientific projection, while the official decision on the General Elections is still within the authority of the General Election Commission (KPU);
- d. The prohibition of quick counts on the General Election day is extremely uncommon in a democratic country. For example, Barack Obama was known to be elected as the American President only 3 (three) hours after the Voting Stations were closed, in accordance with the projection of the Press Association in the United States;
- e. A quick count on the General Election day was once practiced in Indonesia during the past 2004 General Elections. For example, SCTV had publicized the quick count results for the victory of SBY

over Megawati after the voting on the General Election day (Exhibit P-3c);

- f. The prohibition of the announcement of quick count results on the General Election day violates the freedom of the citizens to conduct research and to convey the results of their research as guaranteed by Article 28E and Article 28F paragraph (3) of the 1945 Constitution.
3. The Petitioners petition for constitutional review of the provisions of Article 282 and Article 307 of Law Number 10/2008 in relation to the criminal sanctions for the publication of survey and quick count results, because:
    - a. Survey and poll activities constitute expressions of academic freedom, which has been subject to other Indonesian positive laws. Therefore, it is not necessary to have additional regulations regulating such academic activities;
    - b. The criminalisation of the act of publication of survey results on the cooling off day and quick count results on the General Election day becomes the criminalization of the constitutional right of citizens, which is inconsistent with Article 28D paragraph (1) of the 1945 Constitution because it does not provide legal certainty and Article 28G paragraph (1) of the 1945 Constitution because it does not provide a sense of security and protection from the threatened fear to exercise the human right of academic freedom.

**[3.11]** Whereas to support their arguments, in addition to presenting written evidence (Exhibit P-1 up to and including Exhibit P-11), the Petitioners have also presented experts and witnesses whose statements have been completely included in the Case Position part of this Decision, but which principally explain as follows:

**1. Dr. A. Irman Putra Sidin, SH., M.H.**

- The articles petitioned by the Petitioners for review do not guarantee the existence of legal certainty. Surveys conducted academically are criminalized, while the predictions foretold by *Mama Lauren* and her fellows are not considered criminal, although they equally influence the community's decision to vote;
- As to the concern that a survey may become a disguised campaign, Law Number 10/2008 has clearly provided for punishments for those conducting campaigns beyond the schedule. A survey is not automatically a campaign. It is true that a survey may be exploited for campaign purposes, but the criminal sanctions shall be imposed upon the campaign organizer, not the survey organizer;
- The effect of survey results on the community is not always negative, but on the contrary, it may have a positive effect of increasing participation of the community in the General Elections;
- As to the argument that a survey can influence the constituents, it would be disproportionate if survey results managed academically

were criminalized and criminal sanctions were then imposed, so it is not necessary to stipulate provisions to the effect that it is prohibited to announce survey results during the cooling off period, because surveys related to the General elections has a very broad meaning.

**2. Dr. Chairul Huda, S.H., M.H.**

- Whereas a criminal provision stipulating an act as a criminal act constitutes a stipulation of a prohibited act which is punishable with a criminal sanction (criminalization). There are general standards for declaring an act as a criminal act or to form a Law regulating a criminal act.
- Article 282 and Article 307 of Law Number 10/2008 do not fulfill the criteria which allow for an act to be criminalized. If the criminalisation relates to an administrative act but is not formulated as a criminal act related to an administrative provision, then such actions will become independently punishable. Although it has administrative provisions, Article 245 paragraph (2) of Law Number 10/2008 is not referred to in the formulation of these punishable acts. Similarly, the prohibition on announcing quick count results on the voting day is also not referred to the administrative norm in Article 245 paragraph (3). This means that technically the legislation from the aspect of criminal law, in the formulation of this article, bears a weakness because although it refers to or is

concerned with an administrative legal provision or norm, the administrative norm is in fact not referred to in Article 282 and Article 307;

- Based on the foregoing, technically the legislation, especially from the technical aspects concerned with the formulation of a norm as a criminal act, the provisions of Article 282 and Article 307 of the *a quo* law are extremely open to multiple interpretations, so that we seem to reinstate the Law on subversive acts which we have buried deep.

### **3. Muhammad Qodari, S.Psi., MA.**

- Whereas Article 245, Article 282, Article and Article 307 of Law Number 10/2008 are inconsistent with democratic General Elections because the people's participation must be encouraged to the maximum extent;
- The voting behavior of the voters is not determined by polling, but more due to sociological, psychological reasons, or rational choice.
- The tendency of the voters is unchanged and unaffected by polling results, because the choice of a figure is the result of identification of the figure and the result of a party's votes;
- In the event that a survey on the General Elections is prohibited, then the community will not obtain sufficient information on the General Elections, and empirical experience indicates that survey results contribute to people's participation in the General Elections;



- Survey organizers consider that their constitutional rights are impaired because they cannot express their academic opinions through the surveys that they conduct and they are even criminalized, while the soothsayers are free to convey their fortune telling;

#### **4. Arman Salam**

- Whereas a quick count is an academic process using a scientific methodology, not a fortune telling and even though there may be differences in number, they are insignificant and do not go beyond the margin of error;
- In fact, quick counts can control civil unrest;

**[3.12]** Whereas the Court has heard the statement of the Government, as completely described in the Case Position part of this Decision and which principally explains as follows:

#### **Legal Standing of the Petitioners**

Whereas the Petitioners' petition is unclear and unfocused, especially in describing, explaining and making constructions that their constitutional rights and/or authority have been impaired due to the coming into effect of the *a quo* Law, because in the whole description of their petition, the Petitioners only present general and unspecific issues, and also the Petitioners do not explain how and which impairment has been caused by the coming into effect of the

provisions of the aforementioned articles petitioned for review; and therefore, according to the Government, the provisions petitioned for review are not relevant to the Petitioners' right of assembly, right of association, and to express opinion, to communicate, to obtain information, and to process information, as well as the guaranteed protection of the certainty of just laws as provided for by the constitution and therefore, according to the Government, it is correct and proper to declare that the Petitioners' petition cannot be accepted;

### **Substance of the Petition**

#### **Regarding Article 245 paragraph (2), paragraph (3), and paragraph (5) of Law Number 10/2008**

1. Whereas the provisions of Article 245 paragraph (2), paragraph (3), and paragraph (5) of Law Number 10/2008 as a manifestation of people's participation in the implementation of the general elections, *in casu* in this petition, 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), namely in the form of dissemination of information on the General Elections, political education for constituents, survey or poll regarding the General Elections, and quick count of the results of the General Elections;
2. Whereas the aforementioned people's participation is for the purposes of increasing people's broad participation and to encourage the creation of a

conducive situation for the safe, peaceful, orderly and uninterrupted implementation of the General Elections. Therefore, the manifestation of people's participation does not allow partiality to favor or disfavor any participant in the General Elections and to interrupt the process of the stages of the General Elections;

3. Whereas Article 245 paragraph (2), paragraph (3), and paragraph (5) of Law Number 10/2008 which prohibits the announcement of survey or poll results during the cooling off period is intended not to intervene or influence the freedom of thought of the people in making their choice voluntarily or at least not to disturb the implementation of the general elections and in turn, the principles of the implementation of the General Elections as provided for by the constitution not to be properly achieved;

Therefore, the aforementioned provisions have provided legal certainty and fair treatment in respect of the implementation of the general elections as a whole, and therefore, according to the Government, the *a quo* provisions are in line with the mandate of the constitution or in other words, the provisions petitioned for review are only related to the issue of time period and not related to the issue of constitutionality of the coming into effect of the *a quo* Law;

**Regarding the provisions of Article 282 and Article 307 of Law Number 10/2008**

1. Whereas Article 282 and Article 307 included in Chapter XXV on Criminal Provisions, which contains the imposition of criminal sanctions for violations of the provisions containing norms, prohibitions or orders. According to the Government, the formulation of criminal provisions in Article 282 and Article 307 is appropriate and is based on the general principles of the criminal provisions included the First Book of the Criminal Code (KUHP), for instance, the provisions related to the principle of legality as well as the principle of applicability to every person outside of the Indonesian territory (attachment C3 point 86);
2. Whereas the announcement of the results of general elections by a survey institution during the cooling off period can influence the decision or affect the freedom of the community to vote according to their will, so as to prevent the proper and correct implementation of the principles of the general elections as determined by the constitution. In other words, a quick count can reduce the citizens' constitutional rights to freely make their choice and/or to influence public opinion, led and oriented toward the election of a certain political party or the name of a legislative candidate;
3. Whereas the prohibition and restriction to influence or to conduct any activity aimed at influencing the right to vote of the citizens or to influence public opinion during the cooling off period also applies to political parties

- participating in the General Elections, members of political parties, organizers of the General Elections, the General Election Commission (KPU), Provincial General Election Commission, Regency/Municipality General Election Commission, as well as individuals that deliberately conduct activities which influence other people or prevent other people from participating in the implementation of the General Elections;
4. Whereas survey activities conducted by survey institutions during the cooling off period cause a disturbance to public order, and therefore, according to the Government, it is relevant that all parties committing violations during the General Elections have criminal sanctions imposed as regulated in the provisions of Article 260 up to and including Article 311 of Law Number 10/2008;
  5. Whereas the provisions regarding the participation of the community in the implementation of the General Elections as well as the criminal sanction provisions against all parties committing violations in the General Elections as regulated in Article 245 paragraph (2), paragraph (3), and paragraph (5), as well as Article 282 and Article 307 of Law Number 10/2008 are intended for the safe, orderly, and uninterrupted implementation of the General Elections, as well as to prevent the occurrence of events which may disturb public order;

Based on the foregoing description, the provisions of Article 245 paragraph (2), paragraph (3), and paragraph (5), as well as Article 282 and Article 307 of Law

Number 10/2008, have provided equal treatment and created just legal certainty for all components of the organizers of the general elections, including the Petitioners themselves. Therefore, the principles of the General Elections which are direct, public, free, confidential, honest, and just as provided for by the constitution and Law Number 10/2008 can be implemented in a timely and effective as well as orderly manner. Thus, according to the Government, the *a quo* provisions are not inconsistent with Article 28D paragraph (1), Article 28E paragraph (3), Article 28F, and Article 28G paragraph (1) of the 1945 Constitution, and also they do not impair any constitutional rights/authority of the Petitioners;

**[3.13]** Whereas the Court has also read the written statement of the People's Legislative Assembly (DPR) as completely set out in the Case Position part of this Decision and which principally explains as follows:

- Regarding the Petitioners' legal standing, the People's Legislative Assembly (DPR) submits the matter completely to the Panel of Justices of the Constitutional Court for assessment;
- Regarding the substance of the Petitioners' petition:
  1. Whereas the provisions of Article 245 of Law Number 10/2008, particularly in relation to public opinion research activities, are not relevant to any of the Petitioners' constitutional rights or constitutional impairment, because the aforementioned Article does

not have any discriminatory element or special treatment with respect to public opinion research activities between one organizer and another. The article applies to all organizers of the aforementioned research activities;

2. Whereas the provisions of Article 245 of Law Number 10/2008 are intended to:
  - a. Prevent partiality which may favor or disfavor any participant in the General Elections;
  - b. Prevent disturbance to the implementation of the stages of the General Elections;
  - c. Increase the political participation of the general public;
  - d. Encourage the creation of a conducive situation for the safe, peaceful, orderly, and uninterrupted implementation of the General Elections.

According to the People's Legislative Assembly (DPR), if the people's participation in the implementation of the General Elections occurs in accordance with the applicable regulations and does not violate legal rules, there will be no reason for the Petitioners to be concerned about the issue of sanctions against criminal acts in the General Elections;

3. Whereas criminal violations in the General Elections as referred to in Article 282 of Law Number 10/2008 are violations of criminal provisions in relation to the General Elections regulated in the *a quo* Law, which are to be settled through a court of general jurisdiction;
4. Whereas if there are any criminal violations in the General Elections, the formal procedures still follow the guidelines of the Law of Criminal Procedure (KUHAP), except otherwise provided in the *a quo* Law;
5. Whereas because the provisions of Article 245 of the *a quo* Law have been very clearly regulated, then judicially the People's Legislative Assembly (DPR) does not agree with the arguments of the Petitioners stating that the provisions of Article 245 of Law Number 10/2008 are inconsistent with human rights and that they have impaired the Petitioners' constitutional rights as guaranteed by the provisions of Article 27 paragraph (2), Article 28A, Article 28C paragraph (2), Article 28D paragraph (1), and Article 28F of the 1945 Constitution, because the People's Legislative Assembly (DPR) fights for rights collectively, for equal status in law and government, for the freedom to express thoughts and opinions, the freedom to communicate and to obtain information, the obligation to respect, to protect and to guarantee the exercise as well as the



fulfillment of the aforementioned human rights of every person, which are universal and applicable to everyone, including the Petitioners themselves;

6. Whereas based on the foregoing, the provisions of Article 245 of Law Number 10/2008 are not inconsistent with the provisions of Article 27 paragraph (2), Article 28A, Article 28C paragraph (2), Article 28D paragraph (1), and Article 28F of the 1945 Constitution.

### **Opinion of the Court**

**[3.14]** Whereas the Court will give its opinion on the Petitioners arguments together with the evidence presented, the statement of the Government, and the statements of the Experts, but first the following matters need to be conveyed:

**[3.15]** Whereas one of the elements of the background to the reform movement which subsequently lead to the reform of the constitution and the political order is the fact that in the past violations of human rights occurred in the form of political violence, namely among other things, violations of the freedom of expression. At that time, the freedom of the press was in chains, the freedom of organization was restricted, and even academic-scientific freedoms were also limited with restrictions which greatly hampered the development of Science and Technology. Constitutional and political reform has asserted the guaranteed protection of the aforementioned rights, and even at the level of Law, various

changes towards more responsiveness with respect to the protection of human rights have been made. For example, various Laws on the Political sector have become more democratic, the amended Press Law has eliminated all forms of unnecessary restrictions such as the elimination of the requirement to have a Publication Permit or *Surat Izin Terbit* (SIT) or a Press Publication Business Permit or *Surat Izin Usaha Penerbitan Pers* (SIUPP), as well as the affirmation of the application of the principle of academic freedom and the freedom of academic forum in universities. Therefore, all forms of restrictions on the freedom of expression, especially on methodology-science-based activities as regulated in Article 245 paragraph (2) and paragraph (3) of Law Number 10/2008 are not in line with the spirit of reform and the spirit of the 1945 Constitution;

**[3.16]** Whereas in addition to the basis for the opinion of the Court, it can be conveyed that the laws and regulations regarding higher education have affirmed the application of the principle of academic freedom and the freedom of academic forum. Academic freedom is the freedom to conduct research or scientific activities in accordance with scientific principles and method, while the freedom of academic forum is the freedom to process and announce scientific findings or information to enhance the intellectual life of the nation without being hindered by any person, except for those which clearly violate the law. Although not conducted by the academicians or *civitas academica* in universities, survey or quick count activities regarding the results of the General Elections are science-based activities which must also be protected with the spirit and principle of academic-scientific freedom and the freedom of academic-scientific forum as

guaranteed not only by Article 31 paragraph (1), paragraph (3), and paragraph (5) of the 1945 Constitution but also by the provisions of Article 28F of the 1945 Constitution which include the freedom to explore, process, and announce information, including scientific information. Therefore, the Court is of the opinion that the restrictive provisions regulated in Article 245 paragraph (2) and paragraph (3) of Law Number 10/2008 are not in line with the spirit of Article 31 and Article 28F of the 1945 Constitution;

**[3.17]** Whereas the consolidation of the stages of the development of democratization which is taking place in Indonesia is fully supported by the freedom to express opinions, the freedom to store and disseminate information, as well as the freedom to obtain information. Both in academic manner and non-academic manner, broadcast by the press media or other media, such freedom in the public domain serves as a social control and as a check and balance. In Law Number 10/2008, this issue is also recognized as people's participation needed in the democratic process, as the supervision and balancing factor, so that the aforementioned provision is expected to contribute to the successful implementation of general elections as part of procedural democracy;

**[3.18]** Whereas a poll or survey as well as a quick count of the voting results using a scientific method is a form of education, supervision and checks and balances in the process of state administration including the general elections. The hoped-for contributions will be realised only if the results as a form of information can be disseminated to and obtained by the community as well as

state administrators, so that the decisions made, both by the constituents and by the state administrators, as well as the general elections, will be enlightened by the existing facts in the community, and cannot be manipulated for the interests of certain parties;

**[3.19]** Whereas the Court does not agree with the view of the legislators represented by the Government and the People's Legislative Assembly (DPR) namely that the results of a survey and quick count can create unrest and influence the community during the cooling off period in facing the upcoming General Elections or prior to the elapse of one day following the voting because according to the Court, this view of the legislators is not factual at all and is outdated at least for two reasons. First, insofar as it is conducted based on the methodological-scientific principle and not having the tendency to influence the constituents during the cooling off period, the publication of survey results may not be prohibited. However, in the event the aforementioned publication of survey results tends to favor or disfavor any contestant participating in the General Elections, then sanctions can be imposed upon the surveyor or the organizing institution by the application of Article 89 of the *a quo* Law and the sanctions provided for in the *a quo* Law. Second, according to the Court, insofar as it is concerned with quick count results, there is no accurate data to indicate that the aforementioned publication of quick count results has disturbed public order or created anxiety in the community. None of a number of quick counts conducted so far has created anxiety or disturbed public order, because as a matter of fact, from the beginning the results of such quick counts have not been able to be

treated as official results. Even if there were such an effect, the facts are very limited in number and even so, it would be due to the fact that the quick count organizers have conducted the quick count in an irresponsible manner and with a certain tendency. Based on the *a quo* Law or other laws and regulations, sanctions can still be imposed upon quick count organizers. It must be remembered that from the beginning, it has become public knowledge (*notoir feiten*) that quick count results are not to be treated as the official results, but that the people have the right to know. In fact, many community members wait for the quick count results upon the completion of the voting with full awareness that the official and valid results would be announced later by the General Election Commission (KPU) according to the official schedule as stipulated. Therefore, both the publication of survey results during the cooling off period shortly before the General Elections and the publication of quick count results upon the completion of the voting are in accordance with the constitutional rights and even in line with the provisions of Article 28F of the 1945 Constitution;

**[3.20]** Whereas even if the prohibition of the publication of survey results during the cooling off period were intended for the interest or benefit of public order which becomes public interest, or for the justice of the participants in the General Elections that wish to prevent a poll to reflect their real status in the eyes of the constituents before the voting, as well as for security and peace, far from conflicts among the General Election participants and their supporters, all the aforementioned legal goals and interests to be protected can be achieved by law enforcement or through the legal sector relevant to the matter. Even so, the

interest of some General Election participants who do not want their image to be publicly discussed before the voting, must be set aside by the interest of the community members who want quicker information regarding various issues in relation to the General Elections in a quicker manner based on a survey;

**[3.21]** Whereas if the right to announce survey or poll results during the cooling off period and to announce quick count results before the elapse of one day following the voting is restricted in accordance with fair demands based on the considerations of morality, religious values, and public order in a democratic society, then in a rational and proportional manner, such a restriction has already been provided for in accordance with Article 28J paragraph (2) of the 1945 Constitution accurately and not in a careless manner. Such restriction is made not through the formulation of formal offense, namely by prohibiting the act, but rather the target of the prohibition should be the consequences (substantive offense) which may arise from the act being regulated, as explained by the expert presented by the Petitioners. In this way, poll and quick count organizers can give their own considerations and assessments on the consequences which may arise from the announcement they conduct, including to make their own calculation of the risks under the criminal law which must be considered as a consequence of their act. Therefore, the criminal law can be actually used in a proportionate and rational manner and shall only be used as the ultimate remedy (*ultimum remedium*), so that the criminal law will not lose its authority due to inaccurate and careless application and will not lead to excessive criminalization;

**[3.22]** Whereas the community's right to know constitutes a part of Human Rights, namely the freedom to obtain information and also, *a contrario*, the freedom to give or convey information (freedom of information). Article 28F of the 1945 Constitution expressly states that *"Every person shall have the right to communicate and to obtain information to develop him/herself and his/her social environment, and shall have the right to seek, obtain, possess, store, process and impart information by using all available kinds of channels"*;

**[3.23]** Whereas the principle of proportionality constitutes the principle and morality of the constitution which shall at all times be presented as the standard for justifying the setting aside of the human rights which have become constitutional rights. It is the Government's obligation and responsibility to protect, to promote, to enforce and to fulfill these rights, as also stipulated in Article 28I paragraph (4) of the 1945 Constitution. Because of the existence of this constitutional obligation and responsibility of the State and the Government in Article 28I paragraph (4), the use of Article 28J paragraph (2) as the reason for setting aside human rights which have become the constitutional rights, must be done in a careful, accurate and meticulous manner, as well as by establishing operational standards of how to apply the provisions which state *"the restrictions stipulated in laws and regulations with the sole purpose to guarantee the recognition of and the respect for other persons' rights and freedom and fulfill fair demands in accordance with the considerations of morality, religious values, security, and public order in a democratic society"*;

**[3.24]** Polls and surveys are a science as well as an art. The preparation of samples and questionnaires, provision of survey equipment, as well as analysis of the results constitute a science of researching into public opinion based on methods and techniques which have been established and verified, whereas the art lies in the preparation of the questions and the choice of words used in the questions (Arterton F. Christopher, *Kegunaan Jajak Pendapat Umum dalam Kampanye* (The Use of Public Opinion Poll in Campaigns), 1996). A survey can be conducted by an independent institution which is not bound to one of the political contestants participating in the General Elections, but it may also be a part of or conducted at the request of one of the participants in the General Elections. Therefore, in the United States for instance, surveys are a part of General Election campaigns (Merloe, 1999, and Arterton, 1996). In Indonesia, as may be understood from the provisions of Law Number 10/2008, a survey is not a part of Campaigns (Chapter VIII), but is included in Chapter XIX on the Community's Participation in the Implementation of the General Elections, so that a survey institution is required to be independent. Regardless of whether surveys and survey institutions constitute a part of the campaign strategies of the participants in the General Elections or are independent, as a scientific activity, surveys and survey institution must keep to the application of scientific principles in surveys, which may be known by the public. Even if a survey and survey institution is independent and does not constitute a part of the campaign strategy of one of the participants in the General Elections, a survey institution must also



comply with the provisions on the cooling off period in General Election campaigns;

**[3.25]** Whereas based on the foregoing view, with respect to the Substance of the Petition, the Court is of the following opinion:

1. Whereas with respect to Article 245 paragraph (2) of Law Number 10/2008 which reads *“The results of a survey or poll shall not be announced during the cooling off period”*, the Court considers that the basic rights regulated in Article 28F of the 1945 Constitution cannot be set aside by the *a quo* provision, and therefore, the Petitioners’ argument is based upon sufficient grounds. This means that the aforementioned announcements of survey results are not unconstitutional insofar as they are not related to the candidates’ track records or other forms which may favor or disfavor any participant in the General Elections as regulated in Article 89 paragraph (5) of Law Number 10/2008;
2. Whereas with respect to the Petitioners’ argument regarding Article 245 paragraph (3) of Law Number 10/2008 which reads *“The results of a quick count may only be announced and/or disseminated not earlier than on the day following the day/date of voting”*, the Court agrees with the argument of the Petitioners that the *a quo* provision is not in line with the nature of a quick count and that it hampers a person’s desire as well as right to know, so that it is inconsistent with Article 28F of the 1945 Constitution. In addition, quick count results will no longer affect the freedom of the

constituents to make their choice because the voting has been completed and it is impossible to conduct a quick count before the voting has been completed;

3. Whereas according to the Court, Article 245 paragraph (5) of Law Number 10/2008 which reads "*A violation of the provisions of paragraph (2), paragraph (3), and paragraph (4) constitutes a criminal act in the General Elections*", is no longer relevant to the provision of paragraph (2) and paragraph (3) because the Petitioners' argument with respect to paragraph (2) and paragraph (3) is considered to be based on sufficient grounds by the Court. Therefore, the provisions of paragraph (5) of Law Number 10/2008 are only relevant to Article 245 paragraph (4) of Law Number 10/2008 which is, *nota bene*, not petitioned for review or which the Petitioners consider constitutional;
4. Whereas according to the Court, with respect to the provisions of Article 282 of Law Number 10/2008 which reads "*Every person announcing survey or poll results during the cooling off period, shall have imposed upon them criminal sanctions of minimum imprisonment of 3 (three) months and maximum imprisonment of 12 (twelve) months and minimum fine of Rp.3,000,000.00 (three million rupiah) and maximum fine of Rp.12,000,000.00 (twelve million rupiah)*", the Petitioners' argument regarding Article 245 paragraph (2) of Law Number 10/2008 has been declared to be based upon sufficient grounds and therefore the existence

of criminal sanctions included in Article 282 of Law Number 10/2008 is no longer relevant and must be declared unconstitutional;

5. Whereas with respect to the provisions of Article 307 of Law Number 10/2008 which reads “*Every person or institution conducting a quick count and announcing the results of a quick count on the day/date of voting shall be punished with a minimum imprisonment of 6 (six) months and a maximum imprisonment of 18 (eighteen) months and a minimum fine of Rp.6,000,000.00 (six million rupiah) and a maximum fine of Rp.18,000,000.00 (eighteen million rupiah)*”, in view of the fact that the *a quo* article provides for criminal sanctions for Article 245 paragraph (3) of Law Number 10/2008 with respect to which the Court has declared that the Petitioners’ argument is based upon sufficient grounds, the existence of Article 307 of Law Number 10/2008 is no longer relevant and therefore it must also be declared unconstitutional.

#### 4. CONCLUSION

Based on the foregoing considerations of facts and laws, the Court has come to the following conclusions:

**[4.1]** The Court has authority to examine, hear, and decide upon the *a quo* petition;

**[4.2]** The Petitioners have legal standing;

**[4.3]** Regarding the substance of the petition, the Petitioners' arguments regarding the review of Article 245 paragraph (2) and paragraph (3), as well as Article 282 and Article 307 of Law Number 10/2008, are based upon sufficient grounds, whereas the Petitioners' argument for the review of Article 245 paragraph (5) is sufficient only to the extent it is related to Article 245 paragraph (2) and Article 245 paragraph (3) of Law Number 10/2008.

## **5. DECISIONS**

Based on the 1945 Constitution of the State of the Republic of Indonesia and in view of Article 56 paragraph (2), paragraph (3), and paragraph (5), as well as Article 57 paragraph (1) and paragraph (3) 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);

### **Decides,**

- To grant the Petitioners' petition, in party;
- To declare that Article 245 paragraph (2), Article 245 paragraph (3), Article 282, and Article 307 Law Number 10 Year 2008 regarding the General Elections 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 2008 Number 51, Supplement

to the State Gazette of the Republic of Indonesia Number 4836) are inconsistent with the 1945 Constitution of the State of the Republic of Indonesia;

- To declare that Article 245 paragraph (5) of Law Number 10 Year 2008 (State Gazette of the Republic of Indonesia Year 2008 Number 51, Supplement to the State Gazette of the Republic of Indonesia Number 4836) to the extent it is concerned with the phrase “*paragraph (2), paragraph (3), and*” is inconsistent with the 1945 Constitution of the State of the Republic of Indonesia;
- To declare that Article 245 paragraph (2), Article 245 paragraph (3), Article 282, and Article 307 of Law Number 10 Year 2008 regarding the General Elections 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), do not have any binding legal effect;
- To declare that Article 245 paragraph (5) of Law Number 10 Year 2008 regarding the General Elections 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) to the extent it is concerned with the phrase

*“paragraph (2), paragraph (3), and”* is inconsistent with the 1945 Constitution of the State of the Republic of Indonesia, and shall not have any binding legal effect;

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

Hence this decision was made in the Consultative Meeting attended by eight Constitutional Court Justices, namely Moh. Mahfud MD., as the Chairperson and concurrent Member, Abdul Mukthie Fadjar, Achmad Sodiki, Muhammad Alim, M. Akil Mochtar, Maruarar Siahaan, Maria Farida Indrati, M. Arsyad Sanusi, on Wednesday dated March the twenty-fifth year two thousand and nine, and was pronounced in the Plenary Session of the Constitutional Court open for the public on this day, Monday dated March the thirtieth year two thousand and nine, by nine Constitutional Court Justices namely Moh. Mahfud MD., as the Chairperson and concurrent Member, Abdul Mukthie Fadjar, Achmad Sodiki, Muhammad Alim, M. Akil Mochtar, Maruarar Siahaan, Maria Farida Indrati, M. Arsyad Sanusi, and Harjono, assisted by Fadzlun Budi SN. as the Substitute Registrar, in the presence of the Petitioners/their Attorneys, the Government or its representative, and the People’s Legislative Assembly or its representative.

**CHIEF JUSTICE,**

**Sgd.**

**Moh. Mahfud MD.**

**JUSTICES,**

**Sgd.**

**Abdul Mukthie Fadjar**

**Sgd.**

**Muhammad Alim**

**Sgd.**

**Maruarar Siahaan**

**Sgd.**

**M. Arsyad Sanusi**

**Sgd.**

**Achmad Sodiki**

**Sgd.**

**M. Akil Mochtar**

**Sgd.**

**Maria Farida Indrati**

**Sgd.**

**Harjono**

## **6. DISSENTING OPINIONS**

With respect to the foregoing decision of the Court, 3 Constitutional Court Justices, namely **Achmad Sodiki**, **M. Akil Mochtar**, and **M. Arsyad Sanusi** have dissenting opinions, as follows:

**[6.1.1] Constitutional Court Justices Achmad Sodiki and M. Akil Mochtar**

**I. SUBSTANCE OF THE CASE**

Article 245 paragraph (2), paragraph (3), and paragraph (5), as well as Article 282 and Article 307 of Law Number 10 Year 2008 regarding the General Elections of Members of the People's Legislative Assembly, the Regional Representative Council, and the Regional People's Legislative Assembly are considered inconsistent with Article 28D paragraph (1) and Article 28G paragraph (1) of the 1945 Constitution of the State of the Republic of Indonesia.

**II. DISCUSSION**

1. *Cogito ergo sum!* "I think, therefore I am", stated by Descartes shows that it is vitally important for humans to develop their thoughts because doing so will benefit the community, so that a person's presence or existence in the community will appear, as he/she is not like other, inanimate objects. Thanks to the development of communication technology, any news through the cyberspace can be easily accessed by everyone.
2. There are three important issues regarding the freedom to express opinions, *"The first view is that freedom of expression is essential to a person's autonomy and self-fulfillment. The second is the marketplace of ideas, that minimal government regulation will allow robust debate between citizens that is most likely to lead to the truth. The third*



*justification is that freedom of expression is a necessary component of democratic government*" (Jacob Rowbottom, "Media Freedom and Political Debate in the Digital Era", *Media Law Review*, Vol. 69 July No. 4, 2006).

Global capitalism offers news as a consumptive object, using the advertisements through the press and the electronic media as an attractive source of income. Many present legislators buy these commodities for the purpose of acquiring votes in the General Elections.

3. News in its every form has become a commodity in the free market, meaning that any capable person can buy and obtain the benefits from news reporting. Surveys made for purely scientific purposes as in Universities, have now turned into a survey industry, serving the interests of individuals or groups and have entered the public domain. The balance between the protection of the interests of individuals and the public interest is needed in the democratic process. News has a great impact on the creation of benefits for individual interests in the political sector. It may happen that with the press' image-making, a legislator candidate or presidential candidate who was once unknown can become a person really needed by the community. Therefore, in the free market of the press, what Descartes said, "*Cogito ergo sum*", "*I think, therefore I am*", has currently shifted to 'I am able to buy news, therefore I am'. News is image. A person can be depicted in the image of a person who is successful in striking down corruptors and defending the poor, who is honest and trustworthy as well as close to the people. On the contrary, the

more a person or a party is incapable to buy an image, the less he/she would be taken into account, just like the Arabian saying, "*wujuduhu kaadamihi*" meaning that their existence seems to be non-existent, and it would be enough for parties with small funds to conduct campaigns just like paying homage at the cemetery, in other words, rarely visited, and only then if reported in the news by the mercy of the press giving the report. These small parties which have no funds become *the least advantaged* parties by the free market of the press. The danger is that "*The mass media, with the high costs of access and control in the hands of an elite, requires some oversight to prevent its important social and democratic functions being skewed in the interests of a small number of speakers or gatekeepers (Jacob Rowbottom: ibid)*". The presentation of image in the mass media has frequently exceeded what constitutes "the fact", and even when there is no such fact at all. Packages of information have created mass groups who are powerless and closed to factual information, thus becoming disguised slaves of modern industrial civilization, because this industry is not free from the manipulation of needs created by the capital-owner elite.

4. Based on such thoughts, it is not impossible that some surveys are financed by the parties having a great amount of funds, either before the upcoming General Elections or during the cooling off period, with the results being misleading to the community. However, it must be admitted that the press in Indonesia has not fully applied the quality of professional

and responsible reporting. Leaving the press to continue without controls and accountability will potentially make it the media of agitation and public deception which affect the psychology of the uneducated public, which, *nota bene*, are greater in number compared to the educated public. The news in the *Newsweek* regarding the abuse of the Koran in Guantanamo turned out to be a mistake of the resource persons and *Newsweek* apologized for the mistake and promised to be more careful in its reporting. Law Number 40 Year 1999 regarding the Press has not accommodated the issue. The aforementioned Law provides for criminal sanctions in the form of a fine if the press violates the norms of morals and the principle of presumption of innocence as well as the issues of advertisements prohibited by the Law (*vide* Article 18 paragraph (2) of the Press Law). The remaining parts of the Press Law only regulate the right to respond and the right to correct the reporting considered be problematic. It is this issue that is actually considered to bear no balance in the press. In addition, the Press Law is not strict in regulating who in the press company must be responsible for the news issued, whether the editorial head or the journalist (Frans Hendra Winarta: *Kebebasan Pers dalam Perspektif Pidana Ditinjau dari RUU KUHP [The Freedom of the Press from the Criminal Perspective Viewed based on the Draft Law on the Criminal Code]*).

5. The freedom of the press is an absolute element in a democratic country. Restrictions are necessary in order to prevent the abuse of the press and

for the protection of the weak. During the 2004 General Elections, survey results announced on the internet were easily infiltrated by the *hackerbarry (hacker)* causing the names of the banana party, the papaya party, and so forth, to appear, which in any case would confuse the people. Such restrictions are sufficiently provided with the imposition of a fine, not necessarily with criminal sanctions. Such limitations are not aimed at restricting the freedom of the press but to make the protagonists in the press more responsible, professional, and to respect other people's human rights.

### III. CONCLUSION

- a. Article 245 paragraph (2) of Law Number 10/2008 reads "*The results of a survey or poll shall not be announced during the cooling off period*". This applies to all the people including the participants in the General Elections or the parties. In Article 89 paragraph (5) of Law Number 10/2008, the print media and broadcasting institutions as referred to in paragraph (1) are "prohibited" from broadcasting news or advertisements, track records of the participants in the General Elections, or other forms which 'lead' to campaign interests which favor or disfavor the participants in the General Elections during the cooling off period. The survey itself may be conducted outside of the cooling off period before the General Elections, but its announcement is prohibited if it has the

purpose as referred to in Article 89 paragraph (5) of Law Number 10/2008. This means that during the cooling off period, the provisions of Article 242 paragraph (2) of Law Number 10/2008 are applicable to anyone which, despite the fact of being a limitation, it is conducted in a just manner in a sense that it is applied to all the people so that it is not discriminatory. During the cooling off period, all paraphernalia and signs of the parties in the general elections are removed. Every person must submit to the restrictions stipulated in laws and regulations with the sole purpose to guarantee the recognition of and the respect for other persons' rights and freedom and fulfill fair demands in accordance with the considerations of morality, religious values, security, and public order in a democratic society. Therefore, the petition with respect to this Article should be rejected.

- b. Article 245 paragraph (3) of Law Number 10/2008 reads *"The results of a quick count may only be announced and/or disseminated not earlier than on the day following the day/date of voting."* This Article is not needed because the relevant General Elections are over, so that the announcement of the quick count does not affect the results of the general elections. The Petitioners have been able to prove that private TV Stations have broadcast the quick count during the 2004 general elections and various

results of quick counts in the General Elections of General Heads, so the petition should be granted.

- c. Article 245 paragraph (5) of Law Number 10/2008 namely the provisions of paragraph (2) and paragraph (3) constitute criminal acts in the General Elections, and therefore, the petition should be granted to the extent it is concerned with the phrase "*paragraph (2), paragraph (3), and*".
- d. The petition with respect to Article 282 of Law Number 10/2008 should be rejected to the extent it is concerned with the words, "*Every person announcing and/or disseminating the results of a survey or poll during the cooling off period which may influence or which is aimed at influencing the Voters, shall be punished with a minimum fine of Rp.3,000,000.00 (three million rupiah) and a maximum fine of Rp.12,000,000.00 (twelve million rupiah) with a criminal sanction of minimum imprisonment of 3 (three) months and*" should be granted to the extent of the words "*...criminal sanction of maximum imprisonment of 12 (twelve) months, minimum imprisonment of 3 (three) months... and maximum imprisonment of 12 (twelve) months*".
- e. The petition with respect to Article 307 of Law Number 10/2008 should be granted because it is related to the granting of the petition with respect to Article 245 paragraph (3) of Law Number 10/2008.

**[6.1.2] Constitutional Court Justice M. Arsyad Sanusi**

The General Elections as the medium of people's sovereignty implemented in a direct, public, free, confidential, honest and just manner must become the legal ideal for the organizers of the General Elections as well all levels of society. Article 22E paragraph (6) of the 1945 Constitution mandates that the General Elections shall be further regulated in law, most recently with Law Number 10 Year 2008. One of the important issues regulated in the *a quo* law is people's participation in the General Elections.

In essence, the people's participation in the General Elections as regulated in Chapter XIX of Law Number 10 Year 2008, means the desire to participate in the political life which will potentially influence the ongoing political process, among other things through surveys or polls as well as quick counts based on the principle of the freedom of expression as the point of departure. According to Puddephaat, there are three aspects of the freedom of expression, namely: (i) seeking information and ideas, (ii) receiving information and ideas, and (iii) imparting information and ideas (Andrew Puddephat, *The Essentials of Human Rights: Freedom of Expression*, 2005), as also guaranteed by Article 28F of the 1945 Constitution.

In relation to the freedom to obtain and to impart information, the following matters may be conveyed:

- a. The freedom to obtain and convey information is a fundamental and universal human right, whereby every person, without exception, has the

- right to obtain and impart information. As a consequence, the state, in this case the Government, shall be obliged to open the channels of information;
- b. The intended freedom can be read in Article 19 of the Universal Declaration of Human Rights which reads *"Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers"*;
  - c. Access to information constitutes the basis for democratic life and the freedom of information constitutes a part of human rights;
  - d. The state shall be obliged to respect, protect and fulfill such rights;
  - e. The concepts of freedom to obtain and impart information, democracy and good governance are interrelated because the *a quo* freedoms allow the people to participate in controlling every policy measure of the Government in the governance of the state and the community;

The provisions of Article 245 paragraph (2) of Law Number 10/2008 regarding the prohibition on announcing the results of a survey or poll during the cooling off period implicates two legal values, namely the freedom to obtain and impart information which must be upheld, on the one hand, as well as the potential interference to the comfort and order on the other hand. Similarly, the prohibition of the announcement of the results of a quick count on the day/date of voting as regulated by Article 245 paragraph (3) of the *a quo* Law also implicates two legal values, namely science-based freedom which must be upheld in a



democratic state and the interference to public order due to anxiety and conflict which may arise within the community.

At this point, the Court is faced with two interests, two legal values, namely every person's interest to seek, obtain, own, store, process and impart information, vis a vis the obligation of the state to protect the people at large from the potential interference to the order and peace of the community. To address the aforementioned two issues, the following matters can be conveyed:

1. The freedom to seek, obtain, own, store, process and impart information, as well as the freedom to advance science and technology constitute inherent concepts in the contexts of human rights, which have the desire for every person to be able to express their thoughts, seek, receive as well as to impart information or ideas, using any kinds media;
2. The freedom to seek, obtain, own, store, process and impart information as well as the freedom to advance science and technology, *in casu* the activities of researchers in imparting information regarding the General Elections, are not absolute, but must submit to the law, because there is no guarantee that the activities of surveys and polls as well as quick count, although conducted based on scientific principles, are free from the tendency to influence the choices which favor a certain contestant in the General Elections. At this point, the state has the necessary role to maintain the quality of democracy and to maintain public order, so that the aforementioned information can be "stored" for a certain period of time

- and be announced to the public only after the elapse of a certain period of time;
3. Article 89 paragraph (5) of the General Election Law regulates the prohibition of the broadcast of news, advertisements, as well as the track records of the Participants in the General Elections, and provides for criminal sanctions. However, the definition of the phrase "or other forms" in the aforementioned article is not explained, so as to open up the opportunity for the results of a survey or poll to be sponsored by a contestant in the General Elections in order to favor or disfavor a certain contestant in the General Elections;
  4. The limitation of the right to information has obtained legal recognition referred to in the European Convention on Human Rights which states as follows: *"The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."*
  5. In relation to the limitation of the right to information, the formulation of the opinion of Prof. Soetandyo Wigjosoebroto, MPA would be proper that in

the middle of the euphoria of the recognition of the sacredness of the citizens' civil rights with respect to their freedom and rights to also participate freely in every political process, the authority of the state officials in the supervision of public order shall be constituted to a minimum extent, whereas the right to the freedom of the nation to its maximum extent. Soetandyo also states that in its further development, when the citizens' right to the freedom and to practice politics turn out to be unable to guarantee the realization of the rights in the economic, social and cultural sectors, the authority of the state to act in an increasingly proactive manner becomes acceptable. Despite the state's hands-off attitude in the issue of maintaining the citizens' right to freedom and to practice politics, the state has been able to work with justifiable authority to be proactive in creating a more conducive situation for every human being on earth in realizing their rights for optimizing their welfare in the economic, social and cultural sectors. (Soetandyo Wigjosoebroto, *Hubungan Negara and Masyarakat dalam Konteks HAM: Sebuah Tinjauan Historis dari Perspektif Relativisme Budaya Politik [Relationship between the State and the Public in the Context of Human Rights: A Historical Review from the Perspective of Political Culture Relativism]*)

6. Soetandyo further states that in the context of political and cultural relativism, under certain circumstances, the efforts to realize the universal principles of the Human Rights may be postponed or reserved. In the event that based on special considerations which are provisional and

inevitable, an effort to enforce human rights – based on the claim of universality – will have the consequence of bringing more harm than benefit, then it would be unwise to force the continuation of the aforementioned effort.

7. Subsequently, in relation to the principle of the aforementioned Article 19 of the Universal Declaration of Human Rights and the European Convention on Human Rights, Toby Mendel (*Freedom of Information: A Comparative Legal Survey: UNESCO: 2004*) presents three parameters as the reference to determine whether information needs to be restricted, namely:
  - a. The relevant information has to be related to a goal included in law;
  - b. Its disclosure will potentially cause great harm which is not in line with the objective of the law;
  - c. Such harm to the objective must be greater than the interest of the community to obtain the aforementioned information.
  
8. Based on the aforementioned three parameters, it is appropriate to ask whether or not it is proper or necessary to have restrictions of the right to obtain and to impart information, *in casu* the results of a survey or poll during the cooling off period and the announcement of the results of a quick count when the General Elections are taking place. The arguments presented are as follows:

- a. Conveyance of information regarding survey or poll results or quick count results should be in line with the goals to be achieved by the Law regarding the General Elections namely to participate in providing information on whether the decision made by the people, the actions of the organizers of the General Elections are in line with the goal to be achieved by the law, *in casu* the General Elections conducted in a direct, public, free, confidential, honest and just manner, insofar as it is not biased by a tendency to favor or disfavor any contestant in the General Elections;
- b. During the period of transition to democracy, increasing mass communication has driven initially apathetic groups to be active in the political process, moved by their social and political awareness so as to increase the extremely conspicuous demands on the government. Huntington reminds us that the rapid development, and the participation of many new groups in politics within a short period of time can disturb stability. Based on the aforementioned social and political reality, the conveyance of survey or poll results during the cooling off period and the announcement of quick count results on the day/date of the General Elections will potentially bring great harm which can happen not in line with the goal of the Law regarding the General Elections;
- c. The harm in the form of interruption to stability and disturbance to the peace of the community due to the conveyance of survey and

poll results and the announcement of quick count results on the day/date of the General Elections is greater than the interest of the community to obtain the aforementioned information. The illustration is what happened during the Regional Head General Elections in South Sulawesi, East Java, and a number of other regions. This means that in relation to the ideal objective to be achieved namely to realize democracy (namely, the people's participation to the greatest possible extent in the political and economic sectors), any occurrence of mistake or error with the results of survey or poll conducted during the cooling off period and the announcement of quick count results on the day/date of the General Elections will in fact create anxiety and disturbance to the security as well as public order leading to a threat to democracy itself.

9. The constitution mandates the protection of the interest of the people at large from potential things which can injure the principles of democracy, the protection of the sense of security and further protection of the integration of the nation and state. Similarly, to achieve successful development, national policies frequently require the willingness of the public to sacrifice and not to prioritize their individual rights, especially when the purpose is national stability (commonly defined as the absence of disturbance to the security and the well-maintained public order), and

therefore, it is understandable that civil and political rights are restricted temporarily and within a limited scope.

10. The common interest to prevent the disturbance to the integration of the nation and the integrity of the state shall become prioritized over the fulfillment of the rights of a class or group of people, because the applicability of the rights argued by the Petitioners may be postponed insofar as the interest of the general public so requires. This is in line with the principle of *maximum disclosure and limited exception (MALE)*, meaning that although public information is open in nature, there is a small part of information which can be excepted. The *a quo* exception can be made in a strict and limited manner, namely that it is only justifiable if there is a legitimate interest that must be protected. Therefore, even though the access to public information has to be maximum, exceptions are allowed to the extent of any legitimate and limited interest for a clearly limited time, for instance during the cooling off period or when the General Elections are taking place.
11. The provisions of Article 245 paragraph (2) of the *a quo* Law constitute a legal policy of the legislators to regulate the implementation of the General Elections. To the extent of the statement of the Petitioners' expert, Muhammad Qodari, explaining that the announcement of survey or poll results does not affect social peace and comforts, it is improper for this opinion to be used as the basis for justification considering that there is no

legal guarantee that survey or poll results announced during the cooling off period and at the time of voting will not trigger conflicts or social vulnerability leading to interference to the comforts and order in the community which have happened during Regional Head General Elections in South Sulawesi, East Java and some other regions. At this point, regulation by the state is important so that the constitutional rights are also implemented by considering the greater national interest, and the willingness of some people claiming to have such constitutional rights to postpone the exercise of such constitutional rights for the interest of the general public.

12. The norms included in Article 245 paragraph (2) of the *a quo* Law, do not at all negate citizens' constitutional right to conduct a survey or poll or for a social institution to conduct a quick count, rather such norms adhere to the principle of proportionate fulfillment of constitutional rights and the obligation of the state to provide a guaranteed sense of security to the community. Moreover, the characteristic of a quick count, survey or poll is that the participation of the community is not fully accurate, correct or perfect, but still bears potential errors. Therefore, it is improper to place the *a quo* provision in opposition to norms of the constitution.
13. The norm contained in included in Article 245 paragraph (3) is also parallel to the legal ideal to be achieved by Article 245 paragraph (2) of the *a quo* Law.



14. Quick count results announced on the voting day also have the potential to trigger social sensitivities when the results announced turn out to be different from the official results of vote acquisition of the contestants in the General Elections, especially when there is a slight difference in the number of votes acquired by the contestants, namely smaller than or equal to the margin of error of the organizers of a survey, poll or quick count. Such cases will lead to extremely great conflict potential and disturbance to social order. Once again, the state is faced with the issue of how to guarantee peace and order in regulating social relations. Social order and peace do not belong to individual persons or a certain group but are longed for by and belong to the whole civilized society;
15. As a choice of legal policy, the provisions of the *a quo* Law having the connotation of criminal sanctions for violations related to general elections are similar to the natural law, whereby every cause has an effect, a reaction follows every action. Similarly, the prohibition of criminal acts must be followed by criminal sanction, and therefore, the provisions in Article 282 and Article 307 Law Number 10 Year 2008 are valid and are not inconsistent with the values of the constitution upheld in a democratic society.
16. Whereas Article 282 and Article 307 of Law Number 10 year 2008 regulating the criminal sanctions in relation to Article 245 paragraph (2) and Article 245 paragraph (3), because the violation of the law with

respect to the *a quo* provisions as provided for in Article 245 paragraph (5), although not petitioned for review, the *a quo* provisions qualify violations of Article 245 paragraph (1), paragraph (2), paragraph (3) and paragraph (4) as criminal acts in the general elections, are considered valid and not inconsistent with the values of the constitution upheld by a democratic society.

Based upon the foregoing thoughts and legal considerations, the Petitioners' petition should have been rejected in its entirety.

**SUBSTITUTE REGISTRAR,**

**Sgd.**

**Fadzlun Budi S.N.**