DECISION

Number 14/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 the constitutional cases at the first and final level, has passed a decision in the case of the Petition for Judicial Review on the Indonesian Criminal Code against the Constitution of the State of the Republic of Indonesia Year 1945, filed by:

[1.2] **1.** **Risang Bima Wijaya, S.H.,** born in Bangkalan on October 5, 1973, moslem, Editor-in-chief of Radar Jogja, Indonesian citizenship, residing at Perum Griya Abadi Nomor 1-2 RT.004, RW.001 Bilaporah Village, Socah District, Bangkalan Regency, East Java Province;

Hereinafter referred to as **Petitioner I**;

2. **Bersihar Lubis,** born in Gunung Tua, Tapanuli Selatan on February 25, 1950, moslem, journalist/columnist, Indonesian citizenship, residing at Perum Depok Maharaja Blok D

Nomor 06 RT.04/15 Rangkapan Jaya Sub-District, Pancoran Mas District, Depok Municipality;

Hereinafter referred to as **Petitioner II**;

Based on Special Powers of Attorney dated March 19, 2008 and March 24, 2008, both of the aforementioned Petitioners granted the power of attorney to Hendrayana, S.H.; Sholeh Ali, S.H.; Muhammad Halim, S.H.; Anggara, S.H.; Mimi Maftuha, S.H.; Adiani Viviana, S.H.; Irsan Pardosi,S.H.; Bayu Wicaksono, S.H.; Nawawi Bahrudin, S.H.; Endar Sumarsono, S.H.; respectively as the Advocates/Public Defense Lawyers and Assistants of Advocates/Assistants of Public Defense Lawyers from the Press Legal Aid Institute located at Jalan Prof. Dr. Soepomo, S.H., Komplek Bier Nomor 1 A, Menteng Dalam, South Jakarta – 12870, in this case acting either severally or jointly for and on behalf of the authorizer;

Hereinafter referred to as **Petitioners**;

[1.3] Having read the Petitioners' petition;

Having heard and read the statements of the Petitioners;

Having heard and read the statements of the Government and the Indonesian Criminal Code Formulating Team;

Having heard and read the statement of the Board of Press as the Related Party;

Having heard and read the statement of Independent Journalists Alliance as the Related Party;

Having read the statement of the Indonesian Journalists Association as the Related Party;

Having heard the statement of the Indonesian Television Journalists Association;

Having heard and read the statement of the expert witness of the Petitioners;

Having heard and read the statement of the Petitioners;

Having heard and read the statement of the expert witness of the Government;

Having examined the evidence presented by the Petitioners;

Having read the written statement *ad informandum* of the Indonesian People's Anti-Corruption Movement or *Gerakan Rakyat Anti Korupsi Indonesia* and the Legal Aid and Human Rights Association;

Having read the conclusion of the Petitioners;

3. LEGAL CONSIDERATIONS

[3.1] Considering whereas the purpose and objective of the *a quo* petition are to review the constitutionality of Article 310 paragraph (1), paragraph (2), Article 311 paragraph (1), Article 316, Article 207 of the Indonesian Criminal

Code (hereinafter referred to as KUHP) against the Constitution of the State of the Republic of Indonesia Year 1945 (hereinafter referred to as the 1945 Constitution).

[3.2] Considering, prior to considering the principal issue of the petition, the Constitutional Court (hereinafter referred to as the Court) shall first consider:

1. Whether or not the Court has the authority to examine, hear, and decide upon the *a quo* petition;
2. Whether or not the Petitioners have legal standing to act as Petitioners in the *a quo* petition.

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

Authority of the Court

[3.3] Considering whereas according to Article 24C paragraph (1) of the 1945 Constitution *juncto* Article 12 paragraph (1) of Law Number 4 Year 2004 regarding Judicial Power (State Gazette of the Republic of Indonesia Year 2004 Number 8, Supplement to the State Gazette of the Republic of Indonesia Number 4358) and Article 10 paragraph (1) of Law Number 24 Year 2003 regarding the Constitutional Court (State Gazette of the Republic of Indonesia Year 2003 Number 98, Supplement to the State Gazette of the Republic of Indonesia Number 4316, hereinafter referred to as Constitutional Court Law), the

Court has authority to hear at the first and the final level whose decision is final, among other things, to review a law against the 1945 Constitution.

[3.4] Considering whereas the *a quo* petition is for judicial review, *in casu* of the Indonesian Criminal Law, against the 1945 Constitution. Therefore, the Court has authority to examine, hear, and decide upon the petition.

The Petitioners' Legal Standing

[3.5] Considering whereas Article 51 paragraph (1) of the Constitutional Court Law states that the Petitioners shall be the parties who deem that their constitutional rights and/or authorities are impaired by the coming into effect of the law, namely:

a. Individual Indonesian citizens;
b. units of customary law communities insofar as they are still in existence and in accordance with the development of community and the principle of the Unitary State of the Republic of Indonesia regulated by law;
c. public or private legal entities; or
d. state institutions.

Therefore, in order for the legal standing of a party to be accepted in the petition for judicial review against the 1945 Constitution, the intended party shall first:

a. clarify his/her/its position whether as an Individual Indonesian citizen, a unit of customary law community, a legal entity, or a state institution;

b. clarify the impairment of its constitutional rights and/or authorities in the position as it is intended in item a above.

[3.6] Further considering, following 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 right and/or authority can be established upon the fulfillment of the following conditions:

a. the existence of constitutional right and/or authority of the Petitioner granted by the 1945 Constitution;

b. the constitutional right and/or authority shall be deemed by the Petitioner to have been harmed by the coming into effect of law petitioned for judicial review;

c the constitutional impairment must be specific and actual in nature or at least potential which pursuant to a logical reasoning will surely take place;

d. there is a causal relationship *(causal verband)* between the intended impairment and the coming into effect of the law petitioned for judicial review;

e. It is expected that upon the granting of a petition the constitutional impairment argued will not occur or no longer occurs;

[3.7] Considering whereas each of the Petitioners, either Petitioner I or Petitioner II, has clarified their positions as follows:

1. Petitioner I, Risang Bima Wijaya, S.H., is an individual Indonesian citizen whose profession is as a journalist;
2. Petitioner II, Bersihar Lubis, is an Indonesian citizen whose profession is as a columnist/journalist.

With regard to the Petitioners' descriptions as referred to in the aforementioned points 1 and 2, the Petitioners have fulfilled one of the conditions for the party who can file a petition for judicial review of a law as intended in Article 51 paragraph (1) of the Constitutional Court Law. The matter that must be further considered by the Court shall be whether or not in such position the constitutional rights of the Petitioners have been impaired by the coming into effect of Article 310 paragraph (1), paragraph (2), Article 311 paragraph (1), Article 316, and Article 207 of the Indonesian Criminal Code;

[3.8] Considering whereas in clarifying their opinion concerning the impairment of their constitutional rights as the result of the coming into effect of Article 310 paragraph (1), paragraph (2), Article 311 paragraph (1), Article 316, Article 207 of the Indonesian Criminal Code, as completely included in the facts of the case part of this decision, the Petitioners principally present the following arguments:

[3.8.1] Petitioner I

a. Whereas Petitioner I, Risang Bima Wijaya, S.H., as a journalist, has written news in the daily *Radar Jogja* concerning an alleged sexual harassment committed by Soemardi Martono Wonohito, Editor-in-chief of

the *Kedaulatan Rakyat* Daily Newspaper/Director of BP SKH Kedaulatan Rakyat Yogyakarta. The news, according to Petitioner, is to give information about the incident committed by a well-respected public figure. In writing the news, Petitioner I has presented the facts and mentioned the source persons clearly, as well as has requested the confirmation to Soemardi Martono Wonohito, either by phone, letter, or even by directly visiting the concerned person;

b. Whereas as a result of the news-report as described in item a, Petitioner I has been reported to the Police with an indictment of having committed defamation. Furthermore, the Petitioner I was summoned before the court with the first indictment of violating Article 311 paragraph (1) *juncto* Article 64 paragraph (1) of the Indonesian Criminal Code or the second indictment of violating Article 310 paragraph (2) *juncto* Article 64 paragraph (1) of the Indonesian Criminal Law or the third indictment of violating Article 310 paragraph (1) *juncto* Article 64 of the Indonesian Criminal Code;

c. Whereas by the court, Petitioner I was decided guilty because he was legally and convincingly proven to have committed slander or defamation as regulated in Article 310 paragraph (2) *juncto* Article 64 paragraph (1) of the Indonesian Criminal Code, with respect to which the decision has had permanent legal force (Exhibits P-7, P-8, P-9);

d. Whereas, according to the Petitioner I, by the incident he encountered, Petitioner I deems that his constitutional right which is guaranteed by Article 28E paragraph (2) and paragraph (3), and Article 28F of the 1945 Constitution has been impaired by the coming into effect of the imprisonment application in Article 310 paragraph (1), Article 310 paragraph (2), and Article 311 paragraph (1) of the Indonesian Criminal Code.

[3.8.2] Petitioner II

a. Whereas Petitioner II, Bersihar Lubis, a columnist and journalist, has written in the column of opinion of the *Tempo* daily newspaper published on March 17, 2007 entitled "*Kisah Interogator yang Dungu*/The Story of the Dumb Interrogator". The writing of the Petitioner II was in relation to the prohibition of the circulation of Junior High School and Senior High School textbooks by the Attorney General's Office on March 5, 2007 for the reason of not including the history of the rebellion of the Indonesian Communist Party (PKI) in Madiun in 1948 and the rebellion of the Indonesian Communist Party in 1965;

b. Whereas, according to Petitioner II, besides for the reason that there have been pros and cons of the prohibition conducted by the Attorney General's Office the writing has been also motivated by the question whether or not the prohibition has been based on a scientific study of historians or just because of power;

c. Whereas the title of the opinion article "*Kisah Interogator yang Dungu*/The Story of Dumb Interrogator" is taken by Petitioner II from the story of Joesoef Isak published by Majalah Medium (*Medium Magazine)* when speaking on "Hari Sastra Indonesia/*The Indonesian Literature Day*" in Paris in October 2004 when he told the situation when he was interrogated by the Attorney General's Office because of publishing the books of Pramudya Ananta Toer's work;

d. Whereas, as the result of his writing, the Petitioner II has been heard and has been sentenced to one month imprisonment with three months trial by Depok District Court because he was proven guilty of committing defamation in writing against public authority as intended in Article 207 of the Indonesian Criminal Code (Exhibit P-20);

e. Whereas based on the foregoing description in item a to item d, Petitioner II deems that the application of the criminal imprisonment in Article 310 paragraph (1), Article 316, and Article 207 of the Indonesian Criminal Code (KUHP) has impaired his constitutional rights and is contradictory to Article 27 paragraph (1), Article 28E paragraph (2), Article 28E paragraph (3), and Article 28F of the 1945 Constitution.

[3.9] Considering whereas based on the description in paragraphs **[3.7]** and **[3.8]** above, the Court is of the opinion that both Petitioner I and Petitioner II have fulfilled the legal standing requirement to act as Petitioners in the *a quo*

petition. Accordingly, furthermore the Court shall consider the principal issue of the petition.

Principal Issue of the Petition

[3.10] Whereas the principal issue and at once the constitutional issue of the *a quo* petition is whether or not the criminal imprisonment is constitutional as regulated in Article 207, Article 310 paragraph (1), Article 310 paragraph (2), Article 311 paragraph (1), and Article 316 of the Indonesian Criminal Code. Each of the Articles of the Indonesian Criminal Code reads as follows:

- Article 207 of the Indonesian Criminal Code, *"Any person who with deliberate intent in public, orally or in writing, insults an authority or a public body set up in Indonesia, shall be punished by a maximum imprisonment of one year and six months or a maximum fine of three hundred rupiahs"*;

- Article 310 paragraph (1) of the Indonesian Criminal Code, *"The person who with deliberate intent harms someone's honor or reputation by charging him with a certain fact, with the obvious intent to give publicity thereof, shall, being guilty of slander, be punished by a maximum imprisonment of nine months or a maximum fine of three hundred rupiahs"*;

- Article 310 paragraph (2) of the Indonesian Criminal Code, *"If this takes place by means of writings or portraits disseminated, openly demonstrated*

or put up, the principal shall, being guilty of libel, be punished by a maximum imprisonment of one year and four months or a maximum fine of three hundred rupiahs";

- Article 311 paragraph (1) of the Indonesian Criminal Code, *"Any person who commits the crime of slander or libel in case proof of truth of the charged fact is permitted, shall, if he does not produce said proof and the charge has been made against his better judgment, being guilty of calumny, be punished by a maximum imprisonment of four years"* ;

- Article 316 of the Indonesian Criminal Code, *"The punishment laid down in the foregoing articles of this chapter may be enhanced with one third, if the defamation is committed against official during or on the subject of the legal exercise of his office"*.

By the Petitioners, Article 310 paragraph (1), Article 310 paragraph (2), Article 311 paragraph (1) of the Indonesian Criminal Code are argued to be contradictory to Article 28E paragraph (2), Article 28E paragraph (3), and Article 28F of the 1945 Constitution. Meanwhile, Article 207 and Article 316 of the Indonesian Criminal Code are argued to be contradictory to Article 27 paragraph (1), Article 28E paragraph (2), Article 28E paragraph (3), and Article 28F of the 1945 Constitution. Each of the intended Article 27 paragraph (1), Article 28E paragraph (2), Article 28E paragraph (3), and Article 28F of the 1945 Constitution reads as follows:

- Article 27 paragraph (1) of the 1945 Constitution, *"All citizens shall have an equal position before the law and government and shall be obligated to uphold such law and government without any exception"*;

- Article 28E paragraph (2) of the 1945 Constitution, *"Every person shall have the right to the freedom to hold a belief, to express his/her thought and attitude in accordance with his /her conscience"*;

- Article 28E paragraph (3) of the 1945 Constitution, *"Every person shall have the right to the freedom of association and expression of opinion"*,

- Article 28F of the 1945 Constitution, *"Every person shall have the right to communicate and to obtain information to develop himself/herself and his/her social environment, and shall have the right to seek, obtain, possess, store, process, and convey information by using all available kinds of channels"*;

[3.11] Considering whereas, furthermore, in order to support their arguments, the Petitioners, beside presenting written evidence, have also presented witnesses and experts whose statements have been heard before the Court and/or presented their statements, which can completely be read in the facts of the case part of this decision. The intended witnesses and experts have principally clarified the following matters:

[3.11.1] Petitioner's Witness, Kho Seng-Seng

In the hearing on June 24, 2008, the witness explained that he once wrote to the readers' column in a national daily newspaper telling the fraud committed by the developer PT. Duta Pertiwi Tbk. The developer then denied it through the same media and pressed the witness but the witness stayed firm. Furthermore, the witness wrote another letter for readers' column and was published in two capital city daily newspapers telling about the threat of the developer (PT. Duta Pertiwi Tbk) which was intended for thousands of kiosk purchasers. This readers' letter was again denied by PT. Duta Pertiwi Tbk. Based on the two writings, the witness then was reported to the Headquarter of the Indonesian National Police with tree indictments: slander, defamation, and calumny, as regulated in Article 310, Article 311, and Article 335 of the Indonesian Criminal Code.

[3.11.2] Petitioner's Witness, Ahmad Taufik

In the hearing on July 23, 2008, the witness explained that he and his friend, Teuku Iskandar Ali, both of whom are the journalists of *Majalah Tempo (Tempo Magazine)*, had been indicted by the Central Jakarta District Attorney's office based on Article 311 paragraph (1) and Article 310 paragraph (1) of the Indonesian Criminal Code in relation to their journalistic writings published in *Majalah Tempo*, edition 3/9 March, 2003, entitled "*Ada Tomy Di Tenabang*?/Is there Tommy in Tenabang?". The witness is deemed to have committed an act of having spread false news or information, deliberately created disorder, and committed slander against the reputation of the businessman Tommy Winata. As the result of the indictment, the witness could not focus on his job, was refused

by important source persons, the witness' family was terrorized, and the witness felt that his freedom in covering news had been limited.

[3.11.3] Petitioner's Expert, Heru Hendratmoko

The expert Heru Hendratmoko, in his statement in the hearing on June 24, 2008 explained as follows:

- Whereas, according to the expert, since the 1998 reform, the freedom of the press in Indonesia has been declining in an average position of 100 among 150 surveyed countries. The threat to the freedom of press, among other things, has come from the Articles of the Indonesian Criminal Code regarding slander and defamation. Through the Articles of which, according to the expert, lead to very subjective interpretation, reporters always encounter the threat of police or prosecution investigation, and furthermore they are heard in the court as if they were criminals;
- Whereas, according to the expert, the Articles of the Indonesian Criminal Code are the rubber articles which injure the ideals toward the democratic and just nation-state, especially when the protection of the freedom of obtaining and conveying information has been guaranteed by the 1945 Constitution;
- Whereas, according to the expert, the Articles on insult and defamation may not be charged to the journalists who are conducting their journalistic duties. As long as the news report's domain is still in the scope of public interest, the journalists and the media publishing it must be protected.

[3.11.4] Petitioner's Expert, Atmakusumah Astraatmadja

The expert, Atmakusumah Astraatmadja, in the hearing on July 23, 2008, explained as follows:

- Whereas, according to the expert, in view of the development of democracy, it is not appropriate anymore, even improper, to impose a criminal sanction of imprisonment and high fine on the creators of works of creative ideas, such as journalistic work, opinions, or expression and freedom of the press which are the inseparable parts of freedom of expression and freedom of conveying opinion;
- Whereas, according to the expert, the imprisonment or high fine sentence against journalists because of their journalistic works, demonstrators, lecturers, or speakers in discussions, is not in accordance with the international standard of freedom of expression and freedom of conveying opinion. Therefore, a number of states have eliminated the criminal provisions on *defamation*, *insult*, *slander/libel*, and *false news*), for the following reasons: (i) it is hard to prove factually as it tends to be an opinion, not a factual statement; (ii) it is relative in nature and completely depending on the subjective feelings and opinion; (iii) therefore it is *multi-interpretable*; (iv) it does not result in *permanent damage*. In reference to journalistic work, "the temporary damage" as the result of news report can always be corrected through the efforts of correction in a short time such

as clarification, confirmation, rectification, right of correction, and right of reply;

- Whereas, according to the expert, there are states which set a condition that the annulment of the intended criminal provisions is effective for the press insofar the journalistic works are created *in good faith* and for the *public interest*. Some states amend the criminal provisions to civil provisions with a proportional fine in order: (i) not to make life difficult or to make companies bankrupt; (ii) not to discourage to keep conveying expression as well as opinion and attitude;
- Whereas, according to the expert, it is time to establish *Asian Court of Human Rights*, when the appeal procedure is not effective to guarantee the freedom of expression, including the freedom of the press and freedom of opinion. This is so in view of the frequent imposition of criminal sanction and civil sanction in form of high compensation sentenced against journalistic works;
- Whereas, according to the expert, historically, theoretically, or factually, the Articles containing the criminal sanctions for the acts deemed as insult to the Government are proven to be anti-democracy and are used by the Government of Indonesia for killing criticisms and for social control.

[3.11.5] Petitioner's Expert, Nono Anwar Makarim

The expert, Nono Anwar Makarim, in the hearing on July 23, 2008, explained as follows:

- Whereas, according to the expert, criminalization of insult or defamation began in 13th. century in England which was intended to keep public order, in which any person who felt insulted deemed himself obligated to challenge the insulter so that it resulted in disorder. Accordingly, in 1275, a provision which was called *scandalum magnatum* in the *Statute of Wesminster* was formulated with the intention of relieving good reputation peacefully;

- Whereas, according to the expert, the condition of this 21st century is no longer in accordance with the condition in the 13th. century, in which in relation with insult in general, people prefer to claim for a compensation. There is a systemic anomaly that if the condition and the character of the act which results in *privaatrechtelijk* must be found in the collection of laws and regulations applicable in *publiekrechtelijk* manner;

- Whereas, according to the expert, slander is a criminal act that can only be aimed at individual person. The criminal acts in Articles concerning slander in the Indonesian Criminal Code are included in the category of complaint offense and law of slander is basically individual law. Meanwhile, Article 207 and Article 208 of the Indonesian Criminal Code shall impose imprisonment for any person who insults an authority or a public body set up in Indonesia;

- Whereas, according to the expert, Article 207 and Article 208 of the Indonesian Criminal Code deliberately set aside the purpose and the objective of legislators to limit the victims of insult just on individual basis. Article 207 and Article 208 of the Indonesian Criminal Code were deliberately created to eliminate the opportunity of the accused to prove the truth of the accusation contained in his/her insult;

- Whereas, according to the expert, Article 207 and Article 208 of the Indonesian Criminal Code are the exceptions of the colonialist to the concordance principle which was effective for Netherlands and its colonies;

- Whereas, according to the expert, Article 207 and Article 208 of the Indonesian Criminal Code violate the sovereignty of the people principle, namely that the official and government status is fully obtained from the sovereign right of people, and therefore they must be open for and subject to the people's criticisms.

[3.11.6] Petitioner's expert, Yenti Garnasih

The expert Yenti Garnasih, in the hearing on July 23, 2008, explained as follows:

- Whereas, according to the expert, in accordance with the argument of *ultimum remedium*, accordingly criminal law is the final instrument to determine what kind of acts that must be criminalized. To determine what kind of acts to be criminalized, there are conditions namely that, among

other things, the act is disgraceful, harmful and obtains the recognition publicly, as well as there is an agreement to criminalize it. It also must be taken into account that it should not go too far as to result in *overcriminalization*;

- Whereas according to the expert, quoting Hoenagels's opinion, it is necessary to consider various factors in conducting the criminalization to keep the *ultimum remedium* argument and to prevent *overcriminalization*, namely: (a) do not use the criminal law emotionally; (b) do not use the criminal law to penalize the act with obscure victim or loss; (c) do not use the criminal law if the loss resulting from the punishment will be greater than the loss by the criminal act that will be formulated; (d) do not use the criminal law if it is not strongly supported by the community; (e) do not use the criminal law if it is predicted not to be effective in its application; (f) the criminal law in certain matters shall consider specifically the priority scale of regulating interest; and (g) the criminal law as repressive medium shall be used simultaneously with the preventive medium.

- Whereas in connection with the offense of violation against the dignity or insult, according to the expert, its regulation in the future must be carried out by a comparative study involving, among others, experts of the sociology of law and criminology. Therefore, if it is included as a light crime the benefit and the loss must be taken into account to penalize someone, while if the penalty is heavier, accordingly the threatened public

interest namely the plugged channel of freedom of opinion must be considered.

[3.11.7] Petitioner's Expert, Toby Mendel

The expert Toby Mendel, in the hearing on July 23, 2008, explained as follows:

- Whereas, according to the expert, the resolution of UNO in the General Session in 1946 has discussed the importance of freedom of opinion as the aspect of democracy and it has been strengthened by the International Court and all of the regional human rights courts all over the world. The reasons are: (a) freedom of conveying opinion is the basis of democracy; (b) freedom of conveying opinion can be used as the means of eradicating corruption; (c) freedom of conveying opinion can enhance accountability; (d) freedom of conveying opinion is the best way to get the truth.

- Whereas, however, according to the expert, freedom of conveying opinion is not absolute in nature but it can be limited for the reason of guaranteeing other people's right, to guarantee the national security, and to guarantee the public order. For the limitation to be legitimate, accordingly (a) the limitation shall be regulated in law, (b) the limitation must have a legitimate objective. Still in relation to the limitation, the expert is also of the opinion that, *firstly*, the limitation of the freedom of conveying opinion must be arranged carefully to focus ourselves on the

protection for reaching the legitimate objective; *secondly*, the limitation must not be too extensive; *thirdly*, the limitation must be balanced or proportional;

- Whereas the imposition of criminal sanction to defamation, according to the expert, is no longer relevant at present for the reason that at the beginning (13th. and 14th. centuries) the defamation was slanderous in nature, while at present there is no more statement which is slanderous in nature because every state through various kinds of laws have effectively protected the public order. Nowadays, many states rely on civil sanction for defamation;

- Whereas the expert does not see the relation between defamation and public order. Even though the defamation as a matter of fact results in problems in the community, however, according to the expert it needs not be extremely handled by imprisonment but it shall be enough by civil law;

- Whereas the expert admits that every state has a different culture so that in evaluating the reputation there will be different opinions too. Sometimes, in a state, a statement is deemed able to destroy the reputation but it is not in other states. The expert, however, is of the opinion that such a different culture is not important or less important to be disputed in relation to the application of criminal sanction for defamation.

[3.11.8] Petitioner's Expert, Ifdhal Kasim

Through his written statement, the expert, Ahli Ifdhal Kasim explains as follows:

- Whereas, according to the expert, the freedom of expression is guaranteed by the 1945 Constitution, namely Article 28E paragraph (2), and has obtained universal recognition, as specified in Article 19 of the *Universal Declaration of Human Rights (UDHR)* and Article 19 paragraph (2) of the *International Covenant on Civil and Political Rights (ICCPR)*;

- Whereas, according to the expert, beside guaranteeing the freedom of expression, the law of human rights also guarantees the right to honor or reputation, categorized into privacy rights, which must be also given the equal protection as the other privacy rights;

- Whereas, according to the expert, one of the forms of state protection of honor or reputation is by including it in the national criminal code, namely by conducting criminalization of every attack or act which takes by force or destroy individual integrity (*crimes against integrity of person*), such as defamation, slander, up to libel. Most of democratic states have conducted criminalization of such acts, with the objective of giving protection to the integrity of person;

- Whereas, according to the expert, the Indonesian national law, through Article 28G paragraph (1) of the 1945 Constitution also gives the protection to the right to honor and reputation. So is the Law Number 39 Year 1999 regarding Fundamental Human Rights, Article 29 paragraph

(1). Furthermore, criminalization against the rights has been contained in the national criminal code, among others in Article 310, Article 311, Article 326, and Article 207 of the Indonesian Criminal Code. However, the protection of the right to honor and reputation must also pay attention to the relation to other rights, freedom of speech, freedom of expression, and freedom of the press which must be also protected by the state. It should not go so far as the criminalization of the act attacking the honor and the reputation to become a powerful weapon in facing the freedom of speech or the freedom of the press. At present, however, according to the expert, more states have left the criminal act of attacking reputation and honor, which means that the states have abolished defamation, slander, insult, false news as criminal acts in their criminal codes;

- Whereas, according to the expert, because there is a relation between the freedom of expression and the right to honor or reputation which must be equally guaranteed by the state, accordingly, the state may conduct reduction or limitation of the two rights, however the reduction or the limitation must be based on the following: (i) it is prescribed by law; (ii) public order; (iii) moral and public health; (iv) national security; (v) public safety; (vi) rights and freedoms of others; (vii) rights and reputation of others; and (viii) necessary in a democratic society. Such limitation principle is also adhered to by the 1945 Constitution, Article 28J;

- Whereas, according to the expert, the offense of defamation or slander in the Indonesian Criminal Code has too extensive formula and is not proportional between the loss resulted in and the sentence imposed against the violator. Therefore, it is time for Indonesia to review the elimination of imprisonment sanction for slander or defamation.

[3.12] Considering whereas the Court has also heard the statements of Independent Journalist Alliance (AJI), Indonesian Journalist Association (PWI), and Board of the Press as the Related Parties , which principally have explained the following matters:

[3.12.1] Statement of AJI as the Related Party

The Independent Journalist Alliance (AJI) as Related Party explains as follows:

- Whereas, according to AJI, the freedom of expression and the freedom of opinion, both oral and written, basically are the rights of every citizen protected by the constitution as contained in Article 28E paragraph (2), Article 28E paragraph (3) and Article 28F, Article 28**I** the Second Amendment to the 1945 Constitution; Article 19, Article 20 and Article 21 of the Resolution of People's Consultative Assembly of the Republic of Indonesia Number XVII/MPR/1998 regarding Human Rights; Article 14, Article 23 paragraph (2) and Article 5 of the Human Rights Law; Article 1 *juncto* Article 4 paragraph (1) of the Press Law; and Article 19 paragraph (1) and paragraph (2) of the International Covenant on Civil and Political

Rights ratified by Law Number 12 Year 2005; Article 14, Article 23 paragraph (2) and Article 25 of Law Number 39 Year 1999 regarding Fundamental Human Rights;

- Whereas, according to AJI, in the last few years, there has been a tendency of press silencing and press institution bankrupting by public officials and entrepreneurs who feel harmed by the news report through lawsuit to the court using Article 310 paragraph (1), Article 310 paragraph (2) Article 311 paragraph (1), Article 316, and Article 207 of the Indonesian Criminal Code;

- Whereas, according to AJI, the imposition of sanction to the claim of defamation experienced by journalists and press, basically is a violation of freedom of expression, freedom of opinion, both oral and written which are the rights of every citizen protected by the constitution. Similarly, the imposition of sanction on the defamation claim to the other people is also a constitutional violation. Because the freedom of expression and conveying pinion is one of the social control forms possessed by the citizens and as the manifestation of democracy. Accordingly the imposition of imprisonment penalty as referred to in Article 310 paragraph (1), Article 310 paragraph (2), Article 311 paragraph (1) of the Indonesian Criminal Code has limited the constitutional right or authority and it is contradictory to the constitution and the principle of constitutional state which upholds the human rights in accordance with the mandate of the 1945 Constitution;

- Whereas, according to AJI, the existence of criminal sanction in Article 310 paragraph (1), Article 310 paragraph (2), Article 311 paragraph (1) of the Indonesian Criminal Code as well as the granting of the privileges to the authority or public body in Indonesia, as contained in 316 and Article 207 of the Indonesian Criminal Code, is a form of violation of the freedom of expression which is the constitutional right of every citizen protected by the constitution.

[3.12.2] statement of PWI as the Related Party

The Indonesian Journalist Association (PWI) as the Related Party basically explains as follows:

- Whereas the existence of reporter or national press reported or claimed or involved in a legal case is not separate from the Board of Press' function which has not be maximal. Nevertheless, if the Board of Press carries out its function maximally, as specified in Article 15 paragraph (2) of Law Number 40 Year 1999 regarding the Press, PWI is convinced that the journalists and the national press need not be afraid of any threat of penalty;
- Whereas, according to the evaluation of PWI, so far the Board of Press seems to merely defend the journalists or the national press with all its effort without carrying out any study to develop the life of press. In this case, the Board of Press should be neutral, and not to be on the side of

either the journalist or the national press and also not to be on the side of the government;

- Whereas, based on the observation of PWI so far, the increasing violation of the press at present is not separate from the contribution of the Board of Press which is not effective in achieving the goal. The heavenly hope of the Board of Press has made journalists and the press engrossed and feel themselves to be a group that must be given privilege;
- Whereas, according to PWI, regarding the petition for judicial review of Article 310 paragraph (1), Article 310 paragraph (2), Article 311 paragraph (1), Article 316, and Article 207 paragraph (1) of the Indonesian Criminal Code against the1945 Constitution filed by the Petitioner is greatly exaggerated. On the contrary, according to PWI, the aforementioned Articles even guarantee the application of Article 28E paragraph (2), paragraph (3) and Article 28F of the Constitution;
- Whereas, the Petitioner as a journalist questions those Articles of the Indonesian Criminal Code, according to PWI, is not correct because the disputed Articles are not merely aimed at journalists or the press but the articles are effective for all. Actually, the Petitioner in fighting for the legal protection for his profession must understand the governing law and propose the completion of the Press Law through the appropriate forum and not to be monopolized by certain press organizations or groups;
- Whereas, concerning the Articles in the present Indonesian Criminal Code which are no longer in accordance with the condition, there would be

already good will from the Government and the People's Legislative Assembly to review them. Here is the struggle of the members of the press or press organization and they would be the persons who have a proper understanding of law. In reference to the sentence accepted by the Petitioner or the journalists using the articles of the Indonesian Criminal Code and not the Press Law, according to PWI is a different problem. Actually the press organization should struggle for their rights jointly and not to go on severally as if they wanted to be the heroes to struggle for their rights. The Press organization must sit close together discussing the problem of legal protection for journalists and national press;

[3.12.3] Statement of the Board of Press as the Related Party

The Board of Press, in its statement in the hearing on July 23, 2008 and in its written statement, as completely set out in the facts of the case part of this decision, explains as follows:

- Whereas the right to convey opinions and the right to honor are two constitutional rights of the Indonesian citizens guaranteed by the 1945 Constitution. How about if the two rights are in conflict, the Board of Press does not give any response but just refers to Article 28J paragraph (2) of the1945 Constitution, and so furthermore states that law which regulates the limitation of human rights cannot be formulated arbitrarily, but it must reflect the prevailing norms in a democratic community;

- Whereas the imprisonment sanction, as intended in Article 310 paragraph (1), Article 310 paragraph (2), Article 311 paragraph (1) of the Indonesian Criminal Code has caused excessive fear and as the impact as the people shall not obtain the information from various ideas and points because many people are frightened and do not want to take any risk to be imprisoned as the result of conveying his/her opinion and view;

[3.12.4] The Statement of IJTI as the Related Party

The Indonesian Television Journalists Association (IJTI), in the hearing on July 23, 2008, gave the statement which is basically as follows:

- Whereas IJTI admits if Article 310 and Article 311 of the Indonesian Criminal Code are not only for the press. However, the most possible party to be imposed by the provisions of the articles are journalists and the provisions of the articles make journalists to be frightened in carrying out their profession to collect information and disseminate it to the public;

- Whereas in carrying out the profession as journalists, if there is an error or because being critical of inconvenient matters is deemed to be slanderous, accordingly there is no more democracy. If such condition is allowed to continue, the public right to convey opinion will be revoked.

- Whereas the imprisonment penalty for journalists is not just to kill the journalists but also harm the public interest which finally injure democracy.

[3.13] Considering whereas the Court has also requested the statement of the Indonesian Criminal Code Formulating Team, in the hearing on June 24, 2008, as completely described in the facts of the case part of this decision, which basically explains the following matters:

- Whereas the Articles containing the criminal act of slander are aimed at protecting the honor and reputation of a person and encouraging every person to respect or to treat other people with respect in accordance with human value and dignity. The reason is that the honor and the reputation of a person are also guaranteed by Article 28G of the 1945 Constitution. Accordingly, at the present context, the formulation of criminal act of slander in the Indonesian Criminal Code is the form of criminal code protection of the constitutional rights of every person as the part of human rights guaranteed by the constitution;

- Whereas it must be distinguished between conveying criticism to a person and slander. Slandering is a criminal act because it is an intent to attack the honor or reputation of a person which is begun with a criminal intent in order to attack the reputation and honor of the person. If a criticism is begun with, or followed by an act of slander, accordingly the penalized act is not the criticism but the act of slander;

- Whereas the relation between the norm formulating the prohibited act and criminal sanction cannot be separated. Therefore, the discussion concerning the criminal sanction only without relating it to the prohibiting

norms is not correct. The prohibiting norms are related to the criminalization policy which is later followed by penalization with the lightest criminal sanction up to the heaviest sanction. While the penalization policy is related to the imposition the penalty, especially imprisonment against certain acts which are deemed to be torts that have been included in other branches of law to be against the law in criminal code, then it is imposed with the criminal sanction. Therefore, a review against the criminal sanction only without reviewing the prohibiting norm is not correct according to the perspective of the criminal code. The reason is that the existence of criminal sanction is related to and cannot be separated from the substance of the prohibiting norm, while the criminal sanction in the Article related to the evaluating criteria toward the formulated criminal act in that article. If the criminal sanction is abolished while the criminal code norm or the prohibition from committing the act in that Article is still effective, accordingly the person who commits the criminal act is not imposed with any criminal sanction or any other sanction;

o Whereas in relation to the press, as regulated in Law Number 40 Year 1999 concerning Press, the following can be explained:

I. The Press Law regulates Press, its position is as administration law which administrates the press;

II. The criminal acts contained in the Press Law include administrative criminal act in the field of press (Article 18 of Law Number 40 Year 1999);

III. The Press Law does not include in the specific criminal code which may contain criminal provisions deviating from the general norm of material and formal criminal code (*lex specialis*) or to be more prioritized from the general norm of material criminal code and/or formal criminal code. Therefore, the principle of “specific criminal code derogates the general criminal code” is not effective for the Press Law;

o Whereas the norm formulation in Article 310, Article 311, Article 316, and Article 207 of the Indonesian Criminal Code, either concerning the norm or the criminal sanction is not specifically intended to the press or to the persons who perform the press profession or journalists, except if they fulfill the requirements:

a. violating the ethical code and/or the professional standards which change to be against the criminal code, against the administrative criminal code, or against the general criminal code;

b. violating the administrative law regulating press which can direct the criminal law, against the administrative criminal law or general criminal law;

c. violating the general criminal law by means of abusing the profession in the field of press;

- Whereas if the petition is granted, it may lead to the lost or non-guaranteed of general protection (general prevention) for each person, as set forth in Article 28D paragraph (1) of the 1945 Constitution. Since, in the future, if someone deliberately committed a criminal act of libel, humiliation, slander and defamation, such person shall not be subject to criminal sanction or such act shall be permitted or shall not be prohibited;

[3.14] Considering whereas the Government has provided written statement the substance of which is principally similar to the statement provided by the Drafting Team of the Indonesian Criminal Code Bill as described in paragraph **[3.13]** above;

[3.15] Considering whereas the Court has also heard the statement of experts presented by the Government as follows:

[3.15.1] Expert of the Government, Dr. Mudzakkir, S.H., M.H.

The expert presented by the Government, Dr. Mudzakkir, S.H., M.H., whose complete statement is included in the Principal Issue of this decision, in the hearing dated July 23, 2008, stated principally as follows:

- Whereas the criminal law norms as a part of the Indonesian national legal system is hierarchical, integrated, comprehensive and has value relationship, so that it forms an inseparable norm or value system. At the top of the pyramid of such norm system, there is the 1945 Constitution as the substantive source for the legislation of laws and regulations, as well

as the basic norms unifying the norms of the Indonesian national law, including criminal law norms. Therefore, it is not allowed to conduct judicial review of law of the state of the Republic of Indonesia based on the constitution of other countries, because each country has unique characteristic of its national law matched with the characteristic of its legal community;

- Whereas criminal law divides legal norm into two categories, namely the norms that formulates the prohibited acts, commonly known as the criminal act norms and criminal sanction norms. The judicial review of law in the field of the criminal law should only concern with its norms and the substance being reviewed must be the provisions of law including the criminal law norms, namely criminal act norms or criminal sanction norms or both;
- Whereas the general definition of defamation is an offensive against a person's honor or reputation, meanwhile the special characteristic of defamation or its forms are as follows: defamation [Article 310 Paragraph (1) of the Indonesian Criminal Code], libel [Article 310 Paragraph (2) of the Indonesian Criminal Code], slander [Article 311 of the Indonesian Criminal Code], minor defamation [Article 315 of the Indonesian Criminal Code], calumnious charge [Article 317 of the Indonesian Criminal Code], false charge [Article 318 of the Indonesian Criminal Code], and defamation of a deceased person [Article 320-321 of the Indonesian Criminal Code]. Hence, the value to be protected or enforced by the Articles on defamation

as set forth in Book II Chapter XVI of the Indonesian Criminal Code is a person's honor and reputation in the public;

- Whereas honor and reputation are part of human rights protected by Article 28G of the 1945 Constitution. Although the definition of honor and reputation may differ, both of them are inseparable, therefore harming one of them is sufficient to charge any person for committing criminal act of defamation;
- Whereas, the act of attacking the honor or reputation of public officials shall not be based on the personal feelings of the related officials, but rather according to the public standards (objective) as to whether such act includes an act attacking the honor or reputation. In this respect, polices, public prosecutors or judges must have sensitivity in maintaining ethics (moral) in the life as a state and nation through the interpretation of Articles related to the complaint offence. Exercising controlling on the state administrators is a part of democracy guaranteed by law, however the right to conduct such control must be exercised in reasonable, proportional manner and with due observance of the legal norms, ethics, and other norms. On the other hand, for public officials, criticism is usually directed to his/her act as public officials rather than as individuals. Therefore, although criticism harms him/her as an individual, it is not necessarily for his/her to file a complaint to the police as individual on behalf of his/her capacity as a public official;

- Whereas the criminal law provides protection for the honor and reputation of any person, no matter of his/her status, and the honor of public office or the state administrator by way of prohibiting defamation, with all forms thereof, which attack his/her honor and reputation. Therefore, according to expert, the criminal law norms including the criminal act of defamation regulated in Book II, Chapter XVI of the Indonesian Criminal Code, are in line with and constitute further implementation of the human rights norms included in the 1945 Constitution, particularly Article 28G and Law Number 39 Year 1999 regarding the Human Rights, so that the elimination of criminal law norms regarding defamation in the Indonesian Criminal Code is not in accordance with and contradictory to the legal values and norms to be enforced by the Constitution;
- Whereas the criminal law is not be intended for a particular person or people practicing certain profession. If it is intended for certain legal subject, the criminal law norms should specifically mention it, because substantively, such criminal act may only be committed by certain people or related to a particular profession. Such provisions are excluded from the general formulation of criminal law. The criminal law norms regulating defamation offence set forth in Articles 310, 311, 316 and 207 of the Indonesian Criminal Code are not intended specifically for the people having profession in the field of the press or journalists, so that they can be applied to anyone, including journalists, insofar as they are proven illegal and have met the elements criminal act;

- Whereas the function of criminal law and criminal sanctions in relation to the other legal norms are to encourage or force the compliance with such other legal norms. Therefore, the criminal law norms should be understood in relation to other norms in the national legal system. The criminal law norm as a legal norm will be meaningless if it is not related to the other norms;
- Whereas the judicial review of the substance of prohibited acts or criminal acts included in the Indonesian Criminal Code must be interpreted as an integral understanding regarding the bases for the prohibition of an act. Moreover, as a part of the national legal system, in addition to be associated with the criminal law system, it must also be related to the national law system as a whole. Therefore, a comprehension of an article in the criminal law must be interpreted based on the values, principles, and legal interests to be protected through the aforementioned article:
    1. It must correspond to the legal interest to be protected in the paragraph, part, and chapter of the Indonesian Criminal Code; and
    2. There is legal interest and legal value to be protected and enforced through other fields or branches of non-criminal law in the Indonesian national law system.

[3.15.2] Expert of the Government, Djafar Husin Assegaff

Expert Djafar Husin Assegaff, in the hearing dated July 23, stated as follows:

- Whereas according to the expert, Article 310 paragraphs (1) and (2), Article 311 paragraph (1), Article 316, and Article 207 of the Indonesian Criminal Code need to be maintained because they protect the honor and reputation of each community member from the mass media exposure, which upholds the facts and truth in its journalistic work process as well as safeguards the honor and reputation of each community member. The aforementioned articles must be respected by every journalist. They must understand the legal system applicable at the place where they work as well as the social norms in their environment;

- Whereas according to the expert, a journalist must be careful in reporting his/her news if it is concerned with a person's reputation. Libel is an unethical act and deviates from the high values of journalistic. Journalistic work process includes disclosing "truth" based on tested "fact". Reporter's job is to find news, write them, and submit them to the editor who then will check them and decide whether or not the news should be published, if so he/she must edit such news in order to prevent: (i) any erroneous or unreasonable fact, (ii) any mistake in the use of language, (iii) what is commonly known as libelous sentences or paragraph. If the news create problem, he/she will be invited to attend a meeting with the Chief Editor and Managing Editor. All of the foregoing measures are taken so that in publishing news, the media will not harm or humiliate, or mock someone's reputation or harm someone's reputation leading to the destruction of his/her business or profession;

- Whereas according to the expert, media is a power, even the fourth or fifth power (for broadcasting media) so that it may be misused. Therefore, media ombudsman is established in order to prevent any deviation by the media and punish any mistake or ethical violation committed. Those are undertaken to uphold law and rules which are aimed at safeguarding the people's pride and dignity. At the end of his statement, the expert also cited A.P. Manual for Libel in America which states, "the publication of libel may result in what is considered a breach of peace. For that reason, it may constitute a criminal offences".

[3.16] Considering whereas the Court has received *ad informandum* statement presented by Indonesian Legal Aid Association (PBHI) and *Gerak Indonesia* which principally supports the *a quo* petition. In addition, the Court also received statement from the parties which is received late by the Registry Office of the Court so that the Court does not need to consider it;

[3.17] Considering whereas the Court has read conclusion of the Petitioners received by the Registry Office of the Court on August 7, 2008 which principally states that the Petitioners are consistent with their petition;

Opinion of the Court

[3.18] Considering whereas upon hearing statements from the parties as described in Paragraphs **[3.11]** up to **[3.15]** above, the Court furthermore states its opinion with respect to the Petitioners' petition. However, since the legal

norms being petitioned for judicial review in the *a quo* petition are the legal norms of criminal law, *in casu* the Indonesian Criminal Code, particularly the provisions setting forth or in relation to someone's reputation and honor, therefore before specifically stating its opinion with respect to the Petitioners' arguments, the Court deems it necessary to prior state its opinion regarding the legal interests both those that are generally protected by the criminal law and those particularly related to someone's dignity and honor.

[3.19] Considering, according to the generally accepted legal doctrine of the criminal law, the general nature of the criminal act or offence (delict) is an act violating norms in such a way that it impairs the legal interests of other person or endangers other person's interests. Meanwhile, there are three legal interests protected by criminal law, namely individual interest, community interest and state interest. Individual or personal legal interest protected or guaranteed by every criminal law, including those regulated in the Indonesian Criminal Code may be in the form of life *(leven),* body *(lijt),* independence *(vrijheid),* and property *(vermogen)*. In its further development, in addition to those four matters, honor *(eer)* also becomes the legal interest protected by criminal law because each person has a sense of honor *(eergevoel)* so that with respect to such honor, every person is guaranteed so that his/her honor will not be impaired or violated. It is this right to the protection of honor which becomes the object of the criminal act of defamation *(de mens heeft het recht dat zijn eer niet zal worden gekrenkt);*

[3.20] Considering whereas in line with the description in paragraph **[3.19]** above, Article 28G of the 1945 Constitution also expressly recognizes honor as well as dignity as the constitutional right and therefore, they must be protected by the constitution.

Article 28G paragraph (1) of the 1945 Constitution reads, "Every person shall have the right to protect him/herself, his/her family, honor, dignity and property under his/her control, and shall have the right to feel secure and be protected from the threat of fear to do, or not to do something which constitutes human right". Meanwhile, paragraph (2) reads, "Every person shall have the right to be free from torture or treatments degrading human dignity and shall have the right to obtain political asylum from another country,";

[3.21] Considering whereas general thought in the criminal law or constitutional provisions regulating the guarantee and protection for individual's honor constitutes a universally applicable legal norm has been proved by Article 12 of the Universal Declaration of Human Rights (UDHR) and Article 17 of the International Covenant on Civil and Political Rights (ICCPR), which read as follows:

Article 12 of the UDHR

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

Article 17 of the ICCPR

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, or correspondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks.

[3.22] Considering whereas therefore both the national and international laws guarantee every person's rights to the honor and reputation. Therefore, every person's freedom or rights cannot be used in such a way without limit so as to attack a person's honor or reputation since such practice is contradictory not only to the 1945 Constitution but also to the international law;

[3.23] Considering after taking into account matters related to the legal interest protected by criminal law and right to the honor and dignity as the constitutional right, the Court also deems it necessary to recall the following important matters:

[3.23.1] Whereas reviewing the constitutionality of legal norms (constitutional review) must be differentiate from the problems arising as a consequence of the application of a legal norms which in some countries (such as Germany or South Korea) are to be included in the scope of the lawsuit issue or constitutional complaint the authority to hear of which is also granted to the to the constitutional court. In the first case (constitutional review), the issue

questioned is whether or not a norm of a law is contradictory to the constitution, while in the second case (constitutional complaint) the issue questioned is whether or not an act of public officials (or the absence of public officials) has violated someone's basic right which, among other things, may occur because the public officials concerned mistakenly interpret the norm of law in the implementation thereof. However, Article 24C paragraph (1) of the 1945 Constitution explicitly declares that the Court shall only have the authority to examine, hear, and decide upon the former (constitutional review), while the 1945 Constitution does not regulate the latter (constitutional complaint) up to now;

[3.23.2] Whereas after carefully reading the Petitioners' petition and Petitioners' statement in the hearing court, in fact the matter being questioned by the Petitioners is more of constitutional complaint rather than judicial review or constitutional review. However, since the aforementioned matter is filed as a petition for judicial review of law against the 1945 Constitution with the arguments that the provisions of the Indonesian Criminal Code being petitioned for judicial review are contradictory to the Articles of the 1945 Constitution, therefore the Court must examine, hear, and decide upon it;

[3.24] Considering whereas Petitioner I argues that Article 310 paragraphs (1) and (2), and Article 311 paragraph (1) of the Indonesian Criminal Code are contradictory to Article 28E paragraph (2), Article 28E paragraph (3), and Article 28F of the 1945 Constitution, since according to the Petitioner, the

provisions of criminal sanction of imprisonment on criminal acts of defamation, libel, and slander are contradictory to the 1945 Constitution, namely:

a. defamatory act, namely intentional act to harm someone's honor or reputation, by charging him/her with a certain fact, with an aim of making the fact known by public [Article 310 Paragraph (1) of the Indonesian Criminal Code];
b. act of libel, namely defamation committed by means of writings or pictures broadcasted, displayed or put up in the public [Article 310 Paragraph (2) of the Indonesian Criminal Code];
c. act of slander, namely the act as regulated in Article 310 paragraphs (1) and (2) of the aforementioned Indonesian Criminal Code the truth of which cannot be proven by the perpetrator [Article 311 paragraph (1) of the Indonesian Criminal Code].

According to the Petitioner I, the criminal sanction of imprisonment against the aforementioned provisions on criminal acts is contradictory to the freedom to express an opinion and attitude in accordance with the conscience [Article 28E paragraph (2) of the 1945]; freedom to express opinion [Article 28E Paragraph (3) of the 1945 Constitution; and freedom to communicate [Article 28F of the 1945 Constitution]. The principal issues of the arguments filed by Petitioner I are as follows:

- Whereas freedom to express thought and opinion, freedom of expression, and freedom of the press are guaranteed by Article 28E paragraphs (2)

and (3) as well as Article 28F of the 1945 Constitution; by Articles 14, 19, 20, and 21 of the Stipulation of the People's Consultative Assembly Number XVII/MPR/1998; by Article 14, Article 23 paragraph (2), and Article 25 of the Human Rights Law; by Article 19 paragraphs (1) and (2) of the ICCPR;

- Whereas defamation offence is frequently charged to the Indonesian citizen using his/her constitutional right to express his/her thought and opinion either verbally or in writing as well as those conducting activities with regard to dissemination of information;

- Whereas the formulation of the offence as stipulated in Article 310 paragraph (1) of the Indonesian Criminal Code is easily used by the parties who do not like the freedom to express thought and opinion stated, freedom of expression and freedom of the press;

- Whereas the formulation of offence in Article 311 paragraph (1) and Article 310 of the Indonesian Criminal Code is not an explicit formulation which adopts the principle of *lex certa* so that it may cause legal uncertainty and vulnerable to unilateral interpretation as to whether an expression of opinion or a thought is a criticism or defamation and/or slander, therefore, a sanction in the form of imprisonment is excessive and may disrupt the constitutional right as guaranteed by Article 28E paragraphs (2) and (3) of the 1945 Constitution;

- Whereas the use of the sentences or words in expressing thought and/or opinion both verbally and in writing will always develop. Therefore, sentences or words which are deemed contemptuous in the past may no longer contemptuous presently, similarly to the sentences which are considered contemptuous currently is probably no longer considered contemptuous in the future;

- Whereas the imposition of criminal imprisonment as referred to Article 310 paragraph (1), Article 310 paragraph (2), and Article 311 paragraph (1) of the Indonesian Criminal Code have lost its relevance and *raison d'etre* in a democratic state based on constitution if it is related to Article V Law Number 1 Year 1946 regarding the Regulations of Criminal Law;

- Whereas no one or no group of people, including the ruling Government may interpret the human rights guaranteed by the 1945 Constitution in such a way in the form of any business or act whatsoever intended to eliminate the rights or freedoms that have been guaranteed by the 1945 Constitution. Therefore, imprisonment sanction as referred to in Article 310 paragraph (1), Article 310 paragraph (2), and Article 311 paragraph (1) has become the source which is able to limit the constitutional right and/or authority and is contradictory to the constitution so that it must be eliminated.

With respect to the arguments of Petitioner I, the Court is of the opinion that if those intended by Petitioner I in his arguments is the existence of Petitioner I's

opinion that the Articles of the Indonesian Criminal code being petitioned for judicial review negate or eliminate the right to freedom of expression of thought and attitude in accordance with conscience, right to express opinion, and the right to communicate freely, therefore according to the Court, such opinion is incorrect. The Constitution guarantees those rights and therefore the state is obligated to protect them. However, at the same time the state must also protect other constitutional right existing at the same level with the previous right, namely the right of every person to their honor and dignity, as regulated in Article 28G of the 1945 Constitution, which reads,

(1) Every person shall have the right to protect him/herself, his/her family, honor, dignity and property under his/her control, and shall have the right to feel secure and be protected from the threat of fear to do, or not to do something which constitutes human right;

(2) Every person shall have the right to be free from torture or treatments degrading human dignity and shall have the right to obtain political asylum from another country.

Due to the obligation to protect the other constitutional right, *in casu* the right to the honor and dignity, then the state is allowed to make restrictions on the right to the freedom of expression of thought and attitude states in accordance with conscience, the right to express opinion and freely communicate, as explicitly stated 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 laws and regulations with the sole purpose to guarantee the recognition of and the respect for other persons' rights and freedom and fulfill fair demand in accordance with the considerations of morality, religious values, security, and public order in a democratic society". In fact, without the provisions of Article 28J paragraph (2) of the 1945 Constitution, every person having the right to such freedom should be aware that each obligation shall always be inherent in the right, at least obligation not to abuse such right. Accordingly, Article 28J paragraph (1) of the 1945 Constitution affirms, "Every person shall be obligated to respect the human rights of another person in the orderly life of community, nation and state".

Moreover, for the right having substance of freedom, the awareness of inherent restrictions in the right concerned is a must.

We cannot expect to achieve order in the social life or mutual life known as society if each person uses his/her freedom arbitrarily. In the foregoing context, restriction of freedom by laws is a must. It is also agreed by experts presented by the Petitioner, namely Toby Mendel and Ifdhal Kasim. According to the expert Toby Mendel, freedom to express opinion is not absolute but it is rather limited in order to guarantee the right of other persons, to guarantee national security, and public order. Meanwhile, the expert Ifdhal Kasim, in his written statement states that there are eight justifiable reasons to make such limitation, namely: (i) prescribed by law; (ii) public order, (iii) moral and public health; (iv) national security; (v) public safety; (vi) rights and freedoms of others; (vii) rights and reputation of others, and (viii) necessary in a democratic society.

Article 310 Paragraphs (1) and (2), as well as Article 311 Paragraph (1) of the Indonesian Criminal Code are the manifestation of such restriction, as well as the realization of the state's obligation to protect and guarantee the respect to every constitutional right as affirmed in the 1945 Constitution. Therefore, the Articles of the Indonesian Criminal Code concerned are not contradictory to the 1945 Constitution.

With respect to the arguments presented by Petitioner I that defamation offence frequently charged to Indonesian citizens using their constitutional right to express his/her thoughts and opinions, as well as those conducting activities to disseminate information, in addition to the fact that such provision is easily misused by those who do not like freedom of and opinion, freedom of expression, and freedom of the press, such aforementioned arguments are arguments questioning the implementation of norms rather than the constitutionality of norms.

It is not right to address the weaknesses or flaws in the implementation of norms by revoking such norms, otherwise every time we are not satisfied with the application of legal norms, *in casu* the norms of the criminal law, such dissatisfaction will be addressed by revoking them, accordingly there are no reasons and place for the criminal law norms to exist in the community. Moreover, most of the cases presented as examples by the Petitioners and parties in the court hearing are related to the deviations in the law enforcement practices.

Furthermore, if Petitioner I disputes the fact that sanction for violation of such restriction in some countries is no longer in the form of imprisonment, this not necessarily makes criminal sanction of imprisonment set forth in Article 310 Paragraphs (1) and (2), and Article 311 Paragraph (1) of the Indonesian Criminal Code unconstitutional or contradictory to the 1945 Constitution. This is because the aforementioned matters are within the cultural aspects related to the values adopted by the community with regard to things considered as good, equitable, just, proper, and so on that oftentimes vary between one country and another. Despite current developments in technology and communication in the global era, mutual influence between one country and another with respect to ideas, principles and traditions is unavoidable, however such mutual influence shall not eliminate the difference of context due to local situation and condition *(situationgebundenheit).*

Similarly, the issue as to whether or not a criminal sanction charged to an act is proportional also depends on the values adopted by the community. The values will continue to change and evolve depending on the references used by a community with respect to something that is considered ideal. Something that is considered ideal will be reflected in the legal politics which is then manifested in the laws and regulations. The Court may not assess and review the constitutionality of political ideas which have not yet become legal products and then declare them contradictory to the constitution. The Court only has authority to conduct judicial review of legal norms as the manifestation of such political ideas, namely in the form of laws. However, in conducting judicial review of the

constitutionality of a legal norm, the Court shall not only depend on the developments or trends occurring in other countries, although it does not mean that the Court shall disregard the dynamics of such developments or tendency.

In addition to the above, the provisions on the criminal acts of defamation or libel in the Indonesian Criminal Code being petitioned for judicial review have been sufficiently proportional because they are formulated as complaint-based offences *(klacht delict)*. Referring to the mindset of Petitioner I, namely that the words used to express thoughts or opinions are always growing, the truth of this argument will be reviewed based on two aspects. First, whether at a certain stage of development, a word or sentence - both verbally spoken and stated in writing - is still considered to be contemptuous, namely whether it is still complained *(klacht)* by someone who considers him/herself as a victim since he/she feels offended or his/her reputation is being slandered by such word or sentence. Second, if the judges - after the substantiation process in the court – agree with the complainant *(aanklager)* that the word or sentence is contemptuous or harm the complainant's reputation.

Furthermore, the criminal sanction being charged by the Article regarding defamation or libel in the Indonesian Criminal Code is alternative in nature, rather than cumulative, so that if it is proved before the court that the defendant of defamation of libel commits such action with the objective of defending public interest or as self defense, for example, a journalist who reveals the criminal acts of a corruptor, then it also depends on the opinion of the judges adjudicating the

case, whether - if he/she proven guilty – he/she will be subject to a sanction in the form of deprivation from freedom (imprisonment) or penalty. It has been affirmed in Article 310 Paragraph (3) of the Indonesian Criminal Code. The current reality indicates that considering the incessant coverage of printed and electronic media about people suspected of committing criminal acts of corruption, the number of those who submit complaints because they deem that their reputation or honor has been impaired by such publication is not significant. At the same time, it shows that there have been positive changes in the legal culture in the community, not only from the perspective of media activists, but also from the perspective of those being the object of the media.

Furthermore, the Court is of the opinion that the formulation of a legislative norm will not automatically lose its raison d'etre thereof just because it is made by a colonial government, unless the norm is clearly made solely for the interest of the colonialists so that it is contradictory to the 1945 Constitution. For example, previous decisions of the Court have declared some Articles of the Indonesian Criminal Code contradictory to the 1945 Constitution and no longer have binding legal effect, among other things, Article 134, Article 136 bis, and Article 137 of the Indonesian Criminal Code (vide Decision Number 013-022/PUU-IV/2006 dated December 6, 2006).

The Court is not also authorized to change the type of criminal sanction set forth in Article 310 Paragraphs (1) and (2), and Article 311 Paragraph (1) of the Indonesian Criminal Code, as being petitioned by the Petitioners in their petitum.

The foregoing matter is the authority of the lawmakers through a legislative review. The *a quo* petition is quite different with the case of judicial review of Law Number 29 Year 2004 regarding Medical Practices in which the Court declared that criminal sanctions of imprisonment in Article 75 Paragraph (1) and Article 76 insofar as they are related to the words "with a maximum imprisonment of 3 (three) years" and "Article 79 insofar as it is related to the words "maximum imprisonment of 1 (one) year or" as well as Article 79 Sub-Article c insofar as it is related to the words "or sub-article e" in the Medical Practice Law are contradictory to the 1945 Constitution. The aforementioned Court's decision is principally based on the grounds that the violations subject to imprisonment in such law are administrative violations so that they may be subject to penalty, rather than imprisonment because it is not proportional (video Decision of the Court Number 4/PUU-V/2007 dated June 19, 2007). Moreover, in such case, the law being petitioned for judicial review is a law which scope only regulates medical practices, instead of a law which is general in nature, such as the Indonesian Criminal Code as being petitioned for judicial review by the Petitioners.

[3.25] Considering whereas Petitioner II argues that Articles 207 and 316 of the Indonesian Criminal Code are contradictory to Article 27 Paragraph (1), Article 28E Paragraph (2), Article 28E Paragraph (3), and Article 28F of the 1945 Constitution because according Petitioner II, the provisions of the aforementioned Articles are contradictory to the 1945 Constitution, namely:

a. defamation against authorities or public body deliberately committed publicly, either orally or in writing [Article 207 of the Indonesian Criminal Code];
b. defamation committed against an official who is performing or for performing his official duties [Article 316 of the Indonesian Criminal Code].

The Petitioner II is of the opinion that both Articles are contradictory to:

1. right to equality before the law [Article 27 Paragraph (1) of the 1945 Constitution];
2. right to the freedom to hold a belief, to express opinion [Article 28E Paragraph (2) of the 1945 Constitution]; and
3. right to the freedom of association and expression of opinion [Article 28E Paragraph (3) of the 1945 Constitution].

The main argumentations presented by Petitioner II to support his arguments are as follows:

- Whereas the freedom to express thought and opinion, freedom of expression, and freedom of the press are guaranteed by Article 28E Paragraphs (2) and (3), as well as Article 28F of the 1945 Constitution; by Articles 14, 19, 20, and 21 of the Stipulation of the People's Consultative Assembly Number XVII/MPR/1998; by Article 14, Article 23 Paragraph (2), and Article 25 of the Human Rights Law; by Article 19 Paragraphs (1) and (2) of the ICCPR;

Whereas with respect to the application of Article 207 of the Indonesian Criminal Code, the Constitutional Court has declared its opinion in its Decision Number 013-022/PUU-IV/2006, "The prosecution of the violators of Article 207 of the Indonesian Criminal Code by state administrators requires future adjustments in line with the Court's considerations on Article 134, Article 136 bis, and Article 137 of the Indonesian Criminal Code above";

- Whereas Articles 207 and 316 of the Indonesian Criminal Code obviously grant protection and special treatment to state officials and state administrators and have eliminated the principle of equality before the law as regulated in Article 27 Paragraph (1) of the 1945 Constitution;
- Whereas the coming into effect of Articles 207 and 316 of the Indonesian Criminal Code poses serious threat to the freedom to express thought and opinion, freedom of expression, and freedom of the press, as well as legal certainty;
- Whereas Articles 207 and 316 of the Indonesian Criminal Code have lost their relevance and *raison d'etre* in a democratic state based on constitution when they are confronted with Article V of Law Number 1 Year 1946 regarding the Criminal Code;
- Whereas the formulation of offence in Article 310 Paragraph (1), Article 316, Article 207 of the Indonesian Criminal Code is not a formulation which explicitly adopts the principle of *lex certa* so that it may create legal uncertainty and is vulnerable to unilateral interpretation as to whether an

expression of opinion or thought is a criticism or libel and/or slander, and therefore, a sanction in the form of imprisonment is rather excessive and may disrupt the constitutional rights guaranteed by Article 28E Paragraphs (2) and (3) of the 1945 Constitution;

- Whereas the application of Article 207, Article 310 Paragraph (1) and Article 316 of the Indonesian Criminal Code may also create legal uncertainty and is vulnerable to unilateral interpretation as to whether a submission of information constitutes a criticism or libel and/or slander to impede the freedom of the press as guaranteed by Article 28F of the 1945 Constitution;
- Whereas the honor and reputation of a person shall reasonably preserved and respected, as regulated in Article 19 Paragraph (3) of the ICCPR (Law Number 12 Year 2005), however the granting of protection under Articles 207 and 316 of the Indonesian Criminal Code to state officials or state administrators is excessive and arbitrary;
- Whereas the freedom to express thought and opinion, freedom of expression and freedom of the press, particularly in the democratic states, have developed so that it is now deemed reasonable to impose criminal sanction of imprisonment on creators of creative works such as journalistic works, opinion or expression-related works;
- Whereas the opinion that considers the expression of opinion, expression and journalistic works is a crime which may be reasonably subject to imprisonment is no longer popular, so it is unreasonable to maintain such

opinion, because it is deemed not in accordance with international standards regarding freedom to express thought and opinion, freedom of expression, and freedom of the press;

- Whereas if pecuniary sanction set forth in the Indonesian Criminal Code is considered insufficient, provisions regarding defamation and libel are also stipulated in Article 1372 up to and including Article 1379 of the Indonesian Civil Code, so that the prosecution of defamation and libel can be done in the mechanism provided in the Indonesian Civil Code.

With respect to the aforementioned arguments of Petitioner II, the Court is of the opinion that insofar the arguments presented by Petitioner II are similar to those presented by Petitioner I, as described in Paragraph [3.24] above, the Court considers that the arguments of Petitioner I shall apply *mutatis mutandis* to the arguments of Petitioner II. Furthermore, with respect to the arguments of Petitioner II referring to Decision Number 013-022/PUU-IV/2006, in order to prevent misunderstanding, the Court needs to refer the legal considerations in the decision concerned in relation to Article 207 of the Indonesian Criminal Code as follows:

- Considering, therefore, with regard to the defamation offense against the President and/or Vice President pursuant to the law, Article 310-Article 321 of the Indonesian Criminal Code should be applied to defamations (*beleediging*) to the personality of the President and Vice President, and Article 207 of The Indonesian

Criminal Code should be applied to defamations against the President and/or Vice Presidents as officials (*als ambtsdrager*);

- Considering, whereas in relation to the application of Article 207 of the Indonesian Criminal Code on the defamation offense against the President and Vice President as for defamations against other authorities or public agencies (*gestelde macht of openbaar lichaam*), the prosecution should indeed be conducted based on an complaint (*bij klacht*). In several countries, such as Japan, defamation against the Emperor, Queen, Queen Grandmother, Queen Mother or other heirs to the empire may be prosecuted based on complaints. Article 232 (2) of t*he Penal Code of Japan* sets forth that the Prime Minister shall file a complaint on behalf of the Emperor, Queen, Queen Grandmother, Queen Mother for the prosecution, and if such defamations are intended to the king or president of a foreign country, the representative of the relevant country shall file a complaint on behalf of the king or president. The prosecution of the violators of Article 207 of the Indonesian Criminal Code by state administrators requires future adjustments in line with the Court's considerations on Article 134, Article 136 bis, and Article 137 of the Indonesian Criminal Code above;

Therefore, the Court's opinion has been clear that Article 207 of the Indonesian Criminal Code is constitutional. The definition of the phrase "state administrators requires future adjustments in line with the Court's considerations on Article 134,

Article 136 bis, and Article 137 of the Indonesian Criminal Code" is the adjustment to be made through the legislation policies, rather than the constitutional review as understood by the Petitioners.

With respect to the Petitioners' arguments that Articles 207 and 316 of the Indonesian Criminal Code give protection and preferential treatment to state officials and eliminate the principles of equality before the law, insofar as it is related to Article 207 of the Indonesian Criminal Code, the abovementioned Court's considerations shall apply *mutatis mutandis*. With respect to Article 316 of the Indonesian Criminal Code, if the discrimination in treatment before the law as intended by the Petitioners is referred to the criminal sanction *(strafverhoging),* thus such criminal sanction is not a discrimination but a logical consequence of the constitutionality of Article 207 of the Indonesian Criminal Code providing special protection for state officials who are performing their duties based on law. The need for special protection for public officials who are performing their duties is caused by the fact that in their positions there are subjective and objective elements requiring credibility, authority and capability to perform their public duties effectively.

[3.26] Considering, particularly with respect to the arguments of the Petitioners related to the freedom of the press and considering the fact developing in the court hearing, namely that the Articles of the Indonesian Criminal Code being petitioned for judicial review would probably restrict the freedom of the press, it is important for the Court to remind the Petitioners that the provisions being petitioned for judicial review in the *a quo* petition are the

criminal law provisions which are general in nature, rather than the provisions which only applicable for the press. Therefore, it is necessary to provide for criminal provisions specifically applicable for the press or mass media in general, such provisions must be specifically or individually formulated in the Law on Press as a special law (lex specialis). Insofar as the law regulating the press or mass media in general still refers to the Indonesian Criminal Code for the criminal acts allegedly committed by the press or mass media in general, it cannot be said that there is erroneous application of law when the public prosecutor use the Indonesian Criminal Code as the basis for his/her prosecution or the judge use the Indonesian Criminal Code as the basis for passing his decision. In other words, if deemed appropriate to apply special regulations for the criminal acts allegedly committed by the press or mass media in general, it must be a part of the agenda of the criminal law reforms to be then manifested through a legislative review. Similarly, if it is deemed inappropriate to apply the criminal law in relation to the losses arising as a consequence of the coverage of the press or mass media in general, but - for example - simply by using a civil lawsuit with the principle of liability based on fault, it can be done through the legislative review in accordance with the political direction of the criminal law that would be established.

4. CONCLUSION

Based on all aforementioned considerations of the facts and laws, it can be concluded:

[4.1] Whereas reputation, dignity or honor of any person shall be one of legal interest protected by the criminal law because they are parts of the citizens' constitutional rights guaranteed by the 1945 Constitution or international law and therefore if there is certain criminal sanction pursuant to the criminal law with respect to actions harming reputation, dignity or honor of any person, such sanction is not contradictory to the 1945 Constitution;

[4.2] Whereas the Petitioners' petition is actually more of a problem of the application of the legal norms, rather than the constitutionality of the norms;

[4.3] Whereas therefore, the Petitioners' arguments are groundless so that the petition must be rejected.

5. DECISION

In view of Article 56 Paragraph (5) 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), therefore based on the 1945 Constitution of the State of the Republic of Indonesia;

Passing the Decision,

To declare that the Petitioners' petition is rejected;

Hence this decision was passed in the Consultative Meeting of Constitutional Court Justices attended by nine Constitutional Court Justices on Wednesday, the thirteenth of August two thousand and eight, and pronounced in the Plenary Meeting of the Constitutional Court open for public held today, Friday, the fifteenth of August two thousand and eight, by eight Constitutional Court Justices, namely H. Harjono as the Chairperson, H.A.S. Natabaya, Maruarar Siahaan, I Dewa Gede Palguna, H. Abdul Mukthie Fadjar, Moh. Mahfud MD, H.M. Arsyad Sanusi, and Muhammad Alim, respectively as Members, assisted by Sunardi as the Substitute Registrar, as well as in the presence of the Petitioners/ their Attorney-in-Fact, the People's Legislative Assembly or its representative, the Government or its representative, the Related Party of Independent Journalists Alliance *(Aliansi Jurnalis Independen),* the Related Party of Press Board *(Dewan Pers)*, the Related Party of the Indonesian Journalists' Association *(Persatuan Wartawan Indonesia)*, and the Related Party of the Indonesian Television Journalists Association *(Ikatan Jurnalis Televisi Indonesia).*

CHAIRPERSON OF THE PANEL OF JUSTICES,

sgd.

H. Harjono

MEMBERS,

sgd.	**sgd.**
H.A.S. Natabaya	**Maruarar Siahaan**
sgd.	**sgd.**
I Dewa Gede Palguna	**H. Abdul Mukthie Fadjar**
sgd.	**sgd.**
Moh. Mahfud MD	**HM. Arsyad Sanusi**

sgd.

Muhammad Alim

SUBSTITUTE REGISTRAR,

sgd.

Sunardi